

Morgan-v- Pooley (7 October 2010)

The Morgans agreed to buy a house from the Pooleys for £1.66 million. It was a substantial house in beautiful countryside with 2 acres of grounds.

An old farm track ran along one boundary. It was seldom used but, unknown to the Morgans, the neighbouring owners had applied for planning permission to build a new drive to their property along the track.

In the Seller's Property Information Form, the Pooleys stated they had not received any notices in relation to the property. This was despite the fact that planning application notices had been sent to their property re the new drive. They claimed not to have received any notice and they relied on the fact it would have been sent before any sale with the Morgans was agreed and they would have responded to it if they had actually received it.

The Morgans found out about the new drive after they had moved in. It caused some substantial interference with their property when it was built as it was used regularly and there were noise issues (particularly at night) and it overlooked part of their grounds, including their swimming pool.

The Morgans sued the Pooleys for breach of contract and misrepresentation. They claimed £200,000 for diminution in value of the property. They claimed the Pooleys must have known about the planning application as notice was not only sent to their address but advertised at the end of the track.

The contract comprised 3 documents being:-

- i) A summary sheet headed "Contract" which set out the principal terms.
- ii) A 2 page document headed "Special Conditions" with 11 printed conditions which had clearly been put together for this specific transaction.
- iii) The Standard Conditions of Sale.

Special Conditions 4 and 6 provided as follows:-

4. In the light of the decision in *William Sindall-v-Cambridge City Council* (1994) it is agreed and declared that the reply to any enquiry or information supplied in any property information form is given to the best knowledge, information and belief of the Seller, and that neither the Seller nor his legal representative has made any further enquiries into such matters and the replies are given on that basis.
6. The Buyer acknowledges that the Contract has not been entered into by the Buyer in reliance upon any representations made by or on behalf of the Seller except those made in writing by the Seller's conveyancers prior to the date hereof as being representations upon which reliance is placed and such as were not capable of independent verification by the Buyer.

Standard Condition 7 deals with errors and omissions in any plan or statement or in the negotiations leading to the contract. It provides for damages to be payable if there is a material difference between the description or value of the property as represented and as it actually is.

Questions and Answers

1. Were the Pooleys liable for breach of contract?

No. Standard Condition 7 is to be given a narrow interpretation. It only relates to statements that amount to some form of description of the property or its value. For example, a statement that the property is worth X because the house next door sold for Y. It would not apply to whether the Vendor had received a letter affecting a neighbouring property.

2. Were the Pooleys liable for misrepresentation?

No. The Court held that they had not received the planning application and that they had no further duty to make any enquiries and they had also not seen the Application displayed by the entrance to the track.

3. What is the effect of Special Condition 4?

It excludes the implied term that, when a vendor states he is not aware of a matter, he has taken reasonable steps and/or made reasonable enquiries to establish the true position. It should therefore not be agreed to readily and, where it is agreed, the buyers need to be made aware of this and that the obligation is on them to make all due enquiries.

In this case, this Special Condition was accepted without argument and the onus was therefore very much on the buyers to carry out due diligence on the purchase.

4. Is Special Condition 6 effective? How can it be challenged and what will the Court take into account?

It was effective in this case. Non-reliance and entire agreement clauses are now very prevalent and buyers have to be aware of their effect and the need to include in the contract, or in enquiries answered by the vendor's solicitors, matters upon which they are seeking to rely as a result of representations made by the vendor or his agents. The Courts like these clauses in that they give certainty as to what can be effectively relied upon and what can not be relied on.

Non-reliance and entire agreement clauses can be challenged under the Unfair Contract Terms Act 1977 or the Misrepresentation Act 1967 if they are unreasonable but they were upheld in this case and in the commercial property case of **Foodco-v-Henry Boot (March 2010)**-where the tenants to a Motorway Service Area sought to rely on incorrect brochure representations as to anticipated footfall.

In deciding whether the term is valid (i.e. reasonable), the Court has regard to the equality of the parties, how clear the provision was (i.e. was it hidden away or clearly identifiable), whether the parties are legally advised, whether it was open to negotiation, and whether it still allows the buyer to rely on answers from the vendor's solicitors.

5. Why would the Planning Application not have been disclosed by the Local Search. What planning investigations should a conveyancer undertake or recommend?

The Search did not cover the adjoining property so there is a real need to make enquiries about land surrounding the property being acquired. Buyers need to understand that, especially when buying an expensive and/or exclusive property, due diligence is required.

6. How much damages did the Court think would have been appropriate if there had been a misrepresentation or breach of contract?

£50,000, being 3% of the price. This was based on noise from traffic and being overlooked and lack of privacy and headlights shining in at night but took account of the ability of the Morgans to grow trees to limit the nuisance suffered. It was considered the Pooleys would have agreed such a reduction if the true facts had been known at the time of purchase.

Jonathan Ross

1 December 2010.