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CHARGING ORDERS ON LAND

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CHARGING ORDERS ON LAND

PART 1 INTRODUCTION

General

1. In July 1971 the Bar Council and The Law Society submitted to the Lord Chancellor's Office a Joint Memorandum prepared by their Law Reform Committees and entitled "The Reform of Isolated Defects in the Law". That document set out by way of example a number of particular instances in which it was claimed that the law was defective, two of which related to the charging orders on land which are obtainable by judgment creditors under section 35 of the Administration of Justice Act 1956. Such orders create charges which "have the same effect" as equitable charges created by the judgment debtor under hand. At our invitation, the Lord Chancellor formally referred these two points to us under section 3(1)(e) of the Law Commissions Act 1965. He also asked us to consider a third point relating to section 35, to which his attention had been drawn by a County Court Registrar.

Summary statement of the three points

2. (i) A charging order, by itself, does not operate to give the judgment creditor any preference in the event of the bankruptcy (or winding-up) of the judgment debtor. In order to acquire preference over other creditors it is necessary for the judgment creditor to take at least one further step, often of a purely formal nature: In re Overseas Aviation Engineering (G.B.) Ltd.[1]

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1. [1963] Ch. 24 (C.A.) ("Overseas Aviation").

(ii) A beneficial interest in land held on trust for sale is not, for the purposes of section 35, an "interest in land", and such an interest cannot therefore be charged: Irani Finance Ltd. v. Singh.[2]

(iii) There appears to be no means whereby a judgment debtor can obtain, after satisfying the judgment, a court order formally discharging his land.

Historical background

3. The history of charging orders on land is not unimportant, particularly as it played a large part in the argument in Overseas Aviation and, indeed, was crucial to the dissenting judgment of Russell L.J. in that case.

4. Before 1838, judgment creditors for sums of money had only one of two remedies against the land of the judgment debtor. What the appropriate remedy was in any particular case depended on the nature of the debtor's estate or interest in the land. If it were legal, the judgment creditor could issue execution process (usually in the form of a writ of elegit) and obtain from the Sheriff of the County possession of the land until the debt was paid. If, on the other hand, the debtor had an equitable interest only in the land, the judgment creditor could obtain only the appointment of a receiver, by means of equitable execution.

5. The Judgments Act 1838 put further remedies into the hands of judgment creditors. By section 13, every judgment was made to operate as an equitable charge on all the landed interests, legal or equitable, of the judgment debtor.

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2. [1971] Ch. 59 (C.A.) ("Irani Finance").

Proceedings to enforce the charge could not, however, be taken for the space of one year, nor did the judgment creditor obtain any preference over other creditors in the event of the debtor's bankruptcy within that period. Furthermore, the charge did not affect purchasers or mortgagees of the land, or other creditors of the judgment debtor, unless the judgment creditor registered his judgment in a special public register kept under section 19.

6. The system of registration was altered in 1900. Under section 2 of the Land Charges Act of that year the Court's register of judgments was closed and judgment creditors were required to register at the Land Registry Office writs or orders for the enforcement of their judgments instead of the judgments themselves. Without such registration there was no statutory charge at all.

7. The 1838 and 1900 provisions were repealed in 1925, but they were reproduced in section 195 of the Law of Property Act 1925. No further change took place until 1956. It came to be recognised, however, that the alterations which had been made in 1900 were not altogether desirable. Before that date, the statutory charge and execution processes were totally distinct: the judgment creditor could obtain a charge on the debtor's land without taking any steps in the nature of execution. After 1900, however, the obtaining of a charge was no longer an alternative to issuing execution process, because no statutory charge could exist unless such process had already been issued. The execution process normally resorted to for the purpose of establishing the charge - the writ of elegit - was itself far from satisfactory; but one of the consequences of obliging the judgment creditor to issue such a writ in order to obtain a charge was that if he chose to proceed with the writ, despite the cumbersomeness of its procedure, he avoided the twelve-month moratorium attached to the charge.

