

## **Co-owners, not co-owers:**

### **Legislative and judicial policy in relation to Charging Orders and Co-ownership.**

#### **(1) Introduction.**

The implications of allowing an unsecured creditor to obtain a charging order on co-owned land were revealed by the decision in Barclays' Bank Plc v Hendricks.<sup>1</sup> The court acceded to an application for sale under section 30 of the LPA from a judgment creditor who had been granted a charging order absolute. The judicial discretion to order the sale of land was exercised so as to enable the chargee to force the sale of co-owned property, regardless of the existence of a non-debtor co-owning occupier. The real importance of the decision in Hendricks<sup>2</sup> was not merely the court's conclusion on the facts: that the chargee could force the sale of the co-owned matrimonial home; but in the laying down of judicial guidelines. Laddie LJ held that in an application for sale under section 30 LPA:

“..the interests of the chargee will prevail over those of the spouse save in exceptional circumstances.”<sup>3</sup>

While judicial policy under section 30 had previously recognised a distinction between occupation of matrimonial property and the occupation of other joint owners, and had treated applications for sale under section 30 LPA from trustees in bankruptcy differently from applications by ordinary creditors, both of these distinctions were abandoned.

The availability of judicial charges is governed by the Charging Orders Act 1979.<sup>4</sup> This Act allows a creditor who has obtained judgment in respect of a debt to apply to the court for an order:

“..imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.”<sup>5</sup>

The substantive value of a charging order rests in the sanctions which become available to a chargee by virtue of the order,<sup>6</sup> particularly in relation to enforcement by sale.<sup>7</sup> A charging order

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<sup>1</sup> [1996]1 FLR 258.

<sup>2</sup> Which followed the precedent set by the Court of Appeal in Lloyd's Bank Ltd v Byrne [1993]1 FLR 369.

<sup>3</sup> Per Laddie LJ, Hendricks, *op cit* at 262.

<sup>4</sup> Hereafter 'COA'.

<sup>5</sup> COA, section 1(1).

alters the creditor's status by giving him *locus standi* to apply to the court for sale of the property under section 30 of the Law of Property Act, 1925.<sup>8</sup> The creditor's personal claim against the debtor is converted into a proprietary claim on his land.<sup>9</sup>

A judicial policy which allows a chargee to force the *sale* of co-owned property unless the circumstances are exceptional, highlights the importance of both legislative and judicial policy towards enabling a judgment creditor to *acquire* such a charge. The COA extended the court's jurisdiction with regard to the categories of property which are capable of forming the subject matter of a charging order. For the first time it became possible for co-owned land to be subjected to judicially imposed security. The consequences for a co-owning occupier, particularly considering their interest in retaining the land itself, are serious. The 1979 Parliamentary extension of the court's power to charge co-owned land rested upon the presumption that non-debtor co-owners would be protected by judicial unwillingness to accede to a chargee at the point of an application for sale. Hendricks has established that this is not the case.

The object of this article is to assess the policy motivations which informed the legislature's decision to expose co-owned land to charging orders, and judicial policy in exercise of the section 1(5) COA discretion to make such orders. The consequences of a judicial decision to exercise the section 1(5) discretion in favour of the creditor have been highlighted by the court's willingness to order the sale of co-owned property, once the charging order is made. The outcome for an occupier, whose co-owner incurs a judgment debt, therefore depends upon the interaction of these judicial and legislative policies. The following section shall consider whether these interlocking developments have been governed by any coherent policy thread.

## **(2) Charging co-owned land: judicial coherence pre-1979.**

The law in relation to charging orders and co-ownership before 1979 reveals a coherent judicial policy. Prior to the enactment of the COA, the judicial discretion to charge a debtor's property was contained in section 35 of the Administration of Justice Act 1956.<sup>10</sup> This provision gave the

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<sup>6</sup> "...it is.. not a direct mode of enforcement in the sense that the creditor can immediately proceed to recover the fruits of his judgment, but it is rather an interim mode of enforcement in the sense that it provides the creditor with security.. over the property of the debtor. It makes the creditor a secured creditor, who having obtained his charging order must proceed.. to enforce his charge in order to obtain the actual proceeds of his charge.." 'The Supreme Court Practice', Vol 1, 1993 Edn., (Sweet & Maxwell), 50/1-9/4, p802.

<sup>7</sup> See RSC Ord 50, r.9A. In practical terms, a charging order can be regarded as an interim measure on the creditor's route towards capitalising his debtor's asset: as a stepping stone to sale.

<sup>8</sup> The Payne Committee stated that the true value of a charge lay in the creditor's accrual of rights and remedies, since the order: "...produces the fruits of the judgment not at the time when the charge is imposed but at the time when the charge is enforced."; Payne Report, *Op cit*, para 855.

<sup>9</sup> See Stevens v Hutchinson [1953]1 Ch 30, where Upjohn J distinguished between a judgment creditor who was *not* a 'person interested' within section 30, having only personal rights, and a chargee, who, having the same proprietary rights as an equitable mortgagee, would be entitled to apply for sale.

<sup>10</sup> Hereafter 'AJA'.

court a discretion to impose a charge on: “...any ..land, or interest in land of the debtor..”,<sup>11</sup> upon application by a judgment creditor. Since co-owned land was held on trust for sale,<sup>12</sup> a co-owning debtor’s interest was *not* an ‘interest in land’, but an interest in the proceeds of sale of the land. This restricted the operation of the charging provisions, and excluded from their scope, all interests in co-owned land. The court’s policy in the operation of section 35 remained faithful to the terms of the legislation. Co-owned land was not subjected to charging orders, even though this limitation had serious consequences for judgment creditors.

