

Cohabiting couples – sole legal owner

This factsheet looks at the situation of cohabiting couples whose relationship has broken down, where one of the cohabitants owns the property and the other does not. It gives information about rights to occupy the home under family and housing law. It looks at protecting those rights in the short and long term, and covers financial issues and considerations.

The factsheet refers to all couples, whether heterosexual, lesbian or gay, unless stated otherwise. For most purposes, lesbian or gay couples that have become civil partners are treated in the same way as married heterosexual couples, and their position is dealt with in Relationship breakdown: 1. For more information about relationship breakdown and domestic violence, see Relationship breakdown: 9.

The law on relationship breakdown

For cohabiting couples experiencing a relationship breakdown where one is a sole owner, the relevant law is a combination of family law and property law. The different ways in which this legislation works is explained below.

Family law

The Family Law Act 1996 gives some cohabitants the right to apply for an **occupation order** of the family home. It also allows the court to order a temporary transfer of liabilities in respect of a family home owned solely by one of the partners. For cohabitants with children, the Children Act 1989 may also allow one partner to apply for a transfer of ownership in the interests of the child.

Property law

Property law explains the legal position of sole owners and non-owning cohabitants in relation to their interest in the home. Using property law principles, courts can establish what interests are held in the home, but they cannot transfer or redistribute those interests. Of particular relevance to relationship breakdown is the Trusts of Land and Appointment of Trustees Act 1996. Where family law applies, it can override property law rights.

What is sole ownership?

Sole ownership means that one person only is the legal owner of the property, even though other people may be living there or may have contributed to the purchase price. In this factsheet, 'non-owning cohabitant' is used for the cohabiting partner who is not the owner of the family home.

Historically, the legal owner of the property is shown on the title deeds, but this is now only true of 'unregistered land'. If this is the case, the title deeds will normally be held by the lender (if there is a loan on the property), by the solicitor involved in the conveyance, or by the owner her/himself. Most residential property is now registered, and information about ownership is included in the proprietorship register held at the Land Registry. A copy of this can be obtained from the Land Registry for a small fee (see Useful organisations, page 24).

Ownership of a property may be freehold or leasehold. Freehold ownership is unlimited in time, while leasehold properties are let on a long lease that is for a fixed term. For more information about home ownership, see the factsheets in the Home ownership section. This factsheet applies equally to freehold and leasehold property, but it does not apply to short-term leases or tenancies (for example for one or two years, or weekly or monthly, which are discussed in Relationship breakdown: 5 and 7).

Rights to occupy the home

Where a couple are cohabiting and the property is in one name only, the non-owning cohabitant will, in many cases, not have an automatic right to occupy. The non-owning cohabitant usually has the status of a bare licensee, ie s/he is only entitled to remain in the family home as long as the cohabiting owner gives permission. If the owner wants the partner to leave, all that is legally required is 'reasonable notice'. Once the notice expires, the non-owning cohabitant becomes a trespasser.

A non-owning cohabitant, however, may be able to show that s/he has a right to remain in one of the following situations. A non-owning cohabitant may be able to show that s/he has:

- a beneficial interest
- a contractual or irrevocable licence
- rights by estoppel.

Beneficial interest

If a non-owning cohabitant can show that s/he has a 'beneficial interest' in the family home, s/he may have a right to occupy the home and/or a right to a share in the value of the property. Establishing a beneficial interest may also give the non-owning cohabitant a defence to any action taken by the owner to evict her/him and give her/him rights that s/he would not otherwise have in regard to occupation orders (see Eligibility to apply for occupation orders where there is a sole owner on page 7) and long-term rights to the home. The courts will need to look in detail at the facts of each case in order to establish whether a beneficial interest exists and, if so, what will be the result on each party's interest in the property. The law in this area is extremely complex and the information below should only be used as a general guide.

Definition of beneficial interest

A beneficial interest is an interest in land that gives a person a financial share in a property and/or a right to occupy a property. There are three different ways in which a beneficial interest can arise:

- an express declaration of interests
- a resulting or implied trust
- a constructive trust.

If there is no express declaration of interests, or if it is not possible for the couple to come to an agreement about the non-owning cohabitant's interest at the time of the relationship breakdown, then the non-owning cohabitant can apply to the court for a declaration of the nature of the trust between them.

Express declaration of interests

The sole owner and the non-owning cohabitant may have made an express declaration of how they intended to share the property, by signing a trust deed or a written agreement. For example, if the sole owner put up the money for the deposit and made all the mortgage payments but signed a trust deed stating that the non-owning cohabitant would have a one third share in the property, this would always be enforced by the courts, as long as there is no evidence of fraud or mistake.¹

Resulting or implied trust

A resulting or implied trust occurs where the court holds that the actions of the parties resulted in a trust arising between them. The resulting or implied trust may be established if:

- the person claiming the beneficial interest has made financial contributions to the purchase of the property, and

- there was a common intention that s/he was to have an interest in the property.

For example, if a couple purchased a house in one partner's name with the other partner contributing a lump sum towards the purchase price, the court would be likely to conclude that there was a resulting or implied trust. Where money has been paid, the resulting or implied trust will be presumed to be in proportion to the contributions made unless there is evidence of any intention to the contrary, eg that the property was intended to be shared equally or the money was intended as a loan or a gift.

Constructive trust

A constructive trust occurs where the court holds that the behaviour of the parties is such that the court will regard one party as a trustee for another. The most important form of constructive trust for cohabitants is the so-called 'common intention trust'. Case law² has established that three things are normally necessary to establish such a constructive trust:

- there must have been a common intention that the non-owner would gain a beneficial interest in the property
- there must be evidence of express discussions giving rise to the common intention
- the non-owner must have acted to her/his detriment by relying on the intention that they would both have a beneficial interest.

For example, if, after discussions with her partner and reassurances from him that he would always look after her, a woman gave up a secure tenancy and her job in order to live in his house and care for his children from a previous relationship so that he could start a new business, and she paid the bills while money was tight, this could be found to be a constructive trust. This means that even if the non-owning cohabitant has not contributed in financial or equivalent terms to the purchase, s/he may still be able to establish a beneficial interest.