8. The Committee on Supreme Court Practice and Procedure[3] (the Evershed Committee) recommended the abolition of the writ of elegit,[4] and an extension of receivership as a means of execution, to cover legal as well as equitable interests.[5] These recommendations were implemented by sections 34(1) and 36(1) of the Administration of Justice Act 1956. The Committee did not recommend any change in the nature of the charge arising under section 195 of the Law of Property Act, but they reverted to the older idea of registering the judgment itself,[6] rather than a separate order for its enforcement (that is to say, an order appointing a receiver). That recommendation was not implemented by the 1956 Act because it did not fit in with the radical alteration in the charging scheme effected by section 35.

The modern scheme

9. So far as is material for present purposes, section 35 reads as follows:

> [Power of courts to impose charges on land of judgment debtor.]
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> 35. (1) The High Court [and any county court[7]] may, for the purpose of enforcing a judgment or order of those courts respectively for the payment of money to a person, by order impose on any such land or interest in land of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.

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3. (1953) Cmd. 8878.
4. Ibid. para. 413.
5. Ibid. para. 416(e).
6. Ibid. para. 416(c).
7. These words were repealed by the County Courts Act 1959 but the section is reproduced, for county courts, in s. 141 of that Act.

(2) An order under subsection (1) of this section may be made either absolutely or subject to conditions as to notifying the debtor or as to the time when the charge is to become enforceable or as to other matters.

(3) The Land Charges Act 1925 and the Land Registration Act 1925 shall apply in relation to orders under subsection (1) of this section as they apply in relation to other writs or orders affecting land issued or made for the purpose of enforcing judgments, but, save as aforesaid, a charge imposed under the said subsection (1) shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand ....

10. The features which distinguish section 35 from the charging system which it replaced may be summarised as follows. First, there is no general or "blanket" charge arising by operation of law: for the first time, the judgment creditor has to obtain a specific order relating to specified land. Secondly, registration is no longer a condition precedent to the existence of the charge although failure to register will have the normal consequences in relation to purchasers. Thirdly, what is registered is neither the underlying judgment nor a traditional process of execution, but the charging order. Finally, the charge may be enforced at once.

11. In the High Court, a charging order is normally obtained in the first place on *ex parte* application to the master or the registrar, and is made absolute after notice has been given

to the judgment debtor.[8] In the county court, the order is made by the Judge on an application of which the debtor has notice.[9] The application[10] in either case may be joined with an application for the appointment of a receiver.

8. R.S.C. O.50, r.1.

9. C.C.R. O.25, r.7.

10. Under R.S.C. O.50, r. 9; C.C.R. O.30, r. 1. The former rule dates from 1967, Barclays Bank v. Moore [1967] 1 W.L.R. 1201 having shown that a master of the Queen's Bench Division had no jurisdiction to appoint a receiver.

PART 2 THE "OVERSEAS AVIATION" POINT[11]

12. The facts of the case which drew attention to this point were simple. A creditor obtained a money judgment against a company, and an order under section 35 charging the company's registered leasehold interest in certain land. A caution was duly registered at the Land Registry, but no application was made for the appointment of a receiver. Shortly afterwards, the company went into liquidation. The judgment creditor claimed to rank as a secured creditor, on the footing that the statutory charge was in the nature of an ordinary equitable charge. The liquidator, on the other hand, argued that the charge was a form of execution, and that the benefit of the charge had been lost because the execution had not been completed. By a majority, the liquidator's argument prevailed in the Court of Appeal.

13. Section 325 of the Companies Act 1948 and section 40 of the Bankruptcy Act 1914 both provide that a judgment creditor who has issued execution shall not be entitled to retain the benefit of it against the liquidator or trustee unless he has completed his execution before the commencement of the winding-up or bankruptcy, as the case may be. For the purposes of these provisions, seizure of the land[12] or the appointment of a receiver constitutes "completion" of the execution. In Overseas Aviation, however, the judgment creditor had not obtained the appointment of a receiver, and his claim to priority over the other creditors was plainly defeated by section 325 unless the obtaining of the charging order did not constitute "the issue of execution", so that the charge was not hit by section 325 at all.

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11. [1963] Ch. 24.

