

CHAPTER 37

TRUSTS AFFECTING LAND

1. INTRODUCTION

From 1926 to 1966—settled land and trusts for sale

37-01 NOTE 3. FOR THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, SEE NOW (7th edn), §§ 10-004, 10-005.

NOTE 5. FOR THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, SEE NOW (7th edn), § 10-009.

The 1996 Act—trusts of land

37-02 NOTE 11. FOR THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, SEE NOW (7th edn), § 15-052.

2. TRUSTS OF LAND

“Trust of land”*“Settled land”*

37-07 NOTE 38. AT THE END ADD: or the 7th edition.

Power to postpone sale under express trusts for sale*“Created by disposition”*

37-09 NOTE 52. FOR THE REFERENCE TO Thomas and Hudson, *The Law of Trusts*, SEE NOW (2nd edn), § 59.35.

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3. POWERS OF TRUSTEES OF LAND**Consent to the exercise of trustees' functions**

- 37–31** NOTE 75. FOR THE REFERENCE TO *Emmet on Title*, SEE NOW *Emmet and Farrand on Title*, § 22.020.

Title guarantees

- 37–50** NOTE 26. FOR THE REFERENCE TO *Emmet on Title*, SEE NOW *Emmet and Farrand on Title*, §§ 16.001 and 16.002.

4. RIGHTS OF BENEFICIARIES OF TRUSTS OF LAND**The right to occupy trust land**

- 37–57** NOTE 59. The text referred to in *Emmet on Title* (now *Emmet and Farrand on Title*) is no longer included within that work.

Excluding and restricting the right to occupy and conditions of occupation

- 37–62** NOTE 81. AFTER SECOND SENTENCE ADD: Principles of equitable accounting do, however, still apply where the occupation of the co-owner has not been excluded or restricted in accordance with the 1996 Act because he has no right to occupy, as where the co-owner is the trustee in bankruptcy of the co-owner's spouse: *Re Barcham* [2008] EWHC 1505 (Ch); [2009] 1 W.L.R. 1124.

NOTE 85. DELETE AND REPLACE BY: *Rahnema v Rahbari* [2008] All E.R. (D) 308 (Mar) at [29]; and see § 9–54 (including second supplement).

The powers of the court

- 37–67** NOTE 3. AT THE END ADD: For a case where the obligation to obtain the consent of the beneficiaries before sale was removed despite its having originally been included as part of the compromise of a proprietary estoppel claim, see *Page v West* [2010] EWHC 504 (Ch); [2010] W.T.L.R. 1811.

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AFTER THE TEXT TO N.8 INSERT: An application may be made between separated spouses, but it is better in principle for an issue about the sale of the matrimonial home to be dealt with in ancillary relief proceedings. If the parties will be able to apply for ancillary relief within a reasonable period, the court should not hear an application for an order for sale under s.14.^{8a}

Supervision of the court*Secured creditors of beneficiaries*

37–70 NOTE 28. DELETE AND REPLACE BY: See *Close Invoice Finance Ltd v Pile* [2008] EWHC 1580 (Ch); [2008] B.P.I.R. 1465 at [13] (in application for order for sale by holder of charging order under CPR 73.10, the court must exercise its discretion in a way which respects the right of all those living in the property to have respect for their family life and their home); *Putnam & Sons v Taylor* [2009] EWHC 317 (Ch); [2009] B.P.I.R. 769 at [29] (s.15 compliant with the Convention); *National Westminster Bank plc v Rushmer* [2010] EWHC 554 (Ch); [2010] 2 F.L.R. 362 at [50] (ordinarily sufficient to give due consideration to the factors listed at s.15). See too the cases cited in § 37–73 (including second supplement), there in the context of applications by a trustee in bankruptcy.

Bankrupt beneficiaries

37–72 NOTE 40. AT THE END ADD: In the absence of exceptional circumstances, the trustee is entitled to an order for possession and the court is obliged to make it unless the bankrupt is in a position to apply for the annulment of the bankruptcy: *Pick v Sumpter* [2010] EWHC 685 (Ch); [2010] B.P.I.R. 638 at [10], [15].

Exceptional circumstances

37–73 NOTE 45. AT THE END ADD: The medical condition of the bankrupt's spouse may constitute an exceptional circumstance even where the spouse is himself bankrupt: see *Everitt v Budhram* [2009] EWHC 1219 (Ch); [2010] Ch. 170 (Insolvency Act 1986, s.335A(2)(b)(ii)).

^{8a} *Miller Smith v Miller Smith* [2009] EWCA Civ 1297; [2010] W.T.L.R. 519 at [18]. Wilson L.J. said that, if there was a measurable chance of the respondent preserving his occupation of the property in the application for ancillary relief, the making of an order for sale under section 14 would almost certainly not be a proper exercise of the court's discretion.

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AFTER THE TEXT TO N.48 INSERT: The circumstances of the making of the bankruptcy order are irrelevant.^{48a} Delay by the trustee in bankruptcy in pursuing an application will constitute exceptional circumstances only where it (a) is inordinate, and (b) materially affects some interest to which the court is directed to have regard.^{48b}

DELETE THE FINAL SENTENCE (BUT NOT N.50) AND REPLACE BY: The question whether the Human Rights Act 1998 has altered the interpretation of what constitutes exceptional circumstances is not yet finally resolved. The relevant decisions are all at first instance, but most recently the courts have indicated that the European Convention on Human Rights does not require any modification of the application of section 335A of the Insolvency Act 1986.