The Court of Appeal was asked to extend its jurisdiction in Irani Finance Ltd v Singh.<sup>13</sup> The judgment debtor had a co-ownership interest in a domestic property and the creditor invited the court to interpret section 35 so as to enable his interest to be charged. The coherence of the court’s policy under section 35 is indicated by the Court of Appeal’s refusal to construe section 35 so as to include interests in co-owned land,<sup>14</sup> or to recast an interest in a trust for sale as an ‘interest in land’.<sup>15</sup> The Court of Appeal remained steadfast to the aims of the 1925 legislators in support of sale. The court’s refusal to depart from the ethos of the trust for sale was rooted in its conclusion that:

“The whole purpose of the trust for sale is to make sure, by shifting the equitable interests away from the land and into the proceeds of sale, that a purchaser of the land takes free from the equitable interests. To hold these to be equitable interests in the land itself would be to frustrate this purpose.”<sup>16</sup>

The court’s decision in Irani Finance v Singh ensured that the judicial approach to section 35 remained consistent with judicial policy in respect of orders for sale,<sup>17</sup> and with the legislative policy of the 1925 LPA. While this denied the judgment creditor access to a judicial charge simply because his debtor shared the ownership of property with another, the Court of Appeal did not allow the statutory limitations of the charging provisions to create judicial inconsistency in the province of trusts for sale.

### **(3) The Charging Orders Act 1979.**

#### **(a) Charging Orders and Co-ownership: the extension of jurisdiction.**

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<sup>11</sup> AJA, section 35(1).

<sup>12</sup> Law of Property Act 1925, part 1; Bull v Bull [1955]1 QB 234 confirmed that land vested in the name of a single owner, where another had a beneficial interest was held on trust for sale.

<sup>13</sup> [1970]2 WLR 117 (ChD); [1970]3 WLR 330 (CA).

<sup>14</sup> Counsel for the creditor argued that the prevalence of co-ownership was such that: “..it would be surprising if the protection intended to be afforded to judgment creditors.. should not be intended to extend to the interest of one of two or more joint owners, or beneficial owners in common, of land.”; [1970] 2 WLR 117 at 121.

<sup>15</sup> The creditor claimed on appeal that the trust for sale did not reflect the co-owners’ actual intentions, and that: “..the law recognised a distinction between cases where the trust for sale was a reality and where it was not, and.. in the latter case the interests of beneficiaries were properly to be called equitable interests in land.”; [1970]3 WLR 330 at 336. The Court of Appeal did not endorse this reasoning.

<sup>16</sup> Irani, *op cit*, at 337.

<sup>17</sup> See Jones v Challenger [1960]2 WLR 695; In re Soloman (A Bankrupt) [1967]2 WLR 172.

The decision in Irani Finance v Singh had revealed a lacuna in the charging provisions relating to co-owned land. The Charging Orders Act 1979 removed the limitation on the court's power to charge by extending the judicial jurisdiction to impose charges. The COA allows a charging order to be conferred: "...on any interest held by the debtor beneficially under any trust..."<sup>18</sup> This effectively enabled the court to impose a charge on the debtor's interest in co-owned land, even though it was held on trust for sale. The inclusion of interests under trusts in the COA represented a significant enlargement of the court's jurisdiction, bringing the large quantity of land, particularly dwelling houses, under joint ownership, within the court's discretion.

The Charging Orders Act was based upon the recommendations of the Law Commission.<sup>19</sup> The Law Commission's proposals presented a *prima facie* solution to the lacuna in the court's power to charge which had resulted from the conversion of co-ownership interests in land into interests in the proceeds of sale. Although it was still not possible for the court to charge the co-owned land itself, section 2(1)(a)(ii) of the COA enabled the court to attach a charge to the debtor's interest behind the trust for sale. It is clear, however, that the implications of charging a debtor's interest in co-owned land go beyond the immediate circumstances of the debtor. Although any charge conferred by the court under section 2(1)(a)(ii) attaches only to the debtor's beneficial interest in the property, it is impossible to avoid the conclusion that a non-debtor co-owner is affected by the judicial imposition of a charge relating to the land.

For a creditor, the practical value of security rests not only in the 'peace of mind' associated with obtaining a charge, but also in the power to realise the security. By converting what was otherwise a personal obligation between creditor and debtor into a claim on the debtor's capital asset, a charging order converts a judgment creditor into a 'person interested' in the land. This status entitles the chargee to apply to the court for an order for sale under section 30,<sup>20</sup> thereby rendering the debtor's co-owner vulnerable to the prospect of non-consensual sale. The legislative policy decision to allow charging orders on interests in trusts, and enabling the court to charge a debtor's interest in jointly owned property, must therefore be assessed in association with the power to order sale under section 30 of the LPA.

#### (b) Charging Orders and Orders for Sale: a presumed protection.

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<sup>18</sup> COA, section 2(1)(a)(ii).

<sup>19</sup> 'Charging Orders' Law Com No 74 (1976).

<sup>20</sup> Midland Bank v Pike [1988]2 All ER 434 (ChD), confirmed that the holder of a charging order had *locus standi* for the purposes of section 30 LPA. While the Master had decided that: "...where the property charged consisted of a beneficial interest in the proceeds of sale of land held on trust for sale he had no right to ask the court to sell the whole of the land in order to realise the share over which he had a charge and that the bank's application was quite unsupported by the authorities and outside the scope of section 30." ([1988]2 All ER 434 at 437); Deputy Judge Edward Nugee QC had: "...no doubt, even in the absence of authority on the point, that a person entitled to a charging order on the share of a co-owner in the proceeds of sale of land had a proprietary interest in that share and was a 'person interested' for the purposes of section 30 just as much as the co-owner himself." *Ibid*, at 438.

