434–435, [1986] Ch 638 at 651–653. The distinction between inference and imputation may appear a fine one (and in *Gissing v Gissing* [1970] 2 All ER 780 at 787–788, [1971] AC 886 at 902, Lord Pearson, who, on a fair reading I think rejected imputation, seems to have equated it with inference), but it is important.

An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.

To impute an intention would not only be wrong in principle and a departure from two decisions of your Lordships' House in this very area, but it also would involve a judge in an exercise which was difficult, subjective and uncertain. (Hence the advantage of the resulting trust presumption.) It would be difficult because the judge would be constructing an intention where none existed at the time, and where the parties may well not have been able to agree. It would be subjective for obvious reasons. It would be uncertain because it is unclear whether one considers a hypothetical negotiation between the actual parties, or what reasonable parties would have agreed. The former is more logical, but would redound to the advantage of an unreasonable party. The latter is more attractive, but is inconsistent with the principle, identified by Baroness Hale (at [61], above), that the court's view of fairness is not the correct yardstick for determining the parties' shares (and see *Pettitt v Pettitt* [1969] 2 All ER 385 at 395, 402, 416, [1970] AC 777 at 801, 809, 826).

This view was not endorsed by the majority of the House of Lords. Although she did not directly address the distinction between inferred and imputed intent, Baroness Hale emphasized the need to determine the parties' shared intentions 'actual, inferred or *imputed*'.[70]

As Piska notes in the following extract, it is practically difficult to distinguish between fairness—the criteria adopted in *Oxley v Hiscock* but apparently rejected by the House of Lords in *Stack v Dowden*—and an imputed intent.

Piska, 'Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*' (2008) 71 MLR 120, 128

The search is for the parties' intentions but, as these are only discoverable through words and conduct, and conduct cannot provide arithmetical answers to quantification, the parties' intentions are determined according to what is fair. That this is what Baroness Hale contemplated is indicated by her statement that the search is for 'the result which reflects what the parties must, in the light of their conduct, be taken to have intended'. The importance of this is that whilst the substance of the fairness approach in *Oxley v Hiscock* is in effect affirmed, Chadwick LJ's view of the reasoning that underpins the principle (fairness) is abandoned in favour of the artificial fiction that he rejected in that case—that the result is what the parties must be taken to have intended. Consequently the majority clothe fairness in the language of intention without providing explicit guidance for determining the content of either.

[70] Ibid, [60] (emphasis added).

The meaning of common intention, and in particular the role of imputed intent, was addressed by the Supreme Court in *Jones v Kernott* in a clarification of *Stack v Dowden*. As the extracts that follow show, the Supreme Court unanimously accepted that the parties' common intention can be imputed in limited circumstances in relation to the quantification of beneficial shares. On the facts, the Supreme Court was divided three to two as to whether it was necessary to impute an intention and, indeed, on whether the analysis of particular facts carried practical significance once the legitimacy of imputing an intent was accepted.

It is important to emphasize that the Supreme Court's unanimous acceptance of the role of imputed intent is confined to the issue of quantification of shares. As we have noted in section 2.2 above, Lord Wilson disagrees with the other justices on the separate point of whether the common intention to depart from the presumption of joint and equal beneficial ownership can be imputed. We have further seen, in section 2.1.2, that the better view is that a common intention cannot be imputed in respect of the primary question of the creation of a trust.

Jones v Kernott
[2011] 3 WLR 1121

Facts: Ms Jones and Mr Kernott were an unmarried couple who had cohabited for a period of ten years. They had initially lived in a property that Ms Jones had bought in her sole name, but they had then acquired the property in question, 39 Badger Hall Avenue, in their joint names and lived there for eight years until the breakdown of their relationship. At that stage, Mr Kernott had left the property while Ms Jones remained with the couple's two children. A deposit for the purchase had been provided by the proceeds of sale of Ms Jones' previous home, while the household expenses had been shared. Once Mr Kernott had moved out, Ms Jones took sole responsibility for the household expenses and had now done so for over 14 years. Shortly after the relationship had broken down, an unsuccessful attempt was made to sell the property. Following this, an endowment policy had been surrendered and the proceeds had been used as a deposit on a home for Mr Kernott, 114 Stanley Road, which was bought in his sole name. The proceedings had been commenced by Mr Kernott to establish his beneficial share in 39 Badger Hall Avenue. At first instance, the judge awarded Ms Jones 90 per cent and Mr Kernott 10 per cent. The Court of Appeal, by a two to one majority allowed an appeal by Mr Kernott and declared that the parties were entitled to equal shares. Ms Jones appealed to the Supreme Court.

Lord Walker and Baroness Hale

At [26]–[36]

Inference or imputation?

In *Stack v Dowden* Lord Neuberger observed (paras 125–126):

> "While an intention may be inferred as well as express, it may not, at least in my opinion, be imputed. That appears to me to be consistent both with normal principles and with the majority view of this House in *Pettitt* [1970] AC 777, as accepted by all but Lord Reid in *Gissing v Gissing* [1971] AC 886, 897H, 898B-D, 900E-G, 901B-D, 904E-F, and reiterated by the Court of Appeal in *Grant v Edwards* [1986] Ch 638 at 651F-653A. The distinction between inference and imputation may appear a fine one (and in *Gissing v Gissing* [1971] AC 886, at 902G-H, Lord Pearson,

who, on a fair reading I think rejected imputation, seems to have equated it with inference), but it is important.

An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend."

Rimer LJ made some similar observations in the Court of Appeal in this case [2010] EWCA Civ 578, [2010] 1 WLR 2401, paras 76–77.

Both observations had been to some extent anticipated as long ago as 1970 by Lord Reid in his speech in *Gissing v Gissing* [1971] AC 886, 897:

"Returning to the crucial question there is a wide gulf between inferring from the whole conduct of the parties that there probably was an agreement, and imputing to the parties an intention to agree to share even where the evidence gives no ground for such an inference. If the evidence shows that there was no agreement in fact then that excludes any inference that there was an agreement. But it does not exclude an imputation of a deemed intention if the law permits such an imputation. If the law is to be that the court has power to impute such an intention in proper cases then I am content, although I would prefer to reach the same result in a rather different way. But if it were to be held to be the law that it must at least be possible to infer a contemporary agreement in the sense of holding that it is more probable than not there was in fact some such agreement then I could not contemplate the future results of such a decision with equanimity."

The decision of the House of Lords in *Gissing v Gissing* has been so fully analysed and discussed that it is almost impossible to say anything new about it. However it may be worth pointing out that their Lordships' speeches were singularly unresponsive to each other. The only reference to another speech is by Viscount Dilhorne (at p 900) where he agreed with Lord Diplock on a very general proposition as to the law of trusts. The law reporter has managed to find a ratio for the headnote (at p 886) only by putting these two propositions together with some remarks by Lord Reid (at p 896) which have a quite different flavour. We can only guess at the order in which the speeches were composed, but the third and fourth sentences of the passage from Lord Reid's speech, set out in the preceding paragraph, suggest that Lord Reid had read Lord Diplock's speech in draft, and thought that it was about "an imputation of a deemed intention."

This sort of constructive intention (or any other constructive state of mind), and the difficulties that they raise, are familiar in many branches of the law. Whenever a judge concludes that an individual "intended, or must be taken to have intended," or "knew, or must be taken to have known," there is an elision between what the judge can find as a fact (usually by inference) on consideration of the admissible evidence, and what the law may supply (to fill the evidential gap) by way of a presumption. The presumption of a resulting trust is a clear example of a rule by which the law *does* impute an intention, the rule being based on a very broad generalisation about human motivation, as Lord Diplock noted in *Pettitt v Pettitt* [1970] AC 777, 824:

"It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples 'presumptions' which are based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era."

That was 40 years ago and we are now another generation on.

The decision in *Stack v Dowden* produced a division of the net proceeds of sale of the house in shares roughly corresponding to the parties' financial contributions over the years. The majority reached that conclusion by inferring a common intention (see Lady Hale's opinion at para 92, following her detailed analysis of the facts starting at para 86). Only Lord Neuberger reached the same result by applying the classic resulting trust doctrine (which involved, it is to be noted, imputing an intention to the parties).

In deference to the comments of Lord Neuberger and Rimer LJ, we accept that the search is primarily to ascertain the parties' actual shared intentions, whether expressed or to be inferred from their conduct. However, there are at least two exceptions. The first, which is not this case, is where the classic resulting trust presumption applies. Indeed, this would be rare in a domestic context, but might perhaps arise where domestic partners were also business partners: see *Stack v Dowden*, para 32. The second, which for reasons which will appear later is in our view also not this case but will arise much more frequently, is where it is clear that the beneficial interests are to be shared, but it is impossible to divine a common intention as to the proportions in which they are to be shared. In those two situations, the court is driven to impute an intention to the parties which they may never have had.

Lord Diplock, in *Gissing v Gissing* [1971] AC 886, 909, pointed out that, once the court was satisfied that it was the parties' common intention that the beneficial interest was to be shared in some proportion or other, the court might have to give effect to that common intention by determining what in all the circumstances was a fair share. And it is that thought which is picked up in the subsequent cases, culminating in the judgment of Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, paras 65, 66 and 69, and in particular the passage in para 69 which was given qualified approval in *Stack v Dowden*:

> "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property."

Chadwick LJ was not there saying that fairness was the criterion for determining whether or not the property should be shared, but he was saying that the court might have to impute an intention to the parties as to the proportions in which the property would be shared. In deducing what the parties, as reasonable people, would have thought at the relevant time, regard would obviously be had to their whole course of dealing in relation to the property.

However, while the conceptual difference between inferring and imputing is clear, the difference in practice may not be so great. In this area, as in many others, the scope for inference is wide. The law recognizes that a legitimate inference may not correspond to an individual's subjective state of mind. As Lord Diplock also put it in *Gissing v Gissing* [1971] AC 886, 906:

> "As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party."

This point has been developed by Nick Piska, "Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*" (2008) 71 MLR 120. He observes at pp 127–128:

> "Subjective intentions can never be accessed directly, so the court must always direct itself to a consideration of the parties' objective intentions through a careful consideration of the relevant facts. The point is that the imputation/inference distinction may well be a distinction without a difference with regard to the process of determining parties' intentions. It is not that the parties' subjective intentions are irrelevant but rather that a finding as to subjective intention can only be made on an objective basis."

In several parts of the British Commonwealth federal or provincial legislation has given the court a limited jurisdiction to vary or adjust proprietary rights in the home when an unmarried couple split up. Most require a minimum period of two years' cohabitation (or less if there are children) before the jurisdiction is exercisable. In England the Law Commission has made recommendations on similar lines (Law Com No 307, *Cohabitation: The Financial Consequences of Relationship Breakdown*, 2007), but there are no plans to implement them in the near future.

In the meantime there will continue to be many difficult cases in which the court has to reach a conclusion on sparse and conflicting evidence. It is the court's duty to reach a decision on even the most difficult case. As the deputy judge (Mr Nicholas Strauss QC) said in his admirable judgment [2009] EWHC 1713 (Ch), [2010] 1 WLR 2401, para 33 (in the context of a discussion of fairness) "that is what courts are for." That was an echo (conscious or unconscious) of what Sir Thomas Bingham MR said, in a different family law context, in *Re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1, 33. The trial judge has the onerous task of finding the primary facts and drawing the necessary inferences and conclusions, and appellate courts will be slow to overturn the trial judge's findings.

Lord Collins

At [64]–[65]

I agree, therefore, that authority justifies the conceptual approach of Lord Walker and Lady Hale that, in joint names cases, the common intention to displace the presumption of equality can, in the absence of express agreement, be inferred (rather than imputed: see para 31 of the joint judgment) from their conduct, and where, in such a case, it is not possible to ascertain or infer what share was intended, each will be entitled to a fair share in the light of the whole course of dealing between them in relation to the property.

That said, it is my view that in the present context the difference between inference and imputation will hardly ever matter (as Lord Walker and Lady Hale recognise at para 34), and that what is one person's inference will be another person's imputation. A similar point has arisen in many other contexts, for example, the difference between implied terms which depend on the parties' actual intention, terms based on a rule of law, and implied terms based on an intention imputed to the parties from their actual circumstances: *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 137, per Lord Wright. Or the point under the law prior to the Contracts (Applicable Law) Act 1990 as to whether (in the absence of an express choice) the proper law of the contract depended on an intention to be inferred from the circumstances or on the law which had the closest connection with the contract.

Lord Kerr

At [72]–[75]

It is hardly controversial to suggest that the parties' intention should be given effect to where it can be ascertained and that, although discussions between them will always be the most reliable basis on which to draw an inference as to that intention, these are not the only circumstances in which that exercise will be possible. There is a natural inclination to prefer inferring an intention to imputing one. If the parties' intention can be inferred, the court is not imposing a solution. It is, instead, deciding what the parties must be taken to have intended and where that is possible it is obviously preferable to the court's enforcing a resolution. But the conscientious quest to discover the parties' actual intention should cease when it becomes clear either that this is simply not deducible from the evidence or that no common intention

exists. It would be unfortunate if the concept of inferring were to be strained so as to avoid the less immediately attractive option of imputation. In summary, therefore, I believe that the court should anxiously examine the circumstances in order, where possible, to ascertain the parties' intention but it should not be reluctant to recognise, when it is appropriate to do so, that inference of an intention is not possible and that imputation of an intention is the only course to follow.

In this context, it is important to understand what is meant by "imputing an intention". There are reasons to question the appropriateness of the notion of imputation in this area but, if it is correct to use this as a concept, I strongly favour the way in which it was described by Lord Neuberger in *Stack v Dowden* [2007] 2 AC 432 para 126, where he said that an imputed intention was one which was attributed to the parties, even though no such actual intention could be deduced from their actions and statements, and even though they had no such intention. This exposition draws the necessary strong demarcation line between attributing an intention to the parties and inferring what their intention was in fact.

The reason that I question the aptness of the notion of imputing an intention is that, in the final analysis, the exercise is wholly unrelated to ascertainment of the parties' views. It involves the court deciding what is fair in light of the whole course of dealing with the property. That decision has nothing to do with what the parties intended, or what might be supposed would have been their intention had they addressed that question. In many ways, it would be preferable to have a stark choice between deciding whether it is possible to deduce what their intention was and, where it is not, deciding what is fair, without elliptical references to what their intention might have—or should have—been. But imputing intention has entered the lexicon of this area of law and it is probably impossible to discard it now.

While the dichotomy between inferring and imputing an intention remains, however, it seems to me that it is necessary that there be a well marked dividing line between the two. As soon as it is clear that inferring an intention is not possible, the focus of the court's attention should be squarely on what is fair and, as I have said, that is an obviously different examination than is involved in deciding what the parties actually intended.

Lord Wilson

At [85]–[89]

In para 61 of her ground-breaking speech in *Stack v Dowden* Lady Hale quoted, with emphasis, the words of Chadwick LJ in para 69 of *Oxley v Hiscock*, which I have quoted in para 71 above. Then she quoted a passage from a Discussion Paper published by the Law Commission in July 2002 and entitled "Sharing Homes" about the proper approach to identifying the proportions which "were intended". Finally she added four sentences to each of which, in quoting them as follows, I take the liberty of attributing a number:

> "[1.] That may be the preferable way of expressing what is essentially the same thought, for two reasons. [2.] First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. [3.] Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair. [4.] For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt*... without even the fig leaf of section 17 of the 1882 Act."

I leave on one side Lady Hale's first sentence although, whereas Chadwick LJ was identifying the criterion for imputing the common intention, the context of the passage in the Discussion Paper suggests that the Law Commission was postulating a criterion for inferring it. On any view Lady Hale's second sentence is helpful; and, by her reference to what

the parties must, in the light of their conduct, be taken to have intended (as opposed to what they did intend), Lady Hale made clear that, by then, she was addressing the power to resort to imputation. Lady Hale's fourth sentence has been neatly explained—by Mr Nicholas Strauss QC, deputy judge of the Chancery Division, who determined the first appeal in these proceedings, at para 30—as being that, in the event that the evidence were to suggest that, whether by expression or by inference, the parties intended that the beneficial interests in the home should be held in certain proportions, equity would not "impose" different proportions upon them; and, at para 47 above, Lord Walker and Lady Hale endorse Mr Strauss's explanation.

The problem has lain in Lady Hale's third sentence. Where equity is driven to impute the common intention, how can it do so other than by search for the result which the court itself considers fair? The sentence was not obiter dictum so rightly, under our system, judges below the level of this court have been unable to ignore it. Even in these proceedings judges in the courts below have wrestled with it. Mr Strauss observed, at para 31, that it was difficult to see how—at that final stage of the inquiry—the process could work without the court's supply of what it considered to be fair. In his judgment on the second appeal Lord Justice Rimer went so far as to suggest, at para 77, that Lady Hale's third sentence must have meant that, contrary to appearances, she had not intended to recognise a power to impute a common intention at all.

I respectfully disagree with Lady Hale's third sentence.

Lord Walker and Lady Hale observe, at para 34 above, that in practice the difference between inferring and imputing a common intention to the parties may not be great. I consider that, as a generalisation, their observation goes too far—at least if the court is to take (as in my view it should) an ordinarily rigorous approach to the task of inference. Indeed in the present case they conclude, at paras 48 and 49, that, in relation to Chadwick LJ's second question the proper inference from the evidence, which, if he did not draw, the trial judge should have drawn, was that the parties came to intend that the proportions of the beneficial interests in the home should be held on a basis which in effect equates to 90% to Ms Jones and to 10% to Mr Kernott (being the proportions in favour of which the judge ruled). As it happens, reflective perhaps of the more rigorous approach to the task of inference which I prefer, I regard it, as did Mr Strauss at [48] and [49] of his judgment, as more realistic, in the light of the evidence before the judge, to conclude that inference is impossible but to proceed to impute to the parties the intention that it should be held on a basis which equates to those proportions. At all events I readily concur in the result which Lord Walker and Lady Hale propose.

The Supreme Court reinstated an order made by the judge at first instance (that had been overturned on appeal) granting Ms Jones a 90 per cent beneficial interest. Lord Walker and Baroness Hale consider the 'logical inference' of the parties conduct was that Mr Kernott's interest in the parties' shared home crystallized at the point at which an endowment policy was surrendered to enable him to buy his own home and, therefore, that a common intention could be inferred.[71] Lord Collins agreed with this analysis.[72] Lord Kerr and Lord Wilson preferred to base the decision on an imputed intent.[73]

The approach to quantification of beneficial shares in a constructive trust following *Jones v Kernott* is summarized in the following extract.

[71] [2011] 3 WLR 1121, [48]. [72] Ibid, [55]. [73] Ibid, [76]–[77] and [89].

Jones v Kernott
[2011] 3 WLR 1121

Lord Walker and Baroness Hale

At [51]–[52]

In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity. (2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change. (3) Their common intention is to be deduced objectively from their conduct: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party" (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69. (4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69. In our judgment, "the whole course of dealing [. . .] in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions. (5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

This case is not concerned with a family home that is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above.

2.4 A CRITIQUE OF THE COMMON INTENTION

Following *Stack v Dowden*, the parties' common intention now provides the basis of both the creation of a constructive trust and the quantification of shares under the trust. Academic opinion has been divided on whether the parties' common intention provides an appropriate rationale for the constructive trust.[74] The common intention has been

[74] See the contrasting views on *Grant v Edwards* [1986] Ch 638 by Montgomery, 'A Question of Intention' [1987] Conv 16 (supporting common intention) and Eekelaar, 'A Woman's Place: A Conflict between Law and Social Values' [1987] Conv 93 (against common intention).

variously described as a myth[75] and a phantom.[76] The endorsement of imputed intent by the Supreme Court in *Jones v Kernott*, albeit currently confined to the issue of quantification, further confirms the fallacy of the common intent. An imputed intent, as has been seen, is one acknowledged not to have been held by the parties. In endorsing imputed intent, the Supreme Court acknowledges the close link between this concept and fairness. In this respect, Piska's analysis (extracted above) appears to have been prophetic. There are, however, differences in emphasis between the justices of the Supreme Court. In the judgment of Lord Walker and Baroness Hale, Chadwick LJ's comment in *Oxley v Hiscock* that '*each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property*' is conflated with imputed intent.[77] Lord Wilson asks the rhetorical question '[w]*here equity is driven to impute the common intention, how can it do so other than by search for the result which the court itself considers fair?*'[78] Lord Kerr appears prepared to go further and favours a '*stark choice*' between an inferred intent (actually held) and fairness, but accepts that the language of imputation is now embedded.[79] The question raised by these views is why, despite recognizing the link with fairness, the Supreme Court still clothes the exercise being undertaken with common intent? It seems that the concept has a power or legitimizing effect, at least as a justificatory tool for intervention, that remains compelling to the court.

While academic commentators have suggested alternative bases for intervention no clear consensus has developed.[80] Alternative schemes may simply raise different concerns. The Law Commission abandoned its own attempt to replace the parties' common intention as the basis of determining property rights in the home,[81] noting that its '*uncompromising rejection of intention was ultimately impossible to justify*' and could prejudice many of those who would obtain an interest under the current law.[82]

Bottomley, who had previously argued that the requirement of a common intention led to discrimination against female claimants,[83] became an unlikely proponent for this approach. This support comes from a specific understanding of what is involved in finding a common intention.

Bottomley, 'Women and Trust(s): Portraying the Family in the Gallery of the Law' in *Land Law: Themes and Perspectives* (eds Bright and Dewar, 1998, pp 206, 227–8)

> "I would contend that neither the Courts of Law nor the Courts of Criticism could continue to function if we really let go of the notion of an intended meaning."[84]

Gombrich, in accepting that a work of art may 'hold' many readings, recognizes a more complex picture of the artist/author than one which assumes that authorial knowledge or control is absolute. Value may be given to a work in a series of readings which 'mean' more than

[75] Glover and Todd, 'The Myth of Common Intention' (1996) LS 325.
[76] See *Pettkus v Becker* (1980) 117 DLR (3d) 257, *per* Dixon J.
[77] [2011] 3 WLR 1121, [51] extracted above. [78] Ibid, [87]. [79] Ibid, [74].
[80] See Gardner, 'Rethinking Family Property' (1993) 109 LQR 263 (relationship-based approach) and Barlow and Lind, 'A Matter of Trust: The Allocation of Rights in the Family Home' (1999) 19 LS 468 (a form of community property).
[81] Law Commission Report No 278, *Sharing Homes: A Discussion Paper* (2006), [1.11].
[82] Ibid, [3.76]–[3.78].
[83] Bottomley, 'Self and Subjectivities: Languages of Claim in Property Law' in *Feminist Theory and Legal Strategy* (eds Bottomley and Conaghan, 1993).
[84] [Gombrich, *Gombrich on The Renaissance* (3rd edn, London, Phaidon, 1984) p ii.]

> the artist/author might have intended or foreseen. However he is holding, as a historian, to a basic need to attempt to draw a distinction between drawing a meaning from a work of art and attributing that meaning to the creator. In a sense it is a recovery of the artist, but with a clear recognition that this is only one mode of analysis, of normative and functional value, rather than a simple reality to be asserted (imposed) to the exclusion of all else. [. . .]
>
> The value of intention returns us to the value of 'intended meaning'. It focuses on a need to try and attribute to actors a purpose to their actions which was within their own foresight. As policy in law, this gives credence to individuals and also, as a broader statement, encourages in individuals the need to take responsibility for their actions. [. . .]
>
> The importance of holding to the idea of 'intended meaning' seems, to me, to be crucial both for women and for feminists when faced with the alternatives of being rewarded (protected) on the basis of status or arguments based on economic exchange or presumed mutuality. It ascribes to us the freedom we seek to make our own decisions; what the law must act to mitigate are those situations which circumscribe our freedom through the power relations emanating from, and creating, economic or emotional dependency.

Much, therefore, may lie on how the requirement of common intention is understood. The acceptance of imputed intent means that a common intention can now be found even where there is no suggestion of an actual agreement between the parties (and therefore, no need artificially to construct one). This chimes with the understanding of an intention on which Bottomley's conversion is based.

2.5 TOWARDS A RATIONALIZATION OF TRUSTS OF THE HOME

The decisions in *Stack v Dowden* and *Jones v Kernott* concern only the quantification of beneficial interests; the secondary question. We have noted that the influence of the decisions extends, to some extent, to the primary question of the creation of a trust. We have seen, for example, in section 2.1.2 above that *Stack v Dowden* supports an expansion of the conduct that may be used to infer an agreement to share beneficial ownership. We have also noted that *Stack v Dowden* represents a policy decision to treat ownership of the home differently to other property. This ethos underling the judgment has the potential to change the way in which the primary question of the creation of a trust is answered more radically. In a discussion of the Court of Appeal's decision in *Jones v Kernott*, Gardner and Davidson commented, '*i[t] is to be hoped, incidentally, that the Supreme Court will also make clear that constructive trusts of family homes are governed by a single regime, dispelling any impression that different rules apply to "joint names" and "single name" cases, and to the "establishment" and the "quantum" of the constructive trust*'.[85] The Supreme Court did not go that far. As the question of quantification was the only one to arise on the facts, any attempt to go further would have been obiter. Whilst the views of the court would undoubtedly have commanded respect, given the significance of the issue to have done as Gardner and Davidson had hoped without full argument would have been open to criticism as an exercise in unjustified judicial activism. In response to Gardner and Davidson, Lord Walker and Baroness Hale emphasized the different starting points in joint and sole name cases while noting that *'[a]t a high level of generality, there is of course a single regime: the law of trusts*'.[86]

[85] Gardner and Davidson, 'The Future of *Stack v Dowden*' (2011) 127 LQR 13, 15.
[86] [2011] 3 WLR 1121, [16].

Following *Stack v Dowden* and *Jones v Kernott*, both the creation of a constructive trust and the quantification of shares under the trust are based on the common intention of the parties. However, the creation of a trust is confined to express and inferred intentions, with inferred intent based solely on financial contributions. Two distinct questions arise. The first is whether the type of conduct through which the parties' common intention can be inferred will extend beyond financial contributions—potentially so that the same conduct can be taken into account to infer intent in relation to the primary and secondary questions. In essence, this requires paragraph 69 of Baroness Hale's judgment in *Stack v Dowden* (extracted above) to apply to the primary question. The argument for doing so may be compelling: it appears illogical to suggest that conduct other than financial contributions can be used to infer the parties' common intention for the purposes of quantifying shares in a trust that already exists, but not to infer their intent to create a trust. The second question is whether, in making such an extension, the concept of an imputed intent is extended to the primary question of creation of a trust. In practice these questions may be inseparable. The wider the range of conduct taken into account, the more strained the notion of an inferred intent may become.

The most radical result of an extension of the reasoning in *Stack v Dowden* and *Jones v Kernott* to the creation of the trust is that domestic conduct that is not currently considered sufficient detriment in reliance on an express agreement would become relevant to determining the existence of an inferred or imputed common intention to create a trust. As we have seen, however, the current approach to detriment has been criticized for its denigration of domestic activities. That appears to be the consequence of adopting Nourse LJ's 'reasonable expectations' test of detriment in *Grant v Edwards*, rather than Browne-Wilkinson VC's broader acceptance of acts done for the parties' joint lives.[87] Further, it would not necessarily be the case that domestic conduct alone would be considered a sufficient basis on which to ascertain a common intention to share the beneficial interest: such conduct would be taken into account only as part of the whole course of dealings between the parties.

Adoption of a broad approach to the constructive trust would bring one further welcome rationale: it would reduce the need for the courts to search for evidence of express discussions for an express agreement constructive trust, and hence remove criticism of the artificiality of this exercise that we have seen in the 'excuses' cases. The broader the range of conduct from which a common intention can be inferred or imputed, the less need there is to search for an express agreement.[88]

On the current state of the authorities there is little evidence to suggest any expansion of the criteria for establishing the parties' common intention in connection with the creation of a trust beyond those provided in *Lloyds Bank v Rosset*. Shortly after the House of Lords' decision in *Stack v Dowden*, in *Abbott v Abbott*[89] the Privy Council considered disputed ownership of a home in the context of sole legal ownership. The parties in the case were married, but, in the jurisdiction from which the case was referred (Antigua and Barbuda), entitlement fell to be determined as a matter of property law. Three members of the Board (Lords Walker and Neuberger, and Baroness Hale) had also decided *Stack v Dowden* and the Opinion of the Board was delivered by Baroness Hale, who noted that '*the law has indeed*

[87] See section 2.1.2 above.

[88] See Gardner, 'Rethinking Family Property' (1993) 109 LQR 263, 265. He suggests that, in the excuses cases, the courts '*were engaged in the business of inventing agreements on women's behalf*' because, in the absence of a direct financial contribution, this was the only way in which a beneficial interest could be conferred.

[89] [2007] UKPC 53.

moved on' since *Lloyds Bank v Rosset*.[90] As regards determining ownership of the home, Baroness Hale explained:[91] '*The parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership.*' To the extent this may be seen as foreshadowing the reasoning in *Stack v Dowden* being carried over to the creation of a trust, caution must be advised.

As a decision of the Privy Council it is not binding on English law. Further, on the facts of the case, Mr Abbott did not dispute that Mrs Abbott should obtain a share of the beneficial interest; the dispute concerned the extent of her share.[92]

In *Holman v Howes*,[93] the Court of Appeal suggested that there is not necessarily any difference between cases of joint legal ownership and those of sole legal ownership in which it is not disputed that the claimant is entitled to some share of the beneficial interest. In both cases, the only issue for determination is the quantification of the parties' shares. The application of *Stack v Dowden* to determine the existence of a constructive trust will be tested only where the claimant's argument for a beneficial interest is disputed by the sole legal owner.

In *James v Thomas*,[94] a claim to a beneficial interest failed. Miss James had worked in her cohabitee's business and had become a partner in the business. The Court of Appeal held that this did not give rise to a common intention to share the beneficial interest in the parties' home. Miss James's assistance was considered to be explicable on the basis that the couple were dependent on the success of the business to meet their outgoings. In that context, it was 'not at all surprising' that she did what she could to make the business prosper.[95]

3 OCCUPATION RIGHTS

A right to occupy a home may be claimed in two ways. Firstly, it may be claimed by virtue of holding a property right of a type that confers a right to occupy. In this respect, where the home is held on trust (whether an express trust or a trust arising under the principles discussed in this chapter), the trust will be a trust of land within the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996). Section 12 of that Act confers a right to occupy on beneficiaries as long as specified preconditions are met. The scope of this right to occupy is considered in Chapter 17. The trustees regulate exercise of the right, in the first instance, with an application to the court under ss 14–15 of that Act in the event of any dispute.

Secondly, a statutory right to occupy is conferred on certain categories of person under the Family Law Act 1996 (FLA 1996), irrespective of holding a property right. In some instances, the right arises automatically; in others, it is dependent on an application to the court. Rights to occupy derived from the FLA 1996 are regulated by applications to the court under that Act.

The FLA 1996 confers an automatic right to occupy (referred to as 'home rights') on a spouse or civil partner in circumstances outlined in s 30. No equivalent rights are conferred on cohabitants.

[90] Ibid, [20]. [91] Ibid. [92] Ibid, [19]. [93] [2007] EWCA 877, [28].
[94] [2008] 1 FLR 1598. [95] Ibid, [27], *per* Sir John Chadwick.

Family Law Act 1996, s 30(1) and (9)

(1) This section applies if—

(a) one spouse or civil partner ("A") is entitled to occupy a dwelling-house by virtue of—

(i) a beneficial estate or interest or contract; or

(ii) any enactment giving A the right to remain in occupation; and

(b) the other spouse or civil partner ("B") is not so entitled.

[. . .]

(9) It is hereby declared that [a person]—

(a) who has an equitable interest in a dwelling-house or in its proceeds of sale, but

(b) is not [a person] in whom there is vested (whether solely or as joint tenant) a legal estate in fee simple or a legal term of years absolute in the dwelling-house,

is to be treated, only for the purpose of determining whether he has home rights, as not being entitled to occupy the dwelling-house by virtue of that interest.

