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PROPERTY TEAM NEWSLETTER

Article: When Push Comes to Shove - Specific Performance of Contracts for Sale

One of the most striking consequences of the Credit Crunch has been the sudden and unexpected withdrawal of secured lending facilities, and this has particularly affected the large number of private individuals who were seduced by an endlessly booming property market into becoming amateur property developers and landlords. These were the target market for flats in large residential developments, usually bought off-plan with the promise of high loan to value (LTV) mortgages. Got £15,000 to put down? Have a 1 bedroom flat. Come into a bit of money recently? Have 3 of them.

But these were also the people who were caught between exchange and completion when the music stopped and those affordable mortgage offers disappeared; either 'in principle' offers failing to convert into formal offers or formal offers expiring whilst the development was being constructed and not being renewed. The high LTV mortgages which they were relying upon to purchase these investment properties are no longer available, and at the same time the housing market slump has resulted in their mortgage valuations coming in at well below the prices they agreed when there was nothing but blue skies in the property market. This double whammy has left them facing the prospect of having to dig deep into their own pockets to make up the difference between these agreed prices and what their mortgagees are prepared to lend. Little wonder, then, that up and down the country they are currently defaulting on completion notices now that construction of their developments is coming to an end and the money is just not there to complete.

So what can developers do to separate the Can't Pays from the Won't Pays and minimise the risk of being saddled with a largely unsold development? How practical is a claim for specific performance when the buyer may simply not have the wherewithal to complete?

Many developers are choosing to take a zero tolerance approach to non-completion and to apply for specific performance at the first sign of default. And although most are surprised at how long and torturous the road to completion is, the strategy can be highly effective. Although the remedy is of course equitable, and therefore discretionary, the principal bar to specific performance in the case of most contracts – namely that damages are an adequate remedy – does not apply to contracts for the sale of land (*Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444).

There are particular defences to a claim for specific performance which need to be considered. The Claimant himself must be ready willing and able to complete, and any failure to prove that ability at the relevant time will be fatal to the relief. The Claimant must not himself be in breach of the contract, and there exists a category of breach which does not amount to a repudiatory breach but which is nevertheless serious enough for the Court to consider it inequitable to grant specific performance. Associated with this is the requirement that the Claimant must come with 'clean hands'. Hardship to the Defendant can also be a defence to a claim for specific performance but it is highly doubtful that 'mere' financial hardship, in the sense of being required to pay the sum contracted for in the absence of an ability to raise finance, would be sufficient.

So is there any real advantage to a claim for specific performance over rescinding the contract and claiming damages? Clearly this latter option releases the developer from any further obligation to the buyer and he can sell the property to a third party, claiming any difference from the Defendant. But of course in a collapsing property market that may be easier said than done. By pursuing the buyer for specific performance the developer shows that he is in earnest and can move swiftly to bring proceedings. Indeed, he may face a defence of laches if he fails to make the claim expeditiously. The claim is often eminently suitable for summary judgment, and indeed the Practice Direction applicable to Part 24 modifies the usual rules for summary judgment, providing that the Claimant need not even wait until the Defendant has acknowledged the claim form, and the application must be served only 4 days before the hearing instead of the usual 14.

The other advantage is that if an order is obtained and the buyer fails to complete in accordance with it, the developer can convert the order for specific performance (where the buyer is in default in failing to pay the purchase price) into a judgment for the full sum payable, plus interest and costs, which can be enforced in the usual way. This is done by application, having first lodged the transfer, executed in escrow by the developer, in Court to demonstrate that the developer remains ready willing and able to complete the sale. Alternatively he can apply to discharge the order and seek damages instead, as well as forfeit the deposit. But it is important to remember that the developer cannot treat a failure to complete in accordance with the order as a default which, without more, entitles him to sell the property to someone else. If he does so without first obtaining a discharge of the order for specific performance then he will not be entitled either to damages from the Defendant, or to forfeit the deposit.

Rupert Higgins

Did you see.....? Recent cases you may have missed.

Real Property

Beneficial interest in land, Registering interest

Shuk Yin Chan v Jian Qiang Chen [2009] EWHC 1489 (Ch)

Claimant (C) and Defendant (D) were brother and sister. They bought a property in D's sole name with monies from both and the assistance of a mortgage. C did not register an interest in the property. Subsequently their relationship turned sour and C wanted the money for her share of the property. C argued that she had provided money to purchase the property and that it had been expressly agreed before purchase that D would hold the property on trust for her. Further, C submitted that she would not have parted with that amount of money without acquiring an interest in the property

Held: The overwhelming weight of the evidence was that C's contribution to the purchase price was a loan, and if that was not the case it was difficult for the Court to see why the property had not been transferred into C and D's joint names.

Residential Letting Contracts

Standard terms in letting arrangements, Unfair terms, UTCCR 1999, reg 6

Office of Fair Trading v Foxtons Ltd [2009] EWHC 1681 (Ch)

The OFT challenged the unfairness of contractual terms in the defendant's old and new standard forms of agreement with landlords. The terms included commission to be charged on the renewal of a tenancy, including third party renewals and commission to be payable in the event the property was sold to the tenant.

Held: The terms were not set out in plain intelligible language which would allow the typical landlord to understand the obligations created. Further, the obligations to pay renewal commission or sales commission were not part of the core bargain of the contract. The terms were not exempt from reg 6 and, on the facts, all the provisions challenged were held to be unfair.

Landlord and Tenant

Human Rights Act 1998 s.6(3)(b), Public Authorities, Termination of Tenancy by Registered Social Landlord

R (on the application of Weaver) v London & Quadrant Housing Trust (Equality & Human Rights Commission intervening) [2009] EWCA Civ 587

The C had challenged the making of a possession order in respect of an assured tenancy on ground 8 of Sch 2 of the Housing Act 1996 (a mandatory ground) on the basis that it interfered with her Art 8 rights. The C failed to establish that she had a legitimate expectation arising out of the D's published Regulatory Code and Guidance and the application was dismissed, but the D challenged the finding that it was a public authority under s.6(3)(b).

Held: In considering whether an act was one of a private nature, the Court was required to consider the context in which the act occurred. In this case, the RSL relied on public funding, its allocation of housing operated in very close harmony with the local authority and it was subject to regulation to ensure that the government's social housing policy objectives were fulfilled. Cumulatively these factors were sufficient to make the provision of housing a public function. The termination of a tenancy by a hybrid RSL was therefore an act of public nature which was subject to human rights considerations.

Case summaries by Laura Tweedy & Andy Creer

The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

Telephone: 020 7242 2523

Web: www.hardwickebuilding.co.uk

Email: clerks@hardwicke.co.uk

Practice Director: Amanda Illing

Senior Practice Manager: Paul Horsfield

Practice Manager: Annabelle Lock

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www.hardwickebuilding.co.uk

Hardwicke Building New Square Lincoln's Inn London WC2A 3SB
Telephone 020 7242 2523 Fax 020 7691 1234 DX LDE 393