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Cahill, Dermot; Owen, John

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Overreaching—Getting the Right Balance

Gwilym Owen* and Dermot Cahill Australia; Canada; The Republic of Ireland; Beneficial interests; Registration of trusts; Comparative Law; Land Registration; Legal history; Overreaching**

INTRODUCTION

In land law overreaching is a defence mechanism which protects purchasers against the rights of beneficiaries under trusts of land, enabling purchasers to take free from such trusts. There are various defences available to purchasers against other incumbrances affecting land, and these vary according to whether the land is registered or unregistered. As unregistered land ‘has had its day’¹ this article will only consider the concept of overreaching in the context of registered land transactions. Overreaching forms part of a much wider framework for the protection of purchasers from incumbrances following transfers of land. It forms part of a fulcrum in the seesaw which attempts to balance out the competing aims of ensuring that land should be a *dynamic security* on the one hand, with the protection of *static security* inherent in the broader structure of land law on the other hand.² There is currently an imbalance, insofar as the defence of overreaching is concerned, in favour of the purchaser at the expense of the beneficiary (i.e. between *dynamic* and *static* security), and the scales need resetting in order to achieve a fairer equilibrium. The article will suggest that this could be achieved by either making trusts of land registrable, or alternatively, by way of an additional form of restriction to the standard forms of restrictions currently available. With regards to the suggestion for making trusts of land registerable, the article should be viewed as forming part of a broader debate concerning the registration of trusts. Of course, overreaching in land

¹ Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001, [1.5]-[1.10]).

² Static security “protects the rights of existing owners at the expense, if necessary, of purchasers. See O’Connor, “Registration of Title in England and Australia” in *Modern Studies in Property Law: Vol 2* (ed Cooke, 2003), pp84-85.

law is not the only defence mechanism in registered land transactions which has its problems in striking the right balance between competing interests. The Register may be altered for the purpose of correcting a *mistake*, giving rise to narrow and wide views of mistake.

It is beyond the scope of this article to articulate a better theory for balancing out competing interests in respect of the various defence mechanisms. Rather, this article will concentrate on the single defence mechanism of overreaching in registered land transactions, and the authors' suggestions as to how a better balance could be achieved. It is for others to consider whether the suggestions made in this article to reform the doctrine, insofar as registered land is concerned, could be incorporated into a wider theoretical framework to evaluate better the protection of rights in both registered and unregistered land transactions. It could well be the case that the concept of overreaching may prove to be anomalous in any such scheme, in which case the question arises as to whether or not we need overreaching at all.

Therefore, the two aims of this article are: (1) to address the fundamental question of whether we should *abandon* the operation of the doctrine of overreaching altogether; and, if the doctrine should not be abandoned, (2) to determine: (a) the *need* for suggesting changes to the existing concept of overreaching, and if there is such a need, (b) to explore *suggestions for resetting the balance* between *dynamic* and *static* security in the context of overreaching in registered land transactions. These suggestions raise contentious issues. For instance, the suggestion for the registration of trusts of land would mean breaching the *curtain principle* and effectively give rise to the abandonment of overreaching in situations where such trusts had been registered on the title (but overreaching would still take place in the absence of registration), as would an alternative suggestion to control the mechanism by way of consent restrictions. For the reasons which will be advanced in the article, the authors consider that trusts of land should be registrable in this jurisdiction and that this argument should be viewed in the context of a broader debate which goes beyond the discrete topic of

overreaching. The authors will contend that *an alternative scheme* can be proposed based upon the provision of better restrictions being added to the existing suite of land registry restrictions which would preserve the doctrine of overreaching. The Law Commission has stated that it is not currently considering reforms to the doctrine of overreaching in its current consultation in respect of the reform of land registration, but it may do so at some point in the future.³ The Law Commission has recently opened its 13th Programme of law reform, and is seeking views on areas of law which would benefit from reform. That is why this article is being written at this point, and the authors will argue that there is a pressing need to reform the operation of the doctrine of overreaching in registered land transactions.

In undertaking this task, the article will begin by analysing certain aspects of the history of overreaching, which is linked with the early land registration Acts in England and Wales. This is necessary as this historical analysis will illustrate the *features* which the early legislation was trying to capture in respect of land law reform. These features will form the benchmark against which an evaluation will be undertaken in addressing each of the two main aims of this article. The historical analysis will demonstrate that the early legislation was not trying to capture any features concerning the use of a property primarily *as a home*. Further, the historical background will show the reason why overreaching developed and why we still need it today but in a modified form to take into account modern trends and developments.

In analysing the two questions which the article seeks to answer, the juxtaposition between the current system in England and Wales and other common law countries will be examined. In seeking an answer to the first question the article will consider an alternative scheme, based upon Australian and Canadian *Torrens* title. Those systems are not affected by the

³ Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com CP No 227, 2016), [1.20].

complexities inherent in the doctrine of overreaching in England and Wales. In Australian and Canadian *Torrens* title, if the beneficial interest is not protected as a caveat, the interest may be lost. For all its faults, it will be argued that the rules concerning overreaching in England and Wales are preferable to such an outcome. The article will adduce *new evidence* to demonstrate that had the first attempts at land registration in this jurisdiction continued unchecked we could have ended up with a land registration system similar to Australian and Canadian *Torrens* title. The article will also consider the position in relation to the registration of *inhibitions* in the Republic of Ireland.

In considering the second question, the issue of the registration of trusts in land titles will be addressed. Comparisons with the Canadian *Torrens* system will be made along with European Directives aimed at making trusts more *transparent*. The issue of *transparency* is very relevant having regard to the current climate which seeks to engender more *transparency* in business affairs, and this theme will be considered in the article. This is a slow moving area of the law but the concept of overreaching lies at the very core of our system of land law, and as such, it is deserving of serious consideration.

