

Property Update – September 2013

Christopher Cant

There have been significant recent cases in four areas involving property:-

1. Repudiation of contract to sell off plan – this has been a particular thorn in the side of persons involved in buy to let. The recent authorities are a warning to purchasers.

2. Need for entire contract to be in writing – yet another harsh decision emphasises the importance of including all terms of sale in a written contract.

3. Rates on unoccupied properties – mixed outcomes for arrangements seeking to reduce or avoid rates on vacant premises.

4. SDLT and Sub-sale relief – the Court of Appeal has very emphatically rejected an attempt to avoid sdt by using the sub-sale and partnership provisions. The reasoning has wider implications.

These areas are discussed in more detail in the following sections.

1. Delayed completion of flats – one of the headaches thrown up by the recession is the resultant delay in completing flats sold off plan usually due to the drying up of funding for the construction work. Such delay may cause the purchaser to lose a mortgage offer and be unable to replace it. Where does that delay leave the purchaser particularly when the terms of the sale contract fail to cover this as is often the case. The dangers for a purchaser and the need for caution in such circumstances have been highlighted by two recent Court of Appeal decisions – Telford Homes (Creekside) Limited v Ampurius Nu Homes Holdings Limited [2013] EWCA 577 and Urban 1 (Blonk Street) Limited v Ayres [2013] EWCA Civ 816. In both cases the purchaser has attempted to terminate the contract on the basis that delay constitutes repudiation. The claim has failed with the consequence that the wrongful termination is itself a repudiation by the purchaser who faces the forfeiture of the deposit and a damages claim.

Unless the provision broken is a condition to establish repudiation it has to be shown either that

(i) there is an intent not to perform or not to perform substantially in the manner agreed; or

(ii) the innocent party will be deprived of substantially the whole of the benefit contracted for.

When there is delay and the contract is for a lease with a long term then (ii) will be difficult to prove repudiation. Similarly if the vendor is attempting to perform it will be difficult to satisfy a Court.

Warning -

(a) terms covering the possibility of delay are crucially important as without them the purchaser faces real uncertainty;

(b) purchasers without the protection of conditions must exercise caution to avoid repudiating the agreement whilst seeking to terminate.

2. All terms in writing sale agreement – the “merciless application” of section 2 of the Law of Property Act 1989 has been illustrated yet again by the appeal decision in Sukhlall v Bansodeb [2013] EWHC 952 (Ch). Having agreed to sell to a relative for £1.1 million a couple then responded to a request to defer payment of part so that the sum payable on completion was £750,000 and the balance payable in tranches after completion. The written agreement only specified payment of the £750,000 and made no mention of the balance. When the widow

sued for the balance her claim was dismissed without a trial due to the failure to comply with section 2.

Points –

- (a) completion of the contract will not cause section 2 to cease to operate. The Courts appear to have set their face against any revival of what use to be called the Tootal principle;
- (b) constructive trust should have rescued the position but was denied so that at best there is considerable uncertainty and at worst unfair harshness

3. Arrangements to avoid or reduce rates on unoccupied property – two methods have been commonly used to avoid or reduce rates on unoccupied properties. One is to have a charity take up occupation and seek to benefit from the charity exemption. The other is to interrupt periods of non-occupation by a period of occupation lasting longer than six weeks so that more than one rate free period is created. These arrangements have met with strong challenges from the authorities and with some but not total success.

3.1 Charities – occupation by a charity for charitable purposes does not mean that the exemption automatically applies. In *Public Safety Charitable Trust v Milton Keynes Council* [2013] EWHC 1237 (Admin) three appeals were heard. In each the charity had installed a transmitter to provide free wi-fi within a location and broadcast a crime prevention message. The extent of use of the premises was minimal. Sales J. on appeal held that to take advantage of the charity exemption the charity must make extensive use of the premises which it did not in this case. However, the use of the premises by the charity does not have to be efficient or needed. In *Kenya Aid Programme v Sheffield City Council* [2013] EWHC 45 (Admin) the demised premises were more extensive than really needed but the charity retained the benefit of the exemption.

To be entitled to zero-rating when not occupying premises a charity only has to show that the next use of the premises will be for charitable purposes. It does not have to prove that the charitable use will be by it. In *Preston City Council v Oyston Angel Charity* [2012] EWHC 2005 a licence was given to a charity to use the premises for charitable purposes with an ability to grant a sub-licence for the same purposes. The authority's challenge to the charity being zero-rated failed on this ground. But the judge made the point that this can always be challenged

on the ground that it has not been proved that the next use will not be for charitable purposes by any charity. He also suggested that a *Furniss v Dawson* sham argument could always be put forward.

3.2 Interruption of periods of non-occupation – the initial period of non-occupancy (three months or six in the case of a qualifying industrial hereditament) is not subject to rates. If interrupted by a period of occupancy of six weeks or less the periods of non-occupation are treated as continuous. An interruption for a period exceeding six weeks will give rise to more than one rate free period of non-occupancy. The arrangement involving a charity installing a transmitter for a period of 43 days was successful for these purposes in *Sunderland CC v Stirling Investment Properties* [2013] EWHC 1413 even if the charity would not be exempt for that period of occupation.

4. Sub-sale relief for sdlt – the sub-sale provisions have been used in attempts to avoid sdlt. One such attempt has failed in the Court of Appeal. It sought to combine the operation of the sub-sale provisions with those applying to a transfer of a chargeable interest by a partner to the partnership (para. 10 Sch 15 FA 2003). Lewison LJ held in *HMTC v DV3 RS Limited Partnership* [2013] EWCA Civ 907 that the purchaser never acquired a chargeable interest and, therefore, there was no land transaction between the purchaser and the sub-purchaser. It meant that sdlt was payable on the purchase of the Dickins and Jones building in Regents Street rather than it being avoided. The reasoning has implications generally for attempts to use the sub-sale provisions.