

Priority searches: the potential for mis-use

Introduction

What can a developer do when it quite properly withdraws a contract for sale issued to a prospective block purchaser of 9 flats and, in response, the prospective purchaser several weeks later lodges priority searches to prevent the seller completing individual sales of those flats to third parties?

This was the dilemma that a national housebuilder, Bellway Homes, faced in November 2006.

Background Facts

One of Bellway's recent developments is a block of 40 flats at William Booth Place, Walton Road, Woking. In July 2006, Bellway was introduced to a company ("LERT Ltd"), which indicated that it was interested in purchasing 9 flats at the block. Accordingly, LERT Ltd paid non-refundable deposits in respect of these 9 flats, of £1000 each. It also signed a Reservation Form.

This Reservation Form was intended to operate as a form of "lock-out" agreement, whereby Bellway agreed not to market the flats until the end of August. There was express wording on the face of the Reservation Form that any agreement embodied in it was not intended to create any form of proprietary interest in the flats.

In the contract negotiations that took place in July and August 2006, both Bellway and LERT Ltd were represented by solicitors. However, problems arose in particular as a result of LERT Ltd's desire to effect "back-to-back" sales of the 9 flats. Quite properly, Bellway was concerned about the proposed arrangements which had, on the face of it, potential hallmarks of mortgage fraud or money-laundering. Discussions between Bellway and LERT Ltd dragged on into late September (long after the end date of the lockout agreement) with no sign of the parties reaching exchange of contracts. Whilst Bellway therefore gave LERT Ltd a period of grace after the end of August, it was not obliged to do this.

On 28 September, Bellway finally lost patience with LERT Ltd and its solicitors were informed "that all the reservations have now been cancelled".

After 28 September, Bellway put the 9 flats back on the market and negotiated sales to other parties, and it was assumed that these sales would proceed smoothly to completion before the end of the year.

Unknown to Bellway, however, some 6 weeks after it had ended negotiations with LERT Ltd, on 8 November, LERT Ltd (using a new firm of solicitors) lodged priority searches in respect of each of the 9 flats as well as the whole title to the site. The priority period for the searches would not expire until 21 December.

Bellway discovered the existence of the priority searches when, on 15 November, one of the new purchaser's solicitors wrote to Bellway's solicitors enclosing a copy of their own priority search which revealed that LERT Ltd had lodged earlier searches. LERT Ltd was asked to withdraw the priority searches that it had made but it refused to do so unless Bellway agreed

to pay it a substantial sum of money. This demand for money suggested that LERT Ltd was aware that Bellway was close to simultaneous exchange of contracts and completion with each of the new purchasers, and the timing of its priority searches was a deliberate ploy on its part to misuse the Land Registration Rules for an “inappropriate” ulterior purpose.

The effect of lodging of applications for a priority search is clearly explained in Ruoff and Roper: Registered Conveyancing volume 1, paragraph 30.009:

“Where a purchaser has applied for an official search with priority of an individual register ... and a third party then makes an application for an entry in the register, the registrar will defer dealing with the third party’s application until the end of the priority period. ... Indeed it may well be that the registrar makes no entry in respect of the third party’s application ...”

In other words, the register is in practical terms frozen until the priority period in respect of the first search ends. In any transaction, the existence of a priority search obviously has the potential to cause anxiety to an intended purchaser who wishes to proceed to exchange of contracts but is naturally unwilling to do so whilst a priority search remains in the daily list. Indeed, as stated above, in this actual case, arrangements were in place with the new purchasers for simultaneous exchange of contracts and completion as each of the purchasers were anxious to be “in for Christmas”. LERT Ltd’s priority searches gave rise to genuine fears on the part of Bellway that one or more of the new purchasers might withdraw if completion did not take place on time. These fears were heightened when LERT Ltd also started to threaten to lodge a unilateral notice against the whole title.

To remove a unilateral notice, which can only be lodged to protect a proprietary interest, it is necessary to use the Land Registration Act (“LRA”) procedure to “warn off” the notice. The procedure can take weeks, if not months, and LERT Ltd’s threat, if carried through, could have delayed the sales to the new purchasers until well into the New Year.

When Bellway’s solicitors approached the Land Registry, it confirmed that it had no power to withdraw LERT Ltd’s searches and remove their entry from the daily list. (See rule 12(1) of the Land Registration Rules 2003 (“the LRR”). The response from the Land Registry and the threat by LERT Ltd to lodge a unilateral notice left Bellway with no alternative but to make an application to the court if it wished to protect the sales to the new purchasers.

The Statutory Background

LRR rule 147(1) states:

“A purchaser may apply for an official search with priority of the individual register of the registered title to which the protectable disposition relates”

“Purchaser” is defined as:

“... a person who has entered into or intends to enter into the protectable disposition as donee, ...”

In other words, when the application for entry into the day list (see LRR rule 148) is made, the applicant has to be (at least) an intending purchaser. The standard application form OS1 requires the applicant to certify that he is an intending purchaser. Further, position of an intending purchaser who, in good faith, has lodged a priority search, but then finds that the

contract negotiations fail, is clear. He is obliged to withdraw the application - which he may do under rule 150:

“... a person who has made an application for an official search with priority of a registered title ... may withdraw that official search by application to the registrar”

Harpum and Bignell: “Registered Land” (2004) states:

“... The power to withdraw an official search with priority (under rule 150) should be utilised whenever an intended transaction protected by such a search does not in fact proceed. Its removal will mean that other pending applications can then be completed without delay.”

Causes of Action

Owing to what appears to be a lacuna in the LRR, it is not, in fact, an express breach of any statutory duty wrongfully and without cause to lodge a priority search application. This can be contrasted with the position relating to notices and restrictions where the LRA section 77 that imposes an obligation on a person applying for entry of a notice or restriction to act reasonably. Making such an application without “reasonable cause” gives rise to a claim for breach of statutory duty that may be brought by any person who suffers damage in consequence.

Bellway's application for injunctive relief contended that LERT Ltd's actions - in misusing the LRR - plainly amounted to a tortious interference with business as they were calculated to affect Bellway's economic interests (see, for example, Clerk and Lindsell on Torts (2006) paragraphs 25-88 and 25-91). Bellway also argued that the court had an inherent jurisdiction (by analogy with cases concerning the removal of cautions entered under the old Land Registration Act 1925) to order the withdrawal of entries made without prior notice (see e.g. Megarry and Wade: Law of Real Property (2000) paragraphs 5-131).

Following comments made by the judge whilst hearing submissions, LERT Ltd decided to embark on a strategic retreat and agreed to offer undertakings to remove its priority searches and not lodge any new searches, notices or restrictions without Bellway's consent or the permission of the court.

Fortunately for Bellway, and its new purchasers, the saga ended on a happy note. Contracts with the new purchasers were exchanged and completed and no doubt they had a very enjoyable Christmas in their new homes. However, the happy ending in this particular case, cannot hide the fact that, unlike notices and restrictions, there is no statutory protection guarding against the misuse of priority searches. This is, perhaps, a lacuna, that the Rules Committee established by the LRA to advise the Lord Chancellor on the exercise of his rule-making powers, needs to investigate and make a recommendation for closing it.

Andrew Olins acted for Bellway Homes in the litigation against LERT Ltd.

Contact

Andrew Olins
Partner
Email andrew.olins@ibblaw.co.uk
Tel 01895 207813