The Law Commission

(LAW COM. No. 115)

PROPERTY LAW

THE IMPLICATIONS OF WILLIAMS & GLYN'S BANK LTD. v. BOLAND

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*)
OF THE LAW COMMISSIONS ACT 1965

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THE IMPLICATIONS OF WILLIAMS & GLYN'S BANK LTD. v. BOLAND

CONTENTS

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To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain

PART I
INTRODUCTION

1. In *Williams & Glyn's Bank Ltd.* v. *Boland*[1] (which we refer to in this report as "*Boland*") the House of Lords held that a Bank which had lent money on the security of a house was bound by the interest of the owner's wife in the house and therefore was not entitled to vacant possession, which it sought to obtain for the purpose of enforcing the debt by sale.

2. The decision in *Boland* has aroused a great deal of interest. On one view, it undermines the system of registration of title, and creates difficulties for purchasers and mortgagees which will inevitably inflate the cost of conveyancing and create new sources of delay and complication.[2] On another view, the conveyancing difficulties are a reasonable price to pay for the additional protection accorded by the law as declared in *Boland* to those, particularly married women, who have rights in relation to the family home.[3] This is the conflict we seek to resolve in this report.

Background

3. In 1969 Michael Boland bought a house and went to live there with his wife and son. She had made a substantial contribution to the purchase price, but the title to the property was in the name of Michael Boland alone. In order to finance his business activities a loan, personally guaranteed by him, was obtained from Williams & Glyn's Bank, to whom he charged the house as security. The Bank made no enquiries about Mrs. Boland's rights. The business failed, and the Bank brought proceedings for possession of the house, with a view to its sale with vacant possession and the recovery, from the proceeds, of so much of the loan as remained due.

4. The Bolands contested the Bank's claim for possession. Mrs. Boland maintained that she had rights which prevailed against those of the Bank.[4] She claimed that she was entitled to a property interest in the house by reason of her contribution to the purchase; that she occupied the house and was entitled to continue to occupy it; and that her rights constituted an "overriding interest" which prevailed against the Bank. The Bank did not dispute that, as against her husband, Mrs. Boland was entitled to a property interest

[1][1981] A.C. 487.
[2]See paras. 28–43 and n. 158 below.
[3]See para. 67 below.
[4]Mr. Boland contested the proceedings on a different ground with which we are not concerned.

in the house and to a right to occupy it. Rather, it maintained that her rights did not bind the Bank.[5] The Bank succeeded before Templeman J. at first instance,[6] but his judgment was unanimously reversed by the Court of Appeal,[7] whose decision was unanimously upheld by the House of Lords.[8]

5. Following the decision of the House of Lords in *Boland* you asked us to consider its impact both upon our work on land registration and upon the recommendations contained in our Third Report on Family Property,[9] to which a draft Matrimonial Homes (Co-ownership) Bill[10] is annexed.

6. Since it has many repercussions outside the field of land registration, we decided to deal with *Boland* separately, and since the conveyancing difficulties stemming from *Boland* are self-contained, we decided to give it priority over the completion of the proposals we are preparing on various aspects of land registration. We consulted a number of professional bodies and experts, whose names are set out in Appendix 1 to this report. Consultation was primarily intended to ascertain the nature and extent of the practical conveyancing problems which have followed the decision in *Boland*, and how they are being handled. It seemed to us that the topic was too limited, too technical and too closely bound up with the law relating to the matrimonial home (on which we had already consulted extensively in the context of our work on family property)[11] to justify the publication of a Working Paper in accordance with our usual practice. Nevertheless, many of those we consulted volunteered views, not only on the technical questions but also on the wider considerations of principle on which any proposals for reform in this field should be based. We are grateful for the help which we received.

Scope of Boland

7. We must first stress three important distinctions, to which we shall frequently refer in this report.

(i) *Boland* was not concerned with the question whether Mrs. Boland was entitled *as against her husband* to an interest in the home. As we have seen, the Bank did not dispute that she had such an interest. If Mr. Boland had tried to sell the house without his wife's agreement she could if necessary have applied for a court order to prevent him doing so unless proper steps were taken to protect her

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[5]For a fuller account of the legal position, see paras. 10–16 below.

[6]*Williams & Glyn's Bank Ltd.* v. *Boland* (1978) 36 P. & C.R. 448. In the county court the similar case of *Williams & Glyn's Bank Ltd.* v. *Brown* (unreported) was also decided in favour of the Bank, and the appeals from the two decisions were heard together.

[7]*Williams & Glyn's Bank Ltd.* v. *Boland* [1979] Ch. 312.

[8]*Williams & Glyn's Bank Ltd.* v. *Boland* [1981] A.C. 487.

[9](1978) Law Com. No. 86, pp. 7–240. In the context of those proposals, which are summarised at paras. 21–24 below, we made a specific (and consequential) recommendation that the property interests of persons in actual occupation of the land should not constitute "overriding interests" under the Land Registration Act 1925 (see para. 1.333 of the Third Report).

[10](1978) Law Com. No. 86, pp. 133–240.

[11](1978) Law Com. No. 86.

entitlement to a share in the proceeds.[12] Had he actually sold the house (whether or not with her agreement), she would have been entitled to compel him, if necessary by obtaining a court order, to pay over her share of the proceeds. These matters were not in issue in *Boland* . What was in issue was the different question whether Mrs. Boland's rights bound a third party, in that case the Bank.

(ii) Although *Boland* happened to be concerned with the position of a wife, the law involved was property law and not matrimonial law. The authority of the case is not confined to the interests of married couples,[13] and does not even touch upon the special rights of occupation of the matrimonial home conferred by statute.[14] There is no reason to suppose that the result in Boland would have been different if the share belonging to Mrs. Boland had belonged to some other relative (such as a mother-in-law) or indeed to a person unrelated to the Bolands.

(iii) In *Boland* the land was registered land. English land law is complicated by the co-existence of two different systems of conveyancing—the old "unregistered" system of title deeds, and the system of registration of title (governed by the Land Registration Acts 1925 to 1971) which is gradually replacing it.[15] It seems probable that *Boland* would have been decided in the same way had the land been unregistered.[16] Accordingly, in the interests of simplicity the text of this report is expressed mainly in terms of registered land except where the difference between the two systems is significant.

Contents of this report

8. In **Part II** of this report we summarise the relevant law (including our previous proposals for reform) as affected by *Boland*. In **Part III** we assess the practical effects of the decision on property transactions. In **Part IV** we seek to balance the advantages of the law as declared in *Boland*, particularly in further promoting the integrity of the family home, against its disadvantages in terms of additional risk, complication and cost of conveyancing and inconsistency with the policy of the law. We conclude that the disadvantages are unacceptable and that reform is required. In **Part V** we set out our recommendations for reform, with reasons. In **Part VI** we summarise our conclusions and recommendations.

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[12] *Waller* v. *Waller* [1967] 1 W.L.R. 451. It is now, irrespective of the law as declared in *Boland*, rarely necessary to apply for a court order in these circumstances, for in practice the wife can more easily prevent a sale by registering her statutory right to occupy the matrimonial home. See n. 174 below.

[13] [1981] A.C. 487, 502 *per* Lord Wilberforce.

[14] See para. 20 below.

[15] Registration of title is now compulsory on sale in areas comprising almost 75% of the population of England and Wales. It is intended to extend the system as and when resources permit: *Hansard* (H.C.) 2 December 1981, vol. 14, col. 113 (Solicitor General).

[16] See para. 17 below.

Terminology

9. We have found it convenient to use certain terms in this report as shorthand. Except where we indicate otherwise, for our purposes "legal owner" means the person who has the documentary title to the land, whether or not he or she also has the benefit of an interest in it; "purchaser" includes a mortgagee; and "husband" and "wife" are interchangeable.[17]

PART II

THE LAW AFTER BOLAND

The co-owner's entitlement

10. What were Mrs. Boland's rights? They fall into two distinct categories. She had a *property interest* in the home and a dependent *right to occupy* it.

(i) *The property interest*: The Bolands' home was in the name of Mr. Boland alone[18] and no express provision was made for Mrs. Boland to have any interest in it. Nevertheless she did have a property interest in the home entitling her to a share in its value. The interest was both an "equitable" interest (i.e. an interest which, unlike a "legal" interest, does not automatically bind anyone buying the land) and a "beneficial" interest (i.e. an interest belonging to her for her own benefit and not as trustee for another). It might seem surprising that a person can successfully claim a proprietary interest in the absence of any deed or document. However, although a legal interest in land can only be created or transferred by a formal deed,[19] proprietary interests can arise informally in equity as a result of the doctrines of resulting, implied and constructive trusts.[20] In recent years it has increasingly been held that a spouse who contributes to the costs of acquiring or improving the home will be entitled to such an interest,[21] but the circumstances in which a trust of this kind will arise are not always easy to predict.[22] This complex-

[17]So far as co-ownership is concerned the law draws no distinction between husbands and wives. We usually refer to wives because the problems with which we are concerned are most frequently encountered in relation to a wife's interest in the matrimonial home.

[18]A fact unknown to Mrs. Boland, perhaps because their previous home had been in joint names.

[19]Law of Property Act 1925, ss.52, 53.

[20]Law of Property Act 1925, s.53(2). See *Snell's Principles of Equity* (27th ed., 1973), pp. 172–188. Sometimes the relevant interest arises as a result of other doctrines such as estoppel (see *Gissing* v. *Gissing* [1971] A.C. 886; *Hussey* v. *Palmer* [1972] 1 W.L.R. 1286), lien (see *Hussey* v. *Palmer*) or licence (see *Re Sharpe* [1980] 1 W.L.R. 219).

[21]The law whereby a spouse's contribution to the improvement of property effectively confers an interest on that spouse is reinforced by statutory provision: see s.37 of the Matrimonial Proceedings and Property Act 1970.

[22]See for example *Pettitt* v. *Pettitt* [1970] A.C. 777; *Gissing* v. *Gissing* [1971] A.C. 886; *Cowcher* v. *Cowcher* [1972] 1 W.L.R. 425; *Re Densham* [1975] 1 W.L.R. 1519; *Hanlon* v. *The Law Society* [1981] A.C. 124, 200. See also Bromley's *Family Law* (6th ed., 1981), pp. 442–480 and Cretney's *Principles of Family Law* (3rd ed., 1979), pp. 228–242.

ity means that it is difficult for anyone to state the law with certainty. Indeed, it has recently been observed[23] by a High Court judge that the present state of the law is "very confused and difficult to fit in with established equitable principles". Since the existence of Mrs. Boland's interest was conceded in *Boland* it was not there necessary to explore these difficulties. However, the uncertainty of the law[24] is a matter which is relevant to a consideration of the need for reform. It is also the law that beneficial co-ownership of land can arise only by way of a trust, whereby the legal owner or legal owners hold the land on trust for the beneficial co-owners. Thus if A and B are entitled to shares in land, the legal title to which is held by A, A will hold the land on trust for himself and B. It is generally assumed in such a case that the trust is a "trust for sale",[25] to which are attached certain statutory duties and powers.[26] A trust for sale requires the trustee immediately or eventually[27] to sell the land and deal with the proceeds in accordance with the trust. A consequential characteristic of these trusts is that the beneficial interests are treated for many purposes as being interests in money, into which the trust requires the land to be converted.[28] Nevertheless, a person who has a beneficial interest under a trust for sale of land obviously has some sort of interest in the land itself, at least until sale, and the courts have held, as they did in *Boland*, that for some purposes a person interested under a trust for sale can rightly be said to have an interest in the land.[29] We shall return to this particular point.[30]

(ii) *The dependent right of occupation.* We use the word "dependent" because the right of occupation with which we are concerned is

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[23]In *Re Sharpe* [1980] 1 W.L.R. 219, 226 *per* Browne-Wilkinson J. at p. 226.

[24]See Bromley's *Family Law* (6th ed., 1981), pp. 442–450. "With the authorities in such confusion, it is impossible to state with confidence what the present law is". (p. 448).

[25]It is not entirely clear how this consequence follows from the relevant statutory provisions: see Megarry and Wade, *The Law of Real Property* (4th ed., 1975), p. 410 and Forrest, "Trusts for Sale and Co-ownership—A Case for Reform" [1978] Conv. 194.

[26]Law of Property Act 1925, ss.23–33. It has recently been argued (Clayton, "Void Mortgages" [1981] Conv. 19) that since the statutory mortgaging powers of trustees for sale (s.28(1)) are insufficient to support a mortgage financing the purchase of land, a mortgage created for this purpose by a sole legal estate owner holding the property on trust would be void. However, in the case of registered land, it seems that the mortgagee will not be affected by any restriction on a trustee's power to mortgage which is not apparent from the register. Moreover, it is a general principle of English land law that, in the absence of any special statutory provision (such as Settled Land Act 1925, s.18, which invalidates unauthorised dispositions by a tenant for life: *Weston* v. *Henshaw* [1950] Ch. 510) *bona fide* purchasers for value of the legal estate without notice take a good title; and it therefore seems probable that a mortgagee would not be affected by any limitations on the mortgagor's powers, unless he had notice (actual or constructive) of the existence of the trust: *Caunce* v. *Caunce* [1969] 1 W.L.R. 286. We hope that the recommendations in this report will help to overcome any difficulties presented by the application of the doctrine of notice in this context. The general question whether the mortgaging powers of trustees for sale are satisfactory will be relevant to work which we hope soon to undertake on the law relating to mortgages.

[27]A power to postpone sale is implied in the case of every trust for sale of land unless the contrary intention appears: Law of Property Act 1925, s.25(1); but s.30 enables the court to make an order for sale either where the trustee refuses to sell or where "any requisite consent cannot be obtained".

[28]See e.g. *Irani Finance Ltd.* v. *Singh* [1971] Ch. 59, 80.

[29]See e.g. *Cooper* v. *Critchley* [1955] Ch. 431 and *Elias* v. *Mitchell* [1972] Ch. 652.

[30]See para. 92 below.

dependent upon the existence of a property interest. In 1955 the Court of Appeal had held that a beneficiary under a trust for sale of land acquired as a home for the beneficiaries is entitled, by virtue of that interest and subject to any court order to the contrary, to occupy the property together with the other beneficiaries.[31] In *Boland* the House of Lords accepted this decision as applicable to Mrs. Boland's situation.[32] (This right is wholly different from the right which is given by the Matrimonial Homes Act 1967[33] to a spouse in occupation of the matrimonial home. That statutory right stems from the existence of the status of husband and wife, not from the existence of a property interest).

Priority of co-owner's rights against purchasers

Registered conveyancing

11. How did Mrs. Boland's rights come to prevail against the Bank? The answer to this question is provided not so much by the general law as by particular statutory provisions relating to registered conveyancing. The short answer to the question is that the rights were held to be an "overriding interest", and overriding interests bind purchasers automatically, i.e. despite the absence of any mention of them on the register. This calls for some explanation.

12. Overriding interests are defined in section 3(xvi) of the Land Registration Act 1925 as meaning "all the incumbrances, interests, rights and powers not entered on the register but subject to which registered dispositions are by this Act to take effect . . .". The Act goes on to provide that on dispositions of freehold and leasehold land, the purchaser's registered title is subject to any entries appearing on the register and "unless the contrary is expressed on the register, to the overriding interests, if any, affecting the estate transferred or created".[34] The overriding interests which affect registered land are set out in section 70(1) of the Act, which includes the following provisions:

> "70.–(1) All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto . . .
>
> . . .
>
> (*g*) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed;
>
> . . .".

In *Boland* it was held that for the purposes of section 70(1) Mrs. Boland's

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[31] *Bull* v. *Bull* [1955] 1 Q.B. 234. The position is different where a trust for sale is created with the intention that the property should be sold: *Barclay* v. *Barclay* [1970] 2 Q.B. 677.

[32] [1981] A.C. 487, 507, 510.

[33] See para. 20 below.

[34] Ss.20(1)(*b*) (freehold) and 23(1)(*c*) (leasehold). See also ss.5(*b*) and 9(*c*), which make equivalent provision for first registration of the title.

beneficial interest was an interest "subsisting in reference" to the land;[35] that she was in "actual occupation"[36] at the relevant time;[37] and that accordingly, since the Bank had made no enquiries of her, her rights, consisting of her property interest and the dependent right of occupation, were an overriding interest,[38] to which the charge in favour of the Bank was subject. It is important to notice here that the status of Mrs. Boland's rights as an overriding interest under section 70(1)(*g*) depended upon the fact that she was in actual occupation—had she not been in actual occupation neither her property interest nor the dependent right of occupation could have prevailed against the Bank. The meaning of "actual occupation" in this context is by no means clear.[39] It has often been said to be a matter of fact,[40] not law; and the words were described in *Boland* as ordinary words of plain English which should be interpreted as such, connoting physical presence rather than some legal entitlement.[41] Yet as a *fact* actual occupation is not always easy either to discern or to establish: a person's occupation may be vicarious (for example, through a deserted wife or a caretaker)[42] and must apparently have some degree of permanence.[43] Moreover, as a *concept*, actual occupation can be exceedingly elusive: for example, in the particular context of rating law personal residence is not a necessary adjunct of actual occupation,[44] and actual occupation is not necessarily terminated by lengthy absences.[45] The breadth of interpretation given to the term in this context affords no confidence that its interpretation in the conveyancing context is liable to be any more precise.

13. We have indicated (at para. 11 above) that it is not the general law but the specific provisions of the Land Registration Act 1925 which provide an answer to the question how Mrs. Boland's rights came to prevail against the Bank. In *Boland* two important features of the general law were held to be excluded: the doctrine of notice and the system of overreaching.

