Shared Ownership

This month's Spotlight looks at the legal position of shared ownership and considers the implications for clients with shared ownership experiencing financial difficulty or insolvency.

The legal position

Shared ownership schemes allow a client to purchase an equitable interest in a property. The share is typically between 25% to 75% and can usually be 'staircased' up so that in most, but not all, cases it would eventually be possible to own 100%. In the meantime, rent is paid in proportion to the percentage not owned by the occupier, whilst at the same time a mortgage may be paid in respect of the down payment.

Strictly speaking, shared ownership is not really 'ownership' at all. In law, the legal estate in land cannot be severed, although the equity can be held in shares. This is demonstrated by the fact that when a property is jointly owned by a couple, both owners will always own 100% of the legal estate, whereas the equity could be held in distinct, sometimes even unequal, shares.

In the case of shared ownership, the housing association remains the sole owner of the legal estate and the occupier's status is as a long leaseholder, not a legal owner. The occupier's financial stake in the property can be viewed similarly to any beneficial interest held in a property where someone else is named on the deeds. Legally speaking, the client's only security of tenure is as an assured tenant, albeit that they have a long, fixed term (typically 99 years) and usually have the option to become the owner through staircasing to 100%.

In some ways, shared ownership is the worst of both worlds. The occupier is responsible for 100% of the repairs and 100% of the service charges or buildings insurance, regardless of their proportion of 'ownership'. They cannot sublet and there may be restrictions on selling the property or securing further borrowing against it. In addition to this, clients with shared ownership are vulnerable to both eviction by the landlord and repossession by the mortgage lender.

Rent or mortgage arrears

Where a client in shared ownership gets into financial difficulty and is unable to pay the rent and mortgage in full then it is usually advisable for them to prioritise the rental payments over their mortgage.

In the case of *Richardson v Midland Heart [2008] L&TR 31*, the High Court determined that a client with shared ownership was an assured tenant. As a result, they are vulnerable to proceeding by the landlord using Ground 8 of Schedule 2 of the Housing Act 1988 (eight weeks/two months' rent due at the time of the notice and at the date of the hearing). This is a mandatory ground, meaning that if the ground is proven then then the court has no discretion and must grant outright possession. There can be no order suspended on terms.

In addition to eviction from the property, the client would also lose their investment. The High Court found that there is absolutely no obligation on a housing association to pay the tenant their money back, although Midland Heart reportedly did so as a goodwill gesture.

In practice, what will often happen where a shared ownership client falls into rent arrears is that the lender will pay off the arrears and add the debt to the outstanding mortgage. In the above case, the client owned her share outright and therefore there was no lender to step in.

It is also important that service charges are kept up to date. When a client with shared ownership has arrears of rent or service charges, and this is a breach of the lease the housing association can apply to the courts for forfeiture. Again, in practice it is common for the mortgage lender to pay the arrears and both the client and the mortgage lender has the right to defend proceedings and apply to the court for relief from forfeiture. In many cases, the housing association and mortgage lender will discuss any rent or mortgage arrears between themselves, before any court action is started.

Where a client is in difficulty with their mortgage payments it may be possible for clients to ask to staircase down and reduce their share in the equity, although the landlord is not obliged to agree. It is important to note that this will lead to a corresponding increase in the amount of rent payable, although the client may be able to claim housing benefit / Universal Credit to help with this.

Insolvency

Debt Relief Order (DRO)

It would not be possible for a client with a shared ownership property to apply for a DRO. This is similar to the position of a client who has a beneficial interest in someone else's property. It is often hard to quantify or prove a beneficial interest (see our Spotlight "Beneficial interest" from our August 2018 e-bulletin on this issue). However, in the case of shared ownership there is clearly documented proof that the client has equity in a property, which is unlikely to be worth less than £1,000.

Individual Voluntary Arrangement (IVA)

It could be possible for a client with shared ownership to enter into an IVA. It should be noted that the equitable interest held in the property is likely to be taken into account and the client may be required to take out a secured loan to realise their interest under the terms of the agreement. It is, in theory, possible for a client to take out a secured loan against the property, but they are likely to need the housing association to consent to this.

Bankruptcy

Ordinarily, in bankruptcy assured tenancies are excluded from a bankrupt's estate under s283(3A)(a) of the Insolvency Act 1986 (IA 1986). However, where a shared ownership property has equity, the trustee will consider claiming the interest using s308A IA 1986. *'Schaw Miller and Bailey'* comments at 14.99: "*Once the property or tenancy in question forms part of the estate, the trustee may sell it pursuant to his general power to sell property comprised in the estate*".

It may therefore be possible for the client to remain in the property following the bankruptcy, although their equity would probably be claimed in the bankruptcy. However, in each case it would depend on the wording of the agreement and whether the housing association would be happy for them to continue living in the property on this basis.

Note that a strict time limit of 42 days is imposed by s309 of IA 1986 for the purpose of claiming an otherwise exempt tenancy. The time limit runs from when the trustee first became aware of the tenancy and does not begin to run again if another trustee is appointed. The Official Receiver will normally be the first trustee to become aware of the situation, so must act quickly in claiming the tenancy by serving notice in writing on the bankrupt. If the tenancy has not been claimed in time, or if there is a dispute about when the trustee became aware of it, specialist advice should be sought.