

DISPOSITIONS OF SUBSISTING EQUITABLE INTERESTS AND S 53(1)(C) OF THE LAW OF PROPERTY ACT 1925

Jordan English* and Jonas Atmaz Al-Sibaie**

1 INTRODUCTION

Section 53(1)(c) of the Law of Property Act 1925 provides that ‘a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by [their] agent thereunto lawfully authorised in writing or by will’. Almost 100 years after of its enactment, s 53(1)(c) continues to give rise to controversies.¹ At the heart of these controversies lie two fundamental issues: (i) the meaning of ‘disposition’ in s 53(1)(c); and (ii) the nature of equitable interests and transactions involving such interests.

This article argues that the expansive meaning given to ‘disposition’ in *Grey v Inland Revenue Commissioners*,² combined with common misconceptions about the nature of equitable interests—such as the notions that a person who holds a right absolutely holds both the ‘legal’ and the ‘equitable’ interest and that a trust involves a split of legal and equitable title—have given rise to conflicting and confused decisions on the scope of s 53(1)(c). As Professor Richard Nolan has said, ‘[i]f ever there were a body of technical law with very little principle to commend it, then it is the body of law which has grown up around section 53 of the Law of Property Act 1925.’³

The aim of this article is to demonstrate that the law has taken a wrong turn and to sketch a path forward for the operation of s 53(1)(c). The law on the formalities for the disposition of subsisting equitable interests is ripe for a fresh look. It is ‘absurdly complex’,⁴ has produced conflicting decisions, and continues to be the source of litigation. The article begins in Part 2 by setting out the decision in *Grey* and identifying some immediate difficulties that arise from the broad meaning of ‘disposition’ adopted in that case. Part 3 then identifies the common misconceptions about the nature of equitable interests that are found in the cases dealing with s 53(1)(c) and explains, as a matter of principle and authority, why they are misconceptions. Part 4 then considers some examples

¹Supernumerary Teaching Fellow in Law, St John’s College, Oxford.

²Stipendiary Lecturer in Law, St Hilda’s College, Oxford. The authors are grateful to William Swadling, Muhammad Jaamae Hafeez-Baig, and Timothy Pilkington for their comments on an earlier draft and to Ben McFarlane for his discussion of a number of the issues.

See, for example, *Hudson v Hathway* [2023] KB 345 and *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1.

³[1960] AC 1.

⁴Richard Nolan, ‘The Triumph of Technicality’ [1996] Cambridge Law Journal 436, 438.

⁵C H Tham, ‘Exploding the myth that bare sub-trustees “drop out”’ (2017) 31 Trust Law International 76, 76.

thrown up by the cases. These examples are used to show that the broad definition of ‘disposition’ in *Grey* and the common misconceptions about the nature of equitable interests have caused cases on s 53(1)(c) to be either in conflict with each other or confused. It is impossible to reconcile all the cases—and some decisions, in particular *Grey*, must be considered wrongly decided—but this part suggests a principled path forward for each example that adheres to the purpose of s 53(1)(c) and avoids a number of the misconceptions that have been identified.

2 THE MEANING OF ‘DISPOSITION’ AND *GREY V INLAND REVENUE COMMISSIONERS*

Section 53(1)(c) requires any disposition of an equitable interest to be in writing signed by the person disposing of the interest or their agent.⁵ The predecessor to s 53(1)(c) was s 9 of the Statute of Frauds 1677, which provided that ‘all grants and assignments of any trust or confidence shall ... be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall ... be utterly void and of none effect’. The key difference between s 9 of the Statute of Frauds and s 53(1)(c) of the Law of Property Act is that while the former required that all ‘grants and assignments’ of equitable interests be in writing, the latter requires that any ‘disposition’ of an equitable interest be in writing. The word ‘disposition’ is ‘normally a word of wide import’,⁶ and ‘[b]y replacing the words “grants and assignments” with the single word “disposition,” the [draftsperson] (as a matter of language at least) potentially extended the requirement of writing to transactions’ that would not have been caught under s 9 of the Statute of Frauds.⁷

The scope of the word ‘disposition’ in s 53(1)(c) was considered in *Grey v Inland Revenue Commissioners*.⁸ Mr Hunter held 18,000 shares in a company, which he transferred to the appellants to hold as nominees (ie trustees) for himself. In February 1955, Hunter orally directed the appellants to hold the shares on trust for his six grandchildren, as part of six previously declared settlements in their favour. The trustees were to hold 3,000 shares for each of the six trusts. Nothing further happened until March 1955, when the trustees and Hunter⁹ executed in writing six declarations of trust, attesting that the trustees had held

⁵ As Brian Green has explained, ‘[t]he reference to “trust” in section 53(1)(c) is anachronistic, and was seemingly simply intended by the draftsman as an alternative rendering of the term “equitable interest” which precedes it.’: Brian Green, ‘*Grey, Oughtred and Vandervell—A Contextual Reappraisal*’ (1984) 47 *Modern Law Review* 385, 386.

⁶ *Grey v Inland Revenue Commissioners* [1958] Ch 375, 382.

⁷ Brian Green, ‘*Grey, Oughtred and Vandervell—A Contextual Reappraisal*’ (1984) 47 *Modern Law Review* 385, 386.

⁸ [1958] Ch 375 (High Court); [1958] Ch 690 (Court of Appeal); [1960] AC 1 (House of Lords).

⁹ Although Hunter executed the declaration of trust, he was not one of the trustees. For the effect of Hunter’s signature on the declarations of trust, see *JSC VTB Bank v Skurikhin* [2019] EWHC 1407 (Comm) [215]-[233].

the shares on trust for the grandchildren since February. The Inland Revenue Commissioners sought to charge the appellants *ad valorem*¹⁰ stamp duty on these six instruments on the basis that each of the six written declarations was a ‘conveyance or transfer operating as a voluntary disposition’ of Hunter’s equitable interest in the shares under the relevant legislation at the time.¹¹

The trustees argued that the written documents only recorded the trusts that had been orally declared; the instruments were therefore not liable to *ad valorem* stamp duty. The Commissioners, by contrast, argued that the oral direction to the trustees amounted to a ‘disposition’ of Hunter’s subsisting equitable interest in the shares within the meaning of s 53(1)(c), which was void because it was not in writing. It followed that the documents vested the equitable interests in the grandchildren and did operate as a ‘conveyance or transfer operating as a voluntary disposition’ of Hunter’s equitable interest in the shares, such that *ad valorem* stamp duty was payable. The central issue therefore was whether Hunter’s oral direction to his trustees to hold the shares on trust for his six grandchildren was a ‘disposition’ within the meaning of s 53(1)(c).

The House of Lords (Viscount Simonds, Lord Radcliffe, Lord Cohen, and Lord Keith) dismissed the trustees’ appeal.¹² Viscount Simonds and Lord Radcliffe, who gave the only reasoned speeches, held that: (i) the word ‘disposition’ in s 53(1)(c) did not bear the same meaning as ‘grants and assignments’ in s 9 of the Statute of Frauds;¹³ (ii) ‘disposition’ was to be given its natural or ordinary meaning;¹⁴ and (iii) this natural or ordinary meaning covered an oral direction to trustees by a beneficiary to hold on trust for another.¹⁵ Unfortunately, neither Law Lord expressly identified the natural or ordinary meaning of ‘disposition’. Viscount Simonds simply said that ‘[i]f the word “disposition” is given its natural meaning, it cannot, I think, be denied that a direction given by Mr Hunter, whereby the beneficial interest in the shares theretofore vested in him became vested in another or others, is a disposition.’¹⁶

The difficulties associated with the conclusion reached in *Grey*—that an oral direction to a trustee by a beneficiary to hold on trust for another amounts to a disposition of a subsisting equitable interest within s 53(1)(c)—and the conflicts it has created in the subsequent cases are discussed in Part 4 below. Here, we are concerned with the meaning of ‘disposition’ adopted by the House of Lords.

¹⁰ Duty levied as a percentage of the value of the asset being taxed.

¹¹ The Finance Act (1909–10) Act 1910, s 74.

¹² Lord Reid ‘was present at the hearing in the Appellate Committee but not at the consideration of their report’: *Grey v Inland Revenue Commissioners* [1960] AC 1, 1.

¹³ *Grey v Inland Revenue Commissioners* [1960] AC 1, 13–15, 16–18.

¹⁴ *Grey v Inland Revenue Commissioners* [1960] AC 1, 13, 15–16.

¹⁵ *Grey v Inland Revenue Commissioners* [1960] AC 1, 12–13, 15.

¹⁶ *Grey v Inland Revenue Commissioners* [1960] AC 1, 12.

The immediate difficulty is that the House of Lords did not expressly adopt any particular meaning of disposition. To this extent, the decision is unhelpfully opaque and offers little guidance. One fair reading of the speeches of Viscount Simonds and Lord Radcliffe, however, is that they adopted the meaning of ‘disposition’ adopted in the Court of Appeal, which included a ‘disposal’ of or ‘getting rid of’ an equitable interest, including its destruction.¹⁷ But there are at least three problems with this broad meaning of disposition.

First, this broad meaning of ‘disposition’ adopted by the House of Lords in *Grey* is not necessary to achieve the purpose of the section. As Lord Upjohn made clear in *Vandervell v Inland Revenue Commissioners*,¹⁸ ‘the object of the section ... is to prevent hidden oral transactions in equitable interests in fraud of those truly entitled, and making it difficult, if not impossible, for the trustees to ascertain who are in truth [the] beneficiaries.’¹⁹ Dr Jessica Hudson and Professors Ben McFarlane and Charles Mitchell similarly explain that the purpose of s 53(1)(c) is to protect the beneficiary and trustee ‘from a risk that is peculiar to their position as beneficiary and trustee: the risk that the trustee will perform the trusts in favour of the wrong person.’²⁰

But the broad meaning of ‘disposition’ adopted by the House of Lords in *Grey* goes far beyond that purpose. In *Grey* itself both the trustees and Hunter as the beneficiary were necessarily involved in the transaction by which Hunter’s equitable interest was destroyed and the grandchildren’s equitable interests created. There was no risk that the trustees would not be able to ‘ascertain who are in truth [their] beneficiaries’²¹ and would perform the trust in favour of the wrong person. Including such a transaction within the meaning of ‘disposition’ does nothing to advance the purpose of s 53(1)(c). And it is trite that ‘[t]he court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose.’²²

Secondly, although the House of Lords expressly purported to rely on the natural and ordinary meaning of ‘disposition’, it is far from clear that this natural and ordinary meaning extends to the destruction of an interest. In *Akers v Samba Financial Group*,²³ for example, a decision concerning the interpretation of s 127 of the Insolvency Act 1986 and the facts of which are

¹⁷ *Grey v Inland Revenue Commissioners* [1958] Ch 690, 723. See Brian Green, ‘*Grey, Oughtred and Vandervell—A Contextual Reappraisal*’ (1984) 47 *Modern Law Review* 385, 393-394.

