Neutral Citation Number: [2017] EWCA Civ 348

Case No: A3/2015/2508

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
His Honour Judge Pelling QC
[2015] EWHC 1963 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2017

Before :

LADY JUSTICE GLOSTER,
Vice President of the Court of Appeal, Civil Division
and
LADY JUSTICE KING

Between :

Orientfield Holdings Ltd (a company registered and incorporated in the British Virgin Islands)	**Claimant/ Respondent**
- and -	
Bird & Bird LLP	**Appellant**

John Wardell Esq QC and Geoffrey Zelin Esq (instructed by **Wedlake Bell LLP**) for the **Claimant/Respondent**
Ms Joanna Smith QC and Ms Tiffany Scott (instructed by **Triton Global Limited T/A Robin Simon**) for the **the Appellant**

Hearing dates : 17 January 2017

Approved Judgment

Lady Justice Gloster:

Introduction

1. The case turns on whether the judge's conclusions on causation in the context of a negligence claim against solicitors acting in a property transaction are correct.

Factual background

2. Orientfield Holdings Limited ("the respondent") is a special purpose vehicle established in the British Virgin Islands for the purpose of purchasing and holding property. Its sole director and shareholder is Rebecca Chow ("Ms Chow"), a Hong Kong resident.

3. From Spring 2010 the respondent was considering the purchase of a substantial property at 56 Avenue Road, London ("the property"). Bird & Bird LLP, solicitors ("the appellant"), and specifically a Mr Baker, acted for the respondent in relation to the purchase of property. The sellers were Mr and Mrs Plant, represented by Magrath LLP ("Magrath"), solicitors and specifically a Ms Calvey. Ms Chow neither found the property nor visited it herself at any time, whether prior to or after exchange of contracts. The respondent did not receive any investment advice as to the purchase and it did not commission a survey or a valuation. The decision that the property was a suitable investment for Orientfield was made by Ms Chow solely by reference to the advice of a friend of Ms Chow and London resident, Nicolette Kwok ("Mrs Kwok").

4. On 14 October 2010 the respondent's offer to purchase the property for £25.75 million was accepted by the sellers.

5. On 25 October 2010 the sellers returned a completed Property Information Form ("PIF"), as requested by the appellant.

6. Following discussions between the appellant and Magrath as to the unsatisfactory nature of the response, on 27 October the latter suggested that a "Plansearch" should be carried out to reveal all planning applications.

7. On 28 October 2010 the appellant duly obtained a Plansearch Plus Report ("the Plansearch report"). The following were relevant features of the Plansearch report:

   i) The report was 52 pages long and provided brief details of a significant number of planning applications within 300 metres of the property.

   ii) A "Summary" page indicated the total number of applications in various categories, distinguishing between 'large' (developments with an estimated value over £100,000), 'small' and 'minor' applications.

   iii) There was a map indicating the location of applications in respect of which permission had been granted within 250 metres of the property.

   iv) One large application relating to 80 Avenue Road was designated ID 8 and placed into multiple categories: residential; education, health, military,

municipal; and commercial. A further small application relating to the same address was designated ID 46 and categorised as education, health, etc. Both applications were identified as "New Build" and as having had planning permission granted. Apart from appearing in the Summary and being shown on the map, together with various other applications, these applications were not highlighted by the Plansearch report. (That contrasted with one large application within 100 metres and one small application within 25 metres of the property, which were highlighted by the Summary.)

8. Importantly, it was common ground that a search of the local authority records, using the planning references supplied, in relation to 80 Avenue Road (i.e. ID 8 and ID 46) would have revealed the full details of what was proposed, which was a major development of the two existing schools at that location ("the development").

9. On 9 November 2010 the appellant provided a Report on Title ("ROT") to the respondent. There was no mention or explanation of the Plansearch report or the development. In relation to "pre-contact inquiries", the ROT simply stated:

> "The information provided by the sellers in their replies to our pre-contact inquiries did not reveal anything that adversely affects the property."

Mr Baker's evidence was that this was because, having briefly considered the Plansearch report, he had concluded that there was nothing in it which needed to be brought to the respondent's attention.

10. On 10 November 2010 the respondent and the sellers exchanged contracts for sale of the property, and the respondent (through the appellant) paid the deposit of £2.575 million.