Hence, B obtains a right to occupy in two circumstances: firstly, where B has no proprietary, statutory, or contractual right to occupy outside of the Act (and B's spouse or civil partner does enjoy such rights); secondly, where B's only proprietary right is as a beneficiary and B does not also hold legal title. In this instance, B may also have a right to occupy under the TOLATA 1996 by virtue of holding a beneficial interest. The scope of the rights conferred by each statute is, however, different. The 'home rights' conferred by the FLA 1996 are confined to the right, if in occupation, not be evicted by his or her spouse or civil partner and, if not in occupation, to enter and occupy with the leave of the court.[96] They are generally limited in duration to the subsistence of the marriage or civil partnership and the continuance of A's own right to occupy.[97]

A right to occupy may be obtained on application to the court by a former spouse or civil partner (s 35) or a former cohabitant (s 36). As with the automatic home rights conferred on spouses and civil partners, applications are confined to parties who cannot claim a right to occupy outside of the Act, or whose only claim is as a beneficiary.[98] The rights are further limited to houses that were occupied, or intended by the parties to be occupied, as their home.[99] Any right to occupy obtained by an application under ss 35 or 36 is temporary, with an absolute maximum duration of one year.[100]

4 RECOMMENDATIONS FOR REFORM

The decisions in *Stack v Dowden* and *Jones v Kernott* were prompted by the absence of legislative intervention determining the property rights of cohabitees.[101] As Baroness Hale explained in *Stack v Dowden*, this is an area in which law reform has not kept pace with

[96] Family Law Act 1996, s 30(2).

[97] Ibid, s 30(8). The rights may be extended by the court under s 33(5).

[98] Ibid, ss 35(1) and (11), and 36(1) and (11).

[99] Ibid, ss 35(1)(c) and 36(1)(c).

[100] Ibid, ss 35(10) and 36(10). The maximum length of a court order is six months, with the possibility of extension on one further application for another maximum of six months.

[101] *Stack v Dowden* [2007] 2 AC 432, [40]–[48]; *Jones v Kernott* [2011] 3 WLR 1121, [35].

social and economic developments.[102] She highlighted the social significance of rules applicable on the breakdown of a relationship between cohabitants, and the clear divergence between how property rights are *actually* resolved and how many people *believe* that such issues are resolved.

Stack v Dowden
[2007] 2 AC 432, HL

Baroness Hale

At [41]–[42]

[. . .] The first development is, of course, the huge expansion in home ownership which has taken place since the Second World War and was given a further boost by the 'right to buy' legislation of the 1980s. Coupled with this has been continuing house price inflation, albeit with occasional interruptions such as occurred at the end of the 1980s. This has meant that it is almost always more advantageous for someone who has contributed to the acquisition of the home to claim a share in its ownership rather than the return of the money contributed, even with interest.

Another development has been the recognition in the courts that, to put it at its lowest, the interpretation to be put on the behaviour of people living together in an intimate relationship may be different from the interpretation to be put upon similar behaviour between commercial men. To put it at its highest, an outcome which might seem just in a purely commercial transaction may appear highly unjust in a transaction between husband and wife or cohabitant and cohabitant [. . .]

At [44]–[45]

Inter vivos disputes between unmarried cohabiting couples are still governed by the ordinary law. These disputes have become increasingly visible in recent years as more and more couples live together without marrying. The full picture has recently been painted by the Law Commission in *Cohabitation: The Financial Consequences of Relationship Breakdown—A Consultation Paper* (Law Com Consultation Paper no 179) (2006) Pt 2, and its Overview paper, paras 2.3 to 2.11. For example, the 2001 census recorded over 10 million married couples in England and Wales, with over 7 5 million dependent children; but it also recorded over two million cohabiting couples, with over one-and-a-quarter million children dependent upon them. This was a 67% increase in cohabitation over the previous ten years and a doubling of the numbers of such households with dependent children. The Government Actuaries Department predicts that the proportion of couples cohabiting will continue to grow, from the present one in six of all couples to one in four by 2031.

Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short lived and childless. But most people these days cohabit before marriage—in 2003, 78.7% of spouses gave identical addresses before marriage, and the figures are even higher for second marriages. So many couples are cohabiting with a view to marriage at some later date—as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans (see J Ermisch 'Personal Relationships and Marriage Expectations: Evidence from the 1998 British Household Panel' (2000) Working Papers of the Institute of Social and Economic

[102] Ibid.

Research: Paper 2000–27). Cohabitation is much more likely to end in separation than is marriage, and cohabitations which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves 'as good as married' anyway (see Law Com Consultation Paper no 179, Pt 2, p 39 (para 2.45)). There is evidence of a wide-spread myth of the 'common law marriage' in which unmarried couples acquire the same rights as married after a period of cohabitation (see A Barlow et al 'Just a Piece of Paper? Marriage and Cohabitation', in A Park et al *British Social Attitudes: Public policy, social ties. The 18th Report* (2001), pp 29–57). There is also evidence that 'the legal implications of marriage are a long way down the list of most couples' considerations when deciding whether to marry' (see Law Com Consultation Paper no 179, Pt 5, p 96 (para 5.10)).

In the absence of legislative reform, the onus has fallen on the courts to expand and develop equity's principles. Whilst acknowledging the need for an active role on the part of the courts, Hopkins has questioned whether in *Stack v Dowden* the House of Lords provided sufficient justification for a policy decision to treat the home differently. Drawing an analogy with the debate in public law on judicial deference, he notes that whether specific rules should be provided in respect of the home '*raises questions of social policy that have not received a consistent approach in those areas where legislation has been enacted. The issue may be described as polycentric*[103] *given that the ramifications of the decision reach far beyond the resolution of the dispute before the court*'.[104] Reporting on the results of empirical research, Douglas, Pearce, and Woodward have suggested that the need for reform extends beyond a legislative scheme for determining the property rights of cohabitees and requires '*a reappraisal of the law and practice of homebuying*'.[105]

The Law Commission first indicated that it was considering the property rights of home sharers in 1995.[106] The intervening period has seen a significant shift in the focus of the Law Commission's work. Its initial aim was to provide a scheme to determine the property rights of all those who share their home, including married and unmarried couples, and others who share homes as friends, relatives, or for companionship or support.[107] The Law Commission explored the possibility of developing a single scheme to determine ownership of the home in all circumstances in which the issue arose[108] (except cases of relationship breakdown covered by existing statutory schemes), and to the exclusion of claims based on the doctrines of trust (discussed in this chapter) and estoppel (examined in Chapter 10). The Law Commission published its conclusions on this work in *Sharing Homes: A Discussion Paper*.[109] The Law Commission concluded that such a scheme simply is not possible:[110] the

[103] Polycentric issues are those comprised of 'a large and complicated web of interdependent relationships, such that a change to one factor produces an incalculable series of changes to other factors': King, 'The Pervasiveness of Polycentricity' [2008] PL 101, 101.

[104] Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31 LS 175, 196.

[105] Douglas, Pearce and Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 MLR 24, 47.

[106] Law Commission Report No 234, *Sixth Programme of Law Reform* (1995), item 8.

[107] Law Commission Report No 278, *Sharing Homes: A Discussion Paper* (2006), p vi.

[108] That is, the four circumstances outlined by the Law Commission in the extract in section 1 above.

[109] Law Commission Report No 278 (2006).

[110] Ibid, [15] of the Executive Summary and Pt VI of the Discussion Paper.

diversity of situations in which people share homes precludes a uniform approach to determining their property rights.

Subsequently, the focus of the Law Commission's work shifted. It narrowed the scope of its work to consider only the position of cohabitants '*living as a couple in a joint household*'[111] (who have not married or entered a civil partnership) and principally in the context of relationship breakdown.[112] Within this narrow context, however, the Law Commission's work has moved outside the confines of determining property ownership to consider more broadly the financial consequences of relationship breakdown. Its recommendations were published in the report *Cohabitation: The Financial Consequences of Relationship Breakdown*.[113] On 6 September 2011, the government announced that it does not intend to implement these recommendations during the current Parliamentary term.[114] However, the need for reform remains. In response to the government's announcement the Law Commission expressed a hope that implementation '*will not be delayed beyond the early days of the next Parliament, in view of the hardship and injustice caused by the current law*'.[115]

The application of the current property rules on the breakdown of a relationship has long provided the focus of criticism—in part, due to the contrast from the statutory scheme applicable to married couples who divorce. The disparity in treatment received further attention during the passage through Parliament of the Civil Partnership Act 2004, which contains its own scheme for property adjustment orders on the dissolution of a civil partnership.[116]

In developing proposals for reform, an underlying issue has been the extent to which any new scheme applicable to cohabitants should mirror the statutory schemes applicable on divorce and on the dissolution of a civil partnership. Those schemes reflect a different ethos to the application of the property rules discussed in this chapter.

Miles highlights the essence of this difference.[117]

Miles, 'Property Law v Family Law: Resolving the Problems of Family Property' (2003) LS 624, 627

Property law, it may be said, is concerned simply with identifying in an 'unpurposive and formalist' manner existing rights to property (most importantly, beneficial ownership of land) in accordance with pre-determined rules. The basic question underlying property law's

[111] Law Commission Report No 307, *Cohabitation: The Financial Consequence of Relationship Breakdown* (2007), [3.13]. This expression is intended, *in substance*, to denote parties living together as though they were married or in a civil partnership, whilst deliberately avoiding the *language* of relationships 'analogous' to marriage or a civil partnership.

[112] Consequential changes are also proposed to the Inheritance (Provision for Family and Dependents) Act 1975 where a relationship ends through the death of a cohabitant.

[113] Law Commission Report No 307 (2007). The report was preceded by Law Commission Consultation Paper No 179, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2006).

[114] Written Ministerial Statement by Jonathan Djanogly, Parliamentary Under-Secretary of State, Ministry of Justice, 6 September 2011, Hansard HL, cols WS18–19.

[115] http://www.justice.gov.uk/lawcommission/docs/20110906_Statement_on_Govt_response.pdf (accessed 4 January 2012).

[116] Civil Partnership Act 2004, Sch 5, Pt II. It was this disparity that led to a request to the Law Commission to undertake the work that led to the current proposals: Law Commission Report No 307 (2007), [1.18].

[117] See also *Hammond v Mitchell* [1991] 1 WLR 1127, in which, Waite J compared the 'forward-looking' approach of family law to the 'painfully detailed retrospect' required to ascertain the parties' property rights.

approach to the acquisition of property rights might be said to be 'what do I have to do?' to get them. [. . .]

Family law, by contrast, is very much concerned with the status of the parties, in particular the relationship between them, and the economic and other consequences of that relationship. Indeed, it is the existence of a prescribed type of relationship that gives family law its jurisdiction over the issue. A key initial question is not 'what do I have to do?' but 'who do I have to be?' Moreover, unlike property law's backward-looking focus—seeking evidence of past conduct which has automatically generated property rights—family law tends to be forward-looking and discretion-based, typically primarily concerned to cater for future needs created by the relationship between the parties, and is prepared by way of court order to adjust patterns of ownership formally determined by the law of property in relation to assets owned by the parties in order to cater for those needs.

In its report on cohabitation, the Law Commission has recommended a scheme to provide financial relief to cohabitants on the breakdown of their relationship. The proposed scheme will provide a more flexible approach than the property rules discussed in this chapter, but is intentionally not modelled on existing schemes applicable to divorce or the dissolution of a civil partnership.[118] The scheme will apply where cohabitants meet specified eligibility criteria. These are that *either* the cohabitants have a child together, *or* they have cohabited for a minimum duration, which the Law Commission recommends is set between two and five years. It will be possible for cohabitants to opt out of the scheme.[119] This must be achieved through a signed agreement between the parties, which '*makes clear the parties' intention to disapply the statute*'.[120] Notably, an express declaration of trust will not, without more, constitute such an opt-out. The proposed scheme will still apply unless the parties have also made it clear that they intend to disapply the new scheme.[121]

The Law Commission explains, in the following extract, the basis on which relief is determined and the form that the relief may take.

Law Commission Report No 307, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007, [4.32]–[4.41])

We recommend that financial relief on separation should be granted in accordance with a statutory scheme based upon the economic impact of cohabitation, to the following effect.

An eligible cohabitant applying for relief following separation ("the applicant") must prove that:

1. the respondent has a retained benefit; or
2. the applicant has an economic disadvantage;

as a result of qualifying contributions the applicant has made.

A qualifying contribution is any contribution arising from the cohabiting relationship which is made to the parties' shared lives or to the welfare of members of their families. Contributions are not limited to financial contributions, and include future contributions, in particular to the care of the parties' children following separation.

[118] Law Commission Report No 307 (2007), [1.2].
[119] Ibid, Pt 5.
[120] Ibid, [5.56].
[121] Ibid, [5.64].

A retained benefit may take the form of capital, income or earning capacity that has been acquired, retained or enhanced.

An economic disadvantage is a present or future loss. It may include a diminution in current savings as a result of expenditure or of earnings lost during the relationship, lost future earnings, or the future cost of paid childcare.

The court may make an order to adjust the retained benefit, if any, by reversing it in so far as that is reasonable and practicable having regard to the discretionary factors listed below. If, after the reversal of any retained benefit, the applicant would still bear an economic disadvantage, the court may make an order sharing that loss equally between the parties, in so far as it is reasonable and practicable to do so, having regard to the discretionary factors.

The discretionary factors are:

1. the welfare while a minor of any child of both parties who has not attained the age of eighteen;
2. the financial needs and obligations of both parties;
3. the extent and nature of the financial resources which each party has or is likely to have in the foreseeable future;
4. the welfare of any children who live with, or might reasonably be expected to live with, either party; and
5. the conduct of each party, defined restrictively but so as to include cases where a qualifying contribution can be shown to have been made despite the express disagreement of the other party.

Of these discretionary factors, item (1) above shall be the court's first consideration.

In making an order to share economic disadvantage, the court shall not place the applicant, for the foreseeable future, in a stronger economic position than the respondent.

The following range of orders should be available to the court:

1. lump sums, including payment by instalment, secured lump sums, lump sums paid by way of pensions attachment, and interim payments;
2. property transfers;
3. property settlements;
4. orders for sale; and
5. pension sharing.

Unlike on divorce, periodical payments should not generally be available.

In so far as the scheme is engaged, it should apply between the parties to the exclusion of the general law of implied trusts, estoppel and contract.

It should be emphasized that the proposed scheme moves the enquiry away from determining the parties' ownership of property. Where the scheme applies, issues of ownership become otiose. It is consistent with this that the scheme will operate to the exclusion of claims based on the property principles discussed in this chapter. If adopted, there will be a clear demarcation between circumstances in which the scheme applies and circumstances in which parties' ownership of their home will need to be determined under the property rules discussed in this chapter.

Table 3 Scope of the Law Commission's Proposals

When the Law Commission's scheme will apply (if implemented)	When ownership will continue to be determined using property law principles discussed in this chapter
(i) Cohabitants have been living as a couple in a joint household; *and* (ii) the eligibility criteria are met; *and* (iii) the parties have not executed a valid opt out; *and* (iv) an application for financial relief is made by one of the parties following the breakdown of their relationship.	(i) The parties are not cohabitants living as a couple in a joint household. This will include relatives and friends who share a home, and those who live together to provide care or companionship; *or* (ii) cohabitants have lived together as a couple in a joint household, but do not meet the eligibility criteria; *or* (iii) the parties have executed a valid opt-out; *or* (iv) in all cases in which the parties' rights need to be determined in circumstances other than relationship breakdown.

QUESTIONS

1. Compare and contrast resulting and constructive trusts. Why do you think constructive trusts are preferred as a means of determining rights in the home?
2. Are the problems of gender stereotypes that have been encountered in ascertaining the existence of detriment inherent in the adoption of the test provided by Nourse LJ in *Grant v Edwards*? Is Browne-Wilkinson VC's test (in the same case) preferable?
3. Compare and contrast an inferred and an imputed intent. What role does each currently play as regards (a) the creation of a constructive trust and (b) the quantification of beneficial shares under a constructive trust?
4. Following *Stack v Dowden* and *Jones v Kernott* what reforms (if any) do you consider desirable to the current law concerning the creation of a common intention constructive trust?
5. What are the advantages and disadvantages of determining ownership of the home through the application of property law principles? Is the Law Commission justified in singling out relationship breakdown between cohabitants as a situation to be dealt with outside property law principles?

FURTHER READING

Bottomley, 'Women and Trust(s): Portraying the Family in the Gallery of the Law' in *Land Law: Themes and Perspectives* (eds Bright and Dewar, Oxford: OUP, 1998)

Douglas, Pearce and Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) MLR 24

Etherton, 'Constructive Trusts: A New Model for Equity and Unjust Enrichment' (2008) 67 CLJ 265

Gardner, 'Family Property Today' (2008) 124 LQR 422

Gardner, 'Rethinking Family Property' (1993) 109 LQR 263

Harding, 'Defending *Stack v Dowden*' [2009] Conv 309

Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 LQR 310

Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31 LS 175

Law Commission Report No 307, *Cohabitation: The Financial Consequence of Relationship Breakdown* (2007)

Mee, *The Property Rights of Cohabitees* (Oxford: Hart, 1999)

Miles, 'Property Law v Family Law: Resolving the Problems of Family Property' (2003) LS 624

Piska, 'Intention, Fairness and the Presumption of Resulting Trust after *Stack v Dowden*' (2008) 71 MLR 120

Piska, 'Constructive Trusts and Constructing Intention' in Dixon (ed), *Modern Studies in Property Law Volume 5* (Oxford: Hart, 2009)

Probert, 'Equality in the Family Home?' (2007) 15 FLS 341

17

REGULATING CO-OWNERSHIP: THE CONTENT QUESTION

CENTRAL ISSUES

1. Through the existence of express and implied trusts (particularly constructive trusts arising under the principles discussed in Chapter 16), it is common for the home to be co-owned.
2. English law has two forms of co-ownership: the *joint tenancy* and the *tenancy in common*. The legal position of the co-owners as between themselves differs under each form.
3. The distinguishing feature of the joint tenancy is the operation of survivorship on the death of a joint tenant.
4. A joint tenant can become a tenant in common through severance of the joint tenancy. This may occur unilaterally, by the individual act of one or more joint tenants, or mutually, by all of the joint tenants.
5. In both forms of co-ownership, the rights and duties of the co-owners are regulated through the imposition of a trust of land, governed by the Trusts of Land and Appointment of Trustees Act 1996.
6. The 1996 Act confers powers on the trustees in relation to the management of the land and rights on the beneficiaries. In particular, it confers on certain beneficiaries a right to occupy the land.
7. The 1996 Act provides a procedure through which disputes between the co-owners are resolved by an application to court.

1 INTRODUCTION

Co-ownership describes the situation in which two or more people are concurrently entitled to legal and/or beneficial title to an estate in land. Co-ownership may arise either in relation to a freehold or leasehold estate, and is of particular relevance in understanding the legal regulation of the home. The home may be co-owned either through the existence of an express trust, or through a successful claim to ownership of the home being made under the constructive or resulting trust discussed in Chapter 16. The defining characteristic of

co-ownership is that the parties have 'unity of possession'—that is, they are each entitled to possession of the whole of the land. It is unity of possession that distinguishes co-ownership from successive ownership (which is considered in Chapter 20), in which possession is enjoyed consecutively, and separate from ownership of neighbouring plots of land.

The presence of co-ownership gives rise both to internal issues, in relation to the relationship between the co-owners themselves, and external issues, as regards the relationship between the co-owners and third parties. The purpose of this chapter is to consider the internal regulation of co-ownership. It is concerned with the *content* question: the relationship between the co-owners themselves, including their rights and duties in relation to each other, and whether one co-owner can insist on a sale of the land against the wishes of another. Chapters 18 and 19 consider external issues of applications for sale of the land by third parties and priority between the co-owners and third-party purchasers of the land.

The internal regulation of co-ownership is dominated by two features of English law: firstly, the recognition of two distinct types of co-ownership—the *joint tenancy* and the *tenancy in common*; and secondly, the imposition of a trust in all cases of co-ownership. When considering the internal regulation of co-ownership, the trust is best seen as a device through which the powers of management and disposition of the land are separated from the enjoyment of the land, whether 'enjoyment' takes the form of occupation, or receipt of profits and the proceeds of sale. Through the imposition of the trust, the powers of management and disposition are vested in the legal owner or co-owners as trustee(s), while enjoyment of the land vests in the beneficial or equitable owners. Even when the same people are both trustees and beneficiaries, it is important to differentiate the capacity in which a person is exercising his or her rights and duties in relation to the land.

2 JOINT TENANTS AND TENANTS IN COMMON

Co-ownership may take the form of a joint tenancy or a tenancy in common. The essence of a *joint tenancy* is that each joint tenant is wholly entitled to the land when acting collectively, but that, individually, no single joint tenant has any 'share' in the land with which he or she can separately deal. This is reflected in Coke's[1] description of the joint tenancy: '[E]*ach joint tenant holds the whole and holds nothing, that is, he holds the whole jointly and nothing separately.*' The practical consequence of each joint tenant holding 'the whole' is that, when one dies, there is no 'share' to pass by will or intestacy. Title simply 'survives' in the remaining joint tenants through the process of survivorship: there is no passing or vesting of title in the remaining joint tenants, because they were already 'wholly entitled' themselves. The operation of survivorship is the key practical difference between the joint tenancy and the tenancy in common.

Tenants in common hold what are described as 'undivided shares' in the land. Lawson and Rudden explain this concept using the analogy of a company.

Lawson and Rudden, *The Law of Property* (3rd edn, 2002, p 93)

> The simplest way to grasp the idea [of tenants in common] is to think of shares in a company. The shareholders each have a separate thing which they can alienate or leave to pass on their

[1] *Coke upon Littleton* (19th edn, 1832), p 186a.

death, but none of them can go to the company's head office, point at a particular room and say 'I claim my share'. So if there are two owners in common of a house each has a separate, though intangible, asset: it is the house which is not divided into distinct 'shares'.

Each tenant in common may deal with his or her share individually during his or her lifetime (for example, by selling the share to another co-owner, or to a third party). On the death of a tenant in common, his or her share passes through his or her will or under the rules of intestacy. In sum, it may be said that while joint tenants can act only *collectively* and their acts necessarily affect the whole of the co-owned estate, tenants in common can also act *individually* in relation to their own undivided shares in the estate.

Where co-owners start out as joint tenants, one or more of the co-owners may subsequently become a tenant in common through the process of severance. Co-ownership of a legal estate is, however, subject to a particular statutory framework that, through a series of provisions, confines the creation of legal co-ownership to a joint tenancy, precludes any subsequent severance of that joint tenancy, and imposes a maximum number of four joint legal owners.

Law of Property Act 1925, s 1(6)

(6) A legal estate is not capable of subsisting or of being created in an undivided share in land [. . .]

Law of Property Act 1925, s 36(2)

(2) No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other joint tenants, or the right to server a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenants [. . .]

Trustee Act 1925, s 34(2)

(2) In the case of settlements and dispositions [creating trusts of land] made or coming into operation after the commencement of this Act—

(a) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;

(b) the number of the trustees shall not be increased beyond four.

Hence, s 1(6) of the Law of Property Act 1925 (LPA 1925) prohibits legal tenancies in common ('undivided shares'), while s 34(2) of the Trustee Act 1925 imposes a limit of four trustees or owners of the legal title. The effect of these provisions is to create a single and indivisible legal title, held by (and registered in the names of) a maximum of four co-owners. The prohibition of severance—a logical consequence of s 1(6) of the LPA 1925—is put beyond

doubt by s 36(2) of that Act. Because legal title cannot be fragmented through severance, purchasers can deal confidently with the legal owners as collective managers of the sole legal title. The certainty provided to purchasers does not come at the expense of flexibility for the co-owners: flexibility is ensured through the fact that co-ownership necessarily arises under a trust.

These provisions affect only the legal title held by the trustees. Beneficial co-owners remain free to choose between the joint tenancy and tenancy in common, with no limitation on their number.

So what happens if, contrary to these provisions, land is purported to be transferred as a legal tenancy in common? This possibility is dealt with by s 34(2) of the LPA 1925.

Law of Property Act 1925, s 34(2)

(2) Where, after the commencement of this Act, land is expressed to be conveyed to any persons in undivided shares and those persons are of full age, the conveyance shall (notwithstanding anything to the contrary in this Act) operate as if the land had been expressed to be conveyed to the grantees, or, if there are more than four grantees, to the four first named in the conveyance, as joint tenants in trust for the persons interested in the land [. . .]

2.1 IDENTIFYING JOINT TENANTS AND TENANTS IN COMMON

While legal title must be held as a joint tenancy, in equity, the beneficiaries may be either joint tenants or tenants in common. So how do we know whether co-owners are joint tenants or tenants in common?

Three factors may determine this. Firstly, the joint tenancy is characterized by four 'unities', which must be present for the beneficiaries to be joint tenants. In addition to unity of *possession*, these are unity of *interest* (the joint tenants have the same interest in the land), unity of *title* (the joint tenants must derive their title from the same act, for example, of adverse possession, or document), and unity of *time* (joint tenants derive their title at the same time). But while the presence of all four unities is a prerequisite for a joint tenancy, it is not determinative. A tenancy in common may still be found where the unities are present.[2]

Secondly, in an express trust, the parties may declare the capacity in which beneficial entitlement is held. In *Goodman v Gallant*,[3] the court held that such a declaration is conclusive. In *Cowcher v Cowcher*,[4] Bagnell J considered that '*A trust for A and B without further definition creates an equitable joint interest*'. In registered land, joint transferees have the opportunity to indicate on the transfer form TR1 whether equitable title is to be held as a joint tenancy—but completion of that part of the form is not mandatory and therefore issues of interpretation will continue to arise as to whether the terms of a trust are sufficient to declare a joint tenancy.[5] In *Robertson v Fraser*,[6] Lord Hatherley LC noted: '*I cannot doubt, having regard to the authorities respecting the effect of such words as amongst and respectively that anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint tenancy, and to create a tenancy in*

[2] Smith, *Plural Ownership* (2005) p 27. [3] [1986] Fam 106. [4] [1972] 1 WLR 425, 430.
[5] *Stack v Dowden* [2007] UKHL 17, [52]–[53]. [6] (1870–71) LR 6 Ch App 696.

common.' A declaration that a survivor can give a valid receipt for capital moneys has been held insufficient to establish an express joint tenancy.[7]

Thirdly, in the absence of an express declaration by the parties, the status of co-owners is determined by the application of legal presumptions. The starting point is the general presumption that equity follows the law. As the parties are necessarily joint tenants in law, they will be joint tenants in equity. Prior to *Stack v Dowden*[8] the initial presumption of a joint tenancy was considered to be readily rebutted where parties contributed to the purchase of land in unequal shares. In such circumstances it was considered that equity favoured the tenancy in common as crediting parties with a share reflecting their actual contribution and avoiding the capricious effect of survivorship that the longest survivor gains all. This approach was preferred by Lord Neuberger in his minority judgment in the case.[9] The majority considered that in the 'domestic consumer context' the presumption of joint tenancy will only be rebutted where the contrary is proved through a common intention constructive trust (in the manner discussed in Chapter 16). Further, it was considered that cases in which the presumption would be rebutted in this way would be 'very unusual'.[10]

This approach was endorsed by the Supreme Court in *Jones v Kernott*,[11] but with significant clarification as to the type of case to which *Stack v Dowden* applies and as to the reasons underpinning the presumption in those cases. In respect of the scope of *Stack v Dowden*, in their joint judgment in *Jones v Kernott* Lord Walker and Baroness Hale referred to the presumption of joint tenancy as operating in respect of properties bought '*in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage*'.[12] In the following extract, they explain the reasoning for the operation of the presumption in these cases.

Jones v Kernott
[2011] 3 WLR 1121

Lord Walker and Baroness Hale

At [19]–[22]

The presumption of a beneficial joint tenancy is not based on a mantra as to "equity following the law" (though many non-lawyers would find it hard to understand the notion that equity might do anything else). There are two much more substantial reasons (which overlap) why a challenge to the presumption of beneficial joint tenancy is not to be lightly embarked on. The first is implicit in the nature of the enterprise. If a couple in an intimate relationship (whether married or unmarried) decide to buy a house or flat in which to live together, almost always with the help of a mortgage for which they are jointly and severally liable, that is on the face of things a strong indication of emotional and economic commitment to a joint enterprise. That is so even if the parties, for whatever reason, fail to make that clear by any overt declaration or agreement. The court has often drawn attention to this. Jacob LJ did so in his dissenting judgment in this case: [2010] EWCA Civ 578, [2010] 1 WLR 2401, para 90.

[7] *Stack v Dowden* [2007] 2 AC 432, [51], approving the Court of Appeal decisions in this respect in *Harwood v Harwood* [1991] 2 FLR 274 and *Huntingford v Hobbs* [1993] 1 FLR 736.

[8] [2007] 2 AC 432, [58] *per* Baroness Hale.

[9] Ibid, [109]–[110]. The presumption of a tenancy in common where parties contribute unequally remains intact in commercial cases. See, e.g., *Malayan Credit v Jack Chia* [1986] AC 549, PC.

[10] [2007] 2 AC 432, [68], *per* Baroness Hale.

[11] [2011] UKSC 53, [25] and [68].

[12] Ibid, [25].

One of the most striking expressions of this approach is in the judgment of Waite LJ in *Midland Bank plc v Cooke* [1995] 4 All ER 562, 575. It is worth quoting it at some length, even though the case was a single-name case and the couple were married (the husband was 19, and the wife a little older, at the time of the marriage):

> Equity has traditionally been a system which matches established principle to the demands of social change. The mass diffusion of home ownership has been one of the most striking social changes of our own time. The present case is typical of hundreds, perhaps even thousands, of others. When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure. Despite the efforts that have been made by many responsible bodies to counsel prospective cohabitants as to the risks of taking shared interests in property without legal advice, it is unrealistic to expect that advice to be followed on a universal scale. For a couple embarking on a serious relationship, discussion of the terms to apply at parting is almost a contradiction of the shared hopes that have brought them together. There will inevitably be numerous couples, married or unmarried, who have no discussion about ownership and who, perhaps advisedly, make no agreement about it. It would be anomalous, against that background, to create a range of home-buyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it.

Gardner and Davidson make the same point at (2011) 127 LQR 13, 15–16:

> The context under discussion is one in which people will not normally formulate agreements, but (this is crucial) the very reason for this—the parties' familial trust in one another—also warrants the law's intervention nonetheless. Unless the law reacts to such trust as much as to more individualistic forms of interaction, those who put their faith in the former rather than the latter will find their interests thereby exposed.

Gardner has termed this "a materially communal relationship: ie one in which, in practical terms, they pool their material resources (including money, other assets, and labour)": *An Introduction to Land Law,* 2nd ed (2009) para 8.3.7.)

The notion that in a trusting personal relationship the parties do not hold each other to account financially is underpinned by the practical difficulty, in many cases, of taking any such account, perhaps after 20 years or more of the ups and downs of living together as an unmarried couple. That is the second reason for caution before going to law in order to displace the presumption of beneficial joint tenancy. Lady Hale pointed this out in *Stack v Dowden* at para 68 (see para 12 above), as did Lord Walker at para 33:

> In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties. The presumption will be that equity follows the law. In such cases the court should not readily embark on the sort of detailed examination of the parties' relationship and finances that was attempted (with limited success) in this case.

In respect of homes bought in joint names by parties who are not in an intimate relationship (for example, those bought jointly by parents and children, siblings, or friends) there will still be an initial presumption of joint tenancy based on the '*mantra*' that equity follows the law. However, that initial presumption will be replaced with a presumption of resulting trust where the parties contributed unequally so that the beneficial shares reflect their contributions. Where the parties' shares are unequal they will necessarily be tenants in common.

In *Stack v Dowden* and *Jones v Kernott* the status of the co-owners as joint tenants or tenants in common was addressed only in relation to cases of joint legal ownership. The decisions do not indicate the status of parties in a case of sole legal ownership where another party (or parties) establish a beneficial interest through a resulting or constructive trust. Prior to *Stack v Dowden*, as with cases of joint legal ownership, the status of the parties would be dependent on whether they contributed equally or unequally: equal contributions were considered to be consistent with a joint tenancy; unequal contributions with a tenancy in common. In cases of sole legal ownership, there is no initial presumption of co-ownership; the initial presumption is of sole beneficial ownership. This may be sufficient to differentiate such cases and leave the existing presumptions intact. But *Stack v Dowden* moves the ethos in determining rights in homes acquired by married and unmarried cohabitees away from contributions (and the resulting trust) to the parties' common intention through the constructive trust. It is consistent with this to suggest that, in sole legal ownership cases, parties should be joint tenants despite contributing unequally to the purchase where, on a constructive trust analysis, there is a common intention to share beneficial ownership equally.

2.2 SURVIVORSHIP

As has been noted, survivorship operates in a joint tenancy, with the effect that, on the death of one co-owner, title simply remains in the survivors. Through this process, the longest surviving co-owner becomes the sole owner. Practical difficulties that would arise where the co-owners die jointly are precluded by an arbitrary rule in s 184 of the LPA 1925.

Law of Property Act 1925, s 184

> In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

The effect of this provision is that, in the event of simultaneous deaths of joint tenants, the land passes wholly under the terms of the will (or rules of intestacy) of the youngest co-owner.