The Law Commission's proposals were based on the belief that the extension of the court's jurisdiction to charge the co-ownership interest of a debtor would have a limited effect on the debtor's co-owner. The Commission reviewed the existing judicial policy under section 30 LPA, and concluded that the imposition of a charging order on a debtor's interest in co-owned land would not have the effect of rendering his co-owner vulnerable to an order for sale. Although there were no authorities in point, the Law Commission acted on the basis of judicial trends at the time of its report,<sup>21</sup> and on the expectation that judicial reluctance to order sale against the wishes of the non-debtor would act as a buffer between the debtor's co-owner and his creditor. The Law Commission presumed that the court, in considering a chargee's application for sale under section 30, would protect co-owning occupiers by exercising its discretion to refuse sale.

The irony of the COA, from a policy perspective, rests in the development of judicial policy after the Act was passed. Subsequent decisions<sup>22</sup> have revealed the courts' actual approach to chargees under section 30, and have indicated a clear judicial policy in favour of granting orders for sale at the request of chargees, notwithstanding the existence of a non-debtor co-owner in occupation of the property. It is now apparent that the legislative decision to allow the court to charge an interest in co-owned land has significant repercussions for the debtor's co-owner. The basis of the Law Commission's recommendations, and the Parliamentary acceptance of its proposals therefore merit further examination.

The Commission proceeded by considering the existing policy when one of the co-owners applied for sale under section 30, and noted the court's willingness to protect the occupation of *matrimonial homes* in that context. Existing authorities suggested that when the property charged was a matrimonial home, the court would protect the matrimonial occupation by refusing to order sale at the request of a beneficiary. The prevailing judicial attitude had been that although the land was held on a trust for sale, its real purpose was use and occupation.<sup>23</sup> The Commission anticipated that the 'collateral purpose', which for a short time offered a limited defence<sup>24</sup> to the occupier of a matrimonial home against a co-owner, would continue to influence judicial policy whenever section 30 applications involved matrimonial property, even when the indebted co-owner was replaced by a chargee. The Commission based its recommendations on the principle that:

"A matrimonial home owned by the spouses jointly is the clearest, as well as the commonest, example of property which is held for a special purpose (namely, that of providing a joint home) notwithstanding that it is technically held on trust for sale."<sup>25</sup>

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<sup>21</sup> The Law Commission cited Jones v Challenger, In re Buchanan-Wollaston's Conveyance, and Bull v Bull, see Law Com No 74, para 71.

<sup>22</sup> Barclay's Bank Ltd v Byrne, Lloyd's Bank v Hendricks, more on this later.

<sup>23</sup> The Law Commission stated that it was 'firmly established' that: "...the court will not exercise its discretion under section 30 at the behest of a beneficiary if the effect of the order would be to defeat the purpose for which the trust was established."; Law Com No 74, para 72.

<sup>24</sup> The 'collateral purpose' argument was limited in as much as it depended on the nature of the application, assisting an occupier only when in competition with one who shared the object of occupation, and subsequently failing to persuade the court to refuse sale even between spouses, since the fact of their dispute rendered the purpose obsolete.

<sup>25</sup> Law Com No 74, para 72.

It was anticipated that the court's awareness of the true nature of matrimonial occupation would be translated into a genuine protection for the non-debtor co-owner when a chargee applied for sale under section 30 LPA.

The Commission contrasted judicial policy towards co-owner applicants under section 30 LPA with the court's treatment of applications by trustees in bankruptcy. It was established policy that the court would grant an order for sale on the application of a trustee in bankruptcy unless the circumstances of the occupier were exceptional. The Law Commission recognised that the position of a trustee in bankruptcy, including his statutory duty to the 'general body of creditors' justified the readiness with which the court acceded to his application for sale. The Commission highlighted, however, the distinction between an individual chargee, who acts in his own interests, and a trustee in bankruptcy, who has a duty to the debtor's 'general body of creditors'. Since a chargee is not under such a duty, the Commission expected that his application under section 30 would probably be treated in a similar fashion to that of a co-owner applicant.

Where the property was subject to a 'collateral purpose' of use and occupation, it was suggested that:

"...a chargee of the interest of one spouse would have no better right to defeat the underlying purpose of the trust than that spouse would have."<sup>26</sup>

The suggestion that a co-owner in occupation would be protected against a chargee in a section 30 application is supported by *obiter* comments in Stevens v Hutchinson.<sup>27</sup> In that case, the proposition that a judgment creditor could be allowed to force the sale of *matrimonial property* was criticised. Although the *ratio* of that pre-1979 decision was that the judgment creditor was *not* a 'person interested' under section 30,<sup>28</sup> Upjohn J added that he would not have exercised his discretion to order sale, even if the court's jurisdiction permitted such an order. Since the property affected was a matrimonial home, and the debtor's wife was not only an equitable owner, but also in *occupation*, the court would not have been prepared to grant an order for sale.<sup>29</sup>

The Commission's proposals were adopted by Parliament, and the COA passed with little opposition in 1979. The object of the legislation in enabling the court to charge co-ownership interests behind trusts for sale, was recognised by Parliament.<sup>30</sup> Although some doubts were expressed in the House of Lords regarding the desirability of: "...provisions for charging orders on a man's home";<sup>31</sup> and in the House of Commons, where the Solicitor General was asked whether the Government had: "...anything in mind for removing anything from the list, such as a person's home?";<sup>32</sup> the Government declined the opportunity to address the implications of charging

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<sup>26</sup> *Ibid*, para 72.

