

Is the registration of a matrimonial rights charge against third parties being abused by the non-owning spouse in England and Wales?

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It is clear that at common law a wife has a right of occupation in the matrimonial home. This does not necessarily mean that the wife has a right at common law to insist on sharing residential accommodation in which her husband has set up a new home with a different partner.

The origin of this right came in the case of *Bendall v McWhirter* [1952] 2QB 466, where Lord Denning established that a deserted wife occupying the marital home had a personal licence to stay there. The decision provoked disapproval among the judiciary and from the public. A correspondent even went as far as writing this to the Judge... "Dear Sir, you are a disgrace to all mankind to let these women break up homes and expect us chaps to keep them while they rob us of what we have worked for and put us on the street. I only hope you have the same trouble as us. So do us all a favour and take a Rolls and run off Beechy Head and don't come back."

The wife's rights are somewhat anomalous. If the home is owned by her husband, she resides there neither as a trespasser nor even a licensee, but in virtue as her status as a wife. Her common law right of occupation is *sui generis*, in that the right to be housed by her husband arises from the fact of marriage itself and is an integral component of the dependency related notion of spousal maintenance.

The wife's common law right of occupation is binding only on her husband and is not enforceable against third parties. If, however, the right of occupation is threatened by an impending sale of the home by her husband, the wife may seek to have the sale restrained by court injunction. See *Lee v Lee* [1952] 2 QB 489 at 491. In an era of equality in our modern age, this right can now be claimed by husbands as well.

Following the House of Lords decision in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, which nullified Lord Denning's work in *Bendall v McWhirter*, by ruling that the deserted wife had no licence to stay, the Matrimonial Homes Act of 1967, reversed the decision.

The Matrimonial Homes Acts of 1967 and 1983 and the County Courts Act 1984 were subsequently replaced with matrimonial home rights in the Family Law Act 1996. Although the Act is primarily concerned with 'spouses', the rights were extended to civil partners by the Civil Partnership Act 2004. The scheme of the Family Law Act 1996, so far as it relates to matrimonial home rights, is quite complicated, but essentially, it does three things:

1. It gives a non-owning spouse certain rights to occupy the matrimonial home, and to enforce the same by what are called 'occupation orders'.
2. It provides that in certain circumstances one spouse's rights of occupation shall be a charge on the estate of the other, and that subject to registration, such a charge can bind third parties, including mortgagees.

3. It contains a number of procedural provisions which seek to protect the non-owning spouse in occupation in the event of proceedings for possession by a mortgagee.

Sections 31(1) - (3) of the Matrimonial Homes Act 1967 provide that where Person A is entitled to occupy the dwelling-house by virtue of a beneficial estate or interest, Person B's matrimonial home rights are a charge on the estate or interest and shall have the same priority as if it were an equitable interest created at whichever is the latest of the following dates (a) the date on which Person A acquires the estate or interest, (b) the date of the marriage, and (c) 1st January 1968.

Section 31(8) of the Act provides that even though Person B's matrimonial home rights are a charge on an estate or interest in the dwelling-house, those rights are brought to an end by (a) the death of Person A, or (b) the termination (otherwise than by death) of the marriage, unless the court directs otherwise by an order made under section 33(5).

It should be emphasised that the right of Person B to enforce his or her matrimonial home rights charge against Person A is not dependant on registration (*Hoggett v Hoggett* (1979) 39 P & CR 121). However, in order to protect the charge against third parties, section 31(10) enables the charge to be registered:

In respect of unregistered land by registering a Class F land charge

In respect of registered land by registering an agreed notice (section 31(10)(a); Land Registration Rules 2003, r 80).

But section 31(10) (b) specifically provides that Person B's matrimonial home rights are not an overriding interest.

It follows that in order to obtain protection and preserve priority against say subsequent mortgage lenders, it is important that Person B registers his or her charge. In practice this is usually only done, if at all, following the breakdown in the relationship, after taking legal advice. While this will prevent Person A from subsequently charging the property to a lender, thereby exposing Person B to the risk of repossession following default, it will obviously not protect Person B in respect of mortgages already taken out and secured on the legal estate.

It should also be emphasised that the courts will not tolerate abuse of the powers and protections in the Act. The scheme of the Act is to protect rights of occupation, not to apply financial pressure: *Barnett v Hassett* [1981] 1 WLR 1385.

