TO SELL OR NOT TO SELL: THAT IS THE QUESTION
THE IRONY OF THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996

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The 1925 property statutes, particularly the Settled Land Act 1925 and the original sections 30 to 36 Law of Property Act 1925, were premised on a fairly narrow view of the prevalence and purpose of co-owned land. Successive interests either fell within the awkward provisions of the Settled Land Act 1925 or were organised under a trust for sale within the ambit of the Law of Property Act 1925. Concurrent co-ownership could exist, also under a trust for sale, but the Law of Property Act 1925 was premised on the assumption that such trusts would be expressly created, with readily identifiable beneficiaries, holding in defined shares, often for investment purposes and primarily in respect of larger land holdings. That is why the original scheme was a trust for sale, why sections 34 and 36 Law of Property Act 1925 appear not to contemplate the implied trust of land at all, why interests behind trusts originally were not regarded as proprietary, why statutory overreaching is so powerful and why sections 2 and 27 Law of Property Act 1925 stipulate a requirement of at least two trustees or a trust corporation before overreaching can occur. Concurrent co-ownership was, essentially, a financial not a residential matter, and the ready conversion of land to liquid asset was regular and expected. The position today is virtually the reverse, with concurrent co-ownership being the normal way by which the family home is owned and with the expectation that it will be retained as that home. Realisation of its capital value is intended to be postponed until the family’s needs have changed.

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1 Prior to Bull v. Bull [1955] 1 Q.B. 234 it was not clear that implied co-ownership necessarily should give rise to a statutory trust for sale.


3 It is commonly said that ss. 2 and 27 require two trustees, implying that the purpose behind these provisions was to safeguard against attempted overreaching by a single trustee. In fact, the single trustee of land was barely contemplated by the 1925 legislation because no practitioner would draft an express trust with a sole trustee, and implied trusts were almost unheard of. Two trustees were thus a “requirement” only in the sense that they were the norm. Indeed, originally it was more important to limit the maximum to four trustees – Law of Property Act 1925, ss. 34(2) and 36(1).

4 And also property held by small businesses, especially family concerns.

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The 1925 property legislation’s assumption that co-ownership of land would take one of two expressly created forms was mirrored by the fact that implied co-ownership was relatively rare until the House of Lords’ judgments in *Pettitt v. Pettitt*⁵ and *Gissing v. Gissing*.⁶ As well as generating a mountain of litigation concerning the primary question of when an interest actually could be acquired impliedly,⁷ *Pettitt and Gissing* also triggered a flood of case law that sought to work out the consequences of implied co-ownership for third parties. The horror at the prospect of overriding interests affecting mortgagees⁸ was matched only by the equal but converse horror at the prospect of forced over-reaching of beneficial owners in occupation of their own homes.⁹ Problems of consent,¹⁰ undue influence¹¹ and the need for judicial inventiveness to minimise the “registration gap” and close the *scintilla temporis*¹² are also by-products of the emergence of implied co-ownership and the imposition of a statutory trust in such cases.¹³ Of course, many of the problems generated by implied co-ownership have been resolved with a measure of clarity,¹⁴ but one area of difficulty that has not received the full attention of the House of Lords in the same way that *Boland, Flegg, Rosset, Cann and Etridge* have dealt with other questions, is the manner in which the court should exercise its discretion when there is a dispute about whether residential co-owned land should be sold. Of course, the issue arises whether land is held on an implied or express trust or by one trustee or two,¹⁵ and although the following analysis will draw from cases of all types, there is no doubt that the problem is more acute if one co-owner has only an equitable

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⁷ *Pettit and Gissing* led to *Lloyds Bank v. Rosset* [1990] 1 All E.R. 1111 and the issue has been reopened by *Stack v. Dowden* [2007] UKHL 17, [2007] 2 A.C. 432, albeit in the context of quantification of shares. *Jones v. Kernott* [2010] EWCA Civ 578, [2010] 1 W.L.R. 2401, on the same issue, has been heard by the Supreme Court, but at the time of writing judgment has not been given.
¹³ In routine cases, conveyancers now advise in favour of a transfer into joint names. Baroness Hale’s suggestion in *Stack* that it should be compulsory to complete the relevant panel on Land Registry transfer forms expressly declaring the nature of the equitable interests has much merit. It has not been adopted in the 2008 amendments to the Land Registration Rules, see *Explanatory Memorandum to the Land Registration (Amendment) Rules* 2008 at p.17, http://www.opsi.gov.uk/si/si2008/emi/uksiem_20081919_en.pdf.
¹⁵ Only infrequently is legal title to residential property held by more than two trustees, although the same considerations apply should there be three or four trustees.
interest as they are unable per se to control dealings with the legal title and may find themselves facing an application for sale by a mortgagee of whom they know nothing.16


The reforms of the Trusts of Land and Appointment of Trustees Act 1996 were driven in large measure by recognition that the original 1925 regimes were ill-equipped to deal with the widespread and mandatory application of either the strict settlement or, more particularly for our purposes, the statutory trust for sale, to co-ownership of residential property. In fact, even before the Law Commission first began its consideration of trusts of land in 1984,17 the judiciary already had taken matters into their own hands by bending the traditional analysis of trusts for sale to fit the reality of the situation.18 The Trusts of Land and Appointment of Trustees Act 1996 was, in consequence, part a recognition of existing practice and part a reforming statute. As Lord Mackay of Drumadoon explained when moving the second reading of the Trusts of Land Bill:

[T]he trust for sale mechanism is not appropriate to the conditions of modern home ownership, which represents the majority of jointly-owned real property, since it is based on an assumption that property which is not subjected to a strict settlement is intended as an investment rather than as a home, to be bought and sold as market conditions demand, with the beneficiaries being interested in the proceeds of sale rather than the property for its own sake.19

As is well known, central among the changes wrought by the Trusts of Land and Appointment of Trustees Act 1996 was the near abolition of the strict settlement and the re-ordering of the trust for sale as a trust of land with, inter alia, the replacement of section 30 Law of Property Act 1925 with sections 14 and 15 Trusts of Land and Appointment of Trustees Act 1996 and the insertion of section 335A into the Insolvency

16 An equitable owner might seek the entry of a standard Form A restriction controlling the dispositive powers of a sole trustee unless and until a second trustee is appointed or the court makes an order under section 14 of the Trusts of Land and Appointment of Trustees Act 1996; see Land Registration Act 2002 s. 43(1)(c) and Land Registration Rules 2003, r93(a).
18 Both Bull and Boland recognised the essentially proprietary nature of the interest behind the trust for sale.
Act 1986. As the Law Commission stated explicitly, it was fundamental to the reforms that a court should be able to refuse sale as well as order it, there being no longer a duty to sell even in contested cases. Although the Law Commission believed that the pre-existing “primary purpose” doctrine encapsulated good general practice, the “main purpose of the trust will no longer be the realisation of the capital value of the land.” Instead, the court was now entitled and required to reach a balanced conclusion, including in its assessment the factors listed in section 15 Trusts of Land and Appointment of Trustees Act 1996 (and where applicable section 335A Insolvency Act 1986). Apart from the obvious point that the removal of the duty to sell reflected the reality of how co-owners viewed their land, the reforms also recognised that the legal owners had to take their duties as trustees seriously. Likewise, the hitherto judicial protection of the rights of “mere” equitable owners was given statutory form. In other words, at its inception, the 1996 Act was intended to make plain both that sale was no longer the required solution of last resort and, crucially, that a court should not presume that the balance between the parties to a section 14 application lay in any particular direction – save in some cases of bankruptcy.

