Falcon Chambers

Overreaching under the Law of Property Act 1925

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Section 2 of the LPA 1925 is headed *"Conveyances overreaching certain equitable interests and powers"*. The terms "overreaching" and "overreach" are not defined in the Act. Rather, they take their meaning from the common law prior to 1925. As part of the overall scheme of simplifying the law relating to title to land and interests in land, those who were responsible for drafting this legislation (principally Benjamin Cherry) sought to set out in s.2 *"the various means by which, where a legal estate in land is affected by any one or more equitable interests or powers, that legal estate can be conveyed to a purchaser in such a way that the purchaser is not concerned with the title to the equitable estate or power or to obtain the concurrence of the owner thereof"*[1].

The flip side to the operation of this principle is that the equitable interest or power is not destroyed but rather is "shifted to become an interest in or power over the proceeds of sale". This is the sense in which the interest is "overreached". The core principle behind s.2 is that the purchaser need not be concerned on taking a conveyance with the equitable interests in the property.

In a seminal article which continues to stir debate about the nature and purpose of s.2, Charles Harpum KC explained overreaching as the process whereby existing interests are subordinated to a later interest or estate created pursuant to a trust or power[2].

S.2(1) sets out four circumstances where a "conveyance" of a legal estate to a "purchaser" will overreach an equitable interest or power affecting that estate. "Conveyance" has a broad definition (in s.205) and includes a mortgage, charge and every other assurance of property, except a will. "Purchaser" is defined (in relation to this Part of the Act) as a person who acquires an interest in or charge over property "for money or money's worth". Overreaching cannot, therefore, operate in relation to a gratuitous transfer of title to property.

The two categories of overreaching conveyance in subsection (1) which are most frequently encountered are conveyances by trustees of land, under sub-paragraph (ii) and conveyances by mortgagees or personal representatives under sub-paragraph (iii). In each case, it is a condition that the *"equitable interest or power is capable of being overreached"*. In relation to trustees of land, under (ii), it is necessary also that the requirements of s.27 of the Act are satisfied (which requires a sale by two or more trustees or a trust corporation). In relation to mortgagees / personal representatives, the capital money arising from the transaction must be paid to the mortgagee or personal representative for the interest to be overreached on conveyance.

An example of the operation of sub-paragraph (iii) is ***Duke v Robson*** [1973] 1 WLR 267. In that case, a dwelling house was owned by D1 and D2 and subject to a mortgage in favour of D3. D1 and D2 were in arrears and found a buyer for their interest (C) who contracted to buy the house from them. The contract was registered as an estate contract. Before

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[1] Wolstenholme and Cherry's Conveyancing Statutes (12 edition, 1932).

[2] "Overreaching, Trustees' Powers and the Reform of the 1925 Legislation" [1990] CLJ 277. This explanation of overreaching was cited with approval by Peter Gibson LJ in State Bank of India v Sood [1997][Ch. 276 at 281D (which is considered below).

that contract completed, the lender (D3) exercised its power of sale as mortgagee and agreed to sell the house for a higher price. The claimant sought to restrain the sale by the mortgagee but was unsuccessful. The reason was that under s.2(1)(iii), the sale by the mortgagee, under its paramount powers (here, the power of sale under s.101), overreached the interest of the earlier buyer. This reflects the fact that D1 and D2 retained only an equity of redemption and this was all they could pass to their purchaser. That equity of redemption was subject to the mortgagee's power of sale. The overreaching provision in s.2(1)(iii) is therefore an important mechanism for the exercise of a mortgagee's power of sale.

Overreaching and Overriding Interests

It is important to keep in mind the distinction between an interest being overreached and an interest being overridden[3]. In registered land a prior interest may be subordinated to the subsequent registered disposition An interest is overridden in the context of registered land by reason of failure to be protected at the time of registration. Sections 28-29 of the Land Registration Act 2002 ("**the 2002 Act**") provide for a rule of priority[4]. An interest is postponed to the interest which is the subject matter of the disposition affecting a registered estate or charge where the interest's priority is not protected at the time of registration.

The relevant registerable dispositions to which this priority rule applies are listed in s. 27 of the 2002 Act. Absent the relevant registration requirements they will not take priority over an unprotected interest affecting the estate or charge disposed of. Thus, for instance in order for section 27(1) to operate the disposition must be "for value". Registered dispositions which are made gratuitously do not affect the priority of any prior interest affecting the registered estate or charge disposed of.

Overreaching applies where (1) the disposition is capable of having overreaching effect, (2) the interest is one capable of being overreached and (3) the statutory requirements to affect over reaching are satisfied.

