Conveyancing and the Family Home

25th November 2020

Richard Snape

ABOUT RICHARD SNAPE

Richard has been the Head of Professional Support at Davitt Jones Bould since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firm and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

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OUTCOME FOCUSED TRAINING INFORMATION

This Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of a service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

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OBTAINING INSTRUCTIONS AND BREACH OF WARRANTY OF AUTHORITY

It is essential that whatever checks as are necessary are made in these circumstances.

Penn v Bristol & West Building Society [1997] 3 All ER 470, CA - A solicitor who failed to notice that a wife's signature (as a joint tenant) was obtained through forgery was liable to the mortgagee for breach of warranty of authority. Such a claim for breach extended to any damaging transaction which the claimant was induced to enter into. The solicitor had to pay the costs of unsuccessful legal proceedings in defending the claim made by the wife. The significance of a breach of warranty of authority claim here is that liability is strict and not dependent on negligence (see **Yonge v Toynbee [1910] 1KB215**). This latter case involved a client where a power of attorney had been automatically revokes due to mental incapacity. The solicitor sold land not knowing this fact and was successfully sued. This obviously has a major bearing in relation to the elderly, for instance, should the client die or be mentally ill and the solicitor goes ahead with exchange not knowing this fact. The Enduring Powers of Attorney Act, the Power of Attorney Act 1971 and, the Mental Capacity Act 2005 allow good title to be passed if the solicitor or donee does not have reasonable grounds to believe that the attorney was not successfully given or has been revoked. A subsequent purchaser or a purchaser under a power of attorney can rely on a statutory declaration within three months of the transaction. Powers of Attorney are very much an exception to the above rule however.

Contrast this with the Scottish decision in **Cheshire Mortgage Corporation v Grandison [2012] CSIH 66** where in similar circumstances there was held to be no implied warranty of authority to act.

In **P & P the Owen White and Catlin [2018] EWCA 1082**, the Court of Appeal seemed to accept that Penn was correct. In this case they stated that if a conveyancer signs a contract on behalf of the client, they will be strictly liable if the person is not who they claim to be. This is now enshrined in the new Code for Completion by Post.

Note: If clients are seen face to face many of the fraud issues are alleviated. Note also that the Law Society/Land Registry joint practice note on identity fraud from September 2017 states that empty properties and properties where there has been an acrimonious break up lend themselves to fraud.

Note: This may be particularly important in relation to equity release schemes where clients' mental capacity may be in question and the doctor's report required. See later.

Note: Conflicts of interest and Joint Purchasers

The SRA Handbook chapter 3 requires that all clients give their informed instructions and one client should not be favoured over another. This applies equally to joint purchasers, as to, for instance, acting for buyer and seller, and borrower and lender in the same transaction.

DECLARATIONS OF TRUST

If married, then declarations of trust are essential in terms of succession and inheritance tax but not so important in relation to family breakdown.

The parties might both jointly appear as legal owners or be joint registered proprietors. The case of **Radmacher v Granatino [2010] UKSC 42** recognised the possibility of a pre-nuptial agreement. However, this will only be valid if both parties have given informed consent and are both economically catered for on divorce. If financial circumstances change after the agreement they may also be questioned. This does not determine beneficial ownership however. The basic maxim that "equity follows the law" is easily rebutted. It is essential that the solicitor therefore explains the nature of a joint tenancy and tenancy in common and that some statement as to beneficial ownership is included in the conveyance. Failure to ascertain the wishes of the parties on this matter may well constitute negligence on the solicitor's part.

Make clear also that joint tenants exercise survivorship and any division of the property will be equal on sale (see below). If a tenant in common look clearly at the probate implications and strongly urge that a will is executed.

See the dicta in **Springette v Defoe [1992] 2FLR 308; Walker V Hall [1984] 1 FLR 126; Bernard v Josephs [1982] Ch391.**

Any express declaration of beneficial ownership should be conclusive of the matter.

Consider this in the light of **Huntingford v Hobbs (1993)** below.

Goodman v Gallant [1986] Fam 106, CA

Property was conveyed to two cohabitants on trust for sale to hold the net proceeds, "upon trust for themselves as joint tenants". The plaintiff served the beneficial interest and claimed a three-quarter share on the basis of contribution. She failed. If the conveyance contains an express declaration of trust, this prevails in the absence of fraud. An express provision may provide for other than equal shares on severance or sale of a joint tenancy. If this is not offered to the client query whether this is negligence.

Also consider the time for determining beneficial interests Turton v Turton [1988] Ch 542, CA. Property was conveyed to the cohabiting parties as joint tenants beneficially. Although the plaintiff had not made any financial contribution this was deemed to be conclusive.

The plaintiff left in 1975. In 1987 she sought a declaration that the house would be sold. The Court of Appeal ordered sale and further ordered that the plaintiff was entitled to a half-share to be valued in 1987. This was subject to a credit for payment of the mortgage capital.