This re-casting of the law concerning contested sales was recognised judicially both before and after the 1996 Act came into force. In Banker’s Trust v. Namdar, a contested sale between one trustee of the land (who was also an equitable co-owner) and a mortgagee of the other co-owner’s equitable interest, resulted in a sale at the request of the lender. Sale was granted with some reluctance under section 30 LPA 1925 with Nourse LJ remarking that it is “unfortunate for Mrs Namdar that the very recent Trusts of Land and Appointment of Trustees Act 1996 was not in force at the relevant time as the result might have been different”. Even more clearly, in Mortgage Corporation v. Shaire, the mortgagee’s interest was postponed to that of Mrs Shaire for similar reasons to those in Namdar and Neuberger J.
dealt explicitly with the submission that a sale should be ordered under the now in force sections 14 and 15 of Trusts of Land and Appointment of Trustees Act because that would have been the outcome under section 30 Law of Property Act 1925. In his view, there were eight reasons why the new law should not follow blindly the interpretation of the old, not least of which was his perception that the Act was intended “to tip the balance somewhat more in favour of families and against banks and other chargees”. Consequently, he concluded that “these factors, to my mind, when taken together point very strongly to the conclusion that s.15 has changed the law. As a result of s.15, the court has greater flexibility than heretofore as to how it exercises its jurisdiction on an application for an order for sale … Once the relevant factors to be taken into account have been identified, it is a matter for the court as to what weight to give to each factor in a particular case”.29 As a matter of principle, therefore, the issue is clear. As Chadwick LJ put it in *William v. London Borough of Wandsworth*, it is “impossible to support the judge’s conclusion that, as a matter of law, if one joint owner wishes to sell property, the other joint owner is compelled to comply with that wish. Whatever may have been the position before the Trusts of Land and Appointment of Trustees Act 1996 … the position since that Act is that, on an application for an order that trustees of land concur in a sale, the court may make such order as it thinks fit”.”30

It would be wrong, however, to regard the early cases under Trusts of Land and Appointment of Trustees Act 1996 as establishing a pattern. Recognition that new legislation has a different emphasis does not always translate into different outcomes in concrete cases. For example, in *TSB Bank plc v. Marshall*, the trial judge accepted explicitly that the pro-sale case law concerning the now defunct section 30 Law of Property Act 1925 was applicable to disputes arising under section 14.31 This is hardly surprising because, whether or not one regarded the section 30 principles as striking a fair balance between “liquidation” and “retention” claims, previously there had been a degree of consistency and certainty in the courts’ approach that was not only due to the existence of a baseline duty of sale. There was also a general reluctance to tie one party to another or to force creditors to wait for their money.32 Whereas pre-Trusts of Land and Appointment of Trustees Act 1996, the interests of the beneficiaries under the trust were recognised by statute as being justifiably convertible to money, the removal of this presumption left a void which the courts were uncertain how to fill.

Since 1 January 1997, bereft of the guiding principle of sale, the courts have struggled to find a consistent approach within the framework of the “new” legislation. After all, it is one thing to understand that the provisions of the Trusts of Land and Appointment of Trustees Act 1996 mean that a sale is no longer required, but quite another to identify those circumstances where a sale would not now be ordered even though that might have been the case under the old law or, ironically, to order sale now in those circumstances when under the old section 30 Law of Property Act 1925 a sale would have been denied. As explored in detail below, even though all of the cases concerning a contested sale necessarily have in common that single fact – that someone wants a sale contrary to the wishes of another interested person – it has become apparent that an application for a sale may be triggered by vastly different events and in a number of very different circumstances. While it is certain that sections 14 and 15 are applicable in all cases of contested sale,33 albeit that the latter yields to the Insolvency Act 1986 in cases of bankruptcy,34 it is not readily apparent why the template for the exercise of judicial discretion established in one type of case should be followed in a completely different type of case. Of course, the legislation requires the same statutory criteria to be considered in all cases (excepting the special bankruptcy rules), but that does mean that application of the factors specified in section 15 Trusts of Land and Appointment of Trustees Act 1996 or section 335A Insolvency Act 1986 should not distinguish between different types of case. Even more so given that it is clear that the section 15 criteria are not exhaustive of the matters that a court can consider. This is more than the trite argument that “each case depends on its own facts”. It is, rather, the contention that different types of case should be treated differently within the applicable statutory framework. It is the aim of this article to examine the different circumstances in which an application for sale of co-owned land may be made in order to assess whether the courts have recognised that different categories of case might require different solutions or a different emphasis (and if not, whether they should) and to assess whether the current interpretation of the legislative provisions is consistent with the purpose behind the reforms of the Trusts of Land and Appointment of Trustees Act 1996.

33 Section 14 can be used in disputes unrelated to sale: for example, questions of possession and rent; questions of partition; questions as to the duties of the trustees. Applications requesting the court to determine the beneficial interest of a claimant may also be made under section 14 – e.g. Oxley v. Hiscock [2005] Fam. 211, [2004] 3 All E.R. 703 – but many of these disputes now fall to H.M. Adjudicator to the Land Registry as they arise in the context of an application to enter a restriction against the title of a sole legal owner requiring payment of monies to two trustees.

34 As amended by the Enterprise Act 2002.
II. CONTESTED SALES UNDER THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996: TYPE CASTING

Should a dispute about sale end up before the court, the judge must decide whether to sustain the trust of land or to permit the applicant to liquidate their stake in the property through sale, perhaps with some ancillary orders as to accounting, occupation rent and the like.\(^{35}\)

Sections 14 and 15 Trusts of Land and Appointment of Trustees Act 1996, supplemented by section 335A Insolvency Act 1986 in cases of bankruptcy, provide the framework for the exercise of the discretion.\(^{36}\)

Bankruptcy aside, the statutory provisions do not discriminate significantly between the different circumstances in which a contest over sale may arise. In particular, while the section 15 criteria focus on the probable consequences for various parties should a sale be ordered, it does not require the court to consider why a judicial sale is required in the first place.\(^{37}\) This may not be a surprise given that sections 14 and 15 concern applications for all purposes concerning co-owned land, but there is no doubt that a request for sale (and of course possession) is the application most likely to be resisted. In a regular dispute between co-owners, the application for sale is usually because the parties cannot agree as to the future use of the property. But, other applicants, such as mortgagees, have powers of sale outside of the provisions of Trusts of Land and Appointment of Trustees Act 1996 and it might well be very relevant why, for example, the secured creditor is unable to sell by reason of its power as mortgagee. In fact, there is nothing in the legislation to prevent a court from asking itself why the parties have had to resort to the court in the first place. Under section 14, the court is required to make such order “as the court thinks fit” and its consideration must “include” the factors listed in section 15, but we know that this does not exclude consideration of other factors. Perhaps the omission of a specific direction to consider why a judicial sale is required betrays the origin of sections 14 and 15 as springing from section

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\(^{35}\) Other solutions are possible. In Blackford v. Tate [2008] EWHC 693 (Q.B.), there was a successful application to transfer legal title absolutely to one of the existing co-owners and in Hopper v. Hopper [2008] 1 F.C.R. 557, the applicant was given a choice as to how to satisfy the other party’s interest in the property.

\(^{36}\) See also Insolvency Act 1986, s. 336(4) for when matrimonial home rights arising under the Family Law Act 1996 are in issue. For property adjustment for separating married couples or civil partners see Matrimonial Causes Act 1973 and Civil Partnership Act 2004, Sch. 5; for provisions concerning children see Children Act 1989 Sch. 1 and, in general, the jurisdiction to make occupation orders under Part IV of the Family Law Act 1996.

\(^{37}\) The matters to which the court is to have regard in determining an application for an order for sale under s. 14 (save in cases of bankruptcy) include: the intentions of the person or persons (if any) who created the trust; the purposes for which the property subject to the trust is held; the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home; the interests of any secured creditor of any beneficiary; the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority according to the value of their combined interests.
Law of Property Act 1925 in that the legislation may not have quite shaken off the idea that the land is, ultimately, an asset that should be liquidated. The idea that a court could require one party to remain locked in co-ownership (albeit with the possibility of some compensatory payment) until the other decides to sell is inherent in the legislation but, one suspects, not rooted in the judicial mind. Yet, it seems almost trite to point out that the social, economic and legal reasons for the applicant having to seek an order for sale should be a relevant consideration. Whether an intuitive preference for sale bears upon the exercise of the judicial discretion found in section 15 and whether this can be counteracted by reference to the history of the parties legal relationship prior to the application for sale, forms part of the following analysis of the different circumstances in which a contested sale may arise.