2.3 SEVERANCE

Severance is the process through which a beneficial joint tenant may become a tenant in common. By doing so, the severing joint tenant obtains an undivided share in the land that can be separately dealt with and which, on his or her death, will pass under the terms of their will or through statutory rules applicable to intestacy. The severing joint tenant is no longer affected by survivorship, which continues to operate as between any remaining joint tenants. Severance is irreversible. Because survivorship operates immediately upon the joint tenants' death, severance must take place during their lifetime. In particular, this carries the consequence that severance cannot take place by will. The severing joint tenant is invariably credited with an equal share.[13]

[13] *Goodman v Gallant* [1986] Fam 106.

Four methods of severance exist. One is provided by statute in s 36(2) of the LPA 1925. That subsection also preserves the operation of other methods of severance. Three other methods have developed through case law and were summarized in the following case.

Williams v Hensman
(1861) 1 J&H 546

Page-Wood VC

At 557

A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi*. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund—losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third pace, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the context have been effected [. . .]

The methods identified by Page-Wood VC may be referred to, respectively, as an act of a joint tenant operating on his or her share, mutual agreement, and severance by a course of dealing. Of these four methods, a joint tenant may use the first two (statutory severance and an act operating on a share) unilaterally. For so long as there are two or more joint tenants, their joint tenancy remains intact between them and exists side by side with the severed tenant in common. The effect of such unilateral severance is illustrated in Figure 10.

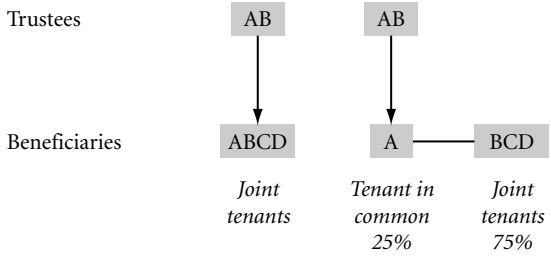

Figure 10 Unilateral severance by one joint tenant (A)

The other two methods (mutual agreement and course of dealing) necessarily involve the participation of all of the joint tenants and, if applied, bring the joint tenancy to an end by turning all of the beneficiaries into tenants in common. These methods of severance cannot be used, for example, by two of four joint tenants to sever their joint tenancy, but leave the joint tenancy intact as between the others.

In addition to these methods, severance may also arise as a consequence of the unlawful killing of one joint tenant by another.

2.3.1 Statutory severance

The statutory method of severance is found in the proviso to s 36(2) of the LPA 1925.

Law of Property Act 1925, s 36(2)

(2) Provided that, where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon [the land shall be held in trust on terms] which would have been requisite for giving effect to the beneficial interests if there had been an actual severance.

It is important to note that, to be effective, written notice must be served on all of the joint tenants. Written notice that is not served on all of the joint tenants will not constitute severance under this provision.

Two key issues have arisen in the application of s 36(2): firstly, what constitutes written notice; and secondly, how to identify the point in time at which notice is validly served.

What constitutes written notice?

While there is no particular form that the notice must take,[14] it must express an immediate severance and must relate to the ownership of the land or proceeds of sale in a manner inconsistent with a joint tenancy. In this respect it is important to bear in mind that a joint tenancy continues to subsist as the property held on trust is exchanged: for example, a joint tenancy of a house continues into the proceeds of sale. The need for a notice to relate to ownership is highlighted by *Nielson-Jones v Fedden*.[15] In that case, severance was held not to have taken place, because the written notice dealt with use, rather than ownership, of the proceeds of sale. The notice, which took the form of a memorandum agreed between the parties, directed the husband to '*use his entire discretion and free will*' to decide whether to sell the parties' former matrimonial home in order to purchase a home for himself. Walton J noted that the memorandum was 'wholly ambiguous' as to ownership of the proceeds of sale.[16] It gave the husband use of the whole of the proceeds of sale, but this did not imply that he was entitled to half absolutely. It is entirely consistent with the unity of possession that is characteristic of co-ownership for one joint tenant to have use of the whole property.

In *Burgess v Rawnsley*,[17] Lord Denning MR suggested that the decision in *Nielson-Jones v Fedden* was wrong. He did not, however, discuss the specific issue regarding a declaration of use.

The need for the notice to express an immediate severance is illustrated by contrasting the two following cases.

[14] There is no requirement that the notice is signed: *Re Draper's Conveyance* [1969] 1 Ch 486, 492.
[15] [1975] Ch 222. [16] Ibid, 229.
[17] [1975] Ch 429. See further Prichard, 'Joint Tenancies: Severance' [1975] CLJ 28, 30–1.

Re Draper's Conveyance
[1969] 1 Ch 486, HC

Facts: A husband and wife were joint tenants of their matrimonial home. Following their divorce, the wife issued a summons under s 17 of the Married Woman's Property Act 1882 for an order that the house be sold, and the proceeds distributed equally between her and her husband—a request reflected in an affidavit sworn by her in support of her application. An order for possession and sale, and equal division of the proceeds, was made, but the husband remained in possession until his death. The question then arose as to whether severance had occurred.

Plowman J

At 492–4

The summons, coupled with the affidavit in support of it, clearly evinced an intention on the part of the plaintiff that she wished the property to be sold and the proceeds distributed, a half to her and a half to the deceased. It seems to me that that is wholly inconsistent with the notion that a beneficial joint tenancy in that property is to continue, and therefore, apart from these objections to which I will refer in a moment, I feel little doubt that in one way or the other this joint tenancy was severed in equity before the end of February, 1966, as a result of the summons which was served on the plaintiff's then husband and as a result of what the plaintiff stated in her affidavit in support of the summons of Feb. 11, 1966 [. . .]

Counsel for the plaintiff took another point. Counsel for the defendants, in argument, having indicated that he relied not only on the summons as operating to sever the joint tenancy but on the orders as well, counsel for the plaintiff submitted on the authority of *Bedson v. Bedson* that there was no power in the court by an order made under the Married Women's Property Act, 1882, to sever a beneficial joint tenancy. He submitted that the power of the court was to declare what the rights of the parties were and not to alter those rights. That may well be so—for the purposes of my judgment I am prepared to assume that counsel for the plaintiff is right about that—but the view which I take is that the question does not arise here. The severance, in my judgment, is effected by the summons and the affidavit, not by any order that was made. Accordingly, in my judgment, the beneficial joint tenancy was severed by the plaintiff in the lifetime of the deceased husband, and I propose to declare that on the true construction of the above-mentioned conveyance and s. 36 of the Law of Property Act, 1925, and in the events which have happened, the plaintiff, as trustee, holds the beneficial interest in any proceeds of sale of the property after discharge of incumbrances and costs for herself and the estate of the deceased as tenants in common in equal shares.

Harris v Goddard
[1983] 3 All ER 242, CA

Facts: As in *Re Draper's Conveyance*, a husband and wife were joint tenants of their matrimonial home. Following the breakdown of the relationship, the wife petitioned for divorce and requested, under the Matrimonial Causes Act 1973, '*That such order may be made by way of transfer of property and/or settlement in respect of the former matrimonial home* [. . .] *and otherwise as may be just*'. The husband was subsequently killed in an accident and the question arose whether this petition had acted to sever the joint tenancy.

Lawton LJ

At 246

When a notice in writing of a desire to sever is served pursuant to s. 36(2) it takes effect forthwith. It follows that a desire to sever must evince an intention to bring about the wanted result immediately. A notice in writing which expresses a desire to bring about the wanted result as some time in the future is not, in my judgment, a notice in writing within s. 36(2). Further, the notice must be one which shows an intent to bring about the consequences set out in s. 36(2), namely that the net proceeds of the statutory trust for sale "[. . .] shall be held upon the trust which would have been requisite for giving effect to the beneficial interests if there had been an actual severance". I am unable to accept Mr Berry's submission that a notice in writing which shows no more than a desire to bring the existing interest to an end is a good notice. It must be a desire to sever which is intended to have the statutory consequences. Paragraph 3 of the prayer to the petition does no more than invite the court to consider at some future time whether to exercise its jurisdiction under s. 24 of the 1973 Act or, if it does, to do so in one or more of three different ways. Orders under s. 24(1)(a) and (b) could bring co-ownership to an end by ways other than by severance. It follows, in my judgment, that para. 3 of the prayer of the petition did not operate as a notice in writing to sever the joint tenancy in equity. This tenancy had not been severed when Mr Harris died with the consequence that Mrs Harris is entitled to the whole of the fund held by the first and second defendants as trustees. I wish to stress that all I am saying is that para. 3 in the petition under consideration in this case did not operate as a notice of severance.

The key difference between the cases is that that the petition in *Harris v Goddard* did not evince an *immediate* desire to sever. It should be emphasized that, in *Re Draper's Conveyance*, the court acknowledged that severance was caused by the summons and affidavit, not the order of the court. Hence, where the application constitutes written notice, severance occurs regardless of whether the application is heard or, if it is, regardless of the outcome. The courts' reliance on the summons and affidavit in *Re Draper's Conveyance* caused doubt to be cast on the decision. In *Nielson-Jones v Fedden*,[18] Walton J noted that, until a court order is made, proceedings can be withdrawn. He considered that notice under s 36(2) of the LPA 1925 must be irrevocable, and therefore doubted that a summons and affidavit could suffice. This doubt was cast aside in *Harris v Goddard*.[19] Lawton LJ noted that the revocable nature of court proceedings is simply a factor for the court to consider in all of the circumstances when determining whether, on the facts of the case, notice has been served within s 36(2).

Whether it is necessary for the notice to be irrevocable appears to remain unsettled. Notably, in responding to Walton J's judgment, Lawton LJ does not explicitly reject such a requirement. But Smith suggests that the endorsement of *Re Draper's Conveyance* by the Court of Appeal, both in *Harris v Goddard* and in a further decision,[20] suffices to dispel the need to show that notice is irrevocable.[21]

Re Draper's Conveyance was applied in the context of different judicial proceedings in *Quigley v Masterson*.[22] There, the judge was satisfied that an application to the Court of

[18] [1975] Ch 222, 236. [19] [1983] 1 WLR 1203, 1210–11.
[20] *Burgess v Rawnsley* [1975] Ch 429. [21] Smith (2005), p 51. [22] [2011] EWHC 2529 (Ch).

Protection in which one joint tenant sought authority to sell a house and divide the proceeds between herself and the other joint tenant, her former partner, constituted notice.

When is notice of severance validly served?

Whether notice of severance has been validly served is a matter of importance, as it is from that moment that the joint tenancy is irreversibly severed, the severing joint tenant becomes a tenant in common and, as such, is no longer subject to survivorship. In most cases, this issue does not cause difficulties: written notice is sent and received, and the matter is beyond doubt. Where the notice is connected to judicial proceedings it will be served in the context of those proceedings.[23] But understanding when notice is validly served may be crucial where a death occurs in close proximity of time or a joint tenant, having issued notice, seeks to intercept it following a change of mind.

The requirement in s 36(2) of the LPA 1925 is that the notice is given to the joint tenants. General guidelines on service of a notice are provided in s 196 of the Act. These have been applied to s 36(2), 'given' and 'served' being considered in this context to be synonymous.[24]

Law of Property Act 1925, s 196(3) and (4)

(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned [by the postal operator (within the meaning of the Postal Services Act 2000) concerned] undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

It should be noted that there is no requirement that the notice is actually *received* or seen by the intended recipient. It is sufficient that it reaches (or is deemed to have reached) the joint tenant's last known address. Where notice is sent by ordinary post, it is served within s 196(3) when the postman delivers the letter, because this constitutes leaving the notice at the '*last known place of abode*'.

This was held in the following case, which contains the most thorough judicial analysis of when written notice is served. As Neuberger J highlights, the seemingly unending possible factual permutations justify a clear rule.

[23] Cf: *Quigley v Masterson* [2011] EWHC 2529 (Ch). There, the joint tenant on whom notice needed to be served was not a party to proceedings which related to an application to the Court of Protection to appoint a Deputy to act on his behalf. The notice was treated as having been served on his Deputy from the time that she was appointed by the court to act on his behalf.

[24] *Re 88 Berkeley Road* [1971] 1 All ER 254.

Kinch v Bullard
[1999] 1 WLR 423, HC

Facts: Mr and Mrs Johnson were beneficial joint tenants of their matrimonial home. The parties were divorcing and Mrs Johnson, who was terminally ill, sent a notice of severance to Mr Johnson by ordinary first-class post. The letter was duly delivered, but, before seeing it, Mr Johnson suffered a serious heart attack. Realizing that she was now likely to outlive her husband, Mrs Johnson destroyed the letter. Mr Johnson died a couple of weeks later, followed, in a matter of months, by Mrs Johnson. An action was brought by the parties' respective executors to determine whether the notice—delivered, but then destroyed—had operated to sever the joint tenancy. If it had, then each party had a 50 per cent share to pass under the terms of their respective wills; if not, survivorship would have operated on Mr Johnson's death, leaving the entire property to pass under Mrs Johnson's will.

Neuberger J

At 427–30

Section 196(4) deems service on the premises to have taken place if the requirements of sending by registered post and non-return by the Post Office are satisfied, even if it can be shown that physical service did not in fact take place on those premises. Section 196(3), on the other hand, requires it to be established that physical service did in fact take place on the appropriate premises, before any deemed service can arise. It appears to me that the natural meaning of s 196(3) is that if a notice can be shown to have been left at the last known abode or place of business of the addressee, then that constitutes good service, even if the addressee does not actually receive it. [. . .]

Thirdly, it was contended on behalf of the defendants that the fact that Mrs Johnson changed her mind and no longer '(desired) to sever the joint tenancy' by the time that the notice might otherwise have been said to have been 'given' (ie by the time that the notice arrived at the property) meant that the notice was ineffective to effect such severance. This argument is based on the language of s 36(2). Assuming that the notice was validly 'given' pursuant to s 196(3), the giving of the notice only occurred when it was actually delivered to the property, and at that time Mrs Johnson no longer 'desire[d] to sever the joint tenancy'. Accordingly, it is said that the statutory precondition for the giving of a valid notice was not, at the date it was given, satisfied, because at that date Mrs Johnson did not have the necessary 'desire'.

In my judgment, this argument is not correct. The function of the relevant part of s 36(2) is to instruct any joint tenant who desires to sever the joint tenancy how to do it: he is to give the appropriate notice (or do such other things as are prescribed by the section). Clear words would be required, in my judgment, before a provision such as s 36(2) could be construed as requiring the court to inquire into the state of mind of the sender of the notice. Once the sender has served the requisite notice, the deed is done and cannot be undone. The position is the same as with a contractual right to determine a lease, which normally entitles either or both parties to serve notice to determine the lease if it desires to put an end to the term. Once the procedure has been set in train, and the relevant notice has been served, it is not open to the giver of the notice to withdraw the notice, and I have never heard it suggested that a change of mind before the notice is given would render it ineffective.

I reach this conclusion based on the proper construction of s 36(2). However, it appears to me that it is also correct as a matter of policy. If it were possible for a notice of severance or

any other notice to be ineffective because, between the sender putting it in the post and the addressee receiving it, the sender changed his mind, it would be inconvenient and potentially unfair. The addressee would not be able to rely confidently upon a notice after it had been received, because he might subsequently be faced with the argument that the sender had changed his mind after sending it and before its receipt. Further, as I have already mentioned, it is scarcely realistic to think that the legislature intended that the court could be required to inquire into the state of mind of the sender of the notice in order to decide whether the notice was valid.

I am inclined to think that the position would be different if, before the notice was 'given', the sender had informed the addressee that he wished to revoke it. In such a case, it appears to me that the notice would have been withdrawn before it had been 'given'. After all, as is clear from the reasoning at first instance and in the Court of Appeal in *Holwell Securities Ltd v Hughes* [1973] 2 All ER 476 at 481, [1973] 1 WLR 757 at 761–762; [1974] 1 All ER 161 at 164, 166–167, [1974] 1 WLR 155 at 158–159, 160–162, a notice sent by post is not 'served' in accordance with s 196(3) until it arrives at the premises to which it has been addressed. Accordingly, it seems to me that, while the notice is still in the post, it has not been given, and, until it is given, the sender has in effect a locus poenitentiae whereby he can withdraw the notice, but only provided his withdrawal is communicated to the addressee before the notice is given to, or served on, the addressee. I should emphasise, however, that this is no more than a tentative view.

Fourthly, it is said that, in the present case, the notice was not 'left' at the property within the meaning of s 196(3). Assuming that, before the notice was actually posted through the letter box, Mrs Johnson had decided that she would pick it up and destroy it, and bearing in mind that she was the person whose notice it was, it is said that the notice was never really 'left' for Mr Johnson at the property. In my judgment, that argument is wrong as a matter of principle, and would be inconvenient to apply in practice.

So far as the principle is concerned, it seems to me that, by putting the notice in the post, Mrs Johnson effectively left it to the Post Office to serve the notice on her behalf. One therefore has to ask oneself whether the person who was, in effect, appointed by Mrs Johnson to serve the notice, acted in accordance with the test propounded by Russell LJ in Lord Newborough's case. In my judgment, by posting the envelope containing the notice, and addressed to Mr Johnson at the property, through the letter box of the property, the postman served the notice in accordance with that test. I do not think that it is right to test the matter by reference to what Mrs Johnson thought or intended, because, she left it to the Post Office to serve the notice. Accordingly, subject to any other arguments, once the notice was posted through the letter box, it had been 'served' in accordance with s 196(3), and therefore 'given' in accordance with s 36(2), and, as I have mentioned, such a notice cannot be 'un-served' or 'un-given'.

So far as convenience is concerned, I consider that, if s 196(3) is satisfied once it is shown that the relevant document was bona fide delivered to the last-known place of abode or business of the addressee, then, although it might lead to an unfair result in an exceptional case, the law is at least simple and clear. On the other hand, if the court starts implying exceptions into the clear and simple statutory procedure, confusion and uncertainty could result. Thus, if, by picking up the notice after it was posted through the front door of the property, Mrs Johnson might have prevented the notice being 'served', problems could arise. Would there be a maximum time within which Mrs Johnson would have to pick up the notice before it would be held to be validly served? Would it make any difference if Mr Johnson had seen the envelope containing the notice on the mat? What if Mrs Johnson had picked up the notice and had kept it but not destroyed it? What if she had picked up the

notice intending to destroy it but had changed her mind? What if she had picked up the notice and tried to destroy it, but Mr Johnson had seen her doing it, or had seen and read the imperfectly burnt notice?

Hence, notice was served at the time that the letter was delivered. Once this had occurred, it was too late for Mrs Johnson to seek to change her mind.

Similarly, in the earlier case of *Re 88 Berkeley Road*,[25] severance was held to have occurred when written notice was sent by registered post and signed for on delivery by the sender without, it seems, ever being passed on to the other joint tenant.

2.3.2 An act of a joint tenant operating on his or her share

An act of a joint tenant severs the joint tenancy by destroying one or more of the unities of title, time, and interest.[26] This first head of severance, identified in *Williams v Hensman*,[27] runs into the immediate logical difficulty that joint tenants do not have 'shares': on what basis can a joint tenant 'act' upon a share that he or she does not have? Logical difficulties are sidestepped by treating the act itself as causing severance and so freeing up the share as the subject matter of the act in question.[28]

In *Williams v Hensman*, Page-Wood VC referred to an act of disposition. The disposition may be voluntary—for example, through the sale of a share—or involuntary—as where a joint tenant's bankruptcy causes his or her share to vest in their trustee in bankruptcy. Despite the terms of Page-Wood VC's judgment, an actual disposition appears unnecessary. Joint tenants have also been held to have acted on their share by, for example, entering a contract for sale,[29] or simply through acquiring a greater share than other joint tenants.[30]

The position is more complex if one joint tenant buys out the share of another. In such a case, the purchasing joint tenant is a tenant in common as regards the newly acquired share, but remains a joint tenant in relation to his or her original interest. Hence, just as the joint tenancy and tenancy in common can subsist side by side, the same beneficiary may be a joint tenant in relation to his or her initial interest and a tenant in common as regards a subsequently acquired interest (see Figure 11).

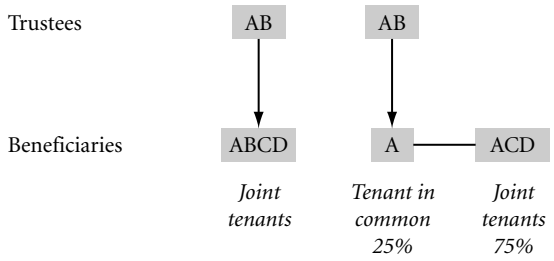

Figure 11 Severance by one joint tenant (B) selling his or her share to another joint tenant (A)

[25] [1971] 1 All ER 254.
[26] Prichard (1975, p 29) (referring specifically to destruction of unity of title).
[27] (1861) J&H 546, (1861) 70 ER 862.
[28] Crown, 'Severance of Joint Tenancy by Partial Alienation' (2001) 117 LQR 477, 478.
[29] *Brown v Raindle* (1796) 3 Ves 296, (1796) 30 ER 998.
[30] *Megarry and Wade: The Law of Real Property* (7th edn, eds Harpum et al, 2008), [13–041].

The ultimate limit on the scope of this head of severance is that there must be *an act* operating on the share. A unilateral declaration of intent to sever by a joint tenant is not effective. In the absence of an act operating on his or her share, the joint tenant must follow the requirements of s 36(2) of the LPA 1925 and serve written notice in order to affect severance. In *Nielson-Jones v Fedden*,[31] Walton J considered there to be 'no conceivable ground' for suggesting that a unilateral declaration can ever be effective to sever.

Voluntary acts

An outright transfer of a share by a joint tenant by sale or gift, whether to another joint tenant or a third party, is the clearest example of an act operating on a share. More contentious is the effect of a partial alienation, where the transferring joint tenant retains an interest and the transfer itself may have only temporal effect.[32]

The most significant practical example of partial alienation is a mortgage or charge of an equitable share. The beneficiary-mortgagor retains an interest in property and (subject to an action for default) the mortgage will eventually be discharged. Such mortgages may be unlikely to be granted expressly, because the security of a beneficial share may not be commercially attractive, but they arise, not infrequently, as the result of a failed attempt by a single joint tenant to mortgage the legal title through, for example, forgery or undue influence committed against the other co-owners.[33] Such a mortgage has no effect on the legal title, but operates as a mortgage of the joint tenant's beneficial interest: does such a mortgage affect a severance? The issue is of importance, because, if severance does not take place, the mortgagee '*joins the survivorship wheel of fortune*', with his or her security interest over the property lost on the death of the mortgagor.[34]

In *First National Security v Hegerty*,[35] a husband forged his wife's signature on a legal charge to use the property as security for a loan. Bingham J considered this to constitute a disposition of the husband's beneficial share, which severed the beneficial joint tenancy and created a valid equitable charge over the husband's share. While this remains the current position, the matter was not argued in the case (it being unclear whether the parties were joint tenants or tenants in common) and academic doubt has since been cast on the issue.

Nield suggests that the distinction between a mortgage and a charge may be crucial in this context. A mortgage of an equitable interest necessarily takes effect as an assignment of the interest and therefore involves a disposition.[36] In contrast, she argues that the inherent nature of a charge means that an equitable charge should not affect severance.

Nield, 'To Sever or Not to Sever: The Effect of a Mortgage by One Joint Tenant' [2001] Conv 462, 469–70

However the historical and comparative evidence against severance by equitable charge is strong. At common law, although alienation was preferred over survivorship, survivorship

[31] [1975] Ch 222, 230. Previous judicial acceptance to the contrary is criticised by Baker (1968) 84 LQR 462. See further, *Burgess v Rawnsley* [1975] Ch 429, 448, where, in a summary of principles, Sir John Pennycuick noted: '*An uncommunicated declaration by one party to the other or indeed a mere verbal notice by one party to another clearly cannot operate as a severance.*'

[32] Crown (2001) pp 479–80.

[33] Nield, 'To Sever or not to Sever: The Effect of a Mortgage by One Joint Tenant' [2001] Conv 462, 462–3.

[34] Ibid, p 463. The debt remains and will need to be met from the mortgagor's estate.

[35] [1965] 1 QB 850.

[36] Nield (2001), p 467.

was preferred over the creation of a mere encumbrance. It has long been asserted that easements and rentcharges do not effect a severance. They are encumbrances and as such are said not to be inconsistent with the nature of a joint tenancy, even though they may create a distinction between the interests of the joint tenants. For instance, it has been suggested that a rentcharge would not disturb the joint tenancy for it could be paid out of the joint tenant's portion of the income from the land, even though re-entry might follow if payments were not made. An easement granted by one joint tenant will only effect the interest held by that joint tenant and the right granted thus must be exercised in common with the rights of the other joint tenant.

Equitable charges are mere encumbrances that give no right to possession. The chargee may apply to court for an order for sale or the appointment of a receiver over the charged property. It is accepted that an equitable charge creates some sort of interest that is proprietary in nature but there is considerable hesitation in acknowledging this interest as an interest in the land itself. There are thus even weaker grounds for claiming that an equitable charge should effect a severance, because it destroys the unities, than in the case of a rentcharge or easement, which are clearly interests in land.

In contrast, Crown considers that the issue of severance should not be left to technical questions as to whether alienation occurs. He suggests the matter should be addressed by considering whether there are policy reasons for preferring one approach to the other.

Crown, 'Severance of a Joint Tenancy of Land by Partial Alienation'
(2001) 117 LQR 477, 483

One can easily imagine a situation where A and B are joint tenants in law and equity of land. A grants an equitable mortgage of his "share". If the approach of *Re Sharer* is adopted, this severs the joint tenancy in equity, but B may know nothing about it. Suppose A repays the loan with the result that the mortgage is discharged, and subsequently B dies. B's personal representatives will have no way of finding out about the creation of the mortgage and the result will be that A will succeed to the entire estate by virtue of the doctrine of survivorship. If A were to die first, however, a different result might well occur. A's personal representatives may well find documentary evidence of the creation of the mortgage while going through his papers. They will then be able to argue successfully that the joint tenancy was severed with the result that they will succeed to half the estate. Policy considerations therefore point strongly towards adopting the view that the grant of an equitable mortgage will not sever a joint tenancy.

Underlying Crown's concern is the risk of a mortgage of an equitable interest causing severance without the knowledge of other joint tenants. While the example he gives is not an attractive outcome, however, it is acknowledged as a unique feature of this head of severance that it enables a joint tenant to sever in secret, without the participation of, or giving of notice to, the other joint tenants.[37]

A novel approach to severance has been suggested in relation to a different example of partial alienation: the unilateral grant of a lease by one joint tenant. As with a mortgage, the joint tenant retains an interest in the land and the status quo is returned to at the end of the

[37] Smith (2005), p 58.

lease. As will be seen in Chapter 22, the essential characteristic of a lease is exclusive possession. The effect of a single joint tenant granting a lease is therefore to confer on the tenant of the lease exclusive possession against all persons other than those joint tenants who did not take part in the grant.[38] There is no clear authority determining whether the grant of a lease by one joint tenant constitutes an act of severance.[39] One possibility in such a case is that the joint tenancy is suspended for the duration of the lease, but is resurrected when the lease expires. The suspension of the joint tenancy ensures that if the grantor of the lease dies during its duration, survivorship does not operate, which ensures that the tenant's lease is unaffected by the death.

The possibility of the joint tenancy being suspended is explored by Crown.

Crown, 'Severance of a Joint Tenancy of Land by Partial Alienation'
(2001) 117 LQR 477, 488

> The notion of a suspension of the joint tenancy has, however, been criticised on the ground that "once a severance, albeit temporary, has occurred, surely the unity of interest of the joint tenants is destroyed, and the co-owners cannot afterward be regarded as enjoying unity of title and time". This argument has a certain attraction, but one needs to bear in mind that the very idea of severance by alienation is based on a logical fallacy, as pointed out at the beginning of this article. Joint tenants do not have separate shares in the land. The alienor disposes of an interest that he does not actually have and this "transfer" creates the very interest, which was supposedly the subject-matter of the transfer in the first place. The truth of the matter is that modern lawyers accept the idea of severance by alienation not because it makes any logical sense, but simply because it is enshrined in the case law. The notion of suspension of a joint tenancy may not be so solidly rooted in the case law, but it is not a new idea and can be supported by reference to the earlier literature preceding Dixon J.'s remarks in *Wright v. Gibbons*. Moreover, it is by no means clear that the co-owners should not be regarded as enjoying unity of title, time and interest after the expiry of the lease. So far as unity of title is concerned, the co-owners still claim title to the land under the same act or document. So far as unity of time is concerned, the interest of each co-owner did indeed vest at the same time. So far as unity of interest is concerned, once the lease has come to an end, the interest of each joint tenant is the same in extent, nature and duration.
>
> Perhaps the strongest argument for the idea of suspension of the joint tenancy in leasehold cases arises out of practical considerations. It has been argued here that the existence of a simple method of severance under modern statute law means that there is no need to increase the number of cases of severance in equity. Indeed, it is undesirable to do so where there is a risk that this might make it possible for one co-owner to sever behind the back of his fellow co-owner. Such a risk may indeed exist in the case of leases.

Fox also supports the suspension of the joint tenancy.[40] If accepted, could the same solution be adopted to the more practically important case of a mortgage? Crown highlights that leases are different from mortgages, because a lease must come to an end, while a mortgage

[38] Crown (2001), p 484.

[39] Ibid, pp 485–90. He notes that while sixteenth-century cases indicate that the grant of a lease by one joint tenant of a leasehold estate affects a severance, there is no authority dealing with the grant of a lease by one joint tenant of a freehold estate. Courts in other jurisdictions have reached different conclusions on the matter.

[40] Fox, 'Unilateral Demise by a Joint Tenant: Does it Effect a Severance?' [2000] Conv 208.

carries the risk that the security will be enforced. He suggests that this may explain the different effect each has on severance. Nield, however considers the suspension of the joint tenancy (or some other means of modifying survivorship) to '*provide tantalising compromises to balance the interests of the mortgagee and joint tenants and deserve serious consideration*'.[41]

A final example of partial alienation is a declaration by a joint tenant of a trust of his or her share. In this instance, severance seems likely to arise by analogy with the effect of a contract to sell the share outright. Such a contract gives rise to a constructive trust through the maxim 'equity looks on as done that which ought to be done'. If a constructive trust effects severance, it necessarily follows that an express trust must also do so.[42]

Involuntary acts

An involuntary act operating on a share is most likely to arise through the interception of a debt affecting one of the joint tenants. Bankruptcy has provided the focus of attention, although the grant of a charging order also operates to sever a joint tenancy as the debt becomes secured against the debtor's share.[43] While bankruptcy undoubtedly causes severance, debate continues as to the time at which severance occurs. This can be significant where the bankrupt (or another joint tenant) dies during the course of the bankruptcy. If death pre-dates the time of severance, then survivorship operates, taking the beneficial interest beyond the reach of the creditors.

There are three possible dates from which severance may take effect: the date of the act of bankruptcy; the date on which the joint tenant is declared bankrupt; and the date of appointment of the trustee in bankruptcy.

The date of the act of bankruptcy was favoured by the common law and was applied under the Bankruptcy Act 1914 in *Re Dennis*.[44] In that case, the bankrupt and his wife were joint tenants of their home. Between the date of the act of bankruptcy (by failing to comply with a bankruptcy notice) and the declaration of bankruptcy, the wife died. The court held that severance occurred at the date of the act of bankruptcy. This meant that, on her death, the wife was a tenant in common of a 50 per cent share, which passed to the couple's children. If the date of the declaration of bankruptcy had been chosen, survivorship would have operated on the wife's death, leaving the bankrupt as sole owner and the entire house therefore available to his creditors.

In *Re Palmer*,[45] which was decided under the Insolvency Act 1986, a different analysis was taken. Under s 306 of that Act, the bankrupt's estate vests in the trustee in bankruptcy immediately upon appointment; from the time of the declaration of bankruptcy, however, the Official Receiver holds the estate in trust. The court held that severance therefore occurs at the time of the declaration of bankruptcy. In that case, Mr Palmer was declared bankrupt after his death. In such a case, the declaration dates back to the day of death, so the bankrupt's estate on that day vests in the trustee in bankruptcy. The court held, however, that this did not include a joint tenancy that the bankrupt had at the start of the day, but which ceased to exist at the moment of his death through survivorship. Through survivorship, Mr Palmer's wife became solely entitled to the home, which was protected from the effect of the bankruptcy.

Both decisions produce results that are sympathetic to the bankrupt's family. The courts' choice as to the date of severance conflicts and, while factually distinct, there is no logical

[41] Nield (2001), p 474. [42] Smith (2005), pp 59–60; Crown (2001), pp 490–2.
[43] See *C Putnam & Sons v Taylor* [2009] EWHC 317 (Ch), [20]. [44] [1996] Ch 80.
[45] [1994] Ch 316.

reason for treating the date of severance as different, according to whether bankruptcy occurs during the bankrupt's lifetime, or after his or her death. The analysis in *Re Palmer* should now be followed in all cases, because it applies the current legislation. If applied to the facts of *Re Dennis*, it would appear to reverse the decision in that case.

