Searches before contract

So just what conveyancing searches should we be making? And what should we be telling clients about the results of the searches we do make? Paul Butt examines a recent negligence case which holds warnings for us all.

Introduction

In the 40 or so years since starting in practice, there have been many changes in conveyancing procedures. One of them is the increase in the number of searches that are available. There are over two dozen searches available from most providers. Long gone are the days of just having local, drainage and mining searches! Indeed, it could now be argued that in modern conveyancing with mainly registered titles, making searches and enquiries is a much more demanding task than that of investigation of title.

We know that conveyancing is a high-risk area for negligence claims and apparently one of the main reasons for claims is a failure to make sufficient searches and enquiries.

Orientfield Holdings Ltd v Bird & Bird [2015] EWHC 1963 (Ch)

The case involved a not so ordinary property. It was the purchase in 2010 of a house at 56 Avenue Road, St Johns Wood in North West London at a purchase price of £25 million. It was described (by the Roll on Friday website!) as a *'tasteless blinged-up mansion'* – taste like beauty, of course, being in the eye of the beholder. Despite the large purchase price, however, the issue that arose was one that could have happened in any house purchase. It all started with replies to the then version of the standard Law Society Property Information Form.

Question 3.2 read: *"Is the seller aware of any proposals to develop property or land nearby or of any proposals to make alterations to buildings nearby? If yes, please give details."*

The sellers did not answer 'yes' or 'no'. They replied "Please make your own inquiries." Was this a refusal to reply (because they did not wish to lie, but equally did not wish to disclose something that might put off the buyer from proceeding) – or was it a mistake?

The judge (HH Judge Pelling QC) commented: "*Given that question 3.2 was concerned with personal knowledge of the vendor, the answer given on behalf the vendors was either a mistake or an implicit refusal to answer. Although Mr Baker* [the solicitor acting for the Buyer] *told me, and I accept, that he subjectively considered the answer to be an error rather than a conscious attempt to avoid answering the question, in my judgment it was an answer that ought to have alerted him to the possibility of a problem."*

So beware such answers – you have been warned!

Further correspondence and discussions ensued between the two sides in which the sellers eventually replied: "*As discussed, given the nature of the area, the planning question is too wide, which is why we advised to carry out a Plansearch which will reveal all the planning applications in the area.*

There are several ongoing developments on Avenue Road, which are obvious on inspection. Our clients are not aware of any proposals to develop the immediate neighbouring homes...“

The buyer’s solicitor admitted that he had not come across Plansearch before but commissioned one on this occasion due to the seller’s comments. To quote the judge yet again:

“The Plansearch report is a proprietary form of search report provided by Jordans. The report included a summary of planning applications of defined types and sizes within the 300-metre radius of the property. It included information that there were two "large" planning applications for sites between 100 and 250 metres of the property. "large" applications were defined as being in respect of developments with an estimated value of in excess of £100,000. There was a plan showing the sites in respect of which permissions had been granted. Those at the school site relevant to the development were shown marked "8" and "46". There then followed a table of various planning permissions identified on the plan. "8" was described as being "new build", and that outline planning permission had been granted in August 2008. The entry also contained the planning reference number. "46" was in similar terms. It is common ground that with this information a search of the local planning authority records would have revealed and ultimately did reveal the full nature of what was proposed. It would also have revealed that detailed planning permission for the development had been granted in September 2010.”

(Please note that Plansearch is provided by Landmark Information Group, who owns the trademark in the name. It is available from other search providers as well as Jordans. It is understood to reveal planning applications within a 250-metre radius, rather than the 300-metre radius stated by the judge).

Subsequently, Bird & Bird reported on the transaction to the buyers, but failed to make any reference to the Plansearch and the proposed developments revealed by it.

Shortly before the date fixed for completion, a representative of the buyer company was speaking to one of the neighbours and was informed of a major redevelopment nearby. Two small schools at Number 86 Avenue Road were going to be redeveloped so as to create an academy and specialist school for about 1400 pupils.