<sup>27</sup> [1953]1 Ch 299.

<sup>28</sup> Since under the AJA 1956 the judgment creditor had not been able to acquire a charge on the co-owned property.

<sup>29</sup> Upjohn J noted that: "...no doubt one day a sale will take place and the plaintiff as receiver will receive the husband's share of the proceeds of sale"; *Op cit*, at 357.

<sup>30</sup> Where the anticipated effect of the COA was: "In particular [to] make it possible to deal with the case *where land is vested in the debtor and his wife* on a statutory trust for sale." *per* Lord Hailsham, LC, 401 HL Deb (5th Series) col 12.

<sup>31</sup> *Per* Lord Hale, 401 HL Deb (5th Series) col 16 (2 July 1979).

<sup>32</sup> *Per* Mr Graham Page, 972 HC Deb (5th Series) col 773 (26 October 1979).

jointly owned domestic property in any substantive sense.<sup>33</sup> The legislature drew attention to the court's discretion to refuse a *charging order absolute*.<sup>34</sup> The extent to which the courts' exercise of the COA discretion has operated to temper the effect of the legislation is considered in part three, below.

(c) A presumption rebutted: chargees and the sale of co-owned land.

The reasoning of the Law Commission's report characterised the initial judicial response to the extension of jurisdiction in the COA. In National Westminster Bank v Stockman,<sup>35</sup> the court was confident that the debtor's spouse would remain secure in her occupation of the matrimonial home, since judicial policy militated against ordering sale at the request of a creditor where a collateral purpose subsisted. The court believed that conferring a charge on a debtor's share in co-owned property would not affect his wife's security of occupation since her:

“..position can be protected in the event of any application by the creditor which would have the effect of defeating the purpose for which the trust was established.”<sup>36</sup>

By 1988, the court, while describing the position as unfortunate, acknowledged that contrary to the opinion of the Law Commission, and regardless of the existence of a collateral purpose of occupation, a chargee would have a better chance of succeeding in an application for sale than a co-owner.<sup>37</sup> A review of more recent decisions on this point confirms the misconception on which the COA's extension of jurisdiction was founded.

The decisions in Lloyd's Bank v Byrne,<sup>38</sup> and Barclay's Bank v Hendricks<sup>39</sup> revealed a clear judicial policy in favour of acceding to applications for sale by chargees under section 30, unless the circumstances are exceptional. In each case the matrimonial home was held by a debtor and his wife on a trust for sale. In each case, the court ordered the sale of the home at the request of a chargee, notwithstanding the wife's interest in the property, and her opposition to the sale. The court in Hendricks stated as a matter of principle, that:

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<sup>33</sup> The Lord Chancellor dismissed these apprehensions with the assurance that the new provision provided enhanced flexibility for the court in exercising their powers, including the capacity to vary or discharge orders should they feel it appropriate at a later stage; see COA, section 3(5).

<sup>34</sup> Section 1(5) directed the court: “In deciding whether to make a charging order..[to] consider all the circumstances of the case and, in particular, any evidence before it as to - (a) the personal circumstances of the debtor, and (b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order”.

Section 3(5) provides that: “The court by which a charging order was made may at any time, on the application of the debtor or of any person interested in any property to which the order relates, make an order discharging or varying the charging order.” The Lord Chancellor stated that: “..we are interested in humanity to the debtor as well. So we try to do justice so far as it is practicable to do it in this rather thorny field of the law.”; *per* Lord Hailsham, LC, 401 HL Deb (5th Series) col 17 (2 July 1979).

<sup>35</sup> [1981]1 WLR 67.

<sup>36</sup> *Ibid*, at 69.

<sup>37</sup> Midland Bank Ltd v Pike [1988]2 All ER 434, 438, *per* Sir Edward Nugee QC.

<sup>38</sup> [1993]1 FLR 369.

<sup>39</sup> [1996]1 FLR 258.

“Where there was a conflict between a chargee’s interest in a matrimonial home and the interests of the innocent spouse, the interests of the chargee prevailed except in exceptional circumstances.”<sup>40</sup>

The decisions in Byrne and Hendricks were based on the precedent of Re Citro (A Bankrupt),<sup>41</sup> where the Court of Appeal had established that a trustee in bankruptcy would be granted an order for sale unless the circumstances were exceptional.

The Law Commission’s recommendation that co-owned property be subjected to charging orders was based on its belief that chargees would be treated differently from trustees in bankruptcy<sup>42</sup> in applications for the sale of a debtor’s property. The distinction between chargees and trustees in bankruptcy in applications for sale was dismissed by Parker LJ in Byrne, when he stated that, regardless of the fact that the chargee was not subject to the statutory duty which had justified a weighty presumption in favour of the trustee in bankruptcy:

“There is no difference in principle between the case of a trustee in bankruptcy and that of a chargee.”<sup>43</sup>

This clearly undermines the basis of the Law Commission’s proposals, and has serious consequences for co-owning occupiers who, as in these cases, have been made vulnerable to non-consensual sale of the home by the court’s power to charge a co-owning debtor’s interest behind a trust for sale.<sup>44</sup> The legislature’s reliance upon a ‘collateral purpose’, which would protect occupiers against their co-owner’s chargees, has also been rejected.<sup>45</sup> The reasoning which justified the decision to allow co-owned land to provide the subject matter of a charging order has been exposed as fundamentally flawed.