Huntingford v Hobbs [1993] 1FLR 736, CA

The cohabitants were registered as joint proprietors, the transfer (Form 19) containing a standard declaration by the parties that "the survivor of them can give a valid receipt for capital money arising on the disposition of the land". The Court rejected the argument that this gave rise to a beneficial joint tenancy. It was equally consistent with the parties holding as trustees for a third party. Thus, evidence of intention and contribution could be submitted and there was held to be a tenancy in

common.

The parties were entitled on a ratio of 61%: 39% based on initial cash payments and mortgage liability. However, the man's 39% was subject to deduction of the £25,000 outstanding mortgage which he had agreed to pay. He could be credited for £2,000 for improvements.

Subsequently, the standard land registration form has been amended. However, many pre 1997 interests (when the form changed) are unclear as to whether they are joint tenancies or tenancies in common on the basis of this decision.

This is also a good illustration of the need for a discussion of respective mortgage contributions to enable the correct trust to be drawn up.

This case has major implications, not least of which on death of a survivor, a lack of a restriction on the register may not automatically point to a beneficial joint tenancy.

Stack v Dowden [2007] UKHL17

The parties had co-habited for 27 years and there were four children by the relationship. A series of houses had been bought, at first in Ms Dowden's sole name and with Ms Dowden providing much of the purchase price and paying most mortgage instalments.

In 1993 a house was bought in joint names using Form 19(JP) and stating that the survivor would give valid receipt for capital money. Following **Huntingford v Hobbs**, this did not give rise to a beneficial joint tenancy.

The House of Lords stated that in the absence of an express declaration of trust the presumption would be that if the property was owned in the sole name of a person, there will be sole beneficial ownership; but if legal title was in joint names, then the presumption of beneficial ownership would also be joint. This presumption could, however, be rebutted. In the present case, bank account details had been kept separate, and as Ms Dowden had supplied substantial amount of the initial purchase price, she was found to be a 65% tenant in common. The House of Lords also made clear that solicitors should be able to prove that the clients understood the implications of a joint tenancy or tenancy in common when the TR1 Form is being filled in.

This case was followed by the Privy Council in **Abbott v Abbott [2007]**. However, in **Lasker v Lasker [2008]** Times March 4, the Court of Appeal did not follow the decision when a mother and daughter bought a property as an investment property. Here the daughter received a one third beneficial interest reflecting her contributions.

Fowler v Barron [2008] EWCA 377

The Court of Appeal refused to find a tenancy in common when there was no express declaration of beneficial interests, as the presumption of a joint tenancy could not be rebutted even though the male partner had provided almost all of the purchase price and made the mortgage payments.

Jones v Kernott [2011] UKSC 53

In **Huntingford v Hobbs [1993] 1 FLR 736** the Court of Appeal held that where a conveyancer had crossed out 'cannot' on a form 19(JP), the standard Land Registry transfer form prior to April 1998 when the form TR1 came in; thus reading that the survivor can give valid receipts for capital money, this did not give rise to a valid declaration of trust. The Court therefore looked at what the parties

intended, and on a sale, they received pro rata with their initial contributions. The House of Lords in **Stack v Dowden [2007] UKHL 17** came to a similar conclusion as to the Form 19(JP), however they decided that in the absence of a declaration of trust the basic presumption was of a joint tenancy. This was rebutted in the case as it was held that the parties must once more have intended to obtain their shares. **Jones v Kernott** is a further reiteration of this. In the present case the parties had separated some 14 years previously and the man had served a notice of severance. There is no sale of the property initially as the man seemed happy to allow the woman to stay there with their infant child. In the meantime, he had purchased another property elsewhere. The Supreme Court held that even if the parties initially intended to be joint tenants, they may change their mind later. In the absence of clear agreement, the court may infer such an intention and it was held that the woman was a 90% tenant in common.

In the light of these cases, it is absolutely essential that conveyancers clearly explain to their clients the difference between a beneficial joint tenancy and the tenancy in common, and moreover that they keep their files for a sufficient period to protect themselves should there be a separation year in the future. It is suggested that purchase files should be kept for at least 15 years under Limitation Act 1980.

Note: Various members of the Supreme Court seemed to disagree as to the extent in which a change of intention as to shares could be inferred outside express dealings.

Pankhania v Chandegra [2012] EWCA 1438

A nephew bought a property as joint tenant with his aunt so that his aunt and uncle would have a house to live in. The nephew was the only person in employment and so could obtain the mortgage. The Court of Appeal held that **Jones v Kernott** would not apply where there was an express declaration of trust.

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Thompson v Hurst [2012] EWCA 1752

In this case a woman was on legal title to a former council house. The man, who was in occasional employment, contributed to outgoings when he could. They also had joint responsibility for council tax and over the years had discussed ownership of a property. The Court of Appeal held that **Stack v Dowden** would only apply when there is joint ownership at law and there is no presumption of a beneficial joint tenancy in the present case. The man obtained a 10% share on the basis of a constructive trust.

