

## Key points to consider when taking instructions and giving advice

### Sale of 19 Minster Yard Blakey

Shilpa has recently instructed us to act for her on the sale of 19 Minster Yard, a detached property with grounds of just under one hectare. A conveyancing partner in our firm acted for her when she purchased the property two years ago, and remembers that she was quite fortunate at the time to secure such a large mortgage with the Cornshire Building Society.

Shilpa is a senior travel guide and spends much of the year 'on the road' conducting guided tours of Great Britain and Ireland. She owns another house in London.

Shilpa has told the conveyancing partner that 19 Minster Yard is in fairly poor condition and there are signs of dry rot in the study. She had some woodworm and damp treatment carried out a few years ago and believes there may be some guarantees somewhere.

Shilpa borrowed about £3,000 from her bank last year to finance the installation of central heating at 19 Minster Yard. She thinks the bank may have a second charge.

The purchaser is Lydia Walmsley whose father is an established client of the firm. Lydia would like you to act for her as well as Shilpa in order to speed things along and also hopefully to save on costs.

### Summary of further information we will require from Shilpa and our advice to her

Before advising Shilpa on her sale we would seek from her as much relevant information as possible. This will prevent us from overlooking important matters and should enable us to give full and proper advice at an early stage.

The following information will be required from Shilpa:

- a. Full names and address of Shilpa together with home and work telephone numbers.
- b. The agreed price.
- c. Confirmation of full address of property and whether it is freehold or leasehold. If leasehold, ask Shilpa for the last receipt for payment of rent and buildings insurance details (if arranged by landlord).
- d. Details of the mortgage with Cornshire Building Society, including address of the branch and mortgage account or roll number. These details may be apparent from the firm's old file relating to Shilpa's purchase of 19 Minster Yard. We shall need to request the deeds on loan from the Society and request a note of the outstanding balance.
- e. Details of the mortgage to the bank (if any). An inspection of the title will establish for certain whether a legal charge has been registered by the bank.

- f. Whether anyone else, apart from Shilpa, is living in the property and, if so, whether that person has made any financial contribution towards its purchase or any subsequent improvement. It may be necessary for us to procure that person's consent to the sale proceeding.
- g. Details of any estate agents who may have arranged the sale and the buyer's solicitors (if known).
- h. Whether the prospective buyer Lydia has paid a preliminary deposit to the estate agents. If so, this must be taken into account by us in our completion statement.
- i. Details of any chattels to be included in the sale and whether Lydia will pay extra for these.
- j. Whether Shilpa intends to take with her any fixtures. If so, they must be specifically excluded in the contract of sale, otherwise they will be deemed to be included. We could ask Shilpa to complete the fixtures, fittings, and contents form.
- k. Does Shilpa have a completion date in mind? Has this been discussed with Lydia?
- l. Have any other terms been agreed between Shilpa and Lydia?
- m. Whether Shilpa is intending to buy another property and if so, is it dependent on the sale of 19 Minster Yard? If there is no related purchase, what are Shilpa's instructions regarding the net proceeds of sale on completion?
- n. Is there a chain of transactions? If the Protocol is being used we shall require Shilpa's authority to disclose information about the chain to Lydia's solicitors.

We would advise Shilpa as follows in relation to the sale of 19 Minster Yard:

We are told that Shilpa purchased 19 Minster Yard two years ago with the aid of a large mortgage. There also appears to be a second charge secured in favour of a bank. Given the recent stabilization and even fall in house prices she should be alerted to the fact that the price at which the house is now being sold could be less than the total amount owing on the mortgage or mortgages to which the property is subject. This situation is known as 'negative equity'. It may be the case that Shilpa has agreed a lower price than she would have liked because of the cottage's poor condition. The buyer's solicitors will on completion require an undertaking from our firm that the existing mortgage(s) will be discharged on completion and clearly we would be unable to do this if a negative equity situation has arisen.

We can ascertain from the old purchase file the amount of the loan from Cornshire (or perhaps Shilpa can tell us), but we shall need an up to date redemption figure from the Society itself before we can assess the true position. We should warn Shilpa that if she has negative equity, the cottage cannot be sold unless funds are available from elsewhere to repay the total indebtedness secured on the property.

Shilpa has indicated that the buyer would like our firm to act for her as well. The Solicitors' Code of Conduct effectively prevents a solicitor from acting for both the buyer and seller in

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the same conveyancing transaction because of the high risk of conflicts of interest. We would therefore advise that Lydia must instruct another firm of solicitors to act for her.