12. Under a writ of sequestration.

14. Russell L.J., in a dissenting judgment, examined the pre-1956 charging system and showed that a charge arising under that system would not have been treated as "execution"; and he saw no justification for holding that the 1956 Act had altered the position. Lord Denning M.R., on the other hand, regarded the history as irrelevant, on the ground that section 35 had introduced an entirely new scheme in relation to charges on land. He cited cases relating to charging orders on shares, in which the orders were described as being in the nature of execution[13]; and he pointed out that in section 35 the imposition of the charge is expressly stated to be "for the purpose of enforcing a judgment....." (The earlier legislation had not used this expression in relation to the general charge.) Harman L.J. agreed with Lord Denning; he considered that the writ of elegit (which was an undoubted form of execution) had been replaced in the 1956 Act not only by the extension of the scope of receivership (section 36(1)) but also by the charge procedure under section 35: "the new remedy given by section 35 is merely an alternative method of execution against the debtor's land".[14] We would observe that a charge would often be more effective than the appointment of a receiver under section 36 because it would enable the creditor to apply for an order for sale.

16. The point which arises directly out of Overseas Aviation may seem to be a small one, but it is impossible not to recognise that a major question of bankruptcy policy underlies it. There is a school of thought which holds the view that it is already too easy for a judgment creditor to acquire

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13. Finney v. Hinde (1879) 4 Q.B.D. 102, 104 (Pollock B.); In re O'Shea's Settlement [1895]1Ch. 325, 329 (Lord Halsbury). Lord Denning also cited In re Love [1952] Ch. 138 in which Lord Evershed M.R. (at p. 152) described a statutory chargee of a partnership interest as (or equivalent to) an execution creditor.

14. [1963] Ch. at p. 46.

a charge over his debtor's land in priority to the other creditors; and, accordingly, that any change in the law ought to be in the opposite direction, removing from the Bankruptcy and Companies Acts those provisions which single out execution against land by treating it as "complete" at a stage before any of the fruits of execution have been gathered. The removal of the present distinction between land and goods in this context seems, indeed, to have recommended itself to the Bankruptcy Law Amendment Committee[15] (the Blagden Committee) in 1957: under their proposals[16] a judgment creditor would be entitled to retain the benefit of his execution (whether against land or goods) to the extent only of what he had actually received before the debtor's bankruptcy supervened. If that were the law, a charging order (assuming it to be a form of execution) would not operate to give a judgment creditor any priority, and the additional appointment of a receiver would not, by itself, be of any significance in this context.

17. It is clear, however, that the arguments are not all one way. A creditor may be satisfied with security alone; indeed, where there is a continuing business relationship between him and the debtor, he may actually prefer security to immediate payment if there is a risk that a demand for immediate payment might precipitate the closing down of the debtor's business. As the law now stands, a creditor may obtain a judgment without intending to execute it, solely with a view to obtaining a charging order (coupled with an order appointing a receiver) which will protect his interest in the event of the debtor's subsequent bankruptcy or liquidation. The continuation of the debtor's trade made possible by the principal creditor's acceptance of security may in the end prove advantageous to the other creditors as well. Any change in the law along the

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15. (1957) Cmnd. 221.
16. Ibid. para. 101.

lines suggested by the Blagden Committee would deny creditors the opportunity of protecting themselves in that way: their only protection would be in speedy execution.

18. Having indicated the nature of the policy question behind the Overseas Aviation point, we are bound to say that there appears to be little prospect of any change in the existing policy being effected in the immediate, or even reasonably foreseeable, future. The Report of the Blagden Committee has remained unimplemented for 15 years, and the Rules of the Supreme Court have since been altered, streamlining the procedure for obtaining the appointment of a receiver and thereby making it easier for a judgment creditor to attach priority to his charge. It is, moreover, now more than ever desirable that our insolvency and company laws should be consonant with those of other nations, and, in particular, with those of the other countries of the E.E.C. A comparative study of the laws in these fields is, we are told, in progress, but it will take some time; and there can be no certainty that at the end of the day any change in the existing balance between judgment creditors and other creditors will be called for.

19. In those circumstances, we think it right to consider the Overseas Aviation point on the footing that the policy of section 40 of the Bankruptcy Act (and of section 325 of the Companies Act) will remain unchanged indefinitely; recognising, however, that that policy may one day be altered, sweeping away any steps taken in the interim to deal with the Overseas Aviation point, together with the point itself.

