



Getting it back!

What do courts have to consider when deciding whether or not to return a buyer's deposit? asks
Kate Chambers

The recent case of *Aribisala v St James' Homes (Grosvenor Dock) Ltd* [2008] EWHC 456 (Ch), [2008] All ER (D) 201 (Mar) considers the importance of deposits in conveyancing transactions and highlights the significance of the Law of Property Act 1925 (LPA 1925) in relation to the terms upon which a deposit is given.

SIGNIFICANCE OF A DEPOSIT

The buyer's payment of a deposit as part payment of the total purchase price, is taken as a reliable indicator of a willingness to proceed. It is commonly accepted that the buyer is likely to forfeit the deposit if there is a failure to fulfil the contract. The Standard Conditions of Sale (4th Ed) provide that should the buyer fail to complete the seller is entitled to retain the deposit. Additionally, the case of *Hall v Burnell* [1911] 2 Ch 551, [1911-13] All ER Rep 631 clarified that there need not be any express right in the contract; as such a right is implied at common law. The payment of a deposit is vital to a conveyancing transaction and the power conferred on the court under s 49(2) of LPA 1925, to return the deposit sits awkwardly with this legal function.

Under s 49(2) LPA 1925, "the court may, if it thinks fit, order the repayment of any deposit." This confers on the court a wide discretion to order the return of the deposit to a buyer in circumstances where justice and equity dictate that this is the best course of action.

ARIBISALA: THE FACTS

A wealthy businessman entered into contracts to purchase two properties from St James' Homes (Grosvenor Dock) Ltd. The accumulative cost of the properties was £2.16m. The buyer paid a reservation fee and accepted the contract drafted by the sellers' solicitors incorporating the standard conditions of sale. The only amendment in relation to the conditions regarding the deposit

was that LPA 1925, s 49 was excluded. Upon exchange of contracts the buyer paid a full 10% deposit by two equal instalments.

Contrary to usual practice the buyer only started to make investigations in relation to obtaining a mortgage to finance the purchase after payment of the deposit. The buyer entered into discussions with Barclays Bank and he was informed that he would be able to obtain an 84% loan to value. Furthermore he was advised that as a non-UK resident a more favourable interest rate was likely from an offshore account. Accordingly the buyer entered into negotiations with Barclays Bank Isle of Man (IOM) to secure the mortgage finance through their offshore mechanism. On 8 September, the date set for completion, the buyer was notified by Barclays Bank IOM that they would only be able to offer a 50% loan to value. Without finance in place the buyer was unable to complete on the completion date and the sellers served notice to complete making time of the essence and 26 September 2006 became the final completion date. The buyer failed to complete and the sellers advised that the deposit had been forfeited.

The buyer applied to court under the provisions of LPA 1925, s 49(2) to order the return of the deposit.

ABILITY TO EXCLUDE SECTION 49(2), LPA 1925

Upon notification of the buyers application the seller requested that the court dismiss the claim as the contract expressly excluded the provisions of LPA 1925, s 49(2). The sellers request was dismissed on the basis that to do otherwise would be to oust the jurisdiction of the court and would be contrary to public policy.

LPA 1925 has been in existence for over 80 years but this is the first case in which a decision has been made in relation to an attempt to exclude the protection provided by LPA 1925, s 49. This decision means that attempts to draft the contract in such a way

IN BRIEF

- Function of deposit and court's power to order its return: how the imbalance is resolved.
- Scope and "exclusion" of the power conferred on the court.
- Factors to be considered by the court in deciding whether to order return of deposit.

as to persuade the purchaser that they cannot claim under LPA 1925, s 49(2) are invalid.

FACTORS TO BE CONSIDERED BY COURT

The case also considered the circumstances in which the court will be inclined to order the return of the deposit. The court made it clear that there was no doubt that the discretion conferred upon it under LPA 1925, s 49(2) was not to be taken lightly. The return of the deposit will only be ordered where the circumstances are such that it is the most equitable solution. Lord Justice Buckley stated in *Universal Corporation v Five Ways Properties* [1979] 1 All ER 552 that "repayment must be ordered in any circumstances which make this the fairest course between the two parties."

When deciding whether to order the return of the deposit a court will consider amongst other factors the conduct of the parties, gravity of the matter, amount at stake and the terms of the contract.

The court concluded that it was not justifiable to order the return of the deposit because the factors relied upon by the purchaser did not take it "out of the ordinary run of cases where the purchaser could not come up with the money".

The decision reaffirms the basis upon which a deposit is given. The case has clarified that it is not possible to exclude the power of LPA 1925, s 49; however, any claim for the return of a deposit will only succeed where the buyer proves that there are exceptional circumstances. In all ordinary cases the buyer must provide the deposit on the understanding that the payment is non-refundable.

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