

The Law Commission

(LAW COM. No. 188)

TRANSFER OF LAND

OVERREACHING: BENEFICIARIES IN OCCUPATION

*Laid before Parliament by the Lord High Chancellor
pursuant to section 3(2) of the Law Commissions Act 1965*

*Ordered by The House of Commons to be printed
19 December 1989*

LONDON
HER MAJESTY'S STATIONERY OFFICE

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Right Honourable Lord Justice Beldam, *Chairman*

Mr Trevor M. Aldridge

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OVERREACHING: BENEFICIARIES IN OCCUPATION

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OVERREACHING: BENEFICIARIES IN OCCUPATION

Summary

In this report the Law Commission recommends that the interest of a trust beneficiary, who is of full age and capacity and who is occupying trust property and has a right to do so, should not be overreached (so that his interest would be transferred to the proceeds of sale) unless he consents. It also recommends that beneficial interests should be overreached when land held on a bare trust is sold. The report contains a draft Bill to give effect to the recommendations.

THE LAW COMMISSION

Item 4 of the Fourth Programme: Transfer of Land

OVERREACHING: BENEFICIARIES IN OCCUPATION

*To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain*

PART I

INTRODUCTION

Background and scope

1.1 In the course of our comprehensive examination of the law relating to trusts of land,¹ we identified the need to examine separately the impact of the principle of overreaching on beneficiaries, who are in actual occupation of trust property. Overreaching is the mechanism whereby, when trustees dispose of land comprised in a trust, the claims of beneficiaries are transferred from that land to the proceeds of the sale.²

1.2 The main question dealt with in this report is whether beneficiaries are adequately and appropriately protected by having an interest only in the proceeds of sale of the trust land, or whether they should not have a claim *in rem* to continue in occupation notwithstanding the disposal of the property by the trustees.

1.3 We also consider the relationship between the principle of overreaching and the rules relating to overriding interests, which apply in the case of registered land. Overriding interests are effective even though not registered or protected on the register,³ and all registered land is deemed to be subject to such overriding interests as relate to it.⁴ One overriding interest protects the rights of those in actual occupation of property.⁵ In *City of London Building Society v. Flegg*,⁶ the House of Lords recently decided that the principle of overreaching is paramount, so that beneficiaries' interests which are overriding interests are transferred to the proceeds of sale.

1.4 The statutory provisions relating to overreaching apply to both registered and unregistered land. However, this desirable consistency—dealing with registered and unregistered land in the same way—is not carried through to other rules which apply to this part of the law. The treatment of the equitable beneficial interest of someone in actual occupation of land when the legal owners sell or mortgage it depends on whether there is a single legal owner or more than one, who are therefore trustees. In the first case the beneficiary's right to occupation will be undisturbed,⁷ while in the second case it will be overreached.⁸ A further complication is that if the trustees who convey the land are bare trustees,⁹ rather than trustees for sale, overreaching does not apply and the position is as if there had been a single owner.

¹ Report on Trusts of Land (1989) Law Com. No. 181. That report recommended a new form of trust of land, replacing trusts for sale. The recommendations made in the present report would apply equally to conveyances by trustees under that new form of trust.

² Overreaching can also take place when a mortgagee or a personal representative sells or property is conveyed under a court order: see para. 2.10 below.

³ Some, indeed, are incapable of protection on the register.

⁴ Land Registration Act 1925, s.70(1).

⁵ Land Registration Act 1925, s.70(1)(g). We have made recommendations to modify this overriding interest: see our Third Report on Land Registration (1987) Law Com. No. 158, paras. 2.54–2.70; Fourth Report on Land Registration, (1988) Law Com. No. 173, paras. 3.2–3.3.

⁶ [1988] A.C. 54.

⁷ The conveyance will have no overreaching effect, although if the land is registered the beneficiary has an overriding interest.

⁸ This will apply whether or not the land is registered.

⁹ "A simple (or bare) trust is one in which property is vested in one person on trust for another, the nature of the trust not being prescribed by the settlor but being left to the construction of the law": Baker and Langan, *Snell's Principles of Equity*, 28th ed., (1982), p. 104.

1.5 To canvass views about the way to tackle this situation, we published a Working Paper in 1988.¹⁰ In this we discussed four possible options: first, that the interests of occupying beneficiaries could be registered, and if registered would only be overreached if they consented; secondly, that the interests of occupying beneficiaries would in any event only be overreached if they consented; thirdly, that overreaching should only apply if at least one trustee to whom the proceeds of sale were paid was a solicitor or a licensed conveyancer; fourthly, that nothing should be done.¹¹ We provisionally favoured the second proposal and suggested that the overreaching machinery should extend to conveyances by bare trustees.¹²

1.6 We are very grateful to all those who responded to our working paper. Their names are listed in Appendix B.

Recommendations

1.7 Taking full account of the views expressed to us, and for the reasons set out in this report, we make two main recommendations. First, the interests of adult beneficiaries of full capacity who have a right to occupy trust land and are in actual occupation of it should only be overreached if they consent. Secondly, the principle of overreaching should extend to conveyances by bare trustees.

Structure of this report

1.8 The present law on this topic is set out in Part II of this report. Its defects and the responses to our consultation are analysed in Part III. Part IV of the report sets out our recommendations, which are summarised in Part V. A draft Bill to implement our proposals, together with explanatory notes, is set out in Appendix A.

¹⁰ Trusts of Land: Overreaching, Working Paper No. 106.

¹¹ Working Paper, paras. 6.3–6.14.

¹² Working Paper, para. 7.1.

PART II

THE PRESENT LAW

Introductory

2.1 It is an established, flexible and convenient feature of English land law that property can be legally owned by trustees, who hold it on behalf of one or more beneficiaries. The nature of the beneficiaries' interests can vary widely, as indeed can the degree of formality with which they are created. The fact that the law can accommodate many different and separate ownership interests in the same property, whether they are concurrent or consecutive, gives owners the chance to deal with their property in almost any way they choose. It can, however, present real problems when the land comes to be disposed of: a purchaser needs to be assured that he is acquiring the whole of the interest for which he contracted. If that interest has been fragmented, proving title can be complicated, costly and time-consuming. "The central dilemma of land law is how to reconcile security of title with ease of transfer".¹

2.2 This dilemma was tackled in the property legislation of 1925, because before 1926 "the purchaser had to examine the lengthy, and, for this purpose, mainly irrelevant, provisions of the settlement in order to discover the principal facts essential to his obtaining a good title . . . To discover these facts was often a tedious task, for the settlement was a long document setting out the trusts in full and a purchaser often had to waste time in reading clauses which were of no interest to him in order to ascertain a few simple facts. There were corresponding inconveniences to the beneficiaries and trustees".² The 1925 legislation effected a compromise by making land held in trust freely marketable, while preserving the interests of the beneficiaries under those trusts, by the device of overreaching, which had originally been developed by conveyancing practitioners in connection with express trusts for sale, as a means of keeping the equities off the legal title.

Equitable interests

2.3 Before we look further at the conveyancing mechanics, however, it is convenient for us to consider the nature of the equitable interests in land which can arise and with which we are principally concerned.

2.4 The traditional settlement of English land would vest the property in one person for his lifetime, perhaps give one or more subsequent life interests, and then direct who should be entitled to the remainder. Subject to certain general constraints,³ interests might be given to people as yet unborn at the date the settlement was created. In addition, lesser benefits might be conferred, such as annuity payments. All these are beneficial interests which can now only exist in equity.⁴

2.5 Although traditional settlements of that type continue to exist, other forms of equitable interest are far more common. The vast majority of, if not all, trusts of land which are now deliberately created are set up as trusts for sale.⁵ This does not mean, however, that any sale of the land is actually contemplated.⁶ Many such trusts arise where land is owned by more than one person, because ownership in undivided shares is no longer possible at law.

"Where . . . land is expressed to be conveyed to any persons in undivided shares and those persons are of full age, the conveyance shall . . . operate as if the land had been expressed to be conveyed to the grantees . . . as joint tenants upon the statutory trusts . . . and so as to give effect to the rights of the persons who would have been entitled to the shares had the conveyance operated to create those shares".⁷

¹ Megarry and Wade, *The Law of Real Property*, 5th ed., (1984), p. 141.

² *Ibid.*, p. 327.

³ Particularly, the rule against perpetuities.

⁴ Although the legal fee simple is vested in the tenant for life under the Settled Land Act, this is a matter of convenient conveyancing mechanics: Settled Land Act 1925, ss.4(2), 6(b).

⁵ Report on Trusts of Land, (1989) Law Com. No. 181, para. 4.3.

⁶ Unless a contrary intention is expressed, every trust for sale is subject to a power to postpone the sale: Law of Property Act 1925, s.25.

⁷ Law of Property Act 1925, s.34(2).

The statutory trusts vest the land “upon trust to sell the same and to stand possessed of the net proceeds of sale . . . upon such trusts . . . as may be requisite for giving effect to the rights of the persons . . . interested in the land”.⁸

2.6 In recent years there has been a sharp increase in the number of married couples acquiring their matrimonial homes and other property in joint names.⁹ Commercial property owned by partnerships is normally also held in this way. In every case, the legal owners are technically trustees, even if they are themselves the beneficiaries for whom they hold the land.

