

Commentary

You have received a memorandum from the senior partner who requires a 'brief report by this evening' so you will need to act quickly! A busy senior partner will not appreciate a long-winded diatribe on the finer points of sales by mortgagee or registered leasehold titles. The partner has told you specifically what is required so stick to the matters in question and make your memorandum in response short and to the point.

You will need to demonstrate a clear understanding of the principles of overreaching in the context of a sale by a mortgagee. There are a number of entries on the register to consider. You should appreciate that the third mortgage and caution registered after the seller's charge will be overreached by the mortgagee's sale, and so may be ignored. The restriction is also something of a red herring. Although this affects future dispositions by a survivor of one of the registered proprietors, it does not prevent a disposition by a mortgagee under its power of sale.

This is a classic case for P.A.T. (Pause and Think). Unless you think the question through, you run the risk of setting off on the wrong track, for instance by writing at length about the restriction and caution which is completely uncalled for. You will not want to find, after writing perhaps a page about cautions, that you realise only then that the presence of a caution **on these facts** will be no obstacle to a sale.

You will notice also the reference to the copy (not **official** copy) entries of title and the standard conditions of sale, with the specific query concerning deduction of the title - easy marks should be gained here if you appreciate the fundamentals of deduction of title to registered land.

Lastly, whenever you are given a registered leasehold title, always check its class - you can virtually guarantee it will be good leasehold, thus inviting an appraisal of the deficiencies of this class of title. Note the reference to the UK Finance Mortgage Lenders' Handbook, a clear sign that you are expected to refer to it. In this case, you will have to check what the Handbook says about good leasehold title.

Suggested answer

ABBHEY & RICHARDS SOLICITORS
OFFICE MEMORANDUM

To: Senior Partner
From: Trainee Solicitor

Re our clients Sam and Jane Cluanie: Purchase of Flat 3, 125 Clothier Street, Kempville, Cornshire

I refer to your memorandum on the above and report as follows:-

Sale by mortgagee

1. A purchaser from a mortgagee must be satisfied on the following two counts:-
 - a) That the mortgagee's power of sale exists,
 - b) That the mortgagee's power of sale has arisen.
2. A power of sale is implied into every legal mortgage unless expressly excluded in the mortgage deed (LPA 1925 s.101). We shall need to inspect the second mortgage deed to check this.
3. We must also check the second mortgage to ensure that the selling mortgagee's power of sale has arisen i.e. that the principal monies have become due for repayment. This is normally stated to be a date early on in the mortgage term (e.g. one month after the date of the mortgage).
4. It is not necessary for a purchaser from a mortgagee to check that the power of sale has become exercisable (although the mortgagee must check this, otherwise the mortgagee may be liable in damages to the mortgagor).
5. A sale by a second mortgagee cannot affect the security of a prior mortgagee. Therefore Mr and Mrs Cluanie will take subject to the first mortgage unless the selling mortgagee agrees to discharge the first mortgage from the proceeds of sale. We must obviously insist on this by requiring the seller's solicitors to give an undertaking on completion to discharge the charge in favour of Cornshire Building Society and to send us Form DS1 upon receipt.
6. The buyers will take free of the seller's registered charge although on completion, the charge technically is not discharged.
7. The third mortgage was registered after the registration of the seller's charge and thus will be overreached by the sale. Mr and Mrs Cluanie will therefore take free of it.

The Title

8. A seller's solicitor should deduce title to registered land by means of official copies, so the photocopies we have of the entries inside the old Charge Certificate are not sufficient. We must insist that the seller's solicitors deduce title by providing us with up to date official copies of the registered title.
9. Entry number 4 in the Property Register reveals a Deed of Covenant dated 8 March 1984 which is supplemental to the registered lease. The register indicates that a copy of the Deed is filed at the Land Registry. We must ask the seller's solicitors to produce an official copy of it, so that we can establish the nature and extent of the rights and obligations contained in the deed and see how they may affect our client's proposed use and enjoyment of the property.
10. We should be concerned that the leasehold title is only registered with a good leasehold title. This means that although the Land Registry is satisfied that the lease

itself is good, the Registry has not approved the superior freehold title. Consequently the right of the landlord to grant the lease is not guaranteed and our clients, once registered as proprietors, would take subject to any right in derogation of the landlord's title to grant the lease. I note that the UK Finance Mortgage Lenders' Handbook is being used. The Handbook stipulates that good leasehold title is acceptable to the lender if a marked abstract of the superior title is provided, or we are prepared to certify that the title is good and marketable, or we arrange indemnity insurance in accordance with paragraph 9 of the Handbook. In order for the leasehold title to become fully good and marketable, ideally it should be upgraded to an absolute title as soon as possible. Accordingly we should ask the seller's solicitors to deduce the whole title to the freehold (which is presumably unregistered). Once we are happy with the freehold title and are satisfied that the Land Registry will approve it and will upgrade the leasehold title to absolute, we can then accept the title. Alternatively if this is not feasible, we could arrange good leasehold indemnity insurance (at the seller's expense) in accordance with the requirements of paragraph 9 of the Handbook. However these requirements are quite strict and the best course would be to ensure that the title will be upgraded.

The Restriction

11. This indicates that Mr and Mrs Logsdail hold the property as tenants in common in equity and prevents a disposition by the survivor of them except by order of the registrar or court. However the restriction will not prevent a sale by the mortgagee under its power of sale (nor indeed any sale by **both** proprietors) so we need not be concerned by it.

The Caution

12. This protects a third party interest in the property (possibly an equitable mortgage) in favour of the cautioner, Stephen Longman (Finance) Ltd. The nature of the interest need be of no concern us however, as it will be overreached by the sale by Provincial Finance Ltd, the proprietor of an earlier registered charge.

Trainee solicitor: time engaged 30 minutes