

● GUIDE FOR TRUSTEES SELLING PROPERTY 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

Following the introduction of the Trusts of Land and Appointment of Trustees Act 1996 ("TLATA") Under TLATA trustees no longer have a duty to sell the land and therefore, beneficiaries are entitled to benefit from the land both in relation to occupation as well as in relation to the proceeds of sale.

Under section 11 of TLATA, trustees must consult the equitable owners and "in so far as is consistent with the general interest of the trust" give effect to their wishes. However, there is no requirement for any purchaser to ensure that the beneficiaries have been consulted. The only remedy for the beneficiaries if they are not consulted is to apply to the court under section 14 TLATA or sue the trustees after the sale.

The trust deed may however, contain a requirement that the trustees obtain the consent of the beneficiaries prior to the exercise of some or all of their powers (which may include the power to sell property). This requirement goes much further than

consultation, and a restriction should be placed on the title to the Property at the Land Registry ensuring that the requirement is complied with.

If there is a requirement for the trustees to obtain the beneficiaries' consent and the land is unregistered land, then under section 16 TLATA, the purchaser will not be affected if the trustees failed to obtain the consent, provided that he was unaware that consent was needed.

The proceeds of sale will then be held under the terms of the trust in place of the property for the beneficiaries.

Trustees have a power to sell, not an obligation.

TITLE GUARANTEE

Title Guarantee is used to imply covenants of title and is given in the sale contract. The presumption where the sale contract is silent is that the property is sold with Full Title Guarantee. The differences between the Title Guarantees are explained below. However, it is important that if the Seller wishes to give anything other than Full Title Guarantee, then this should be decided at the outset of the transaction and before the sale contract is sent to the Buyer's solicitor.

Full title guarantee is given and expected where the seller owns the legal and equitable interest in the property. It is the default position if not mentioned in the contract and implies that:

- The seller party has the right to sell the property.
- The seller party will do all it reasonably can to give the title it purports to give, at its own cost.
- If the property being sold is registered at the Land Registry, then it is the whole of the registered title that is being sold.

- If the property being sold is unregistered land, then it is presumed that the property is freehold. If it is leasehold, then it is presumed that the remainder of the lease term is being sold.
- The property being sold is free from all charges (mortgages), encumbrances and adverse rights, except any charges, encumbrances or adverse rights about which the seller does not know and could not reasonably be expected to know.
- If the property being sold is leasehold, then additional covenants are implied that the lease still exists and that the seller has complied with all of its terms.

Where a seller is a trustee or a personal representative, then only limited title guarantee should be given. Limited title guarantee will imply less extensive covenants for title than a full title guarantee and this is particularly important as the trustees will in all likelihood have never visited the property and will have little (if any) knowledge of the title matters.

There is an option to give no title guarantee. This is relatively rare, but would be used where the seller is selling the Property as mortgagee in possession.

ENQUIRIES

It is well known that the general principle of English property law is caveat emptor (buyer beware). However, this does oversimplify matters. In modern conveyancing practice, the buyer of land will raise a number of pre-contract enquiries and the buyer is entitled to rely on the law of misrepresentation for the replies given by the seller.

If there has been a misrepresentation and the buyer has relied on it then the buyer may be able to rescind the contract and reclaim their financial losses or in lesser cases, sue for damages. By way of example, in *McMeekin v*

Long, the Sellers were held liable for damages for £67,000 for having given incorrect answers about a dispute with the owners of neighbouring land.

The problem for trustees is that they rarely have in depth knowledge of the Property. The beneficiary or the company's agent will usually complete the replies to enquiries on behalf of the trustees. The trustees as owner of the property will then need to sign off the replies, they should be aware that it is they who will be liable for any misrepresentation (eg for not informing a buyer that there is a dispute).

It is therefore particularly important that the trustees carefully check any responses given by a beneficial owner or other third party and ensure that there is a limitation of liability clause in the contract and in the transfer deed.

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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