There was also going to be some residential development. To cut a long story short, the buyers were appalled at this prospect and subsequently instructed other solicitors who purported to rescind the contract under the then version of the Standard Conditions.

The sellers refused to accept this termination of the contract. Eventually, court proceedings were commenced, the sellers claiming a declaration that the buyer’s deposit (£2.25 million!) was forfeited to them. The buyers counterclaimed claiming the return of their deposit and damages. The claims were compromised just before trial, each side receiving half of the deposit and bearing its own costs.

The buyers then brought a claim for their loss against Bird & Bird – hence the present case. The buyers claimed that had they known about the school development, they would not have bought the property. The development would affect the value and enjoyment of the house and Bird & Bird should have disclosed the result of the Plansearch to them. Bird & Bird responded by claiming that that they were under no duty to disclose this.

There were also issues as to the measure of damages and lack of evidence of the alleged reduction in value – indeed, according to Roll on Friday, the property was subsequently sold in 2014 for £38.5 million.

But we are concerned with the question of the conveyancer’s duty in this situation. The judge stated as follows:

“No authorities were cited to me that were relevant to the breach of duty issue that arises in this case. In general a solicitor is not obliged to undertake investigations that are not expressly or impliedly requested by the client.

29. *To the general proposition that I started this section of this judgment with, there is however this qualification: if in fact a solicitor acquires information that may be of importance to a client, then it is the duty of the solicitor to bring that information to the attention of the client.*

30. *I am prepared to accept that the defendants could not be criticised if in fact they had not carried out a Plansearch. This follows from the first of the general propositions set out above. However, having carried out such a search, then in my judgment Mr Baker came under a duty to explain the results of that search to his client. In my judgment this plainly follows from the qualification to the general principle set out above…. If, as Mr Baker apparently thought, it was necessary for him to carry out a Plansearch because of the responses that he had received to question 3.2 of the PIF, then it was a breach of duty to say, as was said in paragraph 8 of the ROT, that the information provided did not reveal anything that adversely affects the property.*

As I have explained, the Plansearch report referred to the existence of planning permissions within the large non-residential categories within 250 metres of the property. There was in my judgment an obligation to include within the ROT a summary of the contents of Plansearch report, given the inclusion of the results of the various other searches within section 7 of the report. When I put this point to Ms Smith (the defendant's QC) in the course of her closing submissions, her response was that Mr Baker had formed the view that the Plansearch report did not indicate anything adverse in relation to the property.

In my judgment that was not a position that Mr Baker could reasonably adopt. The report showed the planning permissions to which I referred. The solicitor had not carried out an inspection on the ground nor had he carried out any further research as to what the planning permissions were for. In those circumstances, Mr Baker was not in a position to form any view concerning the contents of the Plansearch report or whether it might affect the decision of OHL represented by Ms Chow to purchase the property.

31. *The duty to communicate matters actually known to a solicitor is to communicate information that may be material, thereby setting the threshold for information to be communicated at an intentionally low level. Solicitors do not generally advise on the business merits of transactions they are instructed to facilitate. The business judgments involved are those of the client, not the solicitor, and it is for the client to judge the impact of the material that may be relevant, not the solicitor. Whether the solicitor agrees with the client's judgment, or with the grounds on which it is arrived at, is immaterial."*

Conclusion

There was a further discussion by the judge as to causation, mitigation and the loss suffered by this breach of duty. (The buyers had prior to their purported rescission incurred costs in relation to a proposed refurbishment of the property once it had bought it, such costs being wasted when they did not proceed; could these be claimed as well?).

The claim had been for (a) the balance of the deposit, £1,287,500 and interest that had accrued thereon, (b) the cost of proceedings against the sellers which had been agreed as being £389,235.48, (c) fees totalling £40,000 incurred in connection with the proposed refurbishment works to the property prior to rescission and (d) legal fees paid in relation to the rescinded transaction in the sum of £29,844.28. The claim was allowed in full.

