

Property Law for Welfare Rights Advisors

This pack is intended to be read in conjunction with the workshop delivered at the NAWRA conference in March 2017 by Duncan Wall of Durham Welfare Rights

The Purpose of the Workshop

One of the most intricate and challenging matters to deal with as a Welfare Rights Advisor is the myriad ways in which property can be owned – and how the different forms of ownership can impact upon the valuation of a property, especially in entitlement and overpayment cases.

Valuation is of course also important in considering notional capital that can have an effect lasting many years.

The Department of Work & Pensions view.

The Department and other government bodies, as well as some tribunals, tend to take a market valuation, and divide that figure amongst the number of owners of the legal title.

As we will see that is often the wrong stance to take, leading to both incorrect and unjust determinations that are (hopefully) easily challengeable at tribunal.

Case Law

The recent case of **JM v Eastleigh Borough Council** CH/1815/2016 and [2016] UKUT 0464 (AAC) would seem on the face of it to support the stance adopted by the DWP and other assessors. Judge Jacobs determined that a correct valuation was an equal share between owners and he quoted the Court of Appeal decision in R(IS)1/01 as authority that had decided largely the same thing.

However he also stated that each case was to be dealt with individually and thus it is for Advisors to create the situation where a challenge can be mounted to the assumed and presumed equal share argument.

As we shall see, there are times and circumstances that this can be achieved.

Judge Jacobs' determination largely centred upon the operation of what is referred to in R(IS)1/01 as S30 of the Law of Property Act 1925 – now replaced by S14 of the Trusts of Land and Appointment of Trustees Act 1996 as follows:-

14 Applications for order.

(1)Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2)On an application for an order under this section the court may make any such order—

(a)relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or

(b)declaring the nature or extent of a person's interest in property subject to the trust,
as the court thinks fit.

(3)The court may not under this section make any order as to the appointment or removal of trustees.

(4)The powers conferred on the court by this section are exercisable on an application whether it is made before or after the commencement of this Act.

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However, although that may appear clear cut, it is qualified by S15, thus:-

15 Matters relevant in determining applications.

(1)The matters to which the court is to have regard in determining an application for an order under section 14 include—

(a)the intentions of the person or persons (if any) who created the trust,

(b)the purposes for which the property subject to the trust is held,

(c)the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

(d)the interests of any secured creditor of any beneficiary.

(2)In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees by section 13, the matters to which the court is to have regard also include the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

(3)In the case of any other application, other than one relating to the exercise of the power mentioned in section 6(2), the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests).

(4)This section does not apply to an application if section 335A of the Insolvency Act 1986 (which is inserted by Schedule 3 and relates to applications by a trustee of a bankrupt) applies to it.

Be aware of specific benefit Regulations such as the HB Regulations that were relevant in *JM v Eastleigh Borough Council*. In that case the 2006 HB Regs set out how to calculate capital; the amount to disallow for expenses of sale and rules as to the treatment of jointly owned property.

We need to take a step back and look at some definitions:

Property

For the purposes of this workshop, 'property' is defined as being an interest or holding in land or a dwelling. Many of the rules and concepts discussed today will also relate to stocks and shares but they form no part of the discussion.

Interest in Property

This relates to the actual level or degree of ownership relevant to an individual, trustee or corporate body.

Owner

The person, trustee or corporate body that has control over or entitlement to profits from property. There can be more than one owner of most property and often different levels of ownership for each property.

Registered Land

Land or buildings on land that are registered at HM Land Registry – a process commenced by the Law of Property Act 1925 and the Land Registration Act of the same year (since repealed and amended by the 2002 Land Registration Act.)

See also the Trustee Act 1925, The Land Charges Act 1925 and the Settled Land Act of 1925. [The latter is repealed by the 1996 Act quoted above but is relevant in terms of intention mentioned in S15]

Effect of registration is that once a parcel of land is registered [either voluntarily or by compulsion] then to take effect any future dealing has to be registered.

Unregistered Land

The system of land ownership by 'deeds' that existed prior to the land being registered.

See also such matters as Land Charges and Equitable Mortgages.

Held in Trust

A property held in trust is looked after by one owner on behalf of another – an example of different types of ownership relating to the same property.

Freehold

The ownership of land with no superior owner save the Crown. Freehold land can still be subject to restrictions and limitations in ownership such as mineral rights.

Leasehold

A contract enabling a tenant to exclusively occupy land or buildings.

Property Held in Trust

Consider here the distinction between a legal and a beneficial owner.