Establishing a beneficial interest

In many cases, it will not be possible to establish beyond doubt whether a beneficial interest exists, and there may be disagreement between the couple as to what actually happened and what their intentions actually were. In this situation, it will be necessary to apply to the court for a declaration. The court will make a decision on the facts of the case. However, a court may be reluctant to find that a beneficial interest exists, so it will always be necessary to get the opinion of a practitioner experienced in property law.

If a non-owning cohabitant wants to try to establish a beneficial interest, then s/he should start proceedings in the county court or the High Court under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. Heterosexual couples who have been engaged in the last three years can also use section 17 of the Married Women's Property Act 1882, and lesbian and gay couples who have had a civil partnership agreement in the last three years can use section 74 of the Civil Partnership Act 2004.

Quantifying financial shares

If the non-owning cohabitant has successfully established a beneficial interest, then each party's share in the property can be quantified in relation to the value of the property. The value of the respective shares should be decided when the property is sold or when one party buys out the other, not when the couple cease to live together.³ If one party has stayed in the property and has spent money that has improved its value, this may be taken into account.

The court will look at any express declaration about the shares in the property or, in the absence of such a declaration, may look for evidence of a common intention regarding the shares.

Contractual or irrevocable licences

It may be possible for the non-owning cohabitant to argue that s/he has a contractual or irrevocable licence. A contractual or irrevocable licence may arise if it can be shown that there is a form of contract or agreement between the parties, for example where one partner gives up her/his home to move into a house which her/his partner had bought to look after their children on the understanding that s/he could live there while the children were of school age, or unless some other situation arose which made it unreasonable for her/him to stay.⁴ If a contractual or irrevocable licence is established, then the non-owning cohabitant can stay until the particular event agreed upon occurs. It should be noted that contractual or irrevocable licences are very difficult to establish, and the distinction between the circumstances giving rise to these licences and a beneficial interest is not always clear.

Rights by estoppel

The non-owning cohabitant may be able to argue that s/he has rights to remain by estoppel. For an estoppel to arise, two criteria must be fulfilled:

- the claimant must have been misled by the owner into believing that s/he would acquire a beneficial interest in the property, and
- s/he must have acted to her/his detriment in reliance on that belief.

An example of this might be if the non-owning cohabitant has acted to her/his detriment to live with the owner of the family home, for example by giving up a job or a home.⁵

If the non-owning cohabitant can establish that s/he has rights by estoppel, the courts may decide on the appropriate remedy, for example by granting her/him a licence, a tenancy or a financial share in the property.

Resolving occupation disputes

In some cases, it may not be possible for the couple to live together, or one partner might refuse to allow the other to occupy the property. If the couple cannot agree what to do with the property, they will have to apply to the court to resolve the situation. In the short term, the court can make an **occupation order** under the Family Law Act 1996 setting out, for example, who can live at the property or ordering one of the cohabitants to leave.⁶ In the long term, couples with children may apply to the court for a transfer of ownership under the Children Act 1989 (see Children Act transfers on page 22) or for an order declaring their interests or ordering a sale of the property (see below).

Occupation orders under the Family Law Act 1996

Occupation orders are orders made by the courts to enforce, declare or restrict rights to occupy the home. They are only a short-term solution and will not affect what happens to the property in the final settlement. Occupation orders can be granted under a number of different sections of the Act. The main differences between the orders are:

- who can apply for them
- the criteria the court must use
- the length of time they may last.

Under each section of the Act, the court may make:

- a **declaratory order**, ie an order that declares, extends or grants the right to occupy, or
- a **regulatory order**, ie an order that controls or restricts existing rights to occupy all or part of the home, or
- both types or order.

Declaratory orders

Either cohabitant may apply to the court for a declaratory order, for example if they both wish to stay in the property but one partner is arguing that the other partner has got to leave. Declaratory orders⁷ declare, extend or grant occupation rights. They are used:

- to declare that the applicant is entitled to occupy
- to enforce the applicant's right of occupation
- to allow re-entry to the home if excluded.

Regulatory orders

Either cohabitant may apply for a regulatory order, for example if it is necessary to stop the other partner from entering the home. Regulatory orders⁸ control or restrict existing rights (they were previously referred to as ouster or exclusion orders). They may be used:

- to regulate the occupation of the dwelling by either or both of the parties
- to exclude the other partner from all or part of the home
- to prohibit, suspend or restrict the other person's rights to occupy (the court has no power to completely terminate these rights, only to suspend them)
- to exclude the other party from a defined area around the home, for example the particular estate or the cul-de-sac where the property is situated.

Occupation orders do not affect long-term rights of occupation, but grant the equivalent of long-term rights for as long as the order is in force. This includes the right to pay the mortgage and the right to intervene in possession proceedings.

Eligibility to apply for occupation orders where there is a sole owner

Occupation orders are available to cohabiting sole owners and to non-owners who have a beneficial interest or other rights to occupy (entitled applicants). They are also available to cohabitants with no right to occupy (non-entitled applicants). Prior to the Civil Partnership Act 2004, lesbians or gay men who were non-owning cohabitants could not apply for an occupation order because they did not come within the definition of 'cohabitants' under the Family Law Act 1996, but the definition of cohabitants is now 'two persons who are neither married to each other nor civil partners of each other but are living together as husband and wife or as if they were civil partners'.⁹ See Relationship breakdown: 1 for more information about the different types of applicants. There are different occupation orders depending on the situation.

Sole owners are always able to apply for occupation orders because of their ownership of the property (they are 'entitled' applicants). The orders can be applied for against anyone who is 'associated' with them according to the Act. This includes cohabitants and former cohabitants and anyone who has lived with them. The full list of 'associated persons' is included in Relationship breakdown: 1.

For non-owning cohabitants, eligibility to apply for occupation orders will depend on the nature of their relationship with the owner of the property and whether or not the non-owning cohabitant has established a beneficial interest. Cohabitants and former cohabitants can always apply for an order, but the type of order will depend on whether they have an established beneficial interest. Cohabitants and former cohabitants with an established beneficial interest will apply for the same type of order as an owner would (ie they will be 'entitled' applicants). Where the beneficial interest is not finally established or there is no beneficial interest, they can apply for other types of orders as 'non-entitled' applicants.