The current judicial policy of ordering sale at the request of a chargee has revealed a lack of coherence between the legislative policy of the Charging Orders Act, and judicial policy under section 30 of the LPA. It is also apparent that a non-debtor co-owner, regardless of the fact of occupation, will almost certainly be subjected to non-consensual sale once their co-owner’s judgment creditor has acquired a charge over his debtor’s share in the land. The prevailing judicial policy under section 30 LPA has therefore highlighted the significance of the judicial discretion to *grant* a charging order absolute.

#### **(4) Judicial discretion in charging land: section 1(5) COA.**

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<sup>40</sup> Barclay’s Bank v Hendricks, [1996]1 FLR 258.

<sup>41</sup> [1991] Ch 142.

<sup>42</sup> For whom an order for sale was granted unless the circumstances were exceptional, see section 2(b), above.

<sup>43</sup> *Per* Parker LJ, Byrne, *op cit*, at 375B.

<sup>44</sup> It is noteworthy that the Law Commission’s presumption that the treatment of a chargee would be more closely assimilable to that of a spouse than to a trustee in bankruptcy was misdirected. It is noteworthy, however, that if the court had accepted the submission that matrimonial property was held for the purposes of occupation as a home, and allowed this to negate the *prima facie* object of sale, the occupier could in fact have been furnished with a more valuable defence when facing a chargee’s application, than that which emerged in reality between co-owners. The judicial substitution of a judgment creditor would not so readily render obsolete the collateral purpose of use and occupation of a property as a home, as compared to a dispute between the co-owner/occupiers themselves!

<sup>45</sup> In Lloyd’s Bank v Byrne, the Court of Appeal approved the view espoused by Nourse LJ in Re Citro, that: “.no distinction is to be made between a case where the property is still being enjoyed as the matrimonial home and one where it is not.”; *per* Nourse LJ, Re Citro, *op cit*, at 82C.

(a) Section 1(5) and the giving of guidelines.

The decisions in Byrne and Hendricks have highlighted the implications of charging co-owned land, even where the creditor has judgment against only one owner. Once the creditor has acquired a charging order absolute, the court will allow him to force the sale of the property unless the circumstances are exceptional. Since a co-owner is not protected under section 30, the avoidance of sale, once a judgment debt is made against the other owner, depends upon the successful opposition of the charging order absolute. Section 1(5) of the Charging Orders Act provides that:

“In deciding whether to make a charging order the court shall consider all the circumstances of the case and, in particular, any evidence before it as to -

(a) the personal circumstances of the debtor, and

(b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order.”

It is submitted that the Law Commission’s belief that occupiers would be protected against non-consensual sale by judicial policy under section 30 LPA, prompted a failure on the part of Parliament to require consideration of their interests within the guidelines in section 1(5).

If the effect of a charging order was simply to substitute a judgment creditor for an indebted co-owner, and if, as the Law Commission expected, a chargee would be in the same position as the co-owner under section 30 LPA, then the conferral of a charging order would have had little real effect on the debtor’s co-owner.<sup>46</sup> Since it is now apparent that the protection afforded to occupiers against chargees under section 30 was chimerical, the co-owning occupier, if she is to be protected against a judgment creditor at all, must persuade the court not to exercise its discretion to charge her co-owner’s interest.

There are no decided cases which deal directly with the court’s policy towards co-owners who oppose the making of a charging order absolute. It is also unclear whether current trends under section 30 LPA will be decisive in influencing judicial policy under section 1(5) COA. In the absence of direct authority, however, the existing case law pertaining to the judicial discretion under section 1(5) can be considered in order to review so far as possible the factors which have influenced the court in making a charging order absolute. The factors which have influenced the court to date suggest that the manner in which the section 1(5) discretion was defined, combined with judicial and legislative reliance on the chimerical protection afforded to occupiers through section 30 LPA, have led to the exclusion of co-ownership interests from consideration within section 1(5). Both the guidelines in section 1(5) and the judicial application of the provision fail to take account of the interests of co-owning occupiers.

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<sup>46</sup> Some members of Parliament still remained doubtful as to the desirability of allowing the court to impose a charge on real property while in use as a *home*; see for example 401 HL Deb (5th Series) col 16 (2 July 1979), *per* Lord Hale; 972 HC Deb (5th Series) col 773 (26 October 1979).

(b) The relationship between section 30 LPA and section 1(5) COA.

Judicial policy under section 30 LPA indicates that the co-owner in occupation of a home is now placed in a very precarious position once a charging order absolute is made. It is instructive therefore to consider whether this policy development is likely to give rise to greater consideration of the non-debtor co-owner's interests when the charging order absolute is made. To date there have been no cases directly in point to indicate whether the court would refuse to make a charging order absolute because it would lead to the sale of the property against the wishes of the debtor's co-owner. The relevance of section 30 LPA has been accepted by the court in the context of section 1(5) COA, and the likely outcome of a section 30 application has also been considered by the court when deciding to grant *specific performance* of a charge on co-owned land. The extent to which the 'section 30 factor' will influence the court in exercising its discretion, however, remains unclear.

The likely outcome of a section 30 application for sale was argued before the court in the cases of First National Securities v Hegerty<sup>47</sup> and Harman v Glencross.<sup>48</sup> In both cases, a creditor's application under section 1(5) for a charging order absolute was opposed by the debtor's spouse. Although these cases are not directly in point,<sup>49</sup> the *dicta* of the court remains instructive as to the factors considered by the court under section 1(5) of the COA. The relationship between the conferral of a charge, and the chargee's application for the sale of the property under section 30 LPA is clearly accepted by the court, although there was some difference of opinion as regards the outcome of a chargee's application under section 30 LPA. The Court of Appeal in Hegerty was confident that the wife's interest would be protected under section 30 when the creditor applied for sale. In rejecting the wife's request that the charging order be denied, Sir Denis Buckley relied on the fact that:

“..the plaintiffs could not in any event sell the house.. without obtaining an order for sale under section 30 of the Law of Property Act 1925, at which stage all competing equities would be carefully weighed by the court..”<sup>50</sup>

The court's decision was based on its belief that the debtor's spouse would be adequately protected in the section 30 proceedings.

