

## ● GUIDE FOR TRUSTEES BUYING LAND IN ENGLAND & WALES

In today's world with society becoming ever more litigious it has become paramount that trustees ensure they conduct their relationships with their advisers so as to minimise the risk of negligence by the advisers and the exposure of liability to the trustees.

Whilst trustees are often content to use solicitors put forward by the beneficiary, there are some pitfalls and issues to consider when dealing with property which merit consideration from the trustee's perspective and which justify the trustee's appointing experienced practitioners rather than relying on the beneficiary's preference or the cheapest option. The purpose of this guide is to provide some practical tips for trustees in their dealings with property in England & Wales.

### BENEFICIARY'S INTERESTS

Prior to the introduction of the Trusts of Land and Appointment of Trustees Act 1996 ("TLATA") there was no power for trustees to invest in land unless the trust deed expressly provided for the power to do so. The case law held that even if there was an express power for trustees to invest in land, it would not allow the trustees to purchase land for occupation by a beneficiary.

This all changed with the introduction of TLATA. Under section 6(3) the trustees of land have the power to purchase property in England and Wales and Section 6(4) enables this power to be exercised for the purpose of investment, occupation or for any other purpose.

The trustees must give consideration to the rights of the beneficiaries when exercising this power.

It should be noted that TLATA only applies to English law trusts. The powers of investment in land will be subject to the law of the proper law of the trust.

### INSPECTING THE PROPERTY

As the trustees or company administrators are usually overseas, rarely will they have an opportunity to physically inspect the property being acquired by the trust or company. They are instead wholly reliant on the beneficiary or an agent to carry out the inspection. The inspection is important for the following reasons:

- To check the state and condition of the Property. In general, a seller is under no obligation to reveal any defects in the Property. There is rarely any warranty given about the state of the property and the standard conditions state that the Buyer will accept the Property in the condition it was at the date of exchange of contracts. It is therefore always prudent to carry out a full survey report.
- To check who is in actual occupation of the Property. The seller may not be the only occupier of the Property and it may be that other occupants have a right of occupation which they could claim to delay or even defeat completion. In addition to spouses and civil partners, adult children may have rights & beneficiaries of a trust may be in occupation. These rights are capable of being "overreached" (see below).
- To check the boundaries. A buyer will want to make sure that the land contained in the contract and transfer is an accurate reflection of the land on the ground. This is also important in the case of flats, where for instance, the flat may be an upper floor flat and have been extended into the roof space. The lease might not have been varied to allow for the extension and the solicitors may be otherwise unaware of the internal layout.
- To check for rights and other easements. Particularly important on larger properties where there is more scope for rights to be

granted or acquired. The property should be inspected for evidence of shared use of driveways or access roads, rights of way, used pathways, signs, gates or styles etc. If there is any evidence, it is important to have this information as soon as possible, so that appropriate enquiries can be raised.

- To check fixtures & fittings. The contract requires a fixtures and fittings form (as already mentioned) to be attached to the contract. This form will list all of the items that will be left at the Property on completion. It is frequently a source of dispute and if there are any items that the Buyer specifically wants included then this should be made clear. An inspection, will verify that they actually exist.

### OVERREACHING BENEFICIAL OWNERSHIP

As good practice, where a trust is purchasing land it would be prudent to ensure that the property is registered in the name of at least two trustees (but no more than 4). This will avoid the need to appoint additional trustees if the property is sold in the future.

A buyer of property will not need to be concerned about unregistered beneficial interests in land where they pay the purchase money to at least two trustees. If payment is made to just one trustee then the Buyer will take the property subject to any beneficial interest arising under the trust.

A purchaser can overreach any equitable interest that can be attached to the proceeds of sale (rather than the property itself) by paying the purchase price to either two trustees or a trust corporation. That purchaser will then take the property free of any such interests.

#### OCCUPATION BY BENEFICIARIES

If property is being purchased with the intention of allowing a beneficiary of the trust to occupy it, then consideration should be given to formalising that relationship with the beneficiary, whether by way of lease or licence to occupy. That document can then govern who is responsible for looking after the property and can include a procedure for ending the beneficiary's occupation of the property.

#### LIMITING LIABILITY

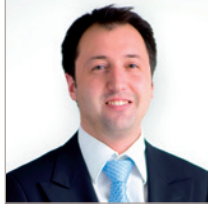
Trustees can, and should attempt to limit their liability in the contract and purchase deed (transfer document) to avoid any liability beyond the assets of the trust. This is of course particularly important if the trustees are individuals as they will be exposed to personal liability.

#### SIGNING DOCUMENTS

To validly transfer an interest in land, the transfer must be executed as a deed and state clearly that it is a deed.

When a foreign company (ie one not incorporated in England & Wales) executes a deed, it may do so in any way permitted by local law. However, unless a foreign company execution clause is used, the Land Registry will require a legal opinion from a lawyer qualified in that jurisdiction confirming that the company has the power to enter into the document. This expense is easily avoided by executing the document in the approved manner.

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