'Tis folly

24 February 2009

By **Ryan Clement**

Solicitors who fail to make adequate enquiries before committing themselves to undertakings or who delay in performing them, run the risk of serious legal and financial consequences, says Ryan Clement

Solicitors giving undertakings should first obtain adequate information on which to base such undertakings, the High Court reminded conveyancers last month.

The case of Angel Solicitors (a firm) v Jenkins O'Dowd & Barth (a firm) and Others [2009] EWHC 46 (Ch) concerned the enforcement of solicitors' undertakings given in the course of acting on separate sales of three residential properties. "It demonstrates", said the presiding judge, Hodge QC, "both the folly of giving the usual solicitors' undertaking to redeem or discharge existing mortgages and charges over the property which is being sold without having first obtained a redemption statement and the mortgagee's agreement to release the properties from all relevant charges upon payment of an ascertained sum, and also the dangers of any delay in paying over the moneys required to redeem such charges following the completion of the sale".

The claimant and the defendant were firms of solicitors who acted for the purchaser and the seller respectively in the course of three residential property transactions. Two properties were mortgaged to Barclays Bank and one to Close Brothers. Each property was charged to the relevant financial institution by way of an 'all-moneys' charge as part security for a loan facility considerably in excess of the value of the individual property.

For each transaction the claimant sought and obtained from the defendant standard undertakings to redeem or discharge the mortgages and charges on completion and to send to the claimant standard discharge forms, the receipted charge(s) or confirmation that notice of release or discharge had been given to the Land Registry as soon as the defendant received them.

No evidence of payment

It appeared that the defendant gave the undertakings without first obtaining the redemption figures. Furthermore, there was no evidence before the court that any part of the sale proceeds from any of the three properties was ever paid over to Barclays or to Close.

In Udall v Capri Lighting Ltd [1988] QB 907 at 917, Balcombe LJ said there were three ways in which a party seeking to enforce a solicitor’s undertaking could proceed: (a) by an action at law; (b) by an application to the High Court to exercise its inherent supervisory jurisdiction over solicitors; and (c) by an application to the Law Society. In the exercise of the supervisory jurisdiction over solicitors, “what in practice has always been done is that the court, if the circumstances warranted, makes an order on the solicitor to do an act which he has undertaken to do” (Re a Solicitor [1966] 3 All ER 52 at 56). It is for the court to determine whether the defendant gave the undertakings and, if the defendant gave those undertakings, whether they have been performed and, if they have not been performed, whether the undertakings are ones that are impossible to perform.

Having failed to secure the performance of the defendant’s undertakings to redeem the existing charges without resort to litigation, the claimant invoked the summary jurisdiction of the court to enforce the said undertakings pursuant to its inherent supervisory jurisdiction over solicitors. The defendant did not shy away from the likelihood that, ultimately, it would have to perform the undertakings (or make payments in lieu). However, it submitted that, had it sought to redeem the relevant charges at, or within a reasonable time after, the undertakings were given, both Barclays and Close would have accepted a lesser sum than they are now seeking to recover.

The sum now required

However, the judge held that because the defendant breached its undertakings the sum ‘now’ required for those undertakings to be performed may be greater than if the undertakings had been honoured in due time – and that while this was unfortunate for the defendant, it cannot detrimentally affect either the position of the claimant or the legal and equitable entitlements of the mortgagees of its clients’ properties.

Pursuant to Udall, before making its application for summary judgment the claimant had made an application to the Law Society – which delayed its High Court application. Consequently, relying on observations of Mummery LJ in Taylor v Ribby Hall Leisure Ltd [1998] 1 WLR 400 at 409H-410B, the defendant submitted that judgment ought not to be granted. However, the judge held that the court should be slow to encourage premature resort to litigation before alternative methods of compelling performance of a solicitor’s undertaking have been exhausted. Summary judgment was therefore granted.

This case has implications beyond those dealing solely with undertakings given by solicitors during the property transaction process. It is clear that if a solicitor is contemplating giving an undertaking it must first be sure of the extent of the risk by making suitable enquiries before committing itself accordingly. Otherwise, it runs the high risk of the sum ‘now’ required for those undertakings to be fulfilled being greater than had the undertakings been honoured in due time and based on information sought and known prior to those undertakings having been given.

Postscript:

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