11. In March 2011, shortly before completion, the respondent learnt of the development at 80 Avenue Road. The respondent asserted that it only became aware of the development, and of letters written on behalf of local residents (including the sellers) objecting to the development ("the objection letters"), a few days prior to the date for completion, and that it acted reasonably at that time in taking the decision not to proceed with the purchase and in serving a notice of rescission. In particular, the respondent asserted in its statement of case in the present action that, having discovered the existence and nature of the development, it no longer wanted to buy the property. Ms Chow's evidence under cross examination was that this was because she had been misled by the sellers.

12. On 1 April the respondent instructed Wallace LLP, solicitors ("Wallace") in place of the appellant, and purported to rescind the contract for the purchase of the property. The sellers issued proceedings against the respondent seeking to forfeit the deposit ("the Plant action") which were eventually compromised on the night before trial, with the respondent recovering half of the deposit and half of the accrued interest thereon.

13. The respondent then issued the present proceedings against the appellant, alleging negligence in relation to the appellant's lack of action in relation to the Plansearch report. The respondent claimed from the appellant the remaining half of the deposit

plus interest, together with costs it incurred in investigating the potential for refurbishment of the property following exchange and the costs incurred in connection with the Plant action.

14. The appellant denied negligence. It said that there was nothing in the Plansearch report that it was under a duty to bring to the attention of the respondent and that it was not part of the appellant's duty to carry out investigations into the nature of any of the various planning applications and permissions listed in the Plansearch report or to ask the respondent for instructions whether or not to do so; accordingly it said that its statement in the ROT sent to Ms Chow on 9 November 2010, that the information provided by the sellers in their replies to pre-contractual enquiries did not reveal anything that adversely affected the property, was accurate and non-negligent.

15. As to causation, the appellant asserted that, had the respondent had sight of the Plansearch report or been invited to investigate the matters it contained, it would not have taken any further action (not least because it was not interested in investigating further any matters which might have affected the value of the property) but would simply have proceeded with exchange in any event.

16. Further, the appellant said that even if the respondent had been made aware specifically of the existence and nature of the development in relation to 80 Avenue Road - that is to say over and above the other planning applications identified in the Plansearch report - it would have nonetheless proceeded to exchange in any event. That was not only because of the lack of any impact which the development had on the value of the property, but also because of the fact that the property was being purchased as an investment and because of the respondent's obvious anxiety to secure it. Thus it was the appellant's case that any alleged negligence would not in fact have caused the respondent to have suffered any loss.

Procedural background

17. On 26 June 2015 HHJ Pelling QC ("the judge"), sitting as a judge of the High Court, after a trial of six days, gave judgment in favour of the respondent ("the judgment"). He found in the respondent's favour in relation to the issues of negligence, causation and on a further issue of mitigation. The judgment is to be found on BAILII at [2015] EWCH 1963 (Ch).

18. On 28 September 2015 Dame Janet Smith granted permission to appeal in relation to the three grounds identified below, all relating to causation, but refused permission in respect of the various other grounds.

19. On 23 November 2016 Lindblom LJ rejected the appellant's renewed application for permission on the grounds which had been refused by Dame Janet Smith. Lindblom LJ also rejected the respondent's application to set aside the grant of permission on the grounds accepted by Dame Jane Smith.

The judgment

20. The judge found that the respondent's claim against the appellant succeeded. In particular, he concluded that:

i) The appellant was negligent in relation to the Plansearch report; see the judgment at [30]-[35], cf. [51]:

> "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 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 acting by Ms Chow to purchase the property.
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> 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.
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> 32. Ms Smith urged me to conclude that Mr Baker could reasonably reach the conclusion he did because question 3.2 in the PIF was concerned with planning applications for "nearby" properties and the development was not "nearby" the property. The difficulty about that is that the expression is an imprecise one. The report identified planning permissions for properties within a 300 metre radius. Mr Baker was not able to explain to my satisfaction why it was necessary to further reduce that area in order to arrive at properties that were to

be regarded as "nearby", and if it was necessary so to reduce the scope, by how much.

33. He then suggested that the only material planning approvals that were relevant were those identified in the text in the summary section of the Plansearch report before the table that set out a summary of all the relevant approvals. Aside from the fact that he didn't advise Ms Chow about even the large development at 64 Avenue Road, the point is without merit because there is nothing within the report that could reasonably lead to the conclusion that the content of the table within the summary could be ignored and attention paid only to what appears in the text. If that had been the intention, then there would have been no point in including the table or any of the detailed material that follows in the report about the material in the table, which included but was not limited to the application referred to in the text appearing above the table.

