

Taking precautions

As a prelude to examining the Law Commission's new proposals for cohabitation law reform, Margaret Hatwood takes a look at recent case law and current advice on cohabitation contracts



Margaret Hatwood
is an associate at
Thomas Eggar

The Law Commission currently advises that those who wish to ensure legal protection in the event of separation should be made to realise that they will have to create their own legal regime via private contract, trusts, wills and so on.'

Some 80 years or so ago, the traditional view was that cohabitation contracts were void for public policy reasons – being sexually immoral and likely to prejudice the status of marriage. By 1976 the tide was already turning – in *Dyson Holdings Ltd v Fox* [1976] Bridge LJ said, *à propos* unmarried partnerships:

The social stigma that once attached to them has almost, if not entirely, disappeared.

At that time cohabitation was relatively rare and was often no more than a dress rehearsal for marriage. In *Sutton v Mishcon de Reya and Gawor and Co* [2003] Hart J said:

There is nothing contrary to public policy in a cohabitation agreement governing the property relationship between adults who intend to cohabit or who are cohabiting for the purposes of enjoying a sexual relationship.

In the 21st century, for whatever reason, cohabitation is now not unusual. With one in six heterosexual couples choosing to cohabit rather than marry, it is vital that the couple apply their minds to what might happen if they split up – ideally before they acquire assets together.

The present situation

For an example of the perils of cohabitation without proper agreements regulating the position, one need look no further than the case of *Cox v Jones* [2004].

Facts

Miss Cox (C) and Mr Jones (J) became engaged in 1998. It was decided that they would buy a property in Essex, the legal title to which was in J's sole name. C claimed there was an understanding that this property was to be a joint home and that she was entitled to a 50% share of the property.

When the flat above C's London home became available she attempted to buy it, but the flat was in fact bought in J's name, with the deposit provided equally by C and J. The flat was let – C dealt with the tenants, she had the keys and the utility bills were in her name. However, the rent was paid into J's account and he paid the mortgage. Their relationship ended in 2001.

Decision

Mann J decided that C was beneficially entitled to 100% of the London property, even though the legal title was in J's name. C received only a 25% interest in the Essex property.

In seeking to determine the parties' interests in the London property, Mann J referred to the judgment in *Lonrho plc v Fayed (No 2)* [1992] (paras 9-10):

Equity will intervene by way of constructive trust, not only to compel a defendant to restore the plaintiff's property to him, but also to require a defendant to disgorge property which he should have acquired, it at all, for the defendant.

He further stated that 'scientific analysis is impossible in these cases; what the court has to do is to form an overall assessment', which is reminis-

cent of the 'course of dealings' approach taken in the Court of Appeal's decision in *Oxley v Hiscock* [2004] only a few months earlier.

What is perhaps most surprising about the case is that C and J were both barristers who should have realised the importance of having clear documentation to record their intentions.

period of time and there being four children of the relationship.

Despite the views in the press (and of some legal commentators) that *Stack* changed the law – so that there is a presumption that property in joint names belongs to the parties equally in the absence of evidence to the contrary, and that property in one person's name

By not giving cohabiting couples rights, England and Wales is lagging behind many other jurisdictions, including Scotland, Australia, New Zealand and many Canadian states.

Stack v Dowden [2007]

It would be interesting to ask Mann J whether his decision would have been the same if it had followed the reasoning in the House of Lords decision in *Stack* earlier this year.

It is worth noting, however, that the facts of the two cases provide examples of the range of cohabitant disputes before the courts, with the parties in *Stack* having cohabited for a significant

belongs to that person solely (again, in the absence of evidence to the contrary) – the author's view is that the law has not changed. Moreover, *Stack* was concerned with an old version of the transfer form used pre-1998, namely Form 19 (JP), now obsolete, which was held on its own not to contain an adequate declaration of trust (see *Harwood v Harwood* [1991]), thus the author's view is that it is of limited application.

Transfer options

The position now with property transfer is that there are three options:

- (1) the property can be shown to be held on trust as beneficial joint tenants; or
- (2) as tenants in common in equal shares; or
- (3) the third option can be used to specify unequal shares or refer to a separate deed of trust.

However, one difficulty is that it is not essential that the transfer document is signed by the transferee unless they are entering into restrictive covenants or an indemnity covenant. It is not difficult to foresee that occasions may arise where the transferees do not sign the transfer.

Latest proposals

The Law Commission has grappled with the issue of whether cohabitants should acquire rights against each other on a number of occasions.

The most recent attempt was in Consultation Paper No 179 'Cohabitation: The financial consequences of relationship breakdown', where the Commission was enthusiastic about cohabitation contracts (para 6.23):

The removal of any doubt about the enforceability of such contracts might encourage cohabitants to exercise their freedom of choice more often by making agreements, therefore reducing the possibility of future litigation. Agreements can also serve a useful function in setting out how the parties propose to manage their finances and property during their relationship.