14. The *doctrine of notice* is that a person who purchases a legal estate in land in good faith and for value takes the land free of any equitable right

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[35][1981] A.C. 487, 507, 511.

[36]*Ibid.*, pp. 505–6, 511.

[37]I.e. the time of the mortgage (or, more precisely, its registration, see para. 16 below). Provided that there is actual occupation at the relevant time it is immaterial that occupation subsequently ceases: *London and Cheshire Insurance Co. Ltd.* v. *Laplagrene* [1971] Ch. 499.

[38][1981] A.C. 487, 503 *et seq.*, 511 *et seq.* The argument that a beneficial interest under a trust for sale is a "minor interest" within section 3(xv) of the Land Registration Act 1925 and must be entered on the register for its protection did not avail the Bank, for the House of Lords held that the *fact of occupation* gave Mrs. Boland's minor interest the status of an overriding interest: [1981] A.C. 487, at pp. 508, 512. It seems that a beneficial interest in settled land, in contrast to an interest under a trust for sale, cannot be an overriding interest, for it takes effect as a minor interest "and not otherwise": Land Registration Act 1925, s.86(2).

[39]"I do not think it desirable to attempt to lay down a code or catalogue of situations in which a person other than the vendor should be held to be in occupation of unregistered land for the purpose of constructive notice of his rights, or in actual occupation of registered land for the purposes of s.70(1)(*g*)." *per* Russell L. J. in *Hodgson* v. *Marks* [1971] Ch. 892, 932.

[40]*Williams & Glyn's Bank Ltd.* v. *Boland* [1979] Ch. 312, 332 *per* Lord Denning M.R.

[41][1981] A.C. 487, 504–505.

[42]*Strand Securities Ltd.* v. *Caswell* [1965] Ch. 958, 984 *per* Russell L. J.

[43]*Williams & Glyn's Bank Ltd.* v. *Boland* [1979] Ch. 312, 338 *per* Browne L. J.

[44]*Routhan* v. *Arun District Council* [1982] 2 W.L.R. 144, 158 *per* Brandon L. J.

[45]"Sufficient to say that, when a husband quits the house leaving his wife there, the court can often regard him as continuing to be in actual occupation, just as when a sailor leaves on a long cruise or a soldier goes on service abroad, whether he sends her an allowance or not": *Ibid.*, *per* Lord Denning M.R. at p. 151.

unless he has "actual or constructive notice" of that right, i.e. has or ought to have knowledge of it.[46] In modern conveyancing, the doctrine has to a large extent been superseded[47] by systems whereby adverse interests are made capable of protection by registration:[48] registration in effect fixes the purchaser with knowledge, so that he takes the land subject to interests which are registered and free of those which are not.[49] It was held in *Boland* that the doctrine has no application to registered land:

> "Whether a particular right is an overriding interest, and whether it affects a purchaser, is to be decided upon the terms of section 70, and other relevant provisions of the Land Registration Act 1925, and upon nothing else."[50]

In *Boland* neither notice nor registration was involved: the Bank would only have taken free of Mrs. Boland's rights if it had made enquiries of her and the rights had not been disclosed.[51]

15. *Overreaching* is a system whereby when a transaction in land takes place the interests in it are transformed into interests in the purchase money and, irrespective of notice, do not bind the land in the purchaser's hands.[52] The system only applies to a limited class of transactions, notably those effected by trustees for sale and those under the Settled Land Act 1925.[53] Interests under a trust for sale of land cannot be overreached unless the purchase money is paid to or by the direction of at least two trustees or a trust corporation.[54] In Mrs. Boland's case there was only one trustee[55] (Mr.

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[46]"Constructive" notice is now in effect defined by s.199(1) of the Law of Property Act 1925 which (under the rubric "Restrictions on constructive notice") provides that a purchaser is not prejudiced by notice of anything which under the Land Charges Act 1972 is unenforceable for non-registration or of "any other instrument or matter or any fact or thing unless—(*a*) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (*b*) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent".

[47]But not entirely. For its survival in unregistered conveyancing, see para. 17 below.

[48]I.e. registration of the adverse interest or "incumbrance". In the case of unregistered land, these incumbrances are registered in a separate register kept under the Land Charges Act 1972. In the case of registered land, they are entered on the registered title: see Land Registration Act 1925, s.59.

[49]For unregistered conveyancing, see Law of Property Act 1925, s.198(1) (registration under the Land Charges Act 1972 constitutes actual notice) and Land Charges Act 1972, ss.4–7 (matters void or unenforceable for non-registration). For registered conveyancing, see Land Registration Act 1925, ss.5, 9, 20 and 23, which provide that dispositions are subject to various matters including entries on the register "but free from all other estates and interests whatsoever".

[50][1981] A.C. 487, 504 *per* Lord Wilberforce.

[51]Land Registration Act 1925, s.70(1)(*g*). See para. 12 above.

[52]Although in the case of a trust for sale the interests are already interests in money, the purchaser will take subject to them if the statutory conditions for overreaching are not complied with and he has notice of the interests. See Megarry and Wade, *The Law of Real Property* (4th ed., 1975), pp. 377–8.

[53]See Law of Property Act 1925, s.2(1).

[54]Law of Property Act 1925, ss.2(1), 27. Trust corporations, which include a wide range of public and private institutions, are defined in s.205(xxviii) and Law of Property (Amendment) Act 1926, s.3.

[55]A sole personal representative, however, does have the power to overreach: Law of Property Act 1925, s.27(2).

Boland), so the question of overreaching did not arise.[56]

16. At what moment was the Bank bound by Mrs. Boland's rights? It might be assumed that it became bound at the moment when the property was charged to it as security. This, however, was not so. In registered conveyancing the purchaser is bound by the overriding interests which exist at the date of registration of the disposition.[57] Effectively, this is the date when the application for registration is duly lodged in the Land Registry.[58] The significance of this will become apparent later.[59] It is sufficient here to notice that, since the date of registration will normally be later than the date on which the transaction to be registered is completed, the overriding interests which bind the purchaser are not necessarily confined (as they happened to be in *Boland*) to those which existed at completion.

Unregistered conveyancing

17. Although *Boland* itself was concerned with registered land, we doubt whether the result would have been different if the land had been unregistered. Admittedly Mrs. Boland's rights would not then have constituted an overriding interest as defined by the Land Registration Act, because unregistered land knows nothing of overriding interests in that special sense; but the rights would have prevailed against the Bank if it had had actual or constructive notice of them, for in unregistered conveyancing, if an equitable interest is neither registrable under the Land Charges Act 1972 nor overreachable,[60] the doctrine of notice determines its enforceability against a purchaser.[61] It seems probable that the Bank would have been held to have had notice of Mrs. Boland's rights, on the ground that it either was or ought to have been aware that she was living in the home[62] and notice of occupation

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[56]Some doubts have been expressed as to the circumstances in which an overreachable interest which becomes an overriding interest can thereafter be overreached: see the discussion in Martin, "Section 70(1)(*g*) and the Vendor's Spouse" [1980] Conv. 361; Sydenham, "Overreaching and the Ratio of Boland's Case" [1981] Conv. 427; and Martin, "Overreaching and Section 70(1)(*g*): the Wide View Versus the Narrow" [1980] Conv. 219.

[57]*Re Boyle's Claim* [1961] 1 W.L.R. 339.

[58]Under the Land Registration Rules 1925 registration is completed "as of the day on which and of the priority in which the application was delivered" (rule 42 (first registration)). See also rule 83(2) (as substituted by the Land Registration Rules 1978) to similar effect for registered dealings.

[59]See paras. 18, 32 and 40 below.

[60]Most equitable interests are either registrable or overreachable, but some are not, e.g. trust interests where there is only one trustee. See para. 15 above.

[61]See para. 14 above.

[62]This is on the assumption (*a*) that Mrs. Boland's occupation was discoverable by reasonable inquiries and inspections and (*b*) that consistently with *Boland* it would now be held that reasonable inquiries and inspections within s.199(1)(ii)(*a*) (see n. 46 above) of the Law of Property Act 1925 include inquiries and inspections as to occupation other than that of the vendor. Cf. *Midland Bank Ltd.* v. *Farmpride Hatcheries Ltd. and Another* (1981) 260 E.G. 493, where reasonable inquiries were held on the facts not to include inquiries as to the capacity in which the vendor was in occupation.

is notice of the occupier's rights[63] unless there is no cause to enquire about them.[64]

Discrepancies between registered and unregistered conveyancing

18. Nevertheless, one effect of *Boland* is to exacerbate the discrepancies between registered and unregistered conveyancing. There may be circumstances in which a purchaser of registered land would be bound by the rights of an occupier where a purchaser of unregistered land would not. For example—

(i) if a purchaser of registered land makes enquiries only of the legal owner and is incorrectly informed that no one else is in occupation, the purchaser will nevertheless be bound by the occupier's rights because he has not addressed his inquiries to that occupier.[65] In the case of unregistered land, however, an enquiry addressed to the legal owner and answered in the negative might—at least where the presence of an occupier is not discoverable by inspection—be sufficient to ensure that the purchaser does not have constructive notice of the rights of any occupier, on the ground that in the circumstances he has made reasonable enquiries;

(ii) if in the case of registered land an occupier's rights are acquired after completion of a mortgage but before its registration, the mortgagee will usually be bound by them.[66] In the case of unregistered land the mortgagee is bound only by those rights which are in existence at completion of the mortgage.

19. There is a further relevant discrepancy between the registered and the unregistered systems. Mrs. Boland's home was registered land and it was open to her to apply for her rights to be protected on the register.[67] Had such an entry been made, the Bank, on searching the register before completing the charge, would have discovered the title to be subject to her rights and would no doubt have acted in the light of that discovery. Had the land been unregistered, the rights would not have been registrable at all, for the matters

[63]The doctrine followed in *Caunce* v. *Caunce* [1969] 1 W.L.R. 286 and *Bird* v. *Syme-Thomson* [1979] 1 W.L.R. 440 that a wife's occupation of the matrimonial home is insufficient to put a purchaser on notice of her rights (e.g. on the ground that her occupation is "consistent" with her husband's title) was treated with scepticism by Russell L.J. in *Hodgson* v. *Marks* [1971] Ch. 892, 934 and was rejected in *Boland* both by Lord Denning in the Court of Appeal ([1979] Ch. 312, 332) and by Lord Wilberforce in the House of Lords ([1981] A.C. 487, 505).

[64]As in *Midland Bank Ltd.* v. *Farmpride Hatcheries Ltd. and Another* (n. 62 above), where a company director suppressed the fact that his occupation was personal and not that of the company.

[65]The relevant words of s.70(1)(*g*) of the Land Registration Act 1925 are ". . . save where enquiry is made of such person and the rights are not disclosed".

[66]See para. 16 above. In the unusual case where a mortgagee makes enquiry of the occupier after completion, and before registration, of the mortgage and the occupier's rights are not disclosed, presumably the mortgagee would take free of the occupier's rights. See Hayton, *Registered Land* (3rd ed., 1981), p. 104.

[67]In practice by the entry of a "*joint proprietorship restriction*" under s.58(3) of the Land Registration Act 1925, whereby a disposition cannot be registered if there are less than two trustees; or by a *caution* under s.54, whereby the cautioner is given notice of any proposed disposition and the opportunity to object to it. When such an entry is made, the interest ceases to be an overriding interest—the definition in s.3(xvi) excludes matters entered on the register—for it then obtains protection solely through its presence on the register.

registrable against unregistered land under the Land Charges Act 1972 do not include equitable interests arising under trusts. For such interests, unless they are overreached,[68] the doctrine of notice holds absolute sway.

Matrimonial Homes Act 1967

20. The absence of any requirement to register the right of occupation derived from an equitable interest contrasts starkly with the provisions relating to the spouses' statutory rights of occupation under the Matrimonial Homes Act 1967.[69] Under that Act a spouse who is not the legal owner[70] of the matrimonial home is given extensive rights of occupation, defined in section 1(1) as:

> "(*a*) if in occupation, a right not to be evicted or excluded from the dwelling house or any part thereof by the other spouse except with the leave of the court given by an order under this section;
>
> (*b*) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house."

Although these statutory rights automatically bind the spouse who is the legal owner, they only bind a purchaser if they have been protected by registration;[71] and section 2(7) of the Act specifically provides that the rights are not an overriding interest within the meaning of the Land Registration Act notwithstanding that the spouse is in actual occupation of the dwelling house.

Matrimonial Homes (Co-ownership) Bill

21. You asked us to reconsider the recommendations made in our Third Report on Family Property and incorporated in the Matrimonial Homes (Co-ownership) Bill, including the recommendation that certain beneficial interests should not be capable of being overriding interests.[72] It is convenient at this stage to summarise the main provisions of that Bill and put that particular recommendation in context.

22. The Bill, which is appended to Book One of the Third Report on Family Property,[73] provides that, subject to certain exceptions,[74] where either husband or wife, or both, own the matrimonial home, they are to own it

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[68]See para. 15 above.

[69]The amendments recently made to the Act by the Matrimonial Homes and Property Act 1981 do not materially affect the subject-matter of this report.

[70]It is immaterial that the spouse has, or may have, a *beneficial* interest: s.1(9), added by Matrimonial Proceedings and Property Act 1970, s.38.

[71]For registered land registration is by the entry of a notice on the register (Matrimonial Homes Act 1967, s.2(7)), and dispositions of registered freeholds are free of matters which are neither entered on the register nor overriding interests (Land Registration Act 1925, s.20(1); see also s.23(1) (leaseholds) and ss.5 and 9 (first registrations)). For unregistered land the statutory rights are registrable under the Land Charges Act 1972 as a "Class F" land charge, which is void against a purchaser unless registered before completion of the purchase (Land Charges Act 1972, s.4(8)).

[72]Para. 5 above.

[73](1978) Law Com. No. 86, p. 133.

[74]Set out in clauses 7 to 14.

equally.[75] This is called "statutory co-ownership". Under the Bill, statutory co-ownership is to take effect by way of a trust for sale, under which the spouses will have joint beneficial interests.[76]

23. *The co-ownership rights.* The Bill attaches certain rights and requirements not only to the new statutory co-ownership interests, but also in general to spouses' beneficial interests in a matrimonial home which they own or have owned exclusively.[77] In all these cases the spouses' consent to dispositions of the matrimonial home[78] and the appointment of new trustees[79] is required; and if the co-ownership interest is registered,[80] a purchaser takes subject to the interest (so that it cannot be overreached unless the purchase money is paid to two or more trustees or a trust corporation[81]) and subject to the associated consent right (so that a disposition made without the required consent has no legal effect[82]).

24. *Registration of co-ownership.* In relation to the registration of co-ownership, the Bill makes separate provision for unregistered and registered conveyancing, following the existing differences of machinery. For *unregistered land,* the protection of spouses' co-ownership is to be by a new type of land charge (Class G), registrable under the Land Charges Act 1972.[83] Provisions of the Bill, together with existing statutory provisions,[84] ensure that registration of this land charge is to be a necessary and sufficient protection of the interest against purchasers. For *registered land,* the protection, as at present,[85] is to be by an appropriate restriction entered on the register of title.[86] As the law now stands in the light of *Boland,* entry of a restriction is not a necessary protection for an interest which the fact of occupation renders an overriding interest.[87] The Bill, however, would give effect to the policy that such interests must be entered on the register of title if they are to bind

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[75]Clause 5. Statutory co-ownership is unnecessary for the common case where the spouses are joint owners apart from the Bill, e.g. where the home is simply put into their names as beneficial joint tenants: clause 7 makes the appropriate exception.

[76]Clause 6.

[77]The relevant provisions are in Chapter III of the Bill, entitled "Incidents of Co-ownership of the Matrimonial Home".

[78]Clauses 19 and 21.

[79]Clauses 19 and 20.

[80]See para. 24 below.

[81]Clause 23(3)(*a*) (unregistered land). In the case of registered land breach of the two-trustee rule will prevent the disposition from being registered.

[82]Clause 21(5) and (6).

[83]Clause 23.

[84]Law of Property Act 1925, s.199(1)(i) and Land Charges Act 1972, s.2 (as amended by para. 1 of Schedule 1 to the Bill), which provide that matters which are registrable and not registered are unenforceable against a purchaser even if he has notice of them, ensure that registration is a necessary protection; and Law of Property Act 1925, s.198(1) which provides that registration under the Land Charges Act 1972 constitutes actual notice, ensures that it is sufficient. See also clause 21(5) and (6)(*b*) providing for the avoidance of dispositions made without consent where the co-ownership interest is registered.

[85]Land Registration Act 1925, s.58(1), (3) and (5) enable applications to be made for the entry on the register of restrictions on transferring or charging the land.

[86]Entry on the register is to be a necessary and sufficient protection against the purchaser: see Land Registration Act 1925, s.59(6) and clause 24(2) and (3) of the draft Bill (purchaser not concerned with matters requiring registration and not registered); and Land Registration Act 1925, ss.5, 9, 20 and 23 (purchaser takes subject to entries on the register). See also clause 21(5) and (6)(*a*), providing for the avoidance of dispositions made without consent where the co-ownership interest is registered.

[87]See para. 12 above.

purchasers: it accordingly provides (in clause 24(4)) that no interests capable of being overreached under a trust for sale or settlement are to be overriding interests. When the Third Report was published we believed that this was probably the law;[88] and clause 24(4) was drafted in declaratory form and expressed to be "for the removal of doubt". *Boland* however has falsified this belief, and as a result clause 24(4), far from declaring the law, now conflicts with it: whilst as a result of *Boland* the beneficial interests of occupying co-owners are overriding interests and need not be registered for their protection against purchasers, the Bill provides that the beneficial interests of co-owner spouses are not overriding interests and that without registration they are not protected against purchasers.