But the moral from this is clear: if you discover something about a property – even if you were under no duty to find that something out – then you must disclose it to the client. Equally, it is a matter for the client's judgement as to whether to proceed with the purchase.

Do not substitute your own judgment for that of the client. This must be the case in relation to any information revealed in making searches or enquiries or investigating title. A railway enthusiast may well be happy to purchase a property adjacent to the new HS2 rail line; many other people would not.

What are our duties with regard to searches?

But just a few more thoughts as to precisely what are duties are with regard to searches. The judge clearly states: " …a solicitor is not obliged to undertake investigations that are not expressly or impliedly requested by the client." And further "…the defendants could not be criticised if in fact they had not carried out a Plansearch."

Was the judge really intending to imply that it is for the client to undertake a survey of what searches are available and then instruct the solicitors to undertake those he or she requires? Because that is the implication of these two statements taken together.

There is only an obligation to commission Plansearch – and presumably any other search - if expressly or impliedly requested by the client. He does not explain, however, how a client can expressly or 'impliedly' request a search that he/she cannot be expected to know exists?

The Law Society conveyancing handbook takes a slightly different view to the judge on a solicitor's obligation to make searches. Having stated that a local search and enquiries and a drainage and water search should be undertaken in every transaction, it goes on to state (B10.6.1):

'The buyer's solicitor must in all cases be alert to the need to make additional searches...If a less usual search is not made, in circumstances where it would have been relevant, and as a result of this omission the client suffers loss, the buyer's solicitor will be liable in negligence.'

On this basis when, for example, would a Plansearch be 'relevant'? Presumably, if a client specifically mentioned to his/her conveyancer that they were concerned about the possibility of development in the area, then there would be an 'implied' instruction under the Judge's formulation and Plansearch would then become a relevant' search under the conveyancing handbook.

But would not most house buyers be concerned about the development of a 1400 pupil school a few yards down the road? Remember, this would not be revealed by the standard Local Search and Enquiries.

But it is clear from the conveyancing handbook that it is for the solicitor to decide what searches are 'relevant' and then advise the client that they should be undertaken. If the client, properly advised as to the need for a particular search, decides they do not want it – usually due to cost – then that is their right, but equally their problem if that decision comes back to bite them in later years.

However, we must not forget that when acting for a mortgage lender, we must comply with the lender's express instructions in the CML Handbook (or BSA Mortgage Instructions). These state:

5.4.2 *"In addition, you must ensure that any other searches which may be appropriate to the particular property, taking into account its locality and other features are carried out*."

Presumably 'appropriate' and 'relevant' would amount to the same obligation being imposed whether acting for just a buyer or for a lender.

So where, as is usual, the conveyancer is acting for both buyer and lender, the buyer has no choice if a search is 'appropriate to the particular property' as the conveyancer must undertake it in order to comply with the lender's instructions.

In truth, despite the possible implications of HH Judge Pelling QC's statements, clients can only instruct if lawyers advise; if lawyers explain the various searches that are available – and most importantly what they might reveal. There can be no dispute that a conveyancer cannot be criticised for not commissioning a Plansearch, but it must be the case that the conveyancer should advise

the client of the availability of Plansearch – otherwise, how is the client to know that it exists and what it might reveal? How otherwise is the client to give express or even implied instructions?

The Law Society conveyancing handbook has got it right when it states:

"A solicitor should discuss with his client which searches may be appropriate and take instructions."

Of course, this obligation must extend to all the searches available – infrastructure, ground stability, flooding, etc., not just Plansearch. This discussion and advice should, of course, include information as to what the various searches might reveal – this is what is important to the client.

Always remember that the client buying a house is making what for most people is the biggest purchase of their life. They must be advised what information is available out there so they can make an informed decision as to whether or not to proceed.

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