Cohabitees and The Problem of Unoverreached Beneficial Interests: Time for a Rethink?

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Let us begin with the following scenario. The freehold title to a house is registered in the sole name of V, who has provided the entirety of the purchase price. His female partner, G, who has lived in the house with V for the last 10 years, is entitled to a beneficial interest in the property as a result of spending her savings on making significant improvements to the property adding considerable value to it. Her interest arises by virtue of a common intention constructive trust.[1] V now wishes to sell the house to P (a purchaser). What options does P have which would allow him to take free of G's equitable interest? If G's interest is overreached, is it right that G should lose her interest in the house and instead acquire an interest in the proceeds of sale given she has been in occupation of the house as her home for the last 10 years and spent her own money on substantial improvements? In most cases, the sale will be able to go ahead without difficulty (V will have discussed the sale with G and both agreed to sell). However, where G contests the sale, the parties will invariably find themselves in a triangular cross-fire of interests with G wishing to remain in the property, V wanting to sell, and P anxious to buy. Similar issues will arise where the house is registered with leasehold title and V is seeking to assign his leasehold estate to P, and G has objected to the assignment.

The problem is also not necessarily limited to a sale of the freehold or leasehold estate in the property. Section 2(1)(ii) of the Law of Property Act 1925 provides that "a conveyance to a purchaser of a legal estate in land shall overreach any equitable interest . . . affecting that estate". The word "conveyance" is defined in s.205(1)(ii) of the 1925 Act as including a lease or mortgage, and s. 205(1)(xxi) defines "purchaser" as including a lessee or mortgagee. In our scenario, therefore, we can also envisage the situation where V, instead of selling the legal estate in the land, seeks to grant a lease of the house for valuable consideration (i.e., at a premium). Here again, G's interest may be overreached leaving her with no right of occupation during the term of the lease. Her interest would be effectively removed from the land and converted (presumably) into a proportionate share of the rental yield generated from the lease. For the sake of completeness, it is also possible to envisage P as a mortgagee (i.e., a bank or building society) where V is seeking to remortgage his house in order to obtain additional finance.[2]

[1] See, *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

[2] See, s.2(1)(iii) of the Law of Property Act 1925, (conveyance made by a mortgagee).

The mechanism of overreaching and overriding interests

Overreaching is a mechanism designed to protect purchasers of the land. Provided the purchaser pays the purchase money to two or more trustees, he will obtain a transfer of the legal title free of any equitable interests arising under an express, resulting or constructive trust.[3] All beneficial interests under the trust affecting the land are effectively overreached so that all the equitable co-owners are swept off the land and their respective interests converted into the proceeds of sale. The vendor, in turn, becomes the trustee of the sale proceeds and accountable to the beneficiaries in accordance with the size of their respective equitable interest(s). Where, however, payment by the purchaser is made to only one trustee (vendor), any equitable co-owner, who is not specifically mentioned on the land register, will have an "unoverreached" equitable interest which will remain in the *land* as his interest will not convert into the proceeds of sale.

In our scenario, referred to above, G's equitable interest (arising by virtue of a constructive trust) coupled with her actual occupation of the house will give rise to an overriding interest which will be binding on P.[4] P will, therefore, acquire the land subject to G's interest in it. To avoid this problem, P will, typically, prior to exchange of contracts, insist on either G waiving her overriding interest in the land as against P, or absent such a waiver, insist that a second trustee (alongside V) is appointed to receive the purchase money so as to ensure that G's interest is overreached and converted into the proceeds of sale. If G's interest is overreached, her overriding interest will no longer bind P.

How does G acquire a beneficial interest in the house?