¹⁸ [1967] 2 AC 291, 311.

¹⁹ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 311.

²⁰ Jessica Hudson, Ben McFarlane, and Charles Mitchell, *Hayton, McFarlane and Mitchell: Text, Cases and Materials on Equity and Trusts* (15th edn, Sweet & Maxwell 2022) 237 [6-080].

²¹ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 311.

²² *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, [8]. See *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28 [41].

²³ [2017] AC 424.

discussed below, Lord Neuberger observed that while ‘the word “disposition” is linguistically capable of applying to a transaction which involves the destruction or termination of an interest’,²⁴ the ‘natural meaning’ of ‘disposition’²⁵ does not extend this far and instead ‘carries with it the notion of a disponor transferring property to a donee’.²⁶ Lord Mance similarly said that while the term ‘disposition’ could ‘embrace destruction or extinction of an interest’, ‘the natural meaning of “disposition” in the context of section 127 ... refers to a transfer by a disponor to a donee of the relevant property (here the beneficial interest)’.²⁷ These observations suggest that it is at least doubtful that the natural or ordinary meaning of ‘disposition’ includes destruction or extinguishment. Of course, courts can attribute a meaning to a word that is not its natural meaning. But given that the broad meaning adopted by the House of Lords in *Grey* does not advance the purpose of the section, there is no reason why courts should stray from the ordinary meaning of ‘disposition’ in this context.

The third and final problem with the broad meaning of ‘disposition’ adopted by the House of Lords in *Grey* is that construing ‘disposition’ in s 53(1)(c) as including the destruction of an equitable interest leads to various cases being caught within its scope that have not generally been considered by courts to be included. As Lord Evershed MR observed in his dissenting judgment in the Court of Appeal, ‘equitable interests have the characteristic that they may be lost, defeated or destroyed in certain circumstances not involving, sensibly, any distinct dealing with or disposition of them.’²⁸ One example he gave was where an equitable interest is ‘defeated upon a purchase for value of the legal estate by one without notice of the equitable interest.’²⁹ The bona fide purchaser doctrine is commonly said to ‘extinguish’³⁰ equitable interests.³¹ Yet, if one accepts the view that the destruction of an equitable interest amounts to a disposition under s 53(1)(c), such that it requires writing to be effective, the bona fide purchase of a legal interest without notice of an equitable interest could not extinguish that equitable interest without writing signed by the holder of the equitable interest or their authorised agent. No case has held that the extinguishment of an equitable interest by bona fide purchase requires such writing. The cases in fact suggest the opposite and, in particular, suggest that the extinguishment of an equitable interest by bona fide purchase does not

²⁴ *Akers v Samba Financial Group* [2017] AC 424, 457 [66]. See also *Newlon Housing Trust v Alsulaimen* [1999] AC 313, 316–317.

²⁵ At least in the context of s 127 of the Insolvency Act 1986.

²⁶ *Akers v Samba Financial Group* [2017] AC 424, 457 [73].

²⁷ *Akers v Samba Financial Group* [2017] AC 424, 454–455 [55]. See also at 457–458 [65]–[73].

²⁸ *Grey v Inland Revenue Commissioners* [1958] Ch 690, 708.

²⁹ *Grey v Inland Revenue Commissioners* [1958] Ch 690, 709.

³⁰ See, eg, *Re Diplock* [1948] Ch 465, 539.

³¹ Compare the view expressed in Mohammud Jaamae Hafeez-Baig and Jordan English, *The Law of Tracing* (Federation Press 2021) 272–274 [8.22]–[8.25].

involve a disposition. In *Akers*,³² shares held on trust for an insolvent company were transferred in breach of trust to a Saudi Arabian company, Samba Financial Group, in circumstances that may have resulted in Samba taking free of the equitable interests under the trust.³³ The Supreme Court held that even if the equitable interests had been overridden, this did not involve a ‘disposition’ within the scope of s 127 of the Insolvency Act 1986, which would have allowed the transaction to be avoided. Lord Mance explained:

If the trust rights are overridden, it is not because they have been disposed of by virtue of the transfer of the legal title. It is because they were protected rights that were always limited and in certain circumstances capable of being overridden by virtue of a rule of law governing equitable rights, protecting in particular (under common law) bona fide third party purchasers for value.³⁴

Taking all of these criticisms together, it is submitted that ‘disposition’ in s 53(1)(c) should mean no more than ‘transfer’. A transfer involves the passing of a right or interest from one person or group of persons (the transferor(s)) to another person or group of persons (the transferee(s)).³⁵ In so passing, the right remains substantially the same, apart from the identity of the right-holder(s).³⁶ This is consistent with the understanding of ‘disposition’ that the Supreme Court adopted in relation to s 127 Insolvency Act 1986 in *Akers*.³⁷ It is also consistent with the natural meaning of ‘disposition’ in the context of s 53(1)(c) and the section’s purpose of protecting the trustee and the beneficiary from the risk that the trustee will perform in favour of the wrong person.

3 THE NATURE OF EQUITABLE INTERESTS

The conflicting decisions on the scope of s 53(1)(c) alluded to above and explored in greater detail in Part 4 are not only due to the wide meaning of ‘disposition’ adopted in *Grey* but also due to two common misconceptions about the nature of equitable interests. These misconceptions are not confined to cases on s 53(1)(c), but they are particularly acute in this context and their correction is key to understanding the proper scope of the section.

³² *Akers v Samba Financial Group* [2017] AC 424.

³³ What effect the transfer had on the equitable interests was yet to be determined: *Akers v Samba Financial Group* [2017] AC 424, 450 [41].

³⁴ *Akers v Samba Financial Group* [2017] AC 424, 453 [51]. See also at 456 [62].

³⁵ *Akers v Samba Financial Group* [2017] AC 424, 455 [55].

³⁶ There is a sense in which it might be argued that rights can never truly be transferred and that any such purported transfer is, in truth, the extinction of the right and the creation of a similar right in a different person: Wesley Hohfeld, ‘Fundamental Legal Conceptions As Applied In Judicial Reasoning’ (1917) Yale Law Journal 710, 746. We take no view on the conceptual correctness of this analysis. It is sufficient to note that the law does regard some changes in legal relations as transfers properly so-called and that there exists a clearly identifiable factual difference between transfers and other transactions.

³⁷ *Akers v Samba Financial Group* [2017] AC 424.

The first misconception is that a person who holds property absolutely holds both the 'legal' and the 'equitable' interest. Take *Vandervell*, the facts of which are set out in more detail in Part 4.³⁸ Mr Vandervell directed his trustee (a bank) to transfer shares that were held on trust for him to the Royal College of Surgeons. The House of Lords held that this transfer did not amount to a disposition of his subsisting equitable interest. But in explaining why the transfer of the shares (the legal interest) did not need to comply with s 53(1)(c), Lord Upjohn said: 'I can see no reason for any further document or any further words in the document assigning the legal estate also expressly transferring the beneficial interest; *the greater includes the less*.'³⁹ Lord Donovan similarly said:

If, owning the entire estate, legal and beneficial, in a piece of property, and desiring to transfer that entire estate to another, I do so by means of a disposition which ex facie deals only with the legal estate, it would be ridiculous to argue that section 53(1)(c) has not been complied with, and that therefore the legal estate alone has passed.⁴⁰

Both these observations suggest that where a person is absolutely entitled to property, they hold both the legal right and the equitable interest in it. But, as Lord Browne-Wilkinson observed in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,⁴¹ '[a] person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all the rights.' A similar point was made in *Commissioner of Stamp Duties (Queensland) v Livingston*.⁴² The Privy Council rejected an argument that a residuary legatee of an unadministered estate must have an equitable interest in the assets of that estate because the 'beneficial interest', if not in the executor, must be located somewhere. Viscount Radcliffe, delivering the Board's advice, said that this argument was:

founded on a fallacy, for it assumes mistakenly that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable. There is no need to make this assumption. When the whole right of property is in a person... there is no need to distinguish between the legal and equitable interest in that property...⁴³

³⁸ [1967] 2 AC 291.

³⁹ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 311 (emphasis added).

⁴⁰ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 317.

⁴¹ [1996] AC 669, 706. See also *Bellis v Challinor* [2015] EWCA Civ 59 [65], referring to the 'well-known dictum of Lord Browne-Wilkinson'. For a general overview of this argument, see William Swadling, 'Property: General Principles' in Andrew Burrows (ed), *English Private Law* (Oxford University Press, 3rd ed, 2013) 173, 212 [4.149].

⁴² [1965] AC 694.

⁴³ *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694, 712.

The same point was also made by Lord Evershed in his dissenting judgment in the Court of Appeal in *Grey*.⁴⁴ He noted that ‘where A is legally and beneficially the owner of the property, there is no room for the subsistence of an equitable interest in [A] distinct from the “legal” title.’

The second, related, misconception is that a trust involves a ‘splitting’ of the legal and equitable interests, or, put another way, that equitable interests are ‘carved’ out of the legal interest. An example of this misconception can be found in Brian Green’s influential article on s 53(1)(c), ‘*Grey, Oughtred and Vandervell—A Contextual Reappraisal*’.⁴⁵ Green described a declaration of trust over a legal interest as having the effect that an equitable interest is ‘carved out of a legal estate’.⁴⁶ Applying that approach to subsisting equitable interests, he then argued that, ‘[a]nalytically, a declaration of trust over a subsisting equitable interest operates by way of sub-trust so as to carve out a subsidiary equitable entitlement from the original equitable proprietary right... but with the superior equitable interest remaining formally vested in the declarant.’⁴⁷ The result for Green was that a declaration of trust over a subsisting equitable interest (ie a declaration of sub-trust) should be caught by s 53(1)(c) because it involves a ‘part-disposal’ of a subsisting equitable interest.⁴⁸

Versions of this misconception are also found in the cases. In *Oughtred v Inland Revenue Commissioners*,⁴⁹ which is also explored in Part 4, a son had entered into a specifically enforceable contract to ‘sell’ his equitable reversionary interest in some shares to his mother, who held the life interest. The specifically enforceable contract was said to give rise to a constructive trust of his reversionary interest.⁵⁰ One of the arguments put forward by the appellant in that case was that when the shares were later transferred to the mother by the trustees, this operated only to pass the ‘bare legal estate’ to her because the ‘entire beneficial interest’ had already passed as a result of the constructive trust.⁵¹ That argument rested on a similar misconception to that made by Green, but was further muddled by another misconception—that where a sub-trust is created the sub-trustee ‘drops out’.⁵² On this view, the effect of creating a sub-trust of a subsisting equitable interest is not just that the equitable interest is

⁴⁴ [1958] Ch 690, 708.