It has emerged over the years, that spouse's especially wife's are abusing the system by deliberately causing a rift in the matrimonial home, and then registering their occupational rights as a Class F Charge. Some will only remove the charge, after the husband agrees to give them a large financial settlement.

Below are 2 case studies, which are true stories (the names have been changed) that show the draconian effects of the law.

Case Study 1

Mr. X, a British citizen by birth, and who had spent majority of his life in the United Kingdom, went on a holiday visit to his parent's country, Ghana. He met Mrs. X, and subsequently married her at a Marriage Registry in Ghana. The latter managed to get a spouse's visa at the British Embassy the following day, and joined Mr. X in the United Kingdom. Within a few weeks, Mrs. X got her mother from Ghana to join her, and together they ganged up against Mr. X. Their ulterior motive was to get Mr. X's property which was located in a very prestigious part of London, and had a lot of equity on it. The marriage eventually broke down, and Mr. X found it extremely unbearable living with mother and daughter. He was trapped, and could not do anything about it. He had spent all his working life accumulating assets, especially his property (the deemed matrimonial home), and now his so called wife of only a few months was trying to take everything away from him.

Mrs X and her mother had been advised by their friends to make up stories of domestic violence. They knew that if the British authorities heard the word 'domestic violence', the husband will be forcibly removed from the property.

Unfortunately for them, their plan backfired, because the neighbours who had known Mr. X since he purchased the property several years before testified to the Police that it was Mrs X and her mother who had been violent towards Mr. X.

The Police subsequently ejected Mrs. X and her mother out of the property, but this was just the beginning of hostilities for Mr. X, because the former had with the advice of a North London firm of solicitors, T & G registered her matrimonial rights as a Class F land charge.

Mrs. X refused to remove the charge, unless she was paid half of the value of the property. Despite being married for just over a year, she was adamant in getting what she wanted.

It was only with the intervention of the Judge, after the latter realised that the property was no longer considered a matrimonial home that she removed the charge, and sadly because of her greed and the incompetence of her solicitors, T & G, she ended up getting nothing. Mr. X successfully sold his property at the full market value, and ended up starting a fresh life outside the United Kingdom.

Mrs. X ended up being a liability to the British tax payer.

Case Study 2

The second case study is very similar to the first, only that the Judge on this occasion did not order for the caution to be removed, and the non-owning spouse who had just been married for under 8 months, ended up bargaining for a very large financial settlement, before her solicitors had the caution removed.

This is a very sad and serious situation, because the law which is meant to protect hard working individuals like Mr. X does the contrary of that. It makes the law somewhat biased towards certain groups of individuals, who end up losing almost everything that they had worked for, and the non-owning spouse whose ulterior motive was financial gain from the outset, gets a large financial settlement, that she never would have imagined ever having.

It has also been claimed by some litigants, that some of these non-owning spouses use it as a weapon in their divorce settlements. It has been abused for malicious purposes by those who need protection least, but is frequently not effected by those who stand most clearly in need of the protection which registration provides.

In *Wroth v Tyler* [1974], for instance, a wife had secretly entered her rights on the register of her husband's title on the day following his exchange of contracts. Her action had the disastrous consequences of exposing him to liability towards his purchaser for breach of contract. The wife, who had not wanted to move house, obstinately declined to remove the entry. This refusal eventually brought about the bankruptcy of her husband (who was unable to pay the contractual damages), with the ironic result that her rights were defeated in any event by her husband's trustee in bankruptcy.

Megarry J observed in the above case that the legislation has 'put into the hands of all spouses with statutory rights of occupation a weapon of great power and flexibility.' Particularly if registration occurs at an inconvenient moment in the process of contract and conveyance, the registering spouse is presented with a relatively simple, speedy and secret means of frustrating any proposed sale of the matrimonial home which he/she does not agree. The stubborn or ruthless spouse is thus enabled to force on his partner a purely private and unshared desire for domestic inertia or, even worse, is enabled to require the other spouse to buy off the charge. Considerations such as these led Megarry J in *Wroth v Tyler* to condemn the Matrimonial Homes Act as 'a companion in obloquy for what in *Keeves v Dean*Scrutton LJ stigmatised as *monstrum horrendum informe ingens*.'

