



Purchaser's Interest Before Completion

Date : July 17, 2015

In the recent English case of *Mortgage Business plc v O'Shaughnessy* [2014] UKSC 52, a prospective purchaser under a contract for sale of land promised the vendor that the vendor could remain in possession of the property after completion. There was no mention in the contract about a lease back arrangement. The purchaser obtained finance to purchase the land but did not inform the mortgagee about its arrangement with the vendor. The Court held that the mortgagee was not bound by the lease between the purchaser (as lessor) and vendor (as lessee) for the following two reasons:

1. The purchaser acquired an equitable interest upon entering into the contract (an executory interest) but did not have the necessary proprietary interest to grant a lease that bound the mortgagee before completion.
2. The purchaser, who bought with the assistance of a mortgage, only ever acquired an interest in the land subject to the mortgage, and could not have had priority over that mortgage.

What does this mean for Australia?

In regards to point 1, it is uncertain as to whether a purchaser can grant a proprietary interest to a mortgagee. For example, a purchaser under a binding contract has the requisite proprietary interest to lodge a caveat, a proprietary interest is assignable and further interests can be carved out of them in favour of third parties. However in most Australian jurisdictions there is legislation (e.g. *Conveyancing Act 1919* (NSW) s 50(1)) that expressly prohibits dealings with executory interests in land.

As to point 2, the Australian Courts have had little to say. The commentary so far suggests that a purchaser acquires an interest in the land subject to a mortgage. In most Australian jurisdictions (including NSW) a registered mortgagee will have priority over an earlier unregistered lease, regardless of notice (*Real Property Act 1900* (NSW) ss 42, 53(4)).

If you require further information about the implications of a potential lease back arrangement as a purchaser, please contact our property team on 9635 7966 to discuss with one of our lawyers.

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