Re Gorman [1990] 1WLR 616

Huntingford distinguished this case where there was a similar declaration but coupled with a statement that the parties were entitled for their own benefit. This could only give rise to a beneficial joint tenancy.

If some form of beneficial interest is implied it will be assessed on the basis of a resulting trust based on the respective contributions, preferably at the date of acquisition.

There must be clear evidence if the parties intended to any other entitlement.

Points to appreciate here:

(a) Make sure you obtain client instructions clearly and keep on file. The maximum limitation period for negligence claims where the transaction is by deed is 12 years from becoming aware of the breach with a 15 year long stop. Under the Latent Damages Act 1986, purchaser files should be kept for 15 years where possible.

(b) Think about offering alternatives and more complex declarations of trust, e.g. preventing sale unless there is a majority vote in Favour, e.g. as in **Goodman v Gallant** above allowing severance of a beneficial joint tenancy in other than equal shares.

(c) Treat different types of relationships separately, e.g. where one of the parties already has a substantial equity.

(d) Make sure that the client is fully aware of what amounts to a monetary payment and what does not for instance a gift or loan will not normally give rise to an interest.

Risch v Mcfee [1991] 1 FLR 105

An initial payment described as a loan and accompanied by a promissory note ceased to be a loan when there ceased to be an intention for it to be collected.

In **Ellis v Chief Adjudication Officer [1998] 1 FLR 184**

A gift was held to be conditional on allowing the donor to reside in the premises for her life.

Gifts, as here, by elderly parents to children are always fraught with difficulties should the child then attempt to evict the parent. A leaseback is a possibility as is giving the elderly parent a very small beneficial interest, coupled with making any sale subject to their consent under **S.8 TLATA 1996.**

Sekhon v Alissa [1989] 2 FLR 94

Here, a payment which amounted to a substantial amount of the grantor's income did not amount to a gift. Cultural matters, such as the family being Sikhs might also point away from a gift

Points to note: -

1. Funds from a third party

   Third parties often assist with purchases, for example relatives often assist first time home buyers. You may be asked to receive funds directly from those third parties. You will need to decide whether, and to what extent, you need to undertake any CDD measures in relation to

the third parties.

Consider whether there are any obvious warning signs and what you know about:

- your client
- the third party
- their relationship
- the proportion of the funding being provided by the third party

Consider your obligations to the lender in these circumstances – you are normally required to advise lenders if the buyers are not funding the balance of the price from their own resources.

Note: It is also suggested that a bankruptcy search be made against the third party, as the gift amounts to a transaction at an undervalue and creditors could apply to courts within five years to have it set aside under the Insolvency Act 1986, even if the transaction did not have a fraudulent motive. A declaration of solvency and insolvency insurance may be required.

2. If a loan is intended, then a second charge may be required. An independent solicitor should be consulted and consent of the mortgage company given.

3. If a beneficial interest is intended, independent advice must be suggested.

4. A gifted deposit will not give rise to SDLT liability. If the donor wishes to retain a beneficial interest of £40,000 or more, this may constitute an additional dwelling and give rise to the SDLT surcharge. A better option would be a charge, which might be with nominal interest to avoid a possibility of the donor being categorised as a trader as this will give rise to the need for an FCA licence.

Springette v Defoe [1992] 2 FLR 388

The parties, two elderly cohabitants, held joint tenants at law on the purchase of a former council house. The female cohabitant obtained rebate of 41% on the purchase due to her previous occupation. This was treated as equivalent to a monetary payment. The man claimed a common but uncommunicated intention that they should share equally in the property. The Court refused to accept this. In words of Steyn L.J. '**Our** *trust* law does ***not*** allow property *rights to be affected by telepathy. Any rebuttal of the resulting trust must be on express intention.'*

The conveyancer should perhaps ask the question whether the client would want an express tenancy in common if they realised that a rebate was equivalent to a monetary payment

Evans v Hayward [1992] Unreported June 23, CA

In this case, the court preferred to look at a rebate, not as an imputed monetary compensation but as a factor giving rise to an inference that the parties may have reached agreement as to how it may be allocated.

Savill v Goodall [1993] 1 FLR 755, CA

Here, the parties purchased a former council house with the help of a 42% discount attributable to the defendant's occupation. The parties reached agreement that they would share equally in the property. This rebutted the presumption as to a resulting trust arising from the discount. However, as the plaintiff had agreed that he would be responsible for the mortgage, a condition of his acquiring a half-share was that he would remain responsible for capital payments. Interest need not be paid, as he was not in occupation. There would be an occupation rent equivalent to interest payments.

McHardy v Warren [1994] 2 FLR 338

In spite of **Springette v Defoe,** Dillon L. J. found a presumption of 50% ownership even though the initial contribution had been much less and in absence of any express agreement.