1. HISTORICAL ASPECTS OF OVERREACHING SEEKING TO FIND THE EVALUATIVE CRITERIA

1 The three key elements

The early history of overreaching shows that there were three key elements which were important in the development of what came to be known as the *curtain principle*. “ This principle says that a curtain is drawn across the register against any trusts. Hence [...] the register does not record beneficial ownership of land.”⁴ The rationale of the principle is to preserve *dynamic security*. Each of the elements comprising the *curtain principle* has a

⁴ Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com CP No 227, 2016), 2.8, p 18.

bearing on the themes being pursued in the dual aims of this article. The first key element was the *conveyancing practice of suppressio veri* (suppressing the truth):

1.1 *Suppressio veri*

Prior to the Statute of Wills 1540 it was not possible under the common law to devise land directly by will, and the concept of the *use* (the precursor to the trust) was in part developed to overcome this problem. This was achieved by a settlor transferring land *inter vivos* to people whom he could trust, who then held the legal estate to the *use* for the settlor or another during his life, and then followed his later written instructions set out in a will. As so much land was held in *use* prior to the Statute of Uses 1536, the question which needs to be answered is: what protection was there for purchasers/mortgagees from hidden *uses* on sales/mortgages. This answer to this question is important as it highlights the origins of the *doctrine of notice* and the methods which were devised to enable a purchaser to take free of equitable interests in order to preserve the dynamic security in land. This lies at the very core of overreaching.

If a purchaser/mortgagee could show that he was a *bona fide purchaser for value without notice* of the *use* (*the doctrine of notice*), then he would take free of it.⁵ To that end, there developed the fictitious practice of *suppressio veri*. By this method, if a settlor empowered his trustees to sell/mortgage land, the relevant transfer would contain an untruthful recital to the effect that his trustees were the absolute owners of the property. Of course, everybody knew that this was not true but it provided the purchaser/mortgagee with an excuse for not making further enquiries so that he could say that he was not on notice.⁶

⁵ For an early example of this concept, see *Cardinal Beaufort's Case* (1453) B. & M. 95.

⁶ J..S.Anderson, *Lawyers and The Making of English Land Law 1832—1940*, (Oxford, 1992), 266-280.

This *practice* had been a part of the common law in England and Wales for centuries.⁷ There was the possibility that a dishonest trustee could make off with the proceeds of sale, which the common law recognised, but it was a policy decision to adopt this approach.⁸ This historical fact is important as it was this policy consideration which led to the two trustee rule in Settled Land transactions which is considered in 1.3 below, and which subsequently found its way into the Law of Property Act 1925.⁹ It was considered that fraud would be less likely in cases involving two trustees than in cases in which there was only one trustee.

1.2 Caveats/cautions

The second key element in the development of the *curtain principle* was the introduction of the caveat/caution.¹⁰ We have already observed that a purchaser/mortgagee took free from any trusts as long as he could show that he was a *bona fide purchaser for value without notice*. This is what Anderson describes as ‘book law’¹¹, and explains that it was the *doctrine of notice* in respect of trusts which had been the problem with investigating title.¹² As we shall see in 2.2 below, because what was proposed in respect of land registration involved changing the substantive law (i.e., *the doctrine of notice*), there had to be safeguards for the beneficiary; ‘[s]ave under the purest ‘mirror of title’ schemes, title registration demanded more, requiring the registration of at least caveats’.¹³

It was because the substantive law was changed that caveats, and later cautions, were introduced in order to provide protection for the beneficiary of the equitable interest to enable him/her to be heard on an application which might defeat that beneficiary’s interest.

⁷ See dictum of Chitty J in *Carriv v Real and Personal Advance Company* (1889) L.R. 42 Ch.D. at p272.

⁸ See dictum of Younger J in *Re Soden and Alexander’s Contract*, [1918] 2 Ch.258 at p 263.

⁹ Sections 2(1) and 27 LPA 1925.

¹⁰ A caveat, later to be named a caution, was a procedure whereby a beneficiary of an interest under a trust was warned of a dealing which might affect his or her interest.

¹¹ J. S Anderson, *Lawyers and The Making of English Land Law*, 93.

¹² *Ibid*, 267.

¹³ *Ibid* 93.

Caveats/cautions were an integral part of what later came to be known as the *curtain principle*.

1.3 Settled Land Act 1882

The problems associated with the practice of *suppressio veri*, detailed in 1.1, were an important reason why the legislature introduced the two-trustee rule in the Settled Land Act 1882.¹⁴ This Act brought about two major reforms: (1) empowering the tenant for life to sell the settled property or part thereof and (2) the process whereby the purchaser got clean title free from the Settled Land trusts by the requirement that the purchase monies were paid to at least two of the Settled Land trustees, and as we have seen the latter condition was a reaction to some of the abuses in the practice of *suppressio veri*.

The above discussion shows the early components of what came to be called the *curtain principle*. The conveyancing practice of *suppressio veri* is evidence of an early form of curtain to overcome the substantive law concerning the *doctrine of notice*. As will be explained in 2 below, the early Land Registration Acts proposed a change to the substantive law relating to the *doctrine of notice*. As a consequence, it was felt that the position of beneficiaries needed protecting—hence the proposals for their protection by the entry of caveats/cautions to offset the curtailment of the *doctrine of notice*.

The final component, the requirement of two trustees to allow overreaching to take effect, which was first introduced in the Settled Land Act 1882, was the last ingredient in the early form of the *curtain principle*. The discussion now turns to consider in more detail how these elements developed.

2 Early attempts at land registration and development of the curtain principle

¹⁴ Section 39 Settled Land Act 1882.

2.1 Steps leading up to the early Land Registration Acts

There had been much discussion as far back as the 1830s and 1840s as to whether there should be a deeds register or a land registry, and for the purposes of this article it is important to understand the difference between the two, namely that a deeds bank was a repository from which the validity of a title could be inferred, whereas the latter contained a register of conclusions.¹⁵

It was the register in the land registration system which ultimately became the *curtain*. Even during these early times the issue of how to protect beneficial owners was a prime concern. The Amendment Society Real Property Committee in 1846 proposed that equitable interests could be protected as *claims*.¹⁶ In Lord Cranworth's Bill of 1853, it was provided that beneficiaries under trusts would have to protect their interests, or lose them, but the machinery for implementing this was not detailed.¹⁷ The 1857 Royal Commission's Report concluded that 'title registration...required at least the registration of caveats.'¹⁸

2.2 The Transfer of Land and Declaration of Title Acts 1862

The first attempt at land registration in this jurisdiction was Lord Westbury's Transfer of Land and Declaration of Title Acts 1862. Both Acts were passed in 1862 and the intention was that they would work in tandem with each other. It is the authors' view that the Declaration of Titles Acts 1862 marked an important step in the development of the modern

¹⁵ J. S Anderson, *Lawyers and The Making of English Land Law*, 65.