2.7 At the same time as the incidence of ownership by more than one person has increased, the concept of equitable interests arising informally has been developed. So, where two people contribute to the purchase price of the property which is then conveyed into the name of only one of them, both contributors are equitable tenants in common.¹⁰ The contribution which entitles someone to a share of the property in equity may be made after the purchase. In one case, where an agreement to share could be implied and one member of a couple who were living together did a great deal of physical work to a property belonging to the other, she was held to have an equitable interest.¹¹ The claimant has to demonstrate a common intention that, even if he did not contribute to the purchase price, he and the legal owner should both have beneficial interests in the property and that he acted to his detriment on the basis of that intention, believing he would acquire a beneficial interest.¹²

2.8 Although the courts consider these circumstances most frequently in relation to living accommodation, the rules affect all types of property for whatever purpose it is owned. The agreement for shared ownership may be express. Where a house was bought by one of two partners, whose partnership agreement expressly stated that all partnership property was to be owned in equal shares, the other party was held to be part owner in equity.¹³ But the agreement to share may be implied. A wife who worked with her husband in a business for some 34 years was entitled to a half-share of property bought, in her husband’s name, from the proceeds,¹⁴ although the extent of the property which is shared may vary depending on the circumstances and the parties’ respective contributions.¹⁵

Overreaching

2.9 One of the main objectives of the 1925 property legislation was to simplify conveyancing and the proof of title to land, by separating legal and equitable interests. The aim was to permit dealings with legal estates without reference to, or even in ignorance of, the equitable beneficial interests. There was no intention to defeat the interests of trust beneficiaries, but rather to ensure that they become rights against whatever was for the time being subject to the trust, without hampering the ability of trustees to dispose of any property. This was achieved by “the principle of ‘overreaching’ by which equitable interests such as the interest of the beneficiaries under trusts are kept off the title to the legal estate, and are overreached on the sale of the legal estate to a purchaser who accordingly takes free of them”.¹⁶ On a sale, e.g., the beneficiary’s claims are transferred to the proceeds of sale, but only if the money is paid to two trustees or a trust corporation.¹⁷

⁸ *Ibid.*, s.35.

⁹ Fifty-one per cent of all owner-occupied homes bought in 1960–61 were purchased in joint names; in 1970–71, the equivalent figure was 74 per cent (source: Todd & Jones, *Matrimonial Property* (1972), p. 80). Experience suggests that this increasing trend has continued.

¹⁰ *Bull v. Bull* [1955] 1 Q.B. 234.

¹¹ *Eves v. Eves* [1975] 1 W.L.R. 1338.

¹² *Grant v. Edwards* [1986] Ch. 638.

¹³ *Elias v. Mitchell* [1972] Ch. 652.

¹⁴ *Re Cummins Deceased* [1972] 1 Ch. 62.

¹⁵ *Nixon v. Nixon* [1969] 1 W.L.R. 1676.

¹⁶ Parker and Mellows, *Modern Law of Trusts*, 5th ed., (1983), p. 5.

¹⁷ Paras. 2.18–2.19 below. A trust corporation means the Public Trustee, a corporation appointed by the court to act as trustee in a particular case, or a corporation entitled to act as a custodian trustee under the rules made pursuant to the Public Trustee Act 1906, s.4; Law of Property Act 1925, s.205(1)(xxviii); Settled Land Act 1925, s.117(1)(xxx).

2.10 This is achieved by the provision, subject to some detailed requirements, that “A conveyance¹⁸ to a purchaser¹⁹ of a legal estate²⁰ in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof”.²¹

This applies to conveyances under Settled Land Act 1925 powers,²² by trustees for sale,²³ by mortgagees²⁴ or personal representatives²⁵ exercising their paramount powers,²⁶ and under an order of the court.²⁷

2.11 The insulation of the legal estate from the interests of trust beneficiaries is reinforced by a rule that

“it shall be deemed not necessary or proper to include in the abstract of title an instrument relating only to interests or powers which will be overreached by the conveyance of the estate to which title is being shown”.²⁸

2.12 Certain equitable interests are not overreached. In all cases, the following created before 1 January 1926 are not affected: restrictive covenants, equitable easements, puisne mortgages and estate contracts.²⁹ In the case of court approved trustees, overreaching does not affect: interests created by the deposit of title deeds, restrictive covenants, equitable easements, estate contracts and equitable interests registered under the Land Charges Act (other than annuities, limited owner’s charges and general equitable charges.)³⁰ The selection of these exceptions has been explained by reference to the nature of the interests. “An equitable interest protected by a deposit of documents relating to the legal estate is treated as a paramount interest. None of the other exceptions could be properly represented in terms of money”.³¹

2.13 There is another statutory provision under which beneficiaries’ interests can be overreached. It takes effect on a conveyance of a legal estate subject to a trust for sale by two or more individuals approved or appointed by the court,³² or their successors in office, or a trust corporation.³³ This provision enables the owner to convey free from interests having priority over the trust for sale.³⁴

Mortgagees

2.14 Since 1925, a legal mortgage of land can no longer be created by a conveyance of

¹⁸ “Includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will”: Law of Property Act 1925, s.205(1)(ii).

¹⁹ “A person who acquires an interest in or charge on property for money or money’s worth”: *ibid.*, s.205(1)(xxi).

²⁰ An estate in fee simple absolute in possession or a term of years absolute: *ibid.*, ss.1(1), 205(1)(x).

²¹ *Ibid.*, s.2(1).

²² *Ibid.*, s.2(1)(i). An absolute owner of a legal estate, which is subject to equitable interests or powers which he wishes to be able to overreach, can for this purpose bring the property within the Settled Land Act by executing a deed and naming as trustees either a trust corporation or two persons appointed or approved by the court: Settled Land Act 1925, s.21. As a result, the land becomes settled land and the estate owner acquires the statutory powers of a tenant for life, including the power of sale. A sale will overreach equitable interests having priority to the settlement with the exception of those specified in s.21(2). As far as we are aware, this provision is rarely, if ever, now used: Megarry and Wade, *The Law of Real Property*, 5th ed., (1984), p. 406.

²³ Law of Property Act 1925, s.2(1)(ii).

²⁴ See para. 2.14 below.

²⁵ See para. 2.16 below.

²⁶ Law of Property Act 1925, s.2(1)(iii).

²⁷ *Ibid.*, s.2(1)(iv).

²⁸ *Ibid.*, s.10(1).

²⁹ *Ibid.*, s.2(5). Puisne mortgages are in this category only until transferred on or after 1 January 1926 and estate contracts until acquired under a conveyance made on or after that date.

³⁰ Law of Property Act 1925, s.2(3).

³¹ Wolstenholme and Cherry, *Conveyancing Statutes*, 13th ed., (1972), vol. 1, p. 55.

³² Most trustees are appointed by the settlor or under the terms of the trust instrument. This provision is therefore confined to special cases.

³³ Law of Property Act 1925, s.2(2). In practice, little use is made of this provision: see Megarry and Wade, *The Law of Real Property*, 5th ed., (1984), p. 406.

³⁴ Subject to exceptions: Law of Property Act 1925, s.2(3).

the fee simple,³⁵ but must be created by executing a demise³⁶ for a term of years absolute or by executing a legal charge which is expressed to be by way of legal mortgage.³⁷ The mortgagor retains his legal estate. Accordingly, a mortgagee seeking to realise his security has to convey the *mortgagor's* interest in the property.³⁸ That legal estate may be subject to equitable interests, created or arising either before or after the mortgage, and it is to those interests that overreaching applies on a sale by the mortgagee.³⁹ It is true that there may already have been overreaching on the creation of the mortgage,⁴⁰ but although the precise effect of this is not clear it seems unlikely that the beneficiary has no further claim against the land.⁴¹

2.15 There is some disagreement amongst commentators whether, after the 1925 changes in the nature of mortgages, the mortgagor's so-called "equity of redemption" continues to subsist as an independent equitable interest in land to which the provision for overreaching on a sale by the mortgagee applies. On one view, the mortgagor retains an equitable interest, as well as the legal estate which he has subject to the mortgage term.⁴² The other view, which accords more closely with the restructuring of the nature of mortgages, is that the mortgagor's undoubted right to pay off the mortgage debt and to procure a cesser of the mortgage term no longer subsists as an equitable interest in land but is merged with his legal estate.⁴³

Personal representatives

2.16 The general rule is that the entire ownership of the assets in the estate of a deceased vests in his personal representatives. Doubt has been expressed whether a specific devise may constitute an exception to this, giving the beneficiary an equitable interest in the property even before the administration has finished. Some judicial dicta support that possibility,⁴⁴ although the point has not been settled. We share the view that, "this exception appears to be of doubtful validity as it is not consistent with the principle that 'whatever property came to the executor *virtute officii* came to him in full ownership, without distinction between legal and equitable interests. The whole property was his.'" ⁴⁵

Bare trustees

2.17 We must also note one case in which there is no statutory overreaching. This is on a conveyance by bare trustees, which does not come within any of the statutory categories. Thus, in a case where a house owner voluntarily transferred the property to her lodger, on the understanding that she retained beneficial ownership, but he sold the house, there was no question of her interest being overreached.⁴⁶ This necessarily presents a conveyancing difficulty, because there is no way in which purchasers can ensure that they take free from equitable interests. Even to appoint a second trustee before conveying is of no assistance, because that does not convert the terms of the bare trust into a trust for sale.