The overreaching removes the interest affecting the registrable estate or interest and this is so even though it would otherwise be one which could take effect as an interest which override the vegetable disposition: ***City of London Building Society v Flegg*** [1988] AC 54, HL. The purchaser is left to be able to take the estate or interest free of the equitable interest which would otherwise affect priority. ("Purchaser " is defined in section 205 (1)(xxi) of the 1925 Act) .

The, 1925 Act provides in s.14 that:

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[3] According to ***Megarry and Wade, Law of Real Property, 10th ed, para 4-063*** the traditional meaning of "overreaching" was the subordination of a proprietary interest to some later interest. Its modern meaning is narrower and is the process by which an interest is transferred into the proceeds of sale: see ***para 4.-64*** ibid.

[4] S.30 of the LRA 2002 applies the same rule of priority to the registrable disposition of a charge.

"This Part of this Act shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may be entitled in right of such possession or occupation."

In the context of unregistered land, the concept of notice has to a large extent been subsumed by the Land Charges Act 1972. Thus an "estate contract" would need to be protected on the Land Charges register to be protected on a disposal of the legal estate; mere occupation would be insufficient. Of course there is no requirement to register a legal interest under the LCA 1972: ***Church of England BS v Piskor*** [1954] Ch 55, CA.

In the context of registered land, the priority of an equitable interest may be protected by entry of a notice or caution. Furthermore as is well known, certain interests remain protected albeit no priority has been secured by an appropriate entry on the registered title. Thus, in registered land the interest of an occupier in actual occupation of the registered estate at the time of the disposition is binding on the disponee: paragraph 3 of Schedule 3 to the Land Registration Act 2002.

However, the priority provisions contained in the Land Charges Act 1972 and the 2002 Act do not replace the general principles of overreaching; those principles apply in relation to both unregistered and registered land. The fact that an interest may override and therefore be protected against a registerable disposition of a legal estate, does not preclude the operation of the principle of overreaching. The interest overreached is not destroyed but instead shifts to the proceeds of sale or other capital money arising: sections 2(1)(ii) of the 1925 Act.

But what of s.14 of the Law of Property Act? In ***City of London BS v Flegg*** 1988 above, it was held that the principle of overreaching nevertheless applied; the overreaching process did not involve prejudice to the interest of occupying beneficiaries under a trust for sale because their beneficial interest is always essentially not in the land but in the proceeds of sale.

And at 91 Lord Oliver said:

> "Once the beneficiary's rights have been shifted from the land to capital monies in the hands of the trustees, there is no longer an interest in the land to which the occupation can be referred or which it can protect. If the trustees sell in accordance with the statutory provisions and so overreach the beneficial interests in reference to the land, nothing remains to which a right of occupation can attach and the same result must, in my judgment, follow vis-a-vis a chargee by way of legal mortgage so long as the transaction is carried out in the manner prescribed by the Law of Property Act 1925, overreaching the beneficial interests by subordinating them to the estate of the chargee which is no longer "affected' by them so as to become subject to them on registration pursuant to section 20(1) of the Land Registration Act 1925."

As Lord Templeman said ibid at 72:

> "Section 14 of the Law of Property Act 1925 is not apt to confer on a tenant in common of land held on trust for sale, who happens to be in occupation, rights which are different from and superior to the rights of tenants in

> common, who are not in occupation on the date when the interests of all tenants in common are overreached by a sale or mortgage by trustees for sale."

Overreaching was, therefore, contrary to those statutory provisions.

The general principle of overreaching applies to overreach any equitable interest[5] or power affecting the estate regardless of whether the purchaser has notice of it, provided that the conveyance is of a legal estate (made by two trustees or a trust corporation). There are only two legal estates created by the LPA 1925, namely a freehold and a term of years absolute. Thus the grant of an easement, albeit a legal interest in land is not a legal estate in land: ***Baker v Craggs*** [2018] Ch 617, CA.

The 1925 Act effected a fundamental reform by reducing legal estates in land to two, namely, a fee simple in possession, and a term of years absolute. As was said by Henderson LJ in ***Baker v Craggs***:

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[5] Certain interests are exempted from the operation of overreaching by s.2(3) of the LPA 1925, which provides:

"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."

s.2(1) also refers to the fact that overreaching will take effect in relation to interests which are "*capable of being overreached*", thereby indicating that some but not all interests can be overreached. It is not made expressly clear whether any exceptions are limited to those specifically set out in s.2(3) or whether the term "capable" has a wider meaning and if so to what extent. It should be noted that the specified exceptions in s.2(3) are stated to be applicable only to s.2(2). As noted by ***Ruoff and Roper, Registered Land, para 15.005*** s.2(2) is" *a rarely used separate overreaching provision from that in s.2(1), which is intended to be utilised for the purposes of overreaching equitable interests having priority to the trust itself and involves a disposition by a trust corporation or by trustees specially appointed by the court*."