Midland Bank v Cooke [1995] 4 ALLER 562

Here, the man was sole legal owner, the wife having contributed **6.47%** towards the purchase price through a gift from her in-laws. The Court stated that **Springette v Defoe** was not intended to provide an all-encompassing rule. Once an interest could be shown to exist, all surrounding circumstances, including inferences could be taken into account in determining the extent of that interest.

Oxley v Hiscock [2004] EWCA 546

This case confirmed **Midland Bank v Cooke 1995** in that a beneficial interest behind the constructive trust will not necessarily be valued pro rata with contributions. However, unlike Cooke, the factors taken into account are not merely those existing at the beginning of the relationship but also subsequent transactions.

The male partners originally helping to buy the woman's council house via a secured loan suggested that they intended other and equal contributions.

Note: also think about advising on the mortgage capital payments.

Graham-York v York [2015] EWCA 12

Here the female partner made substantial indirect contributions and it was accepted that there was express agreement as to the ownership of the property. On the man's death the property passed to their child who was subsequently faced with a mortgage repossession. The female partner successfully argued a constructive trust. In the absence of express agreement as to the beneficial interest, the court held that all surrounding circumstances should be looked at and awarded her a 25% share.

Stott v Ratcliffe [1982] 129 Sol J310

The male partner was already married but separated. The two became beneficial tenants in common. On death his wife inherited his share but was not able to force sale until death of the partner. Question whether this is negligence.

Think of the possibility of undue influence between the parties and suggest and even insist on independent advice in certain circumstances. There are potential conflicts of interest just as between borrower and lender.

UNDUE INFLUENCE

The background to the potential claim is that if a party is persuaded to enter into a contractual agreement as a consequence of undue influence, then they may take steps to avoid the contract after the influence has ceased. Undue influence, according to **BCCI v Aboody [1992] 4 ALLER 955** takes several forms. Firstly, there may be category 1 undue influence, i.e. actual undue influence is shown to have existed. Secondly, Category 2A undue influence arises from the nature of the relationship, e.g. solicitor and clients, doctor and patient. Thirdly, there may be Category 2B undue influence, which is presumed to exist whenever a person reposes trust and confidence in another. There is no presumption of undue influence arising automatically from the relationship of husband and wife or cohabiting partners: **National Westminster Bank v Morgan [1985] AC 686.** However, it may be shown that trust and confidence is reposed.

The question for the courts is frequently whether a third party such as a mortgagee may be bound by such undue influence. Since the seminal case of **Barclays Bank v O'Brien [1993] 4 ALLER 417,** which stated that in cases where presumed undue influence or misrepresentation may exist such as between co-habitees, or parent and child, the mortgagee should ensure independent advice is given to the surety, there have been many cases in this area. The more recent authorities quite clearly have the effect of limiting the seriousness of the decision for the mortgagee and potentially passing any liability to solicitors.

Also consider the fact that another obvious situation where a party suffers a manifest disadvantage is where parties decide to co-own in proportions different from their respective contributions.

CIBC v Pitt [1993] 4 All ER 443, HL

The **O'Brien** case only applies to surety cases not, as here, to a normal mortgage loan. The wife was persuaded by mans of actual undue influence to agree to re-mortgage the house, in order for him to play the stock market. As far as the bank was concerned, this was a normal mortgage transaction. There was no constructive notice of the undue influence.

Note: Consent Forms

Banco-Exterior International v Mann [1995] 1 All ER 930, CA

Here, a consent form was signed in the presence of the husband's solicitor. The solicitor confirmed to the mortgagee that advice had been given. The mortgagee was entitled to assume that the advice was independent. Moreover, a solicitor did not have to advise not to sign. The next development may well be in relation to co-ownership and undue influence claims.

Credit Lyonnais Bank Nederland v Burch [1997] 1 All ER 144

O'Brien was extended to include a situation between employer and employee where the latter reposed confidence in the former. There was an irresistible conclusion of undue influence on the facts. The Bank should have insisted on independent advice. Advising the guarantor that independent advice should be obtained was insufficient. Moreover, a solicitor should not solely explain the nature of the agreement but must also ascertain that no undue influence exists. If the solicitor is not satisfied of this and the client insists on going ahead with the transaction, the solicitor should refuse to act. The Bank may still be bound where independent advice has been given if it was obviously unreasonable advice to give.

For a similar decision, consider **Steeples v LEA [1998] 1 FLR 138**. It was also suggested that even if the third party does not want to obtain independent advice, they should be sent to a third party.

Royal Bank of Scotland v Etridge (No 2), HL [2001], 4 ALLER 449

The case makes it quite clear that a solicitor who gives independent advice will be the agent of the client and not the Bank. More of an onus is put on the Bank to give advice as to the nature of the transaction and then strongly urge that they receive advice from a solicitor. Unless there is a conflict of interest, illustrated by exceptional circumstances, (e.g. as in **Credit Lyonnais**), in which the case the solicitor should refuse to act, then the Bank's or borrower's solicitor may give the advice, although the House of Lords recognised that this would be rare.