³⁵ If a person attempts to create a mortgage by this method after 1925, the conveyance takes effect as a demise for three thousand years: Law of Property Act 1925, s.85(2).

³⁶ Or, if the mortgaged property is a lease, a sub-demise for a term which is at least one day less than the unexpired residue of the lease: Law of Property Act 1925, s.86(1).

³⁷ *Ibid.*, ss.85 and 87. In the case of a charge, the mortgagee acquires "the same protection, powers and remedies" as if he had taken a lease of the fee simple or a sub-lease of the demised property.

³⁸ *Ibid.*, ss.88, 89, 104.

³⁹ *Ibid.*, s.2(1)(iii).

⁴⁰ "'Conveyance' includes a mortgage": *Ibid.*, s.205(1)(ii).

⁴¹ Such a conclusion, which would be contrary to accepted practice, would open the way to the beneficiary's interest being completely defeated on the redemption of the mortgage.

⁴² Tyler, *Fisher and Lightwood's Law of Mortgage*, 10th ed., (1988), p. 8; *Cheshire and Burn's Modern Law of Real Property*, 14th ed., (1988), p. 629; Megarry and Wade, *The Law of Real Property*, 5th ed., (1984), p. 139.

⁴³ Williams, *Vendor and Purchaser*, 4th ed., (1936), p. 518; *Halsbury's Laws of England*, 4th ed., vol. 32 (1980), para. 571; Baker and Langan, *Snell's Principles of Equity*, 28th ed., (1982), p. 390.

⁴⁴ *I.R.C. v. Hawley* [1928] 1 K.B. 578, 583, per Rowlatt J. (bequest of shares in a company); *Re Neeld* [1962] Ch. 643, 687-688, per Diplock L.J. (land settled by the will).

⁴⁵ Parry and Clark, *Law of Succession*, 9th ed., (1988), p. 369, quoting *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] A.C. 694, 707, per Viscount Radcliffe.

⁴⁶ *Hodgson v. Marks* [1971] 1 Ch. 892.

Safeguard for beneficiaries

2.18 Clearly, any beneficiary whose interest is overreached needs to be reassured that his position has not been prejudiced. His safeguard is, in the majority of cases,⁴⁷ directions as to payment of the consideration for which the legal estate is sold.⁴⁸ On a sale under Settled Land Act powers or by a trustee for sale, the money must be paid to or applied by the direction of at least two persons as trustees for sale, or (as the case may be) trustees of a Settled Land Act settlement, or a trust corporation. When the conveyance is made under an order of the court, any capital money must be paid into, or in accordance with an order of, the court.⁴⁹ If the appropriate requirement for payment is not fulfilled, there is no overreaching.

2.19 The requirement to pay capital money to two trustees or a trust corporation was newly introduced by the 1925 legislation. "The safeguard against mistake or fraud of having at least two trustees or a trust corporation where capital money falls to be received, is a fairly obvious reform; it became essential when additional powers . . . to overreach equitable interests were conferred".⁵⁰ That comment, in the early years after the 1925 legislation, may be seen as over-optimistic about the strength of the safeguard for beneficiaries. In a recent case, a couple bought a house to accommodate themselves and the wife's parents and all contributed to the cost of it. A mortgage by the legal owners *pro tanto* overreached the older couple's interest, and on the mortgagors' default the mortgagee's claims took priority.⁵¹

2.20 In the case of a statutory trust for sale, the trustees must so far as practicable consult the beneficiaries of full age before selling. They must give effect to the wishes of the beneficiaries, or of the majority of them, so far as consistent with the general interests of the trust. However, a purchaser is not concerned to see that the trustees have complied, so a sale without the beneficiaries having been consulted, or in defiance of their wishes, is valid. This provision can be expressly applied to other trusts.⁵²

Registered land

2.21 Although all these rules about beneficial interests and overreaching apply to land of which the title is registered, there is an important additional provision which we must also consider. One of the "overriding interests" to which registered land is deemed to be subject, unless there is a note to the contrary on the register,⁵³ is

"The rights of every person in actual occupation of the land . . . save where enquiry is made of such person and the rights are not disclosed".⁵⁴

Every disposition of registered land is, unless the contrary is expressed on the register, subject to any overriding interests affecting it.⁵⁵

2.22 Where the property is registered in the name of a single registered proprietor (other than a trust corporation), it is now clear that a person with an equitable interest in the property, e.g. a wife who contributed to the purchase price of a property registered in the sole name of her husband, has an overriding interest while in actual occupation.⁵⁶ Because the interest is an overriding one, it does not need any protection on the register.

2.23 Where there is more than one registered proprietor, however, there is another consideration: a transfer complying with the statutory requirements⁵⁷ should have the effect of overreaching beneficial interests. The House of Lords has considered the

⁴⁷ Overreaching principally arises in cases of conveyances under powers conferred by the Settled Land Act 1925 or by trustees for sale who are not specially appointed (see para. 2.10 above). On a conveyance by a mortgagee or a personal representative, the proceeds of sale may be paid to the vendor: there is no requirement that they be paid to two persons or to a trust corporation.

⁴⁸ Law of Property Act 1925, s.2(1), (2); Settled Land Act 1925, ss.72(1), 94(1).

⁴⁹ Law of Property Act 1925, s.2(i)(iv).

⁵⁰ Wolstenholme and Cherry, *Conveyancing Statutes*, 12th ed., (1932), p. 268.

⁵¹ *City of London Building Society v. Flegg* [1988] A.C. 54.

⁵² Law of Property Act 1925, s.26(3).

⁵³ Land Registration Act 1925, s.70(1).

⁵⁴ *Ibid.*, s.70(1)(g).

⁵⁵ *Ibid.*, ss.20(1), 23(1).

⁵⁶ *Williams & Glyn's Bank Ltd v. Boland* [1981] A.C. 487.

⁵⁷ Para. 2.18 above.

apparent conflict between the doctrines of overreaching and overriding. The difficulty becomes apparent in posing this question. What is the effect when joint registered proprietors of registered land,⁵⁸ of which someone with a beneficial interest is in occupation, sell that land: does the purchaser take subject to that beneficial interest because it is an overriding interest, or is it overreached because the sale is by two trustees?⁵⁹

2.24 The effect of overreaching was held to be paramount: the equitable beneficial interest is transferred to the proceeds of sale.⁶⁰ Lord Templeman explained, “The respondents claim to be entitled to overriding interests because they were in actual occupation of [the property] on the date of the legal charge. But the interests of the respondents cannot at one and the same time be overreached . . . and at the same time be overriding interests. The appellants cannot at one and the same time take free from all the interests of the respondents yet at the same time be subject to some of those interests. The right of the respondents to be and remain in actual occupation of [the property] ceased when the respondents’ interests were overreached by the legal charge . . .”⁶¹

Registration of beneficiary’s interest

2.25 Although overreaching applies to registered land in the same way as it does to unregistered land, there is another significant respect in which registered land is treated differently. Where a person who is not registered as proprietor has a beneficial interest in the proceeds of sale, that interest can be protected by an entry on the register. This follows the decision that a partner entitled to joint ownership of property registered in the other partner’s name was entitled to lodge a caution against dealings,⁶² which was later approved in the House of Lords.⁶³ This contrasts with the position relating to unregistered land. There is no category of land charge registrable under the Land Charges Act 1972 which can include the equitable interest of such a beneficiary.⁶⁴

2.26 A caution against dealings to protect an interest in the proceeds of sale of land will be registered without question where no restriction is entered on the register.⁶⁵ However, a person with an interest which has already been protected on the register in some other way is only entitled to lodge a caution with the registrar’s consent.⁶⁶ Where joint owners are registered and a single survivor is not entitled to give a good discharge for capital money arising on a sale, a restriction must be entered on the register to the effect that a disposition by one proprietor, other than a trust corporation, will not be registered except under an order of the registrar or the court.⁶⁷ It is still possible, in that type of case, to apply for the registration of a caution, and an application is viewed with sympathy in a case where the trustees are also beneficiaries, and the cautioner claims an interest in the share of one of them.⁶⁸

2.27 Even if a beneficiary’s interest in the proceeds of sale is recorded on the register in this way, the degree of protection afforded is strictly limited. All it formally does is to prevent registration of a dealing with the land by the proprietors until the registrar has served notice on the cautioner, giving time to object to registration.⁶⁹ The notice is,

⁵⁸ Only registered land can be affected by an overriding interest.