While the Court of Appeal in Hegerty were satisfied that the debtor's co-owner would be protected against non-consensual sale by judicial policy under section 30, that analysis was rejected in Harman v Glencross.<sup>51</sup> Ewbank J was without reservation in his conclusion that: “..leaving it until an application under section 30.. is failing to do justice to a wife in the circumstances of this case.”<sup>52</sup> It appeared that the prospect of rendering a co-owning spouse

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<sup>47</sup> [1985]QB 850 (CA).

<sup>48</sup> [1984]3 WLR 759; [1986]2 WLR 637 (CA).

<sup>49</sup> These cases are not direct authorities on the charging of co-ownership interests, since the charging proceedings coincided with divorce proceedings and the spouse's application for a property adjustment order, and the debtor's spouse was attempting to establish a claim on her husband's share of the home, rather than safeguarding her own ownership interest.

<sup>50</sup> *Per* Sir Denis Buckley, *ibid*, at 863.

<sup>51</sup> [1984]3 WLR 759; [1986]2 WLR 637 (CA).

<sup>52</sup> *Per* Ewbank J, *ibid*, at 767.

vulnerable to a forced sale at the hands of the husband's creditors was considered by the court, although the persuasiveness of the 'section 30 factor' in the context of the section 1(5) COA discretion remained unclear.

The effect which the court's decision to impose a charge on a joint interest will have on the debtor's co-owner has also been considered in other contexts. In Thames Guaranty v Campbell,<sup>53</sup> the court was asked to exercise its general equitable jurisdiction to enforce a charge which the creditor had attempted to create with the debtor's consent, but without a valid consent from his co-owning spouse. The creditor asked the court to exercise its equitable discretion to grant *specific performance* of the debtor's promise to create a charge. The Court of Appeal<sup>54</sup> held that:

“..the mere fact that an order for partial performance ..would give the chargee a *locus standi* to apply for a sale under section 30..should not, by itself, necessarily deprive an innocent chargee of the remedy of partial performance.”<sup>55</sup>

Slade LJ relied on the principle that the discretion conferred by section 30 was real and unfettered, regardless of the judicial trend which had emerged in its exercise, and which favoured sale in almost every case. The Court of Appeal maintained that regardless of the prevailing judicial policy under section 30 LPA: “..a result in a contest of this nature is by no means a foregone conclusion.”<sup>56</sup> The likelihood that a co-owner would be adversely affected in a subsequent application for sale under section 30 was held to be a sufficient ground for denying a creditor the remedy of specific performance.

Before the decision in Barclay's Bank Plc v Hendricks<sup>57</sup> there remained an element of uncertainty as to the likely outcome of a chargee's application for sale under section 30 LPA. Although there have been no decisions in respect of section 1(5) of the Charging Orders Act following Hendricks, the question of ordering *partial performance* at the request of a creditor has been subsequently considered by the court. In Bankers Trust Co v Namdar,<sup>58</sup> the bank brought proceedings against a husband and wife for possession and sale of their home. Mrs Namdar claimed that her signature had been forged on the charge document, and so a valid charge had not been created over the property. The bank therefore requested an equitable charge on Mr Namdar's beneficial interest. Counsel for Mrs Namdar argued that to allow the bank to obtain an equitable charge over Mr Namdar's interest in the co-owned property would be to order *partial performance* of the contract, and that this ought not to be allowed since such an order would be prejudicial to his co-owner, Mrs Namdar.

The Court of Appeal followed the reasoning of Slade LJ in Thames Guaranty v Campbell,<sup>59</sup> and held that the outcome of a section 30 LPA application ought not to dictate the court's exercise of its discretion to confer a charge. Although it had become clear since Byrne and Hendricks that sale would be ordered at the request of a chargee unless the circumstances were exceptional, the

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<sup>53</sup> [1984]1 All ER 144.

<sup>54</sup> [1984]2 All ER 585.

<sup>55</sup> *Per* Slade LJ, *ibid*, at 599.

<sup>56</sup> *Per* Slade LJ, *op cit*, at 598.

<sup>57</sup> *Op cit*.

<sup>58</sup> Court of Appeal (Civil Division) 14 February 1997, Unreported; Transcript: Lexis.

<sup>59</sup> *Op cit*.

court maintained that since its discretion under section 30 LPA remained technically unfettered, the *likely* outcome of an application for sale ought not to govern decisions in other areas. Gibson LJ held that while the court could *consider* the outcome of a section 30 application for sale when exercising its equitable discretion to enforce a charge, the prevailing judicial policy in the making of orders for sale was not a *conclusive* factor.<sup>60</sup>

It is now apparent that sale will almost certainly result once the charging order absolute is made, and it is reasonable to suggest that if the court is prepared to consider the debtor's co-owner and their interests as part of 'all the circumstances of the case', then it may allow the consequences for the co-owner vis-à-vis section 30 to influence the exercise of its section 1(5) discretion. The likelihood that a co-owner will be subjected to a non-consensual sale is not, however, a conclusive factor in the court's exercise of its equitable discretion to enforce a charge on a co-owning debtor's interest in land. If the Court of Appeal maintains a consistent approach in the context of its section 1(5) COA discretion, the outcome for the debtor's co-owner with regard to sale may be considered, but the 'section 30 factor' is unlikely to be the determining factor.