Subsequent to the decision in *Re Palmer*, the Insolvency Act 2000 inserted s 421A into the Insolvency Act 1986. The effect of that provision is that where a joint tenant is declared bankrupt after his or her death (so that survivorship operates in favour of the remaining joint tenants), the survivors may be required by the court, on an application by the trustee in bankruptcy, to compensate the bankrupt's estate by payment of a sum not exceeding the value lost through survivorship. Hence, while the operation of severance remains governed by *Re Palmer*, the financial consequences of the decision may be reversed by an application under s 421A.

2.3.3 Severance through mutual agreement

The scope of the second category of severance identified by Page-Wood VC in *Williams v Hensman* is difficult to pinpoint in the abstract: it is sandwiched between the stricter requirement of an 'act' and the more liberal third category of a course of dealings. Collectively, mutual agreement and a course of dealings differ from statutory severance and an act operating on a share, because they only enable severance by all of the joint tenants. They differ from the other common law methods of severance as regards the rationale for severance. As we have noted, an act operating on a share effects severance by the destruction of one or more of the unities of title, time, and interest.[46] In cases of mutual agreement and a course of dealings, the rationale for severance is the common intention of the parties. For example, in *Davis v Smith*[47] the Court of Appeal held severance to have taken place where correspondence between the joint tenants evidenced a common intention that a house should be sold and the proceeds divided equally. Destruction of a unity is the result of the severance, not the cause of it.[48]

The Court of Appeal applied severance by mutual agreement in the following case. Browne LJ's judgment demonstrates both the similarities and differences between this method and the other two recognized in *Williams v Hensman*.

Burgess v Rawnsley
[1975] Ch 429, CA

Facts: Mr Honick and Mrs Rawnsley were joint tenants of a house occupied by Mr Honick alone. The property had been purchased in the expectation that the parties would both live there, but while Mr Honick anticipated marriage, Mrs Rawnsley intended to live alone in the upstairs flat. The parties' mismatched expectations came to light after the purchase. Mrs Rawnsley did not move in, but reached an oral agreement to sell her share to Mr Honick for £750. She then changed her mind and sought a higher price. Matters stood this way at Mr Honick's death, whereupon the house was sold and Mrs Burgess, his administratrix, sought to establish that severance had occurred, leaving his estate entitled to 50 per cent of the proceeds of sale.

[46] See section 2.3.2 above.
[47] Unreported, judgment 23 November 2011 (CA).
[48] Prichard (1975), pp 29–30.

Browne LJ

At 443–4

Counsel for Mrs Rawnsley conceded, as is clearly right, that if there had been an enforceable agreement by Mrs Rawnsley to sell her share to Mr Honick, that would produce a severance of the joint tenancy; but he says that an oral agreement, unenforceable because of s 40 of the Law of Property Act 1925, is not enough. Section 40 merely makes a contract for the disposition of an interest in land unenforceable by action in the absence of writing. It does not make it void. But here Mrs Burgess is not seeking to enforce by action the agreement by Mrs Rawnsley to sell her share to Mr Honick. She relies on it as effecting the severance in equity of the joint tenancy. An agreement to sever can be inferred from a course of dealing (see Lefroy B in *Wilson v Bell* and Stirling J in *Re Wilks*) and there would in such a case ex hypothesi be no express agreement but only an inferred, tacit agreement, in respect of which there would seldom if ever be writing sufficient to satisfy s 40. It seems to me that the point is that the agreement establishes that the parties no longer intended the tenancy to operate as a joint tenancy and that automatically effects a severance. I think the reference in *Megarry and Wade* to specifically enforceable contracts only applies where the suggestion is that the joint tenancy has been severed by an alienation by one joint tenant to a third party, and does not apply to severance by agreement between joint tenants. I agree with counsel for Mrs Burgess that s 40 ought to have been pleaded, but I should be very reluctant to decide this case on a pleading point.

The result is that I would uphold the county court judge's judgment on his second ground, namely, that the joint tenancy was severed by an agreement between Mrs Rawnsley and Mr Honick that she would sell her share to him for £750. In my view her subsequent repudiation of that agreement makes no difference. I would dismiss the appeal on this ground.

Section 40 of the LPA 1925 has since between replaced by s 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989), under which an oral contract for sale of land is void. This change does not, however, alter the decision in the case. Browne LJ's judgment demonstrates that there was no act operating on a share in the absence of a specifically enforceable contract; there was, instead, an informal agreement, drawn from the parties' course of dealing. It is emphasized, however, that severance was based on mutual agreement, not on the course of dealings itself. The Court of Appeal was unanimous that severance had occurred under this method, while, as will be seen, the judges were divided on the possible application of course of dealings as an alternative basis for severance. Browne LJ's judgment leaves that method of severance to apply where the course of dealings falls short of even an informal agreement.

In *Hunter v Babbage*,[49] although an informal agreement was found on the facts, the court suggested that such an agreement is not necessary for this method of severance. Drawing on comments in the judgment of *Williams v Hensman*, Deputy Judge John McDonnell QC considered that it would be sufficient if it could be inferred that the parties had mutually treated their interests as a tenancy in common.[50]

2.3.4 Severance through a course of dealings

Actions between parties falling short of establishing a mutual agreement will still sever if there is a sufficient course of dealings to intimate that the parties regarded themselves as

[49] (1995) 69 P & CR 548. [50] Ibid, 554.

tenants in common. The exact demarcation of this method with mutual agreement may be difficult to identify with certainty, particularly if, as has been suggested, mutual agreement can include cases falling short of an actual agreement. Practically, nothing may turn on any overlap between the categories. It is more important to note, as was emphasized by Pennycuick LJ in *Burgess v Rawnsley*,[51] that this method of severance is distinct from mutual agreement, not merely a subheading of that category.

In that case, the judges were divided on whether a course of dealings provided an alternative means of severance on the facts.

Burgess v Rawnsley
[1975] Ch 429, CA

Lord Denning MR

At 440

Even if there was not any firm agreement but only a course of dealing, it clearly evinced an intention by both parties that the property should henceforth be held in common and not jointly.

Pennycuick LJ

At 447

I do not doubt myself that where one tenant negotiates with another for some rearrangement of interest, it may be possible to infer from the particular facts a common intention to sever even though the negotiations break down. Whether such an inference can be drawn must I think depend on the particular facts. In the present case the negotiations between Mr Honick and Mrs Rawnsley, if they can be properly described as negotiations at all, fall, it seems to me, far short of warranting an inference. One could not ascribe to joint tenants an intention to sever merely because one offers to buy out the other for £X and the other makes a counter-offer of £Y.

Browne LJ expressed no final opinion on the matter. The key issue appears to be when negotiations falling short of an agreement are sufficient to effect severance. Lord Denning MR appears to take a broad view of this issue, reflected both in his decision in *Burgess v Rawnsley* and in his discussion, in his judgment in that case, of *Nielson-Jones v Fedden*.[52] In that case, as has been seen,[53] a memorandum granting the husband discretion to sell the house was considered insufficient to sever under s 36(2) of the LPA 1925 on the basis that it dealt with use, rather than ownership of the proceeds of sale. At the time of the husband's death, a contract for sale had been entered and a deposit paid by the purchaser. It was argued, as an alternative to s 36(2), that the parties' discussions, as regards their financial arrangements and the distribution of part of the deposit, constituted severance. Walton J rejected this argument, on the basis that no agreement could be drawn from the parties' ongoing negotiations.

We have seen that Lord Denning MR considered the decision to be wrong in relation to s 36(2). He further suggested that severance had occurred through a course of dealings:[54] '*The*

[51] [1975] Ch 429, 447. [52] [1975] Ch 222. [53] See section 2.3.1 above.
[54] *Burgess v Rawnsley* [1975] Ch 429, 440.

husband and wife entered on a course of dealing sufficient to sever the joint tenancy. They entered into negotiations that the property should be sold. Each received £200 out of the deposit paid by the purchaser. That was sufficient.' To the extent that reliance is placed on negotiations, these should be accepted only where the agreement, if reached, would have been sufficient to sever within the category of mutual conduct. If the agreement would have been insufficient to affect severance, it necessarily follows that negotiations for the agreement cannot do so.[55]

2.3.5 Severance through unlawful killing

Public policy prevents a person responsible for the unlawful death of another from benefiting from their death. Such benefit could arise through the operation of survivorship where one joint tenant is responsible for the death of another. The public policy rule is achieved through forfeiture under the Forfeiture Act 1982, with the possibility of relief.

In *Re K*,[56] Vinelott J accepted the view of counsel that '*the forfeiture rule unless modified under the Act of 1982 applies in effect to sever the joint tenancy in the proceeds of sale and in the rents and profits until sale*'. This implies that, where relief is awarded, the correct analysis is that severance does not occur, leaving survivorship to operate. Hence, it is the availability of relief that determines whether severance occurs.[57] In *Re K*, relief was awarded where a battered wife, who had unintentionally shot and killed her husband (her intention had been merely to threaten him), had been convicted of manslaughter.

The culpability of the defendant has since been confirmed as the principal factor in determining relief.[58]

2.3.6 Are the current severance rules satisfactory?

In 1985, in its Working Paper on *Trusts of Land*, the Law Commission considered two radical reforms of severance: firstly, limiting severance to the statutory method of written notice; secondly, enabling severance by will.[59] Reform of severance was not carried over into the subsequent final report on *Trusts of Land*, on the basis that the issue is also relevant to personal property; instead, the Law Commission indicated that the matter would form the basis of a separate, future report.[60] The Law Commission has, in fact, carried out no further work in this respect. Notwithstanding, its suggestions have continued to attract academic attention in discussions of possible reforms.[61]

The limitation of severance to written notice necessarily carries the consequence of the abolition of the *Williams v Hensman* methods of severance. We have seen that these methods of severance do cause difficulties in interpretation and application. The underlying question, therefore, is whether these difficulties are sufficient to support the extreme response of abolition—a question addressed by Tee, together with the other reform discussed by the Law Commission: the introduction of severance by will.

[55] *Hunter v Babbage* (1995) 69 P & CR 548, 560.

[56] [1985] Ch 85, 100.

[57] The practical focus on the availability of relief is noted by Bridge, 'Assisting Suicide Rendered Financially Painless' [1998] CLJ 31, 32.

[58] *Dunbar v Plant* [1998] Ch 412, in which relief was awarded to the survivor of a suicide pact who was clearly criminally complicit in the suicide of her fiancé, although had not been charged.

[59] Law Commission Working Paper No 94, *Trusts of Land* (1985), [16.11]–[16.14].

[60] Law Commission Report No 181, *Transfer of Land: Trusts of Land* (1989), [1.3].

[61] Tee, 'Severance Revisited' [1995] Conv 105; Smith (2005), pp 79–82.

Tee, 'Severance Revisited' [1995] Conv 105, 110–13

The abolition of severance by acting upon one's share has a certain attraction in logic—there has always been an intellectual sleight of hand which allows the alienation both to transform and transfer the interest, but it would effectively prevent a joint tenant from dealing with his equitable interest in any way. Voluntary alienation, whether by sale or mortgage would be impossible, unless there had been a prior severance. Thus, for example, an innocent mortgagee would only obtain an unsecured debt if a determined rogue "mortgaged" his unsevered "share". Involuntary alienation, as, for example, in bankruptcy, would also be affected. At present, the vesting of the debtor's estate in the trustee in bankruptcy automatically severs the debtor's joint tenancy and vests the resultant tenancy in common in the trustee. An absolute requirement of written notice would complicate an already difficult area of the law and could result in unfairness to creditors where the bankrupt held property as a beneficial joint tenant.

The abolition of severance by mutual agreement or by mutual conduct would have fewer legal repercussions. It is arguable that severance on such grounds has been found so rarely by the courts over the last 50 years that the abolition of these methods would not in practice amount to a serious limitation, and would produce much needed certainty. When personal representatives feel obliged to go to court to discover the beneficial entitlement to a home after the death of an erstwhile joint tenant, land law is shown in a poor light; the stress of any litigation is self-evident, and the timing, shortly after a death, and the subject matter, a home, must only compound the unhappiness for the parties involved.

What is uncertain, however, is how often severance on one of these grounds has been recognised and accepted by practitioners without resort to court. The Working Paper suggests that "if either has behaved as though the joint tenancy does not exist and treated the property as his own, it seems right that the law should accept that [...]" If indeed people often act in this way, then the abolition of informal methods of severance could result in widespread unfairness. The advantage of permitting informal methods, in terms of fairness to lay people, has to be weighed against the disadvantage of the uncertainty engendered by the possibility of informal severance having taken place.

(c) The introduction of severance by will

This is a radical suggestion, which runs counter to the whole concept of joint tenancy with its right of survivorship. This right is its distinctive feature, and is why equity in general favours the less capricious tenancy in common. Thus the arguments in favour of introducing severance by will must be carefully examined. The Working Paper mentions that in a matrimonial breakdown a spouse may be anxious to sever but unwilling to serve a notice and thereby aggravate negotiations over, for example, access to the children. The argument has a certain force, but the period during which such considerations hold sway should be quite short. In any relationship breakdown negotiations over children and property may be delicate and fraught, but they still need to be pursued and any property arrangement would be incomplete without an explicit decision as to the beneficial ownership of the home.

A more persuasive argument is that severance by will would prevent undesired devolution of property. There must be many cases where a beneficial joint tenant leaves his property by will, fondly (and not unreasonably) imagining that thereby the "half share" in the house will go to his children, his new loved one or whomever. No doubt the testator was told about the right of survivorship and the methods of severance when he originally bought the house, but that could have been many years ago. Presumably, the deceased

testator is never aware that his wishes have been frustrated. The cases do not come to court because the law is clear: one cannot bequeath a beneficial joint tenancy. Although the problem would not occur if a testator took proper legal advice before making a will, this frequently does not happen.

The counter argument is two-fold: first, it would be unfair to allow severance by will and second, difficult questions of construction would arise. The first argument is that a "rogue" beneficial joint tenant could secretly sever by will and then enjoy the possibility of the right of survivorship without any risk to his estate. If he survived his co-tenant, he would take all, and if he pre-deceased, his chosen beneficiaries would inherit his share. Thus he could both "have his cake and eat it". His co-tenant, meanwhile, would not know of his severance by will, and would assume that the right of survivorship was going to operate. By the time she discovered her mistake (after the rogue's death), it would be too late for her to rearrange her affairs. Or she might die first, never knowing that she had been duped. It is possible to riposte that she must have been content that the rogue should take the house or she, too, would have made a will to the contrary, or would previously have severed inter vivos. Also, although she might have relied financially upon acquiring the rogue's "share" after his death, such reliance would not have been secure anyway—up until the moment of death, the rogue could have served a notice of severance—and the family provision legislation should cure any dependancy problems. But still one's immediate reaction is that the law should not facilitate such apparently unscrupulous behaviour, or permit a joint tenant to break faith with his co-tenants with impunity. A sophisticated argument that the unfairness is more apparent than real is not the basis upon which to apply legislative reform, especially one which directly affects so many people.

The other difficulty with severance by will is a practical one—the construction of the will. The Working Paper states that severance by will should be specified and explicit: "Severance should not be implied by a gift, for example, of all the residue to a charity, but a gift of 'my halfshare of Blackacre' should be sufficiently explicit to sever". Those examples seem clear enough, but the gift of all the residue to the testator's children, or indeed of "all to mother", would be far more problematic. At present, it is sometimes uncertain whether inter vivos severance has taken place; the additional possibility of severance by will would no doubt result in still more uncertainty for the survivors and a succession of applications to the court. The question to be decided is whether the real problem of undesired property devolution is sufficiently serious to warrant a reform which will in turn produce problems both of principle and practice.

While both reforms discussed by the Law Commission are drawn from dissatisfaction with the operation of the current rules, they provide polarized responses that strengthen or weaken the role of survivorship. Abolition of the *Williams v Hensman* methods of severance would inevitably appear to increase the incidence of survivorship; in contrast, the introduction of severance by will would enable joint tenants to undermine the very essence of the joint tenancy as a gamble on survivorship. Because survivorship is the key difference between the two forms of co-ownership, perhaps the underlying issue is the desirability of the beneficial joint tenancy. The scope and purpose of any reform must logically reflect a policy decision as to the desirability of the joint tenancy. Without this, there is a danger of focusing on the symptoms, whilst ignoring the disease.

We return to this issue at the end of this section of the chapter, after first noting the methods through which co-ownership is brought to an end.

3 TERMINATION OF CO-OWNERSHIP

Co-ownership comes to an end once there is a sole legal and equitable owner. Where the same person is entitled in law and equity, this also marks the end of the trust. Where the legal and equitable owners are different (for example, if *T* is the sole legal owner and *B* the sole beneficial owner), a bare trust remains.

Termination of co-ownership in this way may arise through a variety of circumstances. In a joint tenancy, the longest surviving co-owner will become solely entitled through survivorship. A sole beneficiary who is of full age and capacity may insist that legal co-owners transfer legal title to him or her through the rule in *Saunders v Vautier*.[62] It should be noted, however, that where co-owned land is sold to a single purchaser, even assuming that the beneficial interests do not bind the purchaser under the priority rules discussed in Chapter 19, co-ownership is not terminated. While the purchaser solely owns the land, the co-owner's interests (whether as joint tenants or tenants in common) shift from the land into the proceeds of sale.

Co-ownership may also be brought to an end through the process of partition. Section 7 of TOLATA 1996 provides for partition by the trustees, though it may also be ordered by the court in the exercise of its powers under s 14[63] (the courts powers under that section are discussed below in section 5.5 of this chapter). Partition is a process through which the trustees may physically divide the land and transfer separate plots into the sole ownership of the beneficiaries. The beneficiaries thus cease to be co-owners, with unity of possession over the land, and become sole owners of their separate parcels of land.

Trusts of Land and Appointment of Trustees Act 1996, s 7(1)–(5)

(1) The trustees of land may, where beneficiaries of full age are absolutely entitled in undivided shares to land subject to the trust, partition the land, or any part of it, and provide (by way of mortgage or otherwise) for the payment of any equality money.

(2) The trustees shall give effect to any such partition by conveying the partitioned land in severalty (whether or not subject to any legal mortgage created for raising equality money), either absolutely or in trust, in accordance with the rights of those beneficiaries.

(3) Before exercising their powers under subsection (2) the trustees shall obtain the consent of each of those beneficiaries.

(4) Where a share in the land is affected by an incumbrance, the trustees may either give effect to it or provide for its discharge from the property allotted to that share as they think fit.

(5) If a share in the land is absolutely vested in a minor, subsections (1) to (4) apply as if he were of full age, except that the trustees may act on his behalf and retain land or other property representing his share in trust for him.

It should be noted that partition is limited to circumstances in which the beneficiaries are tenants in common. This precludes the trustees from interfering with the consequences of survivorship while joint tenants remain. While it is also initially restricted to trusts in which

[62] (1841) 4 Beav 115.

[63] *Atkinson v Atkinson*, unreported judgment 30 June 2010 (Leeds County Court).

the beneficiaries are of full age (subs (1)), subs (5) enables the trustees to partition even where there are minor beneficiaries—in which case, the minor's land is held on trust by the trustees.

4 IS THE BENEFICIAL JOINT TENANCY DESIRABLE?

The operation of survivorship is the key practical difference between the joint tenancy and the tenancy in common. As has been noted, the two reforms of the severance rules discussed by the Law Commission would strengthen or weaken the role of survivorship. It was suggested, therefore, that the reforms raise an underlying issue of the desirability of the beneficial joint tenancy. Difficulties and uncertainties in the application of severance rules would be removed at a stroke by confining equitable ownership to the tenancy in common. But because this would come at the expense of the loss of survivorship, is this a price worth paying?

The operation of survivorship is most obviously consistent with the likely intentions of parties embarking on what they anticipate will be a lifelong relationship. Smith notes that relationship breakdown, where survivorship ceases match the parties' intentions, now provides the factual context for the 'great majority' of severance cases[64]—but he also notes that the abolition of the joint tenancy will not resolve problems.

Smith, *Plural Ownership* (2005, pp 87–8)

We now need to investigate the broken down relationship in more details. This context is the major source of concern as far as the operation of the joint tenancy is concerned. How well would the law operate if there were no joint tenancy? Obviously, if the parties never wanted survivorship, then the tenancy in common works well. However, in most relationships the parties are likely to want the survivor to get the property. We have just seen that this can cause problems if one dies during the relationship without making a will. The tenancy in common demands that wills be made in order to that the parties' intentions are fulfilled. What happens if a will has been made and then the relationship breaks down? In theory, the answer is simple: a new will should be made. In practice, the obvious danger is that this will be overlooked (as with joint tenancies, unexpected deaths pose the greatest problems) so that on death the property passes to the estranged spouse or partner. This is exactly the same outcome as with an unsevered joint tenancy. The lawyer who sees the problem is as likely to sever a joint tenancy as to urge the making of a new will. In other words, the problems will be just as severe whether a joint tenancy or tenancy in common is employed. Any legal structure which provides for property to go a particular person is apt to malfunction if the relationship with that person has broken down. It is difficult to avoid the conclusion that positive steps must be taken to change the destination of the property and that those steps are in fact not taken in many cases. Indeed, one may argue that joint tenancy is much more likely to produce the correct result because of the court's ability to find a suitable agreement or course of dealing to achieve severance; implying terms into wills is far more difficult. [. . .]

The main advantages of joint tenancies lie in fulfilling the wishes of co-owners when one dies during the relationship. Both joint tenancy and tenancy in common can cause inappropriate results once the relationship breaks down. It seems likely that breakdown of relationships

[64] Smith (2005), p 85.

has become more common. This is reflected in the growth of divorce rates and is likely to be related to greater numbers living together outside marriage. These changes tend to reduce the advantages of the joint tenancy.

As this extract shows, the underlying problem is not with the joint tenancy itself, but with the failure of the parties to utilize legal devices to ensure that their intentions are met. While the joint tenancy remains apt to give effect to the parties' intentions where the relationship continues at the time of death, the tenancy in common places the onus on the parties, in all cases, to ensure that their intentions are reflected in an up-to-date will. The arguments for and against abolition of the beneficial joint tenancy appear finely balanced and dependent on many variables. Smith suggests that the case for abolition has not been made out,[65] but he acknowledges that evidence as to the true intentions of purchasers, the incidence of relationship breakdown, and the use of wills may all affect our perception of where the balance currently lies.[66]

5 TRUSTS AND CO-OWNERSHIP

Whenever land is co-owned, whether co-ownership arises in relation to the legal title, the beneficial interests, or both, the land is held on trust. As was noted in section 1, the imposition of a trust in all cases is a dominant feature of the regulation of co-ownership in English law. All co-ownership trusts now constitute 'trusts of land' and are governed by the TOLATA 1996—an Act that originated in Law Commission recommendations.[67] Of its time, and in terms of its effect on the conceptual scheme of land law, the Act was described as '*the most significant measure of property law reform since the legislation of 1925*'.[68] Prior to the 1996 Act, co-ownership trusts were almost invariably classified as 'trusts for sale'—a form of trust regulated by the LPA 1925. To understand the significance of the TOLATA 1996, it is therefore necessary to consider how the trust of land differs from this previous form of regulation.

The Law Commission succinctly highlighted the key differences, both in substance and ethos in its report.

Law Commission Report No 181, *Transfer of Land: Trusts of Land* (1989, [3.1]–[3.5])

PART II

THE TRUST OF LAND

Concurrent interests

At present, most concurrent interests fall under a trust for sale, either expressly or by implication. The defining feature of the trust for sale, at least as it was originally designed, is that the trustees are under a duty to sell the trust land. Implicit in this is the notion that this land should be held primarily as an investment asset rather than as a 'use' asset.

[65] Ibid, p 89. [66] Ibid.

[67] Law Commission No 181 (1989). For general discussions of the Act, see Oakley, 'Towards a Law of Trusts for the Twenty-First Century' [1996] Conv 401; Hopkins, 'The Trusts of Land and Appointment of Trustees Act 1996' [1996] Conv 411; Clements, 'The Changing Face of Trusts: The Trusts of Land and Appointment of Trustees Act 1996' (1998) 61 MLR 56.

[68] Harpum, 'The Law Commission and Land Law' in *Land Law Themes and Perspectives* (eds Bright and Dewar, 1998), p 169.

> This formulation may well have been suitable or convenient for the purposes which it was designed to serve. However, since the passing of the 1925 property legislation, social conditions have altered to such an extent that the invariable imposition of a duty to sell now seems wholly artificial. This is largely because the incidence of owner-occupation has, over the last sixty-three years, risen to such a level that most dwellings are now owner-occupied. Most of these are occupied by joint owners. One consequence of this is that the imposition of a duty to sell seems clearly inconsistent with the interests and intentions of the majority of those who acquire land as co-owners. In such cases the intention will rarely be that the land should be held pending a sale; it is much more probable that it will be retained primarily for occupation. In other words, the property will not be held simply as an investment asset, but rather as a 'use' asset.
>
> The courts have sought to neutralise this artificiality by developing the principle that, where the 'collateral purpose' of the trust is, for example, to provide a family of matrimonial home, and where that purpose still subsists, the court may, in the exercise of its discretion under section 30 of the Law of Property Act 1925, refuse to order a sale. In that a single trustee is no longer able to force a sale (as against occupiers' interests) the 'use' value of the property is given recognition. It is, however, somewhat illogical that the courts should be required to develop and maintain a doctrine which takes as its foundation the artificiality of the trust for sale.
>
> As a corollary of the duty to sell, and in accordance with the doctrine of conversion, any interest held under a trust for sale is an interest in the proceeds of the sale of the land. Consequently, the beneficiaries are deemed not to have an interest in the land as such. Once again, the courts have intervened to mitigate the artificiality of the position. This intervention has, however, resulted in an unsatisfactory division between those circumstances in which an interest under a trust for sale will be held to be an interest in land and certain others in which it will not, or might not.
>
> Our proposals in relation to concurrent interests are focused upon two features of the trust for sale. Our principal recommendations are, firstly, that all land which previously would have been held under an implied trust for sale should now be held under the new system by trustees with a power to retain and a power to sell, and, secondly, that the doctrine of conversion should cease to apply. Thus, the main purpose of the trust will no longer be the realisation of the capital value of the land. Although this purpose is often seen as a merely notional one, judicial interpretation has not been so consistent as to exclude the occasional reappearance of the 'old' approach. The new system will be more readily intelligible to non-lawyers than the trust for sale. The point here is not simply that it should be easier for practitioners to explain the law to their clients, but also that co-ownership should take a form which non-lawyers can make sense of for themselves.

Section 30 of the LPA 1925 concerning the powers of the court under a trust for sale, referred to in this extract, has been repealed by the TOLATA 1996, and replaced by ss 14 and 15 of that Act.

Hence, as a matter of policy, the trust of land represents a shift to a form of regulation that is more suited to the use of land as a home, reflecting modern trends of home ownership. This shift is marked, in particular, by the removal of the duty to sell—the defining characteristic of the trust for sale—together with the abolition, in this context,[69] of the doctrine of

[69] Ibid, p 173. He notes that the sidenote to the Trusts of Land and Appointment of Trustees Act 1996, s 3, which reads '*Abolition of doctrine of conversion*' has '*excited some attention amongst academic commentators*'. In fact, the Act only purports to abolish the doctrine in the specific context of its application to trusts for sale.

conversion (which is further discussed in section 5.3 below). Against this background, the key provisions of the 1996 Act can be considered.

5.1 SCOPE OF THE TRUST OF LAND

While we are considering trusts of land in the context of co-ownership trusts, it is important to note that the trust of land itself is broader in scope. One of the principal objectives of the Law Commission was to replace the prevailing tripartite scheme with a single form of regulation for all trusts of land.[70] Prior to the TOLATA 1996, in addition to the trust for sale governing (principally) co-ownership trusts, trusts under which the beneficiaries are entitled in succession (discussed in Chapter 20) were usually regulated by the Settled Land Act 1925.[71] Bare trusts, in which there is one adult beneficiary, fell outside both of these schemes of regulation.

The scope of the trust of land is defined in s 1 of the TOLATA 1996.

Trusts of Land and Appointment of Trustees Act 1996, s 1

(1) In this Act—

(a) "trust of land" means (subject to subsection (3)) any trust of property which consists of or includes land; and

(b) "trustees of land" means trustees of a trust of land.

(2) The reference in subsection (1)(a) to a trust—

(a) is to any description of trust (whether express, implied, resulting or constructive), including a trust for sale and a bare trust, and

(b) includes a trust created, or arising, before the commencement of this Act.

(3) The reference to land in subsection (1)(a) does not include land which (despite section 2) is settled land or which is land to which the Universities and College Estates Act 1925 applies.

Through this section, all trusts that consist of or include land are brought within the scope of the 1996 Act, whether express or created, for example, through the doctrines of resulting and constructive trust considered in Chapters 11 and 16. The application of the Act was extended to trusts in existence at the date of its commencement (1 January 1997). All trusts for sale and bare trusts in existence at that date were turned into trusts of land. But by s 1(3), existing successive interest trusts governed by the Settled Land Act 1925 remain unaffected.

5.2 TRUSTEES' POWERS

The powers of trustees of land are set out in broad terms in s 6 of the TOLATA 1996.

[70] Law Commission No 181 (1989), [8.1].

[71] Settled Land Act 1925, s 1(7), precluded the application of that Act to trusts for sale, enabling successive interest trusts to be expressly created as trusts for sale.

Trusts of Land and Appointment of Trustees Act 1996, s 6

(1) For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.

[. . .]

(3) The trustees of land have power to acquire land under the power conferred by section 8 of the Trustee Act 2000.

[. . .]

(5) In exercising the powers conferred by this section trustees shall have regard to the rights of the beneficiaries.

(6) The powers conferred by this section shall not be exercised in contravention of, or of any order made in pursuance of, any other enactment or any rule of law or equity.

(7) The reference in subsection (6) to an order includes an order of any court or of the [Charity Commission]

(8) Where any enactment other than this section confers on trustees authority to act subject to any restriction, limitation or condition, trustees of land may not exercise the powers conferred by this section to do any act which they are prevented from doing under the other enactment by reason of the restriction, limitation or condition.

(9) The duty of care under section 1 of the Trustee Act 2000 applies to trustees of land when exercising the powers conferred by this section.

The Law Commission acknowledged that many trustees, particularly of a co-owned home, considered themselves to be 'owners'. Hence, s 6 represents an attempt to reflect this, while ensuring that general equitable duties imposed on trustees are respected.[72] The trustees have the same powers as an absolute owner, but these are conferred on them specifically in their capacity as trustees of the land, not as absolute owners entitled to enjoy the land (by occupation or receipt or profits) themselves.[73] Hence, the powers are to be exercised with regard to the rights of the beneficiaries[74] and in a manner consistent with any other enactment or rule of law or equity.

Section 8 of the TOLATA 1996 enables further limitations to be imposed on the trustees' powers where the trust is expressly created.[75] Under that section, the settlor of the trust may remove or restrict the trustees' powers, or make their exercise subject to obtaining consent.

Section 6 has the effect of removing the duty to sell imposed under a trust for sale: the powers of an owner include the power to sell or to retain the land.[76] While these are equally weighted, the Act is, in fact, biased against sale,[77] reflecting the recognition that land is commonly held on trust for use as a home, rather than as an investment. Section 8 conceivably enables the settlor of a trust to exclude the power of sale and, by so doing, make land

[72] Law Commission No 181 (1989), [10.4]. [73] Hopkins (1996), p 413.

[74] On the interpretation of s 6(5) see Ferris and Bramley, 'The Construction of Sub-section 6(5) of the Trusts of Land and Appointment of Trustees Act 1996: When is a "Right" not a "Right"?' [2009] Conv 39.

[75] Trusts of Land and Appointment of Trustees Act 1996, s 8, applies to trusts 'created by a disposition'. This may not, in fact, cover all express trusts. As Clements notes (1998, p 58), the need for a 'disposition' may exclude the situation in which a settlor declares him or herself to be holding on trust. The section would then be confined to express trusts created where the settlor transfers the land to trustees on trust. There is, however, no logical reason for drawing such a distinction.