20. In forming a judgement on the place of charging orders in a bankruptcy situation there are two matters to be borne in mind:

(i) Bankruptcy law at present accepts (subject to the rules about fraudulent preference) that charges expressly created by the debtor by deed or under his hand confer priority. If a debtor executes a charge under pressure from his creditor he undoubtedly creates a secured charge. Unless there is good reason for distinguishing between an express charge and a charge under a section 35 charging order, there would seem to be no logical ground for denying to the statutory charge the same effect.

(ii) Bankruptcy law at present accepts that the general body of creditors cannot reclaim the value of assets already actually taken in execution,[17] and that it is sufficient for this purpose, in the case of land, that the land should be in the hands of a receiver.

21. We can see no grounds for distinguishing between express charges (acquired in the circumstances indicated above) and statutory charges. Furthermore, a chargee (and, in particular, an equitable chargee) with a present right to payment, but no express right under his charge to appoint a receiver, is ordinarily entitled to the appointment of a receiver by the Court,[18] and it would therefore appear that the general body

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17. Subject to the provisions of s. 41(2) of the Bankruptcy Act 1914 and s. 326(2) of the Companies Act 1948, by virtue of which the proceeds of sale of goods should not be paid to the creditor for 14 days if the judgment debt exceeds £20.

18. Re Crompton & Co., Ltd., [1914] 1 Ch. 954; Barclays Bank v. Moore [1967] 1 W.L.R. 1201.

of creditors would not in practice be prejudiced if a charging order alone were sufficient to give the judgment creditor preference. At present, the other creditors should know that the judgment creditor can apply for and obtain his charging order and the appointment of a receiver at the same time (and might expect him to do so, especially if the debtor's solvency is suspect) so that it is by the merest chance that they are sometimes not faced with a fully secured debt.

22. From the judgment creditor's point of view, the necessity of obtaining a receiver in order to get the full benefit of the charge constitutes a trap, albeit one which it is now easy to avoid. Moreover, the appointment of a receiver is often a mere formality, just as the issue of a writ of elegit was under the old system.[19] In very many cases the land subject to the charging order is the judgment debtor's own home or place of business producing no rent for a receiver to receive, and the creditor must therefore rely not on the receivership but on the power of sale under the charge. Nevertheless, even if there is nothing for the receiver to do, his appointment alone will have added to the cost of enforcing the judgment; this additional cost falls on the debtor or, in many cases, on the general body of creditors. Quite apart from the trouble and expense involved, it offends against reason that a party should have to make an application for something he does not want in order to obtain, by a side wind, something he does want.

23. Although it cannot be regarded as certain that the underlying policy will remain unchanged, we think that the point raised by Overseas Aviation may in the circumstances fairly be treated as if it were an isolated one. On that footing, our conclusion is that there is a case for reversing

19. See the judgment of Russell L.J. in Overseas Aviation [1963] Ch. 24 at p. 48.

the effect of Overseas Aviation.[20] This might, we suggest, best be done by amending section 40(2) of the Bankruptcy Act 1914 and section 325(2) of the Companies Act 1948 so as to add a charging order on land to the steps constituting completion of an execution. The decision on the point at issue in Overseas Aviation (namely, that a charging order is "execution") would in that way remain unaffected. We think it might be undesirable to create a distinction in this respect between charging orders on land and similar orders relating to shares.

Summary

24. Any one of three possible courses may be taken on the point which arose in Overseas Aviation. The first is to do nothing, on the ground that the present policy, which draws a distinction in the matter of priority between execution against land and execution against goods, is suspect, and that no positive step should be taken to make it even easier for a judgment creditor to obtain priority over the other creditors. The impediment (from the judgment creditor's point of view) is, however, of a procedural nature only, and it affords no substantial protection to the other creditors; and to do nothing would perpetuate the existing illogical distinction between a charge created by the debtor himself and one imposed by statute. Second, the point could

20. Cf. the Report of the Committee on the Enforcement of Judgment Debts (the Payne Committee) (1969) Cmnd. 3909 paras. 867-8.

be eliminated altogether by depriving charges on land (whether express or statutory) of any special degree of priority in a bankruptcy or winding-up; but that obviously raises wider issues and we doubt whether any immediate action along those lines can be expected. Third, treating the point as an isolated one, charging orders under section 35 could be placed on the same footing as ordinary charges for the present purposes by amending sections 40(2) of the Bankruptcy Act 1914 and 325(2) of the Companies Act 1948 so that execution would be "completed" by the making of a charging order. We suggest that this may be the best approach, but would welcome the views of others.