Summary

25. It is now necessary to recapitulate the position of Mrs. Boland and the Bank as they were found to be in *Boland.* Mrs. Boland, through her contribution to the purchase of the family home, acquired an equitable interest in the home and a dependent right of occupation. The equitable interest gave rise to a trust for sale, whereby the legal owner (Mr. Boland) held the land on trust to sell it and distribute the proceeds rateably between Mrs. Boland and himself. When the charge in favour of the Bank was registered it was, as a result of Mrs. Boland's actual occupation, subject to her rights, which constituted an overriding interest. Since the Bank was bound by Mrs. Boland's right of occupation, it could not obtain vacant possession of the land so as to enforce its charge. Mrs. Boland could have protected her rights on the register of title, but she did not do so.

26. It is plainly of the utmost importance to wives and other equitable co-owners that their rights should be protected. But it is equally important that intending purchasers should be able to find out about these rights before the transaction is completed. The effect of *Boland* is to provide some measure of protection for these co-owners on a sale or mortgage by the legal owner. Where the land is registered, the co-owner may place some reliance upon the Land Registration Act 1925 to give automatic protection, as an overriding interest, to his or her beneficial interest and the dependent right of occupation. The position of a purchaser, however, is much less secure: he merely knows that the transaction will be subject to the rights of occupiers which exist at the relevant time[89] unless he makes enquiries of the occupiers and the rights are not disclosed. He cannot now rely upon the register to reveal the existence of even *spouses'* rights of occupation, for the *Boland* right, unlike the statutory right created by the Matrimonial Homes Act 1967,[90] does not require registration for its protection against a purchaser. He is therefore now at risk of being bound by rights which he cannot be sure of discovering. In the next part of this report we consider, with reference to current practices, the existence of this risk to purchasers and how and with what consequences it can be reduced.

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[88](1978) Law Com. No. 86, para. 1.253(*b*). See also paras. 1.332 and 1.333.

[89]I.e. the date of registration (registered land) or the date of completion of the purchase (unregistered land): see para. 16 above.

[90]Para. 20 above. The position would be different if the Matrimonial Homes (Co-ownership) Bill were law, for under that Bill the spouses' co-ownership interests are registrable and if not registered are unenforceable against a purchaser.

PART III

THE CONVEYANCING CONSEQUENCES

27. The principal conveyancing consequence of *Boland* is the increased uncertainty which it brings to house purchase: whatever they do, purchasers and mortgagees cannot be sure that they will obtain an unencumbered title.

The purchaser's risk: a pig in a poke

28. The fact that occupiers'[91] rights may prevail against a purchaser even where he has no knowledge of them is an obvious risk to him. Moreover, whatever precautions he takes, the purchaser can never know for certain that he has succeeded in identifying all the occupiers. The presence of one unidentified (and perhaps unidentifiable) occupier will be sufficient to stultify the purchase. It is not merely that the risk "may add to the burdens of purchasers, and involve them in enquiries which in some cases may be troublesome":[92] the position was succinctly put by Russell L.J. in *Hodgson* v. *Marks*:

> ". . . a wise purchaser or lender will take no risks. Indeed, however wise he may be he may have no ready opportunity of finding out, but, nevertheless, the law will protect the occupier."[93]

Frequency of risk

29. The risk certainly exists whenever a disposition is to be made by a sole legal owner,[94] for in every such case there may be an undisclosed trust for sale under which there are beneficial interests and dependent rights of occupation.[95] We have no means of discovering the annual number of these dispositions, but such evidence as we have[96] suggests that over 75% of mortgages of matrimonial homes are now in the joint names of husband and wife and thus outside the scope of the decision in *Boland*. This still leaves a considerable residue of existing and future purchases which have been or will be taken in the name of a sole legal owner.

30. It is impossible to predict how frequently co-owners would assert *Boland*-type claims if no special precautions were taken by purchasers, the more so because such claims would by no means be confined to cases in which some dispute had arisen between the legal owner and the occupier—indeed the occupier's rights may often be invoked primarily to frustrate proceedings brought by a mortgagee against the legal owner, as in fact they were in

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[91]The rights covered by Land Registration Act 1925, s.70(1)(*g*) also include the rights of those "in receipt of the rents and profits".
[92][1981] A.C. 487, 508, *per* Lord Wilberforce.
[93][1971] Ch. 892, 932.
[94]See para. 15 above.
[95]See para. 10 above.
[96]I.e. estimates supplied by the Building Societies Association.

Boland itself.[97] In any event, even if the occupiers' claims are not pressed to litigation or if pressed fail, considerable delay, anxiety and expense may well have been caused, and in some cases the doubtful state of the law may prompt a mortgagee to settle a claim on disadvantageous terms rather than run the risk of a complete defeat in attempting to obtain possession.

Incidence of risk

(i) *to house purchasers*

31. For the house purchaser, the risk that the house is subject to undiscovered occupiers' rights is most serious where he fails to ensure that he obtains possession on or before completion of the purchase. In such a case there is always the possibility that the house, though vacant when inspected, will be occupied either before the date of completion or (in the case of registered land) the date of registration.[98]

32. Even where the purchaser stipulates for vacant possession on or before completion, the element of risk is still present, for at least two reasons. First, actual occupation may be very difficult to detect.[99] Secondly, the discovery of an occupier at the moment at which possession is to be taken will put the purchaser in an extremely difficult position. He may be unable to move in that day as planned, and if (as commonly happens) he has already contracted to give vacant possession of his old house the same day he may be unable to move back. Apart from the resultant inconvenience and expense, the purchaser is likely to be uncertain what to do next. He may be advised that he can probably recover damages from the vendor for breach of contract, but he will be reluctant to incur the additional worry and expense of litigation if there is a reasonable prospect that the vendor will be able to secure vacant possession. He may therefore face a prolonged period of uncertainty and the expense and upset of finding temporary accommodation for himself and his family,[100] whilst the vendor attempts to settle his differences with the occupier.

(ii) *to mortgagees*

33. For mortgagees the risk is perhaps most serious where the mortgage (as in *Boland*) is not contemporaneous with the purchase. In such cases the mortgage is inevitably subject to all overriding interests which have been set up by the purchaser's household.

34. Even where the mortgage is contemporaneous with the purchase (such as the ordinary building society mortgage), the risk is substantial. In the case of *registered land,* since purchasers are bound by occupiers' rights existing at

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[97]And in *Knightly* v. *Sun Life Assurance and Others, The Times* 23 July 1981, where the legal owner sought to invoke the occupier's rights against the mortgagee notwithstanding that the occupier had been a party to the mortgage and disclaimed any interest in the property. Although the claim was unsuccessful, the case illustrates the sort of circumstances in which *Boland* can be invoked in the courts. See also para. 63 below.

[98]See para. 16 above.

[99]See para. 12 above.

[100]See for example *Re Sharpe (A Bankrupt)* [1980] 1 W.L.R. 219, mentioned at para. 58 below.

the date of *registration* of the transaction,[101] the "contemporaneous" mortgagee will take subject to any overriding interests established by the mortgagor's wife or other members of the household at any time before registration of the mortgage. One commentator has expressed the position in these words:

> ". . . if there is at the date of registration a person in actual occupation of the land (whether the spouse, mistress, child, or merely the friend of the registered proprietor) any proprietary interest which he can assert (by reason, for example, of having made a contribution to the purchase price, or even installing central heating) will bind the registered proprietor. More to the point, it will bind the building society or other mortgagee which has provided the funds to enable the purchase to take place . . . However assiduously [the mortgagee] may check that the property is vacant at the time when he hands the mortgage money over on completion he is liable to find himself bound by adverse interests of whose existence he had no means of knowledge."[102]

35. In the case of *unregistered land,* although the occupiers' rights to which a purchaser or mortgagee takes subject are those in existence at *completion,* a "contemporaneous" mortgagee may still be vulnerable: if, for example, a house is being bought partly from the proceeds of a former matrimonial home in which the wife had a property interest, the wife will almost always acquire a corresponding interest in the new house at the moment when the sale is complete, and it seems that the mortgagee will take subject to her rights (at least if he knows or ought to know of her stake in the house), for although the conveyance and the mortgage are usually simultaneous they are separate transactions, and in law the conveyance precedes the mortgage.[103]

The purchaser's precautions

36. Although the frequency and incidence of the risk which *Boland* creates for purchasers cannot be assessed with complete accuracy, the existence of the risk appears to us to justify the taking of precautions at the very least in every case where title is given by a sole legal owner. In theory the precautions required for registered and unregistered land are different. A purchaser of registered land needs to discover the occupiers' rights, because he will usually[104] take subject to them. For the purchaser of unregistered land the application of the doctrine of notice[105] means that he only needs to make "reasonable" inspections and enquiries. However it cannot safely be predicted what inspections and enquiries the court would (after the event) regard as reasonable, with the result that the difference between registered and unregistered conveyancing is unlikely to be reflected in the precautions taken by the purchaser. In practice he will always wish to satisfy himself so far as possible that the interests of all occupiers are accounted for.

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[101]See para. 16 above.
[102]Freeman, "Wives, Conveyancers and Justice", (1980) 43 M.L.R. 692, 693.
[103]*Church of England Building Society* v. *Piskor* [1954] Ch. 553.
[104]See para. 18 and n. 65 above.
[105]See paras. 14 and 17 above.

37. What precautions, then, can a purchaser take to satisfy himself as far as possible that the interests of all occupiers are accounted for? In order to ascertain the effect of *Boland* upon conveyancing practice we wrote to a number of interested bodies seeking specific information on the point. Adjustments in conveyancing practice have been made as a result of the case, and although the replies[106] disclosed some divergences in these adjustments, they did enable us to draw certain broad conclusions about the practical problem facing purchasers and the methods used to deal with it.

38. The practical problem confronting a purchaser is how to be satisfied *either* that there are no occupiers other than the vendor himself or that no such occupier has any rights in the land, *or* that such occupiers' rights as do exist cannot be enforced against a purchaser. The purchaser's precautions therefore fall into two categories, those designed to ascertain the existence and nature of occupiers' rights and those designed to neutralise occupiers' rights so far as the purchaser is concerned.

Ascertainment of occupiers' rights

39. Occupiers' rights may be ascertained either by inspection on the site, or by enquiry on or off the site. There is a disadvantage common to both inspection and enquiry: neither can be conclusive, for neither when it is made will necessarily reveal the presence of occupiers, and neither *can* reveal the presence of any occupier who takes up occupation in the interval of time, however short, which must almost inevitably exist between inspection and completion (or registration). Moreover inspection may be expensive or inconvenient to arrange, and enquiries tend to involve both sides in the potential embarrassment of laying bare the vendor's domestic affairs.

40. Physical inspection of the premises immediately prior to completion is and has long been a sensible precaution in ensuring that vacant possession is obtained. It is not, however, a complete answer. As we have seen in the case of registered land,[107] the fact that the purchaser does obtain vacant possession on completion does not protect a mortgagee against any interest of a member of the purchaser's household acquired before the date of registration of the mortgage. A mortgagee of unregistered land may also be unprotected in certain circumstances.[108] Moreover, there may be serious practical difficulties involved in making inspections immediately prior to completion, particularly in the case of "chains" of sales and purchases all due for completion on the same day. Each link in the chain is dependent for its completion upon completion of the previous link. If each purchase is delayed until the purchaser has arrived to satisfy himself that there is vacant possession, postponements of completion would seem inevitable together with the consequential worry and expense.

41. The making of enquiries by solicitors as to occupiers' rights has become

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[106]The names of those who replied are given in Appendix 1 below.

[107]Paras. 16 and 18(ii) above.

[108]See para. 35 above.

virtually standard practice. For example, specific enquiries as to occupiers' rights are included in standard forms of enquiries before contract,[109] and similar enquiries are sometimes made at later stages in the transaction. In general, the practice seems to be to address these enquiries to the legal owner alone (through his solicitor) relying on his honesty and accuracy, rather than to address them to the occupiers themselves. Detailed investigation of the nature of the occupiers' rights is normally dispensed with,[110] the objective being to ensure that such rights as do exist are neutralised so far as the purchaser is concerned.

Neutralisation of occupiers' rights

42. There are two distinct methods of preventing the enforcement of occupiers' rights against the purchaser. First, the occupier may be persuaded to release his rights. Secondly, an additional trustee may be appointed with the legal owner. We consider these in turn.

(i) *Release of rights.* Whether or not inspection or enquiry reveals the existence of occupiers' rights, it now seem to be usual for any occupiers whose names are not on the title to be asked to sign a form or join in the transaction releasing as against the purchaser (but not as against the legal owner) any interest which they may have in the property. This prevents the assertion of those rights as overriding interests, whilst preserving their effectiveness against the proceeds of sale in the hands of the legal owner. Although the concept of release is straightforward enough, in practice a number of problems may arise. For example—

(*a*) a solicitor acting for a legal owner may feel that his client's interests are adverse to those of the client's wife, and thus come under some duty to warn her. If he warns the wife of the need to take independent advice, extra expense is likely to be incurred. If he fails to warn her, it is possible that any purported release or joint mortgage would be held to be invalid by reason of the inequality of bargaining power between the parties,[111] or for some other reason. Problems of this nature are an obvious source of additional complication, expense and even conflict;

(*b*) in some cases the occupier may be legally incapable of giving a valid consent to the release: the incapacity may result from mental infirmity, and many of those we consulted have put to us the case of a person under 18 who may be entitled to claim a beneficial interest but is incapable of giving a valid release so long as he remains a minor.[112]

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[109]See e.g. Form Conveyancing 29 (long) published by Oyez Publishing Ltd.

[110]Understandably, we think: the occupiers will rarely be represented by a solicitor and will often be uncertain as to their rights.

[111]See for example *Lloyds Bank Ltd.* v. *Bundy* [1975] Q.B. 326.

[112]It has long been established at common law that a minor may avoid a disposition of an interest in land on attaining his majority or within a reasonable time thereafter. See *Halsbury's Laws of England* (4th ed.) vol. 24, para. 445 and Treitel, *The Law of Contract* (5th ed., 1979), p. 519.

(ii) *Appointment of additional trustee.* Given that a disposition by two trustees overreaches the beneficial interests,[113] it is plainly to the advantage of purchasers that dispositions should so far as possible be in joint names, whether or not the names of husband and wife. In some cases it appears that sole owners are being asked to arrange for the disposition to be joint,[114] and one consultee went so far as to suggest that loans to sole owners should be refused altogether. In general, however, there appears to be considerable reluctance to request a sole owner to arrange for a joint disposition: such a request, by bringing into question the beneficial ownership of the property, intrudes into affairs which are normally regarded as private to the owner's household. In any event, the legal owner is under no obligation to comply with a request for a joint disposition, and may be unwilling by doing so to concede that the entire beneficial interest is not his. Such a concession would arise not only where the additional name is that of some person (such as the owner's wife) who may have acquired a beneficial interest in the property by contribution, but also where it is that of an outsider; in each case it is being acknowledged that there is a trust, and consequently that the beneficial interest is not exclusively that of the legal owner.

Complication, delay and expense

43. It will be apparent from this brief account of the conveyancing practices that the lurking presence of potential overriding interests is causing additional complication, which is bound to increase expenses and to delay property transactions. It seems probable that the new precautions will involve legal advisers in additional work and will delay some transactions whilst the occupiers agree and sign their releases. It is not possible for us to quantify the additional expense, but we have little doubt that legal costs overall will increase. This expenditure cannot be regarded as in the nature of a premium for comprehensive insurance cover: as we have seen, the precautions paid for do not necessarily eliminate the risks.

PART IV

CRITIQUE OF BOLAND

44. In this part of the report we evaluate the effects of *Boland* and we consider the case for reform. We maintain that, despite its advantages, the protection given by the law as it was found to be in *Boland* is inadequate for co-owners, detrimental to purchasers and inconsistent with the general policy of the law; and we indicate the particular respects in which we consider that reforms are needed.

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[113]See paras. 15 above and 48 below.

[114]For some suggested difficulties in the way of appointing an additional trustee, see [1980] Conv. 458.

Protection given to co-owners

45. It seems certain that *Boland* will have some additional effect in protecting the matrimonial home against a disposition made without the wife's consent, for a husband seeking legal advice on such a disposition will now be told that unless his wife's consent is obtained she may frustrate the transaction by asserting or threatening to assert an overriding interest.[115] Purchasers and mortgagees may be similarly advised. It is the legal duty of a trustee under an implied trust for sale to consult the beneficiaries;[116] and *Boland* has reinforced this duty by creating a practical need to obtain the consent of beneficiaries to transactions which are otherwise vulnerable to their claims. Nor is the protection effective only when the trustee and beneficiaries disagree: if the interest is undetected, the protection may be invoked in *defence* of the trustee (that is, the legal owner) against his creditors, as in *Boland* itself, where the wife's assertion of her rights enabled the family home to survive, at least for some period of time, the husband's financial collapse.

Protection not given to co-owners

46. Yet the protection conferred by *Boland* upon co-owners should not be exaggerated. The protection may be absent or lost where the co-owner is not in actual occupation; where the co-owner's interest is converted into money; where the purchaser's inquiries yield nothing; and where the legal owner becomes bankrupt. We now deal with these possibilities in turn.

