

When must a seller reveal plans for development in the area?

Sellers have an obligation to be truthful about their knowledge of any proposed developments affecting a property. But precisely what constitutes ‘knowledge’ and ‘affecting’ is less clear cut.

Introduction

In the last issue of the First Title Newsletter, we looked at a case where a buyer bought property and then discovered that major development was to be undertaken just down the road. The buyer company then declared that had it known of this development before entering into the contract to purchase, it would not have entered into that contract. In that particular case (***Orientfield Holdings Ltd v Bird & Bird (2015) EWHC 1963 (Ch)***), the buyer sued the solicitors acting for it, claiming that they should have passed on information from a Plansearch which would have revealed the development; you will recall that the solicitors, although under no obligation to commission such a search, were held to be under an obligation to disclose its results when they had actually commissioned it.

In this issue, we have a very similar situation, but this time it was the sellers who were sued for misrepresentation in failing to disclose the planned development in the replies to the Property Information Form.

Thorp v Abbotts (2015) EWHC 2142 (Ch)

The buyers bought a house in Droitwich in 2010 for £625,000. Shortly after completion, they discovered that a large-scale planning application for over 700 houses had been submitted for a site some 300 yards away.

As in the Orientfield case, the buyers said that had they known of this development prior to entering into the contract, they would not have proceeded. The buyers claimed that the sellers had failed to answer the questions on the Sellers’ Property Information Form (SPIF) truthfully. This, they claimed amounted to fraudulent misrepresentation.

Firstly, we must digress with a little reminder of the law in this area. A misrepresentation is an untrue statement made by one contracting party which is relied upon by the other, which induces him / her to enter into the contract, and as a result of which he / she suffers loss.

A misrepresentation may be **fraudulent** i.e. a deliberately dishonest statement; **negligent** i.e. made carelessly without having checked the facts, or **innocent** i.e. a genuine and innocently made mistake.

The remedies for misrepresentation are rescission of the contract and / or damages.

The case

The judge, (HHJ David Cooke) set the facts out as follows:

“1. The claimants’ case is, in summary, that truthful answers to the questions asked on the SPIF would have revealed proposals for large-scale development

in the vicinity of the property which would have caused them to withdraw from the purchase. They do not, however, seek rescission of the contract. The defendants' position is that their answers were true because the only development in prospect at the time of sale was one which does not affect the property and so was not required to be disclosed by them. The possibility, which has since become reality, of development at another site which may affect the property was not such as to require disclosure".

The facts

2. The SPIF was in The Law Society's form TA6, 2007 version. The relevant questions were in section 3, as follows:

"3. Notices

3.1 Has the seller either sent or received any communication or notices which in any way affect the property (for example from or to neighbours, the council or a government department)?

If yes, please supply a copy.

3.2 Has the seller had any negotiations or discussions with any neighbour or any local or other authority affecting the property in any way?

If yes, please give details."

Both questions were answered "No".

The property being purchased was known as Oakwood Lodge and was situated on Pulley Lane, Droitwich.

"6. In or about 2006, a planning and consultation process was put in train by three local authorities in the South Worcestershire area, referred to as the "South Worcestershire Joint Core Strategy" or "JCS". Among other things, it considered the government's strategic assessment that more housing development was required and what land in the South Worcestershire area might be designated in planning terms to receive such development.

7. In relation to housing, a considerable number of possible sites for additional housing were identified in and around Droitwich and views were invited as to whether they should be approved in policy terms or not. Most of these appear to have been put forward by interested landowners and developers through a process known as the Strategic Housing Land Availability Assessment, so that the mere fact they were referred to in the JCS documents did not necessarily reflect any view, provisional or otherwise, on the part of the local authorities or their planning officials as to whether they should eventually be approved, but only that having been put forward it was necessary that they formed part of the consultation and policy development process.

8. The JCS identified three potential sites for major housing development in the vicinity of Oakwood Lodge. These were:

i) Copcut Rise, an area to the North East of Oakwood Lodge on the far side of the A38. The nearest houses built on that site would be behind an earth bank and shallow screen of trees running along the A38 and were estimated to be about 250 or 300m from Oakwood Lodge.

ii) South Pulley Lane, an area of Green Belt farmland to the South of Pulley Lane, including land immediately opposite Oakwood Lodge.

iii) Yew Tree Hill, an area to the East of the Ridings estate, presently consisting of farmland and open land used for amenity purposes such as walking. That site would front to Pulley Lane. The nearest point of any development would, Mr. Thorp agreed, be about half a mile from Oakwood Lodge.