⁵⁹ Assuming that the proceeds of sale are paid to both of them: see para. 2.18 above.

⁶⁰ *City of London Building Society v. Flegg* [1988] A.C. 54.

⁶¹ *Ibid.*, p. 73.

⁶² *Elias v. Mitchell* [1972] Ch. 652.

⁶³ *Williams & Glyn’s Bank Ltd v. Boland* [1981] A.C. 487, 507, *per* Lord Wilberforce.

⁶⁴ It was put to us on consultation that the position of equitable owners of unregistered land would be improved if they could register a land charge which would have the effect of preventing a transaction by the legal owner without notice to those whose interests might be overreached. However, this raises issues going beyond the resolution of the immediate problem created by the decision in *City of London Building Society v. Flegg* [1988] A.C. 54. Under our proposals (in Part IV) the interests of beneficiaries will be protected from overreaching if they do not consent to the conveyance and are in actual occupation (so that prospective purchasers will be alerted). In the context of our proposals it is not necessary to provide the further measure of protection suggested, and we are not convinced that it would be appropriate to do so.

⁶⁵ Ruoff and Roper, *Law and Practice of Registered Conveyancing*, 5th ed., (1986), p. 823.

⁶⁶ Land Registration Act 1925, s.54(1) proviso.

⁶⁷ *Ibid.*, s.58(3); Land Registration Rules 1925, rule 213.

⁶⁸ Ruoff and Roper, *Law and Practice of Registered Conveyancing*, 5th ed., (1986), p. 823.

⁶⁹ Land Registration Act 1925, s.55.

necessarily, served after the transaction has been completed and an application made for registration. When contested, the matter must eventually be disposed of according to the respective rights of the parties involved. Registration of a caution provides no substantive rights, but offers a valuable brake on registered proprietors disposing of property either in a way in which they are not entitled to do or in a way which is perfectly proper but without the beneficiary being forewarned. A caution's greatest effect is informal, as a deterrent to prospective purchasers and mortgagees who see it in advance.⁷⁰

Beneficiary in occupation: summary

2.28 In summary, then, the position where a beneficiary who is not a legal owner is in occupation of property as a result of that equitable interest, and the legal estate is sold or mortgaged, depends on a number of factors: the number of legal owners, the nature of the trust and whether the title to the legal estate is registered.

2.29 If the legal estate is in the hands of a single owner, other than a trust corporation, the beneficiary's interest cannot be defeated unless he fails fully to answer enquiries about it. The conveyance has no overreaching effect, so the interest remains enforceable against the trust property, even if sold by the trustees. In the case of registered land, this is reinforced by the occupying beneficiary's right being an overriding interest.

2.30 The position is different where at least two trustees own the legal estate. If they convey it and ensure that the price is paid in accordance with the statutory requirements, the beneficiary's interest is overreached. That frees the property sold from any claim by the beneficiary, although he has a claim against the proceeds of sale. This applies whether or not the property is registered land.

2.31 There is no way in which the beneficiary's interest can be protected by registration unless the title to the land is registered. If it is, it will often be possible for the beneficiary to register a caution against dealings. This should ensure that he or she receives advance notice of any disposition, but does not of itself give any substantive right to contest a sale or prevent overreaching.

2.32 Conveyances by bare trustees are not covered by the statutory overreaching provisions, whatever the number of trustees. There is therefore no automatic protection of which a purchaser can avail himself. Indeed, unless the purchaser from two or more trustees investigates the terms of the trust, he cannot be sure whether the case falls into this category or into one to which overreaching applies.

⁷⁰ They will not normally proceed until satisfied that they will take free from the interest protected by the caution.

PART III
NEED FOR REFORM

Change of circumstances

3.1 The 1925 legislation compromise between the need to protect beneficiaries under trusts of land and the demand for certainty and simplicity in conveyancing was satisfactory, and perhaps ideal, in the circumstances in which it was intended to operate. A purchaser from trustees¹ could ignore the beneficial interests so long as he was careful to observe simple precautions in paying the price. This successfully hid the terms of the settlement “behind the curtain”. Buying from trustees became as simple as buying from a single beneficial legal owner which it certainly had not been previously.² At the same time, the financial interest of the beneficiary was safeguarded by transferring his claim to the proceeds of sale. So long as the trustees properly conducted the affairs of the settlement, it was not important to the beneficiary by what assets his interest was secured.

3.2 Doubts about these provisions arise now because, over the years, the patterns of land ownership and the use of settlements have changed. Although the rules with which we are concerned affect all types of real property, the changes relating to residential property are most significant. Since 1925, both the number of dwellings in England and Wales and the percentage of them which are owner-occupied have jumped dramatically.³ Couples have increasingly bought owner-occupied housing in their joint names, and this trend was accelerated by the decision in *Williams & Glyn's Bank Ltd v. Boland*,⁴ following which lending institutions encouraged borrowers to buy jointly so that they, the institutions, had the advantage of the statutory overreaching rules. These couples are technically trustees for sale,⁵ whether they hold on trust only for themselves, as is often the case, or whether there are others with beneficial interests.

3.3 For this reason, there is now a very large number of cases in which trust beneficiaries occupy trust property as their homes. Sometimes, also, the trust property is where they carry on business. Generally, the trust is a conveyancing technicality, imposed by the Law of Property Act 1925 as part of the scheme to confine normal conveyancing to legal estates. Most individuals in this position would be surprised to hear themselves referred to as trustees or as beneficiaries; they regard themselves simply as joint owners. The changes in circumstances have exposed the 1925 rules for the device which they are. “If the framers of the property legislation in 1925 had been able to foresee the growth in joint ownership of property which, coupled with the vast increase in the breakdown of marriage,⁶ has exposed the artificiality of the statutory trust for sale, they might have made clearer provision for the protection of beneficial interests without widening the enquiries needed to be made by a purchaser”.⁷

Protecting occupation of property

3.4 In our working paper we said, “we are not in this exercise primarily concerned with protecting beneficiaries’ financial interests. It is their prospect of enjoyment of the land itself and its loss where overreaching occurs upon which we wish to focus”.⁸ Some of those who responded agreed with this view. One correspondent said, “I do not think it right that people in actual occupation of property should be in peril of losing their home as a result of the overreaching process”. Another pointed out that “almost all other occupiers [of residential property] have some protection from arbitrary eviction”.

¹ Ignoring, for the moment, bare trustees: see para. 3.10 below.

² See para. 2.2 above.

³ Statistics are not available for 1926 (the year in which the 1925 legislation came into effect). In 1931, there was 9.4m dwellings in England and Wales (source: Census of England and Wales 1931), compared with 20.35m in 1988 (source: Housing and Construction Statistics). The proportion of dwellings which were owner-occupied was 11.24 per cent in 1914, 32.46 per cent in 1938 and 67.19 per cent in 1988 (source: Department of the Environment). There are therefore about 6.5 times as many owner-occupied dwellings now as there were when the 1925 legislation came into force.

⁴ [1981] A.C. 487; see para. 2.22 above.

⁵ Law of Property Act 1925, s.34(2).

⁶ Between 1961 and 1986 the divorce rate rose from 2.1 per 1,000 married people to 12.9 per 1,000: see Facing the Future: a Discussion Paper on the Ground for Divorce (1988), Law Com. No. 170, Appendix A.

⁷ Ruoff and Roper, *Law and Practice of Registered Conveyancing*, 5th ed., (1986), p. 822.

⁸ Working Paper, para. 6.1.

3.5 We remain of the view that reform is required here. There are four main reasons. First, the exclusively financial protection given by the 1925 legislation is no longer appropriate for occupiers of their own homes; their real concern is often with the enjoyment of the property itself which will be lost after overreaching. Secondly, as the general understanding of many of the beneficiaries with whom we are concerned is that they are joint owners, they should have appropriate ownership rights. There is scant justification for the law giving preference to the wishes of one joint owner over those of another, simply because the former was constituted trustee of the legal estate. Thirdly, it is unsatisfactory that the consequences which a sale visits upon a beneficiary in occupation are different depending whether the legal estate happens to have been vested in one, or in more than one, person. Fourthly, it is difficult to defend the situation where someone not married to the legal owner in actual occupation of their home, and in which they own a share, has less right to remain there than a husband or wife without any such ownership interest.⁹

3.6 Accordingly, we reject one possible option which we put forward in the working paper, do nothing.¹⁰

3.7 In seeking a solution, we nevertheless, recognise the importance of avoiding unnecessary complications in conveyancing. As we pointed out, “it is important not to lose sight of the advantages for the public in facilitating reasonably speedy and safe conveyancing”.¹¹ This point was emphasised by many of the respondents to the working paper, who were practical conveyancers. One solicitor wrote, “it would not be appropriate for anything to be put forward that would have the effect of making conveyancing more difficult and/or expensive”.

