

## Chapter 8: Assessment question

'Brecklands' is a detached house with garden situated in Derby. It has been registered title since 1988. Seema purchased Brecklands in November 2008, and became registered proprietor. In December 2008 she signed an agreement (not in the form of a deed) with her neighbour Ursula, allowing Ursula and her family to use the inside toilet in Brecklands. Ursula pays £10 per month for this right. In practice this right is 'exercised' about twice a day.

In February 2009 Seema signed another agreement (not in the form of a deed) with Ursula, under which she leased a part of Brecklands' garden to Ursula for six years. The agreement also granted to Ursula an option to purchase the whole of the garden for £12,000.

In April 2009 Seema married Pritesh, who moved into Brecklands. Pritesh had no income of his own, but he looked after the house, cooked the meals and did very small do-it-yourself jobs.

In July 2009 Seema left Pritesh to go and live with Harun. Last week she sold Brecklands to Ahmed. Ahmed bought the property without taking any professional advice, and did not even visit the property. On arriving at Brecklands Ahmed finds Pritesh still living in the house, and refusing to move out. He also found Ursula digging the garden, and insisting that she has a right to use the toilet. Moreover Ursula announces her intention of exercising the option to buy the whole of the garden.

Advise Ahmed.

## Specimen answer

The third party right created in the December 2008 agreement is an easement (*Miller v Emcer Products* [1956] Ch 304; see p. 513). An easement is essentially a right to make use of nearby land for a limited purpose. The agreement was not in the form of a deed; it did not comply with the requirements under s.1 LP(MP)A 1989. Subject to s.2 LP(MP)A 1989 which deals with the formalities of a contract, it appears that this easement is equitable.

The easement created in December 2008 appears to be an equitable easement. To ensure priority of the interest s.29 LRA 2002 provides that the interest must be protected. Under LRA 2002 equitable easements are always categorised as interests subject to an entry on the register (minor interests). Equitable easements under Sch. 3 para.3 LRA 2002 are not overriding. Ursula's easement only binds Ahmed if Ursula has entered a 'notice' on the register of title (s.32 LRA 2002). If not protected by 'notice', it will be void against Ahmed, as a purchaser for value (s.29 LRA 2002).

The agreement created in February 2009 appears to be an equitable lease. It has not been granted by deed (s.1 LP(MP)A 1989) and it is assumed that the agreement complies with s.2 LP(MP)A 1989. Following *Walsh v Lonsdale*, a contract for a lease creates an equitable lease. Ursula's rights regarding the garden are both equitable: equitable lease

and an option to purchase. In principle, both rights are subject to an entry on the register of title. To maintain priority of the interests, these should have been protected by entry of a 'notice' on the register (see s.29(2) and s.33 LRA 2002). It is unlikely that Ursula would realise that she ought to have done this. If these interests have not been protected by 'notice', they will be void against Ahmed as a purchaser for value.

Where the interests have not been protected by an entry of a 'notice' on the register of title, all may not be lost. These rights may be recognised as overriding interests if they come within the scope of Sch.3 para.2 LRA 2002.

For Ursula to satisfy this provision, she must be in actual occupation, and this occupation must be obvious on a reasonably careful inspection.

Whether or not Ursula is in actual occupation is a question of fact. It is submitted that if Ursula has been cultivating the garden regularly then she will be in actual occupation. Contrast the 'fleeting presence' which *Abbey National v Cann* holds is not actual occupation.

Fortunately for Ahmed, it is probable that Ursula's occupation would not be obvious on a reasonably careful inspection. Anybody visiting the land would probably imagine that the cultivation was being done by Seema, the landowner. Ursula's occupation would only be obvious if she had for example erected a notice proclaiming 'Ursula's garden'. Ursula's rights are therefore probably not overriding within Sch. 3 para 2.

If Ursula's equitable lease is an overriding interest under Sch. 3 para. 2 LRA 2002, then her option would also be overriding (*Webb v Pollmount*) but only with respect to that part of the garden which she occupies under her lease (*Ferrishurst v Wallcite* overruled). With respect to the part of the garden she does not occupy, her option is a minor interest, which would need protecting by 'notice' on the register of title (s.33 LRA 2002).

Pritesh will not have a constructive trust interest but will have a 'home right' (Family Law Act 1996 (as amended)). This right cannot be an overriding interest within Sch. 3 para. 2 LRA 2002. It will be only binding upon Ahmed if Pritesh had protected this right by entering a 'notice' on the register (s.33 LRA 2002). It is unlikely Pritesh would know that he should enter such a 'notice'.