Occupation orders where the applicant is the sole owner cohabitant or a non-owning cohabitant with an established beneficial interest

These occupation orders are available for sole owner cohabitants or non-owning cohabitants who have established a beneficial interest.

Where the sole owner cohabitant wishes to stay in the family home, s/he can apply for an occupation order as an entitled applicant.¹⁰ As the sole owner has rights to occupy under property law and the cohabiting partner will usually be a bare licensee, in practice s/he would not need to apply unless there is a dispute about rights (declaratory order) or the non-owning cohabitant refuses to leave the property (regulatory order). There may be a dispute in situations where the non-owning cohabitant has an established beneficial interest, in which case s/he can also apply as an entitled applicant.¹¹

Duration of orders

At the court's discretion, occupation orders can last:

- indefinitely, or
- for a certain length of time, or
- until a specific event occurs.¹²

Declaratory provisions

If an order is made, it may contain the following declaratory provisions:

- to declare that the applicant is entitled to occupy¹³
- to enforce the applicant's right of occupation¹⁴
- to allow the applicant to enter the home if s/he is excluded.¹⁵

Regulatory provisions

In addition, the court may attach further regulatory provisions:

- to regulate the occupation of the dwelling by either or both of the parties¹⁶
- to exclude the other partner from all or part of the home¹⁷

- to prohibit, suspend or restrict the other person's rights to occupy (the court has no power to completely terminate these rights, only to suspend them)¹⁸
- to exclude the other party from a defined area around the home, for example the particular estate or the cul-de-sac where the property is situated.¹⁹

Other provisions the court can attach

When the court makes an occupation order, it may include certain provisions in addition to declaring/regulating who can live in the home and/or who is excluded from it. It can:

- impose obligations on either partner to repair or maintain the home or to take responsibility for the mortgage and other outgoings. This could temporarily end the sole owner's liability for the mortgage, and order that the non-owner take on that liability.²⁰ The liability ceases when the occupation order ends.²¹
- oblige the partner who remains in occupation to make payments to the other partner who has been excluded from all or part of the home.²² This is sometimes known as an occupation rent, and is intended as a compensation for the loss of the right to occupy.
- make orders regarding other outgoings and who should carry out repairs and maintenance.²³
- make orders granting use of furniture and contents, and orders to take reasonable care of furniture, contents and the home generally.²⁴

These provisions end when the occupation order ends.²⁵

Circumstances in which an occupation order can be granted

The court has the power to grant an order where it considers it just and reasonable to do so, but it must consider specific criteria when reaching its decision. It must have regard to all the circumstances of the case, including:

- the housing needs and housing resources of each of the parties and any relevant child. Housing resources are likely to include whether either party would qualify for rehousing under homelessness or allocations legislation (see the factsheets in the Accessing accommodation and Homelessness sections). A 'relevant child' is defined as a child who lives with or could be expected to live with either party, a child subject to an order under the Adoption Act 1976 or the Children Act 1989 that is in question in the occupation order proceedings, or any other child whose interests the court considers to be relevant.
- the financial resources of each party
- the likely effect of any order or the effect of not making an order, on the health, safety or wellbeing of the parties and of any relevant child
- the conduct of the parties.²⁶

Occupation orders can, therefore, deal with occupation of the home in both violent and non-violent relationship breakdown situations.

In addition to the criteria above, the court must also consider the likelihood of 'significant harm' to any of the parties concerned and the 'balance of harm'.

Balance of harm test

This means that the court must consider the likelihood of significant harm to either party and any relevant child if an order is made, balanced against the likelihood of significant harm if an order is not made. The test is applied in the following way:

- the court considers whether there is significant harm to the applicant or any relevant child. If there is it **must** make an order, **unless**
 - the other party or any relevant child is likely to suffer significant harm if the order is made, **and**
 - the harm in that case is as great or greater than the harm likely to be suffered by the applicant or any relevant child (as a result of the other party's behaviour) if the order is not made.²⁷

If the court does not consider that significant harm is likely, it is not obliged to make an order, but can do so if it sees fit.

The Act defines 'harm' as ill-treatment or impairment of health, and, for children under 18, also the impairment of development. Ill-treatment includes non-physical forms. Health includes physical or mental health and, in relation to a child, child abuse. Development means physical, intellectual, emotional, social or behavioural development. A child's health or development should be compared with the health and development that 'could reasonably be expected of a similar child'.²⁸

Occupation orders where the applicant is a non-owning cohabitant or former cohabitant

Where the other cohabitant or former cohabitant is the sole owner, the non-owning cohabitant or former cohabitant who does not have a beneficial interest may apply for an occupation order as a non-entitled applicant.²⁹ Orders may only be made in respect of a property that the applicant and the former cohabitant live(d) together in or intended to live together in.³⁰ Non-owning cohabitants and former cohabitants without a beneficial interest do not have a right to occupy unless they are successful in obtaining an occupation order. A non-owning cohabitant can also apply for an occupation order as a non-entitled applicant where a beneficial interest probably exists but has not yet been established. This will not prevent her/him from applying subsequently for an occupation order as an entitled applicant with an established beneficial interest,³¹ and this may be appropriate where a longer term order is sought.

Duration of orders

Orders can be made for a maximum of six months initially, and the court may extend the order once only for a period of not more than six months.³²

Declaratory provisions

If an order is made, it **must** contain one of the following declaratory provisions:

- that the applicant has the right not to be evicted or excluded from the home or any part of it for the duration of the order, and the other cohabitant or former cohabitant is prohibited from evicting or excluding the applicant,³³ or
- if the applicant is not in occupation, the right to enter and remain in occupation for the duration of the order and requiring the other cohabitant or former cohabitant to allow this.³⁴

Regulatory provisions

In addition, the court may attach further regulatory provisions:

- to regulate the occupation of the dwelling by either or both of the parties³⁵
- to exclude the other partner from all or part of the home³⁶
- to prohibit, suspend or restrict the other person's rights to occupy (the court has no power to completely terminate these rights, only to suspend them)³⁷
- to exclude the other party from a defined area around the home, for example the particular estate or the cul-de-sac where the property is situated.³⁸

Other provisions the court can attach

When the court makes an occupation order, it may include certain provisions in addition to declaring/regulating who can live in the home and/or who is excluded from it. It can:

- impose obligations on either cohabitant to repair or maintain the home or to take responsibility for the mortgage and other outgoings. This could temporarily end the sole owner's liability for rent and order that the non-owner cohabitant or former cohabitant take on that liability.³⁹ The liability ceases when the occupation order ends.⁴⁰
- oblige the cohabitant or former cohabitant who remains in occupation to make payments to the other partner who has been excluded from all or part of the home.⁴¹ This is sometimes known as an occupation rent and is intended as a compensation for the loss of the right to occupy.⁴²
- make orders granting use of furniture and contents, and orders to take reasonable care of furniture, contents and the home generally.⁴³

Circumstances in which an occupation order can be granted

The court has the power to grant an order where it considers it just and reasonable to do so, but it must consider specific criteria when reaching its decision. It must have regard to all the circumstances of the case, including:

- the housing needs and housing resources of each of the parties and any relevant child. Housing resources are likely to include whether either party would qualify for rehousing under homelessness or allocations legislation (see the factsheets in the Accessing accommodation and Homelessness sections). A 'relevant child' is defined as a child who lives with or could be expected to live with either party, a child subject to an order under the Adoption Act 1976 or the Children Act 1989 that is in question in the occupation order proceedings, or any other child whose interests the court considers to be relevant.
- the financial resources of each party
- the likely effect of any order, or the effect of not making an order, on the health, safety or wellbeing of the parties and of any relevant child
- the conduct of the parties.⁴⁴

When deciding whether to make a **declaratory order**, the court must also consider:

- the nature of the parties' relationship (the court must have regard to the fact that the couple had not demonstrated the commitment involved in marriage)⁴⁵
- the length of time during which they lived together as husband and wife
- whether there are any children of both parties or for whom both parties have parental responsibility
- the length of time since the parties ceased to live together
- any other proceedings pending under the Children Act or relating to beneficial interests.⁴⁶

For **regulatory orders**, the court must consider the matter separately and consider only the first four matters listed above (all the circumstances including housing needs and resources, financial resources, the likely effect of an order on the health, safety or wellbeing of all parties and the conduct of the parties).⁴⁷ The court must also look at the balance of harm. This means that it must consider the likelihood of significant harm to either party and any relevant child if an order is made, balanced against the likelihood of significant harm if an order is not made.⁴⁸

Preventing sale or disposal of the home by the sole owner

In most cases, a sole owner can dispose of her/his property however s/he wishes. If the non-owning cohabitant has no beneficial interest in the property, the action s/he can take to prevent a sale of the property is limited to cases where the property is the subject of legal proceedings. It may then be possible for the non-owning cohabitant to obtain an injunction to prevent a sale or disposal before a court hearing to decide who gets the property. The most common example of this

is where the non-owning cohabitant has applied for a property transfer under the Children Act (see Solutions involving the courts on page 20).

Where a non-owning cohabitant has a beneficial interest in the property, s/he has more chance of preventing any sale or disposal by the sole owner. In some cases, s/he will not need to take any action to prevent disposal of the property. In other cases, the non-owning cohabitant will need to take specific action to prevent the sole owner disposing of the property, for example where a non-owning cohabitant has established that s/he has a beneficial interest in the home or is in the process of establishing a beneficial interest or taking any other legal proceedings, for example under the Children Act. The specific action that needs to be taken will depend on each individual situation. In most situations, it will be advisable for the non-owning cohabitant to take positive steps to protect her/his beneficial interest where this is an option.

Cases where no action necessary to protect the non-owning cohabitant's beneficial interest

In some situations, the non-owning cohabitant will not need to take any action to prevent the owner disposing of the home without her/his knowledge.

Registered land

Where the land is registered (see What is sole ownership? on page 2), there is one situation where the non-owning cohabitant does not need to take any action to prevent the sole owner from selling or disposing of the property: this is where the non-owning cohabitant has an 'overriding interest' in the property. It does not apply to unregistered land.

Overriding interest

If the non-owning cohabitant has not protected her/his interest by registering a notice or restriction (see Registration, page 16), but is actually occupying the property, s/he may be able to establish an overriding interest.⁴⁹ The effect of this would be for her/his interest to be binding on any buyer or lender, whether or not they knew about the interest, unless enquiries had been made of the person claiming an interest and s/he failed to disclose it when s/he could reasonably have been expected to do so, or unless that person's occupation was not obvious on reasonably careful inspection and was not known to the buyer.⁵⁰

To establish an overriding interest, the non-owning cohabitant must prove that:

- s/he has a relevant interest in the property, for example a beneficial interest or a tenancy. A personal right to occupy (ie a bare licence) is not sufficient.
- s/he was actually occupying the property at the time the buyer or lender registered her/his/its title to the property

- the exceptions relating to enquiries in the previous paragraph do not apply.

If an overriding interest is established, it may mean that a non-owning cohabitant may be able to retain the right to occupy against, for example, a lender calling in a second charge taken out by the sole owner.⁵¹ The overriding interest only extends to the part of the land in actual occupation, which may be significant where the property is large or subdivided. If, however, a mortgage or loan was already in place before the non-owning cohabitant acquired a beneficial interest, her/his interests would not be protected. It is, however, now normal practice for lenders to make extensive enquiries of anyone living in the property, and to ask anyone living in the property at the time any loan is agreed to sign a document giving the lender's rights precedence over her/his own. This is often called a 'waiver'. If such a statement is signed, this would mean that although any financial interest could be claimed against the owner, the non-owning cohabitant would not be able to prevent the lender from repossessing the property.

Unregistered land

There is no register of ownership for unregistered land. Proof of ownership is found in the title deeds or an 'abstract of title', which is a summary of the most recent changes of ownership. Where there is a mortgage, the title deeds are usually held by the lender; where there is no mortgage, they could be held by the owner, by a solicitor or be lodged with a bank. To find out whether or not land is registered, it is necessary to complete a form and send it to the Land Registry, or to search online. Charges on unregistered land are found in the Land Charges Register, which is held at the Land Charges Department (see Useful organisations, page 24).

