



Compass Chambers

*“The roof, the whole roof and nothing
but the roof”*

The Prosecution of Property Misdescription

Murdo MacLeod QC

Compass Chambers Regulatory Crime
Conference



R v Beresford Adams 2011

Facts: BA – Estate agents in Wrexham. The complainant had an offer accepted on the property but subsequent searches and surveys revealed the presence of a mineshaft very close to the property. BA had been aware of the presence of the mineshaft for some time, having had their attention drawn to it by other potential purchasers who had withdrawn from purchasing when they too discovered about the old mine working.

However, they had done nothing with this information and allowed the complainant to go ahead and incur the costs of searches and a survey.

Result: BA fined £3,200

Consequences: Reputational damage. TS: The decision will be far-reaching



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D Limited

- Award-winning developer
- 800 employees
- 10,500 houses
- New build apartments
- New development near Aberdeen



The Sales Brochure

- Produced years before the properties were built
- Very glossy and simplistic
- Each flat had a floor-plan
- Accompanying dimensions for irregular ('Z' – shaped) rooms were described in a binary manner ('A' length by 'B' width), but qualified by the word "max"
- Regularly shaped rooms were not qualified in this way
- No indication of pillar between windows



The disclaimer

- The information and images are intended to convey the concept and vision
- They are for guidance only
- They may alter as work progresses
- They do not necessarily represent a true and accurate depiction of the final product
- The brochure has been designed to be illustrative
- None of the statements contained in these particulars are to be relied upon as a statement or representation of fact



PF v D Ltd

- Charged with 10 contraventions in respect of false measurements and the obstruction of views
- Said to have be the first prosecution of its kind in Scotland
- Summary complaints conjoined into one
- 10 – day trial
- Householders, Trading standards officers, expert witness, the Head of Construction, client care manager

Regulatory Framework

Property Misdescriptions Act 1991

1(1) Where a false or misleading statement about a prescribed matter is made in the course of an estate agency business or a property development business...the person by whom the business is carried on shall be guilty of an offence under this section.

1(2)(5)(a) “false” means false to a material degree;

(b) a statement is misleading if (though not false) what a reasonable person may be expected to infer from it, or from any omission, is false,

(c) a statement may be made by pictures or any other method or may be made orally or in writing,

2 (1) Defence. “ all reasonable steps and exercised all due diligence”



Nature of the charges

- that the dimensions or irregular rooms given in the brochure ('A' x 'B') were false - the "truth" being that the rooms were in fact 'C' x 'D'
- that measurements had been taken from the rear of fitted wardrobes, but should have been to the wardrobe doors
- that a pillar, not shown in the brochure, obscured the view in the living room area



NCTA submission

- No evidence in support of the “truth”. The Trading Standards officers’ measurements of the irregularly shaped rooms were no more truthful than the dimensions in the brochure
- Their measurements were the minimum length and width, often taken at the narrowest point of the rooms. No “truth” having being established, there was insufficient evidence to substantiate each of the three charges
- The Sheriff repelled the submission since as it remained open to the PF depute to offer further amendments to the charges



Defence Evidence

- Senior management
- Independent surveyor
 - (1) the manner in which dimensions were provided and the lay-out of the floorplan both conformed to industry practice
 - (2) the statements, in their opinion, were not misleading
 - (3) that the provision of further detail within the brochure may have led to confusion



The motion to amend

- During closing submissions the procurator fiscal moved to amend the charges
- to delete “false” and insert “misleading”; and to delete “truth” (in terms of the accuracy of dimensions)
- to substitute the allegation that the appellant “did not clearly indicate the basis of the calculation for said measurement.”



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s. 159 of CP(S)A 1995

(1) It shall be competent at any time prior to the determination of the case, unless the court see just cause to the contrary, to amend the complaint by deletion, alteration or addition, so as to—

(a) cure any error or defect in it;

(b) meet any objection to it; or

(c) cure any discrepancy or variance between the complaint or notice and the evidence.

(2) Nothing in this section shall authorise an amendment which changes the character of the offence charged, and, if it appears to the court that the accused may in any way be prejudiced in his defence on the merits of the case by any amendment made under this section, the court shall grant such remedy to the accused by adjournment or otherwise as appears to the court to be just.