The Bank would explain the reason for seeing a solicitor and once the guarantor has decided upon one, they should (with the borrower's consent) give details of financial history to the solicitor. If the solicitor does not receive such details they should refuse to act.

The solicitor's role is not to veto the transaction but to explain why they are advising and what the nature of the guarantee agreement is. They should also see if the client wishes to try to re-negotiate the transaction, and explain the financial position of the borrower. Once more, if the client wishes to go ahead, unless there are exceptional circumstances, they should report accordingly. They should not report to the Bank until the client has agreed.

In **Thompson v Foy (2009)**, there was held not to be trust and confidence merely because an elderly mother trusted her daughter to do the right thing in paying off a loan related to a house purchase.

Hewett v First Plus Financial Group [2010] EWCA 312

Here an ex-wife was able to claim that she was induced into entering into a mortgage on the family home, to pay off the husband's credit card debts, through misrepresentation and undue influence. The husband had concealed that he was having an affair and if she had known this fact, she would not have agreed to the charging of the family home. Moreover, it was accepted that the mortgage company had constructive notice of this fact and the charge was set aside.

GIFTS

Wright v Hodgkinson [2005] WTLR 435

Here an elderly person transferred substantial property into joint names with a younger friend. On the facts, the transaction was set aside due to undue influence. The court stated the following:

Consider the following in relation to gifts:

1. A generous gift can be sufficient evidence of a relationship of trust and confidence following which there will be an onerous evidential burden.

2. Knowledge and understanding of the nature of the transaction is insufficient to amount to full and informed thought if there was no advice on theoretical issues which did not arise in practice.

3. It was not necessary to show that the gift would not have occurred if fuller advice had been given.

4. It was insufficient for a defendant to show that advice had previously been given if they could not show the detailed content of such advice

5. Anyone advising a potential donor about a gift should expressly consider whether the proposed gift might be the consequence of actual undue influence or be suspicious.

6. The reason and motivation for the gift should be recorded, and advice given as to possible consequences.

7. If there are potential tax implications, the donor should be made aware of them and it should be recorded if the donor did not want tax advice.

8. Any impact on benefits and social security should be considered.

9. Future financial needs should be addressed and the donor warned about the consequences of the donee becoming insolvent, dying or becoming divorced.

10. The donor should be given full advice and copies obtained.

Finally, the closeness of the relationship between donor and donee.

STAMP DUTY LAND TAX AND ADDITIONAL DWELLINGS

Introduction

Stamp Duty Land Tax at a higher rate was announced in the autumn statement of 25th November 2015. It will affect both domestic and foreign purchasers of additional residential properties in England and Northern Ireland (not Scotland where SDLT no longer applies). Land Transaction Tax in Wales has similar provisions. The government reminds people that SDLT is a self assessment tax. If a client deliberately or recklessly fills in false information in a Land Transaction Return then they could be prosecuted and also required to pay a surcharge of 100% of the tax owed. The government in their consultation, which was produced on 28th December 2015, stated that conveyancers would be well advised to require their clients to verify that the property that they are purchasing is their main residence. The Finance Act 2016 was published on 16th March 2016. It adds to the Finance Act 2007 a schedule 4 ZA. Guidance is now available but the land transaction return will not be amended. Where the higher rate applies the conveyancer must fill in code 04 in question 1.

If a rebate is claimed this must be done online and within a year of submission 12 months of the rebate becoming due whichever is the latter. The time period to claim the rebate was increased from 3 months to 12 months by the Finance Act 2019. The rebate must refer to the reference number on the original land transaction return and so presumably this will have to be filled in by the conveyancer. The HMRC say they expect any money to be paid within 15 days but cannot promise this. A hard copy is also available via the Birmingham Stamping Office.

Note: It was announced in the budget of 29th October 2018 that if a person replaces their main residence within a year of submitting the return then they will have a year to claim the rebate.

Amendments 22nd November 2017

The Finance Act 2018 has made the following amendments which will:

- prevent abuse of relief for replacement of a purchaser's only or main residence by requiring the purchaser to dispose of the whole of their former main residence and to do so to someone who is not their spouse

- disapply HRAD where an individual buys a property from their spouse or civil partner

- disregard certain interests retained by a former spouse or former civil partner upon dissolution of a marriage or partnership - it disregards an interest if it is held under certain 'property adjustment orders', for example in the case of a divorce

- make changes so that a property held by a child's parents is disregarded when a property is purchased by a child's trustee pursuant to power conferred on the trustee by a relevant court appointment, for example such an appointment made by the Court of Protection

Basic Principles

The provisions apply to any second property where a major interest is being acquired. This will include a freehold purchase or a lease of more than 7 years duration. The purchase price must be not less than £40,000. The provisions will not apply to the purchase of a reversionary interest which does not take affect in the future for more than 21 years. The provisions will also not apply to the replacement of a main residence.