PART 3. THE "IRANI FINANCE" POINT[21]

25. In this part of our paper we have to consider the availability of a charging order where the land in question is held on trust for sale. Such a trust always exists if the land is owned by two or more persons concurrently (for example, by husband and wife); and express trusts for sale are also very frequently imposed on land belonging to persons in succession. The trustees, holding the legal estate, are capable of charging the legal estate, and a purchaser of the land will take it subject to the charge. Each of the beneficial owners, however, can charge only his beneficial interest, and a purchaser of the land will not be affected by such a charge,[22] which is transferred to the beneficiary's interest in the proceeds of sale. If the trustees and the beneficial owners are distinct bodies of people, it is easy to distinguish between their respective charging powers; but they are often exactly the same people, and that can lead to confusion.

26. Where land is held on trust for sale, the interests of the trustees (whether they be the same persons as the beneficial owners, or not) are necessarily in land, because they hold the legal title; but the interest of each of the beneficial owners, in his capacity as such, is for most purposes regarded as being an interest not in land but in personalty (the proceeds of sale) whether or not the sale has yet been carried out. As section 35 is at present worded, this point is crucial because the only interests which can be charged under that section are interests "in land". It was upon this point that the creditor's case foundered in Irani Finance.

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21. [1971] Ch. 59.

22. Assuming always that the purchase moneys are paid in accordance with s. 27 of the Law of Property Act 1925.

27. In the present context it is essential also to bear in mind a principle which is fundamental to the law of execution, namely, that only the debtor's property shall be taken or charged. It follows that it is not normally possible to levy execution against property the legal title to which is held on trust, because the beneficial interests are likely to be vested, at least in part, in persons other than the judgment debtor. As we shall see, however, it is sometimes possible to levy execution against trust property without breaching that fundamental principle. For the purposes of our present enquiry, levying execution against property means imposing a charge under section 35 on the legal title to land held on trust for sale. So far as that principle of execution law is concerned, there is no reason why a judgment debtor's own equitable interest under a trust for sale should not be capable of being subjected to a charge: it is only the wording of section 35 which now prevents the Court from imposing such a charge.

28. In our view, the correctness of the principle of execution law to which we have referred is not open to question. While it is permissible in some cases to impose a charge on the legal title (that is to say, on the land itself), it would not be proper to treat all cases alike. This has been demonstrated by the different results arrived at in Irani Finance and the more recent case of National Westminster Bank Ltd. v. Allen[23]. On its facts, Irani Finance was a special variant of the ordinary type of case in which it would not be right to impose a charge on the land itself; the facts in National Westminster Bank were different in an essential respect and that case provides the simplest example of the type in which such a charge may be imposed. We shall also examine a special variant of the National Westminster Bank type, which has not

23. [1971] 2 Q.B. 718 ("National Westminster Bank").

yet come before the courts and which may be regarded as an intermediate case.

29. In their simplest form, the facts of an Irani Finance type of case would be as follows. Blackacre belongs to A and B as tenants in common, holding the legal title as trustees for sale. X has obtained a money judgment against A. Although A and B, as joint owners of the legal estate, are together capable of charging the legal estate in Blackacre with the debt owed to X, any such charge would affect B's position, and he cannot be forced to cooperate in the creation of such a charge. By the same token, the Court cannot impose such a charge at X's behest, over B's head. Execution cannot in these circumstances be levied on Blackacre because A is the only debtor and he is not the only beneficial owner. The same principle applies if the facts are different because the legal title is vested in separate trustees or because the beneficial interests of A and B are successive rather than concurrent. (Indeed, it is if anything even more obvious that a reversioner's creditor should not be able to execute his judgment by enforcing a charge over the head of the tenant for life in possession of the land - or *vice versa*). A further variant of the simple case is provided by the actual facts in Irani Finance. There, the creditor happened to have judgments against both A and B; but the judgments were for different sums and although the reports of the case do not indicate how the debts arose it is assumed that they arose under distinct transactions. The principle, however, remains the same; neither of the debtors ought to be called upon, in effect, to underwrite the separate debt of the other by submitting to the imposition of a charge on the legal estate.