A. Type 1, Disputes between Co-owners: No Third Party Interest

A dispute between the co-owners may arise in variety of circumstances, but often there is some kind of relationship breakdown, either personal or professional. Of course, the co-owners need not be sexual partners, but if the couple are married or in civil partnership, or children are involved, then the question of sale may be subsidiary to issues of property adjustment or the welfare of those children and section 14 may not be the relevant statutory provision. Likewise, the Trusts of Land and Appointment of Trustees Act will be irrelevant where the parties are content with (or not against) a sale in order to release themselves from the financial and emotional burden of sharing a property.

This means that there is not a large body of case law concerning disputes just between co-owners about sale where the relevant statute is an application under section 14 Trusts of Land and Appointment of Trustees Act. Consequently, it is unwise to draw any firm conclusions about the way in which the discretion to order sale will be exercised. However, there are indications of a general approach. Indeed, the important point for the purposes of this analysis is that the co-owners in this type of situation stand on a level playing field. It may well be that only one is a legal owner, but the Trusts of Land and Appointment of Trustees Act 1996 has ensured that this does not raise a presumption that the legal owner’s wishes are paramount. A fortiori if both are

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38 Bankruptcy excepted, Insolvency Act 1986, s. 335A(3).
39 See above note 36. Where divorce or similar proceedings are imminent, it is usually appropriate to defer any application made under Trusts of Land and Appointment of Trustees Act s. 14 in favour of ancillary relief made in those proceedings. However, that does not mean that an order under s. 14 can never be made, especially if there is no arguable case against a sale, Smith v. Smith [2009] EWCA Civ 1297; [2010] 1 F.L.R. 1402.
trustees. Thus, although under section 23 Land Registration Act 2002, a registered proprietor (including a trustee)40 enjoys all the powers of an absolute owner unless the contrary is expressed on the register, the Trusts of Land and Appointment of Trustees Act 1996 protects the proprietary nature of the equitable owners’ interests and does not assume that a legal owner has proprietary priority simply because they are a trustee.41 The significance of this is that not only is there no duty to sell, but in disputes between the co-owners, neither is the court constrained by differences in the nature of each party’s interest in the land: there is no sense in which a legal interest is paramount to an equitable one or vice versa. There is nothing which prevents the court from reaching a conclusion based solely on their personal circumstances of the parties. This seems to be the general sense of the case law and it accords with the Law Commission’s understanding of the section 14 jurisdiction.42 Significantly, in exercising this unencumbered jurisdiction, the courts have not demonstrated a strict adherence to the “primary purpose” doctrine favoured under the old section 30 Law of Property Act 1925, save only that it is but one factor in the assessment under section 15 Trusts of Land and Appointment of Trustees Act.43 A good example is Smith v. Smith, where the fact that the home was larger than the party resisting sale could possibly require, when combined with the fact that it had been purchased originally as a family home, was sufficient to justify an order for sale.44

In many disputes of this type, the application for sale may be combined with an application for another order relating to the property: perhaps concerning the very existence of an equitable interest; or in relation to the size of an equitable share; or perhaps in respect of a claim to an application for compensation (or rent) for exclusive occupation or ouster.45 This is precisely what sections 14 and 15 Trusts of Land and Appointment of Trustees Act were meant to achieve and allows the court to both decide the extent of co-ownership of the property and how this should take effect in practice now that the

40 But note that according to Trusts of Land and Appointment of Trustees Act 1996, s. 6, a trustee’s powers as absolute owner is “for the purpose of exercising their functions as trustees”.
41 “Proprietary priority” is a handy description for the state of affairs where the property interest of one party enjoys priority over the property interest of another; for example, as provided for in sections 29 and 30 Land Registration Act 2002 concerning the impact of third party rights on registered disponees, or where a mortgagee is able to take possession and conduct a sale simply by reason of being a legal mortgagee with priority under a registered charge.
42 The reformulation “should clear the way for a genuinely broad and flexible approach” and the courts “will not be required to give preference to sale”, Law Commission Report No. 181, para.12.5 et seq.
43 For a view of s. 15 within an overall trusts framework see G. Ferris and E. Bramley, “The construction of sub-section 6(5) of the Trusts of Land and Appointment of Trustees Act 1996: when is a “right” not a “right”? [2009] Conv. 1.
44 See above note 39.
parties are in dispute. Thus, in *Chun v. Ho* the claimant succeeded in both establishing a share of the equity (51 per cent.) and an order for sale was made, but to take effect only when the claimant had completed her studies or chose to sell, whichever was the earlier. The trial judge noted in this regard that he paid particular attention to the claimant’s relative poverty, the disruption that would be caused to her by an immediate sale, the defendant’s conduct, the fact that the claimant was a majority beneficial owner and to the intention of the parties. Similarly, in *Holman v. Howes*, once the question of the size of each parties share had been settled, the court ordered that the property should not be sold at all unless the co-owner in occupation agreed, based largely on the strength of an assurance to this effect given to her by the other co-owner. In *Wilcox v. Tait*, settlement of issues relating to share and equitable accounting was followed by an order for immediate sale, and similarly in *Strange v. Scutt*, where the occupant was given charge of the ordered sale despite having opposed the application. Likewise, in *Murphy v. Gooch*, various accounting issues were settled, with the defendant given an option to purchase the claimants share within 3 months, failure to exercise which would result in a sale. In neither of these last two cases – nor indeed in *Stack v. Dowden* itself – were the reasons for ordering a sale explored, possibly because the parties regarded it as inevitable.

In contrast, in *White v. White* there was a real fight and the party seeking to resist sale asserted specifically that the judge had erred because he (the District Judge) had appeared to presume that a sale was required under the Trusts of Land and Appointment of Trustees Act 1996 by analogy with the old section 30 Law of Property Act 1925. While indicating that this would have been the wrong approach, the Court of Appeal rejected the submission, finding no evidence that the judge had made this mistake. They also rejected the applicant’s subsidiary submission that the trial judge had not given sufficient weight to those factors listed in section 15 Trusts of Land and Appointment of Trustees Act that tended against ordering sale. In so

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46 [2002] EWCA Civ 1075, [2003] 1 F.L.R. 23. Although the freehold was held by a company, the sole shareholders were claimant and defendant and the dispute proceeded on the basis that it was a typical two party dispute.

47 Judgment para. 47, citing the judgment in the County Court. He also considered whether there should be an immediate clean break, the defendant’s need to realise his share and the fact that the house was too large for sole occupancy.


50 2004 W.L. 3568131.


53 There were also issues as to the overlap between Trusts of Land and Appointment of Trustees Act and the jurisdiction under Schedule 1 of the Children Act 1989. See Z. Pabani, Fam. L. J. (2005) No. 51, 22.
doing, Arden L. J. specifically addressed the factors identified in section 15 and her judgment provides some of the only explicit guidance on its scope. As she points out, section 15 does not attribute relative weight to each of the factors, nor does it say they are exclusive. It is a matter of judgment in the light of the specific operative factors of each case. The wishes of the parties are clearly relevant and cannot be dismissed because they may have changed over the course of the proceedings. Likewise, she notes that “intention” within section 15 in relation to the use of the land must, where two or more people created the trust, mean a common intention (not each party’s current competing intention) and also an intention that was held at the time the trust was created. In the result, sale was ordered because the Court of Appeal accepted that the trial judge had carried out a proper assessment under section 15 and, in particular, had given weight to the welfare of the children.