As far as the poor condition of the property is concerned, we would advise Shilpa that, generally speaking, this is a matter for the buyer under the maxim *caveat emptor*. Subject to the point raised below, Shilpa is under no duty to disclose physical defects but she must be careful not to deliberately conceal a defect (e.g. the dry rot), otherwise this could amount to a fraudulent misrepresentation on her part that the property is not defective (see *Gordon v Selico Co Ltd* [1986] 1 EGLR 71). As the seller's practitioner we must be aware of the dangers of falling foul of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) as amended by the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). The aim of these regulations is to prohibit trading practices that are unfair to consumers and, as such, arguably change the traditional role that *caveat emptor* has played in conveyancing practice. As a consequence, we may need to consider disclosing (with Shilpa's consent) any adverse matters affecting the property of which she has knowledge, even physical defects. We would ask her to try and find the woodworm and damp guarantees because copies should be sent to Lydia's solicitors with the seller's Property Information Form (or, if the Protocol is not being used, with replies to preliminary enquiries).

Shilpa must be advised of the possible liability to capital gains tax (CGT) as a consequence of the sale. The Taxation of Chargeable Gains Act 1992 provides for CGT on any gain made on the disposal of a chargeable asset. The gain however is exempt where the sale is of a person's principal private dwelling house (PPD), including grounds of up to half a hectare. Prima facie, CGT will be payable on Shilpa's land in excess of half a hectare unless she can show that such land is necessary for the reasonable enjoyment of the dwelling house. Any chargeable gain can be reduced or eradicated entirely by setting against it her personal annual exemption for CGT.

It should be noted that the PPD exemption would only apply if the property has been Shilpa's only or main residence throughout her period of ownership. However, various periods of absence can be disregarded for this purpose and, from the given facts, Shilpa's time away on business would not appear to disqualify her from the PPD exemption.

She owns another property in London and we must advise her that the PPD exemption can only apply to one property. Accordingly she must make an election as to which house the exemption will apply. It may of course be the case that Shilpa is selling the property for less than she paid for it, in which case there is no gain and no possibility of CGT.

We must have regard to the SRA Standards and Regulations dealing with client care. Shilpa should be told who is to have the day-to-day conduct of the file, the name of the partner responsible for overall supervision, and the name of the person in the firm whom she can contact if she has a problem with the service provided.

Other aspects of client care of which Shilpa should be advised are the future action to be taken to progress the matter, the likely timescale of the transaction, and when we will next contact Shilpa. We should offer her a brief explanation of the conveyancing procedures and estimate how long before exchange of contracts and completion.

We must give Shilpa the best information possible about the likely costs of the sale, including VAT and all disbursements. It is a requirement that the costs and client care information should be confirmed to the client in writing.

## **Purchase of 9 Castle Hill Blakey**

We have received instructions from Shilpa Jennings and Daniel Rodriguez who wish to buy 9 Castle Hill, a Victorian terraced cottage, for £200,000. The price includes some chattels, the value of which the clients believe to be about £2,000.

Shilpa has £15,000 on deposit at her building society and will be utilizing the net proceeds from the sale of her related property, 19 Minster Yard (see above). The balance of the purchase price will have to be borrowed and Shilpa and Daniel will want some guidance on this. They have agreed to share the mortgage outgoings and the costs of purchase equally.

Daniel is a first time buyer and is presently living in rented accommodation although he is happy for us to correspond with him at Shilpa's address as he spends most of his time there.

In the future Daniel would like to work from home and is thinking of converting part of 9 Castle Hill into an office.

### Summary of further information we will require from Shilpa and Daniel and our advice to them

Before advising Shilpa and Daniel on their purchase we would seek from them as much relevant information as possible. This will prevent us from overlooking important matters and should enable us to give full and proper advice at an early stage. Refer to summary of information under "Sale of 19 Minster Yard" above for the type of information that may be relevant. In addition, the clients will require from us the following advice:

The clients require guidance as to the type of mortgage they will require, but we cannot be sure that they will even be successful in getting one. Obviously, we must advise the clients not to enter into a binding contract until their financial arrangements are in order, and any mortgage offer must be in writing and approved by the clients and ourselves.

In giving mortgage advice we must have regard to the provisions of the Financial Services and Markets Act 2000 which regulates the conduct of investment business. Generic advice as to the type of mortgage (e.g. pension mortgage as opposed to endowment mortgage) will not be caught by the Act, but advice that a particular lender should be used may fall within the definition of mainstream investment business if the mortgage is linked to an investment product. To give such advice we must be authorized by the Financial Conduct Authority (FCA). Only a few hundred specialist firms throughout the country are currently authorized by the FCA and I believe our firm is not one of them. If our clients require mainstream investment advice we should refer them to a duly authorized third party (ATP).

We must advise the clients on appropriate sources of finance such as banks, building societies, or insurance companies. If the firm has an arrangement with a lender for the introduction of clients, this must comply with the SRA Standards and Regulations.

We must consider how much the clients need to borrow. The purchase price is £200,000 including chattels of £2,000. Shilpa is contributing £15,000 plus the related sale proceeds so,

assuming the clients have funds available to cover costs and disbursements (which we must check), the amount of the loan will be roughly £123,000.