47. ***Co-owner not in actual occupation.*** As we have seen,[117] the co-owner's beneficial interest is not an overriding interest unless the co-owner is in actual occupation at the relevant time.[118] There is no sure test for determining what constitutes "actual occupation" in this context.[119]

48. ***Conversion of co-owner's interest into money.*** A co-owner who receives money in satisfaction of his share thereby loses his interest in the land and with it the right to occupy the land. But the loss of the interest in the land by its conversion into money does not result only from the co-owner's voluntary act: the interest may be overreached or may be realised on a sale under a court order.

(i) *Overreaching.* In *Boland*, with only one trustee (Mr. Boland), Mrs. Boland's interest could not be overreached.[120] But on the footing that a sale or mortgage by two or more trustees overreaches the beneficial interests under a trust for sale, the protection created for co-owners as a result of *Boland* can be removed by the appointment

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[115]The wife's consent (or a court order) is also necessary where she has registered her statutory rights of occupation under the Matrimonial Homes Act 1967 (see para. 20 above).
[116]Law of Property Act 1925, s.26(3). See n.126 below.
[117]Para. 12 above.
[118]Paras. 16 and 32 above.
[119]See para. 12 above.
[120]Para. 15 above.

of a co-trustee[121] (which could be done by the legal owner without consulting the co-owner), and in those circumstances on a sale or mortgage the co-owner's right of occupation will be defeated.

(ii) *Sale under court order.* The co-owner's interest may also be converted into money as a result of a sale under a court order. As we have seen,[122] section 30 of the Law of Property Act 1925 enables the court to make an order for sale either where the trustees refuse to sell or where "any requisite consent cannot be obtained". In *Bull* v. *Bull*[123] it was held that where an occupying co-owner refuses to vacate the premises the court has jurisdiction to make an order for sale with vacant possession under section 30, which it will exercise where it is right and proper to do so. It would seem to follow from this that a purchaser too could apply for an order under section 30 and there seems no reason to suppose that in an appropriate case he would not obtain one. Moreover, a mortgagee has a statutory right to sell the mortgaged property.[124] Suppose that the Bank in *Boland* had sold the house to a purchaser *subject* to Mrs. Boland's rights. What would Mrs. Boland's position have been then? It seems to us that the purchaser, in acquiring the house, would necessarily have held it on trust for himself on the one hand and Mrs. Boland on the other. Each would then have been "entitled . . . to the possession of the land and to the use and enjoyment of it in a proper manner".[125] In practice, however, the idea of a wife occupying the home concurrently with the purchaser is wholly unrealistic. It seems to us likely that the courts would follow the logic of *Bull* v. *Bull* or the analogous precedent in bankruptcy law[126] and order the sale of the house with vacant possession, the wife's share being discharged out of the proceeds.

49. ***Purchaser's enquiries.*** We have seen that in some circumstances the purchaser's enquiries may be insufficient to protect him.[127] In other circumstances they may also be sufficient to deprive the co-owner of protection. Thus, in the case of registered land the co-owner's interest is not an overriding interest if the intending purchaser makes enquiries of the co-owner and the interest is not disclosed;[128] and in the case of unregistered land the in-

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[121]See para. 42(ii) above.
[122]See n.27 above.
[123][1955] 1 Q.B. 234.
[124]Law of Property Act 1925, s.101(1)(i); Land Registration Act 1925, s.34(1).
[125]*Bull* v. *Bull* [1955] 1 Q.B. 234, 238 *per* Denning L. J.
[126]Para. 51 below. See *Re Solomon* [1967] Ch. 573; *Re Turner* [1974] 1 W.L.R. 1556; *Re Densham* [1975] 1 W.L.R. 1519; *Re Bailey* [1977] 1W.L.R. 278; *Re Lowrie* [1981] 3 All E.R. 353; cf. *Re Holliday* [1981] Ch. 405. Under an implied trust for sale the trustee for sale (i.e. the purchaser in the case suggested) is by statute required "so far as practicable" to consult the beneficiaries, and "shall, so far as consistent with the general interests of the trust, give effect to the wishes of such persons, or, in case of dispute, of the majority (according to the value of their combined interests) of such persons": Law of Property Act 1925, s.26(3). Accordingly, unless the wife's share were at least one half, the purchaser would be entitled to override her wishes on the footing that her wishes were not those of the majority. However, if the wife refused to concur in a sale, the purchaser/trustee could not evict her, but would have to apply to the court to order a sale with vacant possession: Law of Property Act 1925, s.30, as applied in *Bull* v. *Bull* above. The court would then have a discretion as to whether or not to order a sale.
[127]Paras. 28 and 39 above.
[128]Para. 18 and n.65 above.

terest is not protected if "reasonable" enquiries and inspections do not reveal it.[129]

50. ***Legal owner's bankruptcy***. If the legal owner is adjudicated bankrupt (which may well occur in precisely those cases where the wife or other co-owner is most in need of protection), the beneficial interest (including the dependant right of occupation) of the co-owner may be lost or at least reduced to an interest in a sum of money.

51. The policy of the law has been to avoid, so far as possible, the scandal of a man preserving his life-style at the expense of his creditors by continuing to enjoy the use of assets acquired by him but vested in his wife. There are various provisions whereby recourse may be made to the wife's property in order to realise it for the benefit of the husband's creditors. In particular, section 42(1) of the Bankruptcy Act 1914 provides that a "settlement" of property made by the bankrupt up to ten years before the bankruptcy may in certain circumstances be set aside at the instance of the trustee in bankruptcy. An interest which is referable only to an agreement between the spouses is liable to be regarded as a "settlement" for this purpose.[130]

52. Whilst an interest resulting solely from financial contributions made by the wife to the acquisition costs remains impregnable against the trustee in bankruptcy,[131] the effect of the husband's bankruptcy is to cause his share to vest in the trustee, who is entitled to apply to the court for orders for possession and sale.[132] The court has a discretion as to whether or not it will order a sale; but in exercising that discretion the question is not whether the trustee seeking a sale or the wife seeking to preserve her home is being reasonable, but "in all the circumstances of the case whose voice in equity ought to prevail?"[133] We are aware of only one reported case in which the voice of the trustee has not prevailed, and the making of an order has been postponed for any length of time.[134]

53. The courts thus have accepted that bankruptcy, in relation to the matrimonial home, has its own claim to protection; and it remains the policy of the law that a man has an obligation to pay his debts and to pay them promptly, even if this affects his ability to maintain his wife and family.[135] That policy is also evidenced in the Matrimonial Causes Act 1973,[136] which provides that section 42(1) of the Bankruptcy Act applies to settlements of property made in compliance with a property adjustment order under the court's jurisdiction, and in the Matrimonial Homes Act 1967, which provides[137] that a

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[129]Para. 14 and n.46 above.

[130]See *Re Densham* [1975] 1 W.L.R. 1519, where an agreement under which the wife was to have an interest in the home greater in value than the share attributable to her contribution was held *pro tanto* to be a "settlement" under s.42(1).

[131]In these circumstances the interest is plainly that of the wife and is not created by any "settlement" within the meaning of s.42(1): see e.g. *Re Densham* above, at pp. 1530–1.

[132]See *Williams and Muir Hunter on Bankruptcy* (19th ed., 1979) pp. 265–266.

[133]*Re Turner* [1974] 1 W.L.R. 1556, 1558 *per* Goff J.; adopted by the Court of Appeal in *Re Holliday* [1981] Ch. 405. See also *Re Lowrie* [1981] 3 All E.R. 353, 359 *per* Goulding J.

[134]*Re Holliday* above, where on exceptional facts a 5-year postponement was ordered. Cf. *Re Bailey* [1977] 1 W.L.R. 278, where there was no postponement, and *Re Densham* above and *Re Lowrie* above, where the postponements were for 6 months and 3 months respectively.

[135]*Re Bailey* above, *per* Walton J. at p. 284.

[136]S.39.

spouse's statutory rights of occupation are, in the event of the other spouse's bankruptcy, void against the trustee in bankruptcy.

54. We have mentioned the case of bankruptcy primarily to illustrate the point that despite the protection resulting from *Boland* the wife's position remains vulnerable. In the husband's bankruptcy proceedings, however, it remains vulnerable not as a result of the law as declared in *Boland* but as a result of the law of bankruptcy. In our view it must continue to be vulnerable in these circumstances so long as the policy of the bankruptcy law is to look first to the claims of creditors.

Uncertainty as to co-owner's protection

55. In *Boland* itself there was no need to clarify the circumstances in which an occupier may acquire a property interest,[138] because the Bank conceded that the wife had such an interest by reason of the contributions which she had made to the acquisition of the home.[139] In the absence of any such concession, however, it would be for the person claiming to be entitled to such an interest to prove the entitlement, and the lack of clarity and certainty in the law is such that the claimant may find difficulty in doing so. We have seen that a person who makes a substantial contribution in money or money's worth to the acquisition or improvement of property may very well be able to claim an equitable proprietary interest in the property.[140] Nevertheless the precise scope, and indeed the underlying juristic basis, of the decisions on this matter remain in some respects uncertain. In particular, many of the contributions (using that word in the broad sense) made by a wife to the welfare of the home do not justify the courts in drawing the inference as to the parties' intentions which will support the assertion of an equitable property interest.[141] The efforts of a wife in caring for the family and the home do not of themselves give her a property interest in it, though they may be sufficient to make it unconscionable for the husband to resile from an implied agreement as to the wife's share;[142] but unless she has made a financial contribution in circumstances entitling her to rely on the principles of trust law she cannot confidently claim any such interest. The uncertainty and technicality of the law in this field were part of the background against which in our Third Report on Family Property[143] we proposed a detailed scheme for statutory co-ownership of the matrimonial home. There have been few recent reported cases in which the question of beneficial entitlement in the family home has been raised between husband and wife, no doubt because the courts have wide discretionary powers on divorce which they do not hesitate to exercise in order to preserve the family home for the wife and children.[144] Yet the

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[137]S.2(5).

[138]See para. 10 above.

[139][1981] A.C. 487, 502, 510.

[140]See para. 10 above.

[141]See *Hanlon* v. *The Law Society* [1981] A.C. 124, 200 *per* Lord Lowry.

[142]*Re Densham* [1975] 1 W.L.R. 1519, 1525.

[143](1978) Law Com. No. 86, pp. 7–240.

[144]*Browne* v. *Pritchard* [1975] 1 W.L.R. 1366; *Hanlon* v. *The Law Society* [1981] A.C. 124, 158 *per* Sir J. Arnold P.

inherent uncertainty of the law has continued to be manifest in those cases[145] in which the court has lacked any such discretionary powers, the exercise of which renders the issue of beneficial entitlement under property law irrelevant.[146] In the aftermath of *Boland* this uncertainty will be increased, for the effect of *Boland* is to increase the extent to which co-ownership interests are capable of enforcement against purchasers and thus to extend the area of uncertainty so as to include conveyancing transactions.

Position of co-owners: the law is unsatisfactory

56. So far as co-owners are concerned, therefore, the law as declared in *Boland* seems unsatisfactory in at least three respects. First, the decision in *Boland* cannot operate to protect the co-owner's interest unless the co-owner is in actual occupation, and "actual occupation" may be fortuitous in fact and uncertain in law. Secondly, whether a co-ownership interest is protected depends to some degree upon the nature, extent and result of the purchaser's enquiries. Thirdly, although the law protects co-ownership interests, it is often uncertain whether a co-ownership interest exists at all, and if it does what is its extent and whether it was acquired in circumstances which make it impregnable on the legal owner's bankruptcy. Before we consider the case for reform, however, we shall assess the impact of *Boland* first upon purchasers in particular and secondly upon the policy of the law in general.

PURCHASERS

The difficulties for purchasers

57. We have already outlined the nature of the risks to which purchasers are now exposed and the steps which are being taken to reduce them.[147] We have seen that on a disposition by a sole legal owner there is always the possibility that a co-owner is in occupation and able to assert an interest binding on the purchaser;[148] that however meticulous the purchaser's enquiries are he may still find himself bound by an interest of which he had no knowledge;[149] and that the need to make enquiries and obtain releases from those entitled to property interests is likely to increase the cost and complexity of transactions.[150]

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[145]Most of these cases have involved the ascertainment of a property entitlement to a family home formerly occupied by an unmarried couple. See e.g. *Cooke* v. *Head* [1972] 1 W.L.R. 518; *Richards* v. *Dove* [1974] 1 All E.R. 888; *Eves* v. *Eves* [1975] 1 W.L.R. 1338; *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346; *Hardwick* v. *Johnson* [1978] 1 W.L.R. 683; *Hall* v. *Hall The Times* 4 April 1981.

[146]"In exercising its powers under section 24 of the [Matrimonial Causes] Act of 1973, the court looks at the whole financial position of the parties jointly and severally during the marriage and at the whole financial position of the parties severally after the break-up of that marriage. It notionally pools all the assets and redistributes them in such a way as to produce as little change in real terms as possible.": *Hanlon* v. *The Law Society* [1981] A.C. 124, 160 *per* Donaldson L. J. See also *per* Lord Denning M.R. at pp. 147, 148.

[147]Paras. 28–42 above.

[148]See para. 15 above.

[149]See para. 28 above.

[150]See para. 43 above.

58. That a *Boland* interest may successfully be claimed against a purchaser who is innocently unaware of it is a serious matter. In practical terms, however, what is perhaps more serious, because it is likely to be more frequent, is the loss and distress which may be caused by the mere possibility of a claim or by the making of a claim which in the end fails, so that the purchaser who believes he is buying a house with vacant possession finds that he has bought a potential or actual lawsuit instead. The recent case of *Re Sharpe (A Bankrupt)*[151] well illustrates the hardship that the late discovery of a flaw in the vendor's title can cause to an innocent purchaser. In that case the assertion of an equitable interest by a member of the vendor's family delayed the sale to such an extent that the intending purchaser could not, as he had planned, open his business on the property and was forced with his wife and two children to live in a small motorised caravan parked in various places on or near Hampstead Heath. It is scant comfort to such a person to be told that he can sue the vendor for damages, for the vendor may be insolvent or untraceable and in any event the damages awarded may (as a result of the rule in *Bain* v. *Fothergill*[152]) fail to reflect his financial losses.

59. The difficulties which the law as declared in *Boland* has brought to purchasers cannot be denied; but it was suggested in the *Boland* appeals on the one hand that the difficulties may have been exaggerated,[153] and on the other that they are acceptable.[154] We now examine these suggestions.

Are the difficulties exaggerated?

60. The proposition that the difficulties are exaggerated can be developed in two ways: first, that the difficulties are not as frequent as may be supposed, and secondly, that they are not as substantial as may be supposed. As regards frequency, it is of course true that the majority of matrimonial homes are in the joint names of husband and wife, and that *Boland* is hardly relevant to these cases, for the couples are then trustees and the presence of two or more trustees should ensure that their beneficial interests, and the beneficial interests of any other occupiers, will be overreached on a sale or mortgage.[155] Nevertheless, as we have pointed out,[156] there is a considerable residue of cases where the home is not in joint names, and in every such case there may be undisclosed occupiers capable of asserting a beneficial interest to the purchaser's detriment. As regards the substance of the difficulties, we have shown that purchasers have no guarantee that the precautions that would protect them from the risk that an occupier's interest will at some stage be asserted against them are necessarily effective or available.[157]

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[151][1980] 1 W.L.R. 219. See also *Easton* v. *Brown* [1981] 3 All E.R. 278, where a purchaser obtained an order for specific performance of a contract for sale, but was deterred from enforcing it when he discovered that the vendor's former wife and children were in occupation.

[152](1874) L.R. 7 H.L. 158. When a contract for the sale of land is broken by reason of the vendor's failure, without his own fault, to show a good title, the purchaser is not entitled to more than nominal damages for the loss of his bargain. The rule survives despite the fact that the courts regard it as anomalous and seek to avoid applying it where its application can reasonably be avoided, as in *Wroth* v. *Tyler* [1974] Ch. 30 and *Malhotra* v. *Choudhry* [1980] Ch. 52.

[153][1981] A.C. 487, 510 *per* Lord Scarman; [1979] Ch. 312, 343 *per* Browne L. J.

[154][1981] A.C. 487, 508–9 *per* Lord Wilberforce.

[155]See paras. 15 and 48 above.

[156]See para. 29 above.

[157]Paras. 28 and 39–43 above.

61. The conclusion we draw is that, whether or not cases of substantial loss resulting from the assertion of a *Boland* interest are likely to be frequent, purchasers and lenders are invariably exposed to the *risk* of such loss and cannot avoid the time-consuming and expensive precautions needed to reduce the risk. It may be that the difficulties have been exaggerated.[158] The important question, however, is not whether courts or commentators have over-stressed the difficulties, but whether the difficulties are acceptable.

Are the difficulties acceptable?

62. The proposition that the difficulties are acceptable in the context of the existing law was put by Lord Wilberforce in *Boland* in this way:

> "These [conveyancing consequences] were alarming to Templeman J., and I can agree with him to the extent that whereas the object of a land registration system is to reduce the risks to purchasers from anything not on the register, to extend (if it be an extension) the area of risk so as to include possible interests of spouses, and indeed, in theory, of other members of the family or even outside it, may add to the burdens of purchasers, and involve them in enquiries which in some cases may be troublesome.
>
> But conceded, as it must be, that the Act, following established practice, gives protection to occupation, the extension of the risk area follows necessarily from the extension, beyond the paterfamilias, of rights of ownership, itself following from the diffusion of property and earning capacity. What is involved is a departure from an easy-going practice of dispensing with enquiries as to occupation beyond that of the vendor and accepting the risks of doing so. To substitute for this a practice of more careful enquiry as to the fact of occupation, and if necessary, as to the rights of occupiers can not, in my view of the matter, be considered as unacceptable except at the price of overlooking the widespread development of shared interests of ownership."[159]

This view was expressed in the context of a situation in which the difficulties could not be removed except through a change in the law. But in our view it is *not* acceptable in principle that a purchaser should be at risk of being bound by an interest which, however extensive his enquiries, he is unable to discover. Such a price for the protection of co-ownership should only be required if no adequate alternative can be found. The philosophy of *Boland* is that the law should not expose innocent co-owners to the risk of losing their homes. Nor, in our view, should the law expose innocent purchasers to that risk.