"24. Section 1(1) of LPA 1925, the first building block of the entire 1925 property legislation, states that the only estates in land which are capable of subsisting or of being conveyed or created at law, or in other words the only legal estates in land which are now capable of existing, are an estate in fee simple absolute in possession, and a term of years absolute. As the introductory note to LPA 1925 in *Wolstenholme & Cherry's Conveyancing Statutes*, 13th ed (1972), vol 1,p 32 says:

> 'Part I of the Law of Property Act, 1925 . . . was entirely new; it effected a fundamental reform by reducing legal estates in land to two, namely, a fee simple absolute in possession, and a term of years absolute . . .'

Previously, various other estates in land had subsisted at law, such as fee tails, life estates and determinable fees. Subject to transitional provisions, these were now abolished.

25. Section 1(2) then creates a limited category of 'interests or charges in or over land which are capable of subsisting or of being conveyed or created at law'. This category includes, by virtue of paragraph (a), an easement 'for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute' and thus includes an easement such as that which the Charltons purportedly granted to the Bakers. By virtue of section 1(4), the two estates in land referred to in subsection (1), and the interests or charges in or over land which are itemised in subsection (2), are together defined as 'legal estates', and that definition is reflected in section 205(1)(x). By contrast, all other estates, interests, and charges in or over land take effect as equitable interests: see section 1(3), and (again) section 205(1)(x).

26. This is the carefully constructed conceptual framework within which the overreaching provisions in section 2(1) of LPA 1925 have to be placed. The opening words of the section confine its operation to cases where there is "[a] conveyance to a purchaser of a legal estate in land". Section 1(1) has just taught us that the only legal estates in land which are capable of subsisting, or of being conveyed or created, are an estate in fee simple absolute in possession and a term of years absolute. Accordingly, it would seem to follow that the doctrine of overreaching can only apply where such an estate in land is conveyed to a purchaser. The grant of an easement to a purchaser of land is not a conveyance of a legal estate in land within the meaning of section 1(1). Rather, it is the grant of an interest over land which, if it is granted for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute, is the grant of a 'legal estate' within the meaning of subsections (2) and (4)."

The Court of Appeal's conclusion was unaffected by the fact that the grant of a charge by way of legal mortgage, not itself being a legal estate, as opposed to an interest, in land, also has overreaching effect, provided that the proceeds of sale or other capital moneys

are paid to not less than two trustees or a trust corporation. The Court said that the answer to this point was provided by section 87 of LPA 1925, which confers upon the mortgagee the same protection *as if he had been granted a mortgage term by demise or sub-demise of the mortgaged property*. Such a mortgage term would be a term of years absolute within section 1(1)(b). The fact that a charge by way of legal mortgage also falls within section 1(2)(c) of the LPA 1925 did not invalidate this reasoning. It merely showed that, for the statutory purpose of conferring protection on the mortgagee, a charge by way of legal mortgage is also deemed by section 87 to create an estate in land properly so-called.

The facts of ***Baker v Craggs*** are of some interest. It involved a disposal by a common vendor. (the Charltons) who sold part of their farm to Mr Craggs but failed to reserve a right of way over its yard to a barn which they proposed to sell afterwards. Prior to Mr Craggs registration at the Land Registry they sold the barn to the Bakers. When doing so they purported to grant a right of way over the farm which had been sold by them to Mr Craggs. This would not have caused a problem as Craggs had undertaken an official search with priority which would have protected his interest, yet to be registered, against any intervening adverse interest created in the "registration gap" i.e. between the disposal and the registration.

However, the Land Registry then cancelled Mr Craggs application for registration such that he lost the protection provided by the official search. When Craggs came to register the right of way over the land he had acquired was noted against his title. Thus, on the face of it the matter was required to be dealt with by the priority rules in ss28 and 29 of the 2002 Act. Mr Craggs interest ought to have had priority because he was in occupation, and his priority was thus not overridden by the subsequent disposition to the Bakers . This, as Henderson LJ said in the Court of Appeal, was the "*instinctive reaction of most property lawyers*" (at [3])]. As he said:

> "…. the problem appears to be one of priorities, to be answered in accordance with the detailed rules contained in the Land Registration Act 2002 ("LRA 2002?@~"). Applying those rules, the purported grant of the easement over Blackacre by V [the Charltons] to B [the Bakers] could not prevail over A"s [Mr Craggs] right to be registered as the proprietor of Blackacre free from the easement, because A's equitable interest in Blackacre under the bare trust arising on completion of his purchase was protected by his actual occupation of Blackacre, and was therefore an overriding interest under section 29 of, and paragraph 2 of Schedule 3 to, LRA 2002, which V therefore could not defeat by the subsequent grant of the easement to B."