9. As part of the process, the councils produced a "Preferred Options" document. A summary of this, apparently prepared for the purposes of consultation beginning in September 2008 (p1295) said:

"7.8 Droitwich Spa

Due to limited land being available within the existing built up area, nearly all the growth will need to happen outside the existing development boundaries. We believe there are some locations which meet our criteria without jeopardising the role of the Green Belt."

Two sites were referred to; Copcut Rise (said to be suitable for 1500 homes plus 10Ha of commercial development) and Yew Tree Hill (said to be suitable for 250 houses). These two sites must, therefore, have been regarded as "preferred" options to some degree though it is clear from the subsequent process that no decision had been taken and that the options identified might be changed.

- 10) *Inevitably, the possibility of development attracted local opposition and (at least) two vocal campaign groups were established. One concentrated on Copcut Rise. The other, which adopted the name "SOGOS" standing for "Save our Green Open Spaces", focussed on South Pulley Lane and Yew Tree Hill".*

It was accepted that prior to the sale the Abbotts had become aware of these planning processes, had received communications and attended meetings in relation to them, and had had discussions about them with persons living in the locality. By their claim, the Thorps contended that because of the above matters the Abbotts should have answered "Yes" instead of "No" to the above questions on the SPIF.

The decision

HHJ Cooke held there was no duty on the Abbotts to answer "Yes" to either of these questions and dismissed the Thorps' claim. The Judge thought that "communication" and "affecting" should each be given a "relatively confined" interpretation. HHJ Cooke held that "communications" did not include "local gossip", but were more properly to be regarded as communications entered into with persons 'in a position to themselves carry

out some act which might affect the property', and further stated that development in the vicinity was not a matter "affecting" the property in the sense meant by question 3 because:

"60. Affecting the property" in my judgment requires that the possible future event will if it happens have some effect on the property itself or the use or enjoyment of it. A possible effect on its value would not be enough on its own- if it were, the question would require disclosure of discussion with a neighbour about the housing market generally or in the particular locality, or (say) the effects on the market of the outcome of an election or leaving the EU. Nor would a general effect on the locality or the desirability to purchasers of the area or the property itself be sufficient, as for instance might be the case if the seller had received some notice of the closure of a local school or hospital. The effect need not, however, be a direct physical interference- a material increase in noise or smell or an adverse effect on views from a property would in my view potentially "affect" the property."

66. *"In relation to Yew Tree Hill I accept that the development that has now been approved will affect Oakwood Lodge, though only (as I find) because of the increased traffic on Pulley Lane it will generate.*
67. *However, no such application (for planning consent) had been made at the date of exchange of contracts, and the discussions and communications Mr. Abbotts had had which might have called for disclosure in response to question 3 were not about any such application, but about the JCS. The position in relation to the JCS was that it was not likely to lead to an outcome that would encourage, let alone make inevitable, such an application, still less that the development would be approved and come to fruition. So far as was known to Mr. Abbotts (and SOGOS took the same view) it was likely to result in a policy against development on the Yew Tree Hill site.*

The planning policy formally in force was still the Wychavon District Local Plan adopted in 2006, under which development was to be concentrated within existing urban areas, which did not include Yew Tree Hill. The purpose of the JCS was to develop a policy to supersede this, but given the position reached there was no reason to think the new policy would increase the possibility of development at Yew Tree Hill. There was, therefore, no effect on Oakwood Lodge at that date arising from the JCS consideration of Yew Tree Hill as a possible development site, and the answers given to question 3 were correct.