Indeed, whether such agreements should be binding is one of the main areas examined by the Law Commission. In its final report, published on 31 July 2007, the Commission confirmed its support for written 'opt-out' agreements, which would be enforceable unless the agreement was manifestly unfair or there had been unforeseen changes in circumstances. This proposal will be addressed in more detail in the forthcoming article on the Commission's recommendations.

However, as the Law Commission was not asked to produce a draft bill, and with the new Prime Minister having already set out a full legislative programme for the coming year, it is probable that any legislation in this area

**TRUSTS and ESTATES
LAW & TAX JOURNAL**

Practical guidance for every trusts and estates professional

'I find the *Trusts and Estates Law & Tax Journal* to be a very practical publication which always deals with the forefront of probate, tax and trusts practice. The articles are well written and informative.'

Jackie Moor, Partner, Wood Awdry & Ford

For a FREE sample copy:
call us on 020 7396 9313
or visit www.legalease.co.uk

Reference point

For further details on *Cox v Jones*, please refer to Kirstie Gibson's article on the case in the September 2004 issue of *Family Law Journal*, which also covers the *Oxley v Hiscock* judgment in an article by James Stewart and Alison Britton.

Readers interested in the *Stack v Dowden* judgment will find a more in-depth analysis by Elissa Da Costa in the June 2007 issue.

will not be forthcoming for at least two years. By not giving cohabiting couples rights on the breakdown of their relationship, England and Wales is lagging behind many other jurisdictions – including Scotland, Australia, New Zealand and many Canadian states.

What can be done now?

The Law Commission currently advises that those who wish to ensure legal protection in the event of separation should be made to realise that they will have to create their own legal regime via private contract, trusts, wills and so on.

So those unmarried couples intending to buy a house together would be well advised to draw up a deed of trust dealing with the ownership of the property. In reality, in these days of price pressures driving couples to obtain their conveyancing from firms that work nationally, where the client may never speak to a lawyer, let alone see one, the chances are that detailed consideration to drawing up a deed of trust will not be given priority for couples living together.

Clients also have a habit of ignoring information sheets giving advice about joint tenancies and tenancies in common, so perhaps family law departments should be targeting the conveyancing department's clients to ensure that couples receive appropriate advice. Quite apart from trust deeds and wills, cohabitation agreements can deal with ownership of cars and other chattels, as well as childcare arrangements and future career plans.

H v M [2006]

However, it should be remembered that such agreements are not necessarily watertight, especially where there are children involved. In *H v M*, which dealt with an application under Schedule 1 to the Children Act 1989 (the 1989 Act),

an agreement the parties reached was overridden by the court.

In this case the mother (M) made an application under the 1989 Act that the father (F) make financial provision for their son (S). F was a multi-millionaire who had had a two-year relationship with M that had ended before the birth of S. Following the breakdown of their relationship, they had negotiated an agreement whereby F was to provide:

- £115,000 towards housing;
- £39,000 per annum maintenance; and
- allowances for school fees and for the regular purchase of a new car.

Significantly, the agreement was never incorporated into a court order. In her application M sought:

It is crucial that a deed of trust is drawn up for the family home, unless the parties are agreed that a beneficial joint tenancy, or a tenancy in common in equal or other fixed shares, is appropriate.

- a property settlement order to enable her to purchase a more rural and spacious property at a cost of around £850,000;
- periodical payments of £80,000 per annum; and
- a lump sum of £134,000 for her debts and to buy a new car.

The application was granted. It was accepted that the agreement could not oust the jurisdiction of the court – the issue was what weight ought to be given to the agreement.

It was highly material that the issue was one of financial provision for a child rather than for a spouse, and the court was free to depart from the agreement, unless it was satisfied that it continued to make satisfactory provision for the child. F was therefore ordered to make available:

- a housing fund of £700,000;
- periodical payments of £60,000 per annum;
- a lump sum of £100,000 to cover M's debts; plus
- provision for a new car.

It would have been interesting to see what weight would have been given to

the agreement if no child had been born of the relationship.

Precedents

Transfers and deeds of trust

Generally the family home will be the most valuable asset. It is crucial that a deed of trust is drawn up unless the parties are agreed that a beneficial joint tenancy is appropriate, or a tenancy in common in equal or other fixed shares – in which case the position can be recorded in the transfer.

However, while there are obvious advantages of fixed shares – eg certainty, convenience, no need to keep receipts (see below) – there are disadvantages. One problem can be that couples drift into cohabitation (see *Stack v Dowden*), and during a long relationship

circumstances may change, so what was equitable when the relationship started may not be 20 years later, especially if children arrive.

Stack was unusual because Miss Stack was the higher earner throughout the relationship. Interestingly, so far as the writer is aware, no Schedule 1 1989 Act proceedings were commenced by her.