Beneficial interests in unregistered land can be registered as cautions against first registration (see Caution against first registration, page 18). If not protected by such a caution, the non-owning cohabitant's beneficial interest will be lost if the property is sold or a loan is secured against it. It will only survive in the following circumstances:

- if a transfer of property occurs where no money changes hands
- if the lender or buyer had 'notice' of the beneficial interest when the transaction took place.

Transfer for no money

All existing interests, including rights of occupation, will survive if a property is transferred without 'valuable consideration', ie without a reasonable amount of money or money's worth. For example, if the sole owner gave away the property to a relative while the non-owning cohabitant was still in occupation, the non-owning cohabitant could not be evicted. The courts have found that a nominal

payment that is clearly not representative of the property's value is not sufficient to avoid this effect,⁵² although a transfer at a substantially reduced price could qualify.

'Notice' of beneficial interest

A buyer or lender is only bound to honour beneficial interests of which s/he/it had notice. Where notice has been given to the buyer/lender, for example by the non-owning cohabitant informing a lender of her/his interest when a loan is taken out on the property, this is known as 'actual notice'. If notice is construed from events, it is known as 'constructive notice' and is the area where problems arise. A buyer or lender can be said to have had 'constructive notice' of a non-owning cohabitant's interest if it can be shown that the buyer or lender would have discovered the interest if s/he/it had inspected the title deeds and the land itself, making reasonable enquiries and inspections.⁵³ In effect, the law deems that notice has been given if the buyer or lender ought to have known about the non-owning cohabitant's interest in the property.

In order to avoid this, lenders usually ask a question about who else is living in the property on the form that has to be completed by the borrower. Where there is a non-owning cohabitant living in the property, the lender would normally ask her/him to sign a statement that the lender's rights will take precedence. This is often called a 'waiver'. If such a statement is signed, this would mean that although any financial interest could be claimed against the owner, the non-owning cohabitant would not be able to prevent the lender from repossessing the property. If the owner does not declare the non-owning cohabitant, the non-owning cohabitant may still be able to claim there was constructive notice if s/he can show that the lender should have known that s/he was occupying the property, for example if s/he had been present at the original interviews for the mortgage.

Cases where action is necessary to protect the non-owning cohabitant's beneficial interest

In some situations, the non-owning cohabitant will need to take some kind of action to prevent the owner disposing of the home without her/his knowledge. The action will be different depending whether the land is registered or unregistered.

Registered land

Most land is registered at the Land Registry. If the land is registered, this means that the Land Registry holds conclusive proof of ownership and any charges registered on the property. To find out whether or not land is registered it is necessary to complete a form and send it to the District Land Registry (see Useful

organisations, page 24). A non-owning cohabitant may be able to prevent the sale or disposal of property on registered land in the following circumstances:

- where s/he registers a beneficial interest at the Land Registry
- where s/he is taking legal proceedings concerning the property.

Registration

A beneficial interest can be protected by a notice or restriction entered on the land register. A **notice** records a claimed property interest on the register.⁵⁴ Its purpose is to give notice of the interest to someone viewing the register and to give the holder of the notice priority against other transactions relating to the property.

There are two kinds of notice:

- An **agreed notice** is either agreed by the registered proprietor of the land or accepted by the Land Registry, having been satisfied by the validity of the notice. While the notice is not binding proof of the validity of the interest protected, it shows that the notice has been approved by the owner or the Land Registry.
- A **unilateral notice** is made on the application of the person making the interest only, without evidence. S/he has only to satisfy the Land Registry that the claim is one that can be protected by a notice.

A **restriction** is an entry in the land register that prevents or regulates the making of a subsequent entry in the register.⁵⁵ It may be indefinite or for a specified period, and absolute or conditional (for example, on a consent). There are three kinds of application:

- Applications made with the consent of the registered proprietor, typically as part of the conveyancing process;
- Compulsory applications. These are of a type that the Land Registry have to register;
- Other applications. The applicant must prove that s/he has a sufficient interest in the making of a restriction. Unless there is a court order requiring the restriction to be entered, the Land Registry will notify the registered proprietor, who will then have the opportunity to dispute the making of the restriction.

A notice or a restriction may protect an overriding interest, but if the notice or restriction is later withdrawn or cancelled, the overriding protection will be lost, so advisers should not necessarily advise clients to seek the extra protection.

The most common interests affecting cohabitants, and the protection that can be sought, are as follows:

- An interest under an **implied or resulting trust** or a **constructive trust** may only be protected by a restriction.

- An interest arising by **proprietary estoppel** can be protected by a notice, usually unilateral.
- A **freezing order** is protected by a restriction.
- A pending land action, that is a **court case about property** or the beneficial interest in property, can be protected by a notice, which may be agreed or unilateral, or by a restriction.

For more information on registration procedures and options, see the Land Registry's Practice Guide 19, available online.

Taking legal proceedings

There may be situations where a non-owning cohabitant is taking legal proceedings in relation to the solely owned property. This might be, for example, an application for a property transfer under the Children Act (see Solutions involving the courts on page 20) or an application to the court to enforce the terms of a trust under the Trusts of Land and Appointment of Trustees Act. In this case, s/he should make an application to the Land Registry declaring her/his interest in the property (see above). This then serves to warn any prospective purchaser of the interest. An application is made on payment of a small fee on a form available from the Land Registry.

Unregistered land

Where the land is unregistered, the non-owning cohabitant may be able to retain her/his interest in the following circumstances:

- by recording the beneficial interest on the title deeds of the property
- where s/he is taking legal proceedings in relation to the property
- by entering a caution against first registration.

Recording on title deeds

A beneficial interest can also be retained by it being recorded on the title deeds if the owner agrees, although this is not likely in most relationship breakdown situations. If the interest has been recorded, this means that the beneficial interest would survive against any loan subsequently taken out on the property or disposal by the owner.

Taking legal proceedings

There may be situations where a non-owning cohabitant is taking legal proceedings in relation to the solely owned property. This might be, for example, an application for a property transfer under the Children Act (see Solutions involving the courts on page 20) or an application for a declaration of beneficial interest under the Trusts of Land and Appointment of Trustees Act.

Where court action has been started but not yet resolved, the non-owning cohabitant can, if s/he wishes, register the proceedings as a pending land action.⁵⁶ This has the effect of giving notice to any buyer or lender of the rights of the non-owning cohabitant, and the buyer or lender will normally make sure that the action is discharged before completing any transaction. A pending land action can be registered for a small fee on a form obtainable from the Land Charges Department (see Useful organisations on page 24).