¹⁶ *Ibid*, 69.

¹⁷ *Ibid*, 83. See Report of the House of Commons Select Committee on the Registration of Assurances Bill, (1852-3) HCP xxxvi. 397. See also J.S. Anderson, *Lawyers and The Making of English Land Law*, 76-77.

¹⁸ *Ibid*, 93.

concept of overreaching.¹⁹ There are two points to be noted about these Acts for the purposes of this article. Firstly, both Acts appear to have drawn inspiration from Australian *Torrens* title as evidenced by reference to the wording ‘indefeasible title’ in the recital to the Declaration of Title Act 1862. All interests not included within the declaration were effectively overreached after the obtaining of the declaration of title by the court, to enable the seller to make title. To that end, s 35 of the Declaration of Title Act 1862 provided that those interests not so included in the declaration were converted into the proceeds of sale.

Secondly, and most importantly, it was the legislature’s intention to provide a landowner with the opportunity of being heard on an application which may have defeated his or her interest. Although a beneficial interest under a trust was not capable of registration, section 35 of the Transfer of Land Act 1862 provided for the protection of beneficial interests under trusts as claims by way of a ‘caveat’ (again note the influence of Australian *Torrens* title by the adoption of the wording ‘caveat’).²⁰ However, the introduction of caveats had been opposed by Wolstenholme at this point (he later changed his mind), and this proved to be a contentious issue.

This attempt at land registration proved to be a failure, and a similar fate awaited the Land Transfer Act 1875.

2.3 Events following the Land Transfer Act 1875

In 1886 Sir James Fitzjames Stephen proposed the abolition of real property law and that all property should be personalty. In his *National Review*²¹ he said that land and houses would never be ‘sold like stock until land becomes, so to speak, a mere right, an abstract idea, like

¹⁹ P. Sparkes, “Declarations of title: 1883 and all that”, *Conv.* 2016, 2 118-137 at p134. Sparkes has pointed out that the 1862 Acts were the first time that the concept of overreaching had been utilised in a statute. However overreaching is a common law concept and had been in existence long before the 1862 legislation.

²⁰ For the form of notice, see R.D. Urlin and T Key, *op cit*, form V p 71.

²¹ ‘The Laws Relating to Land’, *National Review*, 6 (Feb.1886)

stock or shares.²² Much land in England and Wales was sold after World War I, a process which had begun in the 1890s.²³ Landowners had to restructure their wealth, and there was a move from land to funds as agriculture was in depression.²⁴ As the discussion will go on to show, it was this perception of land which was prevalent when the Law of Property Act 1925 was enacted. That perception does not sit well with our perceptions of land in the twenty first century, and is an important reason for calling for reform of the law in this area.

2.4 Haldane's 1915 Bill

It became clear that the rights of beneficiaries under trusts had become caught up in a tangle concerning theoretical distinctions between realty and personalty.²⁵ Ultimately, Haldane aligned himself with Wolstenholme's proposal that beneficial interests (named Subordinate Estates) would be overreached on sale unless they were protected as cautions or inhibitions on the register.²⁶ Haldane's 1915 Bill was read in the House of Lords on 26 July 1915 and drew upon Wolstenholme's proposal for the protection of beneficiaries by way of cautions and inhibitions. However, this proposal was rejected by a Select Committee which was appointed in January 1919 'to consider the present position of Land Transfer in England and Wales, and to advise what action should be taken to facilitate and cheapen the Transfer of Land'. Its recommendations included Cherry's Bill.

²² Anderson, *Lawyers and The Making of English Land Law*, 174.

²³ For more on this topic, see M Cragoe and P.Readman., *The Land Question in Britain, 1750-1950* (London, 2010). For the Welsh perspective see K.O.Morgan, *Rebirth of a Nation: Wales 1880-1980* (Cardiff/Oxford, 1981). For the land reform debate see I.Packer, *Lloyd George, Liberalism and the land: The Land issue and party politics in England, 1906-14* (London, 2001), 178-93.

²⁴ See F.M.L. Thompson (1990)– Presidential Address: English Landed Society in the Twentieth Century: Collapse and Survival, *Transactions of the Royal Historical Society*, 40, pp 1-24, esp. pages 13, 14 and 23.

²⁵ Anderson, *Lawyers and The Making of English Land Law*, 254.

²⁶ *Ibid*, 255.

2.5 *The Land Acquisition Committee Report November 1919* ²⁷

Instead of the protection of cautions and inhibitions proposed by Wolstenholme's and Haldane's Bills, Cherry argued that beneficiaries should be protected unless the purchase money was paid to two trustees in which case their interests would be overreached. He felt that there was less likelihood of fraud in the case of two as opposed to one trustee. For the very first time we see in the 1919 Select Committee Report express reference to the *curtain principle* as 'Principle C' in Appendix IV of the 1919 Select Committee Report.

Cherry's Bill drew heavily on Haldane's 1915 Bill but without setting up a register of cautions and inhibitions.²⁸ There then appeared The Law of Property Bill (1920) containing Cherry's universal *curtain principle*.²⁹ So far the discussion has concentrated on the care which was taken by the early land registration Acts to protect the static interests in land. Cherry's *curtain principle* was aimed at protecting the dynamic nature in land transactions. The provisions dealing with overreaching are now contained in sections 2 and 27 of the Law of Property Act 1925 to which reference has been made previously in section 1.3 above. Whereas these latter provisions do not expressly refer to a curtain, one is definitely implied.³⁰

2.6 *The Land Registration Act 1925*

Sections 53 to 57 of the Land Registration Act 1925 made provision for the entry of cautions in registered land transactions which provisions were repealed by the Land Registration Act 2002. Section 58 of the Land Registration Act 1925 also provided for the entry of restrictions. It seems that it was not entirely clear whether the interests of beneficial interests under trusts were meant to be protected by cautions or by way of restrictions prior to the Land

²⁷ 1919 [Cmd.424] Fourth report of the Acquisition and Valuation of Land Committee on the transfer of land in England and Wales.

²⁸ *Ibid*, section 25.

