

## Buying 'Off-plan' Going According to Plan?



BY GEORGINA COOK

Developers often market properties for sale before they have been built or when they are in the course of construction. A purchaser cannot physically view the finished property before having to commit to the purchase, so care must be taken to ensure that the legal commitments that are made are clearly defined and understood so that the purchaser can know, with sufficient certainty, what it is he is contracting to buy, and how he will complete the purchase process.

Once a purchaser has agreed which unit he is to acquire, the seller's lawyer will issue a package of legal paperwork to the purchaser's lawyer. This will typically consist of: a sale agreement, development plans (for larger developments, the purchaser is usually invited to view these at the developer's office), a specification detailing the materials to be used in the build, title documentation and estimated service charge figures (where the development includes communal elements).

### **The binding sale agreement**

The sale agreement is a document signed by the seller and the purchaser which creates a legally binding obligation on both parties to complete the sale and purchase of the property. In the event that either party fails to complete the purchase on the due date, the defaulting party will be liable to pay damages, often totalling up to one-third of the purchase price. It is therefore imperative that the parties understand the obligations they are committing to before executing the sale agreement as there is no right to withdraw after the agreement has been entered in to. Employing a lawyer to review

the agreement is recommended as she will seek to amend any unduly onerous clauses before advising the purchaser on the terms thereof, at which point a purchaser should raise any concerns, or any clauses he does not understand. A lawyer will also carry out a title check to ensure that the title to the property is sound.

### **Plans and specifications**

As a purchaser cannot view the finished product, it is important that he is satisfied as to the plans showing how the property is to be built. A careful examination of such plans should be carried out and any queries arising as a result thereof should be put to the developer for clarification. Similarly, the specification should be carefully reviewed as this details the quality of the materials that will be used in the build and the fit-out of the property. If you think you are getting a certain quality of kitchen or bathroom, for example, the specification should reflect that to ensure that there is no misunderstanding as to what is expected to be fitted in the finished product.

### **Management and service charges**

Where a new development comprises some communal areas, such as communal hallways (in apartment blocks) or play or 'green' areas in housing estates, the purchaser will need to understand how the costs of maintaining such areas are to be dealt with. The estimated service charge budget should be obtained and the calculations as to how the figures have been reached, scrutinised. Just because the

budget says the service charge for a property will be £x, if the budget has not been prepared on a proper basis, the actual costs payable by the purchaser may turn out to be much higher. A purchaser must be comfortable both that the service charge figures put before him have been calculated on a proper basis and that he can afford to make such payments (which are often due monthly or quarterly) when demanded. A purchaser must be satisfied on both matters before he signs the sale agreement.

### **Payment of a deposit**

On signing the sale agreement, a purchaser will be expected to pay a proportion of the purchase price, often five or ten per cent, to the developer. This money may be held 'in escrow', usually by the developer's lawyer, pending completion, in which case the developer cannot use those funds until they are released to him upon completion.

Sometimes, the developer wishes to make use of the deposit straight away. If so, a purchaser should ensure that proper protection is offered in case the developer fails to complete the development, in which event, the purchaser would wish to see his deposit returned. In this situation, a purchaser should insist that the developer takes out a specific form of insurance under which the insurer will refund the deposit to the purchaser in the event that the developer fails to do so. The purchaser's lawyer would review the terms of such insurance to ensure that sufficient levels of cover are afforded to the purchaser.

### **Changes during the build**

The sale agreement will refer to the plans by which the property is to be constructed. It is also likely to permit the developer to make immaterial changes to those plans which may be necessary as the build progresses. However, if the developer wishes to make material changes to the plans (which are not required by an authority such as the Planning Department), he cannot usually do so without the prior consent of the purchaser. This protects against the purchaser signing-up to buy one thing and finding that, at completion, the property bears little resemblance to what was originally proposed.

### **Funding generally**

As previously mentioned, once the sale agreement has been signed, neither party can withdraw or fail to complete the purchase without exposing themselves to paying substantial damages. It is therefore important for a purchaser to be sure that he will have sufficient funds available at the completion date. Before signing the sale agreement, it is sensible to secure 'in principle' funding from a bank if a mortgage is to be obtained to fund the purchase. Sometimes, given the long delay between signing agreements and completion (delays of two years or more are not uncommon), a bank will not be prepared to confirm that it will lend as a purchaser's financial situation or, indeed the bank's financial situation, may be quite different in a few years' time from that at the date of signing agreements. A purchaser therefore needs to be comfortable that it is likely to be able to secure whatever funding it will need to complete the purchase and be alive to the possibility that either his circumstances (both personal and financial) or the bank's (will the bank still be lending on similar terms?) may be quite different at completion.

### **Completion**

Practical completion of the property is usually the trigger for completion of the sale and purchase. A good sale agreement will set out the mechanism for triggering completion and should offer the purchaser the chance to inspect the property before completion to be satisfied that it is, indeed, practically complete. If the purchaser considers that it is not so complete, he should immediately raise this with his lawyer and/or the developer. If the developer disputes the purchaser's claim that the property is not complete, the sale agreement usually prescribes that the matter is determined by an independent arbitrator.

### **Defects**

Any new-build will naturally have a number of 'snagging' items, that is, defects or incomplete matters which are of a minor nature. The sale agreement should prescribe the way in which such matters are to be dealt with and will usually involve the purchaser meeting with a representative of the developer to agree what constitutes a 'snagging' matter and what does not, and settling a programme

for putting those agreed matters right. It is sensible for a purchaser to keep a record (photographic or written) of snagging matters as and when they arise so that they may then be put to the developer together, rather than on a piecemeal basis.

One would expect to see specific warranties on the part of the seller in respect of the build-quality of the property generally. If the finished property has defects which fall beyond 'snagging' matters, these matters should be put to the developer for rectification, subject to the terms of the sale agreement. Sometimes, the developer's obligations in this regard are supplemented by latent defects insurance whereby new developments are insured (often for ten years) against major defects in their structural integrity, design or workmanship. Again, the purchaser's lawyer should make enquiry of the

vendor's lawyer as to whether such insurance will be provided.

The above matters are the basic elements that should be considered when buying 'off plan'. Of perhaps equal importance is who the developer is – does it have a good reputation for delivering quality products, is its Customer Care Team able to provide the assistance a purchaser needs, both before and after committing to the purchase, have you seen examples of other developments this developer has completed?

Buying 'off plan' can be an exciting opportunity to acquire precisely the property that you want, at a pre-agreed price. If the issues discussed here are properly considered, buying 'off plan' will hopefully go according to plan!

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