30. The second type of case is, as we have said, exemplified by National Westminster Bank. There, a husband and wife were joint owners (at law and in equity) of a house, and were

jointly indebted to the bank in respect of their joint accounts which were overdrawn. The bank obtained a single judgment in proceedings in which the debtors were joint defendants, and applied for an order imposing a charge on the legal title to the house. Waller J. granted the order. The essential respect in which the facts differed from those in Irani Finance was what we will call the "unity of the debt", that is to say, the existence of a debt for which both parties were equally responsible. Although the debtors held the legal estate in the house as trustees, that legal estate was vulnerable, because neither of the debtors was in a position to plead (as trustees usually are) that the beneficial ownership was vested wholly or partly in some other person not equally responsible for the same debt. A charge on the legal title therefore constituted no breach of the principle of execution law. Moreover, as that principle gave them no protection in their legal capacity, the particular point which arose in Irani Finance (namely, that beneficial interests under trusts for sale are interests in personalty) was not in issue: in their capacity of legal owners the debtors undoubtedly had interests in land.

31. We now have to consider the intermediate case. Let us suppose that in National Westminster Bank the house had been held on an express trust for sale by separate trustees. In that situation, it would seem that the bank might not have obtained a charge on the house because the joint defendants would have had no legal estate and the reasoning in Irani Finance would have been applicable to their separate beneficial interests. Nevertheless, judged by the one criterion which really matters - the unity of the debt - the case would still be a National Westminster Bank case rather than an Irani Finance one.

32. There is, in fact, a case not unlike that which we have supposed, relating to chattels. In Stevens v. Hince,[24] certain chattels were held by trustees (with power of sale) for a husband during the joint lives of himself and his wife and thereafter for the survivor absolutely. A creditor obtained judgment against the husband and wife on a joint promissory note and it was held that the chattels could be seized under a writ of fi.fa. It had been argued on the debtor's behalf that goods which were at the equitable disposition only of the judgment debtor could not be so seized, but Bailhache J. said[25]

> "In my opinion, although that is true as a general proposition, it is not true where the whole of the equitable and beneficial interest in the chattels is vested in the judgment debtor or the judgment debtors as the case may be. I do not think that in this case the trust can be set up as any sort of a defence to an execution. The judgment debtors can themselves deal with the property exactly as they please..."

The latter remark is based on the principle known as the rule in Saunders v. Vautier,[26] which is equally applicable to trusts for sale of land.[27] If this principle were applied (as we hope it would be) to a case such as that we have supposed, the result would be that it would be possible to obtain an order under section 35 imposing a charge on the land itself, notwithstanding that, strictly speaking, the debtors only have equitable interests in personalty under a trust for sale. It is important to note that Stevens v. Hince was a case where

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24. (1914) 110 L.T. 935.

25. At p. 937.

26. (1841) 4 Beav. 115, affd. Cr. & Ph. 240.

27. Re Horsnaill [1909] 1 Ch. 631, 635. See also Law of Property Act 1925, s. 26 (3).

there was unity of debt between the beneficial owners. We do not suggest that the rule in Saunders v. Vautier should be applied in its widest sense to enable a charge to be imposed on the legal title whenever the beneficial owners are debtors, even if there is no unity of debt (as in Irani Finance). To do so would be to bring the rule into conflict with the principle of execution law to which we have referred.

33. It follows from what we have already said that we regard Irani Finance and National Westminster Bank as being complementary authorities, so far as charging orders affecting the legal title to land is concerned, so that no question arises of expressing a preference between the respective approaches of Buckley J. and the Court of Appeal in the one case and of Waller J. in the other.[28] It would, we suggest, have been wrong to have imposed a charge on the house in Irani Finance simply because the two debtors happened to be the legal owners. The distinction between cases in which there is unity of debt between the beneficial owners[29] and those in which there is not, seems to us to be a valid one. But there is no reason in principle for refusing a charge on the debtor's own equitable interest in those cases in which, for want of unity of debt, a charge cannot properly be imposed on the legal title.

34. We are inclined to the view that the scheme of section 35, as it exists at present, envisages only charges on the legal title; and that the short answer to an application for a charging order on a beneficial interest under a trust for

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28. For another view, see "Common sense about charging orders" (S. Cretney): (1971) 121 N.L.J. 724.