However, Newey J at first instance saw otherwise. He determined ([2017] Ch 295), on a claim for a declaration by the Bakers that they had a right of way binding on Mr Craggs, that the vendors' grant of the right of way and its registration by the Bakers (the claimants) during a delay in the registration of Mr Craggs' title was a "conveyance to a purchaser of a legal estate in land'' within the meaning of section *2*(*1*) of the Law of Property Act 1925. The Charltons held the Baker barn on trust for themselves while the farm will have been

held on bare trust for Mr Craggs. When the Bakers granted an easement crossing the farm, the proceeds of sale (as part of the purchase price of the Baker barn) were paid to two trustees, i.e. the Charltons. Thus, it was said the requirements of *sections 2 and 27* of the LPA were therefore satisfied: there was a "conveyance to a purchaser of a legal estate in land" (for relevant purposes, the easement) "made by trustees of land" (namely, the Charltons) and the proceeds of sale were paid to two trustees (again, the Charltons).

Accordingly Mr Craggs' equitable interest in the land to be acquired had been overreached and subordinated to the claimants' right of way for the purposes of that provision. This was so notwithstanding that Mr Craggs was in actual occupation of the yard within the meaning of section 29 of and paragraph 2 of Schedule 3 to the Land Registration Act 2002 at the time the Bakers' land purchase from the vendors. He accordingly granted the declaration to that effect. On that declaration being set aside the simple priority position of the LRA 2002 as noted above governed the position and Mr Craggs took free of the Bakers' right of way. .

Baker v Craggs raised a novel issue, which was whether the doctrine of overreaching in section 2(1) of the Law of Property Act 1925 was capable of operating in circumstances where the conveyance to a purchaser which was alleged to have the overreaching effect was the grant of an easement over land, and the equitable interest which was said to be overreached was not an interest in the easement itself, or even in the land conveyed to the purchaser with the benefit of the easement, but an interest in the servient tenement which the common vendor had previously contracted to sell to a third party, and which (following completion of that sale) the vendor held as a bare trustee for the third party pending registration of his title with HM Land Registry. However, as the Court of Appeal points out, if the grant of the easement was said to engage overreaching that gave rise to conceptual difficulties. The Bakers were seeking to overreach Craggs interest in his own property by the grant of an easement over it by the common vendor.

As Henderson LJ said:

> "On the assumption that section 2(1) did apply, its effect would be to overreach "any equitable interest . . . affecting that estate", which would have to mean an equitable interest in the legal estate conveyed to the purchaser, namely the easement itself. But the easement had no prior existence before it was granted by the Charltons, and the equitable interest which Mr Craggs had was his beneficial interest in the servient tenement under the bare trust arising on completion of his purchase, *not an equitable interest of any description in or over the land sold to the Bakers*." (Emphasis added)

Furthermore, as noted above, overreaching applies only where the interest is one capable of being overreached. S.2(3) of the 1925 Act contains a little-known list of exemption from the operation of overreaching. One of those exemption is "(iv) the benefit of any contract .....to convey or create a legal estate....." Mr Craggs argued before Newey J that this exemption applied to him. Newey J rejected this on the basis that a contract for the sale of registered land merges in a transfer, so the contract for sale of the farm to Mr Craggs ceased to exist when the transfer of the farm to him was executed. No challenge was

made by Mr Craggs to the judge's determination on this point and Henderson LJ expressed no view on the matter (at ibid [21]).

Overreaching applies only where the interest is one capable of being overreached. It has been held that section 2(1) of the Law of Property Act 1925 is not limited to beneficial interests under trusts. It is clear from the opening words of that section that it applies to "*any* equitable interest" affecting the estate[6]; and equitable interests are themselves widely defined by section 1(8) of that Act. Moreover the express list of exclusions from overreaching in section 2(3) (which includes such matters as easements, equitable charges protected by deposit of deeds, and estate contracts) demonstrates that the ambit of overreaching is wide, otherwise those exclusions would not have been necessary. In ***Mortgage Express v Lambert*** [2017] Ch 93, CA it was said that a mere right to set aside a transaction as being unconscionable was capable of being overreached albeit it was potentially an overriding interest.