Opposition to amendment

- Timing of the amendment
- The fact that it changed the nature of the offence to the extent that the amended charge did not disclose a crime under the statute
- There was no specification as to how the statement actually misled the purchasers. In the same way that an averment of falsehood would require to specify the nature of the falsehood and would then be contrasted with a statement of the truth (i.e. in all such cases alleging falsehood one would expect specification of the egregious conduct to be followed by “... the truth being”), so an allegation of misleading conduct would require detail as to how the complainers were misled. Fair notice required such averments to be made



The result

- The amendments were allowed
- Acquitted of seven charges – those referring to the dimensions into the fitted wardrobes, and in respect of the pillar
- Convicted in respect of the irregularly shaped rooms, as *per* the amended charges
- Fined £9,000



Appeal – the truth

- Dates in complaint related to when statements made
- There was no “truth” at that time – flats not built
- As disclaimer says, design/plans could change

BUT: *Bryan Lewin v Barratt Homes* [2000] Crim LR 323

Facts: Similar facts – complainers bought houses off-plan, based on a picture – also looked at show-home

Houses that were built were materially different

QB held that the show-home and picture contained an implied statement of present fact, namely that the householder intended to build houses to the design seen in the picture and the show home. Matter of degree.



Appeal – the disclaimer

Norfolk County Trading Standards Service v Bycroft [2012]
EHWC 4417 (per LJ Elias)

Cannot rely on the disclaimer – it does not insure against prosecution

The use of the word “approximately” is not always apt

“It was true that there was also a statement that the measurements were not guaranteed or verified, but that did not contradict or neutralise the statement in its entirety”

Appeal – the amendment

“It appears to us that the amendment made by the Crown does not give rise to a relevant charge. As the advocate depute conceded, the charge could have been expressed with greater specification. Mr MacLeod QC referred us to *Blair v Keane* (1980 JC 19) which related to a contravention of the Trade Descriptions Act 1968. There, the High Court on appeal found that the terms of the complaint which echoed the statutory provision did not give rise to such fair notice.



Blair v Keane 1981 J.C. 19

s.1(1)(b) of the Trade Descriptions Act 1968. False description

Sale of a used car - “A1 condition...great little motor...it is perfect...you'll not have trouble for years” .

“About a week after her purchase of said motor car Mrs Crosbie was driving the vehicle on the road between Denny and Falkirk when the front suspension of the vehicle collapsed and it could no longer be driven. She had driven the vehicle a total of about thirty-five miles since the date of purchase”

Held (per LJC Wheatley)

“The terms of this complaint did not, in our view, give the appellant fair notice of the case he had to meet since they did not specify the defects on which the prosecution would lead evidence to establish the charge”



“In the present case, the Crown initially proceeded to present the charge on the basis that the measurements of the irregular rooms were false; for example in the case of charge one that there was no dimension of 5.82m. The amended charge moves from the “goalpost” of a false statement to a misleading statement, which we recognise adopts the statutory language of false or misleading statement which also appeared in the original and is retained in the amended charge.”



“However, we find that, to be a relevant charge, the Crown required to specify how the statement was misleading. It was not sufficient for them to say only *“...which statement did not clearly indicate the basis for the calculation for said measurement.”*

This did not give the defence fair notice of the Crown case of how it would be said this had misled the purchasers. Accordingly we shall allow the appeal.”



“We would also add that we have a concern that the sheriff allowed the amendment at an extraordinarily, if not uniquely late stage and thereby denied the defence a fair opportunity to prepare their defence to the charge which the Crown sought to put to the sheriff.”



Conclusion

- Consequences for the industry were potentially far-reaching
- Although the PMA has recently been repealed, almost identical provisions are found within the Consumer Protection from Unfair Trading Regulations and the Business Protection from Misleading Marketing Regulations
- But, now applies to all commercial transactions
- The level of industry awareness is lacking
- Care must be taken with descriptions such as *'breathtaking views'* and *'quiet area'*; also with omissions
- Trading Standards and the Crown



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The views and information contained in this presentation may be wholly ill-informed and inaccurate.

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