Cox v Jones

[2004] EWHC 1486 (Ch)

Dyson Holdings Ltd v Fox

[1976] QB 503

H v M

[2006] Fam Law 927

Harwood v Harwood

[1991] 2 FLR 274

Lonrho plc v Fayed (No 2)

[1992] 1 WLR 1

Oxley v Hiscock

[2004] EWCA Civ 546

Stack v Dowden

[2007] UKHL 17

Sutton v Mishcon de Reya and Gawor and Co

[2003] EWHC 3166 (Ch)

Zamet v Hyman

[1961] 3 All ER 933

Floating shares

The other option is floating shares; this gives flexibility but no certainty. Co-owners need to keep receipts, accounts and statements showing who pays what and when. In practice they seldom keep these documents, despite clear advice that they should do so. It is also difficult to draw the line between repairs

substantial deposit and the other may have the income to pay the mortgage, an agreement could record that the mortgage-paying party should receive a small percentage initially in the event of the relationship breaking down, with the percentage increasing annually up to an agreed maximum. Such an agreement can do justice between the parties in

'Floating shares' gives flexibility but no certainty. Co-owners need to keep receipts, accounts and statements showing who pays what and when.

and improvements – what repairs should affect the beneficial interest? One precedent frequently used provides for the parties to have their original contributions refunded and the balance is then owned in fixed shares.

Variable shares

The author has found that where couples cohabit after a previous long marriage has been dissolved in possibly acrimonious circumstances, both will wish to avoid more acrimony (and expense) in the future. Where one party has a

certain circumstances. After all, what is fair after one party has paid the mortgage for two years is vastly different from what is fair after twenty years.

A number of publications contain suitable precedents – the writer uses 'Cohabitation: Law, Practice and Precedents' (Wood, Lush and Bishop, Jordan, third edition 2005), which contains precedents for not only trust deeds but also cohabitation agreements. In addition 'The Encyclopaedia of Forms and Precedents' (by LexisNexis Butterworths) contains a number of helpful precedents.

Conclusion

At present, the law governing the position when a cohabiting couple's relationship breaks down is something of a dog's breakfast. There are numerous different statutes to look at, depending on whether there are children (the 1989 Act), whether there is a property (Trusts of Land and Appointment of Trustees Act 1996), and whether the couple were engaged (Married Women's Property Act 1882) – to name but a few. It is hoped that the Law Commission's recommendations will result in clear legislation being drawn up.

It remains, pending a potential change in the law, that cohabitation contracts are not binding and the relatively few reported cases in which the parties had entered into a cohabitation contract illustrate the potential pitfalls. Agreements are more likely to be strongly persuasive where there are no children of the relationship, the parties have followed the guidelines as to disclosure and legal advice, and their circumstances have not changed significantly since the agreement was entered into. ■

The Law Commission's report and recommendations will be considered in detail in next month's issue of Family Law Journal.

Cohabitation contracts – some suggested guidelines

In addition to the publications referred to above, basic templates can be found online at Advicenow.org.uk, a not-for-profit website. Information can be found also at www.love-and-money.co.uk (Skipton Building Society). The government's advice is at www.direct.gov.uk.

It is essential, however, to follow some basic pointers:

- There must be an intention to create legal relations.
- Consideration can be found in the exchange of mutual promises but it is safer for the document to be in the form of a deed.
- Evidentially it makes sense to have the agreement in writing.
- There is no presumption of undue influence with cohabiting couples, in contrast with engaged couples – where historically there was a presumption of undue influence. However, following the decision in *Zamet v Hyman* [1961] the view may now be that undue influence will not automatically be presumed from the mere fact of engagement. However, it would make sense for practitioners preparing cohabitation contracts to follow the guidelines suggested in the 1999 government Green Paper 'Supporting Families', which dealt with pre-nuptial agreements, including obtaining independent legal advice, mutual disclosure of assets, and noting that the agreement should either make provision for the arrival of children or provide for the agreement to be revisited in such circumstances.

- Do not insert provisions that might render the agreement void for public policy. In *Sutton v Mischn de Reya and Gawor and Co* [2003] it was said a cohabitation deed was not a property contract between two people whose sexual relationship involved them in cohabitation. Mr Sutton (S) was an air steward who supplemented his income by working as a prostitute. The defendants were two firms of solicitors. An advertisement placed by S attracted the notice of a businessman, Y. The services offered by S consisted of Y acting as master to S's role as slave. The parties entered into a deed of cohabitation which had been drafted by a solicitor employed by the first defendant. The parties did not cohabit. S brought proceedings against the defendants claiming that they had been negligent. The defendants applied to strike out the proceedings arguing the cohabitation deed was unenforceable on one or more of the following grounds:

- (i) there was no intention to create legal relations;
- (ii) the contract, if there was one, was unlawful on the ground of public policy, being either a contract for sexual services or a contract for slavery; and/or
- (iii) in any event the contract was liable to be set aside for duress, undue influence, unconscionability and/or misrepresentation.

The strike out application was allowed

- Checklists: do make use of them! For excellent checklists to be used in a variety of circumstances see 'Cohabitation: Law, Practice and Precedents'.