The principles under which a non-owning cohabitee may acquire a beneficial interest in property which is in the sole legal ownership of his/her partner are well-rehearsed in the landmark cases of *Lloyds Bank plc v Rosset*,[5] *Stack v Dowden*[6] and *Jones v Kernott*.[7] The two-fold requirements of common intention (express or inferred) coupled with detrimental reliance, necessary to support a constructive trust, are now firmly rooted in our law of property. In the express common intention category, very little detriment is required and a wide range of conduct may qualify to support a constructive trust. In *Grant v Edwards*,[8] Sir Nicholas Browne-Wilkinson V-C opined that:

> " . . . once it has been shown that there was a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to

[3] Section 2(1)(ii) of the Law of Property Act 1925.

[4] See, Schedule 3, para. 2, to the Land Registration Act 2002. G's interest will not bind P if P can show that direct enquiry was made of G, prior to the purchase, as to her interest and occupational status, and G failed to properly disclose the truth of her position. If the land is unregistered, again having only one trustee, G would likewise have an unoverreached interest which would potentially bind P, if P has actual, imputed, or constructive, notice of G's equitable interest: see, *Kingsnorth Finance v Tizard* [1986] 1 WLR 783 and *Hunt v Luck* [1902] 1 Ch 428.

[5] [1991] 1 AC 107.

[6] [2007] 2 AC 437.

[7] [2012] 1 AC 776.

[8] [1986] 1 Ch 638, at 657.

> the joint lives of the parties is, in my judgment, sufficient to qualify. The acts do not have to be inherently referable to the house."

This liberal approach to the meaning of detriment in the specific context of an express common constructive trust is echoed in *Rosset*,[9] where Lord Bridge referred to the required detriment in this category as being merely a "significant alteration in position" by the claimant. It is evident, therefore, that expenditure on improvements or undertaking physical labour may count towards establishing a constructive trust in this category.[10] In the absence, however, of any finding of an agreement or arrangement between the parties to share beneficially, the court may alternatively rely on the parties' conduct both as a basis from which to infer a common intention and as the detrimental conduct relied on to give rise to a constructive trust. The relevant conduct, therefore, serves a dual purpose when determining whether the claimant has surmounted the first hurdle of establishing a constructive trust under Lord Bridge's scheme in *Rosset*. Here again, a subsequent improvement by one of the parties may qualify on its own to create a beneficial share even in the absence of any financial contributions to the initial purchase or subsequent mortgage instalments. In *Bernard v Josephs*,[11] Griffiths LJ stated:

> "It might in exceptional circumstances be inferred that the parties agreed to alter their beneficial interests after the house was bought; an example would be if the man bought the house in the first place and the woman years later used a legacy to build an extra floor to make more room for the children. In such circumstances, the obvious inference would be that the parties agreed that the woman should acquire a share in the greatly increased value of the house produced by her money".

The point is also addressed by Fox LJ in *Burns v Burns:*[12]

> " . . . while, initially, there was no intention that the claimant should have any interest in the property, circumstances may subsequently arise from which the intention to confer an equitable interest upon the claimant may arise (e.g. the discharge of a mortgage or the effecting of capital improvements to the house at his or her expense)."

The obvious conclusion here is that improvements to property may rank as an equivalent financial contribution to the cost of acquisition and, therefore, be capable of supporting an inferred common intention constructive trust. In order to qualify, however, the improvements must be significant in nature so that mere decoration, minor repairs, gardening, DIY jobs, etc, will not suffice. Assuming, however, the improvements are significant, they will normally be quantified by taking an added-value approach. In *Re Nicholson (Deceased)*,[13] Pennycuick V-C held that the proper way in which to work out improvements was to ascertain the value of the property at the date immediately before the making of the improvement and then to identify what addition to the value of the property was due to the improvement. The share of

[9] [1991] 1 AC 107, at 132.
[10] See, for example, *Eves v Eves* [1975] 1 WLR 1338 and *Drake v Whipp* [1996] 1 FLR 826.
[11] [1982] 1 Ch 391, at 404.
[12] [1984] Ch 317, at 327.
[13] [1974] 1 WLR 476. See also, *Griffiths v Griffiths* [1973] 1 WLR 1454.

the party who made the improvement should then be treated as enlarged by a proportionate amount corresponding to the increase in value represented by the improvement.