34. I accept Mr Wardell's submission that a reasonably competent solicitor with the Plansearch report to hand would not have unilaterally assumed that only developments within 100 metres were material and the others not. If that approach was to be adopted, then a much more careful and qualitative analysis of the various planning approvals would have to be undertaken. In fact, Mr Baker skim read the report in not much more than a couple of minutes, as he accepted in the evidence recorded at transcript Day 5, page 94, lines 12 and following. He did not undertake any further enquiries of any sort in relation to the information contained in the Plansearch report. Had such enquiries been undertaken, they would have revealed that the development was of at least potential importance as is confirmed by the fact that Mr and Mrs Plant thought the school would be sufficiently intrusive to appoint agents to object to the grant of outline planning permission in 2008 and to do so again as part of a group of residents when detailed planning permission was considered in 2010. Quite simply, Mr Baker was not in a position reasonably to make the judgment he said he made.

35. In my judgment Mr. Baker was in breach of his duty by failing to include in the ROT a summary of the effect of the Plansearch report, the further investigations that could be undertaken with the LPA without undue difficulty, cost or delay, and to invite instructions in the light of that summary. By doing so, he would have given Ms Chow the opportunity to decide whether she wished to proceed, withdraw or obtain further information before deciding.

.....

51. As Ms Smith noted in her submissions, the starting point is to ascertain what the non-negligent solicitor would have done in the particular circumstances. As I have held already, such a solicitor would have included within the ROT a summary of the purpose of the Plansearch report, followed by a summary of the results contained in that report, coupled with a short description of what further

> information could be obtained if it was required and a request for instructions as to how the recipient of the report wished the solicitor concerned to proceed. Such an approach would have revealed the existing permission for a "large" non residential development at 80 Avenue Road and that further details could be obtained without undue difficulty, cost or delay by approaching the relevant Local Planning Authority. Alternatively, the issue might have been addressed by saying that a qualified answer to question 3.2 of the PIF had been received and setting out the same basic information."

ii) If the appellant had not acted negligently, the respondent would not have exchanged contracts; thus the respondent would have avoided the losses in respect of which the claim had been brought; see the judgment at [36]-[66]. In particular, if Ms Chow had learned of the development:

> "she would have either withdrawn from the purchase at that point – something that the [sellers] no doubt feared might be the result – or would have instructed the [appellant] to make further enquiries, which would, of course, have revealed [the details of the development.]" (See the judgment at [60]).

iii) The respondent had not failed to mitigate (see the judgment at [67]-[89]).

iv) The respondent was not contributorily negligent (see the judgment at [90]).

Grounds of appeal

21. The grounds of appeal which the appellant was permitted to pursue were as follows:

i) Ground 1: Despite finding that the appellant ought to have provided the respondent with a summary of the results of the Plansearch report, the judge erred in failing to make a finding as to what the terms of a summary of the Plansearch report should have been.

ii) Ground 3: The judge erred in finding that a summary of the Plansearch report would have revealed the existence of the development to the respondent.

iii) Ground 2: If the judge had made a finding as to precisely what the appellant should have told the respondent in the summary, and given that the development would not have been thereby revealed, the only proper conclusion should have been that the respondent would not have done anything differently. The respondent would not have pulled out of the purchase, and the losses would have been suffered in any event.

22. Grounds 1 and 3 therefore attack conclusions reached in the judgment at [35] and [51]. Ground 2 attacks conclusions reached in the judgment at [57] and [60]-[61].

23. There is thus no appeal against the conclusion that the respondent would not have exchanged contracts, if it had been informed of the detail of the development in October 2010. (Permission was sought in respect of this Ground, but it was refused by both Dame Janet Smith and Lindblom LJ.) The grounds of appeal therefore permit the

appellant only a narrow challenge, namely: even if the appellant had not acted negligently in relation to the Plansearch report, the respondent would not have been informed of the detail of the development and thus would have proceeded in the exact same way.

The appellant's submissions

24. Miss Joanna Smith QC and Miss Tiffany Scott appeared on behalf of the appellant. In support of the appeal they submitted in summary as follows:

Grounds 1 and 3

i) The judge made a serious error in relation to his findings on causation. He failed to make any specific findings as to what the appellant should have included in its summary of the Plansearch, report, had it been acting as a non-negligent solicitor. He failed to address the counter-factual of what a non-negligent report on title would have shown. Rather, the judge simply said that the respondent was "under a duty to explain the results of [the Plansearch]", should have provided "a summary of the contents of the Plansearch", "a summary of the effect of the Plansearch" or "a summary of the results": see the judgment at [30], [35], [51].