3.8 Another reform option would be to require beneficiaries, who wanted to be consulted before the property was disposed of, to register their interests. The corollary to this would be that in the absence of registration overreaching would apply without the beneficiary having any right to withhold consent.¹² We commented, “this proposal can be rejected as being both complex and unrealistic”.¹³ It did, nevertheless, attract limited support. One firm of solicitors considered “that requiring an occupying beneficiary to register his interest produces a degree of certainty as to who has such an interest”. However, we agree with the academic lawyer who said, “The real problem is the case of the casual contributor, who is unaware of the need to protect his or her position”. Several Mothers’ Union groups suggested that “since few beneficiaries would anticipate difficulties later on, they would not themselves take the necessary action”. This is the nub of the difficulty in this approach to reform. The objective must be to confer greater rights on those whom fairness dictates should have them. To do so in such a way that the procedural requirements will defeat the claims of many who are intended to benefit is not a satisfactory way forward. We do not doubt that a lot of people whose ownership interests derive from contributing to the purchase price of a property or from spending money on improvements would fail to register their claims, because they would not know of the need to do so.

3.9 Nevertheless, the need to alert purchasers and others interested in the property remains, and efficient conveyancing demands that beneficiaries’ interests can be readily discovered. In our view, the very fact of a beneficiary’s occupation of the property will provide a sufficient, although not an infallible, advance warning that he may have an interest, so that appropriate enquiries can be made. This is already the case for registered land,¹⁴ and it is what in practice alerts people to the existence of beneficial interests which will not be overreached.¹⁵ We therefore consider that there is no need for beneficiaries to be required to take further steps, and our principal recommendation, set out in Part IV,¹⁶ is made on that basis.

⁹ The non-owning spouse has occupation rights under Matrimonial Homes Act 1983, s.1(11).

¹⁰ Working Paper, para. 6.14.

¹¹ Working Paper, para. 6.2.

¹² Working Paper, para. 6.3.

¹³ Working Paper, para. 6.4.

¹⁴ See para. 2.21 above.

¹⁵ By virtue of *Williams & Glyn’s Bank Ltd v. Boland* [1981] A.C. 487; para. 2.22 above.

¹⁶ Para. 4.3 below.

Bare trusts

3.10 The problem posed by the lack of statutory overreaching rules in the case of bare trustees¹⁷ is different. Here, no protection is afforded to purchasers, so conveyancing is not facilitated. Although we think that most conveyancing is conducted ignoring, or perhaps in ignorance of, the lack of overreaching provision in this case, when the position is highlighted it is unacceptable, because the effect is to undermine the other safeguards. Theoretically, the different rule makes a case for a purchaser from joint owners always to investigate the capacity in which they hold the property. That would comprehensively undermine the 1925 simplifications, which were based on eliminating the need for the purchase of a legal estate to investigate the title to equitable interests, and must be rejected. Nevertheless, as things stand, a purchaser has no way in which he can differentiate between joint owners whose conveyance will, if the statutory conditions are met, overreach equitable interests and joint owners whose conveyance will not. For this reason, and also to give purchasers from bare trustees reasonable protection, some change is required. In our working paper¹⁸ we suggested that the principle of overreaching should extend to conveyances by bare trustees. This suggestion was supported by all those who commented on this issue. Our recommendation to this effect is set out in Part IV.¹⁹

¹⁷ Para. 2.17 above.

¹⁸ Para. 7.1.

¹⁹ Para. 4.27 below.

PART IV
REFORM PROPOSALS

Principal recommendation

4.1 We have concluded that the present protection of the interests of equitable owners in occupation of property is, in some circumstances, inadequate. The owner of an equitable interest which carries a right of occupation is entitled to two distinct benefits: a right to the value of the interest and that right to enjoy occupation. When the owner of a legal estate is in a similar position, the law protects each right separately; if the owner opts to remain in possession, he cannot be obliged to rely solely on the alternative financial right. The effect of overreaching is, however, to oblige the equitable owner to surrender his occupation right in favour of his financial one, without the chance to make a choice. We see no reason why equitable owners should be at a disadvantage in this respect.

4.2 We are, however, conscious of the need to maintain arrangements which will not unduly interfere with conveyancing. This leads us to place our emphasis on protecting the rights of owners of equitable interests who are in actual occupation of the property. That very fact of occupation can be used to alert prospective purchasers and mortgagees to the claims of the equitable owners. It means that the protection of occupation rights does not extend to those who, while they are entitled to occupy, are not currently exercising the right. While that means that equitable owners will sometimes be at a disadvantage, when compared with legal owners, it seems to us to be a reasonable compromise. It offers the right to continue in occupation, to those who are already there, so it is likely to extend the new protection to those who most need it, and of course protection extends to those who enter later.

4.3 Our principal recommendation, to protect the occupation rights of those with an equitable interest in property, can be succinctly stated:

A conveyance of a legal estate in property should not have the effect of overreaching the interest of anyone of full age and capacity who is entitled to a beneficial interest in the property and who has a right to occupy it and is in actual occupation of it at the date of the conveyance, unless that person consents.¹

We examine below the detailed effects of the recommendation.

Beneficiaries

4.4 The new protection against overreaching would extend to anyone who at the date of the conveyance:

- (a) has an equitable interest;
- (b) is of full age and capacity;
- (c) is in actual occupation of the property under a right enforceable against the person conveying the legal estate; and
- (d) has not given consent.

We shall consider each of these requirements individually.

(a) Interests

4.5 Overreaching is only relevant where an equitable interest or power affects the legal estate in land which is being conveyed.² Our proposals do not of themselves create any equitable interests, nor do they entitle anyone to an interest which he would not otherwise have had. The rules for ascertaining whether someone is entitled to an equitable interest would therefore remain unchanged.

4.6 A beneficiary who gave consent, under our proposals, to overreaching would not, without more, extend the overreaching effect to equitable interests which are not at

¹ The lack of consent, in any case where it is required, would not invalidate the conveyance. It would merely take effect subject to the subsisting rights and interests which had not been overreached.

² Law of Property Act 1925, s.2(1).

present affected.³ Accordingly, an equitable interest which cannot be overreached would remain effective, even if a beneficiary in occupation consented to a conveyance which would overreach the interest giving him his right to occupy.

4.7 It is also important to appreciate that there is one other way in which our recommendation is not intended to change the present position. It will not give any new rights of priority to equitable interests. Normally, overreaching affects equitable interests to which a legal estate is subject, but not rights which have priority to that legal estate.⁴ Our proposals will not change this: they alter the circumstances in which overreaching will be possible, but not its consequences.

(b) *Capacity*

4.8 Our recommendation is that the right for an occupying beneficiary to give consent before a conveyance of the legal estate has the effect of overreaching should be confined to those of full age and capacity. In other cases, overreaching would apply as it now does. So, e.g. if two parents own a property and one of their children who is a minor lives with them, the parents could sell without need to question whether the child has an equitable interest. If there is any such interest, it would be overreached and would become an interest in the proceeds of sale.

4.9 It may at first sight seem arbitrary to confine the benefits of our recommendation to those of full age and capacity. However, bearing in mind that the new rule restricts overreaching, expressly, to cases where the beneficiary has consented, the logic becomes apparent. Flexibility remains necessary if property dealings are not to be unreasonably hampered, and it will only be effective if there is the chance of overreaching; for that, it must be possible for a valid consent to be given. It is important for efficient conveyancing that it is possible, with certainty and speed, to obtain the necessary consents. For these reasons, the beneficiaries in question must be people with the capacity to give a binding consent.⁵

4.10 There are two other more pragmatic reasons for restricting the consent provisions to those of full capacity. First, it is rare in practice for those without full capacity to be able independently to occupy property. To give them consent powers, and for consent to be withheld on their behalf, would therefore not generally achieve any useful purpose. Secondly, limiting the class of people who can impede conveyancing by withholding consent similarly limits the scope of the enquiries which prospective purchasers and mortgagees will have to make. Even a small reduction in this burden will be welcome.

(c) *Occupation*

4.11 Our consent proposals would apply if the beneficiary is in actual occupation of the property and has a right to occupy it enforceable against the person conveying the legal estate. The latter requirement would, for example, cover the case of a beneficiary with a life interest under a trust for sale if the trustees proposed to sell. It would also include a beneficiary who had no right to occupy the property by virtue of his beneficial interest but acquired, for instance, a contractual right to occupy which was enforceable against the trustees. Two points may be noted. First, the right to occupy must exist at the date of the conveyance. Accordingly, a beneficiary with a reversionary interest, giving no immediate occupation rights, would not be covered merely because he happened to be in actual occupation at that date. Secondly, the right to occupy must be enforceable against the person conveying the legal estate. Where, for example, it is the legal owner who proposes to sell a house, the owner of an equitable interest who is in actual occupation of it would have a right to give or to withhold consent if he has a right to occupy which is enforceable against the owner. On the other hand, if the property is subject to a mortgage and it is the mortgagee who proposes to sell, our consent proposals would apply if the occupying beneficiary had a right to occupy which is enforceable against the mortgagee.

³ See para. 2.12 above.

⁴ For the exceptional cases, see paras. 2.10 (n. 22) and 2.13 above.

⁵ It is also to be noted that the present requirement for trustees to consult beneficiaries (see para. 2.20 above) applies only to persons of full age: Law of Property Act 1925, s.26(3).