(c) The scope of section 1(5): Protection of matrimonial occupation and the rights of the judgment creditor.

In First National Securities v Hegerty,<sup>61</sup> Stephenson LJ expressed concern about the absence from section 1(5) of the Charging Orders Act of any reference to the implications of charging domestic property. His comment that:

“..circumstances of the kind present in this case, namely an interest of the wife of a judgment debtor in the subject matter of the execution and hardship to her or her children if the principle is applied, are not among those set out or considered in Lord Brandon's statement of the principles or in the Charging Orders Act 1979 or in RSC, Ord 50.”;<sup>62</sup>

emphasises the lack of synchronicity between the extension of jurisdiction in the COA and the exercise of the judicial discretion under section 1(5) of the Act. Although section 1(5) includes a direction that the court consider 'all the circumstances of the case', where a co-owner has been protected under section 1(5) to date, the protection has been spouse-based rather than ownership-based. In Harman v Glencross<sup>63</sup> the Court of Appeal protected Mrs Glencross's occupation of the matrimonial home. It is noteworthy, however, that this protection was based on her interest as the debtor's spouse and dependent, rather than on her independent property interest.<sup>64</sup> Matrimonial occupation was the touchstone, and although the court held that the protection of a

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<sup>60</sup> “I do not accept that the court is deprived of discretion, though I do accept that the likelihood of the court allowing the creditor's voice to prevail is a factor to be taken into account by the court in determining whether to recognise an equitable charge.”; *per* Gibson LJ, Banker's Trust Company v Namdar, *op cit*.

<sup>61</sup> *Op cit*.

<sup>62</sup> *Per* Stephenson LJ, Hegerty (CA), *op cit* at 867.

<sup>63</sup> *Op cit*.

<sup>64</sup> The court described Mrs Glencross as having two distinct interests in the co-owned property. The first was her matrimonial claim on her husband's assets, pending the property adjustment order. The other was her co-ownership interest in the property. In deciding to hear her claim, the court considered only her interest as a spouse.

spouse should not be any *less* because she also had a property interest,<sup>65</sup> there was no suggestion that ownership added to the spouse's claim under section 1(5).

The existing case law suggests that, as a general rule, a judgment creditor is justified in expecting that he will be granted a charging order. Although the terms of the legislation require that the court consider the 'personal circumstances of the debtor', the courts have continued to apply section 1(5) with a prejudice in favour of the creditor. Roberts Petroleum Ltd v Bernard Kenny Ltd,<sup>66</sup> established the principle that the burden of showing why a *charging order nisi* should not be made absolute was on the debtor. This was later confirmed in the context of *domestic* property, and where co-owning occupiers were likely to be affected by a court order charging the land. In First National Securities v Hegerty,<sup>67</sup> Bingham J, after citing the terms of section 1(5), stated that:

"..the present question arises primarily between creditor and debtor from a transaction having nothing directly to do with the matrimonial relationship.. I see no reason why the plaintiffs should be obliged to pursue their quest elsewhere."<sup>68</sup>

In weighing the interests of the creditor and the co-owning spouse, the court concluded that the wife's concerns: "...did not weigh very heavily against the legitimate claims of the plaintiffs."<sup>69</sup>

The court was aware that they were extending the application of the principle in Roberts Petroleum, and of the possibility that different considerations may have been relevant where the property concerned was domestic land in which a co-owner was interested,<sup>70</sup> but the presumption in favour of the creditor was retained.<sup>71</sup> The importance of providing a remedy for a judgment creditor was emphasised by Fox LJ, who added that:

"..it is necessary to bear in mind that the court is not, in relation to the grant of a charging order, exercising a jurisdiction under the matrimonial law, but under commercial law."<sup>72</sup>

The court was not willing to deprive the creditor of his rights in favour of the family, to whom the creditor owed no obligations.<sup>73</sup>

#### (d) Judicial Policy under section 1(5) COA: some conclusions.

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<sup>65</sup> "It would be peculiar if Parliament had intended that a wife who has a proprietary interest in the matrimonial home should have any less priority." *per* Balcombe LJ, *ibid*, at 648.

<sup>66</sup> [1982]1 WLR 301. This case involved a business property, and the title was vested in a single owner.

<sup>67</sup> [1985]QB 850.

<sup>68</sup> *per* Bingham J, 855G. Mrs Hegerty was disadvantaged by her failure to seek a property adjustment order at an earlier stage.

<sup>69</sup> *per* Bingham J, at 856.

<sup>70</sup> "The question of a home did not arise, nor did the question of the interests of a person other than the judgment debtor arise.", *per* Ewbank J, [1984]3 WLR 759 at 766.

<sup>71</sup> See also the comments of Sir Denys Buckley in Hegerty that: "...a judgment creditor... is justified in expecting that such an order will be made in his favour unless the judgment debtor can persuade the court that in all the circumstances of the case the order should not be made.", Hegerty (CA) op cit at 866.

<sup>72</sup> *Per* Fox LJ, *Ibid* at 657.

<sup>73</sup> *Ibid* at 658. Fox LJ also indicates the priority conferred on a creditor's claim by limiting the extent to which a wife could be considered: "...the court should seek to provide such a degree of security for the wife and children as is consistent with fairness to the creditor."; *Op cit* at 658.