63. It is understandable that in the *Boland* appeals little emphasis was placed on the need to protect innocent purchasers (who include deserted wives, widows, and others who deserve social justice as much as does the wife

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[158]Thus in the Court of Appeal Lord Denning M.R. and Ormrod L.J. rejected the term "chaos" as descriptive of the consequences ([1979] Ch. 312, 332, 339) whilst Templeman J. at first instance had described them as "wide and almost catastrophic" and "quite intolerable" ((1978) 36 P. and C.R. 448, 454).

[159][1981] A.C. 487, 508–9.

in occupation) against the claims of occupiers whose existence may be difficult or even impossible to discover: the purchaser in the case was a bank which had lent money needed for a commercial venture, and there was nothing to suggest that Mrs. Boland's occupation was not obvious. But *Boland* affects not only lenders such as banks and other representatives of "monied might":[160] it also affects the ordinary citizen in what is often the most crucial transaction of his lifetime, having profound effects upon the well-being of the family. *Boland* does not in our view justify any general inference that the claims of co-owners are necessarily more deserving than those of purchasers. Even in regard to *Boland* itself it has been questioned whether the justice of the case pointed unequivocally in favour of the wife. One commentator has made the point in these words:

> "This was not a case in which a wife had been deserted by a husband who might well have been concerned to defeat her interest. On the contrary, there is nothing to suggest that the lives of Mr. and Mrs. Boland were other than models of domestic felicity. Had Mr. Boland's building business (which employed 60 or more people) prospered, no doubt Mrs. Boland would have shared in the increased standard of living made possible by the successful use of capital provided by the Bank. Marriage is, after all, a partnership to which both parties contribute. Is there any justification for departing from the normal principle of partnership, under which profits are shared if things go well, but losses are shared if they go badly?"[161]

64. So far as lenders are concerned, it may perhaps be argued that they are well capable of taking care of themselves; they can insure, or increase their charges, to cover the occasional "*Boland*" loss so that such losses are borne by the general body of borrowers, without perceptible hardship to the individual. But not all lenders are institutions: if, for example, the plaintiff in *Boland* had been a caring relative who had lent money to Mr. Boland at a low rate of interest with the intention of helping him out of financial difficulty, and if Mrs. Boland, in order to thwart the relative's claim, had refused to leave the premises, it is questionable how firmly a decision against the relative could have been based upon considerations of social justice. Even if the lender is engaged in the business of providing finance, few such lenders can today be likened to the "hard-hearted mortgagees of the 19 century, foreclosing and obtaining possession, turning out the innocent and grinding the faces of the poor."[162] We do not regard it as satisfactory in principle that the present state of the law as declared in *Boland* should expose lenders, whether institutional or not, to additional financial risks.

Position of purchasers: the law is unsatisfactory

65. In our view the risks and difficulties discussed above are resulting in a situation which is unsatisfactory for purchasers and mortgagees. Before we

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[160]"We should not give monied might priority over social justice": [1979] Ch. 312, 333 *per* Lord Denning M.R.

[161]Freeman, "Wives, Conveyancers and Justice", (1980) 43 M.L.R. 692, 696.

[162]*Hanlon* v. *The Law Society* [1981] A.C. 124, 150 *per* Lord Denning M.R.

consider how the law might be changed to improve this situation, however, we need to examine *Boland* in the context of the policy of the relevant law as a whole.

POLICY OF THE LAW

66. We have seen that on analysis the apparent protection given to co-owners by the law as found in *Boland* is insecure and apt to prove illusory, and that the security of conveyancing transactions has been undermined to an unacceptable extent. In considering whether these apparent defects ought to be remedied by changes in the law, it may be helpful to set them in a wider context. Although the law has no special bias towards the interests of co-owners of land, and indeed enables those interests to be overreached and so transformed into interests in money, it has long recognised the need to protect wives in their enjoyment of their own property and the matrimonial property, and has developed a growing regard for their position.[163] The law has also, not least since the property reforms of 1925, shown a consistent trend towards simpler and cheaper conveyancing. These two aspects of legal policy are both relevant to an assessment of *Boland*, and we now examine them in turn.

The protection of wives

67. In one sense *Boland* may be seen as a development of a well-established social trend towards the greater protection of the rights of wives. The appellate judges gave strong indications that there was a need to protect the interests of wives in the matrimonial home. In the Court of Appeal Lord Denning said:

> "We should protect the position of a wife who has a share—just as years ago we protected the deserted wife."[164]

And in the House of Lords Lord Scarman used these words:

> "The Court of Appeal recognised the relevance, and stressed the importance, of the social implications of the case. While the technical task faced by the courts, and now facing the House, is the construction to be put on a sub-clause in a subsection of a conveyancing statute, it is our duty, when tackling it, to give the provision, if we properly can, a meaning which will work for, rather than against, rights conferred by Parliament, or recognised by judicial decision, as being necessary for the achievement of social justice. The courts may not, therefore, put aside, as irrelevant, the undoubted fact that, if the two wives[165] succeed, the protection of the beneficial interest which English law now recognises that a married woman has in the matrimonial home[166] will be strengthened whereas, if they lose, this interest can be weakened, and even destroyed, by an unscrupulous husband."[167]

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[163]For an account of these developments see *Snell's Principles of Equity* (27th ed., 1973), pp. 513–530.

[164][1979] Ch. 312, 333.

[165]I.e. Mrs. Boland and, in the other appeal, Mrs. Brown (see n.6 above).

[166]For the uncertainties associated with this interest see paras. 10(i) and 55 above.

[167][1981] A.C. 487, 509.

If a marriage breaks down, the court has in divorce and kindred proceedings wide powers over both spouses' property,[168] which it will normally exercise so as to preserve for the wife not only her "investment" in the matrimonial home but also her right to go on living there.[169] If the husband dies intestate, the wife is entitled, in addition to an interest in residue, to a "statutory legacy" sufficient (if the estate is sufficient) to cover the cost of an average house[170] and to have the matrimonial home appropriated in satisfaction of that interest.[171] If the husband's will or intestacy fails to make reasonable financial provision from the estate for his wife the court has wide powers to order that such provision should be made for her.[172] The court also has extensive powers to set aside transactions intended to prevent or reduce financial provision being granted on divorce or death.[173] Yet until *Boland* the fact that a wife had a share, even a majority share, in the home did not effectively prevent the husband from selling or mortgaging it without her consent, so as to defeat or jeopardise the interest which she had acquired in the home, often by her own efforts.[174] In our view this was a weakness in the wife's legal position which the decision in *Boland* has exposed and helped to repair.

Conveyancing

68. In the field of conveyancing, however, *Boland* represents an alarming departure from the course of modern developments. For over 150 years[175] the policy of the law has been both to simplify conveyancing and to maintain the security of property interests on the one hand and the marketability of land on the other. The Royal Commission on Legal Services detected a "steady improvement" over this period:

> ". . . it is rare to encounter a modern title with a serious and previously undetected defect or to find that the documentary evidence of title is inadequate."[176]

This simplification has been achieved despite the fact that the large number of property interests capable of existing over a single piece of land is bound to

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[168]Matrimonial Causes Act 1973, s.24.

[169]See *Harvey* v. *Harvey* [1982] 2 W.L.R. 283. The type of order made in *Mesher* v. *Mesher and Hall* [1980] 1 All E.R. 126 whereby the wife's enjoyment of the home was effectively limited to the period in which she had the care of dependent children is liable to lead to problems over re-housing and is no longer generally favoured.

[170]£40,000 or, where there are no issue of the intestate, £85,000: Family Provision (Intestate Succession) Order 1981 (S.I. 1981 No. 255).

[171]Intestates' Estates Act 1952, Sch. 2 para. 1(1). Even if the value of the house exceeds the value of the interest, it may still be appropriated on payment of the excess: *Re Phelps (deceased)* [1980] Ch. 275.

[172]Inheritance (Provision for Family and Dependants) Act 1975.

[173]Matrimonial Causes Act 1973, s.37; Inheritance (Provision for Family and Dependants) Act 1975, ss.10–12.

[174]The same applies to all cases of an implied trust for sale in which a beneficial co-owner is not the legal owner, for although in such cases the trustee or trustees for sale are bound to consult the beneficiaries of full age and give effect to their wishes, the purchaser is not concerned to see that this has been done (see n.126 above). In the particular case of the matrimonial home, a spouse who is not the legal owner may, by registering a statutory right of occupation under the Matrimonial Homes Act 1967, effectively prevent or at least delay a disposition without consent, though the registration cannot be used exclusively for this purpose. See para. 93 below.

[175]An identifiable starting-point being the legislation following reports of the Real Property Commissioners in 1829–30.

[176](1979) Cmnd. 7648, para. 21.5.

carry with it the seeds of conflict between the two principles of security and marketability. Lord Denning has said, in relation to the sale of goods,

> "In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title".[177]

The great reforming measures consolidated in the 1925 property legislation sought to resolve this conflict by way of a compromise.[178] First, the marketability of titles was improved by reducing the number of estates and interests capable of binding a purchaser without notice, by providing for the ultimate registration of title to these estates and by extending the use of the system of overreaching and establishing it as a principle of basic importance in English land law. Secondly, the security of property interests off the legal title was strengthened by extending the system of registration to include many "commercial" (i.e. non-family) interests, such as second mortgages and restrictive covenants. By this means protection was provided for property interests which might otherwise either have been defeated or have bound a purchaser who was in fact unaware of them. The substitution of the straightforward procedure of registration for the uncertainties, refinements and complexities of the doctrine of notice was thought to strike a fair balance between the competing interests: a person entitled to an interest could easily protect it, and a purchaser who took the simple precaution of searching the register would be secure in the knowledge that he would not be bound by those interests which should have been registered but were not registered. As recently as 1967, for the protection which the courts had, in the end unsuccessfully,[179] tried to give to deserted wives in the occupation of the matrimonial home, there was substituted a clear statutory right of occupation binding purchasers if, but only if, the spouse's right has been protected by registration.[180]

69. In our view the law as declared in *Boland* is inconsistent with these improvements. It leads to a deterioration in the security of titles, for it makes it more likely that a purchaser will find himself bound by an undetected defect in the title. It is a step away from the ready marketability of land, for it increases the complexity of transactions and the number of enquiries and safeguards which need to be adopted, and it adds to conveyancing costs.

BOLAND: THE GENERAL AND PARTICULAR AIMS OF LAW REFORM

70. We are now in a position to point to those aspects of the law affected by *Boland* which we consider to be in need of reform, and to suggest what the

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[177] *Bishopsgate Motor Finance Corporation Ltd.* v. *Transport Brakes Ltd.* [1949] 1 K.B. 322, 336–7.

[178] There is an illuminating account of the simplification of the law in 1925 in *Cheshire's Modern Real Property* (12th ed., 1976), pp. 83–112.

[179] *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175, a decision which rejected the notion of the "deserted wife's equity".

[180] Matrimonial Homes Act 1967. See para. 20 above.

aims of that reform should be. The consistency of *Boland* with current social policy which favours the protection of the wife in the matrimonial home is in contrast to its inconsistency with the policy of property law which upholds the security of titles, the marketability of land and the simplification of conveyancing. Whilst the law as developed in *Boland* confers a measure of protection on the wife's interest in the matrimonial home, areas of uncertainty as to the existence of that protection remain. First, there is the uncertainty about the *fact of occupation*, the purchaser not knowing whether he has discovered all the occupiers and the co-owner not knowing whether he or she will be in actual occupation at the relevant time. Secondly, there is the uncertainty as to the *right of occupation*, which may be lost through the co-owner's interest being converted into money. Thirdly, there is the uncertainty as to *co-ownership* itself, that is to say whether or not on particular facts it exists at all, and if so what is its extent. In our view the aims of law reform in this field should be to uphold social policy in the protection of the matrimonial home, to remove unnecessary complications in property law and conveyancing, and, in accordance with these general aims, to remove or reduce these areas of uncertainty.

PART V

PROPOSALS FOR REFORM

71. In this part of our report we make specific proposals for the reform of the law, with reasons. We have examined and rejected various alternative suggestions: those suggestions and the reasons for rejecting them are summarised in Appendix 2 to the report.

The problems

72. Having indicated the defects of the law as it emerges from *Boland*,[181] we are now in a position to define the particular problems to which solutions are required. The first problem is a *conveyancing problem*: how may a co-owner ensure that the co-ownership interest is protected against a purchaser and the purchaser ensure that he takes free of co-ownership interests of which he is unaware? The second problem is about the *effects of co-ownership*: in what circumstances should a co-owner be entitled to protect his enjoyment of the land against a purchaser? The third problem is a problem about *entitlement to co-ownership*: how, and in what circumstances, can the existence and extent of co-ownership be established with reasonable certainty? We shall find it convenient to deal with these problems separately; but we would stress that *Boland* seems to us to demand solutions to all three, not to any one or two of them.

[181] Para. 70 above.

The conveyancing problem: how may a co-owner ensure that his interest is protected against a purchaser and the purchaser ensure that he takes free of co-ownership interests of which he is unaware?

73. The simplest and most effective way to deal with this problem would be for co-ownership interests not to be enforceable as overriding interests,[182] or through the operation of the doctrine of constructive notice,[183] but to be recorded on the appropriate register under the Land Registration Act 1925 (registered land) or the Land Charges Act 1972 (unregistered land). These Acts provide for the registration of certain interests and contain machinery by which purchasers take subject to these interests if they appear on the register and free of them if they do not.[184]

Advantages of a registration requirement

74. A registration requirement of this kind would have several major advantages. For example—

(i) The requirement would provide a purchaser with a virtually infallible guide to the possibility of a claim by a co-owner and would relieve him of the need to make any enquiries outside the register as to such claims. The conveyancing system makes it vital for his protection that he searches the register before completing the transaction. The search is elementary conveyancing routine; and the registrability of a new type of incumbrance would impose no extra burden on purchasers or their advisers, for a single search reveals all the relevant entries.

(ii) Registration would bring benefits to co-owners, for the protection of their interests would no longer depend upon unpredictable factors, notably the fact of occupation and the extent of the purchaser's enquiries. We think it undesirable that the protection of a co-ownership interest should depend upon events outside the co-owner's control.

(iii) Registration would avoid the increased cost, delays and complexity of conveyancing which the need to satisfy purchasers has entailed since *Boland*, for the time and expense of registration would be minuscule by comparison with the trouble and expense involved in precautions which purchasers are now obliged to take.[185]

(iv) The registration requirement would bring consistency into the law, both generally by its accordance with the principles of the 1925 property legislation, and in two particular respects. It would create consistency between the protection of statutory rights of occupation under the Matrimonial Homes Act 1967[186] and the protection of rights of occupation derived from beneficial interests. It would also create consistency between registered and unregistered conveyanc-

[182]See para. 12 above.
[183]See para. 14 above.
[184]See para. 14 and n. 49 above.
[185]Registration of a co-ownership interest is a simple procedure, of which the main elements are the completion of a form and the payment of a small fee.
[186]See para. 20 above. Under the 1967 Act the statutory rights of occupation are protected against purchasers if, and only if, they are registered.

ing, for whilst in registered conveyancing a co-ownership interest can be protected by registration, in unregistered conveyancing it cannot.[187]

Disadvantages of a registration requirement

75. There are, however, those who believe that to impose a requirement that interests in the matrimonial home must be protected by registration if they are to be capable of binding third parties is unsatisfactory. It has been suggested, with particular reference to the Matrimonial Homes Act 1967, that registration is both a technical step which a wife may fail to take and a hostile step which she may be unwilling to take: in other words, that a registration requirement is at one and the same time a source of risk and a source of friction.

76. *Registration as a source of risk.* The argument that a requirement of registration carries a risk was put in *Boland* by the Master of the Rolls in these words:

> "It [the Matrimonial Homes Act 1967] gave her a charge on the house: but it was subject to this severe restriction: it had to be registered as a Class F charge, and not all of the deserted wives had sufficient knowledge or advice to do this. That Act . . . did not apply to a wife who was entitled to a share in the house. Her position was remedied to a slight extent in 1970 by section 38 of the Matrimonial Proceedings and Property Act 1970. It enables a wife, who has a share, to register a Class F charge. But that amendment was of precious little use to her, at any rate when she was still living at home in peace with her husband. She would never have heard of a Class F charge: and she would not have understood it if she had. If she is to be protected at all, it will be by the decision of the judges".[188]

We accept that registration, even if it were to be vital to the protection of a co-owner's interest, would not always be resorted to and that if there were a registration requirement the protection against the purchaser would in these cases be lost.

77. Registration is not an automatic process. If the machinery is to be set in motion, the initiative of the parties or their advisers is needed; and there must be sufficient inducements to work the system. In some cases the co-owner will have legal or other advice, either when the co-ownership interest is created or when a dispute arises or a sale or mortgage is contemplated, as to whether there is a need to register. But co-owners are by no means invariably in receipt of advice at the relevant time. Co-ownership can arise—and in the case of married couples often arises—through a succession of informal and sometimes indistinct events, emerging as a result of the working of the trust law[189] rather than as a result of formally recorded decisions taken with legal or other advice. In such cases the co-owner may be unaware even of the existence of a co-ownership interest, let alone the need to register it. Even

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[187]See para. 19 above.
[188][1979] Ch. 312, 328.
[189]See paras. 10(i) and 55 above.

where an informally created co-ownership interest is known to exist, the co-owner would not necessarily be aware of the need to register it.