ii) The judge erred in failing to go on to conclude that a summary would, in effect, merely have repeated the headline information given in the Plansearch report. It would simply have made known to the respondent that there was a large number of planning applications (251, if more precision were needed) of a residential and non-residential nature within 300 metres of the Property. This was because:

a) As the judge rightly noted, the appellant was under a duty to communicate information which *might* be material to the respondent – an intentionally low threshold (judgment at [31]).

b) The respondent had not provided any specific instructions to the appellant as to its requirements for the property (judgment at [28]).

c) Therefore the appellant could only have relayed to the respondent information which might have been relevant. The appellant was not in a position to identify any specific planning application as more or less important to the respondent.

d) The judge did not conclude that a non-negligent solicitor would have carried out any investigations relating to the Plansearch report before reporting on it; thus, the appellant could only have been summarising information in the Plansearch report.

iii) It follows from the appellant's submissions above that a summary of the Plansearch report would not have emphasised the development as being of particular interest. At most the development would merely have been counted

as one of a significant number of large planning applications, which was how it appeared in the Plansearch report. Without further research, any summary would not have contained any of the detailed information about the development.

iv) Therefore, the judge's conclusion in [51] that the development would have been "revealed" to the respondent was incorrect, if what was meant was that that the respondent would have alighted upon it and requested that it be investigated. The details of the development which motivated the respondent to withdraw from the purchase of the property would therefore not have been revealed by the summary.

Ground 2

v) If the summary had merely relayed the headline information in the Plansearch report and not highlighted the specific development, the respondent was unable to discharge the burden of proof upon it to establish on the balance of probabilities that it would have done anything differently.

vi) The only evidence as to what the respondent would have done if provided with such a summary was that of Ms Chow in cross-examination. That was to the effect that the respondent would have required all applications (i.e. both large and small applications, of any type) to be investigated.

vii) Given the judge's conclusion that Ms Chow's evidence had to be approached with caution, that her evidence as to the purpose of the purchase and as to her intention to occupy the property had been "consciously exaggerated" (see [49] of the judgment"), that evidence should have been rejected. Rather, the judge should have held that the respondent would have proceeded as in fact occurred. In particular , the respondent would not have instructed B&B to investigate any of the planning applications to which its attention had been drawn in the summary, let alone all of them; and further there was no evidence to demonstrate or reason to suppose that it would have singled out the application affecting 80 Avenue Road in particular.

The respondent's submissions

25. Mr John Wardell QC and Mr Geoffrey Zelin appeared on behalf of the respondent. In summary, they submitted as follows:

i) Contrary to the appellant's arguments under Ground 1, the judge did make findings as to what a non-negligent ROT should have contained. Accordingly, the appeal was based on a false premise. The judge found that the development would have been highlighted by the summary. As a result, through the respondent asking the appellant to investigate the development, the full details of the development would have been revealed.

ii) The essence of the respondent's case was that the judge found that the summary would have explained the Plansearch report and highlighted the development. It was not necessary for the judge to have spelled out precisely what the ROT should have said and it would have been inappropriate for him

to have attempted to do so. The judgment at [51], amounted to a finding that a non-negligent solicitor would have produced a summary which "contained sufficient information by way of explanation of the Plansearch to highlight the school development (either alone or along with other matters) and to invite instructions as to whether further investigations should be carried out[,] which would have revealed the nature of the development". Whilst the judge's findings were sufficient, precisely what the summary might have said was set out in detail in the respondent's skeleton argument.

iii) The appellant's submission that the summary could have told the respondent "nothing at all" about the applications was inconsistent with the judge's findings on liability and the emphasis on a need to explain the Plansearch report.

iv) Ms Chow's evidence that she would have required explanation and investigation had to be accepted, as it was the only sensible response for an astute businesswoman to have made.

v) On any basis the development was unique. It was the only current large non-residential development with planning permission; and it was in the same block as 56 Avenue Road. In other words, it was the only current multi-faceted scheme involving commercial, education/health/military/municipal and residential use. The other residential developments were not in issue, so the fact that the judge did not attempt to grapple with that non-issue could not possibly be used to criticise his finding as to what should have been said about the development on the school site.

vi) On the facts of this case there were very good reasons why Mr Baker should have reported the school site development. In particular, it, more than anything else, raised questions about the veracity or frankness of the sellers' responses. The very reason why he had obtained the Plansearch report in the first place was because he had not received a satisfactory answer to question 3.2.

vii) Although the Plansearch report referred to 33 applications for large residential developments (which he would have explained meant estimated to cost more than £100,000), it was clear from the face of the report itself, that 17 related to proposals where no planning reference number had been provided which meant that they were either projects at a very early preplanning stage or involved works that did not require planning permission. Of the remaining applications, 2 had been withdrawn (and therefore can have been of no concern); the remaining applications related to 12 addresses and involved 7 new builds on those sites, with the rest being extensions and refurbishments or repairs to residential properties.