It may also be possible to obtain an injunction to prevent anything happening to the home pending the outcome of proceedings. Whether or not the court would grant an injunction to enable a non-owning cohabitant to continue to occupy the home would depend on the circumstances of the case.⁵⁷

Caution against first registration

A beneficial interest in unregistered land may be protected by a caution against first registration. Most transactions for value are now subject to compulsory registration, which means that, in order to complete the transaction, the buyer or lender must register her/his/its interest. Where a caution against first registration has been entered, the cautioner will have the opportunity to object. Provided that the cautioner is able to establish her/his interest in the land, the transaction will not be registered, or will be registered subject to that interest. Any prudent buyer or lender will have carried out a search of the register before parting with any money, and would be unlikely to proceed unless and until the property interests had been resolved. A caution against first registration should almost always be considered when protecting unregistered land. For more information on cautions against first registration, see the Land Registry's Practice Guide 3, available online.

Action after a sale or disposal by the sole owner

For both registered and unregistered land, if the sole owner has taken action to sell or dispose of the home, it may be possible, in extremely limited circumstances, for the non-owning cohabitant to:

- get the transaction set aside on the grounds that it was affected by the 'undue influence' of one party upon the other or by material misrepresentation
- preserve her/his occupation rights by proving that the transaction took place for no money or the buyer/lender had notice of her/his interest
- realise a beneficial interest in financial terms under the concept of 'overreaching'.

Undue influence or material misrepresentation

Where a transaction can be shown to have been affected by the 'undue influence' of one party on the other, or by material misrepresentation, it may be possible to get the transaction set aside. To show undue influence or misrepresentation, it is necessary to establish that one partner has exploited the emotional involvement and trust of the other, or that one party misrepresented information to the other, for example about the amount of a loan or the purpose for which the loan was required. It will also need to be shown that the third party was, or ought to have been aware, of the likelihood of undue influence.

Some success has been had in cases involving banks, for example, where a loan is being taken out solely for one partner's benefit, such as for a business.⁵⁸ If the lender is aware of the possibility of undue influence or misrepresentation to a cohabitant then, in order to make sure that any charge is enforceable, it would need to take reasonable steps to protect the cohabitant, to avoid being fixed with notice of the wrong, for example, by making sure that the person who may be affected has independent advice. The area of undue influence is a complex one that is subject to developing case law, and it should be stressed that the courts are often very reluctant to make a finding of undue influence. It will always be necessary to seek expert opinion before pursuing this option.

Transfer for no money/buyer or lender had notice of the interest

It is possible for a beneficial interest to survive where the transfer of the property takes place for no money, or the buyer or lender had, or ought to have had, notice of the beneficial interest (see the section on Unregistered land on page 17).

In either case, the practical result for the non-owning cohabitant is that her/his rights, ie to occupy the property or in financial terms, will take precedence over those of the new owner or lender. This could mean that the non-owning cohabitant is allowed to remain in occupation, although the former cohabitant no longer owns the property, and the new owner is not able to occupy. The non-owning cohabitant's financial interest could also be registered as a charge on the property, and will take precedence over any other charges. If the non-owning cohabitant remains in occupation, s/he may have to pay an 'occupation rent' to the new owner or lender.

Overreaching

Overreaching means that a buyer buys land free of any beneficial interests, provided the money is paid to two trustees. Where there is a sole owner and a non-owning cohabitant with a beneficial interest, in theory the buyer should pay the purchase price to two trustees in order to take over the property free of the

beneficial interest. In practice, the buyer may not know of the beneficial interest and is likely to pay the money to the sole owner, rather than two trustees. In this case, there will have been no overreaching, and whether or not the non-owning cohabitant's beneficial interest is protected will depend on whether the buyer had notice of it (see Notice of beneficial interest on page 15). In contrast, where overreaching has occurred (ie payment was to two trustees), the non-owning cohabitant will have no rights to remain in the property, but can get her/his money back by pursuing the trustees.

Staying in the home long term

Once it is clear that the relationship is definitely over, the parties will usually want to settle things finally. There are a number of long-term solutions that may or may not involve applications to the court.

Solutions not involving the courts

It may be possible for the sole owner and the non-owning cohabitant to come to an agreement about long-term rights to the home without involving the courts, although the non-owning cohabitant is not in a very strong position unless s/he has a beneficial interest or there are children. The obvious advantage of reaching an agreement rather than using the courts is that it is likely to be quicker, cheaper and offer more flexibility.

Agreements

When there is a relationship breakdown, cohabiting couples can make any type of agreement concerning what will happen to their home. For sole owners and non-owning cohabitants, this is most likely to be the case where the non-owning cohabitant has a beneficial interest.

Existing agreements (trusts)

It may be the case that the couple made an agreement clarifying their intentions in the event of a relationship breakdown when they began their relationship or bought their home. This would normally be in the form of a written, signed declaration or statement or a formal trust deed prepared by a solicitor. It is possible for there to be a verbal agreement, although this will obviously be harder to prove in the event of a dispute. Examples of agreements might be for the property to be sold and the proceeds divided in specified shares, or for the non-owning cohabitant to be allowed to remain in the property with the children for a specified length of time.

If there is no such document, then it will be more difficult to claim long-term rights to the home. Nevertheless, it can be done if a beneficial interest can be established (see page 3 for more information about beneficial interest).

Solutions involving the courts

Where it is not possible for the couple to reach an agreement, or if it is not practical to seek one in the first place, for example if there is domestic violence or the owning partner has disappeared, then, nevertheless, the non-owning cohabitant may be able to claim long-term rights to the home if s/he has a beneficial interest or there are children. The non-owning cohabitant with a beneficial interest may apply for an order for sale to realise her/his financial share in the property, or for an order to prevent a sale under the Trusts of Land and Appointment of Trustees Act 1996. Cohabitants who have been engaged in the last three years can also use the Married Women's Property Act 1882, and there are similar provisions after a civil partnership agreement in the Civil Partnership Act 2004. For couples with children, the non-owning cohabitant may apply for a transfer of ownership in the interests of a child under the Children Act 1989.