The interplay between overreaching and overriding interests was considered in ***Birmingham Midshires Mortgage Services Ltd v Sabherwal*** (1999) 80 P& CR 256. Mrs Sabherwal was assumed to have had an interest in a house as a result of a proprietary estoppel: precisely the kind of interest contemplated by section 116 of the 2002 Act. Robert Walker LJ said, at para 24:

> "On that basis, it would have been a remarkable result if those more precarious rights were incapable of being overreached, on a sale by trustees, under section 2(1)(ii) of the Law of Property Act 1925."

He then considered a number of cases in which rights in equity were held not to have been overreached by a disposition. He concluded, at para 28:

> "The essential distinction is, as the authors of *Megarry & Wade* note, between commercial and family interests. An equitable easement or an equitable right of entry cannot sensibly shift from the land affected by it to the proceeds of sale. An equitable interest as a tenant in common can do so, even if accompanied by the promise of a home for life, since the proceeds of sale can be used to acquire another home."

<u>Payment of Capital Money</u>

The third condition for overreaching to occur is concerned with the payment of capital money arising under a disposition: s.2(1)(ii). One such requirement is contained in s.27(2), which provides for payment of "the proceeds of sale or other capital money" to be made to two or more trustees, a trust corporation (or a sole personal representative).

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[6] ***Meggary and Wade*** ibid note that there are a few exceptional cases where there is a statutory power to overreach legal interests: ibid at 4-066.

Unhelpfully, "capital money" is defined in the LPA[7] by reference to a definition in the Settled Land Act 1925 (**SLA**). For the purposes of both acts, money is capital[8] money if it is of a capital nature and is receivable for the trusts and purposes of the SLA. The term is not however taken as confined to money arising under the powers and provisions of the SLA.

What happens if no capital money arises time of the conveyance, or at all?

This question came before the Court of Appeal in ***State Bank of India v Sood*** [1997] Ch 276.

In *Sood,* the first and second defendants were registered proprietors of land over which they executed a second legal charge as security for certain present and future liabilities.

The mortgagee claimant brought possession proceedings in which the third to seventh defendants argued that they had equitable interests which overrode the mortgage by virtue of their occupation (under the Land Registration Act 1925 s.70(1)(g)). They also contended that, because no capital money had been paid over at the time the mortgage was made, the requirements of s. 27(2) were not engaged and their interests were not overreached.

Peter Gibson LJ rejected the contention that there had been no compliance with s.27(2) absent any contemporaneous advance, citing with approval the Harpum article referred to above[9], and rejecting an apparent consensus between counsel. It argued that the exercise, *intra vires*, of a power of disposition which does not give rise to any capital money, such as an exchange of land, overreaches just as much as a transaction which does.

Further, the Court was not willing to infer from the wording of the statute that s.2(1)(ii) was premised on the existence of capital money because of the absence of the word "any" from s.2(1)(ii) (which the beneficiaries observed features before the term "capital money" in paragraphs (iii) and (iv) of s.2 (1)).

[7] s. 205(xxvi)
[8] s. 117(1)(ii)
[9] [1990] CLJ 277

The beneficial interests of the third to seventh defendants were therefore held to have been overreached[10], and could not override the mortgage by virtue of their occupation.

The result was that their interests attached to the equity of redemption, which was in the event worthless given the indebtedness secured.

From a conveyancing perspective, the exclusion of equitable interests from title and the ability to overreach them has many attractions; it delivers certainty and simplicity. The necessary consequence is potential hardship on beneficial owners, even if an actual occupation of their homes. Calls for reform[11] to increase protections for occupying beneficial owners have not ultimately found favour.

In reality, most lenders will procure beneficiary consent before proceeding, and in the context of a sale, beneficiaries will ordinarily have to concur to achieve vacant possession on completion.

[10] Of note is the view taken by the authors of *Emmet & Farrand On Title* [5.141] that the CA departed from orthodoxy in *Sood,* by mischaracterising the case as one of true overreaching, and criticising the adoption of Dr Harpum's 'expansive' approach. Perhaps unsurprisingly a different view is to be found in Megarry & Wade *The Law of Real Property* (9th edition) at [4-063] – [4-064], which contends overreaching applies not only to the transfer of an interest in land to some other property, but more generally to subordination of interests upon the exercise of a power or by reason of a trust. *Sood* was cited in the SC last year as authority for this proposition without qualification: *Byers and others v Saudi National Bank* [2024] A.C. 1191

[11] Law Com. No 188. *Transfer of Land, Overreaching: Beneficiaries in Occupation* (1989)