Note: Bizarrely, the provisions would apply to leasehold enfranchisement and leasehold extensions where the consideration is £40,000 or more. HMRC have now confirmed that they believe this to be the case. On 22nd November 2017 an amendment was made in relation to SDLT whereby if the premises being enfranchised is the owner's main residence both on and before the enfranchisements the surcharge will not apply. The attitude of the Welsh Government under LTT on this is unclear.

Married Couples and Civil Partners

Married couples and civil partners who own one property at the end of the date of completion will not be liable to the extra tax. However, if one then buys an additional property it may be chargeable to SDLT if not their main residence.

As with Capital Gains Tax private residence relief will not be applied if there is a:

- divorce through court order
- deed of separation has been executed by reference to s1107 Income Taxes Act 2007.
- they no longer live together and there is no realistic possibility of this occurring in the future.

Note: If any minor children have any interest in the property then this may also give rise to tax liability on behalf of the married couple.

Beneficial interest behind a trust

Where there is a bare trust or interest in possession, any property will be deemed to that of the beneficiary and if the beneficiary has other properties the additional tax will apply. More remote interests such as under a discretionary trust, will be treated as properties of the trustees.

If a beneficiary behind a bare trust or with an interest in possession owns another property this may attract the additional tax. It will not matter if someone else also has an interest in that property. The additional tax will still be paid.

Inheritance

Where a person becomes entitled to an interest through inheritance in the past 3 years, the property can be ignored provided that the beneficiaries became joint owners with no more than a 50% interest together with their spouse or civil partner at the date of inheritance.

DEBT AS CONSIDERATION

Transfers of equity

A common transaction involves putting a house into joint names. No problem if there is no mortgage. But let us assume there is. A house worth £500,000 has a £300,000 mortgage and is owned by X – who wants, or needs, to include Y as a joint owner.

1. **X could declare a trust of the equity of redemption**, what is left once the mortgage has been repaid, in favour of X and Y. No need to change any rights or liabilities under the mortgage. No need to tell the mortgagee or get consent.

2. If the lender requires Y to join in the mortgage, **it may be possible to agree a "borrower only" mortgage**. Title remains with X. Y simply joins in the mortgage to covenant to repay. Although there is now an implied assumption of debt equal to the respective property shares, Y's share remains 0%, so no SDLT to pay.

3. If the lender requires Y to become a joint legal and beneficial owner, and X transfers half to Y, there will be an implied assumption of half the mortgage debt - £150,000 – on which SDLT is payable. There is existing secured debt either side of the transaction. Do not forget that if the transfer is merely to meet the lender's requirements and not because Y needs 50% **one might advise X to transfer a lesser share**. A transfer of 40% would imply £120,000 consideration, SDLT 0%.

4. **New debt.** Most often the transfer is not in the context of existing debt, but just before raising new debt. Assume X is re-mortgaging for £350,000 but the new lender wants Y as a joint owner and borrower. Many conveyancers would simply transfer the house from X to XY and either

(a) assume no SDLT is payable (on the basis that the old mortgage is discharged, then there is a transfer, and then a new mortgage), or

(b) charge Y SDLT on half the old (or new) mortgage debt.

Both are wrong. XY is a joint party quite separate from X and Y. If V sell a house to P for £500,000, and V discharges the old mortgage and P takes on a new mortgage (a typical sale and purchase) there is what the House of Lords described as a "composite transaction". At completion, the old mortgage cannot be discharged until P pays the price, and P cannot pay the price except by using the new money raised on the security of a first charge – which cannot exist until (a) the transfer and (b) the discharge are completed! We do composite transactions like this routinely.

SDLT, however, is charged on individual transactions – a mortgage discharge, a transfer and a new mortgage. Only the transfer is chargeable – but on what? The price. The money paid by P to V.

Where the vendor is X and the purchaser is XY what money has X&Y paid to X? It is not nothing. It is the amount X requires to discharge the old mortgage – in other words £300,000 – on which SDLT is payable.

A slight restructuring of the transaction is required.

If X first declares a trust of the house in favour of XY – under which Y could explicitly assume a share of the old mortgage debt equal to Y's share of the property – then Y must pay SDLT on that transaction. The declaration can be made shortly before the re-mortgage, and does not need to involve the old lender, whose mortgage is about to end. Now X can transfer the legal estate to XY for no consideration, appointing XY as new trustees. XY, both joint legal and beneficial owners, now re-mortgage and use the proceeds to repay the old mortgage for which they are both responsible.

SDLT is now based not on the whole mortgage debt, but only on that part equal to Y's share.

OVERRIDING INTERESTS AND SCHEDULE 3 PARAGRAPH 2 - LAND REGISTRATION ACT 2002

The right is defined in the Act as:

…the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed.

There are three essential elements to this overriding interest, then – "rights", "actual occupation" and "enquiry".