²⁹ *HLP v. 323*.

³⁰ Anderson, *Lawyers and The Making of English Land Law*, 309.

Registration Act 2002. In *Flegg*,³¹ Mr and Mrs Flegg eventually ‘protected’ their beneficial interests by way of a caution, but at the beginning of his judgment Lord Oliver implies that this should have been achieved by entering a restriction.³²

2.7 *The evaluative criteria*

From the above historical analysis we can see the tension between (1) the competing goals of land being a dynamic security, and, (2) the protection of static interests such as beneficial interests under trusts. Striking a balance between these competing claims has been an important feature which the legislature has been trying to capture since the very earliest attempts at land registration. In this regard, an important feature was the right of a beneficiary under a trust to be heard on a disposition which might defeat his or her interest, i.e., fairness. Another important feature was that the protection of the beneficiary was further reinforced by borrowing from the Settled Land Act 1882 the requirement that capital monies had to be paid to no fewer than two trustees for overreaching to take effect. It is also important to note that the early Land Registration Acts were enacted at a time when land was thought of more in terms of personalty rather than realty which was an important consideration for the legislature in reforming trusts for sale having regard to the position prior to the Trusts of Land and Appointment of Trustees Act 1996. Therefore, it is correct to conclude that in 1925 the legislature was not trying to capture any features concerning the use of property primarily *as a home*. Now that the salient features have been identified, the first issue which needs to be settled is whether we should *abandon* the doctrine of overreaching altogether at the beginning of the twenty first century in view of the fact that it is a concept which was conceived at the beginning of the twentieth century to strike the right balance in the context of a different socio-economic background. The article now moves on to consider this matter from two

³¹ *City of London Building Society v Flegg* [1988] A.C. 54 HL.

³² *Ibid*, p 74.

perspectives: (1) by analysing alternative schemes by reference to the *caveat* system in Australian and Canadian *Torrens* title (the adoption of which would severely curtail the operation of the doctrine of overreaching), and the Irish system (the adoption of which would significantly modify the doctrine in this jurisdiction), and these will be examined in part II of the article; (2) whether overreaching should effectively be *abandoned* by providing for (a) trusts to be registered by way of a *notice* which *would trump* overreaching, which will be considered in part III of this article, or *alternatively* (b) *restrictions* which would require that a transaction could not be registered without the consent of the beneficiary, which will be considered in section 2.2 of part III of the article.³³

II. ALTERNATIVE SCHEMES

An obvious alternative model for consideration is the Australian caveat system. The reasons for this are threefold. Firstly, we have identified in 2.2 above that the earliest attempt at land registration in this jurisdiction was heavily influenced by the Australian *Torrens* system. Secondly, the complexities of the English concept of overreaching are absent in the Australian *Torrens* States and Territories. Thirdly, it is the authors' view that had land registration developed in a different way in this jurisdiction following the Declaration of Title Acts 1862, we might well have ended up with a similar system of caveats which forms part of Australian *Torrens* title. This would have meant that, unless protected as a *claim* by way of a caveat, the owner of a beneficial interest under a trust would have lost his or her interest on a disposition. The analysis now moves on to consider the Australian model.

1. *The Australian model*

³³ Notices protect priority *if* a triggering disposition is made under s 29 Land Registration Act 2002, whereas restrictions limit the circumstances in which a s 29 disposition can be made.

As in England and Wales, in the Australian States and Territories beneficial interests under trusts are not capable of registration. They can be protected merely as *claims* by way of a caveat on the register. A transfer cannot be registered until the court has been satisfied as to the validity and priority of the claim.³⁴ The problem with caveats is that, in the absence of fraud, the equitable interest can be lost if it is not protected by way of a caveat, which has dire consequences for the owner of that interest. Leaving aside the decision in *City of London Building Society v Flegg* (this case will be considered in Part III of the article) for the moment, in this jurisdiction the equitable interest would not be lost but would be overreached, and converted into the proceeds of sale. It is suggested that for all its faults this consequence is preferable to running the risk of losing the beneficial interest altogether, in the absence of protecting that interest as a *claim* by way of a caveat, which would be the position in the Australian system, and also the Canadian system which is considered next.³⁵

2. *The Canadian model*

To the best of the authors' knowledge information and belief, the only jurisdiction in which it is possible to register trusts is in British Columbia, and it is believed that any such trusts would have to be express rather than implied trusts.³⁶ One reform option which will be considered in Part III of this article is the registration of both *express* and *implied* trusts. In practice, trusts are seldom registered in British Columbia in view of the fact that the transfer of legal title in British Columbia attracts property transfer tax, and the transfer of property into the name of a trustee would attract this tax. In the Canadian provinces with a *Torrens*

³⁴ See G. Owen, 'A New Paradigm for Overreaching—Some Inspiration from Down Under', [2013] 77 Conv. pp378-381.

³⁵ It should be acknowledged that in England and Wales a beneficiary could lose his beneficial interest within the priority provisions, where his interest is not technically overreached (e.g. a beneficiary holding under a single trustee, where the beneficiary is not in actual occupation when the seller sells to a purchaser in breach of trust). In this situation the proceeds would be held on (constructive) trust of the beneficiary, owing to the trustee not being able to take advantage of his own breach of trust. Whilst this is not explained by overreaching, the result is functionally the same.

³⁶ For British Columbia, see s 180 Land Title Act, R.S.B.C. c250.. See also, Di Castri, *Registration of Title to Land*, (Carswell 1987) 17-23 to 17-26.

land title system, as in the Australian States and Territories, the supersession of the beneficial interest by a transfer of the ‘uncaveated’ registered title to a purchaser for value takes place, in the absence of fraud, as a result of the operation of the relevant land title statute which obviates the need to look behind the register.³⁷

In the Australian and Canadian *Torrens* systems there is more emphasis on the notion of *dynamic security* at the expense of *static security*, thereby creating an imbalance at the expense of those with beneficial interests. This is all very well as long as there are adequate safeguards for the owner of the *static security*. Overreaching provides that *basic form* of fairness in this jurisdiction, so the authors consider that the doctrine still has a role to play and that it should not be abandoned. However, the doctrine is in need of reform to deal with the unfairness which can arise in a case such as *Flegg*, and which is considered in part III. Essentially, the consequence of *Flegg* is that under certain circumstances, and where there is negative equity in a property, overreaching can have the effect whereby the owner of a beneficial interest under a trust can not only lose his or her home, but also end up with nothing from the proceeds of sale of the property in which that interest subsisted. This may be viewed as a consequence of English pragmatism. We rely on equity and possible breach of fiduciary duty to do the heavy work here, which is of no use to people faced with problems such as those which beset Mr and Mrs Flegg. Situations such as these should not be left to be resolved primarily by the rules of equity. The laws of real property need to provide a better solution. Before considering how best to reform the doctrine in this jurisdiction, the Irish model will be considered. Whereas this model is not premised on abandoning overreaching, if implemented in England and Wales it would represent a significant difference from the English and Welsh concept of overreaching.