78. But the risk created by a registration requirement must be seen in perspective. There are at least three factors of particular relevance here:

(i) The evidence as to the registration of rights of occupation under the Matrimonial Homes Act 1967 does not suggest a general reluctance to register. In 1977–78 there were approximately 17,000 charges registered under the 1967 Act.[190] Admittedly the majority of these charges are probably registered when a matrimonial dispute has arisen, as a routine interim step to protect the wife's interest pending settlement of her financial claims; but it is mainly in cases of dispute that the need for registration arises. A wife who fails to register when decisions affecting the matrimonial home are jointly taken by herself and her husband suffers no disadvantage: in such a case the harmony of married life renders legal protection unnecessary. We do not think there is any significant distinction in this respect to be drawn between the registration of statutory rights of occupation and the registration of co-ownership.[191]

(ii) There is little reliable evidence about the extent to which laymen are aware of the need to protect their interests by registration. But people and organisations such as solicitors, legal advice centres and Citizens Advice Bureaux which advise laymen are well aware of this need. In so far as there is ignorance in these matters, the most appropriate solution might be to seek to reduce the ignorance by means of a determined campaign of education and publicity.

(iii) The consequences of failure to register a co-ownership interest would not necessarily be damaging.

(*a*) In some cases there would be no relevent disposition of the property at all—for example, where a married couple have bought a house for their retirement. Registration or failure to register would then be of no consequence. In most cases the co-owner will agree to the mortgage or sale proposed, either because the mortgage is needed to finance the purchase of a joint home or because the parties want to move house. Failure to register would then merely reflect the co-owner's wish not to assert a prior interest or a right of occupation against a mortgagee or purchaser; and wherever the parties were in accord, the proceeds of sale would go towards the purchase of a replacement home or be distributed *pro rata* between them.

(*b*) There remains a residue of cases where the co-owner either does not know of or does not agree to the sale or mortgage.

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[190]Annual Report of the Chief Land Registrar (1977–78) paras. 11 and 34. The figures for subsequent years relating to registered land are not available. In 1980–81 there were over 9,000 1967 Act registrations against unregistered land: Annual Report of the Chief Land Registrar (1980–81), para. 25.

[191]See (1978) Law Com. No. 86, para. 1.336, where we suggest that the registration of co-ownership rights should be the exception and not the rule.

Even here the co-owner's rights would not necessarily be prejudiced by a failure to register the co-ownership interest. Failure to register would make no difference to the co-owner's rights against the legal owner. The co-owner may be able to protect his right of occupation by obtaining an injunction against the sale or mortgage,[192] or to protect his property interest by compelling the legal owner, if necessary by proceedings founded on a trust obligation, to disgorge the co-owner's share of the proceeds. Those remedies do at least afford the co-owner some measure of protection even though it may not always be sufficient in the circumstances.[193]

79. *Registration as a source of friction.* The argument about friction was put by Ormrod L.J. in *Boland* as follows:

> ". . . the registration of Class F land charges or cautions is an essentially 'hostile' type of proceeding which is not well suited to couples who are living together on reasonably good terms".[194]

In our Third Report on Family Property we accepted the substance of this argument,[195] both in relation to the Matrimonial Homes Act 1967 and in relation to our own proposals for registration in the Matrimonial Homes (Co-ownership) Bill. We remain of the view that registration can be seen as a hostile step, though we think it is possible to exaggerate this effect. In the majority of cases registration is probably resorted to in the course of a matrimonial dispute,[196] when the wife has a special need to protect her own position: at that stage "hostilities" have begun, and the husband is unlikely to be surprised to discover that the wife has registered a charge. In any event, hostility is not peculiar to registration: even more hostile than registration is the act of thwarting a transaction by the last-minute assertion of an overriding interest,[197] and *Boland* has provided ample opportunity for such acts.

80. Yet even if the step of registration is not normally a hostile one, it may be seen as one, and for that reason some wives may be reluctant to take it. To this extent a possible source of friction is itself a source of risk, because it acts as a deterrent to registration.

Registration requirement: advantages and disadvantages compared

81. A registration requirement would solve the conveyancing problem and carry with it the advantages we have mentioned.[198] Moreover, the ability to

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[192] *Waller* v. *Waller* [1967] 1 W.L.R. 451. See para. 7(*i*) above.

[193] The remedy of injunction is discretionary, and any remedy for the recovery of the proceeds from the legal owner may be valueless if he is insolvent or untraceable.

[194] [1979] Ch. 312, 339.

[195] (1978) Law Com. No. 86, paras. 1.330, 2.86.

[196] See para. 78(i) above.

[197] Registration may also involve a last-minute assertion, as it did in *Wroth* v. *Tyler* [1974] Ch. 30; but in that case there was never any doubt, as there often will be where an overriding interest is claimed, that the wife did in fact have a right of occupation.

[198] See para. 74 above.

enforce a beneficial interest against a third party is a substantial benefit, complementing the co-owner's rights against the legal owner; and in principle we do not think it unreasonable that co-owners should be expected to protect this additional benefit by registration and thus put purchasers on notice of their potential liability. There would, however, be some cases in which the co-owner would fail to register, and in a small proportion of those cases, where the right of occupation or the property interest could not be enforced against the legal owner, the co-owner would be prejudiced by such a failure. It must also be remembered that the great majority of those co-owners who are not on the title are in fact married women. Wives are perhaps more likely than other types of co-owner to fail to register—partly because wives' co-ownership more often arises informally and in the absence of legal advice, and partly because for them the step of registration may sometimes appear hostile.

82. It is also necessary to balance the risk created for co-owners by a registration requirement against the risk created for purchasers by the absence of such a requirement. We do not think it would be feasible to measure these risks against each other with a view to choosing the less damaging option. From the conveyancing point of view it is important to remember that, whilst registration of his interest would eliminate the risk to the co-owner and failure to register would not affect the co-owner's rights against the legal owner, under the present law neither enquiries nor any other precaution can wholly eliminate the risk to the purchaser.

Conclusion and recommendation as to a registration requirement

83. From the point of view of conveyancing, we have no doubt that the advantages of a registration requirement are overwhelming. We therefore *recommend*, as a solution to what we have called the "conveyancing problem",[199] that co-ownership interests, whether in registered or in unregistered land, should be registrable, and that purchasers should take subject to such an interest if, but only if, it has been registered.

84. Our recommendation relates only to the conveyancing problem. We do not propose that it should be adopted in isolation from the other recommendations in this report, for it must be accepted that the advantages of a registration requirement can only be bought at a price—the price that in some circumstances married women and others will lose the protection which the law currently affords them. We think there is a need to offset this potential loss of protection, and our further recommendations are made with that in mind.

The problem about the effects of co-ownership: in what circumstances should a co-owner be entitled to protect his enjoyment of the land against a purchaser?

85. The registration requirement we have recommended would solve the conveyancing problem, protecting both the co-owner and the purchaser in the way we have just described. But what would be the extent of this protection?

[199]See para. 72 above.

It is clear that a co-ownership interest in land may comprise not only a *property interest* but also a *right of occupation.*[200] The effect of *Boland* is to protect both these elements, but only to a limited extent.[201] Would our registration requirement afford adequate protection? If not, what further protection is needed?

The property interest

86. The *property interest* is protected primarily by the "two-trustee rule", that is the legal requirement that the purchase money should be paid to or by the direction of two or more trustees or a trust corporation.[202] If there is failure to comply with this rule, the co-owner may[203] have a remedy against the purchaser either for the value of the co-ownership interest or (following *Boland*) by the assertion of a right of occupation.

87. We see no reason to disturb the two-trustee rule. It has long been basic to our law that on a disposition of land which is subject to a trust the purchaser should have the necessary protection against being bound by the trusts and the beneficiaries should have the necessary protection for their interests. It is in aid of this dual objective that the two-trustee rule exists, the co-owner's interest being overreached if, but only if, the purchase money is paid to or by the direction of two or more trustees or a trust corporation.[204] If the purchase money is so paid, the beneficiary is considered to be adequately protected. If it is not so paid, the beneficiary may have[203] a remedy against the purchaser, and the purchaser a corresponding liability.

88. It is true that the system has undergone an important change in consequence of *Boland,* for it there became clear that a beneficial co-owner has protection against a purchaser not only for his property interest but also for the right of occupation which is dependent upon that interest. But here again we see no reason for a change in the law. If the property interest is not protected by the presence of two or more trustees or a trust corporation, it seems to us only right that the co-owner should be able to protect it by asserting the right of occupation against the purchaser, just as he can assert the property interest itself: what is involved is that the remedies which the co-owner already has against the legal owner are in these circumstances made available against the purchaser. That seems to us to be the right result where a purchaser fails to observe the two-trustee rule which the law requires.

89. It is of course implicit in the two-trustee rule that the co-owner has no remedy against the purchaser where the rule *is* complied with. In that case the co-owner's interest is overreached and whatever claim he has is against the

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[200]See para. 10 above.
[201]See para. 56 above.
[202]See para. 15 and n. 54 above.
[203]Whether in fact he has such a remedy depends upon whether the purchaser takes subject to the trust, e.g. if (in the case of registered land) the trust interest is an overriding interest or (in the case of unregistered land) the purchaser has notice of the trust. See the treatment of this point in the Third Report on Family Property (Law Com. No. 86), at paras. 1.247 and 1.253.
[204]See paras. 15 and 68 above.

trustees. In so far as, in consequence of *Boland,* any doubt may exist on this point,[205] the doubt should be resolved in favour of overreaching.

90. How would our proposed registration requirement affect the two-trustee rule and breaches of that rule? The requirement would not affect the rule itself at all. Registration of a co-ownership interest would simply give notice of a trust for sale and consequently of the need to comply with the rule. The requirement, however, would make a considerable difference, for once registered a co-ownership interest would come to the notice of every purchaser. There would be no recurrence of the *Boland* type of situation, where the purchaser is "stuck" with an interest of which he had been unaware at the relevant time. *Either* the interest would be registered and the purchaser would comply with the two-trustee rule, *or* it would not be registered and the purchaser would be free to ignore the rule.

91. In our view the two-trustee rule is a satisfactory means of protecting the property interest, and the registration requirement which we have recommended would help to ensure compliance with the rule and thus make it unnecessary for the co-owner to exercise any legal remedy against the purchaser.

The right of occupation

92. We have seen that the co-owner's right of occupation may be invoked as a means of protecting his or her property interest on a disposition by a sole legal owner, that is where the purchase money is not paid in compliance with the two-trustee rule.[206] It does not however follow that the exercise of this right of occupation must always be regarded as in the nature of a remedy designed to protect the property interest. There may be circumstances in which the right may justifiably be used against a purchaser to protect the co-owner's enjoyment of the home. We regard the position of married couples as just such a circumstance. A central feature of the *Boland* appeals was the emphasis laid upon the protection of wives in their enjoyment of the matrimonial home. The appellate judges did not regard their decision as merely protecting a property interest or financial stake in the home. They regarded it as protecting the wife's enjoyment of the home itself. Ormrod L.J. said this:

> "In the instant cases the object of the trust was to provide a joint home and the last thing the parties contemplated was that the house would be sold and the cash divided between them.
>
> In converting such a relationship into a trust for sale the legislation of 1925 created, in effect, a legal fiction, at least in so far as the implied trusts are concerned. This may have been an inescapable consequence of the method adopted to achieve its primary objective, that is, the simplification of conveyancing. But to press this legal fiction to its logical

[205]See para. 15 and n. 56 above.
[206]See para. 88 above.

conclusion and beyond the point which is necessary to achieve the primary objective is not justifiable, particularly when it involves the sacrifice of the interests of a class or classes of person. The consequence is that the interests of persons in the position of the wives ought not to be dismissed as a mere interest in the proceeds of sale except where it is essential to the working of the scheme to do so."[207]

Lord Denning M.R. was even more forthright:

"What is the nature of this trust? It was suggested to us that it was not a trust of the house itself, but only a trust in the proceeds of sale. That cannot be right. When a married man and his wife buy a house, they do it so as to live in it—so that it should be home for them both and their children—for the foreseeable future . . .. In determining what the nature of the trust is, the court must give effect to the intention of the parties—to be inferred from their words and conduct."[208]

And Lord Wilberforce said:

"As Lord Denning M.R. points out, to describe the interests of spouses in a house jointly bought to be lived in as a matrimonial home as merely an interest in proceeds of sale, or rents and profits until sale, is just a little unreal . . .."[209]

93. We are in broad agreement with these views. We think that marriage, unlike any other relationship, inevitably connotes a mutual obligation and commitment to live together permanently under the same roof. It follows that any contribution made by the wife or husband to the acquisition or improvement of the joint home should be seen as such and not merely as a means of acquiring a share in its value. We think that a wife (or husband) who has acquired an interest in the home in which both intend to live should, by virtue of that interest, be entitled to protect her or his occupation against a disposition *whether or not* the property interest is protected by the presence of two or more trustees or a trust corporation. To some extent this point is already recognised in the Matrimonial Homes Act 1967, which provides the spouses with statutory rights of occupation capable of enforcement against purchasers. But the statutory right of occupation is primarily intended as a protection for the deserted wife: the court has the power to exclude it or restrict it; and the right does not normally survive the divorce of the parties or the death of the spouse who is the legal owner, and cannot be enforced against a purchaser in respect of more than one home.[210]

94. In our view, however, the law as found in *Boland* cannot adequately achieve the objective of protecting wives and husbands in their enjoyment of the matrimonial home—for several reasons. First, the law cannot *both* countenance the two-trustee rule and the system of overreaching *and* effectively protect the co-owner's right of occupation against a purchaser. The

[207][1979] Ch. 312, 336.
[208][1979] Ch. 312, 329.
[209][1981] A.C. 487, 507 *per* Lord Wilberforce.
[210]See Matrimonial Homes Act 1967, ss.1(2), 2(2) and 3, and the discussion in Law Com. No. 86, at paras. 1.237 *et seq.*

system of overreaching and the continued exercise of a right of occupation against a purchaser are plainly incompatible. The two-trustee rule is specially designed to ensure not only that the co-owner's interest is protected, but also that the purchaser obtains a clear title. Secondly, since a wife's beneficial co-ownership does not of itself[211] prevent her husband from selling or mortgaging the home, her right of occupation is not then a right to protect her enjoyment of the matrimonial home at all: it is merely a right, in competition with the purchaser, to occupy the house which was the matrimonial home before the sale took place. Thirdly, the right to occupy a particular house in competition with the purchaser who may have an equal or better right would almost invariably precipitate a sale with vacant possession as the only realistic solution.[212]

THE MATRIMONIAL HOME

Need for a requirement of consent to dispositions

95. The difficulties to which we have just referred seem to stem from the fact that the means by which the co-owner's enjoyment of the home is protected involve the assertion of a right of occupation which is neither an exclusive right of occupation nor a right the enjoyment of which is compatible with the protection of the property interest on which it depends. In our view what is needed is not a right which is liable to be encashed, or to be exercised in competition with similar rights, but a right which may be exercised to prevent any disposition taking place at all. We therefore *recommend* that married co-owners should have a clear right to prevent any disposition of the matrimonial home taking place without their consent. This solution would not only protect the right of occupation: it would also achieve completely and directly what a right of occupation can only achieve incompletely and indirectly, namely the protection of the co-owner against the *making of a disposition* rather than against a purchaser when a disposition has been made. The consent requirement inherent in this solution would go to the validity of the transaction itself: without the consent, the transaction would be ineffective to pass the legal title.

96. The proposal for a consent requirement of this kind is not new. We made a similar proposal in our Third Report on Family Property.[213] But we arrived there by a different route. In the Third Report we envisaged the consent right primarily as a means whereby decisions to sell or charge the matrimonial home would be made jointly. In the present context we base our proposal on the need to ensure that the wife's interest is an interest in land capable of full protection against a purchaser or mortgagee.

97. The proposal in the Third Report for a consent right was subject to one important limitation. This was that the court should have the power, in

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[211]She may sometimes be able to obtain a court injunction: see n. 12 above.
[212]See para. 48 above.
[213](1978) Law Com. No. 86, paras. 1.227–1.246, 1.270–1.292.

appropriate cases, to dispense with the need for consent, just as it has power to dispense with it when it is required by a trust instrument.[214] That limitation seems to us to hold good: just as trustees for sale can be compelled to sell if they unreasonably refuse to do so,[214] so too a beneficiary should not in our view be given power to hold up a sale unreasonably or because his decision cannot for some reason be obtained. It would obviously be intolerable for the consent right to be used solely as a means of sterilising property on the market.

98. We propose that the consent right for co-owners should be available only to married couples and not to other co-owners such as parent and child, investors, partners and cohabitees. Our main reasons for this view are that a consent right should only be implied by law where decisions as to dispositions of the home ought to be joint decisions; that decisions should only be required to be joint where the parties' relationship connotes an obligation to live together permanently under the same roof; and that there is no such relationship outside marriage. A further reason is that where there are several co-owners a consent right for each individual would sometimes tend to create disputes and to impede transactions. We feel that where a matrimonial home is not involved it is reasonable to expect the parties to settle between themselves whether and how dispositions are to be controlled.

99. How would this consent right for married co-owners be affected by our proposed registration requirement? The right would be a concomitant of a co-ownership interest. The effect of registration of the co-ownership interest, therefore, would be to give notice of the consent right.[215] Where the co-ownership interest was registered, a disposition made without the consent would be ineffective to pass the legal title. Where it was not registered, the absence of consent would not affect the validity of the disposition, the co-owner being left to his or her remedies against the legal owner for breach of trust.