The legal owner's name appears in the Title Register of the Land Registry – this then is the person who signs documents relating to the transfer of ownership of all or part of the land; the person who can sign a mortgage deed, and the person who can create a lease of all or part of the land.

The beneficial owner is the person entitled to the profits to be made from the land, either by way of sale, rental or mortgage.

The value of the legal owner's interest in the land is likely to be nil.

The legal owner and the beneficial owner can be the same person, or the same people.

Consider the situation of a Will leaving a house to a child. Minors are not able to own real property so a trust will be created. The 'trustee' being the person appointed and empowered to look after the property is charged with the duty of ensuring that the terms of the trust are carried out for the benefit of the child who in this case is the beneficiary.

What would be the value of the respective ownerships?

Consider a situation where the trustee is a company – what difference would that make?

Can a beneficiary 'hide' behind a trustee?

What would the difference be between a 17 and a 19 year old beneficiary?

Tenancies

A tenancy is a right to reside on land or in a building for a period of time – the ownership is not in the land but in the right to reside.

For domestic property there are two types of tenancy; the assured shorthold and the leasehold.

Assured Shorthold

This is the normal rental property agreement and like a lease, it is a contract between a superior title holder and the resident. As Assured shorthold can last between 6 months and 2 years for a certain term but then becomes a periodic tenancy once the certain term has expired.

Under the fixed term, the property cannot be reclaimed (in most circumstances) unless the tenant has breached the terms of the tenancy. Any right to recover the property where there is no breach is only at the discretion of a County Court Judge.

The periodic tenancy can be terminated by the giving of notice – the length of which is set by the frequency of rental payments.

What happens when a property owner lets a friend stay in the property and charges a monthly rent without a tenancy agreement?

Security of Tenure

This comes about where the law precludes the landlord from evicting a tenant because either the tenancy pre-dates the assured shorthold system or the proper tenancy was never created.

The effect on valuation is catastrophic because there will always be a sitting tenant, meaning that any new owner would not be entitled to occupy the property (nor in many cases can they increase rent or change the terms of the tenancy agreement)

In these circumstances the value of the property is usually calculated as a multiplier of the annual rent – a sum likely to be significantly less than the market value.

Leasehold Property

The value of leasehold property diminishes as the lease nears its expiry.

A common situation is the 99 year lease – often created on housing built and sold in the 1950's and 1960's.

Mortgage companies insist on at least two mortgage terms (therefore 50 years) before they will lend on a property and therefore if the lease only has say 40 years left to run

then the value of the property is significantly reduced as only cash buyers would be able to purchase.

The Leasehold Reform Act of 1967 initially gave leaseholders the right to extend the term of the lease – usually at a high price. The 2002 Commonhold and Leasehold Reform Act gives qualifying leaseholders the right to purchase either the Superior Leasehold Title or the Freehold of the land – again at a price.

Therefore in terms of valuation the Tribunal would have to consider the value of land as it stood when the decision was made – in the case of a lease close to expiry the valuation would be virtually nil.

Overriding Interests

An overriding interest is defined as *interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property.* [Land Registry Practice Guide 15 29th February 2016 edition]

- **Short leases.** Originally a short lease was for 21 years or less, but the Land Registration Act 2002 now reduces that to leases of a duration of 7 years or less. Any lease created prior to the 13th October 2003 will continue to be overriding under the old rules – ie 21 years or less, meaning that the concession will become moribund by October 2024 at the latest.
- **Interests of Persons in Actual Occupation.** This relates to rights of occupation that arise as opposed to rights of ownership. The rules are complicated and require competent legal advice to implement but simply stated they mean that someone may acquire a right to live in the property even if they do not own it – and for our purposes, that right to reside affects the value of the property

Williams and Glyns Bank v Boland 1981

- **Easements & Profits a Prendre.** An unregistered easement or profit can still override property ownership in certain circumstances. Again comprehensive legal advice is essential on this point. An easement could be, for instance, a right of way over the land that would significantly diminish the value.
- **Adverse Possession.** Frequently referred to as 'squatters rights.' Within this doctrine if a 'non-owner' of land occupies it exclusively for a period of time then he or she can eventually claim ownership of that land. To recover the land, the owner will have to result to claim trespass and prove that the land belongs to them – the cost and time will adversely affect the valuation of the land.

