

Chapter 17

Question 1: Outline the rules that would be used to determine the enforcement of a beneficial interest against a purchaser where purchase money is paid to (i) one trustee and (ii) two trustees.

The overreaching mechanism discussed in this chapter is the principal priority rule applicable to beneficial interests. Where it applies, it takes precedence over other priority rules and the effect of the mechanism is to give the purchaser a defence against the enforcement of beneficial interests. Where it does not apply, the enforcement of beneficial interests falls to be determined under other priority rules of registered and unregistered land. This question draws on the key factor that determines the application of overreaching. As we have seen in part 2.3 of this chapter one of the conditions of the operation of the overreaching mechanism is that any capital money is paid to a minimum of two trustees or a trust corporation. Hence in determining the enforcement of beneficial interests a practical distinction can be made between one and two trustees trusts. Where purchase money is paid to two trustees the enforcement of beneficial interests is determined by the overreaching mechanism. Where purchase money is paid to one trustee the enforcement of beneficial interests falls to be determined under general land law priority rules. We have noted these rules in parts 1 and 7 of this chapter, though you should also refer to the relevant discussion of priority rules in chapters 15 and 16. In registered land, where purchase money is paid to one trustee beneficial interests may be enforceable against the purchaser as overriding interests if the beneficiary is in occupation of the land. We have considered the enforcement of beneficial interests as overriding interests in chapter 16.

Question 2: To what extent does the requirement that purchase money must be paid to two trustees for overreaching to take place protect the beneficiaries against dissipation of funds by trustees?

As we have seen in part 2.3, one of the requirements of overreaching is that the statutory requirements as regards payment of capital money must be complied with. These requirements are contained in section 27(2) of the LPA 1925 which provides that the proceeds of sale must be paid to a minimum of two trustees or a trust corporation. This should provide a level of protection to beneficiaries in ensuring the purchase money is retained for them. In essence, this is because it is easier for one trustee acting alone to defraud the beneficiaries than it is for two trustees, who will need to collude in order to do so. However, as we have seen, there are limitations in the protection afforded. In particular, you should take into account the following:

- We have seen that overreaching may occur even where the transaction does not involve payment of capital money. See the discussion of *State Bank of India v Sood* [1997] Ch 276 in part 2.3.
- Payment of capital money to two trustees did not protect Mr and Mrs Flegg in *City of London Building Society v Flegg* [1988] AC 54 where the trustees, their daughter and son-in-law, used money raised on security of the parties' shared home for their own purposes.

Question 3: Does a disposition by trustees in breach of trust (*ultra vires* or *intra vires*) have overreaching effect? What is the position of the purchaser following such a disposition?

We have seen in part 2.2.3 that the most satisfactory explanation of the legal basis of overreaching lies in the trustees' powers of disposition. As a consequence, only a disposition made within those powers has overreaching effect. However, we have seen in part 4 that this simple statement is qualified as there are different forms that a breach of trust may take and because statute may protect *purchasers* (but not volunteers) against the effects of a breach of trust by the trustees.

- Where trustees act within their powers, but notwithstanding in breach of trust, purchasers are protected by section 2 of the LPA 1925 provided the purchase money is paid to a minimum of two trustees. This is the view put forward by Ferris and Battersby which is considered in part 4.1. An example of this type of breach would be where trustees who have power to sell, sell the land but then misapply the proceeds (for example, *City of London Building Society v Flegg* [1988] AC 54).

- Where trustees act in breach of trust by acting outside of their powers (an ultra vires breach), then *prima facie* overreaching does not take place. However, purchasers will often be protected against the breach. Through these means, the purchaser's liability is in fact dependent on the scope of statutory protection rather than on the trustees' powers of disposition.
 - In registered land, by section 23 of the Land Registration Act 2002 (extracted in part 4.2.2), purchasers are protected against any limitation on the trustees' powers that is not entered on the land registry as a restriction.
 - In unregistered land, purchasers are protected by section 16 of the Trusts of Land and Appointment of Trustees Act 1996 (extracted in part 4.2.1) provided they do not have actual knowledge of the trustees' breach of trust.

We have noted, in part 4.1.1, that the wide statement of the powers of trustees now given in section 6(1) of the Trusts of Land and Appointment of Trustees Act 1996 as consisting of "all the powers of an absolute owner" is generally considered to carry the consequence that ultra vires breaches of trust are less likely to arise. However, we have noted that this argument is disputed by Ferris and Battersby who consider that other subsections of section 6 operate to curtail the apparently broad statement of the trustees' powers and increase the risk of transactions being ultra vires. In part 4.1.1 we have seen that Ferris and Battersby's argument was implicitly endorsed in *HSBC Bank plc v Dyche* [2009] EWHC 2954 (Ch). This is significant as – if correct – it means that *Flegg* is implicitly reversed, as the breach of trust in that case would now be classified as an ultra vires breach. A purchaser or mortgagee in such a case would therefore have to rely on the statutory provisions (outlined above) to take free from the beneficial interests. However, we have noted that there were other grounds on which overreaching could not have taken place in *Dyche* – in particular, the fact that there was only one trustee. We have suggested that the decision is unlikely to be followed on the Ferris and Battersby point without a full discussion of the implications.