100. The consent requirement we are proposing would considerably strengthen the position of co-owner wives. We think it would also substantially reduce the number of cases in which wives would be prejudiced by failure to register a co-ownership interest, for we have little doubt that advisers of husbands would in practice ascertain whether the requirement existed and, if it did, would ensure that it was complied with. Failure on a husband's part to obtain his wife's consent would be a breach of trust, just as failure to consult her is a breach of trust under the existing law;[216] and we would expect that even where the co-ownership interest was not registered it would become normal practice for the husband's advisers to seek the consent, both as a matter of propriety and courtesy and also as a matter of prudence in order to avoid the possibility of the wife taking late steps by registration, or even by legal proceedings, to prevent the sale. Although the purchaser's advisers would not

[214]Law of Property Act 1925, s.30. See para. 48(*b*) above.

[215]The system of registered conveyancing already contains machinery by which such a right can be protected on the register: Land Registration Act 1925, s.58(3) and Land Registration Rules 1925, r. 213. In unregistered conveyancing the registration of the interest would have to show on its face that it carried a consent right.

[216]See para. 48 and n. 126 above.

strictly be concerned with the need for consent if it were not registered, we think that in practice it would often be convenient to enquire, not least in order to be satisfied that late registration would be unlikely to occur.

Consent requirement not a complete solution

101. Yet a consent requirement would not be a complete solution to the problem of protecting the occupation of married co-owners against purchasers. The requirement would be of no avail to wives who have no co-ownership interest at all, and many cases would arise in which the existence of the requirement would be uncertain simply because the existence of co-ownership is uncertain. The fact that the consent requirement, as we envisage it, would be based upon an interest whose existence may often be doubtful or disputed[217] does considerably restrict the advantage which the requirement would confer on wives in general.

102. Moreover we cannot claim that the improvement which a consent requirement would bring about would be of great substance. To some extent, as we have seen,[218] the requirement is already present in the provisions of the Matrimonial Homes Act 1967; and although the consent requirement would substantially reduce the need for registration,[219] there would still be some cases in which unscrupulous husbands would seek to sell or mortgage the home without obtaining the necessary consent and where the wives would be unaware of the requirement or of the need to protect it by registration.

103. In our view, therefore, the advantages which would be brought about by adding a consent requirement to a registration requirement are of themselves insufficient to eliminate the defects of the law as it was found to be in *Boland*. Although these requirements would help to protect both co-owners and purchasers, they would not overcome the difficulty of discovering whether in any particular case that protection is in fact available. It seems to us important that some answer should be found to this question, for the protection of rights whose existence and extent is uncertain is apt to prove illusory. In the last section of this part of the report we shall suggest how this uncertainty should be cured.

Proposals as to the effects of co-ownership

104. Our solution to what we have described as the problem about the effects of co-ownership[220] falls into three parts. First, we have concluded (at paragraph 87 above) that co-ownership interests should continue to be protected by the two-trustee rule. Secondly, we have recommended (at paragraph 95 above) that in the case of the matrimonial home a married co-owner

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[217]See para. 55 above.
[218]See para. 93 above.
[219]See para. 100 above
[220]See paras. 72 and 85 above.

should have the right to prevent any disposition of the home taking place without that co-owners's consent, subject to the power of the court to dispense with that consent if it is unreasonably refused or withheld. Thirdly, the protection of the two-trustee rule and of the consent requirement should be effective against a purchaser if, but only if, the co-ownership interest is registered in accordance with our recommendation at paragraph 80 above.

105. It may now be helpful to set out in some detail how our proposals as to the effects of co-ownership would work when taken in conjunction with our recommendation as to the registration of co-ownership interests.

(i) A married co-owner should have the right to prevent any disposition of the matrimonial home taking place without his or her consent, subject to the power of the court to dispense with the consent where it is unreasonably refused or withheld; and if (and only if) the beneficial co-ownership interest is registered, a disposition made in the absence of such consent or dispensation should be ineffective to pass the legal title.

(ii) Where on a disposition of land subject to co-ownership the purchase money is paid in accordance with the two-trustee rule[221] (and any consent requirement under (i) above is complied with), the beneficial co-ownership interests should be overreached.

(iii) Where a beneficial co-ownership interest in land is protected by registration and on a valid disposition[222] of the land the purchase money is not paid in accordance with the two-trustee rule,[221] the interest should not be overreached and the co-owner should be entitled to enforce his or her property interest (or any dependent right of occupation) against the purchaser by appropriate remedies.

(iv) Where a beneficial co-ownership interest is not protected by registration, a purchaser of the land should take free of that interest and any dependent right of occupation, and free of the requirement to comply with the two-trustee rule and of any consent requirement under (i) above.

The problem about entitlement to co-ownership: how and in what circumstances can the existence and extent of beneficial co-ownership be established without uncertainty?

106. We have already pointed out that the facts in *Boland* made it unnecessary in that case to clarify the circumstances in which a co-owner may be held to have a property interest; and we have indicated how the present uncertainty arises.[223] The problem was wholly outside the scope of the decision in *Boland.* We have to look to other cases for guidance, but the law is far from clear.

107. One might well ask how co-ownership can be adequately protected if it is not easily ascertainable. Before *Boland,* the question whether a wife had a

[221] I.e. to or by the direction of two or more trustees or a trust corporation. See para. 15 above.

[222] Where a disposition is made in breach of the consent requirement under (i) above, it would be ineffective and sub-para. (iii) would not be applicable.

[223] Paras. 10(i) and 54 above.

co-ownership interest in the home was of little concern to a purchaser, for the interest would not usually bind him. It is a consequence of *Boland* that on every sale or mortgage both the co-owner, if there is one, and the parties to the transaction, are concerned to know for certain whether a co-ownership interest does indeed exist.[224] It was fortuitous that in *Boland* itself the Bank was able to concede this point. A variety of circumstances can be imagined in which the point would be disputed and litigated at great length and expense. It is true that our proposals for registration would mean that a co-ownership claim would be brought to the purchaser's attention before the purchase: but this would not solve his problems, for where a doubtful claim was asserted against him he would be faced with a choice between abandoning the transaction on the uncertain assumption that the claim was good, and examining and perhaps disputing the claim in the equally uncertain hope that it was bad. Nor would registration solve the wife's problems: in her uncertainty she might either be hesitant to register a claim which was in fact good, to her own detriment, or eager to register a claim which was in fact bad, to the detriment of the transaction.

108. Our proposals are designed to provide adequate protection for co-owners and purchasers in the course of conveyancing transactions. The proposals for registration and consent requirements are steps in this direction. But they do not take us far enough. Neither requirement serves to eradicate the uncertainty on particular facts as to whether a co-ownership interest exists or as to its extent. In these cases, which we believe to be particularly prevalent where the property concerned is a matrimonial home, neither registration nor consent fully protects the co-owner: both are built upon the swamp of uncertainty.

How to resolve the uncertainty

109. There are various possible ways of resolving this uncertainty. It could, for example, be provided that no-one could be a co-owner without being on the title. However we do not think that this would be a fair or realistic substitute for the principle of English law that an interest in the home may be acquired simply by a sufficient contribution towards the costs of acquisition or improvement.[225]

110. Another possible solution would be to give married couples a consent right automatically by virtue of their married status, and an automatic entitlement to register that right. This has some attraction, but there are several drawbacks:

(i) A universal consent right for married couples would do nothing to cure the uncertainty, and remove the possibility, of expensive litigation as to the existence and extent of a co-ownership interest: although it would be an effective means of preventing a disposition,

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[224]For the position before *Boland*, see e.g. *Caunce* v. *Caunce* [1969] 1 W.L.R. 286 and *Bird* v. *Syme-Thomson* [1979] 1 W.L.R. 440 and n. 55 above.

[225]See para. 10(i) above.

when consent *was* given the wife could not be certain whether she was entitled to a share of the proceeds and if so what share.

(ii) A consent right unattached to a co-ownership interest would not in our view be a sufficient benefit to offset the disadvantage to wives inherent in the registration requirement which we regard as essential for the solution of the conveyancing problem. The fact that a universal consent right for married couples would derive from their married status and not from the doubtful existence of a co-ownership interest is no answer to this point.

(iii) It would be difficult to devise a consent right which would be appropriate both for married co-owners and for married non-co-owners. We think that every married co-owner ought to have a right to prevent a disposition taking place without his or her consent, but we feel unable to suggest that such an unrestricted right should also be conferred upon married non-co-owners. Whilst we fully accept the principle enshrined in the Matrimonial Homes Act 1967 that every wife should have an effective means of preventing a disposition by her husband which would deprive her of the roof over her head, to suggest that a wife with no property interest in the home whatsoever should automatically be entitled to control any disposition of it (a mortgage, for example) by her husband would represent a drastic inroad into accepted concepts of property. It may also be questionable whether it would be right for a married non-co-owner to have an automatic consent right in respect of the matrimonial home after the death of the other partner, or to have such a right in respect of a second home. If, however, an appropriate consent right cannot be devised to fit the needs of co-owners and non-co-owners alike, the two cases would have to be distinguished; but if this were done it would re-introduce the whole difficulty of establishing a consent right which is dependent upon the doubtful existence of a co-ownership interest.

For these reasons we reject the idea of a universal consent right for married couples as an appropriate solution to the problem of uncertainty.

Our proposed solution

111. Another solution would be to provide a means whereby the beneficial shares of all co-owners should be fixed where they are not already mutually agreed. We do not think that this would be practicable for the wide variety of circumstances in which beneficial co-ownership may arise outside the relationship of marriage. For married couples, however, the position is very different. The previous development of our thinking on this topic is to be found in our Working Paper on Family Law,[226] our First Report on Family Property: A New Approach,[227] and our Third Report on Family Property.[228]

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[226](1971) No. 42.
[227](1973) Law Com. No. 52.
[228](1978) Law Com. No. 86.

In the First Report we expressed the view that the present law relating to the matrimonial home was artificial, technical, uncertain and unfair; and we reached this conclusion:

> ". . . the present rules determining the interests of a husband and wife in the matrimonial home are in need of reform by the introduction of a principle of co-ownership under which, in the absence of agreement to the contrary, a matrimonial home would be shared equally between husband and wife."[229]

And in the Third Report we said this:

> "The present law about the ownership of the matrimonial home during marriage is not only highly technical and sometimes uncertain in application, but inappropriate in substance. The rules now applied to determine the ownership of the home are essentially the same as those which determine the ownership of a commercial or investment property: they ignore the fact that the home is the residence of a family as well as being, in many cases, its major capital asset. Husband and wife each contribute to the home in their different ways—the wife's contributions are no less real because they may not be financial—and the home is essential to the well-being of the family as a whole. In our view these factors make the matrimonial home a unique item of property, and one to which a unique law of co-ownership should apply."[230]

112. Our proposals for equal co-ownership have received both approval and criticism.[231] But *Boland* has added a new dimension. In the First and Third Reports the reforms we proposed were primarily designed to do justice between husband and wife and to eradicate the existing state of uncertainty as to their mutual interests. But we also mentioned the possibility that this uncertainty might spill over into conveyancing transactions. In our First Report, in referring to the uncertainty of the law, we said this—

> ". . . if the house is in the name of one spouse, and the other has become entitled to a beneficial interest in it, there may be doubt in the event of a sale as to the respective rights of the beneficiary spouse and a third party purchaser."[232]

Boland has given these words a new significance. The case for equal co-ownership of the matrimonial home, as a clear and fair allocation of matrimonial property, remains in our view justifiable on its own merits, and has recently been supported in the Council of Europe;[233] but the state of the law as found in *Boland* provides an added reason for its introduction.

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[229](1973) Law Com. No. 52, para. 30.

[230](1978) Law Com. No. 86, para. 0.9.

[231]See *Hansard* (H.L.) 18 July 1979, Vol. 401, cols. 1432–48, 1455–65 and 12 February 1980, Vol. 405, cols. 112–154. Deech, "Williams and Glyn's and Family Law", (1980) N.L.J. 896; Murphy and Rawlings "The Matrimonial Homes (Co-ownership) Bill: The Right Way Forward?", (1980) 10 Family Law 136; Stone, (1979) 42 M.L.R. 192; Temkin, "Property Relations During Marriage in England and Ontario", (1981) 30 I.C.L.Q. 190.

[232](1973) Law Com. No. 52, para. 13.

[233]Governments of member states are recommended to secure the rights of spouses to occupy the matrimonial home by appropriate legislation and "to take into consideration the possibility of adopting systems of co-ownership . . . as one of the means of strengthening the right of occupation of the family home" (Recommendation R(81)(15) of the Committee of Ministers to Member States of the Council of Europe, adopted by the Committee of Ministers on 16 October 1981 at the 338th meeting of Ministers' Deputies)."

113. In our Third Report on Family Property[234] we proposed that equal co-ownership of the matrimonial home should arise by operation of statute, and we made detailed recommendations as to how and in what circumstances this should happen. These recommendations were fully worked out in the draft Matrimonial Homes (Co-ownership) Bill, the main provisions of which are outlined at paragraphs 21 to 24 above. The equal co-ownership contemplated by the Bill, known as "statutory co-ownership", will arise whenever it is not excluded by the agreement of the parties (or as a result of some other exception[235] contained in the Bill), and may be terminated either by the agreement of the parties or through the exercise by the court of its jurisdiction in matrimonial proceedings to make property adjustment orders.[236]

114. The provisions of the Co-ownership Bill have been published and we do not intend to discuss them further here. However, we expect that two consequences of particular relevance to this report would follow from the enactment of the Bill.

(i) An increasing number of married couples will provide expressly for equal co-ownership of their homes (e.g. by putting the house into their joint names), because enactment of the Bill will both reflect and encourage the growing tendency towards equal co-ownership and because, as we pointed out in the Third Report,[237] express provision for equal co-ownership made by the parties is for several reasons more satisfactory than reliance on statutory co-ownership.

(ii) The fact of statutory co-ownership will rapidly become common knowledge. This should substantially restrict the number of cases in which there is a failure to register a co-ownership interest when registration is necessary for the protection of the interest;[238] and whereas a husband may be tempted to ignore the need to obtain his wife's consent to a disposition where the existence or extent of her beneficial interest is uncertain, he will be less likely to ignore it when she has a statutory equal share in the home.

In our view, therefore, the Bill will do much to cure the present uncertainty regarding the existence and extent of co-ownership interests, not only directly by its provisions for statutory co-ownership but also indirectly by encouraging married couples themselves to provide expressly for equal co-ownership. Moreover, in those cases where statutory co-ownership will apply, the ownership of a half share in the matrimonial home will be a matter of such substance that the need to register the co-ownership interest for protection against purchasers is unlikely often to be overlooked.

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[234](1978) Law Com. No. 86.

[235]The most important of these exceptions concern interests acquired before marriage, interests excluded by a donor, and interests existing before the Bill comes into force.

[236]Matrimonial Causes Act 1973, s.24. In this jurisdiction the court could, for example, order an unscrupulous person who had married for gain and then deserted the former partner to restore all or part of the equal share acquired by statutory co-ownership, like any other item of property.

[237](1978) Law Com. No. 86. See paras. 1.3, 1.227 and 1.235.

[238]See paras. 81 and 100 above.

Conclusion and recommendation as to entitlement to co-ownership

115. We conclude that the best solution to the problem we have described as the problem about *entitlement to co-ownership,*[239] that is to say how and in what circumstances the existence and extent of co-ownership can be established with reasonable certainty, is the introduction of a scheme for equal co-ownership of the matrimonial home. We are also satisfied, for the reasons given in our First and Third Reports on Family Property,[240] that equal co-ownership of the home is justifiable on its merits as a means of achieving justice between husbands and wives. A suitable scheme for equal co-ownership is provided by the Matrimonial Homes (Co-ownership) Bill annexed to our Third Report. We *recommend* the adoption of that scheme.

116. This recommendation completes our answer to the problems asociated with *Boland.* At the beginning of this part of the report[241] we define the three problems to which, following *Boland,* solutions are required. We have recommended that the *conveyancing problem* should be dealt with by the introduction of a requirement that co-ownership should be registered for protection against purchasers, and that the problem about the *effects of co-ownership* should be dealt with by making the consent of a married co-owner essential to the validity of dispositions of the matrimonial home. For the reasons we have indicated, notably the uncertainty of the law relating to the *entitlement to co-ownership,* and the disadvantages to wives of a registration requirement, we do not regard that requirement or the consent requirement as adequate solutions on their own. But when, as we propose, those requirements are bolstered by a scheme of co-ownership which will not only help wives to obtain an equal share in the matrimonial home but also offset the disadvantages of our proposed registration requirement in the way we have explained,[242] we believe that the proposals form a coherent whole and one which is consistent with social policy regarding the protection of wives and the policy of the law in the direction of simpler and cheaper conveyancing.

Implementation of recommendations

117. The Matrimonial Homes (Co-ownership) Bill annexed to our Third Report on Family Property[243] provides a suitable basis for the implementation of the recommendations in this present report. The Bill contains provisions not only for statutory co-ownership of the matrimonial home but also for the registration of co-ownership interests in the home and for a requirement of consent to dispositions of the home.[244] These provisions would require some amendment, notably to take account of the law as declared in *Boland*[245] and to give effect to our recommendation for the registration of co-ownership interests in land irrespective of whether a matrimonial home is concerned.[246]

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[239]See paras. 72 and 106 above.
[240]See para. 111 above.
[241]See para. 72 above.
[242]At para. 115 above.
[243](1978) Law Com. No. 86.
[244]See paras. 21–24 above.
[245]E.g. to provide that co-ownership interests are not to be overriding interests. See para. 73 above.
[246]See para. 84 above.

