

Commentary

The first part is an example of a property law and practice question that involves a simple calculation of figures and it will assist you, and the marker, if you jot down a brief financial statement in your answer book before you start.

Conveyancing clients often arrive in the office armed with an inaccurate financial plan and it is essential that you check their figures carefully. The obvious point must be made that every conveyancer should, at the stage of taking instructions, check that the client has sufficient funds available not only to complete but also to cover all costs and expenses. You will notice the question states that estate agents are involved, so their commission will obviously be payable on the sale.

The clients are selling and buying and the two transactions are dependent upon each other so, even though the proposed completion dates are different, it is essential to synchronise exchange of contracts. If you hint in your answer at an exchange on one property before the other, the examiner will think you have misunderstood your clients' needs.

The question of the undertaking introduces another professional conduct issue and one which is of critical importance to conveyancers. You should be aware that professional undertakings turn up time and time again in subject assessments, so be prepared for them.

The second part of the question requires a good understanding of the Land Registration Act 2002.

Suggested answer

1. Before considering our advice, it may be helpful to prepare a brief financial statement:

Sale price	1,750,000
<u>less</u> mortgage redemption	<u>1,200,000</u>
sale proceeds	550,000
Purchase price	1,850,000
<u>less</u> net mortgage advance	<u>1,000,000</u>
	850,000
sale proceeds	550,000
<u>add</u> bridging loan	<u>300,000</u>
	850,000

At first glance the calculations appear to be correct, but a careful analysis of the clients' instructions will reveal that they have overlooked the following matters:-

- a) The amount required to redeem the Wisteria Grange mortgage will not be exactly £1,200,000. This is the initial loan and does not take into account any outstanding interest charges, administration fees, or redemption penalties. We must obtain an up to date redemption figure. (As the mortgage is an endowment rather than a repayment, the principal sum will not have been reduced).

- b) We are told there are estate agents on the sale so the clients will be liable to pay their commission + VAT.
- c) They must pay stamp duty on the purchase of £135,750.
- d) They must pay legal fees on the sale and purchase, plus VAT and disbursements (for example; Land Registry and search fees). They must also pay their surveyor's fee.
- e) The bridging loan will incur interest charges and probably an arrangement fee.

In light of the above, the clients should be advised that the net sale proceeds of Wisteria Grange will be insufficient to repay the bridging loan. We cannot advise them to proceed unless they can increase their bridging loan or find additional funds. An alternative solution would be to try and negotiate a reduction in the purchase price of Tall Trees.

We would advise the clients that they will need to fund the 10% deposit on the purchase, payable on exchange of contracts. We could seek to utilise the deposit we receive on the sale (this is permitted under a contract incorporating the standard conditions of sale), but this would still leave a shortfall of £53,000. The clients would have to find this from their own resources or seek a further bridging loan. Alternatively, the owners of Tall Trees could be asked to accept a reduced deposit.

Wisteria Grange appears to be the clients' principal private dwelling house but if this is not the case then they must be advised of their potential liability to Capital Gains Tax.

In the event of the bridging loan proceeding we must consider several matters before giving an undertaking to the bank. Breach of a solicitor's undertaking is professional misconduct and will result in disciplinary action.

- a) Can we trust the clients and are they creditworthy?
- b) The clients must give us an express and irrevocable authority in writing to give the undertaking.
- c) Our undertaking should be in writing and signed by a partner.
- d) We must be sure that we can comply absolutely with the terms of the undertaking. To this end, the wording must be clear, unambiguous, and wholly capable of performance by our firm.
- e) Are we satisfied that the anticipated net sale proceeds will be sufficient to discharge the bridging finance plus interest?
- f) In our undertaking we would state the sale price and itemise the anticipated deductions (for example; mortgage redemption, agent's commission, legal fees etcetera) to calculate the approximate net proceeds of sale.

- g) As the undertaking is one to pay money, we would make it clear in the wording that payment by us of the net sale proceeds of Wisteria Grange will be made only if and when the sale proceeds are received by our firm. This safeguards against the possibility of us never receiving the proceeds of sale (for example because of client bankruptcy), but still being obliged to repay the bank.
- h) Ideally, the undertaking should not be given until after exchange of contracts. However as the clients will require a synchronised exchange we would in practice give it shortly before the point of exchange provided there are no unresolved problems.

2. In general terms overriding interests are interests which bind a transferee of registered land even though they are not recorded on the register of title.

The categories of overriding interest in registered land are laid down in Sch. 3 of the Land Registration Act 2002. Paragraph 2 of Sch. 3 protects an interest belonging at the time of the disposition to a person in actual occupation. However importantly it does not offer protection (a) where the person's occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, or (b) where the transferee has actual knowledge of the interest. On the facts of this question we would require more information to assess whether these exceptions would apply here.

Although Daphne's mother is clearly in 'actual occupation', it should be noted that overriding interests do not apply to purely personal rights in the land, only proprietary interests which are capable of being overridden (see *Strand Securities Ltd v Woosey* [1965] Ch 958). Thus if Daphne's mother has contributed towards the purchase price of Wisteria Grange (or any subsequent improvement), she would have acquired a beneficial interest under a trust (a proprietary interest) which would be capable of protection as an overriding interest (see *William & Glyn's Bank Ltd v Boland* [1981] AC 487 where a wife contributed to the purchase price and became a beneficiary under a resulting trust of the land). However if Daphne's mother has not acquired a proprietary interest in the property then, notwithstanding her occupation, she cannot have an overriding interest.

Even if Daphne's mother has an overriding interest, it will be noted from a reading of Sch. 3, paragraph 2(b) of the 2002 Act that her interest will be defeated if the proposed buyer asks her what rights she has and she fails to disclose them when she could reasonably have been expected to do so. In order for this to occur the buyer must enquire directly of her. It is insufficient merely for the buyer to raise an enquiry with the registered proprietors (see *Hodgson v Marks* [1971] Ch 892 per Russell LJ).

The mother's interest (if any) may also be defeated in another way, stemming from the fact that the property is held under a trust of land by two trustees. The house is registered in the joint names of her daughter and son-in-law and so a sale by them as trustees would overreach any equitable interest she may have acquired, and in this event her right of occupation would cease (see *City of London Building Society v Flegg* [1988] AC 54).

Finally it should be noted that if Wisteria Grange has an unregistered title, Sch. 1 (not Sch. 3) of the 2002 Act is relevant. On first registration, Sch. 1 para 2 protects simply 'an interest belonging to a person in actual occupation, so far as relating to land of which he is in actual

occupation, except for an interest under a settlement under the Settled Land Act 1925'.
Unlike with registered land there are no further qualifications as mentioned above.