Trusts of Land and Appointment of Trustees Act

Where there is a sole owner and a non-owning cohabitant with a beneficial interest, either party can make an application to the court for a declaration of interests and an order directing or preventing sale. The application is made in the county court or the High Court under section 14 of the Trusts of Land and Appointment of Trustees Act 1996.

The court's powers are broad and extend to ordering an immediate sale or postponing a sale. When deciding whether to make an order under the Trusts of Land and Appointment of Trustees Act 1996 the court must consider:

- the intentions of the person(s) who created the trust
- the purpose for which the property is held
- the welfare of any child under 18 who occupies the home or might reasonably be expected to do so
- the interests of any secured creditor, eg a lender.

The court must also consider whether the original purpose for which the home was bought still exists, for example, if it was to provide a family home for both the parents and the children for an indefinite period⁵⁹ Where the original trust still exists, the court will not make an order that defeats it. The court cannot adjust property rights, ie give a beneficial interest where one does not already exist or adjust the amount of the beneficial interest.

Married Women's Property Act

Cohabitants who have been engaged in the last three years can use the Married Women's Property Act 1882 to obtain an order concerning the home. This is a summary procedure (ie the judge may make whatever order s/he thinks fit in respect of disputed property), but the principles on which her/his decision is based

are still the principles of property law. There are similar provisions after a civil partnership agreement in the Civil Partnership Act 2004.

This procedure is usually quicker and can have significant advantages in terms of costs, as the Legal Aid board has the discretion to postpone recovery of the statutory charge on dwelling houses, and there is a £3,000 exemption from the statutory charge on any money or property recovered. This exemption does not apply where the Trusts of Land and Appointment of Trustees Act 1996 is used (see Courts and legal action: 4 for more information about legal aid and costs).

Children Act transfers

A cohabitant who is a parent or guardian of a child or children may apply for a transfer of property from the child's other parent. The court can order a property transfer to a child or to the parent caring for the child if it is for the benefit of that child (or children).⁶⁰ Property can also be settled for the benefit of the child, for example, the family home may be kept for one partner's use until the children are 18, when it could be sold. Given that children cannot legally own property, the order will presumably provide for transfer to a parent or guardian, or to trustees under a settlement.

The court must consider the following factors:

- income, earning capacity, property and other financial resources of both parties now and in the foreseeable future
- financial needs, obligations and responsibilities of both parties now and in the foreseeable future
- income, earning capacity, property and financial resources of the child
- any physical or mental disability of the child
- the manner in which the child was being, or was expected to be, educated or trained.⁶¹

As the transfer is meant to be solely for the child's benefit, the court must not consider matters that specifically relate to the parents' relationship, eg the length of their relationship or their age. As this is family law, rather than property law, the courts can change existing property rights or grant a right where one did not exist, ie they can adjust the amount or nature of each partner's beneficial interest.

Applications for a property transfer

Applications for property transfer orders may be made by a parent or guardian of a child, or by anyone in whose favour a residence order is in force with respect to a child, but only the natural biological parents of the child are subject to the orders.

Courts' use of powers to transfer owner-occupied property

This provision is still relatively little used, so that it is not yet clear how it is working in practice. As the property settlement is intended to be for the benefit of the child rather than the partner, it may be that the courts are unwilling to order outright transfers of valuable property from one parent to another if this results in a disproportionate benefit to one partner. The courts are more likely to make orders granting rights to occupy the home until a child reaches a certain age, after which the property may be sold.

Paying the mortgage

This section looks at the position regarding mortgage payments for cohabiting sole owners and non-owners.

The position of cohabiting sole owners and non-owning cohabitants in relation to mortgage payments can be summarised as follows:

- Where there is a mortgage in one person's name, s/he is liable for the mortgage payments, regardless of who is occupying the property.
- Where the person with the mortgage liability has left the home and stopped making mortgage payments, the other party may want to pay the mortgage so as to avoid possession proceedings being taken by the lender. The lender has no legal obligation to accept payments, but may do so anyway. In the short term, a cohabitant may be able to obtain an occupation order that will include the right to pay the mortgage loan but not the liability for it,⁶² unless the court makes provisions transferring liability temporarily.⁶³
- If the property has a sole owner but there is a mortgage in joint names, then both parties are jointly and independently liable for the mortgage payments, regardless of who is occupying the property. In a relationship breakdown situation, if one party leaves the property and stops contributing to the mortgage payments, the lender is entitled to require payments from the remaining party to cover the entire mortgage, and it is not possible to argue that s/he is only liable for a particular share. This is known as 'joint and several liability'.
- Where there is a joint mortgage, either party can make payments and either is entitled, if eligible, to claim Income Support or Jobseeker's Allowance towards the interest on the mortgage loan payments.⁶⁴ Where the property is a leasehold property, maintenance, service charges and ground rent can be included as housing costs that are eligible for benefit.⁶⁵
- Where the non-owning cohabitant is not liable for the mortgage, s/he may be entitled, if eligible, to claim Income Support or Jobseeker's Allowance towards the interest on the mortgage loan payments. The non-owning cohabitant could claim benefit if the owner is not making payments and s/he must make payments in order to continue to live in the home.⁶⁶ Where the property is a

leasehold property, maintenance, service charges and ground rent can be included as housing costs that are eligible for benefit.⁶⁷

- Where there is a joint mortgage and the partner who has left is claiming Income Support or Jobseeker's Allowance towards the interest on mortgage payments, benefit can be paid on two homes if s/he is treated as liable to make payments for both dwellings, is treated as occupying both dwellings as her/his home because s/he has left and remains absent through fear of violence, and it is reasonable that housing costs should be met on both the former and the present dwelling.⁶⁸ Payment can also be made for up to four weeks if the cohabitant has moved into a new home permanently and the liability for payments on two homes is unavoidable.⁶⁹

Useful organisations

HM Land Registry (Headquarters)

32 Lincoln's Inn Fields, London WC2A 3PH

Tel 020 7917 8888

www.landreg.gov.uk (National website from which a great deal of information and guidance can be obtained, including details of local Land Registries)

Land Registry Online

www.landregisteronline.gov.uk (for online searches etc)

Land Charges Department

Plumer House, Tailyour Road, Crownhill, Plymouth PL6 5HY

Tel 01752 636666

Further reading

Relationship breakdown and housing - a practical guide; Lesley Moroney; Shelter.