68. *It is of course true that the possibility of development had not been ruled out, and SOGOS, whose concern was that it should be ruled out as firmly as possible, were no doubt justified in continuing to keep an eye on the situation. But the SPIF did not ask whether there was any possibility of development nearby or whether present and future planning policy ruled out such a possibility. Mr. & Mrs Abbotts were under no duty to warn the Thorps of such a possibility, even if they considered it to exist. If the Thorps had been concerned to avoid any such risk of nearby development at all, as they now state, it is in reality hard to see how they could safely purchase anywhere. If they wanted to evaluate the degree of risk in the vicinity of Oakwood Lodge, they could and should have made their own enquiries into the planning position and possible future planning policies.*

69. *I find therefore that the defendants' answers in the SPIF were not misrepresentations, and as a result the claim must fail."*

Conclusion

One immediate conclusion from this case and the Bird & Bird case we looked at in the summer is how buyers view the prospect of development in the area around their new home and how this can put them off buying that property and look for someone to blame

when they discover the development when it is too late to change their minds. Conveyancers who fail to take this into account when acting for buyers do so at their own risk. We must manage clients' expectations and make it clear to buyers that the local search and enquiries will not disclose applications to develop properties in the vicinity.

And note the judge's comment – *"If they wanted to evaluate the degree of risk in the vicinity of Oakwood Lodge, they could and should have made their own enquiries into the planning position and possible future planning policies"*. So we need to warn buyers of the impact that possible development in the area can have on their future enjoyment of the property and advise that there are searches – for example Plansearch – which will give them information about planning applications within a 250-metre radius of the property.

In this case, of course, this particular development would not have been revealed by any kind of search. At the time of the purchase, no application for planning consent had actually been submitted. This brings us to a statement of the obvious; things do change. There might well be no plans for any development in this particular area at this particular moment in time, but that could all change tomorrow – or the day after the client exchanges – or completes – or indeed after any search is made. Do we really need to remind clients of this as well?

Of course, one other thing that has now changed is the Property Information Form itself. The relevant questions now differ from those asked in 2010. If there was a similar situation today, this may result in a seller having to provide different answers from those in the case. In particular, the new form specifically requests information about any 'proposals to redevelop.' It now reads:

"3 Notices and proposals

3.1 Have any notices or correspondence been received or sent (e.g. from or to a neighbour, council or government department), or any negotiations or discussions taken place, which affect the property or a property nearby? If Yes, please give details:

3.2 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:“

3.1 In the word ‘communications’ has now been replaced by ‘correspondence’, which suggests information provided in writing. Presumably, however, the judge’s thoughts on the kind of ‘communications’ to be disclosed would still be relevant to ‘correspondence’”.

The big change is question 3.2, which asks about development. It makes no reference at all to whether or not the development might ‘affect the property’. It just refers to development of property ‘nearby’. What might that mean, I wonder? How ‘near’ does the development have to be in order to be ‘nearby’? Would the 300 yards in the Thorp case be ‘nearby’? The Oxford Dictionary defines nearby as ‘*Not far away; close*’. So maybe 300 yards would not be ‘nearby’.

And what is meant by a ‘proposal’ to develop? What amounts to a ‘proposal’? The Oxford Dictionary defines proposal as ‘*A plan or suggestion, especially a formal or written one, put forward for consideration by others*’. ‘Obviously an actual submission of a planning application would be a ‘proposal’, but what (if anything) else might amount to a proposal to develop etc? The Law Society guidance states:

“Section 3: Notices and proposals

This section aims to provide information to the buyer about any notices or proposals that may affect the property. Some information may also be available from the search made of the local authority.

Question 3.1 The seller should provide copies of any letters or communications from neighbours, the local authority or government departments etc. which might affect the property.

Question 3.2 The seller should give details of any proposals to develop or change the use of nearby land or buildings”.

I am not sure that this gets us any further!

Why am I posing these silly questions? Well think of the advice you might have to give to a seller client who tells you he / she has heard a rumour that a developer is buying the house next door to convert it into flats and asks whether he needs to mention this on the Property Information Form. If you advise the client that it need not be mentioned – and you get it wrong – or you advise the client to mention it – and he / she cannot then find a buyer, who will get the blame?

And one further problem. What about the situation where the client tells you that he / she knows that the house next door is going to be redeveloped in some way and that this will affect the house being sold. Client says “*If I tell potential buyers this, it will put them off buying. What do I do?*”

The correct answer, of course, is that there is no obligation to answer the question, but if the question is answered, it must be answered truthfully. The client then goes ahead and answers “No”. So you know that this is a deliberate lie.

What do you do then? Do you send the SPIF to the buyer, knowing that your client has told a deliberate lie? Or do you refuse to continue acting unless the client agrees to withdraw the incorrect answer? It must be the latter - submitting a document to the buyer which you know contains a deliberate lie would be a breach of the Code of Conduct.

Conveyancing gets no easier, does it?

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