29. Unity of debt most commonly exists where the beneficial owners operate a joint bank account, or are respectively principal debtor and guarantor.

sale is provided by the doctrine that such an interest is an interest in personalty. That answer, however, would not be a satisfactory one in the special case discussed in paragraphs 31 and 32 above. Although the imposition of a charge in such a case would not be contrary to the scheme of section 35 (because the charge would be on the legal title), the debtors would not, according to the received doctrine, have interests in land. We suggest that the scope of section 35 should be enlarged, with the result that where there is unity of debt between the beneficial owners, the legal estate may always be charged; and where there is not, the relevant equitable interest may be charged.

35. It remains to consider the consequences of a charge on the equitable interest of a beneficiary under a trust for sale.[30] The chargee (the judgment creditor) would be entitled to collect the debtor's share of any income, through the appointment of a receiver; and he would also be entitled to apply to the Court for an order for the sale of the equitable interest. Further than that the creditor should not, we think, be allowed to go because other uncharged beneficial interests must not be materially affected.[31] We feel bound to point out that in many cases these remedies would in practice be of little value to the judgment creditor; there may well be no income, and it may not be easy to sell the debtor's interest

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30. It will be borne in mind that the interest may not be in possession, and may not even be vested.

31. If the debtor beneficiary's interest is a joint interest, any charge on it will effect a severance so that the beneficiaries become tenants in common: York v. Stone (1709) 1 Salk. 158; Re Pollard's Estate (1863) 3 DeG. J. and Sm. 541. The non-debtor thus loses his right of accruer by survivorship. We do not, however, consider that a distinction should be created between the effect of an express charge under the hand of the debtor and that of a statutory charge by taking steps to preserve this precarious right if s. 35 is extended to interests under trusts for sale of land.

because the interest would not carry with it vacant possession of the property in which the interest subsists. But that does not mean that the remedies should not be available at all. It is not unusual for the efficacy of execution to be affected by the nature of the available assets. The power of sale would, for example, have been effective in Irani Finance because the creditor would have been entitled to sell both the beneficial interests separately, but simultaneously, to the same purchaser; such a double sale would be tantamount to a sale of the house itself, with a right to possession. In practice, the debtors would appreciate that a lower aggregate price would probably be achieved on such a double sale, and they would accordingly anticipate any such action on the creditor's part by carrying out the trust for sale themselves.

36. At first sight, it would seem reasonable to suggest that if a judgment creditor could, in effect, procure the sale of the land itself, he ought to be entitled to obtain a charge on the legal title and thereby achieve the same result in a direct manner. We think, however, that to give him such a charge would often lead to serious complications (quite apart from its being contrary to principle, as indicated earlier in this Paper). First, the charge on the legal estate would have to be cancelled if any of the judgment debtors satisfied the judgment against him before a sale took place. This could happen on the eve of a sale, and debtors would often make strenuous efforts to make such a payment. To proceed with a sale in those circumstances would be to levy execution against a person who was no longer a debtor. Secondly, problems would arise if any of the judgment debts exceeded the value of that debtor's beneficial interest in the land. Let it be supposed that a house, worth £10,000, is owned by A and B in equal shares, and that X has judgments against them respectively for £8000 and £1000. In such a case, £3000 of A's debt cannot be effectively secured by a charge and if X

were able to sell the house he should retain £6000 only, and hand £4000 to B. He cannot look to B to discharge the balance of A's debt. We think that it is asking too much of a creditor to expect him to examine the interests of the beneficial owners as between themselves, in order to discover the limitations (if any) on his right to recover the debts in full out of the proceeds of sale. If the judgment creditor were to be placed in a position to sell the land itself, we think that it would be necessary to provide that the proceeds of sale should be paid into Court; and that would add considerably to the costs of the execution. We admit that the alternative, namely, giving the creditor charges on the respective beneficial interests of the judgment debtors, constitutes a less certain security, because if the debtors carry out the trust for sale themselves the creditor immediately loses the benefit of charges on land (if and so far as they can be so described) and he may have to act swiftly to prevent the debtors disappearing with the proceeds. This is a hazard inherent in the "curtain" principle, which enables the purchaser of the land to take free from incumbrances on the equitable interest under the trust for sale.