Question 4: Assess the arguments for and against enabling overreaching of the interests of beneficiaries in occupation. What advice would you give an occupying beneficiary who is concerned that their trustee or trustees may sell the land?

This question requires you to assess the arguments we have discussed in part 3 concerning the position of occupying beneficiaries in relation to overreaching. Of central relevance is the decision in *City of London Building Society v Flegg* [1988] AC 54 and you will find it useful to refer to the extracts from that case in part 3. As we have seen, controversy surrounding the operation of overreaching is brought to the fore when it operates contrary to the interests of a beneficiary in occupation and this is most likely to arise where, as in *Flegg*, a home is held on trust by the trustees for themselves and other members of their family. We have highlighted that in such cases tension arises as the overreaching mechanism, which reflects use of land as an investment, conflicts with the intention of the trust, which was to use the property as a home. We have also seen in part 5 that following the decision in *Flegg*, the Law Commission recommended that the interests of a beneficiary in occupation should not be overreached unless he or she consented to the transaction (an extract from their Report is contained in part 5), but a decision has been made not to implement this recommendation. To assess these arguments you will find it useful to consider the following:

- What risks would arise for purchasers (and mortgagees) if occupying beneficiaries were exempt from overreaching unless they consented?
- Would a purchaser necessarily know whether an occupier was a beneficiary? Consider, for example, the effect of the "curtain principle" in registered land (a concept we have discussed in chapter 3 and in chapter 16).
- What rules may be needed to ensure that consent, where provided, was free and informed? Consider, for example, the role played by undue influence in ensuring proper consent is given to a mortgage (discussed in chapter 27, part 3.3).
- The operation of overreaching reflects an ethos that an interest in money is as good as an interest in land. Is this consistent with the ethos underlying the Trusts of Land and Appointment of Trustees Act 1996? You will find it useful to refer to our discussion of that Act in chapter 1 part 5 as well as to part 5 of this chapter.

To consider the advice you should give to a beneficiary who is concerned that their trustee may sell the land, you need to synthesize your knowledge of trusts and priorities from this chapter and chapters 13 and 14, as well as take into account the operation of the Trusts of Land and Appointment of Trustees Act 1996 from chapter 13 part 5. Key points of advice include the following:

- If the land is sold in a transaction that has overreaching effect, then their interests will shift from the land into the proceeds of sale. There is no special protection against this merely because they are in occupation.
- If the land is sold but the transaction does not have overreaching effect (for example, because there is only one trustee) then the enforcement of their beneficial interest against the purchaser will be dependent on the general priority rules of registered and unregistered land (the topic of question 1).
- If the land is registered, then the beneficiary can ensure that no transaction is made by a single trustee by entering a restriction on the register (on which see chapter 16). This will not prevent a sale (except a sale by a single trustee), but it will ensure that a sale has overreaching effect.
- If the sale is against the wishes of the beneficiary, then they may be able to prevent a sale on an application to the court under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (discussed in chapter 13 part 5.4). However, you should consider the likely outcome of such an application against the criteria in section 15.

Question 5: What are the dangers for a purchaser who buys land from a sole surviving joint tenant? To what extent have these dangers been overcome?

We have seen in parts 1 and 7 (and in our answer to question 1) that where there is a single trustee overreaching does not take place. Beneficial interests may then be enforceable against a purchaser under the general priority rules governing registered and unregistered land. In chapter 13 we have seen that through the process of survivorship the longest surviving joint tenant becomes sole owner. However, a legal joint tenant may hold on trust for beneficial tenants in common, whose beneficial interests are not affected by survivorship. Hence, the danger for a purchaser dealing with a sole surviving joint tenant is that he or she may be holding the land on trust for beneficial tenants in common. This may arise either because the beneficial interests have been held as tenants in common from the inception of the trust, or because severance has occurred since the creation of a trust for beneficial joint tenants. These beneficial interests may bind the purchaser under the general priority rules of registered or unregistered land.

An attempt to overcome these difficulties is provided by the Law of Property (Joint Tenants) Act 1964 which is discussed in part 7. Section 1 of that Act protects purchasers who deal with sole surviving joint tenants against claims by beneficiaries. However, we have seen that the Act is limited to unregistered land and, in *Grindal v Hooper*, unreported judgment 6 December 1999, protection was denied where the purchaser had notice of the beneficiary's interest.