⁴⁵ Brian Green, ‘*Grey, Oughtred and Vandervell—A Contextual Reappraisal*’ (1984) 47 *Modern Law Review* 385.

⁴⁶ Brian Green, ‘*Grey, Oughtred and Vandervell—A Contextual Reappraisal*’ (1984) 47 *Modern Law Review* 385, 387.

⁴⁷ Brian Green, ‘*Grey, Oughtred and Vandervell—A Contextual Reappraisal*’ (1984) 47 *Modern Law Review* 385, 396.

⁴⁸ Brian Green, ‘*Grey, Oughtred and Vandervell—A Contextual Reappraisal*’ (1984) 47 *Modern Law Review* 385, 395-399.

⁴⁹ [1960] AC 206.

⁵⁰ On the basis of the doctrine set out in *Lysaght v Edwards* (1876) 2 Ch D 499, 506. See also *Walsh v Lonsdale* (1882) 21 Ch D 9.

⁵¹ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 238-239.

⁵² This is discussed and rejected in Part 4 below.

‘carved out’ of the subject matter of the trust, but that because the sub-trustee has dropped out, the sub-trust operates to divest the original beneficiary of their interest under the trust—in other words it operates as a transfer of the equitable interest.

Both the view taken by Green and the arguments in *Oughtred* subscribe to a version of the ‘splitting’ view. On this view, when a trust is declared the legal and equitable interests are split. The creation of a sub-trust operates in the same way, with the only difference being that if one assumes that the sub-trustee does ‘drop out’, the result is not a further splitting of the equitable interest but a complete divesting of it.

It is, however, clear that a declaration of trust does not involve the splitting of legal and equitable interests or the carving out of an equitable interest from the legal interest. The language of ‘splitting’ was addressed by Lord Mance in *Akers v Samba Financial Group*.⁵³ He held that ‘[t]he metaphor of a “division” or “split” of title needs to be approached with some caution’, referring to a passage from Professor William Swadling where he had spoken of the ‘the falsity of statements which talk in terms of a “division” or “separation” of rights when rights are held on trust, or even worse, of legal and equitable “titles” existing before the creation of the trust.’⁵⁴

The language of ‘carving out’ the equitable interest from the legal interest is also problematic: the ‘right of [a] beneficiary constitutes an equitable estate in the property, it is engrafted onto, not carved out of, the legal estate.’⁵⁵ This is because—and it is important to emphasise this point—‘the placing of a right on trust in no way alters the nature of the right’.⁵⁶ It should also be made clear that, although the cases do often speak of holding ‘property’ on trust, which can be taken to refer to a physical thing, a trustee holds ‘rights’ and not ‘things’ on trust.⁵⁷ The effect of a trust arising is simply that the trustee comes under an

⁵³ [2017] AC 424, 452 [50].

⁵⁴ William Swadling, ‘Property: General Principles’ in Andrew Burrows (ed), *English Private Law* (Oxford University Press, 3rd ed, 2013) 173, 212 [4.149].

⁵⁵ *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, 311. See also *Carter Holt Harvey Woodproducts Australia Pty Ltd v The Commonwealth* (2019) 268 CLR 524, 561 [82], 571 [106]; *Commissioner of State Revenue v Rojoda Pty Ltd* (2020) 268 CLR 281, 307 [44]; *Federal Commissioner of Taxation v Carter* (2022) 96 AJLR 325, 334 [41].

⁵⁶ William Swadling, ‘Property: General Principles’ in Andrew Burrows (ed), *English Private Law* (Oxford University Press, 3rd ed, 2013) 173, 211 [4.145].

⁵⁷ Compare the alternative view—expressed in Peter Jaffey, *Justice in Private Law* (Oxford University Press, 2023) 141–145 and Peter Jaffey, ‘Explaining the trust’ (2015) 131 *Law Quarterly Review* 377—that what is held on trust is ‘property’ in the sense of a physical or intangible ‘thing’. The view taken in this article is consistent with those expressed in: Ben McFarlane and Robert Stevens, ‘The Nature of Equitable Property’ (2010) 4 *Journal of Equity* 1; James Edelman, ‘Two Fundamental Questions for the Law of Trusts’ (2013) 129 *Law Quarterly Review* 66, 72–73; William Swadling, ‘Property: General Principles’ in Andrew Burrows (ed), *English Private Law* (Oxford University Press, 3rd ed, 2013) 173, 211–213 [4.145]–[4.150]; Ben McFarlane and Robert Stevens, ‘What’s Special about Equity? Rights about Rights’ in Dennis Klimchuk, Irit Samet, and Henry Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 9

obligation with respect to the subject matter of the trust, whether it be a legal right or an equitable right.⁵⁸

The misconception that equitable interests are carved out of the legal interest, rather than engrafted or impressed upon it, has also given rise to a tendency to assume that any transaction where one person holds an equitable interest, which results in another person holding an equitable interest, must be a transfer of *that* interest. In *Grey*, for example, Viscount Simonds said: '[I]t cannot, I think, be denied that a direction given by Mr Hunter, whereby the beneficial interest in the shares theretofore vested in him became vested in another or others, is a disposition.'⁵⁹ Lord Radcliffe also stated:

Something had to happen to that equitable interest in order to displace it in favour of the new interests created by the direction: and it would be at any rate logical to treat the direction as being an assignment of the subsisting interest to the new beneficiary or beneficiaries or, in other cases, a release or surrender of it to the trustee.⁶⁰

But as Lloyd LJ made clear in *Independent Trustee Services Ltd v GP Noble Trustees Ltd*,⁶¹ in a passage which was unanimously approved, and relied on, by the Supreme Court in *Akers*,⁶² a transaction may have the same substantive effect as the transfer of a beneficial interest, even though it does not involve such a transfer, as, for example, the destruction of an interest and the creation of a new interest might.⁶³ In that case, Lloyd LJ explained that a transfer of a legal interest in breach of trust to a bona fide purchaser for value without notice does not operate to 'vest' the beneficiary's equitable interest in the purchaser.⁶⁴ He added that 'the availability of the bona fide purchaser defence means that a transaction in favour of a bona fide purchaser for value without notice is as effective as it would be if [the trustee] could vest the beneficial title in the purchaser.'⁶⁵ Contrary to the passages from *Grey* outlined above, not all instances of the simultaneous loss and acquisition of rights involve transfers of rights.

These misconceptions are common, and the mistakes easily made, but avoiding them is key to understanding the proper scope of s 53(1)(c) and to analysing the

2020) 191, 194-201.

⁵⁸ See, eg, *DKLR Holding Co (No 2) Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510, 519.

⁵⁹ *Grey v Inland Revenue Commissioners* [1960] AC 1, 13.

⁶⁰ *Grey v Inland Revenue Commissioners* [1960] AC 1, 16.

⁶¹ [2013] 1 Ch 91, 129 [106].

⁶² *Akers v Samba Financial Group* [2017] AC 424, 454 [52], 456 [62].

⁶³ See the discussion of this point in Ben McFarlane and Robert Stevens, 'What's Special about Equity? Rights about Rights' in Dennis Klimchuk, Irit Samet, and Henry Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) 191, 200-201.

⁶⁴ *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] 1 Ch 91, 128 [104], 129 [106].

⁶⁵ *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] 1 Ch 91, 129 [106].

issues presented by the cases in a principled and coherent fashion. It is to that task that we now turn.

4 THE EXAMPLES

This part considers the cases on the scope of s 53(1)(c). Its purpose is to highlight the conflicts between the cases and the resulting confusion about the scope of s 53(1)(c)—all of which stem from the broad definition of ‘disposition’ adopted in *Grey* and the common misconceptions identified above. But this part also argues that courts have generally reached the right results and provides principled reasons for their conclusions. This is intended to provide guidance to judges, practitioners, and students about the proper operation of s 53(1)(c). As will become clear, the only case that must be treated as wrongly decided is *Grey* itself. The four examples considered in this part are: (i) a direction to a trustee to transfer rights held on trust to another;⁶⁶ (ii) a direction to a trustee to hold on trust for another;⁶⁷ (iii) specifically enforceable contracts to dispose of equitable interests;⁶⁸ and (iv) surrenders and disclaimers of equitable interests.⁶⁹

Direction to trustee to transfer rights held on trust to another

In *Vandervell v Inland Revenue Commissioners*,⁷⁰ Mr Vandervell wished to make a gift of £150,000 to the Royal College of Surgeons to set up a Chair of Pharmacology. Vandervell was the chairperson, managing director, and principal shareholder of Vandervell Products Ltd, a successful engineering company. Relevantly, of the total shareholding in that company, 100,000 non-voting shares were held by a bank on trust for Vandervell.

In order to make the gift to the College, Vandervell orally directed the bank trustee to transfer the 100,000 shares to the College, which it did. He then caused the company to declare dividends on these shares. In addition, the College, at Vandervell’s direction, granted an option to purchase the shares to Vandervell Trustees Ltd, who were the trustees of a family settlement. The transactions were structured in this way to minimise potential tax consequences.

⁶⁶ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291.

⁶⁷ *Grey v Inland Revenue Commissioners* [1960] AC 1.

⁶⁸ *Oughtred v Inland Revenue Commissioners* [1960] AC 206; *Neville v Wilson* [1997] Ch 144; *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1. This will also involve a discussion of declarations of sub-trust: *Nelson v Greening & Sykes (Builders) Ltd* [2007] EWCA Civ 1358; *Sheffield v Sheffield* [2013] EWHC 3927.

⁶⁹ *Hudson v Hathway* [2023] KB 345 (and its discussion of *IRC v Buchanan* [1958] Ch 289); *Re Paradise Motor Co Ltd* [1968] 1 WLR 1125.