How will P become aware of G's equitable interest?

There will be a number of ways that P may acquire knowledge of G's equitable interest prior to the sale. Most commonly, perhaps, P will receive a response from V's solicitors to enquiries before contract which indicates that G may have an overriding interest[14] as being in actual occupation of the property.[15] Alternatively, a Form A restriction registered by G on the land register (which states that "no disposition by a sole proprietor of the registered estate . . . is to be registered unless authorised by an order of the court") may alert P of G's interest. If G's expenditure on the improvements generates an alternative potential claim based on proprietary estoppel,[16] a notice entered by G on the land register recognising G's estoppel equity binding on P, under s.116 of the Land Registration Act 2002, may also trigger P's awareness of G's rights in respect of the house.[17] Lastly, P (through his agent) may be advised to conduct a physical inspection of the property which alerts P to G's actual occupation.

How will P seek to avoid G's interest?

It is usual, in such circumstances, for P to insist on the appointment of a second trustee of the legal title on the land register so as to automatically overreach G's equitable interest and convert the same into an equivalent interest in the proceeds of sale.[18] In this connection, s.27(1) of the Law of Property Act 1925[19] refers specifically to a purchaser of a legal estate "from trustees of land" which suggests that payment of the purchase price must be made to two or more trustees who are all actually on the register in order to bring about an effective overreaching of any prior equitable interests. However, s.27(2) of the 1925 Act[20] does not appear to require that both trustees hold the legal title for the purpose of overreaching so, rather than requiring V to amend the register so as to include a second trustee, P may insist

[14] If an equitable owner's interest is not protected on the register, it will qualify as an overriding interest so as to bind the purchaser if the equitable owner is in actual occupation of the land: see, Schedule 3, para. 2, to the Land Registration Act 2002.

[15] See, Schedule 3, para. 2, to the Land Registration Act 2002 and *Link Lending Ltd v Hussein* [2010] EWCA Civ 424. Non-disclosure of G's overriding interest by V would amount to a misrepresentation and/or possible breach of contract, where the land is sold free from incumbrances, generating a potential claim for rescission of the contract and/or damages for breach of contract.

[16] The estoppel equity may be satisfied, in appropriate circumstances, by the grant of an equitable interest in the land under a constructive trust: see, *Hussey v Palmer* [1972] 1 WLR 1286, at 1290, where Lord Denning MR alluded to the possibility of using the constructive trust as a mechanism for satisfying the estoppel-based equity.

[17] *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (2000) 80 P & CR 256, at [24]-[32].

[18] See, s.36(6) of the Trustee Act 1925 and *City of London Building Society v Flegg* [1988] AC 54, where the House of Lords confirmed that a mortgage by the two trustees overreached the interests of Mr and Mrs Flegg so as to give the mortgagee a prior right to possession when the trustees defaulted on the mortgage payments.

[19] See also, s.2(1)(ii) of the Law of Property Act 1925.

[20] See also, *T Choithram International SA v Pagarani* [2001] 1 WLR 1, at 12.

that a second trustee is appointed for the sole purpose of receiving *payment* of the purchase money. Indeed, this appears to be current conveyancing practice.[21]

A third option is for P to require that G sign a written waiver/consent form in relation to her equitable interest so as to concede priority in favour of P. This may be coupled with a requirement that G obtain independent legal advice before signing the waiver/consent so as to preclude any later claim by G that the waiver/consent was procured by undue influence, misrepresentation or some other vitiating factor. Lastly, G may sometimes be required to assign her equitable interest[22] to V separately so as to avoid the difficulty of appointing a second trustee altogether. Similar options will be available to P assuming he is a mortgagee and our scenario is a re-mortgage situation, although typically, in this context, the mortgagee will insist that G sign a consent form in relation to her equitable interest so as to concede priority in favour of P as mortgagee.[23]