Discussion and determination

26. There was perhaps some force in the appellant's submissions that the judgment ought to have worked through the issue of causation more methodically and explicitly, and stated expressly what information should have been provided to the respondent, what the respondent would have done, and what would then have happened.

27. However, in my view it is clear from a proper analysis of the judgment in the context of the pleadings, the evidence and the way in which the arguments were presented at trial, that the judge did indeed reach positive findings to the effect that: a proper summary would have highlighted the development and explained its potential significance (i.e. it would not merely have repeated basic information from the Plansearch report); the respondent would have then instructed the appellant to look into the development; and thus, the details of the development would thereby have emerged. This is the natural reading of the judgment at [51] and [60], quoted above.

28. There are a number of features which support this conclusion. First, as Mr Wardell submitted, an important feature was the manner in which the case was pleaded. The pleaded complaint was that the appellant had failed to inform the respondent of the planning applications for large non-residential developments intended to be carried out within 250 metres of the Property. The pleading went on to make it clear that it was apparent on the face of the Plansearch Report that the only current large non-residential development was a large development on the site of the school; see paragraphs 17A and 17A.1 of the amended particulars of claim. This was said to involve a new-build for both commercial (which encompasses industrial, office and retail) and educational, health, military or municipal purposes, in addition to a new build for residential use on the site. All of that was admitted by the appellant; see paragraph 6 A of the re-amended defence. The respondent's case was that, had the appellant investigated or got instructions to investigate, it would have discovered in a matter of minutes that the planning application(s) related to the demolition of the existing schools and the construction of a new 6 storey academy. Again that was admitted in the re-amended defence at paragraph 6A.

29. So the sole focus of the case as opened and presented at trial was on the planned re-development of the school. The respondent argued that anyone who had taken the trouble properly to read and understand the Plansearch Report would have realised that there was a substantial development proposed for the school site; would have understood that the development had multiple features present (by which is meant that it was not just for one use and that the relevant uses were commercial, "educational, health, military or municipal" and residential); but would not know from the Plansearch Report itself the precise scope of that development. In the circumstances the respondent contended that there was a clear duty to inform the respondent of the proposed development and to ask whether it wanted the matter to be investigated further.

30. The appellant's pleaded defence which was advanced at trial was that there was no duty to look *beyond* the adjoining or neighbouring properties (by which was meant properties within 100 metres). The defence went on to assert that Mr Baker was entitled to disregard developments further than 100 metres away as they could not have been regarded as "nearby". Thus, the appellant submitted, there was no need to inform the respondent about the existence of the Plansearch report, no need to mention it in the RoT, and no reason to draw the Respondent's attention to its content.

31. The other feature is that, as Mr Wardell submitted, it would have been perfectly obvious to the informed reader from the face of the Plansearch report that the school development was, or was potentially at least, highly significant. In those circumstances, it would not have been difficult for any non-negligent solicitor to have prepared a very brief summary of the features of the development, together with a

recommendation as to what further steps were necessary to ascertain what the impact of such a development might be. That was particularly so in the context where the vendors of the property had been suspiciously qualified in their answers to the PIF.

32. Against that background, the fact that the judge did not himself formulate precisely the terms in which a non-negligent solicitor should have formulated the summary to my mind goes nowhere. He clearly and sufficiently considered what an appropriate summary of the Plansearch report would have revealed and his conclusion in paragraph 51 of the judgment cannot be faulted. I see no basis for a successful appeal on Ground 1.

33. The appellant is therefore in the position of having to say that the judge was wrong in this conclusion, and in finding that the summary would thereby have revealed the development. Once the argument that the judge failed to consider the content of the summary has been rejected, there is, in my judgment, no basis whatsoever for this court to upset the judge's conclusion that a summary of the Plansearch report would have revealed the development to the respondent. The judge heard all the evidence and reached the wholly unsurprising conclusion that a non-negligent summary would have resulted in the detail of the development emerging. Ground 3 therefore also fails.

34. Likewise, in my judgment, Ground 2 falls away: the respondent would have known about the development before exchange, and the conclusion that the respondent would have withdrawn from the purchase at that time is unassailable.

Disposition

35. For the above reasons, I would dismiss this appeal.

Lady Justice King:

36. I agree.