

Raising the Curtain on Beneficial Ownership

Mark Pawlowski considers the possibility of disclosing beneficial interests on the land register

Property lawyers will be familiar with the so-called “curtain principle” under which beneficial interests are kept off the face of the land register and hidden behind the veil or curtain of registration. The principle has been enshrined in statute since the Land Transfer Act 1875, which provided (in s.83(1)) that “there shall not be entered on the register or received by the registrar, any notice of any trust, implied, express or constructive.” The current formulation of the principle is to be found in s.78 of the Land Registration Act 2002, which imposes the curtain in somewhat similar terms: “the registrar shall not be affected with notice of a trust.”

There are, of course, safeguards within the system which seek to protect both purchasers and equitable owners of the land. So far as the purchaser is concerned, the Form A restriction on the register alerts him to the existence of a trust and, hence, to the need to ensure that he takes the land free from any equitable interests by paying the purchase money to at least two trustees of the land. If he does, the equitable interests will be overreached automatically converting the equitable owner’s interest in the land into the proceeds of sale. Equitable owners are also protected against purchasers (where payment is to just one trustee and overreaching does not take place) by the concept of the overriding interest which will bind a purchaser provided the equitable owner is in actual occupation of the land: Schedule 3, para. 2, Land Registration Act 2002.

The argument for disclosure

But why are equitable interests kept secret in the first place? Surely, it would make more sense (in line with the notion of transparency which pervades the land registration system) if details of beneficial entitlement were included on the register. Over two decades ago, a report, produced by Andrew Edwards, *The Land Registration Quintennial Review*, (June 2001), suggested that consideration be given to the disclosure of true or beneficial ownership on the register where this differs from legal ownership. The Report put forward a “strong case” for such a register, at p. 105:

“The disclosure of such information on the Register, and the index of true or beneficial property owners that the Land Registry could compile from it, would be invaluable for law enforcement, regulatory and tax authorities, as would similar information on ownership of private companies. Without such information, the transparency of land registration must always be seriously qualified. The existence of the requirement would itself do something to deter the unscrupulous from putting the proceeds of crime into property assets. A requirement to register beneficial ownership should also be helpful in tracing bankrupt persons and combating mortgage fraud.

Without it, the tracking of properties or charges on property owned by persons who are the object of bankruptcy petitions or orders must remain seriously deficient.”

It was envisaged that the register would continue to record legal ownership (thereby avoiding wider implications for land, property and trust law), but would include as well a notice stating what the legal owners have declared about true or beneficial ownership where this differs from the nominal or legal owners. The relevant notice would be included in the proprietorship register and would take one or other of the two following forms:

“The registered owners have declared that they are also the true, ultimate and beneficial owners and that the names recorded on the Register are their true names.”

“The registered owners have declared that the true name of the true, ultimate or beneficial owner is/are [].”

With notices framed in this way, the Registry would not be guaranteeing the truth or falsehood of the owners’ disclosure. In this connection, although the Report did concede the possibility of registered proprietors providing false information, it was felt that this was unlikely given that the making of a false declaration to the Land Registry would give rise to the commission of a criminal offence.

Human rights issues

How would such transparency impact on the rights of landowners to privacy and property? Article 8 of the European Convention on Human Rights protects an individual’s right to privacy and Article 1 of the First Protocol (embodied in Schedule 1 to the Human Rights Act 1988) protects the right to property. Neither of these rights are, of course, absolute and the State is allowed to interfere with both, as long as it is in the public interest and such action is proportionate. Interestingly, the 2001 Report recognised that a balance had to be struck between privacy and transparency. It also suggested that, in sensitive cases (where personal security might be threatened), the Registry could require registered owners to disclose beneficial ownership in confidence without placing the information on the public register. In exceptionally sensitive cases, it would even be possible to waive the requirement for declaration altogether on the advice of law enforcement or other relevant authorities.

Completion of TR1 form

The proposal to introduce a register of beneficial interests would need to coincide with a related amendment to the Land Registration Act 2002. The current TR1 form (which asks about how the property is to be held beneficially) is still not mandatory and the relevant part of the form (asking whether the property is to be held on a joint tenancy, or tenancy in common in equal or some other shares) is not routinely completed by purchasers despite pleas from the judiciary (including, most notably, Baroness Hale in *Stack v Dowden* [2007] UKHL 17) that this should be done. Clearly, if the proposal to create a register of beneficial ownership is to have any bite, the need to complete the TR1 form should be placed on a mandatory footing.

Overseas entities

On 1 August 2022, a new Register of Overseas Entities under the Economic Crime (Transparency and Enforcement) Act 2022 came into force, requiring overseas entities that currently own land in the United Kingdom to register verified information relating to their beneficial owners or managing officers at Companies House by 31 January 2023. Once registered, the overseas entity will be given a unique Overseas Entity ID which can be supplied to the Land Registry for registration purposes. On 5 September 2022, the amendment provisions to the Land Registration Act 2002 (by inserting a new Schedule 4A) came into force which prevent the Land Registry from registering an overseas entity as a proprietor unless it has an overseas entity ID.

Needless to say, the new law was introduced as part of the Government's strategy against overseas criminals who launder money through UK real estate. Interestingly, this underlying rationale for disclosure was also at the forefront of the 2001 Report which stated, (at pp. 12-13): "this would accord with Parliament's clear wish, reflected in earlier statutes, that the Register should record the owners of properties, and with the increasing emphasis in other statutes on transparency so as to combat money laundering."

The Law Commission

Interestingly, the *Land Registration 10-year Strategy Policy 2003-2013* document, at pp. 45-46, stated that a joint consultation would be undertaken with Government "on the issue of including on the Land Register details of the true or beneficial owners of registered properties". However, a new strategy plan was adopted in 2008 which contained no reference to the question of beneficial ownership. In 2016, in its Consultation Paper, No. 227, 31 March 2016, *Updating the Land Registration Act 2002*, at para. 1.21, the Law Commission stated:

"The treatment of beneficial interests under the Act, however, reflects an ongoing debate about the correct balance to strike between the rights of purchasers and mortgagees on the one hand, and beneficiaries on the other, particularly in the context of beneficial interests that people may own in their home. That debate raises broad questions of social policy that ultimately touch on the appropriate balance the law strikes between property as a "home" and as a financial investment for homeowners to realise . . . We did not consider that it would be appropriate to interfere with long-established assumptions by looking at how beneficial interests are dealt with by the LRA 2002 in isolation from the broader debates."

At para. 2.35, it stated emphatically that "we have not pursued a suggestion that we should review the inability of beneficiaries to record their interests on the register." Despite this, it is hoped that the opportunity to make relatively short amendments to the 2002 Act so as to require: (1) mandatory completion of the TR1 form; and (2) full disclosure of beneficial ownership on the register (not limited to overseas entities) will be taken up again in the not too distant future.

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