An assessment of the relatively modest case law available suggests that the courts adopt a highly flexible, circumstance dependent approach to two-party disputes when acting under section 14 Trusts of Land and Appointment of Trustees Act 1996. The court clearly looks at the factors listed in section 15 as an aid to the exercise of its discretion, but is not prevented from considering other matters. There is no evidence to suggest that the default position of sale as pertained under section 30 Law of Property Act 1925 now carries any force – a point exemplified by Oke v. Rideout where sale was refused in order to preserve the family home. The intention of the parties still carries sway, as does the majority interest holding, but neither appear decisive.

Arden L. J.’s indication in White that the relevant “intention” is a common, original intention will, more often than not, point towards a sale because almost by definition the fact of a dispute means that this intention cannot now be fulfilled, but this does not mean a sale is inevitable. It is but one factor. The parties stand level in law and it is the court’s task to weigh the factors within section and such additional factors as may be relevant. It is even possible for the court to change its mind, following a change in circumstances. The unusual Dear v. Robinson, where a sale was first ordered and then postponed on an
appeal out of time, demonstrates clearly that in two-party disputes, the exercise of the section 14 jurisdiction does not depend on a pre-conception of how disputes as to sale should be resolved. Sale is now more easily refused or postponed and Trusts of Land and Appointment of Trustees Act appears to be achieving its aims. It is likely that Holman v. Howes would have been decided differently under section 30 Law of Property Act 1925.

B. Type 2, Disputes between a Mortgagee and a Co-owner

1. The argument from principle

In recent years, applications by a mortgagee under section 14 Trusts of Land and Appointment of Trustees Act for an order for sale appear to have increased. This in itself is significant. The very fact that the mortgagee – a secured creditor – is forced to make an application for sale under the Trusts of Land and Appointment of Trustees Act indicates that there has been some problem in relation to the priority of the mortgage. Mortgagors will have intended to take security by way of legal mortgage over the registered title and in the ordinary course of events, this security will have priority over any other co-ownership interest, both that of the legal owner (for he will have executed the mortgage) and that of any non-legal equitable owner. Priority over the latter may have been secured in a number of ways. The mortgage may simply have been executed (or be deemed to have been executed) before the equitable co-ownership interest arose, the mortgage may have overreached the equitable interests; the mortgagee may have secured the express consent, the implied consent or the transferred consent of the equitable owner; or the mortgagee may have been fortunate in that the equitable owner’s interest did not amount to an unregistered interest which overrides because she does not fall within paragraph 2, Schedule 2 Land Registration Act 2002. In this last scenario, the

59 See also Swindale v. Forder [2007] EWCA Civ 29, [2007] 1 F.L.R. 1905 referring to previous proceedings where an application for sale by an intervenor in matrimonial proceedings was stayed while the property was still required as a family home.
60 Bank of Baroda v. Dhillon [1998] 1 F.L.R. 524 is a rare example of such an application under the Law of Property Act 1925, s. 30. For context see P. Omar, “Equitable interests and the secured creditor: determining priorities” [2006] Conv. 509.
63 Saving a counter plea of undue influence, e.g. Alliance and Leicester plc v. Slayford [2001] 1 All E.R. (Comm) 1.
64 Paddington B.S. v. Mendelsohn (1985) 50 P. & C.R. 244.
66 For example, that actual occupation did not exist, or that it was not discoverable, or not in respect of the land over which the interest existed or there was no disclosure when it was reasonable to disclose.
mortgagee secures priority not because it has done something positive to secure such priority, but simply by reason of being a purchaser under a registered disposition in respect of land where the prior equitable right is not protected. In all cases where the mortgagee does have priority, it has no need to resort to section 14 Trusts of Land and Appointment of Trustees Act for a sale because possession and sale flow from the paramount powers under the mortgage. It may well be that the mortgagor will seek to resist possession (and therefore sale) by means of an application under section 36 Administration of Justice Act 1970 or even by mean of an application under section 91 Law of Property Act 1925, but the former application is predicated on the finding that the mortgagor is able to meet the mortgage obligations – thus rendering a sale otiose – and the latter simply gives conduct of the sale to the mortgagor. Crucially, therefore, a mortgagee who seeks an order of the court for sale under section 14 Trusts of Land and Appointment of Trustees Act by definition has taken a security that is defective in terms of its priority. It does not enjoy “proprietary priority”. At first blush, it might be thought that the proprietary priority enjoyed by the equitable owner should inevitably result in a refusal of the mortgagee’s application for sale. After all, if the proprietary nature of the equitable owner’s interest – a proprietary status deliberately emphasised by the enactment of the Trusts of Land and Appointment of Trustees Act 1996 – is to have real meaning, we might think that it should guarantee possession against those whose own rights are subject to it – such as a mortgagee without priority. Refusal of sale would, in other words, reflect the proprietary priority of the equitable interest. Nevertheless, it is apparent that applications by non-priority mortgagees for a forced sale under section 14 Trusts of Land and Appointment of Trustees Act have been successful and the clear terms of section 14 mean that there is no jurisdictional bar to making such an order. However, in all of the cases where a sale has been ordered in favour of a non-priority mortgagee, little or no weight has been given to the fact that the mortgagee is seeking forcibly to convert the

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67 Land Registration Act 2002, s. 29. In the absence of overriding status, the equitable interest is not capable of protection by means of a unilateral or agreed notice, Land Registration Act 2002, s. 33(a).
68 Possession is not needed in order for a mortgagee to sell, Horsham Properties v. Beech [2008] EWHC 2327 (Ch), [2009] I W.L.R. 1255; S. Greer, [2009] Conv. 516. But the pool of willing buyers is limited and the Council of Mortgage Lenders has indicated that its members will not seek to sell or appoint a receiver in respect of owner-occupied residential property without first obtaining an order for possession, http://www.cml.org.uk/cml/policy/issues/4707.
equitable owner’s priority as a possessory fact into a priority as a money fact. Should a sale occur, the equitable owner would of course be paid before the mortgagee from the proceeds of sale and this will inevitable represent a percentage of the sale value, with the balance being collected by the mortgagee in full or (more usually) partial satisfaction of its debt.\textsuperscript{71} In reality, however, the payment of part of the sale price to the equitable owner does not confer the same benefits as the maintenance of possession against the mortgagee but the approach in many cases is to worry more about the loss suffered by the mortgagee were it to be kept out of its money, rather than to worry about the denial of the possessory and proprietary quality of the co-owner’s rights. This is despite the fact that it is usually the case that the mortgagee had every opportunity to secure the priority that would have made a section 14 application unnecessary: for example, by refusing to lend unless there are two trustees or by seeking consent of all discoverable actual occupiers and ensuring that that consent is given validly.\textsuperscript{72}

Nevertheless, it is apparent from the case law that the argument from principle has not been enough to prevent a non-priority mortgagee obtaining a sale under section 14 and, in fact, there is little recognition in the case law that there even is a question of principle to consider. Of course, the provisions of the Trusts of Land and Appointment of Trustees Act leave no doubt that the court has a discretionary jurisdiction to exercise, not a principle to uphold, so it is not the contention that a non-priority lender should never be able to achieve a forced sale. If that were indeed the case, the role of section 14 would be much diminished. Rather, it is that the terms of the legislation and its purpose, when combined with the fact of the equitable owner’s proprietary priority, require a deeper analysis of why the mortgagee is in this position and that this could (and sometimes should) lead to a refusal to order sale, or at the very least the exposition of clear grounds for granting an order in such circumstances. It is submitted that the cause of the mortgagee’s lack of priority and hence their need to apply under Trusts of Land and Appointment of Trustees Act at all should be a weighty factor in the exercise of the court’s discretion. In the end it may not be decisive, for the need to realise the capital value of the land may outweigh all else, but it should not be largely ignored.

\textsuperscript{71} Thus the mortgagee must calculate carefully before applying for a forced sale, or else be happy with only partial satisfaction from the sale with the possibility of securing the balance through personal action against the mortgagor.