⁷⁰ [1967] 2 AC 291.

The Inland Revenue Commissioners assessed Vandervell as liable to pay surtax on the dividends under s 415 of the Income Tax Act 1952, which applied to him unless he could show that he had 'divested himself absolutely' of the shares that were gifted to the College.⁷¹ The Commissioners argued that Vandervell had not divested himself of his equitable interest in the shares for two reasons:

1. the oral direction to the bank trustee to transfer the shares to the College was a 'disposition' of his subsisting equitable interest under the trust and, not being in writing, was void for non-compliance with s 53(1)(c); and
2. the option to purchase the shares granted to Vandervell Trustees Ltd was held on resulting trust for Vandervell.

The House of Lords unanimously rejected the first argument but, by a majority, upheld the second. Our focus here is on the first argument.

Lord Upjohn (with whom Lord Pearce agreed) explained, by reference to the purpose of s 53(1)(c), that where a beneficiary was absolutely entitled under a trust and 'in a position to give directions to his bare trustee with regard to the legal as well as the equitable estate', there could be no ground 'for invoking the section.'⁷² This was because s 53(1)(c) was 'directed to cases where dealings with the equitable estate are divorced from the legal estate'.⁷³ He said:

[I]f the intention of the beneficial owner in directing the trustee to transfer the legal estate to X is that X should be the beneficial owner I can see no reason for any further document or further words in the document assigning the legal estate also expressly transferring the beneficial interest; the greater includes the less. ... [I]t certainly cannot... be a statutory requirement that to effect [the] passing [of the beneficial interest] there must be some writing under section 53(1)(c).⁷⁴

Lord Donovan also agreed on the s 53(1)(c) point.⁷⁵ He said that by making it clear to the trustees that Vandervell wanted 'to pass, by means of that transfer, his own beneficial, or equitable interest, plus the bank's legal interest, he achieved the same result as if there had been no separation of the interests'.⁷⁶

Though the conclusion reached by the House of Lords is correct as a matter of principle, the difficulty with the observations of Lord Upjohn and Lord Donovan is that, if taken literally, it is hard to see why s 53(1)(c) did not need to be complied with. Both adopt versions of the misconceptions referred to in Part 3.

⁷¹ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 307.

⁷² *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 311.

⁷³ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 312.

⁷⁴ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 311.

⁷⁵ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 317. So too did Lord Reid (at 307) and Lord Wilberforce (at 329-330), although Lord Wilberforce taking a slightly different route.

⁷⁶ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 317.

On Lord Upjohn's view, the 'greater' legal interest included the 'lesser' equitable interest, which implies that the equitable interest was transferred with the shares. Lord Donovan, adopting the misconception that a person who is absolutely entitled to property holds both the legal and equitable estate, suggested that because compliance with s 53(1)(c) is not required for a person absolutely entitled to property to transfer the 'entire estate', it should not be required in case like the present where Vandervell effected (in Lord Donovan's words) 'a disposition not of the equitable interest alone, but the entire estate in the shares.'⁷⁷ The difficulty with this view is obvious: it expressly accepts that there is a disposition of the equitable interest.

Vandervell was nonetheless correctly decided. The difficulties with Lord Upjohn's and Lord Donovan's reasons arise from their assumption that an equitable interest is simply a subset of the greater legal interest. On their view, there is a disposition, in the sense of a transfer, of an equitable interest on the facts of *Vandervell*, but this disposition is exempted from s 53(1)(c) by virtue of the section's purpose. But Vandervell's direction to his trustees to transfer the shares to the College did not transfer Vandervell's equitable interest to the College; it operated to terminate or 'overreach' it.⁷⁸ The effect was simply that the bank trustees transferred the shares to the College unencumbered by any equitable interest. This is not within the scope of s 53(1)(c).

The decision in *Vandervell* is also difficult to reconcile with *Grey*. *Vandervell* accepts that an oral direction by a beneficiary to a trustee to transfer shares held on trust to another person to hold absolutely is not within the scope of s 53(1)(c). But what if Vandervell had orally directed the bank trustee to transfer the shares to another person to be held on trust for a member of Vandervell's family?⁷⁹ The decision in *Vandervell* would appear to suggest that this could be done without writing.⁸⁰ But, as Green has asked, '[c]an it really be that, as was held in *Grey*, if B directs T to hold for X in equity, such direction is within section 53(1)(c): but if B directs T to pass property to T₂ on trust for X such direction is outside section 53(1)(c)?'⁸¹

The conflict between *Vandervell* and *Grey* is even more fundamental than the example above suggests. The broad meaning of 'disposition' adopted in *Grey* included the destruction or extinction of an equitable interest. This is precisely

⁷⁷ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 317-318.

⁷⁸ Richard Nolan, 'Vandervell v IRC: A Case of Overreaching' [2002] Cambridge Law Journal 169, 181-182.

⁷⁹ See Brian Green, 'Grey, Oughtred and Vandervell—A Contextual Reappraisal' (1984) 47 Modern Law Review 385, 411; Richard Nolan, 'Vandervell v IRC: A Case of Overreaching' [2002] Cambridge Law Journal 169, 186.

⁸⁰ Brian Green, 'Grey, Oughtred and Vandervell—A Contextual Reappraisal' (1984) 47 Modern Law Review 385, 411.

⁸¹ Brian Green, 'Grey, Oughtred and Vandervell—A Contextual Reappraisal' (1984) 47 Modern Law Review 385, 411.

what occurred in *Vandervell*, yet the House of Lords found that there was no disposition. But this conflict is a problem with the construction of s 53(1)(c) and the result reached in *Grey*, not with the result reached in *Vandervell*. A ‘disposition’ should not be understood to include the destruction or extinction of an equitable interest. The better view is that a disposition in s 53(1)(c) simply means a transfer and there was no transfer of an equitable interest on the facts of either case.

Direction to trustee to hold on trust for another

The leading authority on whether a direction to a trustee to hold on trust for another is a disposition of a subsisting equitable interest within s 53(1)(c) is *Grey*.⁸² We have already noted the problems with the overly-broad definition of ‘disposition’ adopted in that case.⁸³ Here our focus is on the conclusion—that an oral direction to a trustee by a beneficiary to hold on trust for another amounts to a disposition of a subsisting equitable interest within s 53(1)(c)—and the inconsistent case law this decision has produced. In particular, the focus of this section is on the decision of the Court of Appeal in *Re Vandervell’s Trusts (No 2)*,⁸⁴ which while reaching the correct result as a matter of principle, is irreconcilable with the decision in *Grey*.

Re Vandervell (No 2) involved a continuation of the facts of *Vandervell*. It will be recalled that the College, at Vandervell’s direction, had granted an option to purchase the transferred shares to Vandervell Trustees Ltd. In *Vandervell*, the House of Lords had held that this option was held on an automatic resulting trust for Vandervell. In October 1961, Vandervell had directed Vandervell Trustees to exercise the option using money from the family settlement and to hold the purchased shares on trust for the children under the family settlement. Vandervell Trustees did so and wrote to the Inland Revenue declaring that the shares were held by them on trust for the children. Between 1961 and 1965, Vandervell Products Ltd declared large dividends in favour of the trustees. Despite Vandervell and the Vandervell Trustees dealing with the shares and the dividends on the footing that these were held on trust for Vandervell’s children, the Inland Revenue Commissioners claimed that Vandervell had still failed to divest himself of his interest in the shares such that he was liable for surtax on the dividends paid to the trustees between 1961 and 1965.

Vandervell died in 1967. His executors became concerned about the substantial surtax that could be charged on the dividends. To make available the funds to satisfy this potential surtax, the executors brought claims against the trustees seeking a declaration that the dividends between 1961 and 1965 had been held

⁸² [1960] AC 1.

⁸³ See Part 2.

⁸⁴ [1974] Ch 269.

on trust for Vandervell and that he had never disposed of his equitable interest in the shares. The argument ran as follows. The House of Lords in *Vandervell* had held that the option was held on resulting trust for Vandervell. The exercise of the option and the declaration of trust amounted to a 'disposition' within the scope of s 53(1)(c) so that it required signed writing by Vandervell. No such signed writing existed. As such, Vandervell had failed to dispose of his equitable interest and was entitled to the dividends declared on the shares between 1961 and 1965.

The Court of Appeal (Lord Denning MR, Stephenson, and Lawton LJ) rejected this argument. The main reasoned judgments were given by Lord Denning MR and Lawton LJ.⁸⁵ Lord Denning MR held that the exercise of the option and the declaration of trust did not amount to a disposition because of the nature of the trust on which the option was held. He said:

A resulting trust for the settlor is born and dies without any writing at all. It comes into existence whenever there is a gap in the beneficial ownership. It ceases to exist whenever that gap is filled by someone becoming beneficially entitled. As soon as the gap is filled by the creation or declaration of a valid trust, the resulting trust comes to an end.⁸⁶

On the facts, this meant that when the option was exercised, the resulting trust for Vandervell ceased to exist and the trustees were able to, with Vandervell's consent, declare a trust of the shares in favour of the children.⁸⁷

Lawton LJ also held that once the option was exercised, '[t]here was no gap between the legal and beneficial interests and in consequence no need for a resulting trust in favour of Mr Vandervell to fill it.'⁸⁸ He added another reason why the resulting trust was automatically extinguished: 'The exercise of the option and the transfer of the shares to the trustee company necessarily put an end to the resulting trust of the option. There could not be a resulting trust of a chose in action which was no more.'⁸⁹ On this view, similar to that of Lord Denning MR, Vandervell's equitable interest under the resulting trust was automatically extinguished when the option was exercised. The trustees were then free to declare a new trust over the shares acquired by exercising the option.

As a preliminary point, the views expressed by Lord Denning MR and Lawton LJ suffer from the misconceptions identified above. It is only by thinking that there

⁸⁵ Stephenson LJ found the case to be more difficult than Lord Denning MR and Lawton LJ, but agreed with the outcome they had reached: *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 322-323.

⁸⁶ *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 320.

⁸⁷ *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 319-320.

⁸⁸ *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 326.

⁸⁹ *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 325.

must always be an equitable interest, whether the right is held on trust or not, that one is led to believe that 'a gap in the beneficial ownership'⁹⁰ must be filled, in this case, by a resulting trust. Once it is made clear that equitable interests and trusts are encumbrances on other interests, and in no way affect the nature of the right held on trust, there is nothing abnormal about the absence of an equitable or beneficial interest: it is simply a feature of holding a right absolutely. If a resulting trust does arise, it is for some other reason, not because there is a gap in the beneficial ownership that needs to be filled.