On the other hand, in *Williams & Glyn's Bank v Boland*, the matrimonial home was bought in the sole name of the husband, though with a substantial financial contribution from his wife. The wife lived in the house, and it was clearly intended from the actions of the parties, that she should have an interest in it. Later on, the husband mortgaged the house to Williams & Glyn's Bank, and Mrs. Boland found herself losing her interest to a third party, as it had not been registered. Luckily for Mrs. Bolan, she was able to set up an overriding interest against the bank under section 70 (1) (g) of the Law of Property Act 1925, for the fact that she was in actual occupation, and any reasonable purchaser ought to have been aware of it. The courts ruled in her favour.

A different result might have occurred, if Mr. Boland had cunningly managed to persuade Mrs. Boland to vacate the property with the pretence of letting it out, and then setting up their matrimonial home in rented accommodation. He then sells the property to a third party, without the knowledge of his wife. Would Mrs. Boland have been able to claim her interest against a bona fide purchaser under section 70 (1) (g) of the Law of Property Act 1925?

The whole point of the Class F Registration process under the Matrimonial Homes legislation was to protect a non-owning spouses interests, as opposed to the latter using it as a weapon.

These two cases, point out the extreme cases of one spouse using the Class f registration process as a weapon, whilst at the same time showing the effects of non registration to the non-owning spouse.

How should one therefore find a balance that will appease both parties involved?

It is perhaps inevitable that the security of spouses will be assured only when the Matrimonial Homes Act and the Family Reform Act finally gives way to a rule of automatic co-ownership of the legal estate in the matrimonial home during marriage. This will be a regime not brought about by the application of commercialist principles of property law, but resulting instead from the status of marriage to only spouses entitled to reside permanently in the United Kingdom. So for instance if spouse A has a spouses visa resident to be in the United Kingdom for just 2 years, she will not have any automatic right to the legal estate of her husband, unless her stay to reside in the United Kingdom is granted by the Home Office permanently. The adoption of this solution would mean that no disposition of the legal estate could ever occur without the active participation of both spouses. Both would have to sign any document of transfer, lease or mortgage. A spouse's occupation of the matrimonial home would thus be rendered absolutely secure against hidden transactions with the title and there would be no need for any hostile registration to be effected where existing marital tension already threatens domestic harmony. A principle of automatic co-ownership would cut clean through the difficulties which have been exposed in the operation of the statutes relating to matrimonial rights.

Even if no legislation incorporating the above principle is enacted in England, and the registration process remains, it will be a good idea, if there are some form of checks and balances in place, before a spouse is allowed to register her charge. Solicitors involved in the registration process should make an undertaking to the registrar of the Land Registry, that he/she has made every form of investigation, to ensure that the spouse who wants to register his/her right is not using it as a weapon or for a malicious reason. If such a solicitor fails to follow the procedure, then he/she should be reported to the Solicitors Regulatory Authority. In that way, solicitors of the registering spouse will ensure that every precaution has been taken, to ensure that the registration of his client's right is done merely to protect the latter against third parties, which was the intention of the statute in the first instance.

It seems anomalous that the operation of a statute of such a wide social significance should depend on the ignorance or apathy of the citizens whose protection it is designed to secure. A further irony consists in the fact that the registration of spousal rights of occupation is usually abused for malicious purposes by those who need protection least, but is frequently not effected by those who stand most clearly in need of the protection which registration provides. This raises at least some question as to the desirability of legislation which in practice requires that protection of occupation should depend not only on a high level of awareness of the legal need to register rights but also on a willingness to undertake an essentially 'hostile type of proceeding'. As Ormond LJ indicated in *Williams & Glyn's Bank Ltd v Boland*, the remedy offered by the Matrimonial Homes Act is 'usually "too little and too late"'. The Government of the day should now make the public aware of their rights through all the sophisticated channels which we have in our modern society. Citizens Advice Centres, local authorities and other similar organisations should ensure that members of the public are aware of this right.

In conclusion, the effects of registration has caused a nightmare to some home owning spouses, as they are victims of blackmail from the other spouse, who uses it as a weapon in divorce proceedings. Those who need the protection the most, rarely use it, due to lack of public awareness. Further, the registration process has ultimately wrecked marriages, causing havoc rather than solve a problem. Some solicitors have also capitalised on this 'weapon', by encouraging the non owning spouse to

squeeze the 'trigger'. But on the other hand, the effect of non-registration has rendered the latter on many occasions homeless. The owning spouse sells the home to a bona fide purchaser, and makes an exit out of the United Kingdom, leaving the non-owning spouse who is probably not British and unaware of her rights, to cater for herself and the children. This has made most Council's Homeless Persons unit inundated with applications from homeless spouses.