\textsuperscript{72} Or even, not to lend at all.
2. *Why has the mortgagee lost priority?*

First, the mortgagee will lose its desired priority over an equitable owner if, absent overreaching, the equitable owner is in actual occupation of the land and the interest was acquired before the mortgage was executed.\(^\text{73}\) Under the Land Registration Act 1925, it was enough that the equitable owner simply was in actual occupation, whether or not that occupation was discoverable by the mortgagee,\(^\text{74}\) but the position under the Land Registration Act 2002 is different because of the qualification that there will be no overriding interest if the occupation “would not have been obvious on a reasonably careful inspection of the land at the time of the disposition”.\(^\text{75}\)

Prior to the Land Registration Act 2002, there were many instances of mortgagees not discovering interests and being “caught” by overriding interests with a consequent loss of priority. But, despite the fact that the 1925 Act gave absolute protection to an occupying interest holder, irrespective of discoverability, it was arguable that even then a court should have thought hard before rescuing a mortgagee from essentially a lost bet. After all, if a mortgagee is prepared to accept the risk of the existence of a prior equitable right (by not taking any precautionary steps), in return for the return on a mortgage, then why should sale be ordered as a lifeboat for its incompetence or imprudence? A mortgagee does not lend out of charity, and if it chooses not to take proper steps to ascertain the existence of an overriding interest, or does so incompetently, it might be thought entirely appropriate not to order a sale when the commercial risk comes back to haunt it. That the equitable owner might have enjoyed the benefits of the use of mortgage monies, and might continue to enjoy possession without having to meet mortgage payments, is not necessarily a reason to rescue the lender from its imprudence. Such an approach might even encourage responsible lending practices. In fact, the argument is even more compelling under the new provisions of paragraph 2 of Schedule 3 Land Registration Act 2002, given that the interest will override only if it is objectively discoverable in the first place, in the sense of being capable of being revealed by the ordinary enquiries and inspections that a mortgagee might be expected to make.\(^\text{76}\) Thus, while there may have been some merit in the argument that a lender had a powerful case

\(^{73}\) Interests arising after execution of the mortgage necessarily have no priority over the mortgage: see Cann.

\(^{74}\) While this raised the theoretical possibility that mortgagees might then have been bound by an undiscoverable interest, in reality such were rare, if indeed any existed at all. See M. Dixon, “The reform of property law and the Land Registration Act 2002: a risk assessment”, [2003] Conv. 136.

\(^{75}\) Land Registration Act 2002, Schedule 3, para. 2. And also that the purchaser did not know of the interest.

for sale when it found itself bound by an overriding interest based on occupation that it could not have discovered, that merit dissolves under the Land Registration Act 2002 given that the interest binds only if the actual occupation was discoverable in the first place. Under this new scheme, if the mortgagee fails to discover the discoverable, why should the equitable owner suffer the loss of possession? In short, there is now no excuse for a mortgagee to lose its priority to an equitable co-owner simply on grounds of the latter’s actual occupation, and in consequence it is submitted that an application for sale under section 14 Trusts of Land and Appointment of Trustees Act should be refused unless there are truly compelling reasons. Proprietary priority should not give way to professional incompetence.

Secondly, if the mortgagee makes enquiries of the equitable owner, and the equitable owner does not reveal her interest, the mortgagee will not lose priority where such disclosure would have been reasonable – there is no overriding interest, para. 2, Schedule 3 Land Registration Act 2002. There is, of course, no need for a section 14 application in such cases. However, the provision is curious. It seems to contemplate the possibility that the equitable owner might be able to mislead the mortgagee – in the sense of not revealing her interest when questioned – and nevertheless maintain priority through overriding status. This would be unusual, and certainly was not the position under the Land Registration Act 1925. Perhaps the reference to the “reasonableness” of disclosure is meant to protect the equitable owner who answers an enquiry honestly, but does not realise and has no reasonable grounds for realising, that they actually had an interest in the property. This interpretation suggests that it is not always safe for a mortgagee to rely on the replies of an occupier. However, in any subsequent section 14 application, the court will be faced with two claimants, both of whom are blameless. Technically, the equitable owner is likely to have priority by reason of her overriding interest (assuming withholding information was reasonable), but the lender can claim to have done all that might be expected of it – in contrast with the position immediately above. In resolving a disputed application for sale in such (probably rare) cases the framework of section 15 effectively allows the judge to reach a decision based on the particular facts as they arise. All that might reasonably be required is recognition that the interests of the equitable owner, who enjoys blameless proprietary

77 It might be enough to justify sale if the equitable owner’s share is small. But, if we can have ransom strips, why not ransom equitable interests, especially where this would preserve possession which the small amount of money could not replace?

78 Currently, there appears to be no case law on the “reasonableness” of disclosure under Land Registration Act 2002, Schedule 3, para. 2.
priority, must be given as much weight as the interests of the mortgagee who is inadvertently subject to that interest.

Thirdly, there are issues surrounding defective consent. In general terms, there are two situations where a mortgagee might be unable to claim priority over a co-owner because of defective consent. First, it is axiomatic that a legal co-owner must give valid consent for the creation of a legal charge. In a number of cases, one co-owning trustee’s execution of the mortgage has been held defective because of some fraud (e.g. personation or forgery) or undue influence by the other legal co-owner who wants the mortgage monies for some purpose of their own. Bank of Ireland Home Mortgages v. Bell,79 Mortgage Corporation v. Shaire,80 First National Bank v. Achampong81 and the more recent Edwards v. Bank of Scotland82 and Hewett v. First Plus Financial Group83 are of this type. Such a failing appears to render the charge void as a legal interest,84 but operates as a charge over the wrongdoer’s equitable interest (and also as a severance of that interest if held on joint-tenancy). Secondly, and less common, in sole legal owner situations, a mortgagee faced with a potential overriding interest may seek the consent of the known or suspected equitable owner (and indeed of every person in occupation) in order to ensure the priority of the charge.85 Again, such consent is effective only if given genuinely and the equitable owner may seek to establish that their apparent consent was tainted by undue influence, misrepresentation or some other vitiating factor. Alliance and Leicester plc v. Slayford86 is of this type.

In both situations, the result is usually that the mortgagee is denied the proprietary priority that they thought they had secured. This is either because, in the first situation, there is no legal charge to benefit from priority under section 29 Land Registration Act 200287 or, in the second case, because the innocent equitable co-owner is likely to be able to

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82 [2010] EWHC 652 (Ch).
84 But see below note 85.
85 Even in the absence of express consent, mortgagee priority may be achieved on the basis of implied consent – where the equitable owner participated in the attainment of the mortgage to such an extent that she cannot later set up her interest against it – or by reason of subrogation. Subrogation is not necessarily denied merely because the lender may have been negligent in securing priority, Anfield (UK) v. Bank of Scotland [2010] EWHC 2374 (Ch), [2011] 1 All E.R. 708.
87 Achampong makes it clear – correctly in the author’s view – that innocent legal owners compromised in the first situation do not need to rely on an overriding interest because they are protected by reason of their status as proprietor. Further, it is arguable, in the light of section 58 Land Registration Act 2002, that in relation to registered land, there is a valid legal charge, at least until the register is rectified by removing it, rather than the mortgagee defaulting to an equitable chargee. But such a charge, even if valid, would not overreach, HSBC v. Dyche [2009] EWHC 2954 (Ch).
assert an overriding interest. Thus, the mortgagee is relegated either to the status of an equitable chargee (situation 1) or a legal owner with no priority (situation 2) and in both cases must rely on section 14 Trusts of Land and Appointment of Trustees Act to secure possession and sale. The question therefore arises whether it is relevant that the mortgagee is denied priority (and an automatic remedy) not because of its lack of understanding of the priority issue or incompetence in failing to discover and deal with an overriding interest, but because it has been caught out by a defence that relates back to the time – possibly years before – when the mortgage was executed and for which, only in the very loosest sense, it is at fault.