[76] Law Commission No 181 (1989), [10.6]. [77] Hopkins (1996), p 414.

inalienable. In contrast, a settlor cannot compel trustees to sell. While a duty to sell can be expressly imposed, in any such trust, s 4 of the Act provides the trustees with a power to postpone the sale and indefinite protection against liability for so doing.[78]

The limitations on the trustees' powers—both general, within s 6, and any expressly imposed by the terms of the trust, through s 8—have a limited impact on purchasers of the land. In this respect, a clear distinction is drawn between the internal regulation of the trust and its effect on third parties. Trustees who act contrary to limitations on their powers may be held personally liable to the beneficiaries for breach of trust. As regards purchasers, s 16 provides specific protection in the context of unregistered land. Purchasers are not concerned with whether s 6(5) has been complied with, and are protected against a conveyance carried out in contravention of ss 6(6) and (8) or contrary to limitations on the trustees' powers imposed through s 8, unless they have actual notice of the contravention or limitation. Section 16 does not apply to registered land where, under the general operation of the Land Registration Act 2002 (LRA 2002), a purchaser would be affected only by a limitation on the trustees' powers entered as a restriction on the register.[79]

5.3 BENEFICIARIES' RIGHTS

The TOLATA 1996 confers two key rights on beneficiaries. Firstly, it confers a right to be consulted by the trustees, who are directed in s 11(1)(b) to give effect to the wishes of the majority (in terms of the parties' beneficial shares) '*so far as consistent with the general interest of the trust*'. By s 11(1)(a), this right is enjoyed by all adult co-owners. It is of practical significance to a beneficiary who is not also a legal owner and who does not therefore play a direct role in the management of the trust: for example, where A holds the parties' home on trust for A and B, s 11(1)(a) requires A to consult B in the exercise of his or her powers as trustee. The right to be consulted may be excluded in express trusts.[80] It does not apply to all trusts that were in existence at the commencement of the 1996 Act.[81]

Secondly, the most important right conferred on beneficiaries is the right to occupy the land. Where co-owners hold their home on trust, it seems remarkable to have to question whether, as beneficiaries, they have a right to occupy—but the imposition of a trust *for sale* brought the beneficiaries' right to occupy into question. As the Law Commission noted in [3.4] of its report (extracted above), the doctrine of conversion had the effect that beneficiaries under a trust for sale had an interest in the proceeds of sale, not in the land. The application of the doctrine arose through a combination of the trustees' duty to sell and equity's maxim 'equity looks upon as done that which ought to be done'. Because the trustees *ought* to sell, equity treated the parties as though sale had already taken place. So if the beneficiaries had no interest in the land, on what basis could they claim a right to occupy?

[78] Ibid.

[79] Full discussion of the purchaser protection provisions is provided in Chapter 19, section 4.2.

[80] As with the Trusts of Land and Appointment of Trustees Act 1996, s 8, s 11(2)(a) applies where a trust is 'created by a disposition'. Whether this includes all express trusts is dependent on the same comment made in relation to the previous provision above fn 75.

[81] Trusts of Land and Appointment of Trustees Act 1996, s 11(2)(b) and (3), excludes the requirement of consultation from express trusts (with provision for the settlors of those trusts to opt in to the new arrangements) and will trusts created prior to the commencement of the Act. This ensures that settlors who relied on the previous law (where a duty to consult would not be imposed unless expressly provided) are respected.

In practice, the courts did not invariably apply the doctrine of conversion.[82] It was clear that trustees for sale, in the exercise of their powers of management, could allow the beneficiaries to occupy. Further, a right to occupy was acknowledged to exist in leading case law,[83] although the basis of the right was uncertain. In particular, it remained unresolved as to whether occupation was a right enjoyed by all beneficial co-owners, or only in circumstances in which the trust had been created for the purpose of his or her occupation.[84] The abolition of the doctrine of conversion, and the shift to a scheme of regulation focused on the use of trust land as a home, paved the way for the introduction of a statutory right to occupy. This is provided for in s 12 of the TOLATA 1996.

Trusts of Land and Appointment of Trustees Act 1996, s 12

(1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time—

(a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or

(b) the land is held by the trustees so as to be so available.

(2) Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.

(3) This section is subject to section 13.

Hence, the existence of a right to occupy is dependent on the criteria in s 12(1) and (2) being fulfilled. As regards the interpretation of these criteria, the purpose of the trust may be derived from the declaration of an express trust, or be ascertained by the circumstances. The alternative criterion of availability enables the right to be claimed where the land is available for occupation, even if this is not within the purposes of the trust. For the trustees to make land available for occupation contrary to the express wishes of the settlor would, however, constitute a breach of trust and therefore would be outside the trustees' powers within s 6(6).[85] The additional requirement, in all cases, that the land is 'suitable' for occupation enables the subjective characteristics of the beneficiaries to be taken into account: for example, no right to occupy will arise if the land is a farm and the beneficiary is not a farmer.[86]

Where two or more beneficiaries are entitled to occupy, s 13 of the 1996 Act enables the trustees to exclude or restrict one or more of those entitled, but at least one qualifying beneficiary must be allowed to occupy. In exercising their powers, trustees may impose

[82] For example, in *Williams v Glyn's Bank v Boland* [1981] AC 487, the House of Lords held that Mrs Boland's beneficial interest under a trust for sale was an 'interest in land' protected as an overriding interest through her occupation.

[83] The existence of the right was acknowledged by the House of Lords in *Williams v Glyn's Bank v Boland* [1981] AC 487 and *City of London Building Society v Flegg* [1988] AC 54.

[84] Ross Martyn, 'Co-owners and their Entitlement to Occupy their Land Before and After the Trusts of Land and Appointment of Trustees Act 1996: Theoretical Doubts are Replaced by Practical Difficulties' [1997] Conv 254.

[85] Hopkins (1996, p 421); Pascoe, 'Right to Occupy Under a Trust of Land: Muddled Legislative Logic' [2006] Conv 54, 59.

[86] This has been a popular example in highlighting the interpretation of the right since first raised by Smith 'Trusts of Land Reform' [1989] Conv 12, 19. See further Pascoe (2006), p 62.

'reasonable conditions'[87] on the beneficiary or beneficiaries in occupation, including the payment of compensation to those excluded from occupation.[88] Prior to the enactment of the TOLATA, the only route to payment of an occupation rent was the general doctrine of equitable accounting. The statutory provision is 'forward looking' enabling the trustees to make provision at the point at which a right to occupy is excluded or restricted, while equitable accounting is generally 'backward looking' and enables the court to take into consideration costs incurred and benefits enjoyed by the parties when apportioning proceeds of sale.[89] The relationship between the statute and the general law was initially unclear, but it has now been established that s 13 operates to the exclusion of equitable accounting in respect of cases within its scope, leaving equitable accounting available for those outside the provision.[90] This is important because, as Bright explains, statutory compensation and equitable accounting differ in relation to the 'gateway' to liability and quantum.[91] Statutory compensation is available only where the trustees have excluded or restricted a right to occupy arising under s 13. Equitable accounting was initially confined to cases of exclusion or ouster of one joint tenant, but it has developed to apply, '*in any case where [an occupation rent] is necessary to do broad justice or equity between the parties*'.[92] While the gateway to statutory compensation is, therefore, narrower than equitable compensation, the quantum of liability is potentially higher. The trustees are directed to have regard to a number of '*wider-non-property concerns*',[93] including the intentions of the settlor(s), the purposes for which the land is held, and the circumstances and wishes of beneficiaries who have a right to occupy.[94] In contrast equitable accounting is generally confined to the rental value of the property. This difference in quantum is explained by Bright as a shift from '*property to welfare*'.[95] However, she notes that this shift does not in fact appear to have impacted on the quantum of awards made by the court under the statutory scheme.[96] Rental value remains attractive to the court as it is '*a relatively objective value on which evidence can easily be supplied*'.[97] An alternative and equally objective basis on which compensation may be quantified is the cost incurred by the excluded beneficiary in obtaining alternative accommodation.[98]

A novel question on the application of s 13 arose in the following case: does the section enable trustees to restrict each beneficiary to occupying part of the trust land?

[87] Trusts of Land and Appointment of Trustees Act 1996, s 13(3). [88] Ibid, s 13(6).

[89] Bright 'Occupation Rents and the Trusts of Land and Appointment of Trustees Act 1996: from Property to Welfare' [2009] Conv 378, pp 378–9.

[90] In *Stack v Dowden* [2007] 2 AC 432 at [94] Baroness Hale noted that, '[t]*hese statutory powers replaced the old doctrines of equitable accounting under which a beneficiary who remained in occupation might be required to pay an occupation rent to a beneficiary who was excluded from the property*'. See further, *Murphy v Gooch* [2007] 3 FLR 934. The suggestion that s 13 was, therefore, an exclusive regime for the availability of compensation was rejected in *French v Barcham* [2009] 1 WLR 1124. There, Blackburne J explained 'But it is important to note that she [Baroness Hale] referred to both parties having a right of occupation. It was in that context that she was addressing her remarks. I do not understand her to have been suggesting that in cases where one of the parties has no statutory right of occupation, the statutory provisions have the effect that that party can no longer claim an occupation rent in any circumstances whatever' [2009] 1 WLR 1124, [19]. See Bright 'Occupation Rents and the Trusts of Land and Appointment of Trustees Act 1996: from Property to Welfare' [2009] Conv 378, 386.

[91] Bright, ibid. [92] *Murphy v Gooch* [2007] 2 FLR 934, [10], *per* Lightman J.

[93] Bright 'Occupation Rents and the Trusts of Land and Appointment of Trustees Act 1996: from Property to Welfare' [2009] Conv 378, 390.

[94] TOLATA, s 13(4).

[95] Bright 'Occupation Rents and the Trusts of Land and Appointment of Trustees Act 1996: from Property to Welfare' [2009] Conv 378.

[96] Ibid, 393–4. [97] Ibid, 394. [98] *Stack v Dowden* [2007] 2 AC 432, [157].

Rodway v Landy
[2001] Ch 703, CA

Facts: Drs Rodway and Landy held the premises of their surgery on trust for themselves in equal shares. In proceedings following the termination of their business partnership, Dr Landy suggested that each of the parties should be given exclusive occupation of part of the surgery.

Peter Gibson LJ

At 712–13

I accept that the limitation on the power to exclude or restrict is expressed as a limitation on the number of beneficiaries who may be excluded or restricted. Plainly it would make no sense if there was no beneficiary left entitled to occupy land subject to a trust of land as a result of the exercise of the power under section 13. That is the force of the words "(but not all)". But if an estate consisting of adjoining properties, Blackacre and Whiteacre, was held subject to a trust of land and A and B were entitled to occupy the estate, it would be very surprising if the trustees were not able under section 13 to exclude or restrict B's entitlement to occupy Blackacre and at the same time to exclude or restrict A's entitlement to occupy Whiteacre, thereby leaving A alone entitled to occupy Blackacre and B Whiteacre. So also I do not see why, in relation to a single building which lends itself to physical partition, the trustees could not exclude or restrict one beneficiary's entitlement to occupy one part and at the same time exclude or restrict the other beneficiary's entitlement to occupy the other part. Each part is land subject to a trust of land and the beneficiaries are entitled to occupy that part until the entitlement of a beneficiary is excluded or restricted by the exercise of the power under section 13. So construed section 13(1) seems to me to make good sense and to provide a useful power which trustees might well wish to exercise in appropriate circumstances so as to be even-handed between beneficiaries. In contrast, I can see no good reason why Parliament should want to confine the trustees to the all or nothing approach [. . .]

The Court ordered that the premises should be divided to provide each of the doctors with a self-contained surgery.[99]

In exercising their powers under s 13 of the TOLATA 1996, the trustees must act reasonably and with regard to the intentions of the settlor (in an express trust), the purposes for which land is held, and the circumstances and wishes of beneficiaries who have a right to occupy.[100] Occupying beneficiaries may be required to make monetary payments to those excluded.[101] In all cases, the trustees may also impose reasonable conditions on beneficiaries in occupation, including, for example, requiring them to meet any expenses arising in relation to the land.[102]

[99] The outcome in this case may be contrasted with partition of the land under the Trusts of Land and Appointment of Trustees Act 1996, s 7. Partition would have involved the physical subdivision of the surgery into two separate properties, each with its own legal title, with the parties receiving legal title to their part of the property. The trust would therefore come to an end.

[100] Ibid, s 13(2) and (4). [101] Ibid, s 13(6). [102] Ibid, s 13(6).

Section 12 remains controversial, both as regards the interpretation of its terms and, more broadly, whether a statutory right of occupation was, in fact, necessary.[103] Pascoe considers the value of the introduction of this right, in its broader context.

Pascoe, 'Right to Occupy Under a Trust of Land: Muddled Legislative Logic' [2006] Conv 54, 55–7

The introduction of a statutory right may be viewed as mirroring social, cultural and economic developments in society, reflecting a contemporary concern with the maximisation of material welfare. The significance of the imperative of an increasingly secular and materialistic age is revealingly, if unconsciously, reflected in the very language of the post-war European Convention on Human Rights, which guarantees the entitlement of every natural or legal person to the "peaceful enjoyment of his possessions". The emphasis is thus on the "use" value of property rather than the "exchange" or capital value and the changing social consensus on the importance of residential utility and residential security has led to the materialisation of this statutory right. Property law is the basic legal expression of the nature of economic life in all its aspects and this development has to be understood in relation to the social context in which it gains its significance as a mode of regulating behaviour. [. . .]

The right to occupy represents part of a shift in power from trustees to beneficiaries. With the abolition of conversion, this right emphasises that beneficiaries under trusts of land have rights in the land. Gray and Gray term this the democratisation of the trust. Where the doctrine of conversion prevailed under trusts for sale, consistency dictated that the trustees would remain the prime decision-makers, but with increasing judicial emphasis on the "use" value of property, the emancipation of beneficiaries inevitably followed as a logical consequence of this progression.

As Pascoe illustrates, in so far as the right to occupy shifts power from the trustees to the beneficiaries, it is logically consistent with the ethos of the trust of land as emphasizing the use value, rather than the investment value, of land. But Pascoe convincingly demonstrates the absence of doctrinal cohesiveness underlying the new right. This arises largely as a result of the preconditions of the right provided in s 12(1) and (2): that either the purposes of the trust include occupation, or the land is held by the trustees to be available for occupation, and, in all cases, that it is suitable for occupation.

Pascoe, 'Right to Occupy Under a Trust of Land: Muddled Legislative Logic' [2006] Conv 54, 63

Section 12 represents an amalgam and jumble of principles derived from the old law intermingled with explicitly new concepts of availability and suitability to constitute a qualified right, which may be the subject of great uncertainty and thus litigation due to the impreciseness of drafting of the section. The merits of such a hotchpotch of concepts challenges the sagacity and utility of instituting a new right which displays three conflicting characteristics: beneficiary autonomy, trustee authoritarianism and settlor interposition.

[103] Barnsley, 'Co-owners' Rights to Occupy Trust Land' (1998) 57 CLJ 123. He argues that, in fact, a broader right to occupy was available under the previous law (as not subject to the conditions imposed by s 12) and that beneficiaries' may still seek to invoke non-statutory rights of occupation.

As was noted above, under the trust for sale, uncertainty remained as to whether a right to occupy was conferred on all beneficiaries, or only those for whom the purposes of the trust anticipated occupation.

The TOLATA 1996 continues to send conflicting messages. The right to occupy is conferred by s 12(1) on a beneficiary '*by reason of his interest*', but this is immediately made conditional on an assessment of the purpose of the trust, or the availability of the land for occupation, and its suitability for occupation by the beneficiaries.

Ross Martyn explains the effect of this.

Ross Martyn, 'Co-owners and their Entitlement to Occupy their Land Before and After the Trusts of Land and Appointment of Trustees Act 1996: Theoretical Doubts are Replaced by Practical Difficulties' [1997] Conv 254, 260

Inevitably trustees will form their own judgment as to whether or not land is unavailable or unsuitable for a particular beneficiary who requests occupation. In doing so, they will be carrying out much the same process as trustees carried out before the 1996 Act, when exercising their discretion whether or not to accede to the request of a beneficiary to go into occupation. They would have made their decision on the basis of whether they thought the land was or was not available and suitable for occupation by the beneficiary in question.

The crucial difference now is that paragraph (b) of section 12(1) and section 12(2) treat unavailability and unsuitability as objective criteria, depriving a beneficiary of an entitlement that he would otherwise have, and not as considerations for the exercise of a discretion.

The beneficiaries' position is made more certain by s 12, in so far as their right to occupy is now derived from statute. Practically, however, their position may be no more secure than under the trust for sale. They have a right to occupy subject to meeting criteria that will be assessed, in the first instance, by the trustees, with disputes resolved by the court under s 15 of the TOLATA 1996.

5.4 APPLICATIONS TO COURT

Section 14 of the TOLATA 1996 enables an application to be made to the court by a trustee or a person with an interest in the trust property '*relating to the exercise by the trustees of any of their functions*'. Section 15 then provides guidance to the court of the factors for the court to take into account when making decisions.

Trusts of Land and Appointment of Trustees Act 1996, s 15

(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the property subject to the trust is held,

(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

(d) the interests of any secured creditor of any beneficiary.

(2) In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees by section 13 the matters to which the court is to have regard also

include the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

(3) In the case of any other application, other than one relating to the exercise of the power mentioned in section 6(2), the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests).

(4) This section does not apply to an application if section 335A of the Insolvency Act 1986 (which is inserted by Schedule 3 and relates to applications by a trustee of a bankrupt) applies to it.

A wide range of matters may be referred to the court under s 14. It was on the basis of s 14, for example, that the court resolved the issue of the beneficiaries' occupation in *Rodway v Landy*. In particular, however, s 14 is the basis on which the courts will consider disputes as to whether the land should be sold. In Chapter 18, we consider applications for sale brought by third parties to the trust: in particular, creditors and trustees in bankruptcy of the beneficiaries. In this chapter, however, we are concerned with how disputed sales are determined when the parties to the trust refer the matter to the court themselves. This may arise, for example, where A and B are co-owners of their home, and, following a breakdown of the parties' relationship, A wishes to remain in the home (either alone or with children), while B wants the house to be sold.

In addition to their practical importance, such disputes may also raise directly the tension between the house as a home and as an investment. Ultimately, in the example outlined, the question that arises is in what circumstances A's desire to remain in the home takes precedence over B's wish to realize his or her capital investment. To answer this question, it is necessary first to consider the general principles and then to address specifically situations in which the welfare of minor children need to be taken into account through s 15(1)(c). We will then consider the extent to which s 15 represents a change in the law from the position under the trust for sale. This is a matter to which we return in Chapter 18, where we consider whether s 15 has changed the law from the position under the trust for sale if the application for sale is made by a third party, such as a creditor, rather than by one of the beneficiaries themselves.

5.4.1 General principles

In all applications, s 15 of the TOLATA 1996 directs the court to have regard to the intentions of the persons who created the trust (s 15(1)(a)), the purposes for which the property is held (s 15(1)(b)), and the interests of secured creditors (s 15(1)(d)).

Arden LJ considered the interpretation of the first two of these factors, and the difference between them, in the following case.

White v White
[2003] EWCA 924, CA

Facts: Mr and Mrs White were co-owners of their home. Following the breakdown of their relationship, Mr White remained in occupation of the home with the couple's

young daughters. Mrs White sought an application for sale of the home. The welfare of the children fell to be considered under s 15(1)(c) and this aspect of the decision is considered below. In this extract, Arden LJ considers whether the provision of a home for the children constituted the intentions of the Whites within s 15(1)(a), or the purposes for which they held the home within s 15(1)(b). The home had been purchased before the children were born.

Arden LJ

At [22]–[24]

[Arden LJ cited s 15 and continued] [. . .] Where more than one person created the trust, the intention for the purposes of section 15(1)(a) must, as I see it, be the intention of all the persons who created the trust and be an intention which they had in common. This is because the subsection speaks of "the intentions of the person or persons [. . .] who created the trust". This may be contrasted with the reference in section 15(1)(c) to the welfare of "any minor". The use of the definite article and the word "person" or "persons" in subsection (1) (a) to my mind make it clear that the intention referred to in section 15(1)(a) must be the intention of the persons who created the trust if more than one in common.

The question then remains whether the intention could include intention subsequently come to, as Mr Routley submits. I do not myself consider that this is the correct construction. Parliament has used the word "intention" which speaks naturally to the intentions of persons prior to the creation of the trust. If that were not its meaning, then it is not clear whether the court should be looking at the parties' intention at the date of the hearing or at some other antecedent point in time and, if so, what date. If Parliament meant the present intention, it would have used some such word as "wishes" rather than the word "intention" which implies some statement or opinion as to the future. In all the circumstances, I consider that the appellant's submissions on the point of law on this point are not correct.

I turn now to what I have termed the third point of law, and it was put in this way. It is that the judge had failed to deal with a submission by the father that there was an additional purpose come to after the property was purchased and the parties had been living there. This was based primarily on paragraph 11 of the father's statement of 22nd February 2001, in which he stated that the trust was entered into to provide a home for the mother and himself but subsequently there arose an additional purpose, namely to provide a home for the children. I would accept that, for the purposes of section 15(1)(b), purposes could have been formulated informally, but they must be the purposes subject to which the property is held. The purpose established at the outset of the trust which, on the judge's finding, did not include the provision of a home for children, could only change if both parties agreed. There was no evidence from which the judge could find that the mother agreed to the additional purpose spoken to by the father. Nor was the assertion that there was such a purpose ever put to the mother. Notwithstanding Mr Routley's submission, I would not accept the argument that the judge's omission to deal with the additional purpose undermines his decision.

Hence, while the 'intentions' of the persons who created the trust are fixed and determined at the time of creation, the purposes can change by agreement of the parties. In *Rodway v Landy*, the Court of Appeal noted that the relevant purposes are those in existence at the time that the application is considered.[104] As we will see below, the interests of the children in *White v White* were still taken into account by the Court through the specific reference to the welfare of children in s 15(1)(c).

[104] [2001] Ch 703, 711.

As regards the interests of secured creditors, it is important to note that these are relevant even in applications brought by the parties to the trust. In *Anneveld v Robinson*,[105] the practical impossibility of a large mortgage being paid by one of the parties, if allowed to remain in occupation, was a significant factor in the court's order of sale on the breakdown of their relationship.

Although the '*circumstances and wishes of the beneficiaries*' are referred to in s 15(2) only in respect of the trustees' exercise of powers under s 13 (right to occupy) they may implicitly be relevant in the context of sale. This is because to be effective an order of sale requires vacant possession, which necessarily impacts on the beneficiaries' right to occupy.[106]

In addition to the factors mentioned in s 15, the court should have regard to any other relevant matter. The matters referred to in s 15 are non-exhaustive In *White v White*, for example, the Court had regard to Mrs White's circumstances and her wish to raise money to provide a home for herself. Arden LJ explained that there is no weighting of the factors within s 15:[107] the responsibility lies with judges to determine how much weight to afford to all relevant factors, including those not specifically referred to in s 15.

5.4.2 Disputed sales and child welfare

Section 15(1)(c) specifically directs the court to have regard to the welfare of minor children who are in occupation of the home, or may be expected to be so. This ensures that the needs of such children are taken into account even where, as in *White v White*, the provision of a home for them was not the intention of the parties and is not an agreed, current purpose of the trust. Section 15(1)(c) is significant in so far as it ensures that the welfare of children is considered. It is consistent with the underlying ethos of the TOLATA 1996 as providing a scheme of regulation for trusts that reflects the fact that much co-owned land is the parties' home.

As we have noted, however, the factors for the court to be take into account in determining applications are not weighted. Other factors may favour sale despite the occupation of children. In *White v White*, the Court of Appeal confirmed an order of sale by the judge at first instance. The Court noted that the judge had correctly taken into account both the interests of the children in remaining in their home and Mrs White's need to realize her only capital asset. In that case, the judge was also satisfied that, following the sale, cheaper suitable accommodation would be available.

5.4.3 Has s 15 changed the law?

Prior to the TOLATA 1996, under the trust for sale, disputes as to sale were considered by the court under s 30 of the LPA 1925. Against the background of the duty to sell, the starting point for the courts was that sale should be ordered unless the trustees unanimously agreed to exercise their power to postpone sale.[108] This was, however, significantly qualified by the courts' recognition that trusts for sale were often created for a purpose other than sale (often referred to as the 'secondary', or 'collateral', purpose of the trust, but, in fact, representing its *primary* purpose). As a general principle, sale would not be ordered for so long as a collateral

[105] [2005] WL 3142400 (county court), judgment 12 August 2005.
[106] *Miller Smith v Miller Smith* [2010] 1 FLR 1402, [17].
[107] [2003] EWCA 924, [26].
[108] *Re Mayo* [1943] 1 Ch 302.

purpose could still be achieved.[109] Hence, the key issues for the courts in settling disputes was the identification of the purposes of the trust and an assessment of whether any of those purposes could still be achieved. Where children were present, a particularly contentious issue was whether the provision of a home for children formed part of the purposes of the trust or whether their interests were '*only incidentally to be taken into consideration* [...] *so far as they affect the matter between the two persons entitled to the beneficial interests*'.[110] Both views could claim support from conflicting Court of Appeal judgments.[111] The balance of the authorities suggested that, where a house was occupied by one of the beneficiaries with minor children, sale would not be ordered unless alternative (cheaper) accommodation could then be provided.[112]

In its recommendations that led to s 15, the Law Commission considered the relationship between the new provision and the secondary purpose case law.

Law Commission Report No 181, *Transfer of Land: Trusts of Land* (1989, [12.9])

> As regards the exercise of these powers [i.e., the powers conferred by s 14 of the Trusts of Land and Appointment of Trustees Act 1996], it is our view that the court's discretion should be developed along the same lines as the current 'primary purpose' doctrine. This approach was moulded to practical requirements, and we consider that it gets the balance more or less right. Nevertheless, we recommend that [s 15] should set out some guidelines for the exercise of the court's discretion, the aim being to consolidate and rationalise the current approach. The criteria which the courts have evolved for settling disputes over trusts for sale are ones which will continue to have validity in the context of the new system. One function of the guidelines will be to put these criteria on a statutory footing. [...]

In *Mortgage Corporation v Shaire*,[113] in an application for sale brought by a creditor, the court concluded that s 15 of the TOLATA 1996 had changed the law (the case is discussed in Chapter 18, section 3). It is certainly true to say that s 15 has changed the focus of judgments. The court is no longer constrained by a presumption of sale and a need artificially to treat every other purpose as secondary to sale. The purpose or purposes of the trust have become one of a number of factors to which the court is to have regard. Importantly, s 15 has also resolved the issue of the relevance of the welfare of children. It is more difficult to assess the extent to which these changes translate into different outcomes of cases as opposed to the reasoning for those outcomes. There remains relatively little case law concerning disputes between co-owners and as a result it is difficult to draw conclusions.[114] Following a review

109 *Jones v Challenger* [1960] 2 WLR 695.

110 *Burke v Burke* [1974] 1 WLR 1063, 1067, *per* Buckley LJ.

111 In *Browne v Pritchard* [1975] 1 WLR 1366, *Williams v Williams* [1976] 3 WLR 494, and *Re Evers' Trust* [1980] 1 WLR 1327, sale was refused where, following the breakdown of the parties' relationship, a home was occupied by one beneficiary and children. *Burke v Burke* [1974] 1 WLR 1063 stands alone as a case in which sale was ordered in such circumstances. This approach was also supported in *Re Holliday* [1981] Ch 405, although the case itself concerned an application by a trustee in bankruptcy, rather than by one of the parties to the trust.

112 *Williams v Williams* [1976] 3 WLR 494, 499.

113 [2001] Ch 743.

114 Hopkins 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 LQR 310, p.325; Dixon, 'To Sell or Not to Sell: That is the Question. The Irony of the Trusts of Land and Appointment of Trustees Act 1996' (2011) 70 CLJ 579, 586.

of the case law, Dixon suggests that there are, however, '*indications of a general approach*', which he summarizes in the following extract.[115]

Dixon, 'To Sell or Not to Sell: That is the Question. The Irony of the Trusts of Land and Appointment of Trustees Act 1996' (2011) 70 CLJ 579, p 589

> An assessment of the relatively modest case law available suggests that the courts adopt a highly flexible, circumstance dependent approach to two-party disputes when acting under section 14 Trusts of Land and Appointment of Trustees Act 1996. The court clearly looks at the factors listed in section 15 as an aid to the exercise of its discretion, but is not prevented from considering other matters. There is no evidence to suggest that the default position of sale as pertained under section 30 Law of Property Act 1925 now carries any force [. . .] The intention of the parties still carries sway, as does the majority interest holding, but neither appears decisive. [. . .] The parties stand level in law and it is the court's task to weigh the factors within section [15] and such additional factors as may be relevant.

5.5 REGULATION OF CO-OWNERSHIP OUTSIDE OF THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996

This chapter has focused on the regulation of co-ownership as a matter of property law through the TOLATA 1996. The rights of co-owners may also fall to be regulated by other legislation: for example, within the regime of family law. Where this is the case, questions arise as to the resolution of overlaps between the jurisdictions. These have been addressed by the court in the context of rights to occupy and applications for sale.

In relation to occupation, in addition to the right conferred by s 13 of the TOLATA considered in section 5.3 of this chapter, we have seen in Chapter 16 that rights to occupy a home may be derived from the Family Law Act 1996 (FLA 1996). There is an overlap between the FLA 1996 and the TOLATA 1996 in two respects. First (as noted in Chapter 16), a spouse or civil partner who is a beneficiary, but does not own legal title, may be entitled to a right to occupy ('*home rights*') under the FLA 1996. Secondly, s 33 of the FLA 1996 enables the court to regulate occupation of a house that is, or has been, or was intended to be, the home of the applicant and '*another person with whom he is associated*'. This expression covers a wide range of people, including existing (and former) married couples, civil partners and cohabitants, and others who have shared a home otherwise than through a commercial relationship.[116]

An application may be made to the court under s 33 by (amongst others) a person entitled to occupy as a beneficiary or through holding '*home rights*' conferred by the FLA 1996.[117] Hence, a beneficiary who is entitled to occupy a home under the TOLATA 1996 may apply to the court for an order regulating occupation under the FLA 1996. An overlap in jurisdictions arises because occupation by beneficiaries is also subject to regulation by the court under ss 13 and 14 of the TOLATA 1996.

The range of orders that can be made by the court, and the factors that the court is directed to take into account, differ under each statute. The resolution of this overlap was considered in the following case.

[115] Ibid, p 586. [116] Family Law Act 1996, s 62(3). [117] Ibid, s 33(1).

***Chan v Leung*, unreported**
30 November 2001, HC

Facts: The case arose following the breakdown of a relationship between Miss Chan and Mr Leung, in the course of which, for a period of time, they had lived together in a house that was the subject of the action. Miss Chan had remained in the house and was pursuing university studies. The court held that Miss Chan had a beneficial interest in the house and then considered what order should be made in relation to occupation. The issue arose of whether this matter should be dealt with under TOLATA or the Family Law Act 1996.

HH Judge McGonigal

Where a court is addressing the question of occupation of a house subject to a trust or the alternative of sale, in my view the court should approach it primarily in the context of s 33 of the Family Law Act 1996. It is in this Act that Parliament addresses the question of occupation of the home in most detail. The court is required by s 33(6) to have regard to all the circumstances. These will include the fact that it is a trust property, so that ss 14 and 15 apply to it. Accordingly, the matters specifically referred to in s 15 of the Trusts of Land and Appointment of Trustees Act 1996 and any other relevant consideration arising from the fact that it is a trust property, including the terms of the trust, should be taken into account by the court when considering the question of continued occupation or sale.

Hence, where the jurisdictions overlap, precedence is afforded to the FLA 1996—but the matters that the court would be required to refer to under the TOLATA 1996 are taken into account as part of the circumstances of the case. On the facts, the court issued an order enabling Miss Chan to continue to occupy, to the exclusion of Mr Leung, for the duration of her current studies, following which the house would be sold. The judge's order was affirmed on appeal, although without discussion by the Court of Appeal of the overlap between the jurisdictions.[118]

In Miller Smith v Miller Smith the Court of Appeal considered how an application for sale bought by a beneficiary under s 14 should be treated where divorce proceedings were pending. In addition to an application for sale under the TOLATA, the applicant had sought to obtain sale under s 17 of the Married Woman's Property Act 1882 and an order under s 33 of the Family Law Act 1996 prohibiting his wife from occupying the property.

Miller Smith v Miller Smith
[2010] 1 FLR 1402

Wilson LJ

At [18]

I am clear that, confronted with an application under TOLATA between separated spouses, the court should embark upon the discretionary exercise by asking itself whether the issue raised by the application can reasonably be left to be resolved within an application for

[118] *Chan v Leung* [2003] 1 FLR 23.

