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5th April 2023

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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.

In June 2020 the Law Society produced a practice note on joint ownership which the conveyancer may refer to.

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 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 claimant had not made any financial contribution this was deemed to be conclusive.

The claimant 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 claimant 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) (this was the predecessor to Form TR1) 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-1998 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] UKPC 53***. 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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Ralph v Ralph [2021] EWCA 1106

In 2000 a father and son purchased a property. The son was on title as the father could not afford a mortgage and the son, who was in employment, could. They were given no advice on beneficial ownership and the solicitor assumed that they would be tenants in common in equal share. This was expressed in the TR1. At a later stage the son wanted to force sale and claim a 50% share. The Court of Appeal allowed the appeal and refused rectification of the transfer. There had been no discussion whatsoever as to ownership and neither had considered beneficial ownership. The son had also been burdened as he was unable to obtain a mortgage with his wife.

***Hudson v Hathway [2022] EWCA 1648*.** Here the parties were cohabiting and had purchased the property as beneficial joint tenants. Subsequently the man left. There was correspondence via emails whereby he had stated that the woman could have the property and its contents in return for her forgoing any claim on his investments or savings. He subsequently argued that these emails were not legally binding as to claim a contructive trust there must be detrimental reliance on the statements and as the parties cohabited and were not married there was no claim on savings and investments anyway. The Court of Appeal confirmed that detrimental reliance in relation to a constructive trust was still required. However as the woman had changed her financial position on the basis of the statements there was such reliance. They also stated that there was an expess decleration of trust. Under **S53 The Law Property Act 1925** the disp[osition ofd an equitable interest in land must be in writing and signed. It was held that the email constituted writing and Hudson had written his first name at the the bottom of the email. The comnstituted a signature. hgan express decleration of trust must be evidenced in writing and signed. It was held that the email constituted evidence in writing and the subscriber with the names of the parties constituted signature.

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. Purchase 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 or, 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.

Gifted deposits

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 (customer due diligence) 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 court 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.

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.

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.

Independent Advice and Consent to Mortgage 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] EWHC 1076***, 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.

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, 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 and must be registered as a notice: ***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 interests on first registrations do not become overriding until registration occurs**.** See also ***Equity and Law Home Loans v Prestidge [1992] 1WLR 137*** 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.

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. The solicitor should also contact a client who does not return with information when they stated that they would. The solicitor should also successfully close the file.

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. His partner duly severed the beneficial joint tenancy. B would have won the case but his claim was statute barred. Make clear to beneficial joint tenants that the joint tenancy may be severed by any beneficiary.

Published January 2022

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