4.12 A beneficiary would have a right to give or withhold consent only in relation to property of which he is in actual occupation. If therefore a trust owned a number of properties, and the trustees sold one of them which the beneficiary did not occupy, his interest would be capable of being overreached in the same way as at present. Similarly, if the property he occupied and other property were conveyed at the same time, the requirement of consent would only apply to that part of which he was in occupation.

4.13 What constitutes “actual occupation”, in the context of the overriding interest in registered land which depends upon occupation,⁶ has been litigated on a number of occasions.⁷ We do not think that it is possible, or even desirable, to attempt a comprehensive statutory definition of what precisely constitutes actual occupation.⁸ Circumstances vary so much that the courts must have the opportunity to apply as seems appropriate a rule laid down in general terms.⁹ The meaning of the term is a question of fact, not law.¹⁰

4.14 The most powerful contrary argument in favour of a precise definition is probably that it would render conveyancing more certain, by making it immediately clear whether or not overreaching applied. However, we doubt whether that would in practice be the result. Conveyancing routine is, in the majority of cases, unlikely to include more than limited, formal enquiries and a brief inspection of the premises. These would probably not be detailed enough to ensure that sufficient information was collected to enable a purchaser to be sure whether or not anyone was occupying the property, in accordance with any detailed and comprehensive definition of actual occupation.

(d) *Consent*

4.15 We do not propose that any particular formality be required for a beneficiary to consent to a conveyance which will have the effect of overreaching. The only requirement—which is one that need not be expressly stated—will be that the consent is real, i.e. that consent has truly been given.

4.16 We considered, and rejected, the possibility that consent should be more formally evidenced. One way would be to specify that consent should be in writing if it were to be effective. That has the obvious attraction of rendering certain the proof of the presence or absence of consent; but it prejudices third parties by preventing overreaching in cases where there has been consent but it was given orally so the formalities were not duly complied with. A requirement of writing might go further and specify that a consent was valid only if on a prescribed form. The object of this would be to allow notes to be incorporated into the form warning the beneficiary of the significance of signing. We regard that as impractical, because the circumstances are likely to vary so widely that it would not be possible within an appropriate compass to draft a single set of fully informative notes. However, the objection to any insistence on particular formalities is more general. There will inevitably be cases in which consent is given informally; if there was no overreaching in those circumstances, purchasers could be misled and it could constitute a trap. Given the premise that the consent is real, there can be no objection to the equitable interest being overreached; such a trap would be undesirable and unjust.

4.17 It does seem to us necessary to have a procedure by which the court may dispense with the requirement that the occupier give consent. Where one joint owner, as trustee for sale, declines to exercise his power of sale, the court has a wide discretion

⁶ Land Registration Act 1925, s.70(1)(g); para. 2.21 above.

⁷ See, e.g. *Strand Securities Ltd v. Caswell* [1965] Ch. 958; *Epps v. Esso Petroleum Co Ltd* [1973] 1 W.L.R. 1071; *Lloyds Bank plc v. Rosset* [1989] 1 Ch. 350; *Abbey National Building Society v. Cann* (1989) *The Times* 15 March.

⁸ See our Third Report on Land Registration, (1987) Law Com. No. 158, para. 2.57; draft Bill annexed to our Fourth Report on Land Registration, (1988) Law Com. No. 173, cl.7(2)(d).

⁹ “I do not think it desirable to attempt to lay down a code or catalogue of situations in which a person other than the vendor should be held to be... in actual occupation... It must depend on the circumstances, . . .”; *Hodgson v. Marks* [1971] Ch. 892, 932 *per* Russell L.J.

¹⁰ *Williams & Glyn's Bank Ltd v. Boland* [1981] A.C. 487, 504–505.

to order a sale, or to do so on terms.¹¹ This jurisdiction is commonly exercised in circumstances where the real question is whether one of the parties who is occupying a property as their home should vacate.¹² The breadth of the court's discretion allows it to take into account all the circumstances of the case.

4.18 The formal issue for decision here is different from cases where a trustee declines to sell. In the latter case there can be no conveyance unless the court intervenes. By contrast, if an occupying beneficiary declines to give consent for the purposes of our proposals, he does not prevent the conveyance being made, but he changes its result in an important way: if the consent is given, the purchaser takes free from the equitable interest; in the absence of consent, the conveyance is subject to that interest. Nevertheless, the decision for the court, in considering whether a beneficiary's consent should be dispensed with, is analogous to the present jurisdiction: in most cases the issue is likely to be whether someone should be obliged to leave their home.

4.19 Accordingly, we recommend that the court be given an unfettered discretion to dispense with the consent requirement. We consider that it is likely, and that it would be appropriate, that in exercising this discretion the courts would follow the principles which have been established in ordering sales by reluctant trustees for sale.

Conveyances by mortgagees

4.20 We have previously mentioned that there is some doubt whether a mortgagor's equity of redemption exists as an independent equitable interest which must be overreached when the mortgagee sells, or whether the mortgagor's interest is such that it can never survive such a sale.¹³ Until now, the result of either analysis of the law has been the same: if a mortgagee sells to realise his security, the mortgagor has no further interest in the property, whether or not he has some claim against the proceeds of sale. Clearly, that is how matters must remain, to ensure that the legitimate rights of mortgagees are not prejudiced. However, if it is correct that a mortgagor has an equitable interest which has to be overreached on a mortgagee's sale, the efficacy of that remedy would be prejudiced by any requirement that a mortgagor who is in occupation must give consent before there can be any overreaching. To deal with this matter of doubt, and to ensure that the mortgagee's remedy remain fully effective, we recommend that any legislation should expressly make it clear that on a conveyance by a mortgagee exercising his power to sale, the mortgagor's consent is not required to enable the conveyance to overreach any equitable interest that he has.

4.21 The position of other beneficiaries who may be in occupation when a mortgagee sells is different. They will not have been parties to the mortgage, so they will not have entered into a transaction which depends for its efficacy on the mortgagee being able, as a last resort, to sell with vacant possession. It is still appropriate, therefore, for their consent to be required in accordance with our principal recommendation. We recognise that, in practice, a mortgagee is likely to seek consents in advance from those whose equitable interests exist at the date of the mortgage. That procedure, which would be analogous to the consents of occupiers which mortgagees often already require, would be consistent with the policy underlying our proposals because it would expressly draw to the attention of beneficiaries the implications for them of the proposed mortgage.

Conveyances by personal representatives

4.22 It is not our intention that our proposals should in any way impede the administration of estates. It is sometimes necessary for personal representatives to sell the deceased's assets to satisfy his debts and to pay expenses, and this may deprive beneficiaries of property they might otherwise have inherited. In view of the small doubt about the position of some beneficiaries under wills,¹⁴ we recommend that the legislation implementing our reforms should make it clear that the consent of a

¹¹ Law of Property Act 1925, s.30(1). We have recommended amending this section: Report on Trusts of Land, (1989) Law Com. No. 181, paras. 12.6–12.12.

¹² See, e.g. *Rawlings v. Rawlings* [1964] P. 398; *Jackson v. Jackson* [1971] 1 W.L.R. 1539; *Williams v. Williams* [1976] Ch. 278; *Re Evers' Trust* [1980] 1 W.L.R. 1327.

¹³ Para. 2.15 above.

¹⁴ Para. 2.16 above.

beneficiary under a will or intestacy is not needed to enable any equitable interest he may have to be overreached by a conveyance by a personal representative exercising his power of sale.

Conveyances under court order

4.23 Conveyances by order of the court overreach equitable interests which are bound by the order, provided that any capital money is paid into court or as the court orders.¹⁵ We see no reason to make any amendment to this provision. In most if not all cases the court will take the opportunity before making any order to consider the rights of all interested parties. No further protection should therefore be necessary, or would indeed be appropriate. Further, there is the existing general rule that any conveyance under the authority of the court is not to be invalidated because of the lack of any consent.¹⁶ Although the lack of a beneficiary's consent under our proposals would not technically invalidate the conveyance,¹⁷ it could, if our recommendations applied, frustrate the intention of the court order. For these reasons, we do not think it is necessary or desirable to extend our proposals to these cases.

Conveyancing procedure

4.24 It is appropriate that we should separately consider the conveyancing effects of our principal recommendation, although we have concluded that they will not be harmful. A prospective purchaser or mortgagee who wishes to ensure, in a case where overreaching could apply, that all equitable interests will be disposed of in that way will need to ascertain whether or not someone other than the vendor or mortgagee is in actual possession. There is nothing new in this. "The first essential is inspection of the property by a purchaser . . . Facts such as the presence of occupying beneficiaries . . . often cannot be ascertained except by inspection".¹⁸ It is already routine for conveyancers to make enquiries about occupiers. As we reported in our working paper, "conveyancers have come to terms with *Boland*¹⁹ and anticipate the existence of beneficial interests belonging to occupiers and not represented on the legal title".²⁰ We would not expect our recommendation to necessitate enquiries and inspections going beyond what is already done at present. Indeed, because only those of full age and capacity could claim the right to give consent, the burden would be less than it now is in ascertaining who may have beneficial interests on a purchase from a sole owner.