More importantly for our purposes, the result in *Re Vandervell (No 2)* cannot be reconciled—at least not convincingly—with the conclusion reached in *Grey*. In *Re Vandervell (No 2)*, following the exercise of the option, Vandervell's equitable interest under the resulting trust was destroyed and new equitable interests were created in favour of the children. This is no different to what happened in *Grey*: Hunter's equitable interest was destroyed and new equitable interests were created in favour of his grandchildren. The main difference between the two cases is the type of trust on which the shares were initially held—in *Grey* it was an express trust; in *Re Vandervell (No 2)* it was a resulting trust. But while this is a distinction between the two cases, it is not a principled one and it should make no difference to the outcome. As Green observed, 'equitable interests behind resulting trusts are as much subsisting equitable interests as are equitable interests behind express trusts.'⁹¹

Nor does Lawton LJ's further reason—that the exercise of the option destroyed the equitable interest in the option because the option ceased to exist⁹²—justify distinguishing *Re Vandervell (No 2)* from *Grey*. When one right held on trust is substituted for another as part of an authorised transaction, the ordinary result is that the equitable interest in the original right is 'automatically transpose[d]' to the substitute right.⁹³ The mere fact that the option was exercised does not explain why the purchased shares were not impressed with the original resulting trust.⁹⁴

Despite these shortcomings, the result in *Re Vandervell (No 2)* was correct as a matter of principle: there was no disposition, in the sense of a transfer, of a subsisting equitable interest within s 53(1)(c). Rather, Vandervell's equitable interest in the option was destroyed by his consent and a new equitable interest

⁹⁰ *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 320.

⁹¹ Brian Green, 'Grey, Oughtred and Vandervell—A Contextual Reappraisal' (1984) 47 *Modern Law Review* 385, 417. See also Jessica Hudson, Ben McFarlane, and Charles Mitchell, *Hayton, McFarlane and Mitchell: Text, Cases and Materials on Equity and Trusts* (15th edn, Sweet & Maxwell 2022) 241 [6-098].

⁹² *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 326.

⁹³ David Fox, 'Overreaching' in Peter Birks and Arianna Pretto-Sakmann (eds), *Breach of Trust* (Hart 2002) 95, 95.

⁹⁴ Compare the view of J W Harris, 'The Case of the Slippery Equity' (1975) 38 *Modern Law Review* 557, 559.

created in favour of his children. The same occurred in *Grey*.⁹⁵ Hunter 'terminated [his equitable interest] and informed his trustees that they should no longer hold for him but should hold on the substituted trusts,'⁹⁶ creating new equitable interests in his grandchildren. The view that either case involved a disposition stems solely from the overly broad definition of 'disposition' adopted in *Grey*. If 'disposition' is taken to mean 'transfer', it is clear that neither case involved a 'disposition'. *Re Vandervell (No 2)* cannot be reconciled with *Grey*, but it is *Grey* that reached the wrong result.

Specifically enforceable contracts to dispose of equitable interests

One particular issue that continues to give courts difficulties is that of a specifically enforceable contract to dispose of an equitable interest. As will be seen, the confusion is largely caused by the misconception that the effect of creating a sub-trust of a subsisting equitable interest is to 'carve out' a subsidiary equitable interest from the original equitable interest. This confusion has been compounded by the myth that where a sub-trust is created, at least in cases involving bare trusts, the sub-trustee 'drops out'.⁹⁷

The issue first arose in *Oughtred v Inland Revenue Commissioners*.⁹⁸ Trustees of a settlement held 100,000 ordinary shares and 100,000 preference shares on trust for Mrs Oughtred for life, remainder for her son, Peter Oughtred. In June 1956, Mrs Oughtred orally agreed to give her son another parcel of shares that she held absolutely ('the consideration shares') in exchange for Peter's equitable interest under the settlement. The purpose of the transaction, for tax reasons, was to enlarge Mrs Oughtred's life interest into a full equitable interest. Eight days later, three documents were executed to give effect to this agreement. First, Mrs Oughtred executed an instrument of transfer of (and transferred) the consideration shares to Peter. Secondly, Mrs Oughtred and Peter executed a deed of release, purportedly made with the trustees.⁹⁹ This deed recited the oral agreement between Mrs Oughtred and Peter and stated that:

[The shares are] accordingly now held by the trustees in trust for Mrs Oughtred absolutely as the trustees hereby acknowledge and it is intended that the same shall forthwith be transferred to Mrs Oughtred or as she shall direct'.¹⁰⁰

⁹⁵ *Grey v IRC* [1958] AC 690

⁹⁶ *Grey v IRC* [1958] AC 690.

⁹⁷ See generally, C H Tham, 'Exploding the myth that bare sub-trustees "drop out"' (2017) 31 Trust Law International 76.

⁹⁸ [1958] Ch 383 (High Court); [1958] Ch 678 (Court of Appeal); [1960] AC 206 (House of Lords).

⁹⁹ As Lord Jenkins explained, it 'appears in fact to have been executed only by [Mrs Oughtred] and Peter': *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 235.

¹⁰⁰ *Oughtred v Inland Revenue Commissioners* [1958] Ch 383, 389.

Thirdly, the trustees executed an instrument of transfer of (and transferred) the shares that were held on trust to Mrs Oughtred, such that, at the end of the process, she held the shares at law and not subject to any trust.

The Inland Revenue Commissioners argued that s 53(1)(c) precluded Peter's equitable interest from passing to Mrs Oughtred under their oral agreement. It followed, they said, that Peter's equitable interest passed only when the trustees transferred the shares to Mrs Oughtred under the third document. The Commissioners thus assessed this document as liable to *ad valorem* stamp duty on the value of Peter's reversionary interest.

In the High Court, Upjohn J rejected this argument. He held that the making of the oral agreement for value to 'sell' Peter's reversionary interest gave rise to a constructive trust of that reversionary interest.¹⁰¹ This constructive trust operated to transfer the equitable interest to Mrs Oughtred and, importantly, was exempt from the requirement of writing in s 53(1)(c) because of s 53(2), which provides that '[t]his section does not affect the creation or operation of resulting, implied or constructive trusts'. He said:

[I]t cannot be doubted that on the making of an agreement for sale the equitable title to the property agreed to be sold passes to the purchaser and the recital in the deed of release to the effect that the trustees held the trust fund in trust for the appellant absolutely was in fact correct, for the exchange consideration was executed contemporaneously. ... In my judgment nothing passed under the transfer except the legal estate, and the principal argument on the part of the commissioners falls to the ground.¹⁰²

The Court of Appeal, while expressing some doubt about the conclusion reached by Upjohn J,¹⁰³ ultimately did not need to decide the point. Instead, the Court allowed the appeal on a point of statutory construction in relation to the Stamp Act 1891.¹⁰⁴

The House of Lords (Lords Jenkins, Keith, and Denning; Lords Radcliffe and Cohen dissenting) dismissed Mrs Oughtred's appeal. Lord Jenkins (with whom Lord Keith agreed), expressly refrained from considering whether s 53(2) had the effect of excluding the oral agreement from the operation of s 53(1)(c).¹⁰⁵ Instead, assuming in Mrs Oughtred's favour that the oral agreement did give rise to a constructive trust, and that s 53(2) exempted the constructive trust from s 53(1)(c), Lord Jenkins said that he could not accept that there was 'nothing left for the disputed transfer to pass to the appellant except the bare

¹⁰¹ *Oughtred v Inland Revenue Commissioners* [1958] Ch 383, 390.

¹⁰² *Oughtred v Inland Revenue Commissioners* [1958] Ch 383, 391.

¹⁰³ *Oughtred v Inland Revenue Commissioners* [1958] Ch 678, 687.

¹⁰⁴ *Oughtred v Inland Revenue Commissioners* [1958] Ch 678, 688.

¹⁰⁵ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 239.

legal estate.¹⁰⁶ This was because, in his view, the later transfer was still ‘for stamp duty purposes a transfer on sale of the property in question’.¹⁰⁷

Lord Denning was also in the majority and gave reasons that mirrored those given in the Court of Appeal in relation to the Stamp Act.¹⁰⁸ He therefore did not ‘think it necessary to embark upon a disquisition on constructive trusts’.¹⁰⁹ But he did express the following obiter view:

I do not think the oral agreement was effective to transfer Peter’s reversionary interest to his mother. I should have thought that the wording of section 53 (1) (c) of the Law of Property Act, 1925, clearly made a writing necessary to effect a transfer: and section 53 (2) does not do away with that necessity.¹¹⁰

Lord Radcliffe, in dissent, agreed with the judgment that given by Upjohn J.¹¹¹ He said that the effect of the oral agreement was that Peter became a constructive trustee for Mrs Oughtred of his reversionary interest in the shares. Section 53(2) exempted that trust from s 53(1)(c) and when Mrs Oughtred transferred her shares to Peter, which constituted the consideration for his promise, ‘he became in a full sense and without more the trustee of his interest for her.’¹¹² From then on, ‘[s]he was the effective owner of all outstanding equitable interests’¹¹³ and no writing was required to achieve this result. It followed that the disputed transfer could not be treated as a conveyance of Peter’s equitable reversionary interest.¹¹⁴

Lord Cohen, also dissenting, took a slightly different route. He agreed that s 53(1)(c) applied and that Peter ‘could not assign [his] equitable interest to [Mrs Oughtred] except by a disposition in writing’.¹¹⁵ But here there had not been a disposition. Instead, Mrs Oughtred had acquired the legal interest (the shares) free of any equitable interest and, because of the agreement, any equitable interest Peter had could not be asserted against her.¹¹⁶

The dissenting speech of Lord Radcliffe was picked up and applied by the Court of Appeal in *Neville v Wilson*,¹¹⁷ which described the point as having been ‘left open’ in *Oughtred*.¹¹⁸ The dispute revolved around 120 shares in a company

¹⁰⁶ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 240.

¹⁰⁷ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 240, applied in *Bishop Square Ltd v Commissioners of Inland Revenue* (1999) 78 P & CR 169.

¹⁰⁸ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 232-233.

¹⁰⁹ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 233.

¹¹⁰ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 233.

¹¹¹ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 227.

¹¹² *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 227-228.

¹¹³ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 228.

¹¹⁴ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 228.

¹¹⁵ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 230.

¹¹⁶ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 231-232.