What type of mortgage should the clients have? We would discuss those currently available and explain how they work, in particular the three most popular ones: repayment, endowment, and pension, and work out the most suitable for our clients. The factors we would consider are the relative cheapness of the repayment mortgage, the availability of tax relief on a pension mortgage and, on an endowment mortgage, the risk that the policy proceeds may be insufficient to discharge the capital loan. Our clients have no dependants, so a mortgage linked to an endowment life policy is probably not appropriate. If either of them is self-employed or not part of a company pension scheme they should consider a pension mortgage. Otherwise, their best option would appear to be the ordinary repayment method which is generally the least expensive.

The clients must be advised that their home is at risk if they fail to comply with the terms and conditions of the mortgage. Accordingly it would be sensible to ensure that the anticipated monthly repayments are not unrealistically high in proportion to the clients' income. We must also advise that the conditions of the mortgage offer will almost certainly preclude any business use at the property. This would thwart Daniel's plans to work from home, although this would depend very much on their nature and extent. If in any doubt, the client should be advised to seek an assurance in writing from the proposed mortgagee that his plans would not contravene the mortgage conditions.

There are two further points on the question of Daniel's plans to work from home. He should be advised that any material change of use or alteration to the structure of the house may require planning permission. In addition, if part of the house is used *exclusively* for business purposes, he will lose his principal private dwelling exemption from Capital Gains Tax in respect of the part so used.

We would advise Daniel and Shilpa of the *caveat emptor* rule ('let the buyer beware') which is particularly important here because the clients are buying a very old property. We would explain to them briefly the nature and effect of the three types of survey generally available: the ordinary valuation, the house buyer's report and valuation, and the full structural survey. In this case, given the age of the property, we would recommend, notwithstanding the additional cost, a full structural survey. The clients' mortgagee will want an ordinary valuation, so rather than incur two survey fees; the clients could ask the mortgagee to arrange the structural survey upon which they can then both rely (provided the mortgagee's surveyor is reputable!).

In view of the property's age the surveyor may recommend some remedial work and the clients should be warned that the mortgagee might make a retention from the mortgage advance until the works have been carried out.

A prudent solicitor would always advise a buyer to have a survey but Daniel and Shilpa should also be advised to undertake their own physical inspection of the property and its neighbourhood. Although we would raise pre-contract enquiries of the seller's solicitors, it does no harm for the buyers themselves to be on the look-out for potential problems like non-owning occupiers or undisclosed rights of way across the land.

The clients should be advised of the two ways in which the beneficial interest in the property can be held, namely either as joint tenants where on the death of one the deceased's interest accrues to the other by survivorship, or as tenants in common where either party's interest is capable of being disposed of during their lifetime, or by will or intestacy.

In this case a presumption of a tenancy in common will arise because the parties are contributing to the purchase price in unequal shares. However we should still advise the clients to expressly record in a separate trust deed a) that they will hold as tenants in common, and b) what proportion of the beneficial interest is held by each of them. This should help to prevent any later disputes. Shilpa has a capital contribution of £15,000 and both clients will share the costs of the purchase and mortgage outgoings equally so we will need to calculate their respective beneficial entitlements. See the [co-ownership options](#) form that we enclosed with our [initial letter to the clients purchasing 9 Castle Hill Blakey](#).

As the clients' shares can be given by will or pass on intestacy, we should advise them to make wills.

They should appreciate that a deposit of 10% (sometimes less) of the purchase price will be payable on exchange of contracts. Presumably this can be provided by Shilpa from her deposit account but if the money is on long term deposit she will need to give notice of withdrawal immediately if she is to avoid, or at least save on, interest penalties.

Daniel is presently in rented accommodation. He will have to give notice to his landlord to terminate the tenancy and he should check the terms of his tenancy agreement. We should advise him not to give notice of termination however until they have a binding contract to purchase 9 Castle Hill; otherwise he could find himself homeless.

The clients believe the value of the chattels to be £2,000. Provided this is a true valuation an apportionment can properly be made to bring the price of the house down to £198,000. Care must be taken however, for if £2,000 represents an overvaluation of the chattels, the consequent reduction in stamp duty could amount to a fraud on HM Revenue and Customs both by the clients and ourselves. Although unlikely in this case, the contract for the sale of the land could be construed as a contract to defraud the HM Revenue and Customs and as such would be unenforceable by action (*Saunders v Edwards* [1987] 2 All ER 651).

Any reduction in the purchase price of the property should be reported to and first approved by the clients' prospective mortgagee. It is a requirement of the UK Finance Mortgage Lenders' Handbook that the mortgagee must be informed if the purchase price for the property is different from that set out in the mortgage instructions. In any event we should check the terms of the mortgage offer and instructions carefully and ensure we comply with them fully.

Finally, we must give them appropriate advice regarding the likely costs and expenses of the transaction, including stamp duty, search fees and Land Registry fees. It would be prudent to ask the clients for a sum of money on account of search fees to be incurred by the firm, say £300. In addition, client care and complaints procedures should be adhered to, pursuant to the SRA Standards and Regulations. Proof of the clients' identity and residence is also required. See our [initial letter to the clients purchasing 9 Castle Hill Blakey](#) enclosing the firm's [terms and conditions of business](#) and an [estimate of conveyancing charges](#).

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