4.25 In recent years it has become the practice for prospective purchasers and mortgagees to require consents and waivers of rights from those in occupation or proposing to go into occupation of property. This is one of the ways in which conveyancers have coped with the problem which the decision in *Williams & Glyn's Bank Ltd v. Boland*²¹ posed for them. We expect the same practice would be adopted in many overreaching cases, and as it expressly draws the position to the attention of those involved we regard it as unobjectionable. There seems no reason why consent to overreaching should not be given well in advance of any conveyance even being planned.

4.26 We believe that overreaching will most often apply to residential property, as experience suggests that the bulk of property comprised in trusts and most property owned by more than one person comes into that category. However, our recommendation extends to all types of real property. While there could theoretically be practical difficulties in the case of premises belonging to large professional partnerships, because occupation by any staff for business purposes could represent occupation by all the partners, we doubt whether this will prove to be a stumbling block in practice. Other inconveniences likely to be caused by involving a large number of people in ownership

¹⁵ Law of Property Act 1925, s.2(1)(iv).

¹⁶ *Ibid.*, s.204.

¹⁷ See para. 4.3 (n. 1) above.

¹⁸ *Emmet on Title*, 19th ed., (1986-88), para. 1.031. Similarly, "The purchaser should inspect carefully the house he wants to buy": *Preliminary Enquiries: House Purchase. A Practice Recommendation*. Conveyancing Standing Committee (1987), p. 8.

¹⁹ *Williams & Glyn's Bank Ltd v. Boland* [1981] A.C. 487.

²⁰ Working Paper, para. 6.6.

²¹ [1981] A.C. 487.

and management decisions will dictate that such properties should be vested in service companies. No trust would then apply, so our proposals would not be relevant. On the other hand, our recommendations will be important in relation to business properties owned by small family partnerships.

Second recommendation: bare trusts

4.27 We now turn to our second recommendation. We concluded above²² that statutory provisions for overreaching should apply to property held on bare trusts. We accordingly recommend that the scope of section 2 of the Law of Property Act 1925 should be extended to apply to these cases. Two points should be noted. First, as in the case of conveyances by other trustees, overreaching will apply only if any capital money which arises is paid to a minimum of two trustees or a trust corporation. This extends the existing safeguard for beneficiaries.²³ Secondly, the overreaching effect of a conveyance will be subject to our primary recommendation,²⁴ i.e. the consent will be required of any beneficiary of full age and capacity who has a right to occupy the property and is in actual occupation of it.

Transitional provisions

4.28 With one exception, we recommend that our proposals on all matters other than bare trusts should take effect as soon as the legislation implementing them comes into force. The exception relates to a conveyance giving effect to a contract made before the Act took effect. It would be unsatisfactory if trustees who had committed themselves, before the new Act took effect, to sell with vacant possession, became unable to perform their contracts because of the change in the law. In these transitional cases, therefore, the old law would continue to apply.

4.29 We recommend that our proposals relating to bare trusts²⁵ should apply to all conveyances which take effect after the Bill implementing them comes into force. The reason why there is not, in this case, any exception for conveyances pursuant to earlier contracts is that our recommendation includes the extension of the requirements for payment of the proceeds of sale which safeguard beneficiaries. The extension of this safeguard should not be delayed.

Application to the Crown

4.30 We recommend that the changes we propose should bind the Crown to the extent which the Act they amend do. However, no express provision is included in the draft Bill, because, with certain reservations, the Law of Property Act 1925 binds the Crown.²⁶

²² Para. 3.10 above.

²³ See para. 2.18 above.

²⁴ Para. 4.3 above.

²⁵ Para. 4.27.

²⁶ Law of Property Act 1925, s.208.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 In this Part of the report we summarise our conclusion and recommendations for reform. Where appropriate, we identify the relevant clauses in the draft Law of Property (Overreaching) Bill (contained in Appendix A to this report) to give effect to particular recommendations.

5.2 We have concluded that the owners of equitable interests in real property should not be obliged to surrender occupation rights in favour of purely financial rights, but that, to avoid undue interference with conveyancing, reform should be limited to protecting the rights of equitable owners in actual occupation of property [Paragraphs 4.1-4.2].

5.3 Our recommendations to implement that conclusion are:

- (i) a conveyance of a legal estate in property should not have the effect of overreaching the interest of anyone of full age and capacity who is entitled to a beneficial interest in the property and who has a right to occupy it and is in actual occupation of it at the date of the conveyance, unless that person consents [Paragraph 4.3; clause 1(1) and (2)].
- (ii) No particular formality should be required for the consent given by a beneficiary [Paragraph 4.15].
- (iii) The court should have a discretionary power to dispense with the consent of an occupier [Paragraph 4.19; clause 1(2) and (3)].
- (iv) On a conveyance by a mortgagee exercising his power of sale, the consent of the mortgagor should not be required for overreaching any equitable interest of the mortgagor [Paragraph 4.20; clause 1(2)].
- (v) On a conveyance by a personal representative exercising his power of sale, the consent of a beneficiary under a will or intestacy should not be required for overreaching any equitable interest that the beneficiary may have [Paragraph 4.22; clause 1(2)].
- (vi) The requirement of consent should not extend to the overreaching effect of a conveyance under an order of the court [Paragraph 4.23; clause 1(2)].

5.4 We further recommend that overreaching should apply on a conveyance by bare trustees when the proceeds of sale are paid to two trustees or a trust corporation, subject to the consent of a beneficiary of full age and capacity who has a right to occupy the property and is in actual occupation of it [Paragraph 4.27; clause 2].

5.5 Our recommendations relating to the application of the new legislation are:

- (i) The new rules should apply to all conveyances after the legislation comes into force, except (but not where the property was held on bare trusts) those giving effect to contracts made before the Act took effect [Paragraphs 4.28 and 4.29; clause 3(3)].
- (ii) The provisions in the new legislation amending the Law of Property Act 1925 should bind the Crown to the same extent as that Act already does [Paragraph 4.30].

(Signed) ROY BELDAM, *Chairman*
TREVOR M. ALDRIDGE
JACK BEATSON*
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
20 November 1989

* The policy adopted in this report was agreed before Mr Beatson joined the Law Commission on 3 July 1989.

APPENDIX A

Draft

Law of Property (Overreaching) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Overreaching and rights of persons in occupation.
2. Bare trusts.
3. Citation, commencement and extent.

DRAFT

OF A

B I L L

INTITLED

An Act to restrict the operation of section 2(1) of the Law of Property Act 1925 in certain cases where a person is in occupation; to extend the operation of that subsection to land held on a bare trust; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Overreaching
and rights of
persons in
occupation.
1925 c.20.

1.—(1) Section 2 of the Law of Property Act 1925 shall have effect with the following amendments—

- (a) in subsection (1), after the word “overreach” there shall be inserted the words “,subject to section 2A below,”; and
- (b) in subsection (2), after the word “conveyance”, in the second place where it occurs, there shall be inserted the words “except to the extent (if any) to which section 2A below has effect in relation to it,”.

(2) The following section shall be inserted after that section—

“Protection for
certain persons
in actual occu-
pation.

2A.—(1) Subject to subsection (2) below, if at the date of a conveyance to which section 2(1) above applies a person of full age and capacity who is entitled to an equitable interest or power affecting the legal estate conveyed is in actual occupation, in the exercise of a right enforceable against the person conveying the legal estate, of any part of the land the legal estate in which is conveyed, that subsection does not have effect in relation to the land of which he is in actual occupation unless the conveyance is made with his consent.

(2) This section does not have effect—

- (a) to require the consent of a mortgagor where the conveyance is made by the mortgagee in the exercise of his paramount powers; or

EXPLANATORY NOTES

Clause 1

1. This clause restricts the circumstances in which an equitable interest or power belonging to a person in occupation of property is overreached when a legal estate in the property is conveyed to a purchaser.

Subsection (1)

2. Section 2(1) of the Law of Property Act 1925 applies overreaching in four cases: (i) on a conveyance under the Settled Land Act 1925 or additional powers conferred by the settlement; (ii) on a conveyance by trustees for sale; (iii) on a conveyance by a mortgagee or personal representative in exercise of his paramount powers; and (iv) on a conveyance under a court order. Clause 2 of this Bill adds a further case: (v) conveyance by trustees under a bare trust. Section 2(2) of the Act applies overreaching on a conveyance by trustees for sale approved or appointed by the court, or their successors, or by a trust corporation.

3. Paragraph (a) of this subsection implements the recommendation in paragraph 4.3 of the report by making the overreaching effect of those conveyances to which section 2(1) of the 1925 Act relates subject to the new rights of persons in occupation which are set out in subsection (2) of the new section 2A of the 1925 Act: see paragraph 4 below. That subsection does not, however, apply to a conveyance under an order of the court. This follows the view expressed in paragraph 4.23 of the report.