In Bell, the court considered that it would be “plainly wrong” to refuse sale in such circumstances because it would be unfair to keep the lender “waiting for its money with no prospect of recovery from Mr and Mrs Bell and with the debt increasing all the time” 88 This was so despite the Bank’s delay in processing its claim. In formal terms, the Court of Appeal decided that the trial judge had considered irrelevant factors (e.g. that the bank might well have a claim in negligence against the acting solicitors) and omitted relevant ones (the fact that the debt was increasing at an alarming rate). However, given that the factors listed in section 15 are not meant to be exhaustive, the identification of “irrelevant” factors as a justification for overturning the trial judge’s exercise of discretion against a sale seems inappropriate and suggests a lingering preference for sale despite the purpose behind the Trusts of Land and Appointment of Trustees Act. Similarly, the fact that Mrs Bell was in ill-health was downgraded to a circumstance justifying postponing sale, rather than refusing it altogether and the court seems to regard the fact that Mrs Bell had not paid anything under the mortgage as relevant – an odd view given that she was not contractually bound to do so. 89 Clearly, while everything turns on the facts, Bell makes it quite clear that a sale is very much the preferred option in cases such as this and questions of proprietary priority, the reasons why a Trusts of Land and Appointment of Trustees Act application is needed in the first place and individual circumstances of the occupiers actually seem to play very little part in the balancing process. 90

In Achampong, the trial judge once again refused a sale – making it clear that the fact that the lender would be kept out of their money was not “unfair” – and once again the Court of Appeal reversed this, relying on Bell, finding that the lender’s delay in bringing the application did not

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88 Judgment at [31].
89 Judgment at [26].
90 Neither was it relevant that the Bank might actually have had an equitable charge in priority to the interest of Mr and Mrs Bell, although the Court of Appeal are not certain this was a correct analysis of the facts. See also R. Probert, “Creditors and section 15 of the Trusts of Land and Appointment of Trustees Act 1996: first among equals?” [2002] Conv. 61.
counteract the disadvantage to the lender of keeping them out of their money. Again, the exercise of the judge’s discretion was regarded as reviewable because, apparently, he had failed to attach sufficient weight to the applicant’s position. In *Edwards*, a case similar to *Shaire*, the judge again worked his way through the statutory factors listed in section 15, bearing in mind the weight to be given the position of a creditor, noting the time they had been kept out of their money and the fact that the wrongdoer (Mrs Edwards) had no other assets capable of meeting her liability to the bank. Again, a sale was ordered, the trial judge being particularly impressed by the fact that a sale of the property (plus income from the sale of other assets) would liberate enough capital to secure Mr Edwards a very decent home in his current location. While on these facts, the decision to order sale in *Edwards* is plainly justified, and the trial judge clearly considered a range of factors personal to the parties, in other cases the fact that the sale would not liberate enough money to provide suitable alternative accommodation has not appeared to be a reason to refuse sale.

The only real brake on this apparent flow of case law towards a sale in the “defective consent” cases is found in *Shaire* where the main point made by Neuberger J. was that section 15 had changed the law by removing the presumption of a sale and replacing it with a structured judicial discretion. In that case, he noted that some factors must be considered – i.e. those within section 15 – but that “it is a matter for the court as to what weight to give to each factor in a particular case”. He was not, however, impressed by the (unproven) suggestion that the bank was more to blame than Mrs Shaire for the fraud perpetrated by the co-owner, nor that there had been delay. In the result, Neuberger J. recognised both that Mrs Shaire’s held a significant interest in a property that was her home (75 per cent.) and that the mortgagee might reasonably expect some return on their 25 per cent. interest (via the share of the wrongdoer). He proposed a number of solutions that might satisfy the interests of both, with the long stop that if Mrs Shaire could not accommodate the bank’s interest (perhaps by paying interest), then a sale would take place because “the hardship on Mrs Shaire would not be enormous”. In other words, Neuberger J. can be seen to have followed both the spirit and the letter of the Trusts of Land and Appointment of Trustees Act by recognising that in cases such as this the interests of both parties can be accommodated other than by a first resort to sale. It may be that there is an unspoken public interest in *Bell*

91 The Court of Appeal would not “condemn the bank to wait”, because “it a plain that an order for sale should be made”. *Achampong* at [62], [65].
92 *Edwards*, at [35], [36].
93 As in *Bell* itself. In *Hewett*, the issue of sale under s. 14 was remitted to the trial judge after the claim of undue influence in respect of the legal charge was upheld.
et al. – the need to preserve the vitality of the mortgage market by ensuring that creditors are not kept out of their money – but it needs to be articulated and the approach in *Shaire* does seem more consistent with the purpose underlying the legislation.

**C. Type 3, Applications by a Chargee in virtue of a Charging Order**

Cases of this type arise when a co-owner is personally indebted to a third party and the creditor enforces a judgment debt by obtaining a proprietary charge over the debtor’s share in co-owned land through a charging order granted under the Charging Orders Act 1979. The chargee has no priority over the non-indebted co-owner and the chargee is not a secured creditor in the same sense as a mortgagee. However, although the charging order gives no immediate right to sale, an application may be made to the court because the chargee is a “person interested” within section 14 Trusts of Land and Appointment of Trustees Act.

As a starting point, one might think that in this type of case the chargee would be able to secure an order for sale against the wishes of the non-indebted co-owner only in the most unusual circumstances, and certainly this appears to be true if the debt is relatively small. In fact, whatever the size of the debt, we should note that the co-owner resisting sale has priority over the chargee as a matter of property law and that the chargee’s interest in the land was never expressly granted but arises out of a personal debt owed by someone else – the other co-owner. Nevertheless, prior to the Trusts of Land and Appointment of Trustees Act, where the debt was significant, applications for a sale under the old section 30 Law of Property Act 1925 were successful. Indeed, in one case the Court of Appeal took the view that such a chargee was equivalent to a trustee in bankruptcy so that sale should be ordered unless the circumstances were exceptional. Although this rather dubious analogy has not been maintained under the Trusts of Land and Appointment of Trustees Act – nor could it in the light of

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94 Under a charging order, the debt is secured purely as a means of enforcement, whereas in a mortgage the debt is secured on land by design.
95 If the land is not co-owned at all, the chargee may apply for an order for sale under CPR r. 73.10(1). If the charging order is against all legal and beneficial owners, then although an application under section 14 Trusts of Land and Appointment of Trustees Act is not required, the court should apply the same factors as if it was made under that Act, even though it is made under CPR r. 73.10(1): *Close Invoice Finance Ltd v. Pile* [2008] EWHC 1580 (Ch), [2009] 1 F.L.R. 873.
96 This appears to be the case whether or not the land is co-owned because loss of a home is regarded as a disproportionate response to the enforcement of small debts and so the charging order will be protected by an entry on the register of title until sale or otherwise satisfied.
the express provisions in section 15 – the evidence suggests that there remains a steady preference in favour of a sale against the wishes of the innocent co-owner.