³⁷ The authors are obliged to Greg Blue, Q.C., senior Staff Lawyer at British Columbia Law Institute for providing this information.

3. *The Irish model*

Overreaching has proved to be an anomalous concept in practice in England and Wales.³⁸ In the Republic of Ireland, the legislature has sought to overcome this by the entry of an *inhibition* and extending the operation of the doctrine of overreaching in respect of transfers by a *single trustee* in certain circumstances. Beneficial interests of beneficiaries are not capable of registration, but they can be protected by entering an inhibition.³⁹ An inhibition protects unregistrable rights (e.g. beneficial interests under trusts) that cannot be converted into registered rights. In order to achieve this, the beneficiary has to demonstrate a *prima facie* right or interest and any disputes concerning this are determined by the court. Therefore, the registration of an inhibition validates the beneficiary's *claim* and no purchaser would proceed without the matter being dealt with before completion.⁴⁰ However, overreaching still takes effect in the case of a transfer by two trustees, but overreaching is restricted in certain circumstances in the case of the transfer by a *single trustee*.⁴¹ In short, the interests of a beneficiary in discoverable actual occupation would not be overreached if there were one trustee, but they would be overreached, even if there were a single trustee, if the beneficiary were *not* in discoverable actual occupation.⁴²

Before dealing with suggestions for reform, the next question which needs to be settled is: if overreaching is desirable in this jurisdiction, why do we need any reform to overreaching at all? *Flegg* was a hard case but as hard cases such as this only come along every so often, why

³⁸ For an explanation of the anomalies, see G. Owen, "A New Paradigm for Overreaching—Some Inspiration from Down Under", [2013] 77 Conv., 380-381.

³⁹ G. Owen, 'A New Model for Overreaching—Some Historical Inspiration', 236. See also. Section 98 of the Irish Republic's Registration of Title Act 1964.

⁴⁰ The Irish Property Registration Authority has power to remove the inhibition.

⁴¹ Section 21(1) of the Irish Republic's Land and Conveyancing Law Reform Act 2009.

⁴² A similar scheme has been proposed for Northern Ireland. For a criticism of these proposals, see G.Owen, "A New Model for Overreaching—Some Historical Inspiration", [2015] 79 Conv., 237-238

not just maintain the *status quo*? The first named author has considered this question in previous work, and this article will proceed on the basis that hard cases *do* matter and that the seeds are there for factual circumstances as were seen in *Flegg* to increase rather than decrease in the future, based upon the reasoning in that previous work.⁴³

III. RESETTING THE BALANCE

By way of an overview, this part of the article will consider various options for resetting the balance to achieve a better equilibrium between the competing interests of *dynamic* and *static* security in the context of overreaching in registered land transactions against the background of the evaluative criteria identified in 2.7 above. In view of the unfairness which can be caused to a beneficiary inherent in Australian and Canadian *Torrens* title arising out of the operation of caveats, the possibility of registering trusts will be considered. It should not be forgotten that Robert Torrens originally felt that there should be registration of trusts and what came to be known as the *curtain principle* did not form part of his original proposals in the Australian *Torrens* system of land registration.⁴⁴ On this proposal for England and Wales, overreaching would only kick in if the trust (*express* or *implied*) had not been registered. As will be discussed, the registration proposal would involve an amendment in England and Wales to s 33 (a) Land Registration Act 2002 to provide that trusts can be registered. In this respect, the article will consider whether any such notices *should or should not trump* overreaching. Finally, the suggestion that the overreaching doctrine should be controlled through the use of different forms of restriction will be considered as an alternative to the proposal for the registration of trusts.

1 *The registration of trusts*

⁴³ G. Owen, 'A New Paradigm for Overreaching' and 'A New Model for Overreaching'.

⁴⁴ Stein, 'Torrens Title—A Case for The Registration of Trusts in New South Wales', [1982] 9(3) Sydney Law Review, 605 and 608.

1.1 *The arguments against registration*

“English law appears resistant to attempts to curtail the curtain principle through which trusts are kept off the register.”⁴⁵ There are three main arguments against the registration of trusts: (1) if registration of trusts were to be permitted this would lead to the register becoming clogged with entries. These would have to be dealt with on every disposition which would lead to a slowing down of the conveyancing process leading to delays and expense. In short, it would take us back to the pre-1925 position; (2) beneficiaries of implied trusts may not have the necessary knowledge in respect of their interests to know that they were capable of registration; (3) even if beneficiaries did have the requisite knowledge, they would not wish to register as it may be regarded as a hostile act. Objections (2) and (3) have been dealt with in previous work.⁴⁶ What will be addressed in this article is objection (1).

1.2 *Further arguments in favour of registration*

It is proposed to deal with objection (1) by reference to three different issues in the manner set out hereunder after which a proposal will be made for regulating the overreaching defence mechanism through the registration of trusts, before considering the alternative method by means of restrictions:

1.2.1 *The relevant underlying economic background at the time when the early Land Registration Acts and the 1925 Law of Property legislation were enacted*

It has already been noted that the early Land Registration Acts and the Law of Property Act 1925 were enacted against an economic background of a restructuring of portfolios from land to funds. Further, home ownership at that time was not as prevalent as it is now.⁴⁷ At the

⁴⁵ McFarlane, Hopkins and Nield, *Land Law, Text, Cases, and Materials*, 671.

⁴⁶ G Owen, “A New Paradigm for Overreaching—Some Inspiration from Down Under” [2013] 77 Conv. 377, pp 391-394.

