A New Paradigm for Overreaching — A Brief Historical Perspective and Some Inspiration from The Emerald Isle

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Overreaching has a common law base and is a necessary concomitant of trustees’ powers.¹ However, in the context of registered land, this view has been challenged by Jackson in recent years.² This paper will suggest that one reason for this is because contemporary lawyers do not consider legal history sufficiently to search for reasons as to why the law in this area has developed in the way that it has. Lord Scarman once famously said that “[a]n English lawyer ignores history at his peril.”³ This paper proposes two options for the reform of the overreaching doctrine in the context of registered land in England and Wales.⁴ It will be argued that there has always been an element of fiction associated with overreaching, which has by now firmly become a part of the current law, and that this fiction needs to be discarded. The core contemporary issue with which the paper is concerned is the reform of overreaching, and relevant historical elements in the development of the doctrine are discussed in order to deepen our understanding of why the modern concept of overreaching is flawed, and why reform is necessary. Reform may have to take place if ever there were a successful challenge pursuant to the European Convention on Human Rights (ECHR) and this possibility will also be discussed.

The paper has four main components:— first it begins with a brief discussion of what is meant by a legal fiction. The second and third components, which deal with the historical background and with modern trends respectively, will take the position that whereas by 1925 it may be argued that overreaching had become divested of many of its fictitious traits, the way in which case law has developed in the last thirty five years shows that fiction is repeating itself,⁵ and that if the concept of overreaching was not fictitious in 1925, it certainly is now. It will be contended that problems associated with overreaching are likely to continue as a consequence of the element of fiction now associated with the doctrine. This position will be supported by a socio-legal analysis of trends in home ownership and mortgage lending since 1925. Contrary to the position taken by Megarry and Wade, the paper will contend that reforms to the doctrine are necessary.⁶

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³ Williams & Glyn’s Bank v Boland, [1980] 3 WLR 138 [HL].

⁴ One option is for the registration of trusts and the other is to make the interests of beneficiaries in discoverable actual occupation non overreachable in the event of a disposition by one trustee.


Finally, reform options in the context of registered land will be considered in the final section (the author has previously suggested certain reforms for the registration of trusts). As an alternative to the registration solution, it will be suggested that serious consideration should be given to legislating some of Jackson’s views, in modified form, which would allow for overreaching to take place in the context of registered land, even if the capital monies be paid to only one trustee. The proposal set out in this paper is that overreaching in the case of registered land should take place only if the beneficiary is not in occupation.

An examination of overreaching in the Republic of Ireland and proposals for reform in Northern Ireland will be considered: in the Republic of Ireland it is possible to protect trusts as claims in respect of registered land by the entry of an ‘inhibition’ which provides a beneficiary with an opportunity to be heard on an application for a registration which may defeat his or her interest. This is similar to the old caveat system in this jurisdiction prior to the Land Registration Act 2002. In Northern Ireland there are proposals for reform in connection with registered land which would allow overreaching by one trustee in certain circumstances, and will be considered in the final part of this article. It is suggested that something ought to be done, as it seems wrong that in England and Wales, the jurisdiction which invented the trust, we should countenance the possibility of the existence of the ‘trust without an equity’.

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9 Whereas the paper will argue against Jackson’s conclusions (insofar as registered land is concerned) that overreaching is not based upon trustees’ powers, and that registered land in this jurisdiction has its own overreaching machinery, that is not to say that certain elements of what Jackson wishes to bring about are neither sensible nor desirable.
10 As exemplified by the decision in City of London Building Society v Flegg [1988] A.C. 54 HL. The phrase ‘trust without an equity’ is taken from G.L.Gretton’s article, “Trusts without equity”, International and Comparative Law Quarterly, 2000 49(3), pp 599—620. In Scots Law there is no distinction between the legal and the equitable estate. The trustee is the owner and the beneficiaries have contractual rights as against the trustee—see p 599. Overreaching is therefore not a problem in Scots Law because there is no distinction between legal and equitable ownership—see p 605:

“…If the right of the beneficiary is real, how is it that a person acquiring from the trustee can take free from the rights of the beneficiary? If the beneficiary’s right is personal, the difficulty disappears: the third party is acquiring from the owner, and no other real rights affect the asset.”