> ancillary relief following divorce. It is in principle much more desirable that an issue, as here, about sale of the home should be resolved within an application for ancillary relief. For there the court will undertake a holistic examination of all aspects of the parties' finances, needs, contributions etc; will devise the fairest set of arrangements for the future housing and finances of each of them; and, to that end, will provide for the transfer of capital, as well perhaps as for payment of future income, from one to the other. By an order under TOLATA , on the other hand, the court lays down only one piece of the jigsaw, namely that the home be sold, without its being able to survey the whole picture by laying down the others. So at this threshold stage of the enquiry into an application under TOLATA between spouses the court will, in particular, have regard to the question whether, within a time-frame tolerable in all the circumstances, the parties will become able to apply for ancillary relief. Furthermore if, at first sight, there appears to the court to be any measurable chance that, on an application for ancillary relief made within that time-frame, the respondent to the application for an order for sale under TOLATA will be able to preserve her or his occupation of the home by securing an outright transfer of ownership of it or a variation of the trust, it is hard to conceive that an order for sale would reflect a proper exercise of discretion.

On the facts, Wilson LJ was satisfied that the application should be dealt with under the TOLATA. Mrs Miller Smith contested the divorce and it was unlikely that an application for ancillary relief would be held within a year. In the meantime, Mr Miller Smith remained liable for a £7 million mortgage secured against the property, which appeared to be his only substantial asset. Further, there was '*no measureable chance*' that the outcome of ancillary relief would enable Mrs Miller Smith to continue in occupation.[119] Wilson LJ explained that the same factors were also likely to be determinative of the application.[120]

In *Chan v Leung*,[121] we have seen that in determining a right of occupation under the Family Law Act 1996 the court considered that the factors referred to in TOLATA would be taken into account as part of the circumstances of the case. In *Miller Smith v Miller Smith*, without reference to that case, it was argued that in determining the application for sale, the court was required to consider whether an occupation order would be obtained against Mrs Miller Smith under the Family Law Act 1996. While this argument was rejected by the Court of Appeal, Wilson LJ noted that '*it would be surprising if an order that in effect a spouse should give vacant possession of a matrimonial home under TOLATA were to be made in circumstances in which the applicant could not have secured an occupation order*'.[122] He appeared to consider that the breadth of discretion conferred by s 15 was sufficient to ensure adequate protection without a specific requirement for the judge to cross-refer to s 33 of the Family Law Act 1996.

Where different jurisdictions are involved, the outcome of the decision in one may also impact on the application of the TOLATA. This is illustrated by *White v White*.[123] In that case, as has been seen in section 5.4.1, the court ordered sale of a home on an application by Mrs White despite the fact that the house remained occupied by Mr White and the couple's young daughters. Mr White had applied under the Children Act 1989 for a transfer of Mrs White's beneficial interest during their daughters' minority. That application had been suspended pending the outcome of Mrs White's case under the TOLATA 1996.[124] The

[119] [2010] 1 FLR 1402, [19]. [120] Ibid, [20]. [121] Unreported, 30 November 2001, HC.
[122] *Miller Smith v Miller Smith* [2010] 1 FLR 1402, [23].
[123] [2003] EWCA Civ 924, CA. [124] Ibid, [5].

consequence of the order for sale was to resurrect Mr White's application. If successful, it would necessarily appear to override the order for sale, because Mrs White would no longer hold the beneficial interest that provided the linchpin of her claim.

QUESTIONS

1. What do you consider to be the main advantages and disadvantages of the joint tenancy and tenancy in common as forms of co-ownership? What factors would you take into account in advising co-owners whether to hold their home as beneficial joint tenants or tenants in common?
2. Assess the methods by which a joint tenancy may be severed: (i) unilaterally, by one joint tenant; and (ii) mutually, by all of the joint tenants. What changes, if any, do you consider desirable to simplify the current law?
3. How does the underlying ethos of the trust of land differ from that of the trust for sale? To what extent is this change in ethos reflected in the rights of the beneficiaries?
4. In what circumstances is the court likely to order sale of a home on an application by one co-owner?

FURTHER READING

Barnsley, 'Co-owners' Rights to Occupy Trust Land' (1998) 57 CLJ 123

Bright 'Occupation Rents and the Trusts of Land and Appointment of Trustees Act 1996: from Property to Welfare' [2009] Conv 378

Clements, 'The Changing Face of Trusts: The Trusts of Land and Appointment of Trustees Act 1996' (1998) 61 MLR 56

Cooke, *Land Law* (Oxford: OUP, 2006, ch 5)

Dixon, 'To Sell or Not to Sell: That is the Question. The Irony of the Trusts of Land and Appointment of Trustees Act 1996' (2011) 70 CLJ 579.

Hopkins 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 LQR 310

Hopkins, 'The Trusts of Land and Appointment of Trustees Act 1996' [1996] Conv 411

Law Commission Report No 181, *Transfer of Land: Trusts of Land* (1989)

Oakley, 'Towards a Law of Trusts for the Twenty-First Century' [1996] Conv 401

Smith, *Plural Ownership* (Oxford: OUP, 2005, chs 3–8)

18

CO-OWNERSHIP AND THIRD PARTIES: APPLICATIONS FOR SALE

CENTRAL ISSUES

1. Third parties may make an application for sale of co-owned land. The most likely third parties to do so are creditors and trustees in bankruptcy of one of the beneficiaries.
2. Since the Trusts of Land and Appointment of Trustees Act 1996, applications made by creditors are considered under the general provisions of that Act, while those by trustees in bankruptcy are considered under the Insolvency Act 1986.
3. As regards applications by creditors, there has been judicial acknowledgment that the 1996 Act has changed the law from the previous practice, which was heavily weighted in favour of sale. The outcome of cases, however, casts doubt on the extent of any such change.
4. In relation to trustees in bankruptcy, under the Insolvency Act 1986, there is a presumption in favour of sale after an initial one-year adjustment period. Sale may be postponed if there are exceptional circumstances, although this criterion has been narrowly construed.
5. In determining applications for sale of a home the court must have regard to the rights of those affected by the sale under Art 8 ECHR. Where the application is by a creditor it must also be borne in mind that they have a right of property under Article 1 Protocol 1.
6. Where sale is discretionary, the courts have the opportunity to undertake a proportionality balance required to ensure compatibility of the sale with the ECHR. This leaves vulnerable to challenge applications by trustees in bankruptcy under s 335A of the Insolvency Act 1986 where the need to demonstrate exceptional circumstances is a precondition to the existence of discretion.

1 INTRODUCTION

In Chapter 17, we considered how the courts determine applications for the sale of co-owned land where the application is brought by one of the co-owners. It may be recalled that applications for sale (like all other applications relating to the exercise of their functions by trustees of land) are made to the court under s 14 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996). Section 15 provides a non-exhaustive list of factors for the court to take into account. In this chapter, we consider applications for sale that are brought by third parties to the trust. Any person with '*an interest in property subject to a trust of land*' may bring an application under s 14. Other than the co-owners themselves, the most likely persons to have an interest in the property are creditors and trustees in bankruptcy of one of the co-owners. As regards creditors, only those whose debt is secured over a beneficial share have '*an interest*' in the property. A creditor may have had a security interest from the outset. Alternatively, the creditor may initially be unsecured, but obtain a charging order over the debtor's land. The effect of a charging order is to turn an unsecured debt into a secured one. Charging orders are discussed in Chapter 28, section 4, where we note that in the context of the recession their use has increased. The circumstances in which such creditors can force sale have become correspondingly more significant.

On an application for sale by a creditor or trustee in bankruptcy, the court must decide whether the beneficiary should be able to remain in the home, or whether the home should be sold to enable debts to be paid. The resulting case law raises interesting policy questions as to the relative weight that should be given to the desire to remain in the home and the purely financial interests of creditor. An appropriate balance between these interests is all the more difficult to determine given the factual context in which disputes typically arise. The beneficiary resisting sale and the applicant for sale may both be 'victims' of another co-owner's fraud or undue influence, or may be suffering the fallout caused by that co-owner's financial crisis.

As far as creditors with a security interest from the outset are concerned, it is possible for a beneficial tenant in common to grant an equitable charge (or mortgage) over his or her share, but such arrangements are not necessarily commercially attractive to lenders. As will be seen in the case law in this chapter, such interests are more likely to arise because a purported grant of a legal mortgage over the entire estate fails: for example, because one co-owner (A) has exerted undue influence over the other (B),[1] or has forged B's signature to procure a mortgage.[2] The result of the undue influence or forgery is that the charge takes effect only against A's beneficial share. Where a creditor succeeds in obtaining an application for sale, the proceeds of sale are divided proportionately between the beneficiaries in accordance with their respective beneficial shares. Only those proceeds representing the debtor's share are used to discharge the debt.[3] If the co-owners were joint tenants, then the creation

[1] For example, *First National Bank plc v Achampong* [2003] EWCA 487, in which a presumption of undue influence was drawn under the tests provided in *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44.

[2] For example, *Mortgage Corporation v Shaire* [2001] 4 All ER 364.

[3] An exceptional decision is *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 FLR 908. In that case, an equitable charge arising as the result of Mr Bell's forgery of his wife's signature was, notwithstanding, held to have priority over both parties' beneficial shares. This meant that, on a sale of the home, the debt would be paid out of the full proceeds, not only the part representing Mr Bell's beneficial interest. The Court of Appeal doubted the decision of the first instance judge in this respect, but that aspect of his decision was not subject to appeal.

of the equitable charge by one co-owner, or the grant of a charging order, constitutes an act operating on the joint tenant's share to sever the joint tenancy (as discussed in Chapter 17).

Where a co-owner becomes bankrupt, all of his or her property vests in the trustee in bankruptcy, who is under a statutory duty to realize the assets. As is the case with creditors, on a sale, only the proceeds of sale representing the bankrupt's share are used to discharge his or her debts. Where the beneficiary is a joint tenant, we have seen in Chapter 17 that bankruptcy also severs the joint tenancy as an (involuntary) act operating on the joint tenant's share.

The starting point in determining an application by a third party is s 15 of the TOLATA 1996.

Trusts of Land and Appointment of Trustees Act 1996, s 15

(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the property subject to the trust is held,

(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and

(d) the interests of any secured creditor of any beneficiary.

[. . .]

(3) In the case of any other application, other than one relating to the exercise of the power mentioned in section 6(2), the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests).

(4) This section does not apply to an application if section 335A of the Insolvency Act 1986 (which is inserted by Schedule 3 and relates to applications by a trustee of a bankrupt) applies to it.

The effect of s 15 is that applications by creditors and trustees in bankruptcy are treated differently. The court deals with applications by creditors under s 15. By virtue of s 15(4), however, applications by a trustee in bankruptcy fall to be decided under s 335A of the Insolvency Act 1986. Therefore, each type of application must be considered separately.

To an extent, however, applications by creditors and trustees in bankruptcy raise the same policy considerations. It is useful to highlight these before analysing the case law concerning the different applicants for sale.

2 POLICY CONSIDERATIONS

In Chapter 17, we noted that the policy underlying the TOLATA 1996 was to provide a form of regulation for trusts of land more suited than the trust for sale to the use of a land as a home. We noted that where a dispute as to sale arises between the co-owners, this raises the tension between one party's wish to maintain his or her 'home' and the other's desire to realize his or her investment. The tension between the 'use' and 'investment' functions of a home

are all the more apparent when the application for sale is brought by a creditor or trustee in bankruptcy of a co-owner, for whom the property has only ever represented a commercial investment.[4]

Fox highlights the opposing concerns of creditors, on the one hand, and of co-owners, on the other, and is critical of the law's track record in protecting the home.

Fox, *Conceptualising Home: Theories, Laws and Policies* (2007, pp 14–15, 23–5)

The concerns of the creditor

It is a truism that, in disputes between creditors and occupiers, the creditor almost invariably wins. Legislative and judicial policy makers have routinely favoured the interests of creditors over those of occupiers, thus demonstrating the greater weight attributed to the concerns of creditors over those of occupiers. It is not difficult to understand why this has been the case. For one thing, the creditor has a legitimate expectation, when he lends money against the security of real property, that the debt will be satisfied or the security honoured. Furthermore, there are a series of policy arguments to bolster the creditor's case, for example, the potentially adverse consequences of diminishing the legal protection of creditors; interests on the availability of credit secured against domestic property, either for acquisition of the property itself or as business capital. By contrast, the occupier's interest in the property which a creditor is seeking to realise as a home is not only inconvenient—operating as it could to subjugate the claims of creditors, whose economic clout weights heavily on the balancing scales—but also difficult to ascertain or represent, relative to the creditor's interest. While the creditor's concerns, which essentially revolve around their economic claim on the property as capital, are relatively straightforward, the occupier's interest in retaining the home for use and occupation is much more complex, and, with its many dimensions—financial, practical, emotional, psychological, social and so on—more difficult to quantify. [. . .]

The concerns of the occupier

While the creditor's concerns are relatively straightforward, the home interests of occupiers are much more complex and difficult to quantify. [. . .] By drawing upon understandings of the meaning of 'home' as they have developed in other disciplines, legal scholars can begin to appreciate that an occupier's desire to retain the property for use and occupation as a home is not merely sentimental but may also encompass multi-emotional, psychological, social and cultural matters. These meanings can operate to intensify the occupier's attachment to their home, and to exacerbate the experience of losing the home through actions at the hands of a creditor.

However, attempts to argue 'home' interests in law, particularly when positioned against financial interests, are beset by difficulties. Although interdisciplinary research has established the authenticity of home meanings, the relationship between an occupier and his or her home—inherently intangible and difficult to define—is not readily comprehensible to lawyers. For one thing, as home scholars in other disciplines have recognised, an occupier's interest in his or her home is:

> a relative concept, not an absolute one that can be defined in a dictionary or by a linguist. Given that it transcends quantitative, measurable dimensions and includes qualitative subjective ones, it is a complex, ambiguous concept that generates confusion.

[4] For further discussion see Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 LQR 310.

> It is often difficult to verbalise ideas about home, since they are highly personal, and this adds to the analytical obstacles. Perhaps even more significantly, particularly in the legal domain, the idea of personal attachment to one's home can be portrayed as sentimental and emotional, and as a consequence can become trivialised, particularly when measured against the objective and quantifiable claims of creditors to the capital value of the property. These characteristics provide a ready argument against attempts to develop a coherent legal concept of home. Nevertheless, even setting aside our instinctive appreciation of the importance of home, the proposition that home is a meaningful site and the authenticity of the attachment of occupiers to their homes have been firmly established in other disciplines. In light of this scholarship and the centrality of home to legal discourse, the idea that the subject of 'home' is too difficult for law to comprehend is indefensible.

While Fox refers to creditors, the concerns of the parties are the same whether the application for sale is brought by the creditors themselves or by a trustee in bankruptcy. As we will see, however, under the applicable statutory schemes, the ability of the court to take into account the concerns of the occupier is greater in a dispute with a creditor. Where a creditor has obtained a charging order over one co-owner's beneficial share, a further policy dimension is added to the claim: should the beneficiary resisting the sale (whose interest is not affected by the charging order) lose their home to enable the repayment of debts that were initially *unsecured*? While the initial status of the debt is a point acknowledged by the courts, in practice it does not appear to have had an impact on the courts decisions.[5]

3 APPLICATIONS BY CREDITORS

Applications for sale by a creditor are considered under s 15 of the TOLATA 1996. In applying that section, the responsibility lies with the judge to determine how much weight to afford to each of the factors listed in the provision and all other relevant matters.[6]

Prior to the 1996 Act, applications for sale by creditors and trustees in bankruptcy were considered by courts under s 30 of the Law of Property Act 1925 (LPA 1925). In applying that provision, it was held that no distinction should be made between the applications. It had been established, in *Re Citro*,[7] that, on an application by a trustee in bankruptcy, sale would be ordered unless the circumstances were exceptional (a criterion that is discussed at sections 4.1 and 4.2 below). In *Lloyds Bank v Byrne*,[8] the Court of Appeal considered that the same rule should apply in relation to creditors.

The 1996 Act distinguishes between these applications, because those by creditors are considered under s 15 of that Act, while applications for sale by trustees in bankruptcy are now dealt with under s 335A of the Insolvency Act 1986. Against this background, Neuberger J considered in the following case whether s 15 of the TOLATA 1996 had changed the law.

[5] See *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580; [2009] 1 FLR 873; *Forrester Ketley & Co v Brent* [2009] EWHC 2441 (Ch); *C Putnam & Sons v Taylor* [2009] EWHC 317 (Ch); *National Westminster Bank plc v Rushmer* [2010] EWHC 554 (Ch); [2010] 2 FLR 362.

[6] *White v White* [2003] EWCA 924, [26]. See further the discussion in Chapter 17, section 5.4.1.

[7] [1991] Ch 142.

[8] [1993] 1 FLR 369.

Mortgage Corporation v Shaire
[2001] 4 All ER 364, HC

Facts: Mrs Shaire and Mr Fox were joint legal owners of their home. Unknown to Mrs Shaire, Mr Fox had forged her signature to secure mortgages over the house. As a result of the forgery, these took effect only against his beneficial share, which the court assessed as being 25 per cent. Following Mr Fox's death, the mortgagee sought sale of the house.

Neuberger J

At 378–80

To my mind, for a number of reasons, Mr Asif is correct in his submission, on behalf of Mrs Shaire, that s 15 has changed the law.

First, there is the rather trite point that if there was no intention to change the law, it is hard to see why Parliament has set out in s 15(2) and, indeed, on one view, s 15(3), the factors which have to be taken into account specifically, albeit not exclusively, when the court is asked to exercise its jurisdiction to order a sale.

Secondly, it is hard to reconcile the contention that Parliament intended to confirm the law as laid down in *Byrne's case* with the fact that, while the interest of a chargee is one of the four specified factors to be taken into account in s 15(1)(d), there is no suggestion that it is to be given any more importance than the interests of the children residing in the house (see s 15(1)(c)). As is clear from the passage I have quoted from the judgment of Nourse LJ in *Re Citro* as applied to a case such as this in light of *Byrne's case*, that would appear to represent a change in the law.

Thirdly, the very name 'trust for sale' and the law as it has been developed by the courts suggests that under the old law, in the absence of a strong reason to the contrary, the court should order sale. Nothing in the language of the new code as found in the 1996 Act supports that approach.

Fourthly, it is clear from the reasons in *Byrne's case* and indeed the later two first instance cases to which I have referred, that the law, as developed under s 30 of the Law of Property Act 1925, was that the court should adopt precisely the same approach in a case where one of the co-owners was bankrupt (*Re Citro*) and a case where one of the co-owners had charged his interest (*Byrne's case*). It is quite clear that Parliament now considers that a different approach is appropriate in the two cases-compare ss 15(2) and 15(3) of the 1996 Act with s 15(4) and the new s 335A of the Insolvency Act 1986.

Fifthly, an indication from the Court of Appeal that the 1996 Act was intended to change the law is to be found in (an albeit plainly obiter) sentence in the judgment of Peter Gibson LJ in *Banker's Trust Co v Namdar* [1997] CA Transcript 349. Having come to the conclusion that the wife's appeal against an order for sale had to be refused in light of the reasoning in *Re Citro* and *Byrne's case*, Peter Gibson LJ said:

> 'It is unfortunate for Mrs Namdar, that the very recent Trusts of Land and Appointment of Trustees Act 1996 was not in force at the relevant time [i.e. at the time of the hearing at first instance] [. . .]'

Of course it would be dangerous to build too much on that observation, but it is an indication from the Court of Appeal and indeed from a former chairman of the Law Commission, as to the perceived effect of the 1996 Act.

Sixthly, the leading textbooks support the view that I have reached. In *Megarry & Wade on the Law of Real Property* p 510 (para 9–064) one finds this:

> 'Although the authorities on the law prior to 1997 will therefore continue to provide guidance, the outcome will not in all cases be the same as it would have been under the previous law. This is because the legislature was much more specific as to the matters which a court is required to take into account.'

Emmet on Title (19th edn, January 1999 release) para 22–035, contains this:

> 'Cases decided on pre-1997 law may be disregarded as of little, if any, assistance [...] because the starting point [...] was necessarily a trust for sale implied or expressed as a conveyancing device enabling the convenient co-ownership of the property [...]'

Seventhly, the Law Commission report which gave rise to the 1996 Act, *Transfer of Land, Trusts of Land* (Law Com No 181, 8 June 1989), tends to support this view as well. It is fair to say that the Law Commission did not propose a new section in a new Act such as s 15 of the 1996 Act, but a new s 30 of the Law of Property Act 1925. It is also fair to say that the terms of the proposed new s 30 were slightly different from those of s 15. However, in my judgment, the way in which the terms of the 1996 Act, and in particular s 15, have been drafted suggests that the Law Commission's proposals were very much in the mind of, and were substantially adopted by, the legislature. In para 12.9 of the report, the Law Commission describe the aim as being to 'consolidate *and rationalise*' (my emphasis) the current approach. When commenting on the proposed equivalents of what are now s 15(2) and (3), the Law Commission said (note 143):

> 'Clearly, the terms of these guidelines may influence the exercise of the discretion in some way. For example, it may be that the courts' approach to creditors' interests will be altered by the framing of the guideline as to the welfare of children. If the welfare of children is seen as a factor to be considered independently of the beneficiaries' holdings, the court may be less ready to order the sale of the home than they are at present.'

Finally, the Law Commission said (para 13.6):

> 'Within the new system, beneficiaries will be in a comparatively better position than beneficiaries of current trusts of land. For example, given that the terms governing applications under section 30 will be less restrictive than they are at present, beneficiaries will have greater scope to challenge the decisions of the trustees and generally influence the management of the trust land.'

Eighthly, to put it at its lowest, it does not seem to me unlikely that the legislature intended to relax the fetters on the way in which the court exercised its discretion in cases such as *Re Citro* and *Byrne's case*, and so as to tip the balance somewhat more in favour of families and against banks and other chargees. Although the law under s 30 was clear following *Re Citro* and *Byrne's case*, there were indications of judicial dissatisfaction with the state of the law at that time. Although Bingham LJ agreed with Nourse LJ in *Re Citro*, he expressed unhappiness with the result ([1990] 3 All ER 952 at 965, [1991] Ch 142 at 161), and Sir George Waller's dissatisfaction went so far as led him to dissent ([1990] 3 All ER 952 at 965–966, [1991] Ch 142 at 161–163). Furthermore, there is a decision of the Court of Appeal in *Abbey National plc v Moss* [1994] 2 FCR 587, which suggests a desire for a new approach.

All these factors, to my mind, when taken together point very strongly to the conclusion that s 15 has changed the law. As a result of s 15, the court has greater flexibility than heretofore, as to how it exercises its jurisdiction on an application for an order for sale on facts such as those in *Re Citro* and *Byrne's case*. There are certain factors which must be taken into

account (see s 15(1) and, subject to the next point, s 15(3)). There may be other factors in a particular case which the court can, indeed should, take into account. Once the relevant factors to be taken into account have been identified, it is a matter for the court as to what weight to give to each factor in a particular case.

The only indication the other way is a decision of Judge Wroath in the Newport, Isle of Wight, County Court in *TSB plc v Marshall* [1998] 2 FLR 769 at 771–772, where he said this, having referred to *Byrne's*, *Moss'*, and *Hendricks'* cases:

> 'Those three cases were all decided where the applications to the court were under s 30 of the Law of Property Act. However, it has been submitted that the principles established are applicable to an application under s 14, and I accept that submission.'

It does not appear clear to what extent the matter was argued before him, or, indeed, whether it was argued before him. With all due respect to Judge Wroath, I disagree with his conclusion.

A difficult question, having arrived at this conclusion, is the extent to which the old authorities are of assistance, and it is no surprise to find differing views expressed in the two textbooks from which I have quoted. On the one hand, to throw over all the wealth of learning and thought given by so many eminent judges to the problem which is raised on an application for sale of a house where competing interests exist seems somewhat arrogant and possibly rash. On the other hand, where one has concluded that the law has changed in a significant respect so that the court's discretion is significantly less fettered than it was, there are obvious dangers in relying on authorities which proceeded on the basis that the court's discretion was more fettered than it now is. I think it would be wrong to throw over all the earlier cases without paying them any regard. However, they have to be treated with caution, in light of the change in the law, and in many cases they are unlikely to be of great, let alone decisive, assistance.

Applying s 15 of the 1996 Act, Neuberger J noted that the intentions of Mrs Shaire and Mr Fox when the house was acquired (within s 15(1)(a)) were to provide a home for themselves and for Mrs Shaire's son from a previous relationship. The property was now held (within s 15(1)(b)) both as a home and an asset for Mrs Shaire, with 75 per cent of the beneficial interest, and as security for the loan as regards Mr Fox's 25 per cent share. The interest of the creditor fell to be considered under s 15(1)(d), while Mrs Fox's son was now an adult and therefore his position could not be taken into account. Under s 15(3), it was also relevant that Mrs Shaire had the majority of the beneficial interest.

Weighing up these factors, Neuberger J noted,[9] on the one hand, that for Mrs Shaire to leave her home of nearly twenty-five years '*would be a real and significant hardship, but not an enormous one*'; on the other hand, for the mortgagee to be '*locked into a quarter of the equity of a property would be a significant disadvantage unless they had a proper return and a proper protection as far as insurance and repair is concerned*'. He therefore proposed a solution under which the mortgage would be converted into a loan, on which Mrs Shaire would pay interest pending any future sale. Failing agreement on this (or Mrs Shaire's ability to pay), sale would be ordered.

The careful balancing act conducted by Neuberger J stands in contrast to how applications for sale by creditors were considered prior to the TOLATA 1996 under s 30 of the LPA 1925. There is no doubt that the facts of the case do not demonstrate 'exceptional circumstances' such as would have prevented sale under s 30.

[9] [2001] 4 All ER 364, 383.

Pascoe is critical of Neuberger J's decision. The Law Commission had envisaged that s 15 of the 1996 Act would consolidate and rationalize the approach developed by the courts under s 30 of the 1925 Act.[10] Against this background, Pascoe considers that Neuberger J's conclusion that s 15 has changed the law is likely to be read with '*some surprise and bewilderment*'.[11] Her concern lies with the consequences of the decision for secured creditors and, in particular, whether these consequences have been fully considered.

Pascoe, 'Section 15 of the Trusts of Land and Appointment of Trustees Act 1996: A Change in the Law' [2000] Conv 315, 327–8

> Neuberger J.'s approach is radical: it recognises more rights for beneficiaries and their children in relation to the land which is arguably a more accurate reflection of the ideals and purposes behind modern home ownership. In his view, section 15 has done more than to codify judicial practice which had been working in the restrictive framework of the 1925 legislation. The new trust of land will therefore better reflect and protect the different expectations which have arisen with the change in our perception of the social role of land. Neuberger J's approach is not one of consolidation and rationalisation; rather he is wiping the slate clean and starting afresh with secured creditors the likely casualties of the new approach. It will be a welcome change in the law for spouses, partners and children living in the property, but an inexpedient, prejudicial and financially detrimental development if one is a secured creditor. Secured creditors must be asking whether the guidelines in section 15 were enacted with proper consideration and deliberation. It must be questionable whether section 15 has abdicated too much responsibility to the judiciary. Perhaps policy should have been formulated by Parliament, rather than relying on ad hoc developments in case law. This will inevitably have commercial and financial repercussions as creditors absorb the effects of the change. Only time will tell if judges are prepared to implement the consequences of Neuberger J.'s judgment and let a fresh wind blow away the remnants of the harshness for families of section 30 of the Law of Property Act 1925 when faced with applications by secured creditors.

Has s 15 of the TOLATA 1996 changed the law? Neuberger J's arguments may appear persuasive, although Pascoe raises legitimate concerns. To the extent that *Shaire* indicates a more sympathetic approach to beneficiaries in actions by creditors, the decision may have been a false dawn. Despite Mrs Shaire's 75 per cent beneficial interest and long-term occupation of the house as her home, sale would only be prevented if the mortgagee's interest could satisfactorily be protected.

3.1 APPLICATIONS FOR SALE BY CREDITORS POST-*SHAIRE*

It is useful to consider the contrasting outcomes in the subsequent cases of *First National Bank plc v Achampong*[12] and *Bank of Ireland Home Mortgages Ltd v Bell*,[13] on the one hand, and *Edwards v Lloyds TSB*,[14] on the other. The following extracts from these decisions show how the courts have exercised their discretion under s 15 of the TOLATA 1996. Analysed

[10] Law Commission Report No 181, *Transfer of Land: Trusts of Land* (1989), [12.9] (the paragraph is extracted in Chapter 17, section 5.4.3).

[11] Pascoe, 'Section 15 of the Trusts of Land and Appointment of Trustees Act 1996: A Change in the Law' [2000] Conv 315, 316.

[12] [2003] EWCA 487. [13] [2001] 2 FLR 809. [14] [2004] EWHC 1745.

together with *Shaire*, the significance attached by the courts to the interest of the secured creditor in determining applications for sale becomes apparent.

First National Bank plc v Achampong
[2003] EWCA 487, CA

Facts: Mrs and Mrs Achampong were co-owners of their home. The parties had granted a mortgage over their home, but Mrs Achampong successfully argued that her agreement had been obtained through the presumed undue influence of her husband. As a result, the mortgage took effect only against his 50 per cent beneficial share. Mr Achampong had returned to Ghana, leaving Mrs Achampong in occupation of the home, with two of the parties' adult children (one of whom was mentally disabled) and three infant grandchildren. Blackburne J considered whether sale should be ordered under s 14 of the 1996 Act.

Blackburne J

At [65]

[. . .] I regard it as plain that an order for sale should be made. Prominent among the considerations which lead to that conclusion is that, unless an order for sale is made, the bank will be kept waiting indefinitely for any payment out of what is, for all practical purposes, its own share of the property. While it is relevant to consider the interests of the infant grandchildren in occupation of the property, it is difficult to attach much if any weight to their position in the absence of any evidence as to how their welfare may be adversely affected if an order for sale is now made. It is for the person who resists an order for sale in reliance on section 15(1)(c) to adduce the relevant evidence. Insofar as the Achampongs' intention in creating the trust of the property was to provide themselves with a matrimonial home, and insofar as that was the purpose for which the property was held on trust, that consideration is now spent. Given the many years' absence of contact between Mr and Mrs Achampong, the fact that there has not yet been a divorce cannot disguise the reality that theirs is a marriage which has effectively come to an end. The possibility, therefore, that the property may yet serve again as the matrimonial home can be ignored. Insofar as the purpose of the trust—and the intention of the Achampongs in creating it—was to provide a family home and insofar as that is a purpose which goes wider than simply the provision of a matrimonial home, I am unpersuaded that it is a consideration to which much if any weight should be attached. The children of the marriage have long since reached adulthood. One of them is no longer in occupation. It is true that the elder daughter, Rosemary, is a person under mental disability and remains in occupation but to what extent that fact is material to her continued occupation of the property and therefore to the exercise of any discretion under section 14 is not apparent.

Bank of Ireland Home Mortgages v Bell
[2001] 2 FLR 809, CA

Facts: Mr and Mrs Bell were co-owners of their home with, respectively, a 90 per cent and 10 per cent beneficial share. Mr Bell forged Mrs Bell's signature to obtain a mortgage. He had subsequently left the property and the parties had divorced. Mrs Bell, who

was in poor health, remained in occupation, with the parties' son. At first instance, the judge had refused an order of sale. This was overturned on appeal.

Peter Gibson LJ

At [26]–[31]

Further, the judge does not mention the fact that the debt was at the time of the trial some £300,000, and increasing daily, no payment of either capital or interest having been received from Mr Bell (or Mrs Bell for that matter) since June 1992. Mrs Bell's beneficial interest is only about 10 per cent at the very most, as Mr De la Rosa conceded, and there is no equity in the property which would be realised for her on a sale of the property. In effect, therefore, the bank would take all the proceeds on a sale. That is a most material consideration to which the judge should have given great weight.

Second, the judge referred to the property being purchased as a family home. Let me accept that as a finding of fact, although Mr Jackson was able to point to other inconsistent evidence from Mrs Bell as to why the property was purchased. Let me assume that the judge thereby had regard to section 15(1)(a), the intentions of the persons creating the trust. But that purpose ceased to be operative once Mr Bell left the family, either in 1991 or at any rate by 1992 when possession proceedings started. Mrs Bell is now divorced from Mr Bell. Therefore that purpose is not a matter to which the judge could properly have regard.

Third, the judge referred to the occupation of the property by Mrs Bell and her son. Let me assume that thereby the judge was referring to section 15(1)(b), the purposes for which the property is held. But that is not an operative purpose of the trust since the departure of Mr Bell. The reference to the son may also be a reflection of section 15(1)(c), the welfare of a minor occupying the property. But the son at the time of the trial was not far short of 18 and therefore that should only have been a very slight consideration.