Law Commission proposals

The Law Commission in its Working Paper No 106, (1988), *Trusts of Land: Overreaching*, and its subsequent Report published in 1989, *Transfer of Land, Overreaching: Beneficiaries in Occupation*,[24] suggested three possible reforms so as to better protect the position of third parties such as G in our scenario. First, G's interest should only be overreached if a second trustee is appointed who is either a solicitor or licensed conveyancer capable of affording protection to an equitable owner such as G by looking after their interests and possibly objecting to a sale. However, one objection to this would be the extra expense involved, as well as the possible reluctance of such professionals undertaking this additional responsibility in sales and remortgages. Would a solicitor have the time or inclination to act as a form of guardian of the equitable owner?

Secondly, the Land Registration Act 2002 should be amended so as to allow G to register her interest by way of a notice, under s.32 of the 2002, as opposed to merely applying for a Form A restriction. This, however, would not prevent P (or a mortgagee) from applying for an order of sale of the house under s.14 of the Trusts of Land and Appointment of Trustees Act 1996. Moreover, it is unlikely that beneficial owners such as G would necessarily invoke registration as a safeguard given that such equitable interests arise informally and without any understanding of the land registration system.

Thirdly, overreaching should only occur where *all* equitable owners of full age and in actual occupation of the property give consent to the sale/re-mortgage. This was considered by the Law Commission to be the preferred option as striking the right balance between beneficiaries and purchasers. The lack of consent, however, in any case where it was required, would not invalidate the conveyance, but merely take effect subject to the subsisting rights and interests which had not been overreached.

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[21] See further, *N3 Living Ltd v Burgess Property Investments Ltd* [2020] EWHC 1711 (Ch), at [46], for the correct procedure when dealing with a sale when there is a Form A restriction on dispositions by a sole proprietor on the register and only one proprietor.

[22] See. s.53(1)(c) of the Law of Property Act 1925. Such an assignment must be made in writing signed by G.

[23] Alternatively, the mortgagee may take the view that, if G has knowledge indicating acceptance of V's re-mortgage application, she must be taken to have consented to it and conceded priority to the mortgagee.

[24] Law Commission Report No 188, (19 December 1989).

The Law Commission's preferred option has admittedly not been free from criticism. It has been suggested that such radical reform would have the potential to hinder the smooth operation of the conveyancing process and effectively destroy the mechanism of overreaching and return the law to its pre-1926 state. The whole point, it has been argued, behind the creation of the concept of overreaching was precisely that a purchaser should be able to buy co-owned property without having to search for every equitable owner and obtain their consent. From a practical point of view, however, obtaining consent from all equitable owners would not necessarily involve a greater burden on potential purchasers. It should be noted that purchasers already have a vested interest in making enquiries of occupiers to protect themselves against interests other than beneficial interests which might form the subject-matter of an overriding interest. Significantly, the Law Commission recognised this in their Report:[25]

> "We do not expect our recommendation to necessitate enquiries and inspections going beyond what is already done at present."

It should also be borne in mind that V would have the ability to apply to court, for example, under s.41(1) of the Trustee Act 1925, for leave to appoint a second trustee in the absence (or refusal) of consent. Although this has the potential to add some delay and expense to the sale of the property, it would have the obvious advantage of allowing the competing interests of G and V to be properly balanced in the light of all the circumstances.

Should we simplify overreaching?

Some would, no doubt, also argue that the current law on overreaching is satisfactory and that no reform is necessary in so far as G, upon sale, acquires a corresponding interest in the proceeds of sale. In any event, s.11 of the 1996 Act imposes a duty on V (as trustee) to consult G "so far as practicable" and "so far as is consistent with the general interest of the trust" give effect to G's wishes. On the other hand, overreaching will occur even if V has not consulted G at all. Moreover, in our scenario, it is arguable that overreaching does not sufficiently safeguard the interests of G who loses the *enjoyment* of the house despite many years of occupation and her significant capital contribution towards improvements.