Thus, in *Pritchard Engelfield v. Steinberg* [100] Peter Smith J. ordered a sale because otherwise the creditor would “be substantially out of pocket”, [101] although on the unusual facts this actually amounted to protection for the innocent co-owner. [102] Similarly, in *Norton Rose v. Davidson* [103] the judge makes the initial point that there is no reasonable prospect of the debtor making any payments to the creditor unless his share of the house is realised but continues that he is “duty bound to consider the requirements of the 1996 Act”. [104] There is then a mechanical consideration of the factors in section 15 and the inevitable sale. In *Putnam & Sons v. Taylor* [105] a rather more detailed analysis was made of the section 15 factors, with the trial judge also finding that the provisions of Trusts of Land and Appointment of Trustees Act had to be exercised consistently with the European Convention on Human Rights, particularly Art 1 Protocol 1. However, although the non-indebted co-owner raised the direct point that she should not suffer the loss of her home because of a debt in respect of which she was wholly innocent and from which she did not profit in any sense, a sale was ordered. This was despite the fact that the debtor was being treated for cancer because the judge did “not consider it is right to put off the evil day indefinitely and effectively keep the claimant out of its money with no prospect of any recovery in the near future. There is no suggestion of payment on account or payment by way of interest. There is a dogged refusal to accept, on Mrs Taylor’s part, that her property, as she sees it, should be made available in any respect for the payment of this debt”. [106] The later view is, of course, entirely understandable, but it is clearly not a factor which weighs heavy with the court. In a judgment containing one of the few explicit explanations of why a sale to enforce a charging order should normally be made, the judge goes on to note that “were it the case that a family home were immune from an order for sale in such circumstances, then a large number of debts would never be paid because husbands could always hide behind their wives or wives behind their husbands”. [107] In reply, one might make the trite
point that a sale might be ordered where this is the case, but not otherwise.\textsuperscript{108} Each case is meant to be determined on its own facts.

However, not all the cases tend to the same way. In \textit{Close Invoice Finance v. Pile},\textsuperscript{109} technically the Trusts of Land and Appointment of Trustees Act 1996 was not in issue as both co-owners were subject to the charging order and there was no-one able to resist sale under the general law. Nevertheless, in considering the matter under CPR r.73.10(1), the trial judge felt that the section 15 factors were relevant by analogy,\textsuperscript{110} and he also determined that the power to enforce the charging order was compatible with the European Convention on Human Rights, particularly Art 1 Protocol 1. In the end, the debtors were not resisting a sale but asking for a lengthy postponement and the trial judge agreed to this. It was very material that one of the debtors was being treated for cancer (and this was not counteracted by the fact that she was a debtor), that one child remained at school with impending examinations (and some additional educational needs) and that the property was a family home for an elderly parent. Similarly, the fact that the debt was less than the property was worth was enough to persuade the trial judge to agree an 18 month postponement. Given that \textit{Close} involved the same judge as the later \textit{Putnam}, the significant features here may well have been the size of the debt to the value of the house and the fact that only a relatively short postponement was requested – there would still be enough equity in the property to satisfy the debt in 18 months time.

\textit{National Westminster Bank v. Rushmer}\textsuperscript{111} also involved an initial suspension of an order for sale and this case illustrates many of the features of the section 14 jurisdiction. In this case, the Bank had obtained a charging order in respect of Mr Rushmer’s debts but the Master had agreed to suspend an order for sale for two years at the request of Mrs Rushmer (the innocent co-owner) because there was a likelihood of successful litigation against a third party by the debtor (arising out of the affairs which caused the debt) with a “real prospect” of substantial money coming in which might satisfy the Bank. The suspension was conditional on Mrs Rushmer making some payments to the Bank from her own resources (equivalent to “rent”), but importantly, the fact that both children had personal circumstances supporting a suspension, were \textit{not} regarded as sufficient.\textsuperscript{112} After failure of the litigation

\textsuperscript{108} A spouse who took no benefit from the contracted debt might be thought more deserving of protection than one who did, or who played some part in the racking up of the debt.


\textsuperscript{110} In fact, he thought it “quite senseless” that the Trusts of Land and Appointment of Trustees Act should not be involved simply because of the accident that both co-owners were debtors, especially when the land was occupied (as here) by others – children and an elderly parent.


\textsuperscript{112} Impending school examinations and treatment at the local hospital. Also, that one child used the swimming pool at the property as part of her training as an elite swimmer.
involving Mr Rushmer, and Mrs Rushmer’s inability to keep up the payments, she applied to the Master to vary his order requesting a further suspension, and this was refused. She then appealed, alleging a serious procedural irregularity and, substantively, that a sale should be suspended because she might now be able to recover money in her own litigation, further citing her daughter’s need for a swimming pool in order to train for the 2012 Olympics, suggesting that the Bank had failed in its duty to realise sufficient money from the sale of other property, noting that the fall in property prices meant that other suitable property might now not be purchased with her share of the proceeds and making claims in respect of the European Convention. Arnold J. treated the matter as a rehearing because he accepted that Mrs Rushmer had been prejudiced by the Master’s failure to disclose letters from the bank’s solicitors. Nevertheless, he confirmed that the section 14 jurisdiction was consistent with the Convention and that ordinarily a balancing of the factors in section 15 would meet the need for proportionality (although he accepted – foreshadowing Pinnock – that this might need to be explicitly addressed in unusual cases). Further, he ordered a sale, being unpersuaded by Mrs Rushmer’s alleged impending litigation and taking the view that suitable properties could still be purchased. Overall, the point was that “the bank has been kept out of its money long enough”.

D. Type 4, Bankruptcy

Should one of the co-owners be made bankrupt and the other wish to retain the property, the application for sale by the trustee in bankruptcy is made under section 14 Trusts of Land and Appointment of Trustees Act but with the court required to apply section 335A Insolvency Act 1986 instead of section 15. The essence of the matter is that the court must have regard to a number of factors, but that if an application is made more than one year after the bankruptcy, the court “shall assume, unless the circumstances of the case are exceptional, that the interest of the bankrupt’s creditors outweigh all other considerations.” As was made clear in Dean v. Stout and confirmed in Turner v. Avis this means that there is a statutory presumption in favour of sale and even the existence of “exceptional circumstances” does

113 Approving Close and Putnam.
114 Judgment at [63].
115 The interests of the bankrupt’s creditor and, in the case of dwellings, the conduct of the spouse, civil partner, former spouse or former civil partner, so far as contributing to the bankruptcy; the needs and financial resources of the spouse, civil partner, former spouse or former civil partner; the needs of any children; all the circumstances of the case, other than the needs of the bankrupt.
not mean a sale should be refused, for there is still a balance to made. Further, while each case must be judged on its facts and there is no need for a catalogue of what amounts to “exceptional”, the fact that a family may be made homeless with insufficient funds to find alternative accommodation, or that all of the assets realised will go to the costs of the bankruptcy and leave nothing for the creditors, is an ordinary consequence of debt and thus not exceptional. “Exceptional” means something “which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, unprecedented or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.”

What this amounts to a statutory direction that the land should be sold, without reference to questions of proprietary priority or status unless there are significant and unusual circumstances. In bankruptcy, the creditors presumptively are not to be kept from their money for more than a twelve-month and the co-owner receives their share from the proceeds. Unsurprisingly, there is a sizeable body of case law on the exercise of this structured discretion as innocent co-owners seek to resist a sale or gain a postponement beyond a twelve-month. Much of this directly concerns applications considered under section 335(A) Insolvency Act but there is also some consideration of the very similar provisions in sections 336 and 337 of the same Act and the equivalent provisions in Northern Ireland. In general terms, the non-bankrupt has challenged the presumptive sale on two grounds: first, with a plea on the facts of exceptional circumstances; and secondly, as an impermissible interference with their rights under the European Convention on Human Rights.

