Reassurance on repossessions

Elizabeth Vyner from First Title explains why Clive Aronson v The Keeper of the Registers of Scotland and Others has brought some much needed clarity to repossession cases.

The decision in *RBS v Wilson* in 2010 not only changed the way in which properties are repossessed, but it also had ramifications on the Keeper's policy, in relation to securities ranked equally or postponed to the security on which a power of sale had been exercised. The procedure has now been amended again by the Court of Session case of *Clive Aronson v The Keeper of the Registers of Scotland and Others,* which was decided on the 19 December 2014.

RBS v Wilson

Before *RBS v Wilson,* the procedures followed by heritable creditors had been in place for around forty years. *Wilson* confirmed that the only way a property can be repossessed is by serving a calling-up notice on the defaulting borrower. This meant that where a calling-up notice had not been served, it was deemed that the correct power of sale procedures had not been complied with, and the Keeper excluded her indemnity accordingly.

The further implication following the decision in *RBS v Wilson* related to when the title had multiple charges held against it, the Keeper confirmed that only the charge that had been called up would be removed from the charges section of the land certificate. The other securities were to remain on the title, with the keeper's indemnity excluded from these.

These charges would then rank ahead of any new charge granted by a purchaser, which obviously caused concern for the new lender.

Clive Aronson v The Keeper

Not long after *RBS v Wilson*, Clive Aronson bought a repossessed property where the heritable creditor had not served a calling-up notice. The previous owner had not only granted a standard security to the bank that had repossessed, but had also granted three other securities to two other creditors.

When registering the property, as a result of the decision in *RBS v Wilson*, it could not be confirmed that all the statutory procedures necessary for the proper exercise of a power of sale had been complied with. The keeper, therefore, excluded their indemnity for any loss which may arise as a result of the failure to comply with the statutory procedures. Furthermore, the keeper did not remove the three securities in favour of the other two creditors from the charges section.

Mr Aronson sought rectification of the register by requesting that the charges still listed be removed from his title. The case hinged on the interpretation of s.26 and s.27 of Conveyancing and Feudal Reform (Scotland) Act 1970 (1970 Act) and the definition of 'sale' within these sections. The keeper's argument was that, as the correct procedures had not been complied with, the sale was outside the scope of the legislation.

Lord Doherty observed that applying the constrained meaning of 'sale' would prejudice the pursuer and that this strained interpretation runs contrary to the presumption that a statutory provision should be read so as not to produce injustice.

In examining the facts of the case, Lord Doherty commented that the Keeper's approach to multiple securities in these circumstances was unclear. This was because indemnity was excluded for any loss arising from the property being declared or found not to have been disburdened of the securities according to s.26 (1) of the 1970 Act.The inclusion of the postponed securities in the charges section, however, could only have been done on the basis that the property had not been disburdened of these charges.

In addition, the Keeper had also argued that s.26 (1) of the 1970 Act should be interpreted in such a way that it prevents the heritable creditor from befitting from their wrongdoing, as this is contrary to public policy. Lord Doherty did not rule out the possibility that some sales might be contrary to public policy and that Parliament would have intended to exclude these from the scope of s.26 of the 1970 Act. He did not, however, believe that this sale fell within this category as there had been no deception or bad faith.

Lord Doherty concluded that s.26 (1) of the 1970 Act applied to this sale and that when the disposition was registered in the Land Register, the property was to be disburdened of all the standard securities. As such, the charges section should be amended to reflect this.

Result

The keeper has decided not to appeal the decision, and Mr Aronson's title will be rectified along with all similar titles. The registers of Scotland have advised that there are around 130 similarly affected titles. As repossession practices were changed following *RBS v Wilson,* these are all historic. However, while all the relevant standard securities will be removed, the Keeper's exclusion of indemnity will still remain on these titles, but only for any loss which may arise as a result of the failure to comply with the statutory procedures.

Title insurance

Where the statutory procedures necessary for the proper exercise of the power of sale have not been complied with, the Keeper's policy is to exclude her indemnity/warranty. However, title insurance can offer the most practical solution to plug the gap where the Keeper has excluded her indemnity/warranty, providing extra comfort to any future purchaser or lender.

Our title insurance policies would cover a challenge to the title by the borrower as a result of any defect or failing in the exercise of the statutory procedures necessary for the proper exercise of the power of sale, resulting in the dispossession of the owner of the property. Our cover will continue in perpetuity.

Conclusion

The decision in *Clive Aronson v The Keeper* has now simplified repossession cases where there are securities ranking pari passu or postponed to the selling creditor's security. However, the title will still be subject to an exclusion of indemnity. Title insurance is a quick and easy solution which should satisfy future lenders and purchasers.

Elizabeth Vyner is a Trainee Assistant Commercial Underwriter

For more information on First Title, our products and services, please contact us using the details below:

Call: +44 (0)141 413 8800
Email: scotinfo@firsttitle.eu
Visit: www.firsttitle.eu