NOTE 50. AT THE END ADD: In *Foyle v Turner* [2007] B.P.I.R. 43, it was said, at [50], that, “provided that the provisions of s.335A are faithfully followed and applied, there is no need to enter into any separate consideration of Art.8 rights. The priority determined by Parliament, as between the creditors and the bankrupt’s family is that save in ‘exceptional circumstances’, the interests of the creditors prevail.”. See *Turner v Avis* [2009] 1 F.L.R. 74 at [16].

Rights of occupation after bankruptcy

37–74 AT THE END OF THE TEXT ADD: Where a co-owner continues to occupy the property until or in default of sale, he will usually be liable to pay an occupation rent to the trustee in bankruptcy upon principles of equitable accounting.^{57a}

Procedure

37–76 NOTES 66 AND 67. FOR THE REFERENCE TO *Civil Procedure* (2007), Vol.1, 48BPD.1 SUBSTITUTE *Civil Procedure* (2011) Vol.1, 48BPD.1. Supreme Court Act 1981 is renamed Senior Courts Act 1981 from October 1, 2009, see Constitutional Reform Act 2005, Sch.11, para.1 and Constitutional Reform Act 2005 (Commencement No.11) Order 2009 (SI 2009/1604).

^{48a} *Everitt v Budhram*, above, at [30].

^{48b} *Foyle v Turner* [2007] B.P.I.R. 43 at [21]; *Turner v Avis* [2009] 1 F.L.R. 74 at [20].

^{57a} *Re Barcham* [2008] EWHC 1505 (Ch); [2009] 1 W.L.R. 1124, applying *Re Pavlou* [1993] 1 W.L.R. 1046. See § 9–54.

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5. THE SETTLED LAND ACT 1925**Conveyancing matters**

- 37–83** AT THE END OF THE TEXT ADD: It was so as to allow conveyances in such circumstances that the meaning of “settlement” includes any estate or interest not disposed of by a settlement and remaining in or reverting to the settlor, or any person deriving title under him.^{97a}

6. WHO CAN EXERCISE THE SETTLED LAND ACT POWERS**Person entitled to possession***Right to occupy*

- 37–92** NOTE 20. AT THE END ADD: It should be borne in mind that this question may still arise today where the right of occupation was granted before the Trusts of Land and Appointment of Trustees Act 1996 came into force: see *Amin v Amin* [2009] EWHC 3356 (Ch) at [276]–[279].

Exercise of powers

- 37–97** AT THE END OF THE TEXT ADD: In Victoria, in a case where the tenants for life were split 14–2 as to whether the settled land should be sold, the court gave the trustee power to sell the land, subject to certain conditions, under the equivalent of section 57 of the Trustee Act 1925.^{46a}

Overriding qualifications*Beneficially interested*

- 37–102** NOTE 60. AT THE END OF THE SECOND SENTENCE ADD: or the 7th edition.

^{97a} Settled Land Act 1925, s.1(4); *Ben Hashem v Al Shayif* [2008] EWHC 2380 (Fam); [2009] 1 F.L.R. 115 at [259]. On the meaning of “settlement”, see § 37–79.

^{46a} *Royal Melbourne Hospital v Equity Trustees Ltd* [2007] VSCA 162; (2007) 18 V.R. 469. The Victorian legislation contains no equivalent to Settled Land Act 1925, s.93. All parties agreed that the provision equivalent to Trustee Act 1925, s.57 applied to settled land. It is doubtful whether this is the position in England. As to Trustee Act 1925, s.57, see §§ 45–12 *et seq.*, and on the question whether s.57 applies to settled land, see § 45–18.

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8. GENERAL PROVISIONS AFFECTING THE POWERS OF A TENANT FOR LIFE

Exercise of powers cannot be fettered

The effect of section 106

37–146 NOTE 11. AT THE END ADD: For a case concerning the equivalent provision in the applicable legislation in Victoria, see *Royal Melbourne Hospital v Equity Trustees Ltd* [2007] VSCA 162; (2007) 18 V.R. 469 at [292].

AT THE END OF THE TEXT ADD: It would seem that section 75(5) and (6) of the 1925 Act, which require the income from securities representing the investment of capital moneys arising under the Act to be paid or applied as they would have been payable or applicable under the settlement, are to be read subject to the provisions of section 106.^{12a}

10. SETTLED LAND ACT POWERS OF SALE AND EXCHANGE

The price

37–188 NOTE 33. FOR THE REFERENCE TO *Snell's Equity*, SEE NOW (32nd edn), § 28–09.

15. APPLICATION OF CAPITAL MONEY UNDER THE SETTLED LAND ACT

Power to direct mode of application of capital money

37–292 AT THE END OF THE TEXT ADD: The trustees and the tenant for life are treated as a single person for the purposes of the income tax^{99a} and capital gains tax^{99b} legislation where the land is vested in the tenant for life and investments representing capital money are vested in the trustees.

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^{12a} *Royal Melbourne Hospital v Equity Trustees Ltd* [2007] VSCA 162; (2007) 18 V.R. 469 at [296].

^{99a} Income Tax Act 2007, s.474(3).

^{99b} Taxation of Chargeable Gains Act 1992, s.69(3).