¹¹⁷ [1997] Ch 144.

¹¹⁸ *Neville v Wilson* [1997] Ch 144, 147, 155.

called Universal Engineering Co (Ellesmere Port) Ltd ('UEC') that were held by two nominees on trust for another company, J E Neville Ltd ('JEN'). An oral agreement was reached between the shareholders of JEN for the informal liquidation of JEN and for the balance of its assets (including the equitable interest in the UEC shares) to be distributed to the shareholders of JEN in proportions corresponding to their existing shareholdings. The issue was whether this informal liquidation had the effect of disposing JEN's equitable interest in the UEC shares to the shareholders. The Court of Appeal (Nourse, Rose, and Aldous LJJ) said:

The effect of the agreement, more closely analysed, was that each shareholder agreed to assign his interest in the other shares of JEN's equitable interest in exchange for the assignment by the other shareholders of their interests in his own aliquot share.¹¹⁹

The Court then noted that '[e]ach individual agreement' was a 'disposition of a subsisting equitable interest not made in writing', which raised an issue of compliance with s 53(1)(c). Ultimately, however, the Court held that writing was not required. Expressly adopting the views of Upjohn J and Lord Radcliffe in *Oughtred*, the Court said:

[T]he effect of each individual agreement was to constitute the shareholder an implied or constructive trustee for the other shareholders, so that the requirement for writing contained in subsection (1)(c) of section 53 was dispensed with by subsection (2).¹²⁰

The Court therefore concluded that the equitable interest in the UEC shares had been effectively disposed of to the shareholders of JEN.

The judgment of the Court of Appeal in *Neville v Wilson*, and its endorsement of Upjohn J and Lord Radcliffe in *Oughtred*, stands for the proposition that where a person enters into a specifically enforceable contract to dispose of an equitable interest, and a constructive trust of that equitable interest arises, there is a disposition within s 53(1)(c) but s 53(2) has the effect that the agreement can 'vest' or 'pass' the equitable interest without writing.¹²¹ But that proposition rests on two assumptions.¹²² First, it assumes that the creation of a

¹¹⁹ *Neville v Wilson* [1997] Ch 144, 155.

¹²⁰ *Neville v Wilson* [1997] Ch 144, 155.

¹²¹ See, eg, Jamie Glistler and James Lee, *Hanbury and Martin Modern Equity* (22nd edn, Sweet & Maxwell 2021) 136-137 [6-017].

¹²² There is a preliminary difficulty with *Neville v Wilson* in that it was the JEN, and not the shareholders, that held the equitable interest in the UEC shares. It is therefore not clear how they, as shareholders in JEN, could hold the equitable interest in the UEC shares on trust for each other when that interest was held by JEN. The Court appears 'treated the separate legal personality of JEN in a somewhat cavalier fashion': Richard Nolan, 'The Triumph of Technicality' [1996] Cambridge Law Journal 436, 437. See also Patrick Milne, 'Oughtred revisited' (1997) 113 Law Quarterly Review 213, 214.

constructive trust of an equitable interest—which, to be clear, is the creation of a sub-trust¹²³—operates to carve out the equitable sub-interest from the original equitable interest. On this view, a creation of sub-trust is a disposition within the meaning of s 53(1)(c) but s 53(2) exempts that disposition from the requirement of writing. Secondly, it assumes that the trustee of a subsisting equitable interest under a trust (ie the sub-trustee) ‘drops out’ of the picture. Indeed, this argument was expressly made by counsel for the appellant in *Oughtred*, who said: ‘The gravamen of the appellant’s case is that before the transfer came to be executed Peter had dropped out altogether’.¹²⁴ And Lord Radcliffe appears to have accepted this argument.¹²⁵ For reasons we will come to, both assumptions are incorrect.

When the two mistaken assumptions are combined, the result is the view that the creation of a sub-trust of an equitable interest not only carves out an equitable sub-interest from the original equitable interest but, because of the ‘dropping out’ rule, passes the whole equitable interest to the sub-beneficiary. This view is advanced most clearly in the judgment of Upjohn J in *Oughtred*, where he describes the effect of the constructive trust that arises upon entering into a specifically enforceable contract of sale (at least once the consideration is executed) as being that ‘the equitable title to the property agreed to be sold passes to the purchaser’.¹²⁶ This is why, for Upjohn J, on the facts of *Oughtred* ‘nothing passed under the transfer [of the shares] except the legal estate’.¹²⁷

Both assumptions are misconceived. As we noted in Part 2, the creation of a trust does not involve a ‘splitting’ of interests or a ‘carving out’ of an equitable interest. The nature of the right is not changed by declaring or creating a trust. The effect of a trust is to impose an obligation on the trustee, which relates to the subject matter of the trust. In the case of sub-trusts, the nature of the original equitable interest is completely unaffected. The sub-trustee simply holds that interest on trust for the sub-beneficiary and is subject to obligations with respect to it.

The suggestion that the sub-trustee ‘disappears from the picture’¹²⁸ is just as mistaken. It arises from the assumption that the equitable interest has been transferred to the sub-beneficiary as the result of the creation of the sub-trust. This is another symptom of the sausage meat conception of equitable interests. It ignores the fact that, as we have said, a trust simply imposes an obligation

¹²³ Importantly, there is no difference in this regard between a constructive trust arising as a result of a specifically enforceable contract to dispose of an equitable interest and a person expressly declaring themselves a trustee of their equitable interest under a trust. Both create trusts of the subsisting equitable interest—that is, a sub-trust.

¹²⁴ *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 213.

¹²⁵ See *Oughtred v Inland Revenue Commissioners* [1960] AC 206, 228.

¹²⁶ *Oughtred v Inland Revenue Commissioners* [1958] Ch 383, 391.

¹²⁷ *Oughtred v Inland Revenue Commissioners* [1958] Ch 383, 391.

¹²⁸ See, eg, *Grey v Inland Revenue Commissioners* [1958] Ch 375, 382.

upon the trustee, which is then engrafted onto the subject matter of the trust—here the original equitable interest. Nothing happens to that interest.

This analysis has been confirmed by recent cases. In *Nelson v Greening & Sykes (Builders) Ltd*,¹²⁹ Lawrence Collins LJ (with whom Wall and Ward LJJ agreed) expressly rejected the argument that a sub-trustee drops out. He explained that while this may be the practical effect it is not the legal effect. After referring to a passage in the Court of Appeal in *Grey*, in which Lord Evershed MR referred to a declaration of sub-trust as having the ‘practical effect’ of ‘getting rid of’ the subsisting equitable interest,¹³⁰ Lawrence Collins LJ said:

[S]aying (as Lord Evershed MR said) that the *practical* effect would seem to amount to or be capable of amounting to the ‘getting rid’ of the trust of the equitable interest then subsisting, is not the same as saying that *as a matter of law* it does get rid of the intermediate trust. What he was saying was that in the case of a trust and sub-trust of personal property the trustees may decide that as a matter of practicality it is more convenient to deal directly with the beneficiary of the sub-trust.¹³¹

These two assumptions outlined above lead to the main mistake in both *Oughtred* and *Neville v Wilson*, which is to assume that there is a disposition within the meaning of s 53(1)(c). As we have explained, the creation of a sub-trust does not operate to transfer the original equitable interest to the sub-beneficiary. As there is no transfer, there is, as a matter of principle, no disposition. It also follows that there is no need to engage s 53(2) to exclude the operation of s 53(1)(c). *Neville v Wilson* was correctly decided in result¹³²—there was no need for signed writing—but not because s 53(2) excluded the constructive trust from the requirement of writing in s 53(1)(c); the right result was reached because s 53(1)(c) did not apply in the first place. The constructive trust did not transfer any rights between the parties; there was no disposition requiring signed writing. Whether *Oughtred* was ultimately correctly decided in result depends upon the correctness of the majority’s interpretation of the provisions of the Stamp Act, which we do not need to consider here.

In sum, the declaration of an express trust (or the creation of a constructive trust) of a subsisting equitable interest is *not* a disposition within the meaning of s 53(1)(c). The result is that s 53(1)(c) is never engaged and therefore reliance on s 53(2) is unnecessary.

¹²⁹ [2007] EWCA Civ 1358.

¹³⁰ *Grey v Inland Revenue Commissioners* [1958] Ch 690, 715.

¹³¹ *Nelson v Greening & Sykes (Builders) Ltd* [2007] EWCA Civ 1358 [57] (emphasis added). See further *Sheffield v Sheffield* [2013] EWHC 3927 [82]–[85].

¹³² Subject to the difficulty mentioned at n 142 above and the further difficulty that the company had subsequently been dissolved and struck of the register of companies: *Neville v Wilson* [1997] Ch 144, 150. We do not need to consider these issues here.

It remains to note that if the sub-trustee were *then* to transfer their equitable interest to the sub-beneficiary, in an ordinary case, this *would* be a disposition within the scope of s 53(1)(c). This discloses an important factual difference between *Neville v Wilson* and *Oughtred*. In *Neville v Wilson*, no subsequent transfer of the equitable interest had occurred. There was therefore no disposition. By contrast, in *Oughtred* the legal interest (the shares) was subsequently transferred to Mrs Oughtred. However, this further step did not involve a disposition because it was a transfer of the *legal* and not the *equitable* interest. For the same reason given above in relation to *Vandervell*, the transfer of the shares (the legal interest) to Mrs Oughtred did not include Peter's equitable reversionary interest—the shares were simply unencumbered by any equitable interest. Instead, Peter's equitable interest was overreached or destroyed and for the reasons already given the destruction or extinguishment of an interest is not a disposition.

The issue of a specifically enforceable contract to dispose of an equitable interest arose more recently in *LA Micro Group (UK) Ltd v LA Micro Group, Inc*.¹³³ The case concerned a dispute in relation to shares in an English company, LA Micro Group (UK) Ltd, which had been acquired in 2004 as a vehicle for a joint venture involving an US company, La Micro Group, Inc, which was owned and run by Mr Lyampert and Mr Frenkel. There were only two issued shares in the UK company; one of these was held by Mr Bell and the other by Mr Lyampert.

