

Legal Review



BUYING AN OPEN MARKET PROPERTY THROUGH A COMPANY

by Paul Nettleship,
Collas Day
Property Department

Companies

Many of Guernsey's open market properties are owned not by those living in them, but by limited companies, which are usually registered in Guernsey. The true "owners" are the proprietors of the shares of the company. The only name on the title documents of the property is that of the company.

Advantages

The advantage of purchasing shares rather than the property itself is that no duty is payable when shares in a Guernsey company are sold. Document duty is, however, payable when a Guernsey property changes hands by conveyance. This duty is chargeable at 3% of the realty price (not including contents), so the saving can be substantial.

Accordingly, the practice has developed for high value properties to be transferred to dedicated companies whose only asset will be the property. On a subsequent sale of "the property" the actual transaction is a sale of the shares in the property-owning company. Because there is no conveyance, there is a total mitigation of duties. This significant benefit for the purchaser may, in turn, be reflected in a premium in the sale price for the seller.

Transaction

A Share Sale and Purchase Agreement ("Agreement") is entered into between the seller and the purchaser, which is a more extensive document than Conditions of Sale used in a normal sale of land. Property, planning and other issues still need to be investigated as though a conveyance were to be entered into. The Agreement will stipulate a date for final completion.

With a standard conveyance, a full conveyance document is drafted and consented to by the parties before the Contract Court on a Tuesday or Thursday morning. However, a completion by way of share transfer takes place by the signing of simple documentation, principally stock transfer forms. This may take place any day of the week and at any time.

Consequences

Where a company is acquired, the purchaser will take on not only the company's underlying assets, but also all of its liabilities. The Agreement should include protection for the purchaser as to the extent of the company's obligations. This is done by including written statements or "warranties". These are representations, which, if incorrect, give the

purchaser a right to claim compensation from the vendors who gave them. To underwrite the warranties and give them real value a retention may be made for a period of time from the purchase monies.

Borrowing

If the purchaser is borrowing to fund the purchase, the bank may require security over the property on completion. As the property will not be owned directly by the purchasers, the company will normally give a guarantee for the purchasers' (or new shareholders') borrowings. This guarantee will be secured by a Bond (a mortgage) over the property. This creates a legal issue called "financial assistance for the acquisition of own shares" where the company is procuring finance to create a market in its own shares. Certain procedures must be followed carefully to make this lawful.

Inheritance

There are inheritance implications if land is held through a company because the purchaser owns the shares in that company rather than the land, and the rules governing the inheritance of land and shares differ under Guernsey law.

In relation to land, the rules state that if a person dies leaving children or grandchildren, they must provide in their will for the property to pass to their surviving spouse or to one or more of their children or grandchildren. However, in relation to shares in a company (which form part of the owners' net estate of personalty) the rules are different. It is advisable to seek the advice of an Advocate as there are many different considerations and consequences to take into account.

Future

The States have made it clear that they wish to see an end to the ownership of high value properties by companies purely for the purpose of avoiding payment of duties, but to date no action has been taken. However, with a fiscal "black hole" looming it is likely that changes will be made. Annual return filing fees for companies will undoubtedly rise, although by how much remains to be seen. There are also proposals for rates to be increased, which will clearly be more relevant to large, open market properties.

For the time being, however, purchasing a property through a company can be an attractive option and worth consideration.