⁴⁷ G Owen, ‘A New Model for Overreaching’ [2015] 79 Conv. 226-239.

beginning of the last century trusts were viewed as a hybrid of realty and personalty. Cherry's overreaching provisions were formulated against this socio-economic background, But this did not matter in a climate when land was regarded as more of an investment rather than a home.

1.2.2 *Should trusts be more transparent?*

The issue of the registration of trusts for land was a peripheral topic in the debates concerning proposals by the European Union Parliament in 2014 to add onto the 3rd Anti-Money Laundering Directive⁴⁸ a requirement for a public register of trusts.⁴⁹ However, some of the matters which were discussed in those debates can profitably inform our understanding of the issues discussed in this article.

In March 2014 the European Parliament published proposals the effect of which would have been to require Member States to set up a public register of trusts as part of its drive to combat money laundering. If implemented in accordance with the original proposals, trustees would have been required to register private details concerning trusts, and there were concerns that this could have extended to trusts for land. This would really only have affected those Member States with common law jurisdictions, as the concept of the trust is not a feature of civil law based systems. The proposals met with fierce resistance in the United Kingdom on the basis that such transparency was seen as a way of eroding privacy.⁵⁰ In the event, the Fourth Money Laundering Directive⁵¹ which was eventually adopted on 20 May 2015 was less extensive in scope than was originally feared and the 'mandatory register of

⁴⁸ Directive 2005/60 on the protection of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L309/15 art.3.

⁴⁹ This is similar in concept to a deeds registry.

⁵⁰ See, F. Nosedá, 'For or against the registration of trusts-why it matters:balancing regulatory concerns and the right to privacy,' *Private Client Business*, 2014, 3, 137—141.

⁵¹ Directive (EU) 2015/849 on the prevention of the use of the financial system for the purpose of money laundering or terrorist funding, amending Regulation (EU) no 648/2012 and repealing Directive 2005/60/EC and Commission Directive 2006/70/EC [2015] OJ L141/73.

trusts applies only to taxable trusts and it will not be public.’⁵² However, the debates which took place in connection with the passing of the Fourth Money Laundering Directive highlighted the distrust that there is in Europe towards the concept of the trust, which is regarded in civil jurisdictions as shady and underhand.⁵³

Whereas the authors would not subscribe to the misguided views held by some in Europe concerning trusts in this jurisdiction, they do feel that the debates highlighted the need to revisit the need for transparency in certain areas concerning our trust laws.⁵⁴ At present we do not have any means by which beneficiaries under a trust can be heard on a disposition which could affect their interests. This is a basic human right and beneficiaries under trusts may be being deprived of that right in England and Wales. Rather, they have the dubious protection of the registration of a restriction.

The authors suggest that the lack of an opportunity for beneficiaries to be heard on an application for registration which might defeat their interests may form the basis for a challenge in the future under Articles 1 (deprivation of rights) and/or 8 (respect for the home) of the First Protocol of the European Convention on Human Rights (ECHR). The task looks difficult but may not be impossible.⁵⁵

⁵² See STEP article, http://www.step.org/full-text-fourth-european-aml-directivepublished#sthash.z.1W1Edr7&st_ref. Accessed, 31 January 2016.

⁵³ See, F. Nosedá, ‘For or against the registration of trusts-why it matters..’, 137.

⁵⁴ Although concerning companies and not individuals, the Department for Business Innovation and Skills issued a discussion paper in March 2016 entitled, ‘Enhancing transparency of beneficial ownership information of foreign companies undertaking certain economic activities in the UK,’: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/505546/bis-16-161-beneficial-ownership-transparency.pdf. Accessed on 16 March 2016: see, Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com CP No 227, 2016), [1.22].

⁵⁵For an analysis of Article 1, see A. Goymour, ‘Property & Housing’ in *The Impact of the UK Human Rights Act on Private Law* (ed Hoffman, Cambridge: CUP, 2011) ch 12 pp 281-4; for an analysis of Article 8, see, Nield, ‘Article 8 Respect for the Home: A Human Property Right’ (2003) 24 KLJ 147, p169.

1.2.3 *The proposal for regulating the overreaching defence mechanism through the registration of trusts*

It is probably unrealistic to propose an amendment to s 27 Land Registration Act 2002 to provide for the *substantive* registration of trusts.⁵⁶ This would meet with objection from the Land Registry as substantive registration would create a legal interest, which would mean the state guarantee of title, which would bring in its wake indemnity issues.

Another option would be to introduce a means of protection of both *implied* and *express* trusts by notice on the title register. The Land Registry does not scrutinise the validity of an application to enter a notice. Unlike with *substantive* registration, a registered notice does not come within the provisions affecting the state guarantee of title. However, those applying for the entry of a notice have to be careful: as we have seen, section 77 of the Land Registration Act 2002 provides that if they do so without reasonable cause, they may be liable to a person who suffers damage as a consequence of the entry.

At present, section 33 of the Land Registration Act 2002 prohibits the use of a notice to protect an interest under a trust of land. Consequently, an amendment to section 33⁵⁷ of the Land Registration Act 2002 could be made to facilitate this. It then needs to be considered whether the proposed new form of notice *would, or would not, trump* overreaching. A notice that survives overreaching would have to be cleared from the title with the consent of the beneficiary of it. Some would argue that this would slow down the conveyancing process, and would take us back to the pre-1925 position in respect of trusts.

⁵⁶ An interest being substantively registrable would only be capable of being legal if also recognised as a legal interest by s 1 LPA 1925. Therefore, to make trusts substantively registrable would also entail making beneficial interests legal interests within that section, which would be antithetical to the nature of a trust as an equitable creation.

⁵⁷ Such rights would only be protected as *claims* and the act of registration would validate those claims.

Therefore, one option would be that the new form of notice should *not trump* overreaching. The question which then arises is: what would be the point of entering a notice which could effectively be ignored? By analogy with the old law relating to cautions, there may be some advantages.

In *Kastner v Jason*⁵⁸ although it was ordered that the caution had to be vacated, the judge was of the view that but for the solicitor's oversight in not informing the purchasers of the existence of the caution, the transaction would not have proceeded until the caution had been vacated. This would have meant a payment to the cautioner whose claim would, to all intents and purposes, have been protected. The above proposal would replicate this position.