In 2004, Bell and Lyampert agreed to hold the shares in the UK company on trust for both the US company and Bell, in proportions of 51% and 49% respectively.¹³⁴ But in 2010, relations between Frenkel and Lyampert soured, causing Frenkel to serve a notice of dissolution of the US company and to inform Bell that he wanted 'nothing to do' with the UK company.¹³⁵ It was against this background that in 2010 Bell and Lyampert—as the trustees of the two shares in the UK company, and Lyampert having authority to act on behalf of the US company¹³⁶—entered into new arrangements, under which Bell and Lyampert orally agreed to share the profits from the UK company equally. The trial judge found, and this was upheld on appeal, that it was 'a necessary implication of the 2010 agreement that the shares in [the] UK [company] would thenceforth be held in the same way as the profits were to be split, namely that *each of the issued shares would be held beneficially for the person in whose*

¹³³ [2023] EWCA Civ 214.

¹³⁴ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 12 [21].

¹³⁵ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 13 [25].

¹³⁶ See, eg, *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 30–31 [87].

name it was issued'.¹³⁷ As the Court of Appeal put it, 'it was agreed that each share should be held beneficially by its legal owner'.¹³⁸

At first instance, the trial judge accepted that this agreement had amounted to a surrender of the US company's equitable interest in the shares in the UK company but held that a surrender would amount to a disposition of a subsisting equitable interest within the meaning of s 53(1)(c) and would therefore need to be in writing.¹³⁹ As the agreement was not in writing, the claim based on a surrender failed. In the Court of Appeal, the UK company and Bell argued that the trial judge 'should have held that the agreement reached in 2010 was specifically enforceable, and hence gave rise to a constructive trust such that the case came within s 53(2) LPA 1925 instead of s 53(1)(c)'.¹⁴⁰

The Court of Appeal, following *Neville v Wilson*, agreed. Nugee LJ (with whom Arnold and Males LJJ agreed) treated the 2010 agreement as a 'quadripartite agreement' between Bell, Lyampert, the UK company, and the US company, under which the parties agreed, for valuable consideration, to 'transfer their respective equitable interests'.¹⁴¹ He said:

[W]hat was agreed was (i) that in the case of Mr Bell's share, the 51% beneficial interest formerly held by [the US company] should be transferred to Mr Bell so that he became the 100% legal and beneficial owner; and (ii) that in the case of Mr Lyampert's share, the 51% interest held by [the US company] and the 49% interest held by Mr Bell should both be transferred to Mr Lyampert.¹⁴²

According to Nugee LJ this would have involved a disposition within s 53(1)(c) and required writing. But the 2010 agreement was specifically enforceable and gave rise to a constructive trust of the equitable interests.¹⁴³ The result was that the 'constructive trust [was] sufficient to carry the equitable interest in the property to the purchaser or donee by virtue of s 53(2) [of the Law of Property Act]' and Bell and Lyampert were 'therefore now the sole beneficial owners of their shares'.¹⁴⁴

There are two difficulties with this decision. The first is that, like *Neville v Wilson*, and Upjohn J and Lord Radcliffe in *Oughtred*, it treats a constructive trust of an equitable interest as transferring that interest to the sub-beneficiary—hence the reference in Nugee LJ's judgment to the constructive trust 'carrying' the equitable interest to the respective parties. But as already

¹³⁷ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 29 [80].

¹³⁸ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1 31 [91].

¹³⁹ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2022] EWHC 1304 (Ch) [59].

¹⁴⁰ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 9 [10].

¹⁴¹ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 32 [92].

¹⁴² *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 31 [91].

¹⁴³ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1 32 [92].

¹⁴⁴ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 32 [92].

explained, this is a misconception arising from the incorrect assumptions that (i) the creation of a constructive trust operates to ‘carve out’ the equitable sub-interest from the original equitable interest, and (ii) a trustee of a bare trust ‘drops out’, so that the result of the sub-trust is that the original equitable interest has been transferred to the sub-beneficiary. To repeat what was said above, this fails to recognise that a trust simply imposes an obligation upon the trustee. It is engrafted onto, not carved out of, the subject matter of the trust. The original equitable interest remains unaffected. There is no disposition within the meaning of s 53(1)(c) and therefore no need to engage s 53(2).

The second difficulty is the Court of Appeal’s characterisation of the 2010 agreement as an agreement to ‘transfer’ the respective equitable interests.¹⁴⁵ This is not, as a matter of substance, what the parties agreed. The parties agreed that they should no longer hold on trust and that ‘each share should be held beneficially by its legal owner’.¹⁴⁶ This, as the trial judge found, is a surrender, which operates to terminate or destroy the equitable interests. The parties did not frame their agreement as a transfer and even if they had this would not be determinative. As Lord Millett explained in *Burton v Camden London Borough Council*:¹⁴⁷ ‘No particular form of words was required for a release. Even if it was drafted as any assignment, it still took effect as a release. The difference was one of substance not form; it was not merely a matter of language.’ Indeed, the Court of Appeal in *LA Micro Group* appears to have accepted that in substance this was an agreement to surrender. Nugee LJ said that the effect of carrying out the agreement ‘would be to surrender or give up [the] beneficial interest’ and that ‘once the surrender has been effected, there is no trust involved at all’.¹⁴⁸ But because Nugee LJ thought that a surrender took effect by way of a transfer, he treated a ‘contract to surrender or give up [the] beneficial interest in the shares’ as equivalent to ‘the contract for the sale of shares in a private company (or the beneficially interest in them)’.¹⁴⁹

The reason resort to the cases on constructive trusts and s 53(1)(c) was even necessary was because of the assumption at first instance and on appeal that a surrender involves a disposition of a subsisting equitable interest. But, as we explain below, a surrender operates by way of a destruction of an equitable interest, not a transfer of it, and as such does not involve a disposition of any subsisting equitable interest. The Court in *LA Micro Group* therefore should have concluded that there was no disposition within s 53(1)(c) because the 2010 agreement, properly characterised, was an agreement to surrender, which,

¹⁴⁵ See, eg, *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 31 [91] quoted in the text to n 165 above.

¹⁴⁶ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 31 [91].

¹⁴⁷ [2000] 2 AC 399, 409.

¹⁴⁸ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 35 [105].

¹⁴⁹ *LA Micro Group (UK) Ltd v LA Micro Group, Inc* [2024] Ch 1, 35 [106].

when carried out, does not involve a disposition.¹⁵⁰ At the very least, if the constructive trust route is preferred, it should have been said that writing was unnecessary, not because constructive trusts are exempt from s 53(1)(c) by virtue of s 53(2), but because a constructive trust of an equitable interest does not involve a disposition of that interest in the first place.

Surrenders and disclaimers

The final set of examples that have arisen in the case law on s 53(1)(c) concern the surrender or release of an equitable interest and the disclaimer of an equitable interest.

The surrender or release of an equitable interest should not, as a matter of principle, involve a disposition within the meaning of s 53(1)(c). This is because it operates to destroy or extinguish that interest; it does not involve a transfer of that interest. When a sole beneficiary surrenders their equitable interest under a trust, the trustee becomes absolutely entitled to the right held on trust, not because they have acquired the beneficiary's right, but because the right which they hold is no longer encumbered by the trust. The beneficiary's equitable interest is simply destroyed. An analogy can be drawn with the cessation of life interests in property. In *Newlon Housing Trust v Alsuleiman*,¹⁵¹ Lord Hoffmann explained:

[A] life interest in a property is an item of property with a temporal dimension, ceasing to exist on the death of the tenant for life. When that event happens, no property passes from the tenant for life to the remainderman. The latter's interest falls into possession but he becomes entitled to possession by virtue of his own interest and not by having acquired that of the tenant for life.

The same is true of equitable interests under trusts. A surrender of a beneficiary's equitable interest does not operate to transfer that interest to the trustee or to other beneficiaries.

There is another reason why this is true in relation to joint tenancies in equity. As Lord Millett said in *Burton v Camden London Borough Council*,¹⁵² 'a release operate[s] to extinguish [the joint tenant's] interest and not to assign it.' This is because '[t]he so-called assignor has no separate interest of his own which is capable of being transferred to the other and which the other does not already own.'¹⁵³

¹⁵⁰ It was apparently conceded that there was a disposition, but a concession on a point of law is not binding on the court: *Armstead v Royal & Sun Alliance Insurance Co Ltd* [2024] UKSC 6 [46], citing *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514, 1525.

¹⁵¹ [1999] 1 AC 313, 317.

¹⁵² [2000] 2 AC 399, 408.

¹⁵³ *Burton v Camden London Borough Council* [2000] 2 AC 399, 408.

Despite this, the Court of Appeal in *Hudson v Hathway*¹⁵⁴ held that a surrender by one equitable joint tenant amounts to a 'disposition' within the scope of s 53(1)(c). In 2007, Ms Hathway and Mr Hudson, an unmarried couple, acquired title to a house in joint names.¹⁵⁵ Although they made no declaration of trust in respect of their joint title to the house, the operation of s 36(1) of the Law of Property Act 1925 was assumed to mean that they held their title on trust for themselves as joint tenants in equity.¹⁵⁶ In 2009, Hathway and Hudson split. They attempted to come to an agreement in relation to the division of assets acquired during their relationship. After some email correspondence in relation to the house, Hudson emailed Hathway on 30 July 2013, and in that email said: 'Which leaves the house You know what, I want none of the proceeds of that either. Take it. Buy yourself somewhere you can afford to live'.¹⁵⁷ The email was signed off with 'Lee'. In response to an email from Hathway confirming the arrangement, Hudson sent another email on 9 September 2013, which said: 'Under this arrangement, I've no interest whatsoever in the house, so whilst I will continue to contribute, I won't do so forever.'¹⁵⁸ This email was also signed off with 'Lee'. Some time after this exchange, Hathway took over all of the mortgage payments for the house. The title to the house remained in their joint names.

In October 2019, Hudson, who had since changed his mind, brought a claim seeking an order for the sale of the house with equal division of the proceeds. Hathway agreed that the house should be sold, but argued that Hudson was not entitled to any of the proceeds of the sale. Two arguments were made on this point: first, Hudson's email on 30 July 2013 was an effective surrender of his equitable interest in the title to the land; and secondly, the title to the house was held on a common intention constructive trust with Hathway as the sole beneficiary. The Court of Appeal (Lewison LJ, with whom Andrews and Nugee LJJ agreed) accepted both arguments, although only acceptance of the first was necessary to dispose of the appeal.

Our focus here is on the first argument.¹⁵⁹ Lewison LJ held that the emails on 30 July and 9 September amounted to a surrender or release of Hudson's equitable interest.¹⁶⁰ Lewison LJ also quoted, seemingly with approval, Lord Millett's

¹⁵⁴ [2023] KB 345; noted in Martin Dixon, 'Dispositions, Constructive Trusts and Co-Ownership' (2023) 82 Cambridge Law Journal 212.