Fourth, the judge referred to Mrs Bell's poor health. At the time of the trial she was facing an operation. I accept that the judge could properly have regard to this, but it would provide a reason for postponing a sale rather than refusing sale.

Fifth, the judge referred to Lloyds Bank as second chargee. But in my judgment that was not a relevant consideration. There was no obligation to give notice to a subsequent encumbrancer. Nor has it ever been the practice of the court when giving effect to a mortgagee's request for an order for sale to hear the views of subsequent encumbrancers. In theory a subsequent encumbrancer might wish to redeem the prior encumbrance, but in practice there was no possibility of that in the circumstances of the present case given the size of the debt.

Prior to the 1996 Act the courts under section 30 of the Law of Property Act 1925 would order the sale of a matrimonial home at the request of the trustee in bankruptcy of a spouse or at the request of the creditor chargee of a spouse, considering that the creditors' interest should prevail over that of the other spouse and the spouse's family save in exceptional circumstances. The 1996 Act, by requiring the court to have regard to the particular matters specified in section 15, appears to me to have given scope for some change in the court's practice. Nevertheless, a powerful consideration is and ought to be whether the creditor is receiving proper recompense for being kept out of his money, repayment of which is overdue (see *The Mortgage Corporation v Shaire*, a decision of Neuberger J on 25th February 2000). In the present case it is plain that by refusing sale the judge has condemned the bank to go on waiting for its money with no prospect of recovery from Mr and Mrs Bell and with the debt increasing all the time, that debt already exceeding what could be realised on a sale. That seems to me to be very unfair to the bank.

Edwards v Lloyds TSB
[2004] EWHC 1745

Facts: Mr and Mrs Edwards were co-owners of their home. Following the parties' separation, Mrs Edwards remained in occupation of the home, with the couple's children (now aged 15 and 13). Mr Edwards had forged his wife's signature on a mortgage of the property, which therefore took effect only against his 50 per cent share. Mr Edwards could no longer be traced. The bank sought an application for sale. Park J held that sale should be postponed for five years, until the youngest child reached the age of 18.

Park J

At [31]–[33]

In this case the bank has applied for an order for sale, and Mrs Edwards has opposed the application. I must weigh up the various factors which are relevant and do the best I can to reach a balanced conclusion. I mention now two particular points on the facts of this case which were (I believe) not present in any of the three cases to which I was referred. First, if the house was sold now it is hard to see how Mrs Edwards could find the money to buy another smaller one. In the other cases it appears to have been different. For example in *The Mortgage Corporation v Shaire* (supra) Neuberger J said that if the house was sold Mrs Shaire would still have a substantial sum which she could put towards a smaller home. In the present case, in contrast, the house is a two-bedroom house in which Mrs Edwards already has to share a bedroom with her daughter. The house is obviously at the lower end of the range of prices for houses in the area where she lives. If there was a sale and the husband's debt to the bank was taken out of half of the net proceeds before the balance was available to Mrs Edwards, I very much doubt that she would be able to find another house which she could afford to buy and which would be adequate to accommodate her and her children.

Second, whereas in the other three cases it appears that the debt owed to the bank already exceeded the value of the interest over which the bank had an equitable charge, in the present case that is not so. On the figures which I gave in paragraph 12 above the value of the bank's security (a 50% interest in the house) would be (if the entirety were sold) about £70,000. The husband's debt to the bank (£15,000 plus interest plus costs) is unlikely at present to be more than £40,000. It is true that interest is not currently being paid to the bank on the debt owed to it, but interest continues to accrue on the debt, and now and for some time to come the security will be sufficient to cover the increasing amount of the debt.

In the circumstances I do not want to order an immediate sale, because I believe that that would be unacceptably severe in its consequences upon Mrs Edwards and her children. But equally I believe that I should make some order which, admittedly later rather than sooner, should enable the bank to recover its debt with accrued interest upon it.

Two points are notable about these decisions. The first point to note is the courts' differing approach to the purposes of the trusts. In *Achampong*, Blackburne J was not prepared to afford weight to any subsisting purposes of the trust of providing a 'family' home following the effective termination of the marriage by Mr Achampong's return to Ghana. Similarly, in *Bell*, the departure of Mr Bell was considered to have ended the purpose of the trust. In contrast, in *Edwards*, Park J was satisfied that, following Mr Edwards' departure, '*in part the purpose still survives, because the house is still the home for Mrs Edwards and the two*

children'.[15] These differing attitudes to the purpose are significant, because the continuing purpose of the trust is the factor that enables the occupying beneficiary to have his or her interests weighed against those of the creditors under s 15 of the 1996 Act. Where the purpose is considered to have come to an end, the likelihood of sale being postponed appears remote, unless there are children present whose interests fall for consideration under s 15(1)(c).

Probert considered the consequences of the narrow approach to the purpose of the trust in *Achampong* and *Bell* in a discussion of the latter case.

Probert, 'Creditors and Section 15 of the Trusts of Land and Appointment of Trustees Act 1996: First Among Equals' [2002] Conv 61, 66–7

> The danger in the reasoning lies in the way that it downgrades the purpose of providing a family home as against the interests of the creditors. If the purpose of providing a family home comes to an end upon the departure of one of the parties and only the original purposes are to be taken into account, then where one party has left the property and there are no children, the only relevant factor remaining is the interests of the creditors. Even where there are children the dispute is reduced to a straightforward contest between the welfare of any minors who might wish to occupy the property and the interests of the creditors. If these two factors are given equal weight then it is possible that either may prevail in the short term. In the long term, the minors will grow up and their interests will cease to be a relevant concern. Moreover, if the interests of those nearing 18 are "only a very slight consideration" then the creditors' interests may prevail even before the former reach adulthood. If the statement that the creditors interests are a "powerful consideration" indicates that more weight is given to this factor than any other, then there is the risk that the interests of creditors will trump the rights of even very young children, once the factors listed in (a) and (b) are negated. If this interpretation of section 15 prevails then the wind has changed and blown us back to where we started.

Does the wider approach to the purpose of the trust adopted in *Edwards* ensure that the interests of the occupying beneficiary (in addition to the welfare of children) are weighed against those of the creditor? The difficulty with the decision lies in understanding when the wider approach to the purpose will be taken. Objectively, the only difference between the three cases as regards the courts' identification of the purpose is the continuing occupation, in *Edwards*, of the couple's young children. It seems likely that this affected the courts' attitude towards the purpose of the trust, despite the fact that the welfare of children should be taken into account independently through s 15(1)(c) of the TOLATA 1996. Even under *Edwards* it remains unlikely that the purpose of providing a family home will be considered to continue where one beneficiary remains in occupation without children. In such cases, as Probert notes, the only remaining factor under s 15 is the interests of the creditors. However, it is important to recall that the factors listed in s 15 are non-exhaustive. On appropriate facts a factor not specifically referred to in s 15 may justify postponing sale.

The second notable point about the decisions is the differing position of the creditors in each case, as highlighted by Park J in *Edwards*. In *Shaire*, as we have seen, the decision not to order sale was dependent on an arrangement being reached under which the creditor would

[15] *Edwards v Lloyds TSB* [2004] EWHC 1745, [29].

not be prejudiced; in *Edwards*, it was clear that this criterion was also met. In contrast, in *Achampong*, the debt had reached a level of £180,000. It was enforceable against only a 50 per cent share of the home, which, at the time of the judgment, had a full value of only £195,000; similarly, in *Bell*, as we have noted, the debt already exceeded the value of the house. The cases illustrate a consistent approach by the courts that while the interests of creditors is only one factor for the court to take into account, it will be difficult to resist sale unless the creditor will not be prejudiced. Hence, in *C Putnam & Sons v Taylor*, the judge ordering sale noted that if he refused to do so, '*I would be condemning the [creditor] to go on waiting for its money with no prospect of recovery from any other source and with the debt increasing all the time*'.[16]

3.2 APPLICATIONS BY CREDITORS: THE HUMAN RIGHTS DIMENSION

An application by a creditor for sale of a home under s 14 engages Art 8 of the ECHR (the right to respect for private and family life) in respect of those who will be affected by the sale. 'Home' has an autonomous meaning within Art 8 and all those with 'sufficient and continuing' links to the home must be taken into account, not only those with property rights.[17] Hence, for example, any children in occupation have a right under Art 8 as well as the debtor's co-owner. Against this, however, must be balanced the secured creditor's right of property under Art 1 Protocol 1 of the ECHR, which may be infringed by refusing to enable the creditor to realize their interest. We have examined these human rights in Chapter 3. There we have seen that these rights are not absolute, although any interference must be for a legitimate aim and must be proportionate to that aim. In *National Westminster Bank plc v Rushmer*, Arnold J noted that as a result of the discretion conferred on the court by s 15 the proportionality of the application with Art 8 can undoubtedly be considered. In his view, the balance would necessarily be drawn by taking into account the factors referred to the court under s 15. He explained, *'[I]n my judgment, it will ordinarily be sufficient [. . .] for the court to give due consideration to the factors specified in section 15 of TOLATA. That will ordinarily enable the court to balance the creditor's rights, which include its rights under Article 1 of the First Protocol, with the Article 8 rights of those affected by an order for sale. I would not rule out the possibility that there may be circumstances in which it is necessary for the court explicitly to consider whether an order for sale is a proportionate interference with the Article 8 rights of those affected, but I do not consider that this will always be necessary*'.[18] There, a creditor had obtained a charging order against Mr Rushmer and had subsequently successfully applied for sale of a home that he jointly owned with his wife. Arnold J rejected a claim that the order should be set aside because there had been no explicit discussion of the rights of Mrs Rushmer and of the couple's children under Art. 8. By weighing all the factors required under s 15, due regard had necessarily been given to the family's Art 8 rights.[19]

[16] [2009] EWHC 317 (Ch), [34].

[17] See Chapter 3, section 4.1.1.

[18] [2010] EWHC 554 (Ch); [2010] 2 FLR 362, [50].

[19] Ibid, [51]. There is no reported case in which sale on an application by a creditor under the TOLATA, s 14 has been considered a disproportionate interference with art 8. For examples where Art 8 has explicitly been addressed by the court see *Forrester Ketley & Co v Brent* [2009] EWHC 3441 and *C Putnam & Sons v Taylor* [2009] EWHC 317 (Ch).

3.3 HAS S 15 OF THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996 CHANGED THE LAW?

On the basis of this analysis of applications for sale by creditors post-*Shaire*, we can assess Neuberger J's conclusion that s 15 of the TOLATA 1996 has 'changed the law' from the courts' previous practice under s 30 of the LPA 1925. The decisions in these cases may cast doubt on the extent of any such change. As we have noted, in applications for sale by a creditor under s 30 of the 1925 Act, *Re Citro* established that sale would be ordered unless the circumstances were exceptional. As we will see below, at the time of that decision, the only reported case in which this criterion was met was one in which a postponement of sale would not prejudice the interest of the creditor.[20] In view of this, it seems that the decisions in *Achampong*, *Bell*, and *Edwards* are entirely consistent with the courts' previous practice. In considering applications for sale, courts have continued to stress the discretionary nature of the jurisdiction under s 15.[21] But despite Neuberger J's conclusion in *Shaire*, the decision in that case may stand alone as one in which the 1996 Act has made a practical difference to the outcome.[22]

Two factors may account for the pattern of decisions since *Shaire*. Firstly, the utility of developing a flexible approach under s 15 of the 1996 Act is dependent on creditors bringing their applications under that provision. It was predicted at the time of the Act that s 15 would operate as an incentive for creditors to obtain an order of bankruptcy, enabling them to rely on the more favourable provision in s 335A of the Insolvency Act 1986.[23] Radley-Gardner[24] notes that, by the time of the decision in *Achampong*, the ability of mortgagors to circumvent s 15 by making the defaulting beneficiary bankrupt had become apparent. This is illustrated by *Alliance and Leicester plc v Slayford*,[25] in which a wife's beneficial interest was binding against a mortgagee, because she had entered into a transaction through her husband's undue influence. The court held that it was not an abuse of process for the mortgagee to sue the husband on his personal covenant to pay the debt, with a view to bankrupting him and bringing an application for sale under the Insolvency Act 1986. Hence, as Radley-Gardner explains: '[E]*ven if a more flexible approach had emerged under section 15, it would have been a paper tiger, easily undercut by recourse to the insolvency regime.*'

Secondly, the decisions in the cases echo Fox's comment, in the extract above, of the difficulty in balancing the qualitative and emotional concerns of occupiers against the quantitative and financial interests of the creditor. In the balancing exercise under s 15, creditors have nothing to prove: their interest in obtaining sale is unarguable. Pitted against this are the more nebulous concepts of the intentions and purposes of the trust, the 'welfare' of children, and a host of matters that may be pleaded to supplement the specific factors listed in s 15. In *Achampong*, little weight was attached to the occupying grandchildren in the absence of evidence as to *how* their welfare would be affected by sale. In *C Putnam & Sons v Taylor* Judge Purle was satisfied that after numerous delays and adjournments, while

[20] *Re Holliday* [1981] Ch 405.

[21] See *Forrester Ketley & Co v Brent* [2009] EWHC 3442 (Ch), [52].

[22] The decision in *Edwards v Lloyds TSB* [2004] EWHC 1745 may be contentious in this regard. The case shares some analogies with *Re Citro* [1991] Ch 142 (in which sale was ordered under s 30) in so far as the application was made despite the continuing purpose of the trust, but the fact the creditors in *Edwards* would not be prejudiced may have been sufficient, in light of *Re Holliday* [1981] Ch 405, to distinguish the cases even under s 30: see Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 LQR 310, 331.

[23] Hopkins, 'The Trusts of Land and Appointment of Trustees Act 1996' [1996] Conv 411, 425.

[24] Radley-Gardner, 'Section 15 of TOLATA, or, the Importance of Being Earners' [2003] 5 Web JCLI.

[25] (2001) 33 HLR 66.

Mr Taylor received treatment for cancer, no further delay was required when further treatment became necessary.[26] Less surprisingly, there is no direct response by the judge to Mrs Taylor's concern as to the trauma a forced sale was likely to cause her cat.[27]

4 APPLICATIONS BY TRUSTEES IN BANKRUPTCY

Where there is a trust of land, applications for sale by a trustee in bankruptcy are considered by the court under s 335A of the Insolvency Act 1986.

Insolvency Act 1986, s 335A

(1) Any application by a trustee of a bankrupt's estate under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 powers of court in relation to trusts of land) for an order under that section for the sale of land shall be made to the court having jurisdiction in relation to the bankruptcy.

(2) On such an application the court shall make such order as it thinks just and reasonable having regard to—

(a) the interests of the bankrupt's creditors,

(b) where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt or the bankrupt's spouse or civil partner or former spouse or former civil partner—

(i) the conduct of the [spouse, civil partner, former spouse, or former civil partner], so far as contributing to the bankruptcy,

(ii) the needs and financial resources of the [spouse, civil partner, former spouse, or former civil partner], and

(iii) the needs of any children; and

(c) all the circumstances of the case other than the needs of the bankrupt.

(3) Where such an application is made after the end of the period of one year beginning with the first vesting under Chapter IV of this Part of the bankrupt's estate in a trustee, the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.

(4) The powers conferred on the court by this section are exercisable on an application whether it is made before or after the commencement of this section.

The circumstances to be taken into account under s 335A of the 1986 Act therefore differ from those under s 15 of the TOLATA 1996. In particular, the intentions of the settlors and the purposes for which the land is held (the criteria contained in s 15(1)(a) and (b) of the 1996 Act) cease to be relevant on bankruptcy. In the following extract, Henderson J considered how the references in s 335A to the 'needs' of various parties should be interpreted.

[26] [2009] EWHC 317 (Ch), [39]. [27] Ibid, [7].

Everitt v Budhram
[2009] EWHC 1219 (Ch)

Facts: Mr and Mrs Budhram had both been declared bankrupt. Both parties suffered from chronic medical conditions. An application for sale of their co-owned home was brought against Mrs Budhram (proceedings against her husband had been stayed through his lack of capacity until legal representation was appointed). Under s 335A the court is directed to disregard the 'needs' of the bankrupt (Mrs Budhram) but take into account those of the bankrupt's spouse (Mr Budhram).

Henderson J

At [36]–[37]

Counsel for the trustee submits that the reference to the "needs of the bankrupt" must be broadly construed and refer to needs of every kind, including not only financial needs but also medical needs and needs of any other description, such as emotional, psychological or mental needs. He submits that this wide construction must be what Parliament intended because, immediately before that, there is a reference to "the needs of any children" as one of the matters that the court should have regard to. He submits, in my view correctly, that the needs of children must be given a very broad interpretation and refer to needs of any kind, and is certainly not confined to needs of a financial nature. Further support for that approach is found in the preceding sub-paragraph, with its reference to "the needs and financial resources of the spouse" of the bankrupt. Again, he submits, and again I would agree, that "needs" should there be given a wide interpretation, and appears to be at least potentially distinct from financial needs or resources, which are the subject of separate express mention. It is true that the reference is to "financial resources" rather than financial needs, but nevertheless the point is still one of some force.

Curiously enough, there seems to be no authority, so far as the researches of counsel have been able to uncover, on the meaning of the word "needs" in this subsection. However, I consider that counsel for the trustee is substantially correct in his submission and that the needs of the bankrupt in paragraph (c) should be broadly interpreted, just as the same word should be broadly interpreted in sub-paragraphs (b)(ii)(iii). Accordingly, the court must disregard not only the financial needs of the bankrupt but also, relevantly for present purposes, the medical and psychological needs of the bankrupt.

On the facts this meant that neither the financial nor medical needs of Mrs Budhram could be taken into account. It is also worth noting that as Mr and Mrs Budhram had both been made bankrupt, if proceedings had continued against both of them, neither of their needs could have been considered. On the facts, however, as Mr Budhram was not a party to the proceedings a broad approach could be taken to interpreting his needs as the bankrupt's spouse. The allowance made by the judge in respect of Mr Budhram's needs is considered in section 4.1.

Through s 335A(3) of the Insolvency Act 1986, as long as the application for sale is brought at least a year after the bankruptcy, the interests of the creditors prevail and sale is therefore ordered unless the circumstances are exceptional. Only if exceptional circumstances are present is the court required to balance the factors listed in the provision.[28]

[28] Compare Dixon, 'Trusts of Land, Bankruptcy and Human Rights' [2005] Conv 161, 164. He notes that this is the manner in which the courts have, in fact, approached s 335A, although he suggests that a 'less

Although s 335A was inserted into the Insolvency Act 1986 by the TOLATA 1996, it is an extension of a provision contained in the original Act, the origins of which lie with the Cork Report. The discussion of the family home in that report remains instructive in understanding the policy represented by s 335A.

Insolvency Law and Practice: Report of the Review Committee **(The Cork Report)** (Cmnd 8558, 1982, [1118], [1120]–[1123])

The family home

It would be clearly wrong to allow a debtor or his family to continue to live in lavish style at the expense of the debtor's creditors for an extended period. Nevertheless considerable personal hardship can be caused to the debtor's family by a sudden or premature eviction, and we believe it to be consonant with present social attitudes to alleviate the personal hardships of those who are dependent on the debtor but not responsible for his insolvency, if this can be achieved by delaying for an acceptable time the sale of the family home. We propose therefore to delay, but not to cancel, enforcement of the creditors' rights.

[. . .]

Nevertheless we consider that any new Insolvency Act should confer on the Court a specific power to postpone a trustee's rights of possession and sale of the family home. In exercising this power the Court should have particular regard to the welfare of any children of the family and of any adult members of the family who are ailing or elderly [. . .] Giving this power to the Court will, we hope and expect, serve to support the natural inclination of the usually sympathetic [trustee in bankruptcy], and to protect the debtor's family in those cases where lack of sympathy with, or anger at, the debtor produces unfortunate and undeserved consequences for his family.

Where there are dependents, the Court should not order an immediate sale unless satisfied that no avoidable hardship to them will be caused by the sale of the family home. That is not to say that application need be made to the Court in every case; once the correct principles have been established, we believe that in only a very small minority of cases will the Court be concerned.

When an application does come before the Court, we consider that the Court must have wide discretion to enable it to make whatever order may be just and equitable in the great variety of circumstances that may arise. While the Court will first consider the dependants—and the greater their vulnerability the greater will be the protection needed—creditors' rights should be postponed only in order to prevent injury to the welfare of those dependants; not to preserve for them any particular standard of life.

No two cases will be alike; the Court must therefore have complete discretion to do what seems to it to be appropriate. Such guidelines as can be given must of necessity be in the most general terms and, indeed, little more than an indication of the factors for consideration. While some of us have considered that there should be a statutory limit on the length of time for which a postponement could be ordered, all of us are agreed that, in practice, any very lengthy postponement should be rare. The majority of us have concluded that the Court's powers should not be limited in duration. In the reported cases, both under the matrimonial legislation and (more rarely) under the bankruptcy law, much importance has been attached to the ages, welfare and educational prospects of the children.

preconceived interpretation' would be that the factors listed should always be balanced, even though the '*scales are heavily tilted*' in favour of sale after the initial one-year period.

The report undoubtedly envisages a less prescriptive regime than that provided for in s 335A,[29] while acknowledging the strength of the creditors' claims following bankruptcy. But s 335A does reflect the underlying idea in this extract of alleviating the hardship of a sudden eviction. The effect of s 335A is to provide the bankrupt (and his or her family) with an initial one-year adjustment period, following which the financial claim of the creditors becomes paramount.

The key issue of interpretation arising from s 335A is the meaning of 'exceptional circumstances', which may result in the postponement of sale after the initial year. We will first consider the courts' general approach to defining 'exceptional circumstances' and then address a developing argument that human rights considerations may require the courts to extend this general interpretation.

4.1 THE COURTS' GENERAL APPROACH TO DEFINING 'EXCEPTIONAL CIRCUMSTANCES'

The test of exceptional circumstances has its origins in the courts' case law under s 30 of the LPA 1925. In applications under that section, *Re Citro* established the general principle that, on an application by a trustee in bankruptcy, sale would be ordered unless there are exceptional circumstances. In doing so, Nourse LJ offered the following definition.

Re Citro
[1991] Ch 142, CA

Nourse LJ

At 157

What then are exceptional circumstances? As the cases show, it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable home in the same neighbourhood, or indeed elsewhere. And, if she has to move elsewhere, there may be problems over schooling and so forth. Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar. It was only in *In re Holliday* [1981] Ch. 405 that they helped the wife's voice to prevail, and then only, as I believe, because of one special feature of that case. One of the reasons for the decision given by Sir David Cairns was that it was highly unlikely that postponement of payment of the debts would cause any great hardship to any of the creditors, a matter of which Buckley L.J. no doubt took account as well.

Implicit in Nourse LJ's definition is that 'exceptional' requires something '*out of the ordinary course, or unusual, or special, or uncommon*'.[30]

[29] Compare, for example, the '*wide discretion*' and the '*complete discretion to do what seems* [...] *appropriate*' in the extract with the actual provision in the Insolvency Act 1986, s 335A. Further, as is noted by Omar, 'Security Over Co-Owned Property and the Creditor's Paramount Status in Recovery Proceedings' [2006] Conv 157, 168, some of the factors the Cork Committee specifically envisaged being taken into account were held in *Re Citro* [1991] Ch 142 not to constitute exceptional circumstances.

[30] *Hosking v Michaelides* [2004] All ER (D) 147, *per* Judge Morgan QC.

In the following case, Judge Sumption QC explained further.

Re Bremner
[1999] 1 FLR 912

Judge Sumption QC

At 915

The test is whether the problems which would result from an eviction are within the broad range of problems, necessarily distressing, which can be expected to arise from the process of bankruptcy and the resultant realisation of the bankrupt's assets, or whether they lie wholly outside that range.

The clearest example of exceptional circumstances is chronic ill health on the part of the bankrupt, or the bankrupt's spouse or partner. In *Claughton v Charalambous*,[31] the bankrupt and his wife were beneficial co-owners of their home. Mrs Charalambous was in poor health, with consequential mobility problems that the couples' home had been altered to accommodate. She had a reduced life expectancy. The judge considered these circumstances to be exceptional and postponed sale for so long as Mrs Charalambous continued to live in the property.[32] In *Re Bremner*, the bankrupt himself was elderly and terminally ill with inoperable cancer. This case raised a specific issue because, under s 335A, the interests of the bankrupt are not themselves a relevant consideration.[33] But the court accepted that the bankrupt's wife, who was also his carer, had a distinct need to continue to provide that care in their home. Sale was postponed until three months after the bankrupt's death.

In the extract from *Re Citro* (above), Nourse LJ notes that, in *Re Holliday*[34] (the only reported case at the time in which exceptional circumstances had been found), the creditors would not be prejudiced by the postponement of sale. In that case, sale was postponed for five years until the bankrupt's children reached 17 years of age, at which point, the proceeds of sale represented by the bankrupt's beneficial share would still be sufficient to pay his debts with interest. An immediate sale, however, would leave his former wife with insufficient funds to obtain alternative accommodation.

The fact that creditors will not be prejudiced by a sale is not, in itself, an exceptional circumstance enabling courts to postpone sale.[35] Where exceptional circumstances are present, however, the impact of any delay on the creditors remains a significant factor in the courts' willingness to postpone sale under s 335A. A review of case law under s 335A suggests that the protection of creditors is a point of synergy between applications under that provision and those by creditors under s 15 of the TOLATA 1996.

[31] [1999] 1 FLR 740.

[32] Contrast *Foenander v Allan* [2006] BPIR 1392. The bankrupt co-owned his home with his brother, who was suffering from progressive dementia. This was not sufficient to postpone sale. Judge Strauss QC noted, at [34], that the house was the only asset available in the bankruptcy and that the Registrar had left open the possibility of sale being delayed as long as necessary to ensure alternative accommodation was provided. Sale was, however, postponed on other grounds discussed below.

[33] There was no co-ownership trust in this case, because Mr Bremner was the sole owner of the home. The case was decided under the Insolvency Act 1986, s 336, which is identical in all relevant respects to s 335A.

[34] [1981] Ch 40.

[35] *Donohoe v Ingram* [2006] EWHC 282.

In *Re Bremner*, the court noted that sale would not necessarily have been delayed if the bankrupt had been younger, or less ill, or had a longer life expectancy. The expected short period of the delay meant that any prejudice to creditors was likely to be modest.[36] In *Everitt v Budhram*,[37] the judge considered that the mental and physical needs of Mr Budhram, including those related to a stroke and diabetes, constituted exceptional circumstances, which he would take into account '*to a limited extent*'.[38] Sale was postponed for a year, or until three months after a possession order was obtained against Mr Budhram (who had also been made bankrupt). In the context of a history of non-co-operation with the trustee in bankruptcy, Henderson J noted that '*[i]f I am too generous, there is a risk that the matter will continue to drag along without anyone taking any serious steps to deal with it. Equally, if I am too severe, I will not give sufficient recognition to the exceptional circumstances which I have found to exist*'.[39]

In *Foenander v Allan*[40] and *Martin-Sklan v White*,[41] a postponement of sale in light of exceptional circumstances was not expected to prejudice creditors, because the sum realized on sale would still be sufficient to repay the outstanding debt. In *Martin-Sklan*, the postponement maintained the 'web of support' provided to the bankrupt's partner, an alcoholic; *Foenander* is an unusual case in which the exceptional circumstances were financial, rather than personal. In that case, an immediate sale would raise sufficient proceeds to repay creditors with a modest surplus. Sale was postponed on condition that an insurance claim for subsidence was likely to be met in a reasonable period. This would significantly increase the value of the home, enhancing the surplus available to the bankrupt and his brother, with whom the house was co-owned.

In *Nicholls v Lan*,[42] sale was delayed for a minimum of eighteen months to give the bankrupt's wife, a chronic schizophrenic, an opportunity to raise funds by the sale of another property, which would enable her to buy out the bankrupt's share. Her medical circumstances meant that a forced sale could have specific psychiatric effects. The case is notable in so far as the sale was postponed despite the fact that the proceeds realized by sale would be insufficient to pay the outstanding debts.

4.2 EXCEPTIONAL CIRCUMSTANCES: THE HUMAN RIGHTS DIMENSION

In section 3.2 above we have seen that the wide discretion conferred on the courts by s 15 of the TOLATA ensures that due regard is given to the Art 8 ECHR rights of those affected by the sale. Where the application is made by a trustee in bankruptcy more than a year after the bankruptcy the courts do not necessarily have discretion. Under s 335A of the Insolvency Act 1986, a presumption in favour of the creditors arises after one year, unless there are exceptional circumstances. Only if such circumstances are present does the court have discretion whether to order sale. Further, the courts have defined exceptional circumstances narrowly, as meaning circumstances outside those expected to arise on a bankruptcy. Even before the compatibility of s 15 of TOLATA with Art 8 had been raised, in *Barca v Mears* the argument was advanced that the absence of any ability by the court to undertake a proper balancing of interests under s 335A constituted an infringement

[36] The eventual sale of the house would still provide sufficient proceeds with which to pay the secured creditors the sum due, plus interest, and pay unsecured creditors, with the loss of statutory interest.
[37] [2010] Ch 170. [38] Ibid, [57]. [39] Ibid, [59]. [40] [2006] BPIR 1392.
[41] [2007] BPIR 76. [42] [2007] 1 FLR 744.

of Art 8. This argument attracted support by the court, although, on the facts, it was not sufficient to prevent sale.

Barca v Mears
[2004] EWHC 2170, HC

Judge Strauss QC

At [39]–[42]

Clearly, in many or perhaps most cases, the sale of a bankrupt's property in accordance with bankruptcy law will be justifiable on the basis that it is necessary to protect the rights of others, namely the creditors, and will not be a breach of the Convention. Nevertheless, it does seem to me to be questionable whether the narrow approach as to what may be 'exceptional circumstances' adopted in *Re Citro (Domenico) (a Bankrupt)* [1991] Ch 142, is consistent with the Convention. It requires the court to adopt an almost universal rule, which prefers the property rights of the bankrupt's creditors to the property and/or personal rights of third parties, members of his family, who owe the creditors nothing. I think that there is considerable force in what is said by Ms Deborah Rook in *Property Law and Human Rights* (Blackstone Press, 2001), at pp 203–205 to which Mr Gibbon very fairly referred me:

> 'It is arguable that, in some circumstances, [s 335A(3)] may result in an infringement of Article 8. The mortgagor's partner and children have the right to respect their home and family life under Article 8 even though they may have no proprietary interest in the house [. . .] therefore it is possible that the presumption of sale in s 335A and the way that the courts have interpreted it, so that in the majority of cases an innocent partner and the children are evicted from the home, violates Convention rights [. . .]'

The eviction of the family from their home, an event that naturally ensues from the operation of the presumption of sale in s 335A, could be considered to be an infringement of the right to respect of the home and family life under Article 8 if the presumption is given absolute priority without sufficient consideration being given to the Convention rights of the affected family. Allen [Mr T Allen in "The Human Rights Act (UK) and Property Law" in *Property and the Constitution* (Hart Publishing, 1999), at p 163] observes that:

> "As the law currently stands, the right to respect for family life and the home receives almost no consideration after the one year period. Whether such a strict limitation is compatible with the Convention is doubtful".

[. . .] it may be that the courts, in applying s 335A [. . .] will need to adopt a more sympathetic approach to defining what constitutes "exceptional circumstances". If an immediate sale of the property would violate the family's rights under Article 8, the court may be required in compliance with its duty under s 3 of the HRA 1988 to adopt a broad interpretation of "exceptional circumstances" [. . .] to ensure the compatibility of this legislation with Convention rights.'

In particular, it may be incompatible with Convention rights to follow the approach taken by the majority in *Re Citro (Domenico) (a Bankrupt)* [1991] Ch 142, in drawing a distinction between what is exceptional, in the sense of being unusual, and what Nourse LJ refers to as the 'usual melancholy consequences' of a bankruptcy. This approach leads to the conclusion that, however disastrous the consequences may be to family life, if they are of the usual kind

then they cannot be relied on under s 335A; they will qualify as 'exceptional' only if they are of an unusual kind, for example where a terminal illness is involved.

It seems to me that a shift in emphasis in the interpretation of the statute may be necessary to achieve compatibility with the Convention. There is nothing in the wording of s 335A, or the corresponding wording of ss 336 and 337, to require an interpretation which excludes from the ambit of 'exceptional circumstances' cases in which the consequences of the bankruptcy are of the usual kind, but exceptionally severe. Nor is there anything in the wording to require a court to say that a case may not be exceptional, if it is one of the rare cases in which, on the facts, relatively slight loss which the creditors will suffer as a result of the postponement of the sale would be outweighed by disruption, even if of the usual kind, which will be caused in the lives of the bankrupt and his family. Indeed, on one view, this is what the Court of Appeal decided in *Re Holliday (a Bankrupt) ex parte Trustee of the Property of the Bankrupt v Holliday and Another* [1981] Ch 405.