It is likely that a proposal whereby the notice would *not trump* overreaching would not find favour because it might fairly be said that it would not be robust enough upon which to base a solution to the overreaching mechanism, notwithstanding its goal of trying to get the parties to sort matters out at the outset, which sits well in the current climate of greater emphasis on alternative methods of dispute resolution. The *alternative* would be for the notice *to trump* overreaching, i.e. provision could be made for a notice to protect a trust (assuming an amendment had been made to s 33 Land Registration Act 2002) which would prevent overreaching in the event of a disposition by two trustees, effectively *abandoning* overreaching where notices were registered under such conditions. The disadvantage of such a proposal is that it might be said that it would result in the clogging up of the register and lead us back to the pre-1925 position. However, there are reasons for being optimistic that this would not happen⁵⁹ and experience in other jurisdictions has not led such an outcome, albeit for a range of unrelated reasons, due to different local circumstances. In section 2.2 below, we discuss how a similar result could be achieved by way of consent restrictions.

⁵⁸ APP.L.R.12/02.

⁵⁹ Section 77 LRA 2002 provides for the payment of damages as a consequence of entries being entered on the register without reasonable cause.

It is proposed that this new form of protection would be a voluntary option, and confined to residential property.⁶⁰ In view of the fact that this proposal should only extend to residential properties, it will be appreciated that in such situations trusts are commonly *implied* and not *express* in nature. Therefore, a beneficiary may not have *the requisite knowledge* to protect the interest. It is suggested that this could be addressed by having a question at some convenient point in the conveyancing process, e.g., as to whether contributions are to be made by a third party who would need be notified of their rights

If neither of these reform options were to find favour, then the other alternative would be to consider controlling the overreaching mechanism through modifications to the existing suite of available land registry restrictions, which are considered next.

2. Restrictions

In part II of the article we concluded that the concept of overreaching is one which is worth preserving in England and Wales. So far, in this part of the article, we have considered proposals for the realignment of the overreaching doctrine by means of providing for trusts to be capable of registration by way of notice under s 33 Land Registration Act 2002. However, an alternative scheme can be proposed based upon different forms of restrictions, and in this regard we need to consider whether overreaching should be modified by way of an alternative new form of restriction which is considered next.

2.1 *Regulating the overreaching defence mechanism by way of better restrictions but preserving overreaching*

⁶⁰ Trusts arise in a myriad of situations, not just residential–discretionary trusts; commercial situations where property is held under a bare trust by a nominee; and a security trustee registered as a mortgagee on behalf of a consortium of lenders. The reason for limiting the protection to residential transactions is because this option would not be attractive in the situations just outlined.

At present, the only *limited* form of protection available to a beneficiary is to enter a restriction. One way in which a beneficiary under a trust can currently ‘protect’ his interest is to enter a Form A restriction.⁶¹ Capital monies have to be paid to at least two trustees or a trust corporation in order to enable overreaching to take place before a disposition by the trustees can operate. However, there are other forms of restriction: the current Land Registration Rules 2003 contain a raft of standard form restrictions which might be appropriate for a particular beneficiary. Additional ‘protection’ may be afforded by entry of a restriction in Form II but this will not prevent overreaching. The rationale for this type of restriction is to provide a mechanism whereby a beneficiary is given notice of dealing *after* it has taken place. It is important to note that it does not prevent overreaching.

Therefore, if there is a shortfall, the beneficiary would have to pursue a remedy through alternative causes of action, and ‘each of these actions has its own limitations.’⁶² This takes us back to the point made in section 2 of part III of this article concerning English pragmatism. Restrictions were introduced to allow overreaching to take place, ostensibly for the ‘protection’ of beneficiaries. However, *Flegg* demonstrated how this protection can be illusory.

The Land Registry could be asked to produce a new standard form of restriction tailored to prevent a situation in *Flegg* arising without the beneficiary having an opportunity of being heard on a disposition which might defeat his or her interest. For example, a new form of restriction could be included providing that on a disposition the purchaser would be obliged to provide full financial details of the transaction to the beneficiary *before* registration could

⁶¹ See: <https://www.gov.uk/government/publications/notices-restrictions-and-the-protection-of-third-party-interests-in-the-register-/practice-guide-19-notice-restrictions>. Paras, 3.4.4 ; 6.4 and 7.34. Accessed 31 January 2016. In fact the Registrar *must* enter a restriction when two proprietors are entered on the register, see LRA s 44(1).

⁶² McFarlane, Hopkins and Nield, *Land Law, Text, Cases and Materials*, (Oxford, 2015), p 673.

take place. The beneficiary would then be given a period of time to assess whether there would be sufficient equity in the property following overreaching to satisfy his or her interest. Any contentious cases would fall to be determined by the Property Chamber of the Upper Tribunal. In cases in which there would be sufficient equity demonstrated, overreaching would take place.

2.2 Regulating the overreaching defence mechanism by way of restrictions which would effectively abandon overreaching

Another alternative would be to create more robust forms of restriction; e.g. requiring the consent of the beneficiary, or someone on behalf of the beneficiary, before a disposition by the trustees could be registered. This would, have the effect of *abandoning* overreaching when such restrictions were entered⁶³

The Land Registry could effectively *abandon* overreaching by providing for consent restrictions which would mean that a transaction could not proceed without the beneficiary's consent and any cases of difficulty could be referred to the court. This solution would have provided a complete defence to the parents in *Flegg* had they been able to avail themselves of it. Further, s 77 Land Registration Act 2002 should ensure that beneficiaries would not enter restrictions frivolously. However, the objection to this suggestion in the context of overreaching is that it provides too much power in favour of the owner of the *static* security at the expense of *dynamic* security, and the Law Commission does not currently have any appetite for a proposal along these lines.⁶⁴ A similar objection could be voiced concerning the proposal for the provision of notices which would trump overreaching. However, the

⁶³ Goymour, 'Mistaken Registration of Land: Exploding the Myth of "Title by Registration"' [2013] CLJ 617, pp 647-8.

⁶⁴ Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com CP No 227, 2016) [paras. 10.43 and 10.47], p 210.

argument in favour of the registration of trusts by way of a notice should be seen as part of a wider debate on the registration of trusts which goes beyond the topic of overreaching.