Subsection (2)

4. This subsection inserts a new section 2A into the Law of Property Act 1925. The object of the new section is to prevent overreaching in cases where a beneficiary is in occupation of the property at the date of the conveyance. In such cases, overreaching will only occur if the occupying beneficiary consents to the conveyance or the court dispenses with his consent.

Subsection (1) of proposed Section 2A

5. This subsection implements in detail the recommendations in paragraph 4.3 of the report.

6. It confers new rights on certain people entitled to an equitable interest or power in land in which the legal estate is conveyed in any of the circumstances covered by section 2(1) of the 1925 Act (other than a conveyance by court order) and where the conveyance is by bare trustees (see clause 2 below).

7. To be entitled to the new rights, a beneficiary must, at the date of the conveyance, be of full age and capacity and be in actual occupation of the land under a right enforceable against the person conveying the legal estate, i.e., the trustees, the mortgagee, etc., as the case may be. The reasons for this are explained in paragraphs 4.8-4.13 of the report.

8. On the sale of part only of the land subject to a trust (e.g., one of two houses to which the terms of the trust apply), the new rights only apply if the beneficiary is in occupation of the part which is conveyed.

9. The rights of a qualifying beneficiary will only be overreached if he consents to the execution of the conveyance, or a court orders that his consent be dispensed with. No particular formality is proposed for this consent: see paragraphs 4.15-4.19 of the report.

Subsection (2)(a) of proposed Section 2A

10. This subsection implements the recommendation in paragraph 4.20 of the report. If the mortgagor is in occupation when a mortgagee conveys the property in exercise of his paramount powers, the mortgagor's consent is not to be required before overreaching can occur.

Law of Property (Overreaching)

(b) to require the consent of a beneficiary under a will or intestacy where the conveyance is made by the personal representative in the exercise of his paramount powers; or

(c) to require the consent of any person to a conveyance—

(i) such as is mentioned in section 2(1)(iv) above; or

(ii) which has effect under section 2(1) of the Law of Property Act 1925 by virtue of section 8 of the Leasehold Reform Act 1967 or paragraph 20 of Schedule 20 to the Housing Act 1985.”

1925 c.20.

1967 c.88.

1985 c.68.

1985 c.20.

(3) The following section shall be inserted after section 30 of the Law of Property Act 1925-

“Powers of court where consent under s.2A is refused.

30A.—(1) If consent required under section 2A above is refused, any person interested may apply to the court for an order dispensing with consent, and the court may make such order as it thinks fit.

(2) The county court has jurisdiction under this section where the land which is to be dealt with in the court does not exceed the county court limit in capital value or net annual value for rating.”

1984 c.28.

(4) In section 24(2)(c) of the County Courts Act 1984 after “30(2),” there shall be inserted “30A(2),”.

Bare trusts.

2.—(1) At the end of subsection (1)(iv) of section 2 of the Law of Property Act 1925 there shall be added “or

(v) the conveyance is made by trustees under a bare trust and the equitable interest or power is capable of being overreached thereby and the statutory requirements respecting the payment of capital money on such a conveyance are complied with.”

EXPLANATORY NOTES

Subsection (2)(b) of proposed Section 2A

11. This subsection implements paragraph 4.22 of the report by making it clear that a conveyance by a personal representative exercising his paramount powers, in the course of administration of an estate, will overreach any equitable interest of a beneficiary under the will or intestacy even without the beneficiary's consent.

Subsection (2)(c) of proposed Section 2A

12. The rights which the section gives to beneficiaries do not apply to conveyances:

- (a) made under an order of the court (see paragraph 4.23 of the report); or
- (b) to give effect to a tenant's statutory right to acquire the freehold of a house held by him under a long lease (Leasehold Reform Act 1967, s.8); or
- (c) to implement an authority's agreement to repurchase defective housing (Housing Act 1985, Schedule 20).

Subsection (3)

13. This subsection inserts a new section 30A in the Law of Property Act 1925. The new section gives the court power to dispense with the consent which a beneficiary in occupation would otherwise have to give, under the proposed section 2A of the 1925 Act, before a conveyance overreached his equitable interest. This implements the recommendation in para. 4.19 of the report.

Subsection (1) of proposed Section 30A

14. Following the precedent of section 30(1) of the Law of Property Act 1925 (which, *inter alia*, gives the court power to order the sale of property held on trust for sale notwithstanding that one or more trustees have refused to sell), this subsection gives the court an unfettered discretion to make an order on the application of any person interested.

Subsection (2) of proposed Section 30A

15. This subsection gives the county court jurisdiction to determine applications to dispense with a beneficiary's consent. It is in the same terms as section 30(2) of the Law of Property Act 1925.

Subsection (4)

16. This subsection amends the County Courts Act 1984, to allow the parties to an application under the proposed section 30A of the Law of Property Act 1925 to agree that a specified county court should have jurisdiction to hear and determine the proceedings.

Clause 2

1. This clause gives trustees under a bare trust who convey a legal estate in land to a purchaser power to overreach any equitable interest or power which affects that estate. This implements the recommendations in paragraph 4.27 of the report.

Subsection (1)

2. This subsection adds a conveyance made by trustees under a bare trust to the list of cases to which the overreaching power granted by section 2(1) of the Law of Property Act 1925 applies: see paragraph 2 of the note to clause 1. Two requirements have to be met. First, the equitable interest or power in question must be one which is capable of being overreached by the conveyance. Secondly, any capital money arising on the conveyance must be dealt with as required by the new provisions in subsection (2) of the proposed new section 27A (see para. 5 below).

Law of Property (Overreaching)

(2) The following section shall be inserted after section 27 of that Act—

“Purchaser not to be concerned with trusts affecting land held on bare trust where proceeds of sale are to be paid to two or more trustees or to a trust corporation.

27A.—(1) A purchaser of a legal estate from trustees holding land on a bare trust shall not be concerned with any equitable interest or power under the trust which affects the land if the interest or power is capable of being overreached by the conveyance to him.

(2) The proceeds of sale arising on a conveyance of land subject to a bare trust shall not be paid to or applied by the direction of fewer than two persons as trustees, except where the trustee is a trust corporation, but this subsection does not affect the right of a sole executor as such to give valid receipts for, or direct the application of, proceeds of sale.”

Citation, commencement and extent.

3.—(1) This Act may be cited as the Law of Property (Overreaching) Act 1990.

(2) This Act shall come into force at the end of the period of two months beginning with the day it is passed.

(3) Section 1 above does not apply to any conveyance in pursuance of a contract made before this Act comes into force.

(4) This Act extends to England and Wales only.

EXPLANATORY NOTES

Subsection (2)

3. This subsection inserts a new section 27A into the Law of Property Act 1925. This section extends rules which apply on a conveyance by trustees for sale, under section 27 of the 1925 Act, to conveyances by bare trustees.

Subsection (1) of proposed Section 27A

4. This subsection relieves a purchaser (widely defined to include a mortgagee and a lessee: Law of Property Act 1925, s.205(1)(xxi)) of the need to be concerned with any equitable interest or power under the trust which is capable of being overreached.

Subsection (2) of proposed Section 27A

5. This subsection lays down requirements for the payment of the proceeds of sale of land subject to a bare trust. It must be paid to, or by the direction of, at least two trustees or a trust corporation. A sole executor may, nevertheless, direct how the proceeds of sale are to be applied, or give a valid receipt for them.

Clause 3

Subsection (3)

This subsection implements the recommendation in paragraphs 4.28 and 4.29 of the report. The new rules relating to overreaching will apply, with one exception, to all conveyances executed after the Bill comes into force. The exceptional case is a conveyance, not relating to land subject to a bare trust, made pursuant to a contract entered into before that date.

APPENDIX B

Individuals and organisations who commented on Working Paper No. 106

Brookes & Bridge, solicitors
Building Societies Association
Chancery Bar Association
Charity Commission
Mrs M. Coleman
Professor F.R. Crane
Country Landowners Association
Mrs D.A. Daborn
Denton Hall Bergin & Warrens, solicitors
The Rt. Hon. Lord Justice Dillon
Mr S. Gardner, Lincoln College, Oxford
General Council of the Bar
Mr C.J. Saville Glanvill, solicitor
Mr J.A. Greed, solicitor
Halifax Building Society
Mr C. Harpum, Downing College, Cambridge
Mr P.G. Harris
Mr W. Herbert, solicitor
Holborn Law Society
Institute of Legal Executives
Justice
H.M. Land Registry
Law Society, Land Law and Conveyancing Committee
Mothers' Union
Mr S.J. Northcott, solicitor
Mr R.T. Oerton, solicitor
The Rt. Hon. the Lord Oliver of Aylmerton
Peard, Webster, Pringle & John, solicitors
Mr J.D. Saunders
Mr R.N. Sexton, Trent Polytechnic
Mr M.T. Smith, solicitor
Mr P. Sparkes, Bristol Polytechnic
Mr I. Storey, Trent Polytechnic
Mr M.P. Thompson, University of Leicester
Mr R. Wakefield, barrister
The Rt. Hon. Sir George Waller



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