Cohabitants and the law; Anne Barlow; Tottel Publishing.

¹ Goodman v Gallant [1986] Fam 106.

² Lloyds Bank plc v Rosset [1991] 1AC 107 HL, Crossley v Crossley [2005] EWCA Civ 1581.

³ Bernard v Josephs [1982] 3 All ER 162.

⁴ Tanner v Tanner [1975] 1 WLR 1346.

⁵ Ungurian v Lesnoff [1990] 3 WLR 840.

⁶ ss.33-41 Family Law Act 1996, as amended by Sch.9 Civil Partnership Act 2004.

⁷ s.33(3)(a) and (b) and s.33(4); s.36(3)(a) and (b) and s.36(4) Family Law Act 1996.

⁸ s.33(3)(c),(d),(f) and (g); s.36(5) Family Law Act 1996.

⁹ s.62(1)(a) Family Law Act 1996, para 13, Sch.9 Civil Partnership Act 2004.

¹⁰ s.33(1) Family Law Act 1996.

¹¹ s.33(1) Family Law Act 1996.

¹² s.33(10) Family Law Act 1996.

¹³ s.33(4) Family Law Act 1996.

¹⁴ s.33(3)(a) Family Law Act 1996.

¹⁵ s.33(3)(b) Family Law Act 1996.

¹⁶ s.33(3)(c) Family Law Act 1996.

¹⁷ s.33(f) Family Law Act 1996.

¹⁸ s.33(3)(d) Family Law Act 1996.

¹⁹ s.33(3)(g) Family Law Act 1996.

²⁰ s.40(1)(a) Family Law Act 1996.

²¹ s.40(3) Family Law Act 1996.

²² s.40(1)(b) Family Law Act 1996.

²³ s.40(1)(a) Family Law Act 1996.

²⁴ s.40(1)(c)-(e) Family Law Act 1996.

²⁵ s.40(3) Family Law Act 1996.

²⁶ s.33(6) Family Law Act 1996.

²⁷ s.33(7) Family Law Act 1996.

²⁸ s.63(3) Family Law Act 1996.

²⁹ s.36(1) Family Law Act 1996.

³⁰ s.36(1)(c) Family Law Act 1996.

³¹ s.36(12) Family Law Act 1996.

³² s.36(10) Family Law Act 1996.

³³ s.36(3) Family Law Act 1996.

³⁴ s.36(4) Family Law Act 1996.

³⁵ s.36(5)(a) Family Law Act 1996.

³⁶ s.36(5)(c) Family Law Act 1996.

³⁷ s.36(5)(b) Family Law Act 1996.

³⁸ s.36(5)(d) Family Law Act 1996.

³⁹ s.40(1)(a) Family Law Act 1996.

⁴⁰ s.40(3) Family Law Act 1996.

⁴¹ s.40(1)(b) Family Law Act 1996.

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- ⁴² s.40(1)(b) Family Law Act 1996.
- ⁴³ s.40(1)(c)-(e) Family Law Act 1996.
- ⁴⁴ s.36(6)(a)-(d) Family Law Act 1996.
- ⁴⁵ s.41 Family Law Act 1996.
- ⁴⁶ s.36(6)(e)-(i) Family Law Act 1996.
- ⁴⁷ s.36(6)(a)-(d) Family Law Act 1996.
- ⁴⁸ s.36(8) Family Law Act 1996.
- ⁴⁹ ss.29-30 and para 2, Sch.3 Land Registration Act 2002.
- ⁵⁰ para 2(b) and (c), Sch.3 Land Registration Act 2002.
- ⁵¹ *William and Glyn's Bank v Boland* [1981] AC 487 HL.
- ⁵² *Peffer v Rigg* [1977] 1 WLR 285.
- ⁵³ s.199(1) Law of Property Act 1925.
- ⁵⁴ s.32(1) Land Registration Act 2002.
- ⁵⁵ s.40(1) Land Registration Act 2002.
- ⁵⁶ s.17(1) Land Charges Act 1972.
- ⁵⁷ s.38 County Courts Act 1984, s.37 Supreme Courts Act 1981.
- ⁵⁸ *Barclays Bank plc v O'Brien plc* (1993) 26 HLR 75 HL, 4 All ER 417; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 43.
- ⁵⁹ *Re Evers's Trust* [1980] 3 All ER 399.
- ⁶⁰ s.15 and Sch.1 Children Act 1989.
- ⁶¹ para 4 Sch.1 Children Act 1989.
- ⁶² s.36(13) Family Law Act 1996.
- ⁶³ s.40(1)(a)(ii) Family Law Act 1996.
- ⁶⁴ para 2(1)(a), Sch.3 The Income Support (General) Regulations 1987 (SI 1987 No.1967); para 2, Sch.2 Jobseeker's Allowance Regulations 1996 (SI 1996 No.207).
- ⁶⁵ para 17(1), Sch.3 The Income Support (General) Regulations 1987 (SI 1987 No.1967); para 16(1), Sch.2 Jobseeker's Allowance Regulations 1996 (SI 1996 No.207).
- ⁶⁶ para 2(1)(b), Sch.3 The Income Support (General) Regulations 1987 (SI 1987 No.1967); para 2(1)(b), Sch.2 Jobseeker's Allowance Regulations 1996 (SI 1996 No.207).
- ⁶⁷ para 17(1), Sch.3 The Income Support (General) Regulations 1987 (SI 1987 No.1967); para 16(1), Sch.2 Jobseeker's Allowance Regulations 1996 (SI 1996 No.207).
- ⁶⁸ para 3(6)(a), Sch.3 The Income Support (General) Regulations 1987 (SI 1987 No.1967); para 3(6)(a), Sch.2 Jobseeker's Allowance Regulations 1996 (SI 1996 No.207).
- ⁶⁹ para 3(6)(c), Sch.3 The Income Support (General) Regulations 1987 (SI 1987 No.1967); para 3(6)(c), Sch.2 Jobseeker's Allowance Regulations 1996 (SI 1996 No.207).