Share and share alike? Legal difficulties in Sharing Property

The Pollen Estate Trustee Co Ltd v Revenue & Customs Commissioners (2013) case might at first sight appear to be a welcome judgment for charities. If charities acquire property jointly with non-charities, they will still receive tax relief on the interest of the property that they themselves have purchased. However, charities do not in fact commonly purchase property jointly even with other charities. The mechanisms in English law for joint ownership are not generally well suited to a common desire to share resources and pursue common objectives.

Charities are often encouraged to collaborate in order to enhance their ability to pursue similar or complementary objectives and to share costs. Occupying the same premises on an equal ownership basis therefore, in many cases, appears to have a practical logic to it. There are, in fact, difficulties in putting the logic into practice. Under our legal regime, the Englishman's (and English charity's) home is his castle, and the mechanisms are more suited to repelling prospective invaders than amicable living with co-owners.

Our land registration system simply does not deal with shared interests in property, except to flag up by means of a standard form "restriction" that if one of the parties ceases to exist, leaving one party, that party generally will have no power to receive sale monies and won't be able to leally transfer the property. That is not a great deal of protection and certainly gives no detail of what the arrangements between the parties actually are.

The extent and nature of shared interests in property therefore have to be dealt with under trust law, and the details of ownership and other rights between the parties are not shown at the Land Registry or indeed on any other public record.

The real problem in practice is that because trust interests cannot be registered they cannot be mortgaged by the individual owners in a way that is satisfactory to banks, or funders who wish to secure grant clawback by mortgages. For a property jointly owned by separate organisations to be mortgaged to secure a loan to one of them there has to be a mix of legal strategies such as trust deeds, pari-passu and pre-emption deeds that are difficult to put in place and in any event are not popular with banks, who in a risk-averse environment, seem to be increasingly allergic to complexity. With the passage of time there is the danger, in any event, that no-one involved with the property will remember what the arrangements were intended to mean or achieve.

Land law does of course recognise leases, which will be registered at the Land Registry, and if they are drafted in the right way, they can be mortgageable. Joint owners can grant themselves long leases over the whole of the property with fairly minimal restrictions so that they would each in effect have a separate mortgageable and sellable interest.

Because in practice use of the property in many collaborative arrangements will involve real sharing of some space (for example meeting rooms) there must often also be further agreements for mutual use of respective parts of the property. The parties must ensure that they do not fall foul of restrictions in mortgages from banks and funders and also must be aware of other potential complications that may arise, for example the risk of VAT liability on sharing space.

Although leases may seem to be clumsy mechanisms for collaborative co-ownership, and must be carefully considered to fit each circumstance, they are often the only real option.

The experience in the case of residential property, where the commonhold system has for some time been available to deal with the ownership and management of flats and common facilities made available to them has probably not been encouraging. Take-up has been low, and some banks will not lend on mortgaged commonhold property. It appears that for some time yet, every project involving joint ownership of property will have to be looked at on its own terms, and the parties involved will have to wrestle with the complexities of leasehold ownership.

Pollen Estate Trustee Co Ltd (2) King's College London V Revenue & Customs Commissioners [2013] Ewca Civ 753

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