On the first point, the case law suggests that a person resisting sale on the basis of exceptional circumstances faces a high hurdle. Of course, persons in danger of losing their home will try any argument, but there are very few situations which have been held to qualify. Illness, 

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123 Section 336 Insolvency Act 1986 applies if the land is solely owned by the bankrupt and a spouse or civil partner has occupation rights under the Family Law Act 1996; section 337 applies where the property was owned by the bankrupt and occupied by him as a home with a person under 18 years. The interpretation of “exceptional circumstances” in these provisions is regarded as identical, Hosking v. Michaelides [2006] B.P.I.R. 1192, Everitt v. Budhram. See also Martin-Sklan v. White [2006] EWHC 3313 (Ch).
extremely chronic or terminal,\(^{125}\) of either the non-bankrupt or a child is recognised as capable of generating an exceptional circumstance, as in *Re Raval (a Bankrupt)*, *Nicholls v. Lan*,\(^{126}\) and *Everitt v. Budhram*,\(^{127}\) all section 335A cases, with Henderson J. in the last of these also making it clear that the concept of “needs” within the section was to be interpreted widely, whether those were of the bankrupt (and therefore excluded) or those of other persons (and therefore relevant).\(^{128}\) Indeed, in both *Judd v. Brown*\(^{129}\) and *Claughton v. Charalambous*,\(^{130}\) sale was refused indefinitely rather than merely suspended for longer than one year, in the first case because the chances of medical recovery would be blighted by a house move and in the second because the applicant was largely immobile. In *Claughton*, it may also have been important that the costs would in any event consume the entire share available to the creditors, but of itself this is not enough to make the circumstances exceptional – *Re Karia*.\(^{131}\) In some cases, inordinate delay by the trustee in bankruptcy has been recognised as capable of constituting an exceptional circumstance, as in *The Official Receiver for Northern Ireland v. Rooney*\(^{132}\) where a 12 year delay was exceptional and sale refused. On the other, delay was not an exceptional circumstance in either *Foyle v. Turner* or *Turner v. Avis* because it was neither inordinate nor disproportionate.\(^{133}\) In short then, serious illness aside, little has been recognised as constituting an exceptional circumstance per se, and then only rarely as a factor preventing sale rather than postponing it. The unusual case is *Martin-Sklan v. White*, a section 337 case, where the troubled state of the family (alcoholic mother) and the need of the children to have a stable support network, when combined with fact that there was enough equity in the property to pay all the creditors even if a sale was delayed, was held to constitute an exceptional circumstance. Possibly it is relevant that this is a section 337 case (which is triggered when the property is home to person under 18) but at least it shows that there is some room in the statutory framework to deal with pressing personal circumstances. Undoubtedly, however, the everyday reality is more like *Awoyemi v. Bowell*\(^{134}\) – sale is almost always automatic.

\(^{125}\) There needs to be an element of extremity, not merely an ongoing condition. *Barca v. Mears* (health problems of child not exceptional).

\(^{126}\) [2006] EWHC 1255 (Ch); [2007] 1 F.L.R. 744.

\(^{127}\) [2009] EWHC 1219 (Ch), [2010] Ch. 170.

\(^{128}\) See also *Re Bremner* [1999] B.P.I.R. 185 (terminal illness), *Hosking v. Michaelides and Re Haghighat* (both mental illness), all cases under Insolvency Act 1986, s. 336.


\(^{131}\) See also *Harrington v. Bennett*. Conversely, the fact that the creditors might still be paid in full even if there was a delay in sale is not exceptional – *Donoho v. Ingram* [2006] EWHC 282 (Ch), [2006] 2 F.L.R 1084.

\(^{132}\) Applying equivalent provisions in Northern Ireland.

\(^{133}\) Note, that the provisions of the Enterprise Act 2000 are likely to render questions of delay otiose.

The human rights argument has attracted both academic and judicial interest. The almost automatic preference for a sale and the narrow approach to exceptional circumstances could be thought to be a disproportionate interference with the Article 8 right to a home and this was given judicial support in Barca v. Mears where Nicholas Strauss QC thought that there needed to be a re-evaluation and a more deliberate balancing to take account of Convention rights. This was given a dose of cold water in Nicholls v. Lan and rejected outright in Foyle v. Turner, itself confirmed in Turner v. Avis. Currently, it seems that the human rights argument has been dealt with conclusively on the basis that the statute itself already ensures that a Convention compliant balancing process has taken place, but it may be important that the reasoning in Foyle was based on the approach in Kay v. London Borough of Lambeth, with Judge Norris in Foyle noting that “compliance with domestic law will sufficiently address all Convention considerations, leaving the defendant only with the course of alleging that the domestic law itself is incompatible with the Convention right.” It remains to be seen whether such an absolute approach can be maintained after Manchester City Council v. Pinnock – assuming that its reasoning can be applied horizontally.

III. CONCLUSION

The purpose of this article has been to analyse the case law concerning applications for sale of co-owned land made under section 14 Trusts of Land and Appointment of Trustees Act 1996. It has been contended that the different sets of circumstances in which such applications arise has not been regarded as a significant factor in the exercise of the statutory discretion. It is submitted that they should be, even if there may be cases where they are not significant enough to prevent a sale. In particular, the submission is that the case law fails to recognise that in some types of case the parties to the dispute do not stand equal in terms of their property rights and that it is important to consider who, if anyone, has proprietary priority and how this has come about. Any diminution of proprietary priority through the ordering of

140 At [16].
sale – clearly contemplated as a possibility by section 14 – should be recognised and explained.

First, where the dispute is between the co-owners and no other party, the relatively little case law suggests that the courts do indeed fashion a solution that responds to the parties particular circumstances. While there is no explicit recognition of the proprietary equality of the parties, sale is not the default option under the Trusts of Land and Appointment of Trustees Act 1996, at least not in the sense in which it was under section 30 Law of Property Act 1925. It seems that the intention of the 1996 Act has been achieved.

Secondly, cases involving a non-priority mortgagee reveal a different pattern. In these cases, the courts tend towards ordering a sale on the general ground that a secured creditor should not be kept out of its money. Perhaps this is in recognition of the importance of institutional lending to the domestic economy, but it is never made explicit. Indeed, there appears to be no recognition of the fact that the equitable owner has proprietary priority over the mortgagee and that forcing him or her to take that priority in money effectively ignores the abolition of the trust for sale by the Trusts of Land and Appointment of Trustees Act 1996. More importantly perhaps, there is no consideration of why the lender has failed to achieve the priority it surely intended to obtain. There is no doubt, of course, that section 14 permits an order for sale to be made in such circumstances, and there will be cases where this is appropriate. But, given the history of the enactment of the Trusts of Land and Appointment of Trustees Act, it might be thought appropriate to consider the relative property strength of each parties’ position and how they arrived there. Thus a mortgagee who has simply failed to achieve the priority it could easily have obtained through responsible lending practices might fail to achieve a sale, whereas one whose priority is lost through the fault or fraud of another (and who therefore is as blameless as the innocent co-owner) might be treated differently. Undoubtedly, the current position reflects the customary deference shown to creditors in English law and the perceived need to protect and facilitate mortgage lending,142 but section 15 itself does not express such a preference.143 Perhaps indeed we might go further and ask whether the courts really have accepted that statutory co-ownership is no longer a device designed to facilitate sale as it was in 1926, even though the doctrine of conversion has been abolished144 and the duty of sale no longer exists. The irony of the Trusts of Land and

142 See, for example, Lord Nicholls in Etridge at [34].
143 Section 15 of the Trusts of Land and Appointment of Trustees Act 1996 refers to the interests of any secured creditor of any beneficiary, but does not, in contrast to the Insolvency Act 1986, s. 335A, stipulate that preference should be given to those interests.
144 Trusts of Land and Appointment of Trustees Act 1996, s. 3.
Appointment of Trustees Act is that a sale now seems more likely in such cases, despite the proprietary nature of the co-owners’ rights and their priority over the mortgagee.

Thirdly, an applicant seeking to enforce a charging order against co-owned land is treated with much the same generosity as a non-priority mortgagee, despite the important difference that such an applicant originally never had any property interest in the land, nor ever expected to have one. Not only do they have no proprietary priority, their claim to be able to enforce the debt against the land arises independently of the use of the land as security, for that was never contemplated. These considerations are disregarded by the courts in determining applications made under section 14. Again, perhaps the reason is a desire to protect those owed money under contract or other obligation, but is this itself a reason to force a sale against the wishes of the person who is not responsible for those debts?

Fourthly, it is only in respect of an application made by a trustee in bankruptcy that the legislation raises a presumption in favour of sale. Unsurprisingly, this is executed faithfully, possibly slavishly, save for those cases where there are “exceptional circumstances”, narrowly defined. The fear that the non-bankrupt’s Convention rights might have been compromised, let alone their proprietary stake in the land, carries little weight.145