37. Consistently with what we have said above, we suggest that the judgment creditor should not, as chargee, be entitled to apply under section 30 of the Law of Property Act for an order requiring the trustees for sale to execute the trust.[32] We suspect that a judgment creditor would not normally succeed on such an application, but it would seem right that if the veil of the trust for sale is lifted in order to give the creditor an "interest in land" for the purposes of section 35, he should not be able to rely on the fact that the trust is

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32. A chargee would, it seems, have a sufficient interest in the land for this purpose: see Stevens v. Hutchinson [1953] Ch. 299.

"for sale". The creditor should be in the same position as a creditor of a person with an interest in settled land.

Summary

38. We are inclined to think that some change in the law in this field is required, in that the right to have a receiver appointed is often a wholly inadequate (not to say irrelevant) execution remedy in relation to beneficial interests under trusts for sale. We suggest that a judgment creditor should be entitled to obtain a charge on such an interest where the subject-matter of the trust is land, but that such a charge should operate as security only and should not carry with it a right to apply to the Court for an order for the sale of the land itself. We would be glad to have comments on this; and on whether beneficial interests under trusts for sale of other forms of property (for example, stocks and shares) might be brought within the same principle.

PART 4. DISCHARGE

39. No provision is expressly made in section 35 for the making of a further order, on proof of the satisfaction of the judgment (or otherwise), discharging the land. The Rules of the Supreme Court and the County Court Rules appear, moreover, to be silent as to the procedure for obtaining such an order, if one exists. By contrast, the Rules do expressly provide for the discharge of an order affecting securities.[33]

40. The reason for this may be that a formal order of discharge is not thought to be necessary, in the case of charges on land, because of sections 6(3), 6(5) and 7(1) of the Land Charges Act 1925.[34] By virtue of the latter section, a charging order is void against a purchaser (or mortgagee) of the land unless it is for the time being registered; section 6(5) authorises the Court to make an order vacating the registration of the charging order, which in the case of unregistered land expires in any event after five years (section 6(3)). So far as purchasers or mortgagees are concerned, therefore, an order vacating the register (or, where the land is unregistered, lapse of time) is as effective as a direct discharging order.

41. It can be strongly argued, however, that this situation is neither entirely logical nor altogether satisfactory. If the charge itself be regarded as the substance and the entry on the register merely as its shadow, and if

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33. R.S.C. O.50, r. 7; C.C.R. O.25, r. 6A(6).

34. And the corresponding provisions of the Land Registration Act 1925 and the Rules thereunder.

the charge has ceased in fact to have effect, it does seem illogical for the law to abolish the shadow but to leave the substance still nominally in existence. Nor, indeed, does the removal of the entry from the register amount for all purposes, even in practice, to the discharge of the charge. Thus the debtor himself might feel aggrieved that although he has, by paying the debt, discharged the charge in fact, it remains nominally in existence and continues nominally to burden his property. And although the removal of the entry from the register enables a purchaser or mortgagee to take free of the charge, it affords no protection to a volunteer, and cases might arise in which this was significant. Finally, it has been represented to us that even a purchaser or mortgagee may not, if he knows of the continued existence of the charge, be satisfied merely by its absence from the register; and although such dissatisfaction may be groundless it is perhaps understandable. At all events at least one county court has been asked to revoke charging orders which, though quite properly made, had become spent. The Court has no inherent jurisdiction to do this.[35]

42. A charging order takes effect as an equitable mortgage under hand and we presume that a receipt given by the judgment creditor on payment of the debt would accordingly operate to discharge the statutory mortgage. He may not have furnished such a receipt, however; and even if he has, it is doubtful whether the entry at the Land Charges Registry would be vacated on the strength of the receipt proffered by the debtor or his successor in title.

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35. Jeffryes v. Reynolds (1882) 48 L.T. 358: Drew v. Willis [1891] 1 Q.B. 450.

43. Although we do not consider that this point is one of very great importance, we think that if legislation is introduced to deal with the other points discussed in this Paper the opportunity might be taken to deal with this one also. We therefore suggest that the Court (and county courts) should be given power to make an order discharging the land; and that such an order should operate also as an order under section 6(5) of the Land Charges Act if the entry is still subsisting. Comments on this suggestion are invited.