11.1 How Do You Know the Sellers are Trustees for Sale?

Suppose you are buying an unregistered title. You are buying it from Abel and Bertha. You read a copy of the conveyance to them. A clause in it says ‘the purchasers declare that they hold the property hereby conveyed on trust to sell the same (with power to postpone sale), and to hold the net proceeds of sale, (and pending sale, the income of the land) on trust . . .’. It does not require a great mental effort to deduce from this that Abel and Bertha hold the legal estate as trustees for sale. The trust to sell is expressly declared.

Suppose instead that you read the conveyance and it says ‘the seller . . . hereby conveys . . . Blackacre to hold unto Abel and Bertha in equal shares’. This also tells you that Abel and Bertha hold the legal estate as trustees for sale. Why? It is because they co-own the beneficial interest. When two or more purchasers co-own the equitable interest, then if no express trust for sale of the legal estate is declared, the legal estate vests in them on an implied trust for sale (ss.34 – 36 of the Law of Property Act 1925). They will always hold the legal estate as joint tenants, whether they hold the equitable interest as joint tenants or tenants in common.

If the conveyance had been to Abel, Bertha, Charles, Deirdre and Edna in equal shares, the difficulty would have arisen that although the equitable interest is owned by five people, a legal estate can only be held by four. The legal estate would vest in the first four adult co-owners named in the conveyance (s.34 of the Law of Property Act 1925). So although the conveyance simply says that the land is conveyed to the five people, it has the same effect as if it read ‘to A B C and D on trust to sell, proceeds of sale to be held by them on trust for A B C D and E equally’. You can see from this that if you were buying the legal estate, you would need a conveyance signed only by A B C and D. E does not own the legal estate. He is sacrificed in the interests of limiting the number of estate owners, but he has not lost his share of the beneficial interest, which is what really matters.

Now suppose that the title is registered. When Abel and Bertha bought from the then registered proprietor, the transfer would either have declared an express trust for sale, or have disclosed the circumstances which gave rise to an implied trust for sale, e.g. the co-ownership of the beneficial interest by the two of them. Abel and Bertha, as the trustees for sale, are entitled to apply to the Registrar to have themselves registered as proprietors. As they are trustees for sale they are under a duty to apply for a restriction to be entered on the register. (The one exception to this is where they hold on trust for sale for themselves as beneficial joint tenants – see later). The restriction will read ‘No disposition by a sole proprietor of
the land (not being a trust corporation) under which capital arises is to be registered except under an order of the Registrar or of the court' (Land Registration Rules 1989).

If they do not apply for the entry of the restriction, the Registrar is nevertheless under a duty to enter it whenever it is clear to him that a trust for sale exists (s.58(3) of the Land Registration Act 1925).

The restriction reflects the fact that a sale by a sole trustee for sale has no overreaching effect, so should not be accepted by the purchaser.

If Abel and Bertha, under an expressly declared trust for sale, hold on trust for people other than themselves, they will only have those powers to deal with the legal estate which statute gives them (see s.28 of the Law of Property Act 1925). They have a power of sale, but only limited powers of leasing and mortgaging. It is a principle of registered conveyancing that the registered proprietor has unlimited powers of disposition, unless an entry on the register says otherwise. If their powers are limited, they should apply for a further restriction to be entered on the register, preventing the registration of unauthorised leases or mortgages.

It is possible for a conveyance or transfer to trustees to increase their powers to deal with the legal estate to those of a sole beneficial owner, i.e. their powers become unlimited. If this has been done, this second restriction will not appear on the register.

If Abel and Bertha are holding a trust for sale for themselves as tenants in common, the first restriction, preventing a sale by the sole survivor, will appear on the register, again reflecting the fact that a sole trustee cannot make good title. However, as in this case the trustees are also the only beneficiaries, their powers of dealing with the legal estate are unlimited, as what they cannot do by reason of their powers as trustees, they can do by virtue of their beneficial ownership. The second restriction will not, therefore, appear on the register.

If Abel and Bertha hold on trust for themselves as beneficial joint tenants, there will be no restriction at all on the register. This reflects the fact that the sole survivor of Abel and Bertha will be able to sell by herself/himself, without any need to appoint another trustee.

Note that a trust for sale can be created by will, and is implied on an intestacy. The vesting of the legal estate in the personal representatives, and later in the trustees for sale, is dealt with in Chapter 10.

11.2 Who Are the Current Trustees?

If you are buying a legal estate that is held by trustees for sale, the first obvious question to ask yourself is 'who are the current trustees?' In unregistered conveyancing, the original trustees are identified by reading the conveyance which created the trust for sale. In registered conveyancing, the original trustees will have been registered as the registered proprietors. Of course, trustees, like all mortal things, are transient. They come and go. The important thing is to check that when a trustee goes, he parts with all