

Sale and leaseback schemes: forthcoming test case

This article is to raise awareness of an important issue which is currently the subject of a number of test cases in the Chancery Division in Leeds relating to the widespread practice of sale and leaseback agreements.

The Housing Team at Zenith Chambers is involved in a test case before HHJ Behrens sitting as a High Court judge in Leeds at the beginning of October listed over 3 days to consider a number of preliminary issues detailed below.

Facts

The cases predominantly involve an organisation known as North East Property Buyers (NEPB) which was involved in a significant number of sale and leaseback transactions in the North East. It advertised widely on radio and television and was contacted usually by distressed owner occupiers who were having financial difficulties.

A representative from NEPB would visit the home of the owner occupier and would agree to purchase the property on the understanding that: the occupier would be able to remain living there, perhaps for the rest of their lives; that they would pay a reduced rent; that they would receive a lump sum. A number of transactions involved an "irrevocable deduction authority" whereby a large sum of money would be deducted at completion from the proceeds of sale and paid to NEPB. They would be given the option to purchase the property back after a certain number of years, usually 10. NEPB had a number of solicitors in the North East who would carry out the conveyance of the property on behalf of the vendor and the transaction was generally completed within a matter of weeks.

Vendors generally believed that NEPB would be purchasing their property but what in fact happened was that "nominees" of NEPB – persons associated with the organisation – would purchase the property and secure a mortgage on the land. They then gave the occupiers a fixed term assured shorthold tenancy agreement. Subsequently in a number of cases the "nominees" stopped paying the instalments on the mortgage and possession proceedings were commenced by the mortgagees against the borrowers. It is understood that the organisation is currently the subject of an extensive police investigation.¹

The legal issues

Solicitors in the Newcastle and Darlington took up the case on behalf of a number of occupiers and the occupiers, as they seek advice, are being added as 2nd and 3rd Defendants,

¹ See, for example: <http://www.journallive.co.uk/north-east-news/todays-news/2009/06/13/five-questioned-in-north-east-property-buyers-fraud-probe-61634-23866668>

together with their cases stayed. The argument we are running on behalf of the occupiers is that they in fact have a variety of overriding interests in the form of a proprietary estoppel; a constructive trust; an equitable right to set aside the transaction and/or a 90 year interest in the land.

The court has set a number of preliminary issues for trial but perhaps the most important and legally significant relates to whether the interests alleged by the occupiers are capable of being interests affecting the estates immediately before and/or at the time of the disposition, sufficient to be an overriding interest under paragraphs 1 and/or 2 of Schedule 3 of the Land Registration Act 2002 (rights of short term tenants & rights of those in actual occupation at the time of the registrable disposition). One of the main issues here is in relation to the "moment in time" principle which was extinguished by the House of Lords in the case of *Abbey National v Cann* [1991] 1 AC 56: the purchase of land with the use of a mortgage happens simultaneously such that there is no "moment in time" when proprietary rights can attach after purchase but before charging the land.

As mentioned above there is a significant number of cases and it is understood that the courts have been staying these cases pending the outcome of the test case.

If you would like to discuss any of the issues in this article then please feel free to contact a member of the Housing Team at Zenith Chambers.

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