- **Other overriding interests include:**

1. relevant social housing tenancies
2. a customary right
3. a public right
4. a local land charge
5. an interest in any coal or coal mine, the rights attached to any such interest, and the rights of any person under sections 38, 49 or 51 of the Coal Industry Act 1994
6. in the case of land to which title was registered before 1898, rights to mines and minerals (and incidental rights) created before 1898
7. in the case of land to which title was registered between 1898 and 1925 inclusive, rights to mines and minerals (and incidental rights) created before the date of registration of the title
8. PPP leases - PPP Leases are made overriding interests by section 90 of the Land Registration Act 2002. They are leases of parts of the London Transport railway system granted under public-private partnership agreements

Disputes Between Co-Owners

One of the most common scenarios faced in overpayment cases is that relating to family breakdown where the former matrimonial home has not sold and yet where both parties to the marriage have moved on.

Habitually as we have said, the DWP will undertake a 'desk-top' valuation of the property, deduct any outstanding mortgage and produce a figure that they confidently assert is the value of the asset 'owned' by the client.

However whilst this may well be a justifiable starting point, there are many other factors to consider.

Court Orders:

A common type of matrimonial order allows one spouse to reside in the property until certain events may take place, such as:

- Children if the family reaching 18 years of age or leaving full time education
- The resident party re-marrying or cohabiting for a period exceeding 6 months
- The resident party abandoning the property for a period exceeding 6 months
- The making of a new court order
- The bankruptcy of the resident owner (in certain circumstances)
- The mortgage on the property going over three month in arrears

Now refer this back to S15 of the 1996 Act

Cohabitees:

When and how does a cohabitee acquire a beneficial ownership in the property? And when can that beneficial ownership be used to dispute the DWP's valuation?

Testamentary Disposition:

The situation where the 'owner' is in fact the trustee for a deceased estate and 'owns' the property for the benefit of another.

Secured Loans / County Court Judgments / Charging Orders

A mortgage is a secured loan – it simply means a loan that is tied to the property so that in default the lender can take possession of the property and sell it to recover the outstanding debt.

A County Court Judgment is not a secured loan or debt in itself – being subject to a CCJ will not automatically mean that the value of a property is diminished.

A Charging Order however is where the creditor, having the benefit of a County Court (or High Court) Judgment has applied to the Land Registry to secure the debt against the property.

Prohibitions against Dealings

It is possible where there is a dispute over the ownership of a property, or a dispute over rights to which the property is subject, one party can seek to restrict the right to sell the property until the dispute is resolved. This will of course have a major impact on valuation.

Easements and other Dominant or Subservient Interests

In many modern conveyances, there are restrictions on either the uses of land, or the ownership of land; for example

- Rights to light and air
- Mineral rights
- The ability to build on the land, or to extend or enhance existing property
- Rights of Way

All of these can have an impact on the value of the land that will not show up on a 'desk top' valuation.

The only way to consider everything relating to the land would be to obtain copies of the entries in the Title from HM Land Registry.

Derelict or Dilapidated Property

This is another way in which the 'desktop' valuation can fail. The condition of the property may mean that it is not suitable security for a mortgage. In these circumstances, the value of the property is thus restricted to those that can, and are willing, to pay cash. The value of the property is thus significantly diminished.

To be adequate security for a mortgage a property must as a minimum be

- Watertight
- Secured by way of doors and windows
- Constructed from suitable material
- Capable of being Insured against standard risks
- Not liable to subsidence, or at risk thereof.
- Have a water supply for cooking and washing.

Valuations

Desktop Valuations obtain the value of a property from comparable data available from HM Land Registry records including previous transactions on the relevant land, and sale prices of neighbouring property.

A desktop valuation does not consider the condition of the property and is often affected by any or all of the following:

- Comparison with dissimilar properties that may statistically provide a false valuation.
- Lack of comparable data if no similar properties in the same location have been sold recently
- In some geographical areas there may still be a proportion of unregistered land and there will be no data on such property.
- Dilapidations
- Neighbour Disputes
- Subsidence
- Previous Insurance claims
- Flooding – although prices in recent years may well start to reflect flood risk and difficulties in obtaining buildings insurance.

Enhanced Desktop Valuation is where the subject property sold in the not too distant past and house price data can be used to calculate with some accuracy the current market value.

Of course such a valuation too has its limitations

- Property Condition
- Local Conditions arising since previous sale
- Was the previous transaction at market value?
- Centred upon economic trends and data reliant rather than property focused

Valuation by Surveyor remains the most accurate reflection of a property's worth. A qualified surveyor will consider the market value but is also trained to consider the impact of the property condition as well as looking for the 'tell tale' signs of overriding interests. Local knowledge of such things as easements and adverse leasehold conditions are also essential. Costs can be prohibitive however.