

## 2 How can the Variable Rate Building Society establish that its mortgage is free of the equitable interests of Dennis and Irene?

### COMMENT

The Building Society has overreached the interests by paying the mortgage money to the two trustees, Helena and George. It may also have protection under s. 16 of the 1996 Act. The Variable Rate Building Society does not have to worry about whether or not the trustees consulted Dennis and Irene before selling. Nor does it have to check that Helena and George had regard to the rights of the beneficiaries when mortgaging the land. Lastly, the Variable Rate Building Society must have no actual notice that the mortgage is in breach of a rule of law or equity. So, if the Variable Rate Building Society know about the trust and know that the mortgage loan is being used by the trustees for their own benefit, the Building Society will not be protected under s. 16. If the Building Society does have actual notice, then the mortgage is invalidated.

So, it is not enough for purchasers to follow the correct procedure and overreach. They must also be without actual notice that the transaction by the trustees is unauthorised. What is the effect of the conveyance or mortgage being invalidated? Hopkins argues that the conveyance or mortgage is not effective to pass the legal estate. Therefore purchasers of unregistered titles from trustees must ensure that they overreach and that they have no actual notice that the trustees' sale exceeds their authority (for example, a sale to raise money for the trustees' own purposes).

Section 16 does not protect purchasers of a registered title. So what protection, apart from overreaching, is offered to purchasers of a registered title from trustees?

In the next activity, we shall look at the case study you considered for **Activity 115** above. This time the title to the house is registered.

The legal estate was transferred to Helena and George. They registered the purchase and became the registered proprietors. Dennis and Irene did not place any restriction on the register to protect their equitable interest. However, as Dennis and Irene are in actual occupation, they have an overriding interest under sch. 3, para. 2 to the Land Registration Act 2002 (previously s. 70(1)(g) of the Land Registration Act 1925).

The Variable Rate Building Society is, again, trying to establish that it is not bound by the equitable interest of Dennis and Irene. Remember that s. 16 of the 1996 Act does not protect purchasers of registered titles.

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### ACTIVITY 117

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#### **Purchasers of registered titles** (allow 1 hour)

In this activity you will answer two questions. For each question, you will be asked to read different sources. Read the comment on question 1 before answering question 2.

- 1 Please read the extract from *City of London Building Society v. Flegg* [1988] AC 54 in *Smith*, pp. 419–423 (extract 12.4.3). This case involved very similar facts to those in our case study. Assuming that our case study came to court before the 1996 Act came into force, the trust imposed over the land would have been a trust for sale. **Explain whether the Variable Rate Building Society's mortgage would be subject to the equitable interests of Dennis and Irene under the trust for sale.** Note that with trusts for sale, purchasers were given protection and did not have to enquire whether or not the transaction was authorised under the trust.

**COMMENT**

In the *Flegg* case, the court decided that the lender had overreached by paying the mortgage money to two trustees and so took free of the equitable interest protected under s. 70(1)(g) of the Land Registration Act 1925 (now sch. 3, para. 2 to the 2002 Act).

Section 70(1)(g) (now sch. 3, para. 2) could not have the effect of preserving as 'equitable interests in the land, interests which are overreached by the exercise of the trustees' powers, or of bringing onto the title which the purchaser from trustees for sale is required to investigate, the equitable interest of every beneficiary who happens to be in actual occupation of the land'.

So, s. 70(1)(g) (now sch. 3, para. 2) does not change the nature of the third-party right it protects. Where the right protected is an equitable interest under a trust for sale or a trust of land, a purchaser can take free of it by overreaching. Once overreaching has occurred, the beneficiary under the trust no longer has an interest in the land that is capable of being an overriding interest under s. 70(1)(g) (now sch. 3, para. 2) — even if the beneficiary is in actual occupation.

The court was anxious to preserve the curtain principle — that equitable interests arising under trusts were to be kept off the register. Purchasers did not have to concern themselves with the equitable interests under the trust provided they followed the correct procedure — overreaching.

So, with trusts for sale, the purchaser — here the Variable Rate Building Society — could have taken free of the equitable interests of Irene and Dennis even though the mortgage was not an authorised transaction for the trustees.

Trusts for sale have been replaced by trusts of land. Does this make any difference?



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- 2 Please re-read the extract from the article by Ferris and Battersby, 'The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land' (using Westlaw), which you previously considered. Please also read s. 26 of the Land Registration Act 2002 in *Smith*, p. 429 (extract 12.4.8). **Assuming that Helena and George are trustees of land and using your problem-solving skills, explain whether the Variable Rate Building Society may find itself bound by the equitable interests of Dennis and Irene.**

(Note: With trusts of land, the trustees have all of the powers of an absolute owner under s. 6 of the 1996 Act, but cannot exercise those powers in breach of a rule of law or equity.)

**COMMENT**

The equitable interests under the trust of land are minor interests and should be protected by an entry on the register to bind a purchaser. The appropriate entry is a restriction. The restriction warns purchasers to follow the correct procedure when buying the land — overreaching.

Section 26 of the Land Registration Act 2002 gives the trustees, once they become the registered proprietors, the powers of an absolute owner (including the power to sell). So any limits on the trustees' wide powers (for example, the need to obtain consents before selling) should be reflected on the register by the entry of a restriction on the proprietorship register. Purchasers are protected, and buy free of the equitable interests under the trust, if they comply with the restriction.

What if there is a limit on the trustees' powers that has not been protected by a restriction? Remember that Dennis and Irene did not register any restriction to protect their equitable interests under a trust.

As Dennis and Irene are in actual occupation, their rights are protected as an overriding interest under sch. 3, para. 2 to the Land Registration Act 2002. As you know, this overriding interest binds purchasers unless they make enquiry of those occupiers and they fail to disclose those rights.

When the Variable Rate Building Society took a legal mortgage from the two trustees, this was an unauthorised transaction for the trustees. The transaction, therefore, may not be one that can overreach the equitable interests of Dennis and Irene. Purchasers of registered titles from trustees are not protected under s. 16 of the 1996 Act. The Variable Rate Building Society may therefore find that it is bound by the interest of Dennis and Irene. We have to wait for the court to consider the issue to provide us with a definite answer on this point.

In Part K, we shall consider the ways in which a trust of land can be brought to an end.