This concept of enquiry is to all intents identical to constructive notice in unregistered land

Examples of Rights might be:

(1) The rights of a beneficiary behind a **bare trust – Hodgson v Marks [1971] Ch 892**

(2) The equitable rights of a licensee by was of **proprietary estoppel** may be overriding – **Re Sharpe [1980] 1 WLR 219**

(3) Most importantly, and most controversially, the rights of a beneficiary behind a trust of land were held to be capable of qualifying as overriding interests in **Williams & Glyns Bank v Boland [1981] AC497**. This was held to be so in spite of the doctrine of conversion whereby, in orthodox opinion, the rights of a beneficiary behind a trust for sale were deemed to be rights in the proceeds of sale. With the demise of trusts for sale and the doctrine of conversion, and their replacement by trusts of land, the issue is now settled beyond doubt. A beneficiary behind a trust of land has an interest in land and this is confirmed by **s12 TLATA 1996**.

Note that there must be a sufficient legally recognised contribution for a beneficial interest to arise: see **Lloyds Bank v Rosset [1990] 1 ALLER 1111.** Direct contributions will suffice or indirect contributions based on express agreement.

Remember that this might alone may be overreached by payment of capital money to at least 2 trustees: **s27(2)LPA 1925**. Overreaching will take place even if the person claiming an interest is in actual occupation. This applies to both registered and unregistered land: see **City of London Building Society v Flegg [1988] ACC 54**. However, for this to apply there must not merely be two parties to the transaction but two independent parties capable of dealing with each other at arms length: see **HSBC v Dyche [2009] EWHC 2954**.

Release

A beneficiary can release their rights in favour of a purchaser. This is commonly done by including a clause in the contract which is signed by the occupier. The Fifth Edition of the Standard Conditions of Sale include such a clause. Alternatively, there may be a signed waiver.

Note: a homes right cannot be overriding: **s31(10) Family Law Act 1996** and **The Civil Partnership Act 2004**

What constitutes actual occupation?

For many years it was thought that actual occupation had a limited meaning, i.e. actual and apparent occupation recognisable as such. It had to be apparent that a person in occupation may have rights in the property. All this was changed by the decision of the Court of Appeal in **Hodgson v Marks [1971]**. A widow transferred her property to a Mr E to enable him to manage the property on her behalf. E was thus a bare trustee holding for her as the sole beneficiary. E sold the property to M. M knew of the existence of the widow but did not enquire as to whether she had any rights in the land. The court held that "actual occupation" was a question of fact – mere physical presence in the property amounted to actual occupation. The widow therefore had an overriding interest which was binding to M.

This decision was confirmed by the House of Lords in **Boland** and is now beyond dispute; however, problems still remain. A person is unlikely to remain present in premises continuously and so actual occupation has been expanded to include occupation through one's personal property.

In **Chhokar v Chhokar [1984] FLR 313**, the husband, who was sole registered proprietor, sold the matrimonial home to which the wife had made financial contributions, whilst she was in hospital giving birth to the child of the marriage! Not surprisingly, the court found that, even through her absence the wife remained in actual occupation. On the other hand in **Abbey National Building Society v Cann [1990] 1 ALL ER 1085**, the House of Lords held that a person could not be said to be in actual occupation, and could not therefore have an overriding interest which bound a mortgagee, when, as an act of grace, the vendor had allowed her to move her belongings into the property 35 minutes before completion.

In **Abbey National v Cann** it was said that occupation by a caretaker or company representative would satisfy the section. In **Hypo-Mortgage Services Ltd v Robinson [1997] The Times, 2nd January** the Court of Appeal held that an infant child's occupation of land was a mere shadow of its parents' occupation. It could not give rise to an overriding interest in land even where the child had contributed to the purchase and thus had a beneficial right in the land.

In **Link Lending Ltd v Hussain [2010] EWCA Civ 424** a mentally incapacitated beneficiary who was in permanent care was held to continue being in actual occupation and thus had an overriding interest under Schedule 3, paragraph 2 Land Registration Act 2002. The beneficiary would return under supervision on special occasions. They were held to be in occupation. A second trustee may be appointed to overreach any beneficial interest, as a quicker alternative to the Mental Capacity Act 2005.

The date of actual occupation

Another matter which caused difficulties until recently was the date on which a person had to be in actual occupation in order to claim an overriding interest which bound a purchaser or mortgagee. The House of Lords has now, in **Abbey National Building Society v Cann**, clarified the situation. Normally, the person must be in actual occupation on the date of completion of sale or of the mortgage. However, in cases of first registration, until the application to be registered as the proprietor is made the land remains unregistered. It is therefore invalid to talk about overriding interests at all and the relevant date of actual occupation is the date on which the application for first registration is made.

What constitutes "enquiry"?

The enquiry must be made of the person in actual occupation; it is this person who must fail to disclose the rights – **Hodgson v Marks**. It is not sufficient to ask the vendor, if he is not the person "in actual occupation". Indeed, the vendor may have very good reasons for **not** disclosing any rights of another person!