A more radical solution, not canvassed by the Law Commission, is to simplify the current law by allowing overreaching to take place where a purchaser/mortgagee pays the purchase money to only *one* trustee. (This approach would be similar to the Australian Torrens system of land registration premised on the notion of the indefeasibility of the land register). The reason for insistence on two trustees under s.2(2) and s.27(2) of the Law of Property Act 1925 is not entirely clear, although it appears to be rooted in the notion that this reduces the risk of mistake or fraud and provides a safeguard for equitable owners -"two heads (containing conscience and brains) ought to be better than one albeit not as good as four".[26] It has been questioned, however, whether the addition of another trustee achieves this purpose. The "two or more trustees" rule does not eliminate fraud, it just reduces the risk of it – two trustees may still act together in a conspiracy to defraud the beneficiaries. On a broader note, mistake or fraud as to financial matters is not nowadays necessarily the worst worry for

[25] ibid, at para.4.24.

[26] Law Commission Working Paper No 106, (1988), *Trusts of Land: Overreaching*, at para. 3.1,

beneficiaries. A far more realistic concern is often with the enjoyment of the land itself which will, of course, be automatically lost by the process of overreaching.

Such an approach could, of course, be coupled with appropriate safeguards to protect the interests of equitable owners in actual occupation of the property such as G in our scenario. This could be done in a number of different ways already mentioned earlier by: (1) amending the Land Registration Act 2002 so as to allow G to register her interest (as opposed to merely applying for a Form A restriction); or (2) allowing overreaching to occur only where *all* equitable owners of full age and in actual occupation of the property give consent to the sale/re-mortgage and, at the same time, providing V with the ability to seek a court order for sale under s.14 of the Trusts of Land and Appointment of Trustees Act 1996 in appropriate circumstances (e.g., where G's equitable interest is based only on a very modest expenditure on improvements or where G's occupation has been temporary). Needless to say, any court ordered sale would, of course, be an overreaching conveyance. Alternatively, V would also have the option of applying for the appointment of a second trustee under s.41(1) of the Trustee Act 1925 where it would be "inexpedient difficult or impracticable to do so without the assistance of the court".

The writers' preferred solution, therefore, is to argue for an approach which would allow for the balancing of the competing interests of G and V so as to arrive at a solution which was appropriate in all the circumstances of the case. In this connection, s.15 of the 1996 Act already provides the court with a discretion as to whether or not to order a sale by reference to a non-exhaustive list of factors[27] which include: (1) the intentions of the person(s) who created the trust; (2) the purpose for which the property subject to the trust is held; and (3) the welfare of any minor who occupies the property subject to the trust as his home. Significantly also, the court is required, under s. 15(3), to have regard to the "circumstances and wishes" of any beneficiaries of full age and entitled to an interest in possession in the property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests). Thus, although the breakdown of the parties' relationship may initially point towards a legitimate reason for V to sell the property, this might exceptionally be countered by appropriate circumstances which militate against a sale or, at the very least, a postponement for an appropriate period of time. In particular, the court would be able to take into account the likely size of G's equitable interest (given her improvements to the property) as well as her need for the property as a home for herself and any of the parties' children. In essence, therefore, G's consent would operate only as a partial bar which would not necessarily prevent a sale of the property, but instead trigger the court's discretionary jurisdiction under s.14 of the 1996 Act.

Conclusion

In the writers' view, the appropriateness of appointing a second trustee in order to ensure overreaching is open to question. As we have seen, this simple administrative act can destroy G's rights of occupation of the family home in circumstances where she has a legitimate

[27] Because the list of factors is stated to be non-exhaustive, other factors may play an important role in determining whether a sale of the property should be ordered (e.g., G is disabled and the house has been converted to meet her specific needs).

interest in protecting her beneficial interest otherwise than by simply relying on her transmutated entitlement to an equivalent share in the proceeds of sale.