In exercising its discretion under section 1(5) COA, the court has been reluctant to look beyond the factors specifically referred to in the legislative guidelines. Since ‘other owners’ were not included in those guidelines, the protection of the debtor’s co-owner under section 1(5) depends on judicial willingness to adopt a flexible approach to the guidelines as given. The case law suggests that where a co-owner has been successful in the past, this has been because of a spousal relationship with the debtor.<sup>74</sup>

To protect a co-owner merely because of the debtor’s duty to provide for her is to disregard her independent property interest. The discussion of appropriate remedies for the spouse’s protection has also confirmed that the court was acting within its matrimonial jurisdiction, and protecting the co-owning spouse on the basis of gender and marriage, not property and ownership.<sup>75</sup> When a co-owning wife has been allowed to challenge a charging order,<sup>76</sup> the court considered her interest as a spouse to be part of her husband’s personal circumstances.<sup>77</sup> By considering a wife’s claim on her husband’s assets to be part of the ‘personal circumstances of the debtor’, the judiciary have merely implemented the stated requirements of the COA in section 1(5). This trend can also be perceived in Austin-Fell v Austin-Fell & Midland Bank Plc,<sup>78</sup> where the court recommended that disputes between creditors and occupiers of matrimonial property could be resolved through the conferral of a postponed enforcement or ‘Mesher-type’ order.

This order would protect the occupation of the property while enabling the creditor to recover the debt at a specified date in the future. The use of postponed enforcement orders is generally confined to matrimonial disputes, although it is legitimate to suggest that the court’s power under section 3(1), Charging Orders Act, to make a charging order: “..either absolutely or subject to conditions ...as to the time when the charge is to become enforceable..”; could allow a balance to be struck between creditor and co-owner outside the context of matrimonial cases.<sup>79</sup>

Any conclusions regarding judicial policy towards a debtor’s co-owner outside the context of divorce proceedings are necessarily based on conjecture. A few significant factors may be gleaned, however, from the existing jurisprudence. The court, in exercising its jurisdiction under section 1(5) COA have shown an awareness of the section 30 LPA implications of a charging

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<sup>74</sup> “It seems to me that ‘the personal circumstances of the debtor’ would include the fact that he is obliged to make provision for his wife and young children..”; *per* Fox LJ, Harman, *op cit*, at 657.

<sup>75</sup> The statement of ‘modern practice’ which suggested that sale is generally postponed until: “..her death, remarriage, voluntary removal from the premises, or becoming dependent on another man..”; confirmed the outlook of the court as directed towards questions of *gender and marriage* rather than *occupation and property*. *Per* Balcombe LJ, Harman, (CA) at 651.

<sup>76</sup> Harman v Glencross, *op cit*.

<sup>77</sup> The debtor’s obligation to provide for his family would also appear to be the reasoning behind the *dicta* in Interpool v Galani, [1987]3 WLR 1042, where the court indicated its reluctance to make a charging order relating to a debtor’s interest in his matrimonial home.

<sup>78</sup> [1990]2 All ER 455.

<sup>79</sup> It is unfortunate, however, that the court in Austin-Fell appeared to suggest that the onus was on the judgment creditor to request a postponed enforcement order as an alternative to a charging order absolute. The terms of the COA do not impose any such restriction, although the use of such a measure would remain within the discretion of the court.

order absolute. Although the court has accepted the relevance of established policy under section 30 when considering the imposition of a charge on co-owned land, it is unlikely that the ‘section 30 factor’ will predominate over all the other circumstances of the case.

To date, the case law has involved attempts to secure matrimonial occupation. The court in Harman accepted that any person affected by a successful section 30 application for sale, was eligible for consideration within section 1(5) COA. It remains to be seen whether the court will extend its reasoning beyond the guidelines in section 1(5) to embrace ‘all the circumstances of the case’, and in considering a debtor’s co-owner, to protect their occupation outside the context of a matrimonial home. It is possible, however, that the judicial tendency to protect the ‘legitimate expectation’ of the judgment creditor will override any judicial policy to protect the occupation of property *per se*.

### (5) Conclusions.

The decisions in Byrne and Hendricks have established that a chargee will almost certainly be granted an order for the sale of property under section 30 LPA, even where the property is co-owned with a non-debtor. The court has accepted the relevance of subsequent section 30 applications when considering the exercise of its discretion under section 1(5) COA, yet the likelihood that the enforcement of the charge will lead to the sale of the property against the wishes of a non-debtor co-owning occupier has not been a conclusive factor in the exercise of judicial discretions. The only remaining protection for a debtor’s co-owner, rests with the successful opposition of a charging order *absolute* on her co-owner’s interest in the property.

It is unlikely that the property interests of co-owners will be substantively protected by the exercise of judicial discretion under section 1(5). The guidelines attached to the section 1(5) discretion do not refer to ‘other owners’ and the courts have tended thus far to protect only the *matrimonial* interests of occupiers, to the exclusion of their property interests. To date, the court’s policy under section 1(5) has departed little from the language and intention of the Charging Orders Act, wherein a debtor’s co-owner was not considered.

The judicial policy of allowing a chargee to force the sale of co-owned land unless the circumstances are exceptional repudiates the underlying policy of the Charging Orders Act, which anticipated an enduring protection of co-owners as against chargees at the point of an application for sale. There is clearly a lack of coherence between the legislative policy of the COA and judicial policy under section 30 LPA. It remains to be seen whether the judicial policy under section 1(5) COA will operate to redress the balance, and provide a single remaining safeguard for a co-owner, exposed to the prospect of a forced sale by the indebtedness of another. If the decision in Bankers Trust Co v Namdar<sup>80</sup> represents an enduring judicial approach with regard to charges on co-owned land, it is unlikely that the inadequacy of the section 30 LPA protection will be counter-balanced with an additional protection for a debtor’s co-owner in the court’s exercise of its section 1(5) discretion.

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<sup>80</sup> *Op cit.*