Thus it may be that, on a reconsideration of the sections in the light of the Convention, they are to be regarded as merely recognising that, in the general run of cases, the creditors' interests will outweigh all other interests, but leaving it open to a court to find that, on a proper consideration of the facts of a particular case, it is one of the exceptional cases in which this proposition is not true. So interpreted, and without the possibly undue bias in favour of the creditors' property interests embodied in the pre-1998 case-law, these sections would be compatible with the Convention.

It is important to emphasize that the objection raised to s 335A is essentially procedural. The possible incompatibility with Art 8 arises where the court is unable to balance the bankrupt's interests against those of the creditors because of the absence of exceptional circumstances. In *Nicholls v Lan*,[43] in which exceptional circumstances were present, Judge Morgan suggested that the balancing exercise that he was therefore required to undertake under s 335A '*precisely captures what is required*' by Art 8. In view of this, while the objection raised is *procedural*, the solution may lie in a *substantive* alteration of the definition of exceptional circumstances. By extending the definition of exceptional circumstances the court gains access to the discretion conferred by s 335A of the Insolvency Act 1986 and is therefore able to undertake the balancing exercise required by Art 8 of the ECHR. Where, even on a wide interpretation of the term, there are no exceptional circumstances, it may be presumed that sale is a proportionate interference with Art 8 rights. In this respect, the existence of the one-year adjustment period before the creditor's interests prevail may be significant. Even in such cases, however, the absence of discretion remains problematic as it excludes any consideration of Art 8. Further, the difference in treatment between applications by creditors on the one hand and trustees in bankruptcy on the other may raise a question of compliance with Art 14 (non-discrimination) unless the difference in treatment can be justified.

Despite these concerns the human rights argument in *Barca v Mears* remains undeveloped. Commenting on the decision, Dixon doubted that it would necessarily lead to an erosion of the preference for commercial claims.[44] Indeed, there is no reported case in which the wide interpretation of exceptional circumstances advocated by Judge Strauss QC has led to sale being postponed to protect an occupier's Art 8 rights. In *Donohoe v Ingram*, as in *Barca v Mears*, the court considered that even on a broad approach to exceptional circumstances,

[43] Ibid, [43].

[44] Dixon, 'Trusts of Land, Bankruptcy and Human Rights' [2005] Conv 161.

sale would still be ordered.[45] Baker is critical of the reception *Barca v Mears* has had. On his analysis, the subsequent case law '*evidences only a variety of alluring yet ultimately unpersuasive defences of the status quo, intended to keep the* Barca *objection at bay*'.[46] He advocates stronger engagement by the courts with Art 8, whilst acknowledging that decisions on the proportionality balance are inevitably subjective. He suggests, '*[a] genuine look at the issue is the least that the blameless victims of debt and improvidence can legitimately expect*'.[47]

4.3 A 'FRESH START' FOR BANKRUPTS

Section 335A of the Insolvency Act 1986 must now be read in conjunction with ss 283A and 313A. These provisions were introduced into the Act by the Enterprise Act 2002 and reflect the policy of that Act of providing a 'fresh start' for bankrupts. Under s 313A, sale will not be ordered where the value of the bankrupt's share is below a prescribed level and, therefore, of marginal benefit to the creditors.[48] Under s 283A of the 1986 Act, the beneficiary's share in his or her home is returned to him or her after three years unless the trustee 'realises' the interest by, for example, applying for sale. As we have seen in section 4 above, under s 335A where an application for sale is made by a trustee in bankruptcy more than a year after the bankruptcy, sale is ordered unless there are exceptional circumstances. This gives the bankrupt a one-year adjustment period. Read together, the practical effect of ss 283A and 335A is that the trustee in bankruptcy has a two-year period during which sale will be ordered in the absence of exceptional circumstances. The meaning of 'realises' was considered by the Court of Appeal in the following case.

Lewis v Metropolitan Properties Realisations Ltd
[2010] Ch 148

Facts: Mr and Mrs Lewis were joint tenants of their home. Mr Lewis had become bankrupt. On the day before the third anniversary of his bankruptcy the trustee assigned Mr Lewis's beneficial interest in the home to the respondent for £1 and 25 per cent of the proceeds of any eventual sale. The Court of Appeal was asked whether the trustee had thereby realized the interest to prevent it from revesting in Mr Lewis.

Laws LJ

At [10]–[11], [22], [24], [27], and [29]

All words which require construction or interpreting have to be placed in their proper context. The same is true of "realise" in subsection (3)(a) of the 1986 Act. The question that we have to consider is whether, in its context, it is capable of covering a transaction where there is a deferred monetary consideration during the period before that consideration comes in. None the less, it is an ordinary English word and it is appropriate to start with a consideration of what the normal English meaning of the word is.

[45] [2006] EWHC 282.
[46] Baker, 'The Judicial Approach to "Exceptional Circumstances" in Bankruptcy: The Impact of the Human Rights Act' [2010] Conv 352, 366.
[47] Ibid, 368. [48] Ibid, 169–70.

The *Oxford English Dictionary* definition of "realise" is: "convert into cash or money". That is a good starting point for the Lewises' case. Alternative definitions are recorded by the judge as being "sell out" and "fetch as a price", which she described as being more general, but we still think that they import the general impression of a completed transaction as opposed to one where the price is still outstanding.

If one pulls these strands together the scheme of section 283A begins to emerge. It is as follows. We assume for the purposes of this paragraph a jointly owned home, and put on one side for the moment the possibility of a sale of the interest at a deferred consideration. (i) The section only applies to that part of the bankrupt's estate comprising his or his spouse/civil partner's dwelling house. It does not apply to other property. (ii) The trustee has three years to decide what to do where the estate has such an interest. (iii) If he does nothing, then (subject to the provisions of subsection (6), which presumably allow for special cases which we do not consider further) the estate loses the property interest. (iv) If the interest is of low value (within the meaning of the 1986 Act) the trustee, while technically owning the interest, will in practice have no enforcement mechanism available to him. If he does nothing, the interest reverts to the bankrupt under section 283A. If he starts proceedings (whether for an order for sale or a charging order), that will technically keep his interest alive while the proceedings are pending (section 283A(3)(b)(d)) but the interest will revest when the proceedings are dismissed under section 313A, as amended: see section 283A(4). (v) If the interest is of significant value, the trustee can do the following. (a) Apply for an order for sale. This keeps the interest out of the scope of section 283A while the proceedings are alive and gives the co-owner the opportunity to buy the trustee out *at the then value*. Alternatively the property will be ordered to be sold and the trustee gets *the then value*. (b) Apply for a charging order (if the conditions of section 313 are fulfilled). This secures *the then value* to the trustee, with future increases going to the bankrupt. (c) Reach an agreement with the bankrupt under section 283A(3)(e)—in effect, sell to the bankrupt. That will obviously reflect *the then value* and secure future increases for the bankrupt. (vi) Sell the interest to someone other than the bankrupt or the civil partner/spouse at a price payable and paid on sale. It is accepted by the Lewises that this would be a realisation. It would be a sale *at the then value,* with future increases accruing to the purchaser. (vii) It should not be forgotten that he might agree with the co-owner to sell, or the co-owner might want to sell anyway, in which case the trustee gets the estate's interest *at its then value*.

There may be some other permutations, but that is the basic scheme which emerges from a consideration of the section. The central feature which emerges is that which appears in the underlined words—the trustee, if he can achieve anything worthwhile at all, gets the equivalent of the then value of the property and is not allowed to hang on for ever as a co-owner, waiting to see property values rise. The provisions also achieve a reasonable degree of certainty for the bankrupt and the co-owner in that by the end of the third year (or the end of litigation commenced within three years) they will by and large know whether the property has to be sold, how much the trustee will get out of the property, that the trustee will no longer be a co-owner, and that the opportunity to make money out of a rising market will not remain with the trustee (giving him an incentive to hang on for some considerable time) but will enure to the benefit of the bankrupt, the co-owner or some other assignee.

Against that background it is now necessary to consider whether a sale of the beneficial interest in exchange for a future price, or a partially future price, would fit into that apparent background. Can it have been intended that such a transaction is a realisation within subsection (3)(a) ? It seems to us that it cannot, for the following reasons. (i) For the reasons given above, it would extend the meaning of "realises" beyond its normal English sense. (ii) It would be an unusual transaction for Parliament to have contemplated in these circumstances.

Section 283A is designed to deal with a real world problem, operating in a world of real, not fanciful, commercial transactions. A sale of a beneficial interest to an outsider is unusual enough. A sale with fixed monetary consideration left outstanding would be even more unusual. It is hard to imagine who would do such a thing. (iii) A sale with a contingent monetary consideration left outstanding is more conceivable, particularly if the consideration is dependent on a future sale of the property and is otherwise not payable, as the present case demonstrates. But the contingency of the obligation makes it look even less like a "realisation" in everyday terms (pending the fulfilment of the contingency), and it seems to create the very uncertainty that the rest of the scheme seems, by and large, to seek to remove. While the scheme is not spelled out and has to be inferred, and while it is not perfect, this sort of transaction sticks out like a sore thumb against the background of the rest of the section.

We therefore conclude that "realises" in the subsection involves getting in the full cash consideration for the deal.

QUESTIONS

1. Compare and contrast the rules applicable to applications for sale made by creditors and those made by trustees in bankruptcy. Do you consider differences between the applications to be justified by the status of the applicants?
2. In considering applications for sale by creditors, have the courts paid sufficient regard to the interests of beneficiaries who wish to prevent sale of their home? In what circumstances do you consider beneficiaries to be most vulnerable to a sale of their home being ordered?
3. Assess the view that arguments founded on human rights have had little practical impact on the courts' jurisdiction to order sale of the home on an application by a creditor or trustee in bankruptcy.

FURTHER READING

Baker, 'The Judicial Approach to "Exceptional Circumstances" in Bankruptcy: The Impact of the Human Rights Act 1998' [2010] Conv 352

Dixon, 'Trusts of Land, Bankruptcy and Human Rights' [2005] Conv 161

Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford: Hart, 2007)

Fox, 'Creditors and the Concept of a "Family Home": A Functional Analysis' (2005) 25 LS 201

Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 LQR 310.

Omar, 'Equitable Interests and the Secured Creditor: Determining Priorities' [2006] Conv 509

Omar, 'Security Over Co-Owned Property and the Creditor's Paramount Status in Recovery Proceedings' [2006] Conv 157

19

CO-OWNERSHIP AND PRIORITIES: THE DEFENCES QUESTION

CENTRAL ISSUES

1. Where co-owned land is sold or mortgaged, a question of priority may arise between a beneficiary who is not a party to the transaction and the purchaser. In co-owned land, priority is determined primarily by the mechanism of overreaching.
2. This mechanism, which applies to registered and unregistered land, enables the purchaser to take free from beneficial interests as long as certain conditions are met. As such, it operates as a defence to a pre-existing equitable interest in land. The beneficiaries' interests are removed from the land and attach to the proceeds of sale.
3. Where overreaching does not occur, priority between the beneficiary and purchaser is determined using the separate rules of registered and unregistered land.
4. The preconditions for overreaching include a requirement that any purchase money is paid to a minimum of two trustees. As a result, a practical distinction is drawn between one and two trustee trusts. In two-trustee trusts, priority is determined by overreaching, while in one-trustee trusts, the separate priority rules of unregistered and registered land are applied.
5. The prevailing view is that the basis of overreaching lies in the trustees' powers of disposition and its operation is therefore dependent on the trustees acting within their powers.
6. Purchasers and mortgagees may often benefit from statutory protection even where trustees have acted ultra vires, although the level of protection differs between registered and unregistered land.
7. The operation of overreaching against beneficiaries in occupation continues to be contentious and may remain vulnerable to challenge under the Human Rights Act 1998.

1 INTRODUCTION

This chapter is concerned with the priority rules applicable where co-owned land is sold or mortgaged. It considers the circumstances in which the beneficial interests of those who are not party to the sale or mortgage as legal owners are binding against the purchaser or mortgagee. In this book, we have conceptualized priority rules as part of the *defences* question (see Chapter 12, section 3). In that respect, this chapter is concerned with when a purchaser or mortgagee has a defence against the enforcement of pre-existing beneficial interests.

The priority between beneficiaries and third parties is determined primarily by the mechanism of *overreaching*. Overreaching is a mechanism enabling purchasers to take title free from certain property interests, particularly beneficial interests under a trust. In other words, as we noted in Chapter 12, section 3.3, it provides the purchaser or mortgagee with a defence against the enforcement of those interests. The interests are removed from the land and attached instead to the proceeds of sale.

Overreaching applies in relation to both personal property and land, although we are concerned only with its application to land. It applies as long as two conditions are met: firstly, the interest must be capable of being overreached; and secondly, the transaction must be one that has overreaching effect. Where these conditions are met, overreaching applies to the exclusion of other priority rules. Importantly, it applies both to registered and unregistered land. Only where one of the conditions is not met is the enforcement of the beneficial interest against the purchaser determined by the separate priority rules of registered and unregistered land that have been examined in Chapters 13 and 14. The priority rules discussed in those chapters are therefore wholly subsidiary to the overreaching mechanism.

In this chapter, we will focus on the particular form of overreaching that applies where a purchaser or mortgagee deals with land held on trust. In such cases, a key element of the requirement that a transaction has overreaching effect is that any capital money is paid to a minimum of two trustees. The practical effect of overreaching is thus to draw a division between transactions undertaken by a single trustee and those executed by two or more trustees. Where there are two or more trustees, issues of priority between a purchaser and beneficiary are determined by overreaching. Where there is a single trustee, priority between a purchaser and the beneficiaries generally falls to be considered under the separate priority rules governing registered and unregistered land.

This chapter focuses on the operation of the overreaching mechanism. The final part of the chapter, section 7, then briefly notes how issues of priority are determined where overreaching does not take place and addresses a specific issue that arises on a sale by a sole surviving legal joint tenant.

2 OVERREACHING

The effect of overreaching is explained in Wolstenholme and Cherry in the following terms.

Wolstenholme and Cherry's Conveyancing Statutes: Vol I (12th edn, ed Farrand, 1972, p 51)

> In such cases [where overreaching operates] the purchaser is not concerned with the title to the equitable interest or power, or to obtain the concurrence of the owner thereof. On the other hand, the equitable interest or power is not defeated or destroyed by the disposition, but is shifted so as to become a corresponding interest or power in or over the proceeds [. . .] The conveyance to the purchaser is then said to 'overreach' the equitable interest or power [. . .] An overreaching conveyance must be distinguished from one which wholly destroys some interest or right.

The key aspect of this explanation lies in the idea that overreaching operates to *shift* the interest from an interest in land to an interest in the proceeds of the conveyance. The purchaser or mortgagee thus obtains title to the land unencumbered by the interest. The holder of the overreached interest no longer has any proprietary claim in the land, but a beneficial interest in the moneys received by the trustees. His or her interest has shifted from an interest in land to an interest in money. In this way, overreaching draws a clear distinction between the beneficiaries' rights against purchasers, on the one hand, and their rights against their trustees, on the other.

Overreaching operates within a complex statutory framework and implements fundamental principles of the trust curtain and security of transactions, both for purchasers and, more particularly (in the leading cases), mortgage lenders. Because the application of the mechanism has been stretched to (and, some would argue, beyond) its legitimate limits, its continuing fitness for purpose is being called into question, together with its compliance with the Human Rights Act 1998 (HRA 1998).

So why do we have overreaching? In the following case, it was considered that the consequences of not giving full effect to overreaching would be as follows.

City of London Building Society v Flegg
[1988] 1 AC 54

Lord Oliver

At 76–7

> [To reverse, by judicial decision] the legislative policy of the 1925 legislation of keeping the interests of beneficiaries behind the curtain and confining the investigation of title to the devolution of the legal estate [. . .] financial institutions advancing money on the security of land will face hitherto unsuspected hazards, whether they are dealing with registered or unregistered land.

This comment reflects the twin objectives of implementing the trust curtain and ensuring security of transactions.

In this chapter, we first consider the general scope of overreaching, and then address the operation of overreaching in two particular circumstances: where the beneficiaries are in occupation of the land, and where the transaction is executed ultra vires (outside) the trustees' powers or in breach of trust. Following an assessment of whether overreaching remains fit for its purpose, we consider the future of the mechanism.

2.1 THE SCOPE OF OVERREACHING

For overreaching to take place, two conditions must be met: firstly, the interest must be capable of being overreached; secondly the transaction must be one that has overreaching effect. Both of these requirements are apparent from the terms of s 2 of the Law of Property Act 1925 (LPA 1925).

Law of Property Act 1925, s 2

(1) A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate, whether or not he has notice thereof, if—

(i) the conveyance is made under the powers conferred by the Settled Land Act, 1925, or any additional powers conferred by a settlement, and the equitable interest or power is capable of being overreached thereby, and the statutory requirements respecting the payment of capital money arising under the settlement are complied with;

(ii) the conveyance is made by trustees of land and the equitable interest or power is at the date of the conveyance capable of being overreached by such trustees under the provisions of subsection (2) of this section or independently of that subsection, and the requirements of section 27 of this Act respecting the payment of capital money arising on such a conveyance are complied with;

(iii) the conveyance is made by a mortgagee or personal representative in the exercise of his paramount powers, and the equitable interest or power is capable of being overreached by such conveyance, and any capital money arising from the transaction is paid to the mortgagee or personal representative;

(iv) the conveyance is made under an order of the court and the equitable interest or power is bound by such order, and any capital money arising from the transaction is paid into, or in accordance with the order of, the court.

(1A) An equitable interest in land subject to a trust of land which remains in, or is to revert to, the settlor shall (subject to any contrary intention) be overreached by the conveyance if it would be so overreached were it an interest under the trust.

(2) Where the legal estate affected is subject to [a trust of land], then if at the date of a conveyance made after the commencement of this Act by the trustees, the trustees (whether original or substituted) are either—

(a) two or more individuals approved or appointed by the court or the successors in office of the individuals so approved or appointed; or

(b) a trust corporation,

any equitable interest or power having priority to the trust shall, notwithstanding any stipulation to the contrary, be overreached by the conveyance, and shall, according to its priority, take effect as if created or arising by means of a primary trust affecting the proceeds of sale and the income of the land until sale.

(3) The following equitable interests and powers are excepted from the operation of subsection (2) of this section, namely—

(i) Any equitable interest protected by a deposit of documents relating to the legal estate affected;

(ii) The benefit of any covenant or agreement restrictive of the user of land;

(iii) Any easement, liberty, or privilege over or affecting land and being merely an equitable interest (in this Act referred to as an "equitable easement");

(iv) The benefit of any contract (in this Act referred to as an "estate contract") to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption, or any other like right;

(v) Any equitable interest protected by registration under the Land Charges Act, 1925, other than—

(a) an annuity within the meaning of Part II, of that Act;

(b) a limited owner's charge or a general equitable charge within the meaning of that Act.

(4) Subject to the protection afforded by this section to the purchaser of a legal estate, nothing contained in this section shall deprive a person entitled to an equitable charge of any of his rights or remedies for enforcing the same.

(5) So far as regards the following interests, created before the commencement of this Act (which accordingly are not within the provisions of the Land Charges Act, 1925), namely—

(a) the benefit of any covenant or agreement restrictive of the user of the land;

(b) any equitable easement;

(c) the interest under a puisne mortgage within the meaning of the Land Charges Act, 1925, unless and until acquired under a transfer made after the commencement of this Act;

(d) the benefit of an estate contract, unless and until the same is acquired under a conveyance made after the commencement of this Act;

a purchaser of a legal estate shall only take subject thereto if he has notice thereof, and the same are not overreached under the provisions contained or in the manner referred to in this section.

2.2 INTERESTS CAPABLE OF BEING OVERREACHED

The remainder of the section substantially curtails the initially broad statement in s 2(1) of the LPA 1925. Firstly, subs (3) excludes certain equitable interests from the scope of overreaching. The general effect of this subsection is to remove from the operation of overreaching most equitable interests that do not take effect under a trust. Discussing the scope of overreaching in *Birmingham Midshires Mortgage Services Ltd v Sabherwal*,[1] Robert Walker LJ indorsed a distinction drawn by Megarry and Wade[2] between 'commercial' and 'family' interests. Family interests, such as beneficial interests under a trust, can readily be represented by money; in contrast, commercial interests (which Robert Walker LJ considered to be exemplified by equitable easements and rights of entry) '*cannot sensibly shift from the land*'. They are logically inseparable from the land over which they are intended to be exercised. In this respect, the effect of subs (3) is to exclude such commercial interests from the initially broad wording of s 2(1).

The second respect in which the broad statement in s 2(1) of the 1925 Act is curtailed is that an interest must be '*capable of being overreached*' through the particular transactions

[1] (2000) 80 P & CR 256, [28].

[2] Citing from *Megarry and Wade: The Law of Real Property* (5th edn, ed Harpum, 1984), p 409.

listed in s 2(1)(i)–(iii).[3] Hence, it is necessary to identify which interests are '*capable of being overreached*' by each type of transaction mentioned. Paragraphs (i) and (iii) can be dealt with briefly in this regard. As regards para (i), the interests capable of being overreached by a conveyance made under the Settled Land Act 1925 are identified by s 72 of that Act. This includes (but is not limited to) the beneficial interests under the settlement. It is not discussed further, because, as we will see in Chapter 20 the Settled Land Act 1925 is in the process of being phased out.[4]

As regards para (iii), in relation to mortgages, this provision ensures that an exercise of the power of sale overreaches the mortgagor's equity of redemption and any subsequent mortgages.[5] Its operation is further discussed in Chapter 30, section 3.1.2.[6]

Of much greater significance is para (ii), which provides for overreaching on a conveyance by trustees of land. Beneficial interests under a trust of land are '*capable of being overreached*' on a conveyance by the trustees where overreaching is provided for by s 2(2) or '*independently of that subsection*'. Section 2(2) provides for overreaching of interests already in existence at the time the trust was created. This is a concept of extended overreaching that may be invoked only by a trust corporation, or by trustees approved or appointed by the court for the purpose. Section 2(2) does not, however, provide for overreaching of the beneficial interests under the trust: the most common and practically significant use of the mechanism, and the use with which we are concerned in this chapter. The basis for overreaching beneficial interests under a trust of land must therefore be found outside the terms of s 2.

On what basis are the beneficial interests under a trust of land '*capable of being overreached*'? Four theories have been advanced, three of which are consistent with the view that overreaching has the same basis and scope in registered and unregistered land. These three theories are:

- that overreaching is provided for by s 27(1) of the LPA 1925;
- that it is based on the doctrine of conversion; or
- that overreaching is inherent in the trustees' powers of disposition.

It will be seen that only the last of these provides a convincing basis for overreaching of the beneficial interests under a trust of land.

The fourth theory is that, while the trustees' powers of disposition provide the basis of overreaching in unregistered land, the Land Registration Act 1925 (LRA 1925) provided—and the Land Registration Act 2002 (LRA 2002) now provides—its own basis for the operation of the mechanism in registered land. On this fourth view, the basis of overreaching and, as a consequence, its scope differs between registered and unregistered land.

2.2.1 Overreaching and s 27(1) of the Law of Property Act 1925

The first theory is that s 27(1) of the LPA 1925 provides the basis of overreaching.

[3] The analogous requirement in para (iv) is found in the requirement that the interest is 'bound by' the court order.

[4] A full discussion of the scope of the Settled Land Act, s 72, is provided in *Megarry and Wade: The Law of Real Property* (7th edn, eds Harpum et al, 2008), [A-093]–[A-100].

[5] Personal representatives have the same functions as trustees of land (by virtue of the Administration of Estates Act 1925, s 9(1)(ii)) and therefore the interests capable of being overreached on an exercise of these powers are the same as those overreached on a sale by trustees of land.

[6] The effect of such overreaching is considered in *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327, [50]–[51].

Law of Property Act 1925, s 27(1)

(1) A purchaser of a legal estate from trustees of land shall not be concerned with the trusts affecting the land, the net income of the land or the proceeds of sale of the land whether or not those trusts are declared by the same instrument as that by which the trust of land is created.

From Harpum's seminal analysis of overreaching[7] (parts of which are extracted below), it is apparent that there are at least two difficulties with using s 27(1) as the basis of the mechanism. Firstly, while we are concerned only with the operation of overreaching in relation to land, the same mechanism is applied to trusts of personal property. Therefore, it cannot have its basis in legislation, such as s 27(1), which is applicable only to land. Secondly, overreaching itself pre-dates the 1925 legislation and therefore its basis must be found outside that legislation.[8]

What, then, is the effect of s 27(1)? It appears to serve two purposes. Firstly, it seems likely that it was intended merely as a declaration of the existing law.[9] It provides a statement of the effect of a conveyance that complies with the conditions of overreaching, but it does not provide the basis for the mechanism itself, nor does it negate the need to show that those conditions have been complied with.[10] Secondly, it absolves the purchasers from any need to ensure that the trustees apply the purchase money in accordance with the terms of the trust.

2.2.2 Overreaching and the doctrine of conversion

The second theory is that the basis of overreaching lies in the doctrine of conversion. That doctrine, which applied to trusts for sale, had the effect that, from the inception of the trust, the beneficiaries were considered to have an interest in the proceeds of sale of the land, rather than the land itself.[11] The doctrine was abolished by s 3 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996).

If the doctrine of conversion provided the basis of overreaching of beneficial interests under a trust for sale, then overreaching should not be possible where trustees hold land under a trust of land, rather than under a trust for sale. This would mean that the 1996 Act, in removing the statutory trust for sale formerly imposed in cases of co-ownership of land, would have dramatically limited the applicability of overreaching. Such a consequence would be wholly unintended. In its report that led to the 1996 Act, the Law Commission specifically envisaged the application of overreaching to trusts of land.[12]

On an initial analysis, there appears to be a logical connection between the doctrine of conversion, providing that beneficiaries have only an interest in proceeds of sale from the inception of the trust, and overreaching, which leaves beneficiaries with a claim against the

[7] Harpum, 'Overreaching, Trusteees' Powers and the Reform of the 1925 Legislation' (1990) 49 CLJ 277.
[8] Ibid, 278.
[9] Explained in the annotation of the section provided by Wolstenholme and Cherry, *Conveyancing Statutes* (11th edn, 1932).
[10] Hopkins, 'Overreaching and the Trusts of Land and Appointment of Trustees Act 1996' [1997] Conv 81, 82.
[11] The doctrine is further explained in Chapter 17, section 5.3.
[12] Law Commission Report No 181, *Transfer of Land: Trusts of Land* (1989), [6.1].

proceeds on sale. But despite this apparent connection between conversion and overreaching, it seems that conversion did not, in fact, provide the basis on which overreaching took place within a trust for sale. Indeed, Harpum dismissed any suggestion of a connection between the doctrines as a misconception.

Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' (1990) 49 CLJ 277, 278–9

> The second misconception is that overreaching is connected with the doctrine of conversion, at least in relation to trusts for sale. Because of that doctrine, it is said that the interests of the beneficiaries are from the inception of the trust in the proceeds of sale. Such a view is untenable as an explanation of overreaching. First, a disposition under a mere *power* of sale will overreach just as much as a disposition under a trust for sale, and this is so even though the doctrine of conversion has no application to powers of sale. Secondly, the doctrine of conversion is usually relevant to determine whether beneficial interests are in land or in personalty. Overreaching applies as much to trusts for sale of personalty as to trusts of realty. Thirdly, overreaching is concerned to transfer trusts from the original subject-matter of the trust to the *actual* proceeds *after* sale. The beneficial interests of those entitled under a trust for sale, by reason of the doctrine of conversion, are regarded for certain purposes as interests in the *notional* proceeds of sale *from the date of the creation of the trust*. There is no inevitability about the application of the doctrine of conversion to trusts for sale, and indeed the doctrine suffers from inherent logical flaws. The correct approach in every case is, it is suggested, to ask whether, as a matter of policy and for the particular purpose in issue, the interests of the beneficiaries should be regarded as interests in the subject matter of the trust or in the proceeds. It is not easy to predict whether the doctrine of conversion will ever again be used to explain overreaching. Lord Oliver, who in analysing the interests of tenants in common in *City of London Building Society v. Flegg*, favoured a strict application of the doctrine of conversion, certainly assumed that overreaching occurred on sale, but at the same time cited with approval the statement that "[t]he 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".

2.2.3 Overreaching and trustees' powers of disposition

The third theory is that the basis of overreaching of beneficial interests under a trust is the trustees' powers of disposition. Harpum, who describes overreaching as a 'necessary concomitant' of such powers, favours this theory.[13] In relation to trusts of land, this means that the basis of overreaching of beneficial interests under such trusts is the powers of disposition conferred on trustees by s 6 of the TOLATA 1996.

Locating the basis of overreaching in the trustees' powers has now attracted a significant degree of acceptance.[14] Ultimately, in view of the shortfalls identified in the other two theories, this view provides the most satisfactory explanation of the basis of overreaching of beneficial interests under a trust of land that can be applied to both registered and unregistered

[13] Harpum (1990), p 277.

[14] See *Snell's Equity* (32nd edn, ed McGhee, 2010), [4.013]; Smith, *Plural Ownership* (2005), pp 184–5, Fox, 'Overreaching' in *Breach of Trust* (ed Birks and Pretto, 2002), ch 4; McFarlane, *The Structure of Property Law* (2008), pp 394–404.

land. The theory is not, however, without its own difficulties. For example, as Sparkes notes,[15] there is nothing in the 1996 Act to say that trustees, having exercised a power of sale, hold the proceeds on trust for the beneficiaries. There is no doubt that such a trust exists, because the trustees cannot take the proceeds themselves, but because the trust is the necessary consequence of overreaching, this omission appears odd if the exercise of powers conferred by the 1996 Act provides the basis through which the mechanism operates.[16]

Further, using the trustees' powers as the basis of overreaching has also given rise to one of the key remaining issues on the scope of the mechanism. If the basis of overreaching lies in the trustees' powers, it follows that overreaching can take place only when the trustees are acting *within* those powers. We consider below the different arguments that have been raised as regards dispositions by trustees that are ultra vires their powers of disposition.

2.2.4 Overreaching in registered land

The final theory to consider is that the LRA 1925 provided its own basis of overreaching for registered land, which has been carried over into the LRA 2002.

Jackson has advanced this argument.[17]

Jackson, 'Overreaching in Registered Land Law' (2006) 69 MLR 214, 227–8

> Any purchaser from a trustee also takes a title under section 20 [of the Land Registration Act 1925], *whether he has notice* of adverse equities or not: 'and the disposition shall operate in like manner as if the registered transferor or grantor were [. . .] entitled to the registered land in fee simple in possession for his own benefit'. Benjamin Cherry, in his evidence to the *Royal Commission on the Land Transfer Acts*, describes this as the 'overreaching' effect of registration. Apart from restrictions, which prevented registration of a transfer that did not comply with their terms, trusts were kept off the face of title. Section 94(1) of the Land Registration Act 1925 provided that trustees are registered as proprietors, not as trustees. There was also a direction in section 74 to keep trusts, as far as possible, off the face of the register. [. . .]
>
> The effect of sections 20, 74 and 94 is to bring about a substantive alteration in the nature of the beneficial interest from a proprietary claim to a claim solely against the substitute property or proceeds of sale in the hands of the trustee(s). Some minor interests could become burdens on the land by registration against the title. Other matters could not be protected against a purchaser in this way, such as interests under a trust for sale or settlements. Such interests could be protected by entries on the register that restricted the registered owner's freedom to deal with the land. The intention behind these restrictions was to ensure that the land was dealt with in accordance with the terms of the trust or settlement. The nature of the beneficiary's interest changed from a proprietary right to a mere restriction or 'restraint on alienation'. But the default position was that trustee proprietors would be able to deal with the land as any ordinary proprietor could.

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[15] Sparkes, *A New Land Law* (2nd edn, 2003), [13.51]. He notes the contrast with the trust for sale, where a trust of the proceeds was express within the terms of the trust.

[16] Although see the explanation provided by McFarlane (2008), pp 400–1.

[17] This argument is not without support in previous literature. For example, see the discussion of the Land Registration Act 1925, s 18, by Harpum (1990), p 308. His comments on s 18 were, however, rejected by Ferris and Battersby, 'The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land' (1998) Conv 168, 180–4, further developed in their subsequent work 'Overreaching and the Trusts of Land and Appointment of Trustees Act 1996: A Reply to Mr Dixon' [2001] Conv 221 and 'General Principles of Overreaching and the Reforms of the 1925 Legislation' (2002) 118 LQR 270, 281–2.