Ultimately, the question, in terms of any reform proposal, revolves around what the law is seeking to protect. Is it merely the equitable owner's financial outlay on the property, or is it also the continued enjoyment of the property as a home? If the former, overreaching already achieves this by preserving G's financial outlay in terms of a share in the proceeds of sale. If the latter, G's continued enjoyment of the house is curtailed by the artificial device of simply appointing a second trustee so as to overreach her equitable interest. What this then points towards is some form of restriction on overreaching (requiring G's consent to a sale) in the specific scenario where G's equitable interest is based not only on her significant expenditure on the property but also on a legitimate expectation that the house is her family home. This, however, would not preclude V's ability to contest G's objection by an appropriate application for a court order for sale under s.14 of the 1996 Act, which would allow the court to weigh up the competing interests of the parties with particular reference to the matters referred to in s.15. In order to avoid delay and reduce legal costs, a summary arbitration procedure[28] could be introduced to deal with such applications relatively quickly with the presumption in favour of sale unless G can show a substantial equitable interest in the property, or other factors militate against a sale including G's continued enjoyment of the house as a home for herself and her children.[29]

In the "routine" scenario, however, where these factors are absent, there is no reason why V should not be able to sell his own house given that G is not a joint owner. Let us take just two examples. In the *Pascoe v Turner*[30] type scenario, the owner assured G that the house was hers and all its contents. In reliance on these assurances, she expended most of her savings on various repairs and improvements to the property. Overreaching here would clearly work an injustice because G would lose enjoyment of the house as her home which she had been promised. But, take the facts in *Hussey v Palmer*,[31] where G had built an extension onto the property belonging to her son-in-law at a modest cost and where G had moved out of the extension due to a falling out between the parties. Here, overreaching would not prejudice G as all she would be entitled to is an equitable interest in the house proportionate to her expenditure in building the extension. This could be satisfied appropriately by converting her interest into a share in the proceeds of sale.

Although the Government decided not to implement the Law Commission's proposals because they were not widely supported at the time, there is an argument for saying that times have changed[32] and that the current law on overreaching may now need to be reconsidered, particularly with the statutory recognition of respect for family life and the home under

[28] Arbitration offers a quicker and cheaper alternative to costly litigation with adjudicators set up to hear specific disputes of this kind.

[29] Other factors may also include ill-health, disability, children with special needs, etc. The list is, clearly not exhaustive.

[30] [1979] 1 WLR 431.

[31] [1972] 1 WLR 1286.

[32] It has been 32 years since the Law Commission's Report, No 188, (19 December 1989). *Transfer of Land, Overreaching: Beneficiaries in Occupation*.

Article 8, Schedule 1 to the Human Rights Act 1998,[33] and as an increasing number of couples decide to set up home together outside marriage.[34]

[33] Indeed, questions have been raised as to whether overreaching in its current form is a mechanism which is compliant with the European Convention on Human Rights both in terms of Article 8 (right to respect for home) and Article 1 of the First Protocol (the right to peaceful enjoyment of possessions). The writers' proposals would, it is submitted, bring English Law more into line with UK human rights and the ECHR. In *National Westminster Bank plc v Malhan* [2004] EWHC 847 (Ch), at [48]-[53], an argument based on the Human Rights Act 1988 failed because the Act did not have retrospective effect. In those circumstances, it was unnecessary to consider the substantive question as to whether the process of overreaching was incompatible with Article 8 and Article 1 of the First Protocol.

[34] Interestingly, whilst married couple families remain the most common, cohabiting couples are the fastest growing type as people increasingly choose to live together before, or without, getting married. Since 2008, the number of cohabiting couple families has increased by over 25.8% s and overtaken the number of couples getting married. : see, Office for National Statistics Report, published in 2018.