CONCLUSION

Having considered the defence mechanism of overreaching in both its historical and modern contexts, we can see that in trying to achieve the correct balance between *dynamic* and *static* security, successive legislators sought to achieve fairness in favour of the owners of beneficial interests under trusts, i.e., *the right to be heard on a disposition which could defeat their interests*. As we have seen, this was a key feature which was captured in the Declaration of Title Acts 1862, as evidenced by the provision in favour of the beneficiary to enter a *caveat*, later to be called a *caution*. History shows that the ability to enter a caution proved to be a contentious issue and by 1919 the idea had been abandoned, but cautions made a return in the Land Registration Act 1925. As we have seen, up until the Land Registration Act 2002 there was some uncertainty as to whether beneficial interests were to be ‘protected’ by way of a caution or a restriction. Cautions were effectively abolished by the Land Registration Act 2002, with the result that thereafter the only way in which a beneficial interest under a trust can be ‘protected’ at the present time is by the entry of a restriction.

This article has shown that one feature which was *not* at the forefront of the minds of the early legislators of land law reform was the need to preserve the interests of beneficiaries in their properties from the standpoint of preserving those properties as *homes*. This was because the early attempts at land registration, and indeed the 1925 Law of Property legislation itself, was enacted against a socio-economic background in which land was looked upon more in the nature of personalty than realty. Consequently, the overreaching machinery propounded by Cherry was well suited to such times. Home ownership was much less then than it is now. Times have changed; home ownership and mortgage lending patterns are far

different at the beginning of the twenty first century than they were at the beginning of the twentieth century, and cases such as *Flegg* bring this into sharp focus. The Trusts of Land and Appointment of Trustees Act 1996 has placed more emphasis in disputes about trust property on the nature of property as a *home*. However, as has already been noted in such situations the courts still lean in favour of creditor interests.

As was pointed out in the Introduction, the Law Commission is not considering the specific topic of overreaching in connection with its current consultation about land registration reform. This is because overreaching straddles both registered and unregistered land, and “[it] is governed primarily by provisions in the Law of Property Act 1925.”⁶⁵ However, there have been calls by stakeholders for the overreaching doctrine to be reviewed, and crucially to consider the registration of trusts on the register.⁶⁶

There is reason to be optimistic that the Law Commission will consider this issue at some point in the future, perhaps in its forthcoming consultation concerning mortgages, as overreaching is inextricably linked to that topic. There is growing evidence to suggest that the question of the registration of trusts as a solution to some of the problems with the doctrine of overreaching is something which might be considered by the Law Commission in the future.⁶⁷ This article has sought to address that issue, and has put forward certain suggestions. However, as this article has endeavoured to show, it may well be that registration of trusts should be considered as a discrete topic and not just in connection with overreaching. There can be no doubt that there is growing evidence to suggest that there should be more *transparency* in business dealings generally, and debates about the future of the overreaching

⁶⁵ Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com CP No 227, 2016), [1.20]

⁶⁶ *Ibid.*, [1.21].

⁶⁷ *Ibid.*, [1.20].

doctrine, and the issue of trust registration in particular, should be seen in the context of that wider debate.⁶⁸ While debates concerning trust registration continue, the reform of the overreaching defence through modifications to restrictions might be viewed as a desirable reform proposal. The matter could be reviewed at a later date once the debates about trust registration in this jurisdiction become a little clearer.

Turning to the two questions posed in the Introduction, in summary we conclude that: (1) the concept of overreaching *should not be abandoned* in England and Wales in its entirety and should continue to exist in a modified form, as has been contended in the article, i.e. it would apply where a *notice* which *would trump* overreaching had not been entered. This proposal is made against the background of wider debates in respect of the registration of trusts which go beyond the specific topic of overreaching. An alternative based on the Australian and Canadian caveat systems, as we have seen, could result in the loss of the beneficial interest if the beneficiary failed to enter a caveat, which would overly favour *dynamic security* at the expense of *static security*.⁶⁹ For the reasons set out in this article, the authors do not consider the Irish model to be a suitable alternative in this jurisdiction either; (2) (a) we have argued that *there is a need* for reforming the overreaching doctrine. Hard cases such as *Flegg do* matter and it is likely that their numbers will increase rather than decrease. The law, as it stands, is clearly against people who might find themselves in the position of the Fleggs, and such people might well be suffering in silence; (b) we propose that the time has come for the *curtain principle* to be breached and to allow for the registration of trusts by way of a simple amendment to s 33(a) of the Land Registration Act 2002. This proposal is aligned to current calls for *transparency* in business dealings. From the sources cited in this article, it has been

⁶⁸ *Ibid.*, [1.22].

⁶⁹ It should be noted that in England and Wales if the beneficiary were *not* in actual occupation and a *sole* trustee sells, the beneficiary's interest in the property will be postponed to the purchaser's interest. Therefore, in this jurisdiction, it is not *always* the case that a beneficiary's interest survives whenever overreaching fails. For a recent discussion on this point, see *Haque v Khan* [2016] EWHC 1950 (Ch). For a recent case concerning overriding interests and overreaching, see *Mortgage Express v Lambert* [2016] EWCA Civ 555.

the practitioners who have been engaging more with this issue, and academic lawyers need to enter the debate. In the meantime, we suggest an additional restriction to the current suite of land registry restrictions set out in section 2.1 in part III of the article. The proposal for the registration of beneficial interests would not only promote legal certainty and align UK practices with more modern trends, but it would also serve the added goal of promoting transparency in line with other areas such as money laundering; combating use of charitable vehicles for use in terrorist financing; and transparency in public tendering. In other words, the present regime is out of step with current trends in making business dealings more transparent, and bringing transparency to the registration of trusts would represent a major step forward. Until the issues in that debate become clearer, it is suggested that the alternative proposal set out in section 2.1 of part III of the article is a practical proposal at the present time.

It is nearly thirty years since the reform of overreaching was last considered by the Law Commission,⁷⁰ and it is suggested that the time has come to revisit the topic.

⁷⁰ Law Commission, *Transfer of Land: Overreaching: Beneficiaries in Occupation* (HMSO, 1989), Law Com. No. 188.

