

SPS Groundworks & Building Ltd v Mahil [2022] EWHC 371 (QB)

A seller failed on an auction sale to comply with its common law duty to disclose an overage obligation affecting the property.

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A seller failed on an auction sale to comply with its common law duty to disclose an overage obligation affecting the property.

Facts

A plot of land was sold at auction in 2019. The land was subject to an overage obligation from 2017 which required payment of 50% of the uplift in the value of land attributable to obtaining planning permission.

The legal pack prepared for the auction sale by the seller (SPS) included a copy of the deed of covenant containing the overage obligation and the deed was referred to in a restriction in the proprietorship register of the title to the land (which was also part of the legal pack). There was no specific reference to the overage obligation in the auction brochure and no oral reference was made to it by the auctioneer who conducted the auction. The sale was though subject to the Common Auction Conditions (3rd Edition), which provided that the land was sold subject to all matters contained or referred to in the auction pack.

The highest bidder at the auction (M) had visited the land, but she did not look at the auctioneer's website. She picked up an auction catalogue at the auction, but did not read the terms and conditions. She refused to complete the purchase when she discovered the existence of the overage obligation.

Issue

Had SPS failed in its common law duty to disclose the overage obligation affecting the property?

Decision

A seller has a duty to disclose all latent defects in title and encumbrances of which they are aware, irrespective of whether a buyer makes enquiries. Where there is no specific reference to a defect, a buyer can assume that entries on a title register (or in other relevant documentation) would be the usual sort of entries that would not significantly affect value.

SPS had not complied with its duty of disclosure. References in the auction brochure and by the auctioneer to the need to read the legal pack were insufficient. Those references were made in respect of all 35 lots at the auction. Full and frank disclosure instead required the overage obligation to be specifically brought to M's attention by description in the particulars, an addendum notice or specific reference by the auctioneer.

Point to note/consider

It must be said that this is a hard decision to understand. A seller's implied duties to sell a property free from encumbrances (other than those disclosed to a buyer or subject to which the sale is expressly made) and to disclose all latent (i.e. non-obvious) defects in title and encumbrances are not in doubt. However, most people would have thought that supplying the relevant deed of covenant and official copies (which referred to the relevant encumbrance) would have sufficed to discharge those duties.

The outcome of this case is particularly significant with auction sales, where a seller knows (or suspects) that a potential buyer may bid for a property (and therefore become contractually bound to buy it) before a lawyer has carried out any due diligence. In those circumstances, it would be a sensible precaution for a seller to make sure that any significant title defects or encumbrances are specifically and clearly highlighted in the auction pack or by the auctioneer (rather than relying on standard conditions and generic disclaimers).

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