118. We have decided on this occasion not to follow our usual practice of annexing draft legislation to our reports. The legislation we contemplate is the Matrimonial Homes (Co-ownership) Bill (annexed to the Third Report) amended in certain respects. That Bill contains a number of provisions which are outside the scope of the recommendations in this report. It would therefore be both repetitious and incongruous to annex the whole Bill, even in its amended form. There would be no useful purpose in annexing the amendments alone, because they will be technical and complex and would not be intelligible by themselves. We do, however, intend to put in hand the drafting of the necessary Bill as soon as it seems helpful to do so.

PART VI

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

119. In this part of the report we summarise our main conclusions and recommendations for reform of the law, and our proposal for implementation of those recommendations.

120. **Summary of Conclusions**

(i) The present law as to co-ownership of land, as declared in *Williams & Glyn's Bank Ltd.* v. *Boland,*[247] to some extent improves the position of co-owners and thus promotes the social policy of protecting the interests of wives in the matrimonial home (paras. 45 and 67).

(ii) The protection given to co-ownership interests, however, is inadequate for co-owners (paras 46–56) and detrimental to purchasers and lenders (paras. 27–43 and 57–65). The law applicable is productive of uncertainty, and thus prejudices the security of titles and the ready marketability of land and increases the complexity and cost of transactions (paras. 68–69).

(iii) The law is in need of reform for the purpose of improving the means by which co-ownership interests are protected against, and made known to, purchasers and lenders and by which the existence and extent of such interests are established (paras. 70 and 72).

121. **Summary of Recommendations**

The following recommendations are designed to form a coherent whole in which a balance is held between the sometimes conflicting interests of wives and other co-owners on the one hand and purchasers and lenders on the other (para. 116):

(i) the interests of co-owners and of purchasers and lenders should be protected by means of the existing systems of registration: there

[247] [1981] A.C. 487.

should be a *registration requirement* whereby an equitable co-ownership interest (including the rights which flow from it) is enforceable against a purchaser or lender if, but only if, the interest is registered in the appropriate manner (para. 83);

(ii) for the further protection of the matrimonial home, the rights of married co-owners should include a special *consent requirement,* whereby no sale or other disposition of the home by one can be effective without the consent of the other or an order of the court (paras. 95 and 97);

(iii) in order to establish the existence and extent of co-ownership interests more effectively, and for reasons given in previous reports, a scheme of equal co-ownership of the matrimonial home should be introduced, in accordance with the provisions and exceptions in the Matrimonial Homes (Co-ownership) Bill annexed to the Third Report on Family Property (Law Com. No. 86) (para. 115);

(iv) the recommendations at (i) and (iii) above should be implemented by legislation incorporating the Matrimonial Homes (Co-ownership) Bill with modifications, in particular to provide additionally for the registration of co-ownership interests other than interests in the matrimonial home (para. 118).

(Signed) RALPH GIBSON, *Chairman*
STEPHEN M. CRETNEY
BRIAN DAVENPORT
STEPHEN EDELL
PETER NORTH

R. H. STREETEN, *Secretary*
1 *July* 1982

APPENDIX 1

List of those who sent us comments on the subject-matter of this report.

The Agricultural Mortgage Corporation Ltd.
Mr. D. C. Allen
Association of County Councils
Mr. C. G. Blake
British Bankers Association
British Insurance Association
British Legal Association
The Building Societies Association
Chancery Bar Association
The Committee of London Clearing Bankers
Messrs. Eddowes, Perry, Adams, Roberts & Co.
Family Law Bar Association
Finance Houses Association Ltd.
Mr. D. Green
House Owners Conveyancers Ltd.
Messrs. Jones Blakeway & Pepper
The Law Reform Commission (of Ireland)
The Law Society
The Life Offices Association
London Personal Finance Association Ltd.
Professor A. M. Prichard
Mr. C. J. Saville Glanvill
The Senate of the Inns of Court and the Bar (Law Reform Committee)

APPENDIX 2

Alternative solutions rejected

1. In the course of preparing this report, we have come across various suggestions for dealing with some of the particular problems created by *Boland*. We found some merit in each of these suggestions, but we have rejected them all because none of them offers a complete solution to the difficulties associated with *Boland* and none of them seems to us to solve a problem which would not be removed or at least adequately dealt with under our own recommendations.

2. Most of the suggestions are directed towards protecting *purchasers of registered land*. They take little or no account of the need to strengthen the position of co-owners, and some do not take account of the implications of *Boland* for unregistered land. In addition to these general characteristics, each suggestion possesses certain special features (to which we refer below) which, in our view, alone have justified us in rejecting it.

3. All the suggestions are aimed at overcoming the difficulties which purchasers and mortgagees now face in discovering the existence of occupiers' rights by which they stand to be bound. The suggestions may be grouped under four headings:

(1) *Closing the "registration gap"*: to enable purchasers and mortgagees of registered land to take free of occupiers' rights which are set up in the period between completion and registration of the purchase or mortgage.

(2) *Official enquiries*: to require the Land Registry to undertake the enquiries about the rights of occupiers of registered land which at present have to be undertaken by the purchaser or mortgagee himself.

(3) *The revival of the doctrine of notice*: to protect purchasers of registered land against occupiers' rights of which they have no notice.

(4) *Reliance on a declaration by the vendor*: to enable purchasers to take free of any equitable co-ownership interest where the vendor denies the existence of such an interest.

We deal with these suggestions in turn.

(1) *Closing the "registration gap"*

4. This suggestion is designed to protect purchasers and mortgagees against occupiers' rights set up between completion and registration of the purchase or mortgage.

5. The starting point of the suggestion is the rule in registered conveyancing that the moment at which enforceability of overriding interests against a purchaser or mortgagee is ascertained is not the date on which the purchase is completed, but the date on which the title is treated as registered, i.e. the date

on which the application for its registration was lodged in the Registry.[a] As we have pointed out,[b] this rule causes particularly acute problems for mortgagees, such as building societies, whose mortgages are contemporaneous with the purchase; for whilst such a mortgagee at least has an opportunity of discovering the presence of occupiers' rights which are in existence before the mortgage is due to be completed, occupiers' rights which arise between completion and registration of the mortgage are enforceable against the mortgagee despite the fact that it is totally impossible for the mortgagee to discover their existence before parting with his money.

6. It is clear that to close the gap would not provide a full solution to the problems arising from *Boland,* for it would do nothing to relieve purchasers and mortgagees (whether of registered or unregistered land) from the need to make the additional enquiries, necessary since *Boland,*[c] *before* completion of the purchase or mortgage as to the rights of those in occupation. Nor would it deal with the case in which the occupiers' rights are set up on completion of the purchase and immediately before completion of the mortgage.[d] The idea represents a partial solution, whose adoption might be justified if the particular situation of lending institutions is regarded as the only feature of the law resulting from *Boland* which merits reform, and if it were thought desirable that the rights of beneficial co-owners should continue to have the status of overriding interests. In our view neither of these conditions is satisfied: as we have said, we consider that *Boland* calls for much more extensive remedial treatment, and we do not think it appropriate that the rights of beneficial owners under trusts should continue to be treated as overriding interests.

7. There are at least three ways in which the "registration gap" could be closed or bridged. It could be provided, in relation to occupiers' rights—

(*1*) that registration of title is not to take effect subject to rights which arise after completion of the disposition; or

(*2*) that a disposition is to be treated as registered on the date of its completion; or

(*3*) that on the issue of an official search certificate to a purchaser or mortgagee, he should have priority over any rights arising during the period of protection conferred by the certificate.

These alternatives require some further explanation. Under the first the gap between completion and registration would be by-passed, for occupiers' rights could not be set up against a purchaser or mortgagee during that interval. Under the second the gap would be notionally closed, for the date of completion and the date of registration would for this purpose be regarded as identical. The third would retain the gap and the enforceability of overriding interests arising within the gap, but would import the existing machinery of the official search to ensure that occupiers' rights arising during this period

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[a] See para. 16 of this report.
[b] See paras. 18(ii) and 34 of this report.
[c] See paras. 39–41 of this report.
[d] For example where the home is bought partly from the sale proceeds of the former home in which the wife had a share. See para. 35 of this report.

are postponed: broadly speaking, this procedure enables an intending purchaser to obtain from the Registry a certificate which ensures that if he applies to register his disposition within the "priority period" of 30 working days from the date of the certificate any other entry made during that period will be postponed to his application for registration.[e]

8. One cannot wholly rule out these possibilities as impracticable; but each of them would involve a somewhat artificial treatment of the registered system for the sake of a limited objective. The first two would diverge from the principle whereby the legal estate passes to the proprietor when his title is registered,[f] and his title and all the incumbrances are determined as from the date of registration. The third would flout the concept of an official search, which is a search of the *register* and protects the searcher against subsequent entries *on the register* made during the priority period; and it would at the same time distort the concept of an overriding interest, for it is inherent in the nature of these interests that they are not entered on the register and that an official search could not in fact reveal them even if they were created before the search was conducted.

9. A further difficulty about adopting any of these alternatives is that if it were adopted solely in relation to occupiers' rights under section 70(1)(*g*) of the Land Registration Act 1925, a fresh anomaly would be introduced into the regime of overriding interests, and this would give rise to additional[g] problems in determining priorities. To take an example, suppose that P buys a house and mortgages it to M; that before registration of the mortgage P's wife is in actual occupation and makes a substantial contribution towards the improvement of the house and thus acquires an overriding interest; and that subsequently the local authority imposes a local land charge (which is an overriding interest under section 70(1)(*i*)) for work undertaken on the premises. Under any of the three possibilities we have mentioned, the mortgage would take priority over the wife's rights, the wife's rights would take priority over the local land charge, and the local land charge would take priority over the mortgage. We hesitate to say that these conflicting priorities could not be resolved if the conflicts came for determination by the courts; but it seems to us wholly undesirable to change the law in such a way that these new complexities could arise.

10. A possible solution to the problems of competing priorities to which we have just referred would be to apply the appropriate "registration gap" solution to overriding interests *as a whole*. But such a solution would be for the sake of consistency only. We have no reason to think that there would be merit in applying it to any type of interest other than occupiers' rights under section 70(1)(*g*).

11. Lastly, we would point out that our own proposals for the registration of co-ownership interests would remove the problem of the "registration gap",

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[e] Land Registration (Official Searches) Rules 1981 (S.I. 1981/1135) especially rule 5.

[f] See e.g. Land Registration Act 1925, ss.5 and 123 (first registration) and 19 (registered disposition).

[g] For the kind of problem which conflicting priorities can create in the field of mortgages, see Megarry and Wade, *The Law of Real Property* (4th ed., 1975), p. 974.

for when such an interest is registered it will automatically become subject to the regime of official search which we have described at paragraph 7 of this appendix.

12. We conclude that the idea of closing the "registration gap" is an inadequate solution to *Boland*, that it would create new and undesirable complications in registered conveyancing, and that the problem to which it is directed is effectively met by the proposals in this report for the registration of co-ownership interests.

(2) *Official enquiries*

13. This suggestion is to create a "fail-safe" system of official enquiry as to the rights of occupiers of registered land, superseding the present need for private enquiries.

14. Section 70(1)(*g*) of the Land Registration Act 1925 provides that occupiers' rights are to be overriding interests "save where enquiry is made of such person and the rights are not disclosed". These words do not expressly state who is expected to make the enquiries, and it is perhaps this vagueness which has led to the suggestion[(h)] that they should be undertaken by the Land Registry.

15. We reject this suggestion on three grounds. First, it would not be any easier for the Registry than it is for a private individual to ascertain who are the occupiers of whom enquiries should be made. To address a written enquiry to "the occupiers", for instance, would in our view comply with neither the spirit nor the letter of section 70(1)(*g*), for there would be no knowing that the enquiry would come to the notice of all the occupiers or indeed any of them. Secondly, the procedure would impose a formidable new administrative burden on the Land Registry at a time when its resources are severely taxed. Thirdly, the procedure could be no more successful than private enquiries in detecting the rights of occupiers which arise *after* the enquiries are made; if the Registry's enquiries are not precisely timed to reach the occupiers and require a reply immediately before the disposition is made, there would be a risk that occupiers' rights would be established between the making of the enquiry and the completion or registration of the disposition.

(3) *Revival of the doctrine of notice*

16. This suggestion is to make the rights of occupiers of registered land subject to the doctrine of notice which still applies in unregistered conveyancing. The purchaser would take free of the rights of occupying co-owners unless he had actual or constructive notice of them (see paragraph 14 of this report).

17. This idea would make a marginal improvement in the position of a purchaser of registered land, for he would not, as at present, be bound by occupiers' rights which he could not reasonably have been expected to discover. Nevertheless, we reject the idea on several grounds. First, it would do

[(h)] "Occupational Hazards" [1980] Conv. 313–315. We do not accept the further suggestion (*ibid.*, 314) that the Land Registry is already bound to make these enquiries when requested to do so.

virtually nothing to remove the need for purchasers and mortgagees to make the additional enquiries which have become necessary since *Boland*.[i] Secondly, it would not *remove* the risk to purchasers and mortgagees of being bound by rights which they had failed to detect, for they would be bound to make "reasonable" enquiries, and what is or is not reasonable in this context cannot safely be predicted.[j] Thirdly, it would weaken the occupier's position, for it would make the enforceability of his rights against a purchaser dependent upon the purchaser's state of knowledge. Fourthly, it would reintroduce into a small area of the land registration system the very doctrine which the system was designed to displace. It is a feature of the system that the purchaser is bound only by matters which are entered on the register or by overriding interests. To introduce a third category of matters which bind purchasers who have notice of them outside the register would in our view be a retrogressive step.

(4) *Reliance on a declaration by the vendor*

18. This suggestion is that the purchaser would take free of an equitable co-ownership interest where he received from the vendor an assurance that no such interest existed.

19. A procedure of this kind, in relation to occupancy rights of married couples in the matrimonial home, is contained in section 6 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981. Under that Act, where one spouse (the "entitled spouse") is entitled otherwise than under the Act itself to occupy the matrimonial home and the other (the "non-entitled spouse") is not so entitled, the latter has a statutory right to occupy the home. This right corresponds to the statutory right of occupation provided by the Matrimonial Homes Act 1967[k] for married couples in England and Wales. The 1967 Act, however, requires the rights to be protected by registration and declares that they are not overriding interests. The Scottish Act contains no such requirement and declares that the rights *are* overriding interests for the purposes of the Scottish land registration system.[l] Subject to certain exceptions, the occupancy rights are not to be prejudiced by any dealing by the entitled spouse in relation to the matrimonial home without the consent of the non-entitled spouse. In Scotland, therefore, a purchaser or mortgagee stands to be bound by these occupancy rights whether he knows of them or not. An *exception*, however, is made for the case of a purchaser or mortgagee of the matrimonial home acting in good faith if, at the time of the transaction, the entitled spouse produces *either* his affidavit declaring that there is no non-entitled spouse *or* a written renunciation of occupancy rights or consent to the dealing which appears to have been made or given by the non-entitled spouse. Where the exception applies, the purchaser or mortgagee takes free of any statutory occupancy rights that actually do exist.

20. One apparent advantage of this kind of procedure is to relieve the purchaser—at least where he is acting in good faith—of the need to make

[i] See paras. 39–41 of this report.
[j] See paras. 17 and 39 of this report.
[k] See para. 20 of this report.
[l] S. 6(4)(c).

enquiry beyond the vendor as to the existence of an occupier's right and the occupier of the need to protect that right by registration. In the absence of an occupier's renunciation or consent to the transaction, the purchaser will assume that there is an occupier's right and the occupier will assume that the right is protected. We can, however, see serious practical and conceptual objections to the use of such a procedure as a solution to the problems arising after *Boland*. We shall now elaborate these objections.

21. In practical terms, a system based upon declarations by vendors would give co-owners substantially less protection than either that which they currently enjoy or that to which they would be entitled under the recommendations made in this report. First, although the purchaser might be fully protected, the co-owner would be dependent on the vendor's, i.e. the legal owner's, good faith and accuracy. The legal owner could defeat the co-owner's rights by making a false declaration, fraudulently or mistakenly. The fact that the legal owner might thereby render himself liable to criminal prosecution for perjury would be of little comfort to the co-owner and would do nothing to restore the co-owner's lost interest. Secondly, many vendors might be unable or unwilling to make the appropriate declaration. We have referred in this report[(m)] to the difficulties of establishing whether an individual occupier does in fact have an equitable interest. In cases where the legal owner cannot be entirely certain whether such an interest has been established, he would no doubt be advised by his solicitor not to make any declaration denying its existence, for this might result in criminal liability. In these cases the purchaser might well have to undertake the kind of time-consuming and inconclusive precautions which in this report we propose should be eliminated.

22. Conceptually, it would be unsatisfactory to introduce a new and unfamiliar procedure into an area of English law which, since 1925, has been largely controlled by systems of registration. Either the vendor's declaration system would have to operate incongruously in tandem with the registration machinery of the Matrimonial Homes Act 1967, or the registration machinery of the 1967 Act would have to be dismantled. We do not regard either of these alternatives as acceptable.

23. For the reasons stated, we conclude that the problems arising in connection with *Boland* would be better solved by the means proposed in this report than by the use or adaptation of the kind of procedure designed in the 1981 Act for the protection of the statutory occupancy rights of married couples.

[(m)] See para. 55 of this report.

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