Note: the court may impute an intention that the mortgage should take priority to any "rights" claimed by an occupier. In **Paddington Building Society v Mendelsohn [1985] 50 P & CR 244**, the occupier was aware that the property was being purchased with the aid of a mortgage. It was held that the rights of the occupier were postponed to those of the mortgagee.

Of course, any overriding interest, if it is to bind a third party, must come into existence **prior** to that of the third party. We know that in registered land, any interest does not take effect until registration of it; however, in **Lloyds Bank v Rosset** it was held that for the purposes of **s70(1)(g)**, and now, Schedule 3, the effective date of occupation is the date of **execution of the conveyance.** This was upheld by the House of Lords, both in **Rosset** and in **Abbey National Building Society v Cann [1990]**. In the latter appeal their Lordships stated, however, that such interest do not become overriding until **registration.** See also **Equity Home Loans v Prestidge [1992]** where there was deemed consent to subsequent re-mortgages also.

SEVERANCE

Severance, i.e. conversion of a joint tenancy into a tenancy in common in equity may take place in several ways, i.e. written notice to the other joint tenant(s) indicating an intention to sever, destruction of one of the four unities, mutual agreement and mutual course of dealing.

In **Re 88 Berkeley Road, NW9 [1971] 1 Ch 648** it was recognised that written notice would be deemed to be served on a joint tenant if delivered to his last known address under **S.196(4) LPA 1925**

Kinch v Bullard [1999] 1 FLR 66

Here, the husband and wife were joint tenants. The wife, who was terminally ill, served written notice on the husband prior to a divorce petition. A day before the notice was delivered to the family address by the postman, the husband had a heart attack. The wife, thinking that she might survive her husband and thus obtain the whole beneficial interest in the premises through survivorship, intercepted the letter and destroyed it.

Even though the husband had no opportunity of seeing the notice, as it had been delivered by a postman at the husband's last known address, severance had occurred.

Dunbar v Plant [1997] 3 WLR 1261

Although homicide of a fellow joint tenant gives rise to severance in equity, this will not be the case if 'little moral blame' (**Forfeiture Act 1982**) attaches to the homicide. No severance occurred here where death of one joint tenant resulted from a suicide pact.

Grindal v Hooper [2000] Times, February 8th

A clause in a conveyance that any notice to sever was only effective if annexed to the conveyance had no bearing on the validity of a properly effected severance. It was designed merely to protect a potential purchaser. However, in unregistered land, the Purchaser would still be bound by the beneficial interest of a tenant in common if he had notice of it. Presumably in registered land, registration of a minor interest should occur, unless the tenant in common was in actual occupation and thus had an overriding interest under **s70 (1)(g) LRA 1925**.

Carr-Glynn v Frearsons [1998] 4 All ER 225

Where a solicitor executed a will, leaving the testatrix to check the title deeds to determine whether she was a joint tenant but the latter died before having done this, the solicitor was liable to the beneficiaries in negligence. A memorandum of severance should have been sent.

Littlewood v Radford and Boston [2009] EWCA 1024

A surveyor (and presumably a solicitor) who had told a client about the importance of meeting a deadline in relation to leasehold enfranchisements a month previously, but did not repeat the advice closer to the date, was held to be negligent. This was in spite of the fact that the surveyor had told the client that he would refuse to continue to act unless a bill was paid. Correspondence between the parties was sufficient to continue the duty. Presumably conveyancers who fail to remind tenants in common to make wills may be faced with problems.

Boycott v Perrin Guy and Williams (2011)

The cricketer Geoff Boycott failed in a negligence claim against his solicitors for not advising that a beneficial joint tenancy could be severed. This was namely on the grounds that it was statute barred and it is suggested that this should be made clear to the client.

DESTRUCTION OF THE FOUR UNITIES – EFFECTING SEVERANCE WITHOUT THE KNOWLEDGE OF A FELLOW JOINT TENANT

Joint tenants must have unity of possession, interest, title and time. Unity of possession is also required for a tenancy in common and if this is destroyed there can be no co-ownership at all. However various activities might result in the other unities being destroyed in equity. This will affect severance. For instance:

Sale

If the joint tenant sells his beneficial interest, the purchaser gains an interest from a separate act or document from the original joint tenants. Unity of title is therefore destroyed and severance occurs. This is a useful way of effecting severance prior to a will without the knowledge of a fellow joint tenant. This is a convenient way of effecting severance without the knowledge of the other joint tenant. Sale might be at a nominal consideration to a beneficiary.

Contract to sell

As "equity looks on that as done which ought to be done", a contract to sell is treated, in equity, as having the same effect as an actual sale. Unity of title is once more destroyed.

Mortgage

If a joint tenant mortgages his equitable interest, unity of title is once more destroyed and severance occurs. A fraudulent mortgage of the whole property seems to have the same effect but this has been disputed. This may be an effective form of severance: a token change of the beneficial share being made.