PROPERTY BUYERS: BEWARE UNLAWFUL OCCUPIERS!

“The time of maximum pessimism is the best time to buy, and the time of maximum optimism is the best time to sell” (Sir John Templeton, billionaire investor)

You are it seems in good company if you view times of depressed property prices and general uncertainty as a great buying opportunity.

Just be aware that if it is a house you are after, whether as an investment or to live in, you should do your homework if the property is (or might be) occupied. Generally speaking, buying a property with occupiers is fine if you know about them and have a binding deal in place with them (see the end of this article for more on that).

But, as a recent High Court decision illustrates, if you aren’t aware of occupiers and/or don’t have a proper agreement in place with them, you could find yourself unable to evict them even if you buy the property “free of lease”.

Before we discuss the case itself, it is important to know that to get an eviction order from a court, you need to prove in terms of PIE (the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act) both –

That the occupants are “unlawful occupiers” and

That it is “just and equitable” to grant such an order after considering all the relevant circumstances.

The Bo-Kaap flat, the sale in execution, and the occupiers

A property investor bought a flat in a sectional title development on a sale in execution. As we shall see below, the history of the flat’s ownership, and its location in Cape Town’s historic Bo-Kaap area, were relevant to the outcome of this matter.

The Sheriff of the High Court sold the flat for R375,000 “free of lease”, but also with “no warranty that the Purchaser shall be able to obtain personal and/or vacant occupation of the property or that the property is unoccupied and any proceedings to evict the occupier(s) shall be undertaken by the Purchaser at his/hers/its own cost and expense….”

The people living in the flat refused to leave or to “legalise … their rights to the property”, and the investor applied to the Court for their eviction.

The eviction order was refused firstly because the investor was unable to prove that the persons it was trying to evict were “unlawful occupiers” for lack of information as to -

Who the occupants of the flat actually were, with the result that “the court has scant knowledge of essential details of the occupiers of the property in circumstances where these are material to the exercise of the court’s discretion under the provisions of PIE”. Crucially, there was nothing before the court as to the ages or circumstances of the occupiers, so it was unable to consider “all the relevant circumstances including the rights and needs of the elderly, children, disabled persons and households headed by women”.

When and under what legal right the occupiers originally took occupation (lease, right of habitation, usufruct etc), when that right was terminated and under what circumstances. Note that timing is important here because once unlawful occupation has lasted for more than 6 months, the question of relocation to land supplied by the municipality or government becomes relevant.

Whether or not the occupants had any form of written or verbal lease. That’s important because of our law’s “huur gaat voor koop” principle – literally “lease goes before sale”, meaning that you are generally bound to honour an existing lease (there are a few exceptions – take specific advice).

Secondly, the investor failed to convince the Court that it was “just and equitable” to grant the eviction.

Again, the lack of information as to the occupiers was relevant, and the Court’s comments on the particular facts of this matter are worth noting in full (our emphasis): “The residents of the area are, generally speaking, not wealthy and Bo-Kaap is home to many poor and working-class people. An eviction of the type sought in this matter, in which a group of related persons appear to occupy a family home that was acquired from the City of Cape Town some time ago, might well render them homeless or at the very least require them to relocate to one of the outlying suburbs that are now home to the many who fell foul of the Group Areas Act. If those circumstances obtain, a court would be required to think long and hard about the justice and equity of ordering people to vacate a dwelling, long occupied, which has been snapped up by a buyer distant to the neighbourhood for investment or development potential. Certainly, it is to be expected of such buyers that when they seek to move established families out of their homes, they do their homework properly and place all relevant facts before the court.”

Do your homework, and do it properly!

Investor or not, the Court’s warning to do your homework applies to you. Establish whether anyone is living in the house, exactly who they are, how long they have been there, and on what basis.

Bear in mind that because leases need not be in writing, you could find yourself battling occupiers who claim to be tenants under a verbal lease. Without a written record they could well claim to be entitled to pay minimal rent and to have many years left on their “verbal lease”.

So first prize will always be to reach a written, water-tight deal with any occupants before buying – ask your lawyer for help.