¹⁵⁵ The parties held jointly at law. It will be recalled that since 1926, it has not been possible in England and Wales to create a legal tenancy in common: Law of Property Act 1925 s 34(1).

¹⁵⁶ *Hudson v Hathway* [2023] KB 345, 361-362 [43]-[46]. Though the common assumption that s 36(1) operates in this way has been questioned: see Alexander YS Georgiou, 'Marr v Collie: The Ballooning of the Common Intention Constructive Trust' (2019) 82 Modern Law Review 129, 156.

¹⁵⁷ *Hudson v Hathway* [2023] KB 345, 356 [13].

¹⁵⁸ *Hudson v Hathway* [2023] KB 345, 357 [17].

¹⁵⁹ For a discussion of the second, see Brian Sloan, 'Detrimental reliance and the family home: orthodoxy restored?' (2023) 45 Journal of Social Welfare and Family Law 181.

¹⁶⁰ *Hudson v Hathway* [2023] KB 345, 363 [50].

statement in *Burton v Camden London Borough Council* that the effect of a surrender is ‘to extinguish his interest and not to assign it.’¹⁶¹ But the question then arose whether such a surrender was nonetheless a ‘disposition’ within the meaning of s 53(1)(c) and therefore was required to be in signed writing. Ultimately, Lewison LJ concluded that the surrender had amounted to a disposition.¹⁶² On the facts, however, the requirement of signed writing had been satisfied by Hudson signing off both emails with ‘Lee’.¹⁶³ Hudson had therefore validly released his equitable interest.

Three points were made by Lewison LJ in support of his conclusion that a surrender was a disposition. First, he referred to *Grey* in support of the proposition that ‘[t]he word “disposition” ... is a word of wide import’.¹⁶⁴ Secondly, he noted that in *Newlon Housing Trust v Alsuleiman*,¹⁶⁵ Lord Hoffmann said that a disposition ‘ordinarily means an act by which someone ceases to be the owner of that property in law or in equity’.¹⁶⁶ And thirdly, he observed that in *Inland Revenue Commissioners v Buchanan*,¹⁶⁷ the Court of Appeal said that a ‘disposition’ in s 21 of the Finance Act 1936 extended to the surrender of a life interest under a trust.

It is clear that in concluding that a surrender amounts to a disposition within the meaning of s 53(1)(c), Lewison LJ was relying on the broad meaning of ‘disposition’ adopted in *Grey*. It has already been explained that *Grey* was wrongly decided and why a ‘disposition’ in s 53(1)(c) of the Law of Property Act should mean no more than ‘transfer’. As for *Newlon Housing Trust* and *Buchanan*, these statements were made in the context of different legislative provisions that arguably justify a broader reading of ‘disposition’. *Newlon Housing Trust* concerned the meaning of ‘disposition’ in s 37(2)(b) of the Matrimonial Causes Act 1973, which empowers the court to make orders setting aside dispositions made with the intention of defeating a party’s claim to financial relief. There are very good reasons for adopting a broader meaning of ‘disposition’ in the context of a provision that is designed to prevent proceedings for financial relief being intentionally frustrated by parties to a divorce. It was, in any event, ‘unnecessary to decide’ the meaning of ‘disposition’ in that case.¹⁶⁸ A similar point can be made about *Buchanan*, which concerned the meaning of ‘disposition’ in s 21 of the Finance Act 1936, a provision designed to tackle certain forms of tax avoidance. As Lord Goddard CJ

¹⁶¹ *Hudson v Hathway* [2023] KB 345, 362 [46], quoting *Burton v Camden London Borough Council* [2000] 2 AC 399, 408.

¹⁶² *Hudson v Hathway* [2023] KB 345, 364 [53]. Nugee LJ also held that the surrender also fell within the scope of s 53(1)(a): at 1268 [181].

¹⁶³ *Hudson v Hathway* [2023] KB 345, 364–367 [55]–[67].

¹⁶⁴ *Hudson v Hathway* [2023] KB 345, 363 [51].

¹⁶⁵ [1999] 1 AC 313, 316.

¹⁶⁶ *Hudson v Hathway* [2023] KB 345, 364 [52].

¹⁶⁷ [1958] Ch 289.

¹⁶⁸ *Newlon Housing Trust v Alsuleiman* [1999] 1 AC 313, 316.

emphasised, the section was intended to capture the very type of transaction the Court was considering, 'under which a parent, by means of some form of settlement, settled money upon [their] children the income of which he or she otherwise would have had and which would, therefore, have increased the parents liability to surtax.'¹⁶⁹ In *Akers*, after referring to *Buchanan*, Lord Neuberger said: 'But, of course, all depends on the statutory context and how they apply to the facts of the particular case.'¹⁷⁰

When s 53(1)(c) is read in its statutory context, it is clear that 'disposition' was not intended to cover the surrender of an interest. It will be recalled that the purpose of the section is to prevent it being 'difficult, if not impossible, for the trustees to ascertain who are in truth [the] beneficiaries.'¹⁷¹ A surrender of an equitable interest necessarily involves the trustee, who must be notified of the surrender. It follows that a surrender does not give rise to the harm to which the section was directed. As such, there is no good reason to read 'disposition' as including surrenders in the context of s 53(1)(c). The better view of the facts of *Hudson v Hathway* is that the surrender was valid irrespective of whether there was writing because there was no 'disposition' within the meaning of s 53(1)(c).

The view that a surrender is a 'disposition' within s 53(1)(c) is also inconsistent with *Vandervell v Inland Revenue Commissioners*.¹⁷² The best reading of *Vandervell* is that the destruction of an equitable interest is simply not a 'disposition' within the scope of s 53(1)(c). But, as seen above, surrenders are merely another way in which an equitable interest can be destroyed. The difference in the method does not affect the point of principle: the destruction of an equitable interest should not be considered a 'disposition'. When seen in this light, *Hudson v Hathway* is in direct conflict with *Vandervell*.

It remains to consider whether a disclaimer of an equitable interest is a 'disposition' within s 53(1)(c).¹⁷³ In *Re Paradise Motor Co Ltd*,¹⁷⁴ the Court of Appeal held that the disclaimer of an equitable interest is not a 'disposition' within s 53(1)(c). This is clearly correct as a matter of principle. The effect of a disclaimer, depending on when the disclaimer is made, is either to avoid the creation of an equitable interest in the intended beneficiary in the first place or to retrospectively destroy a vested equitable interest.¹⁷⁵ When the effect of a disclaimer is to avoid the creation of an equitable interest in the beneficiary in

¹⁶⁹ *Inland Revenue Commissioners v Buchanan* [1958] Ch 289, 297.

¹⁷⁰ *Akers v Samba Financial Group* [2017] AC 424, 458 [69].

¹⁷¹ *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291, 311.

¹⁷² [1967] 2 AC 291.

¹⁷³ A disclaimer is the mechanism by which a beneficiary, either before or within a reasonable time after the creation of a trust, refuses to accept the equitable interest arising under the trust: see Ying Khai Liew and Charles Mitchell, 'The creation of express trusts' (2017) 11 *Journal of Equity* 133, 152-153.

¹⁷⁴ [1968] 1 WLR 1125.

the first place, the disclaimer cannot be a disposition as there was no subsisting equitable interest that could be transferred. When the effect of a disclaimer is to destroy a vested equitable interest, a disclaimer functions in the same way as a surrender or release. Just as surrenders should not be ‘dispositions’ within s 53(1)(c), neither should disclaimers.

For completeness, there is an argument that our approach is precluded by s 205(1)(ii) of the Law of Property Act 1925, which defines ‘disposition’ as including a ‘conveyance’, and defines ‘conveyance’ as including ‘disclaimer’ and ‘release’. But s 205(1) makes clear that these definitions are to apply ‘unless the context otherwise requires’. The statutory context requires that ‘disposition’ carries a different meaning in s 53(1)(c). The narrower meaning for which we contend accords with the purpose of the section and avoids the many difficulties the decision in *Grey* has caused.¹⁷⁶

5 CONCLUSION

The law on when a particular transaction involves a disposition of a subsisting equitable interest falling within the scope of s 53(1)(c) of the Law of Property Act 1925 is riddled with complexity. As recent cases have shown, the precise boundaries of the section continue to be tested. This article argued that the confusion surrounding s 53(1)(c) has arisen from two matters. The first is the broad meaning of ‘disposition’ adopted in *Grey*, which extends to the destruction or extinction of an interest. ‘Disposition’ in s 53(1)(c) should mean no more than ‘transfer’. The second matter causing confusion is two common misconceptions about the nature of equitable interests and transactions involving such interests (the propositions that a person who holds a right absolutely holds both the ‘legal’ and the ‘equitable’ interest, and that the creation of a trust operates to ‘carve’ out an equitable interest from the subject matter of the trust).

As we saw in Part 4, this is not just a matter of academic interest. A number of important practical consequences flow from adopting the meaning of ‘disposition’ and the explanation of the nature of equitable interests contended for in this article. It would mean:

1. a direction to a trustee to hold on trust for another does not amount to a disposition of a subsisting equitable interest; it involves no more than the

¹⁷⁵ See Ying Khai Liew and Charles Mitchell, ‘The creation of express trusts’ (2017) 11 *Journal of Equity* 133, 153–154; *Federal Commissioner of Taxation v Carter* (2022) 96 ALJR 325, 333–336 [33]–[48].

¹⁷⁶ As Green points out, the section was not cited to the Court in *Re Paradise Motor Co Ltd* [1968] 1 WLR 1125: Brian Green, ‘Grey, Oughtred and Vandervell—A Contextual Reappraisal’ (1984) 47 *MLR* 385, 394 fn 43. Nonetheless, he considers *Re Paradise Motor Co Ltd* to be correctly decided.

destruction of one right and the creation of another, neither of which individually amount to dispositions.

2. the creation of a vendor-purchaser constructive trust or sub-trust does not amount to a disposition of a subsisting equitable interest—it involves no more than the creation of a new equitable interest and the mere creation of such an interest is not a disposition; and
3. the surrender or disclaimer of an interest is not a disposition of a subsisting equitable interest; it involves no more than the destruction of an interest, which, properly understood, does not amount to a disposition.

The aim of this article has been to demonstrate where the law took a wrong turn and to sketch a path forward for the next centenary of s 53(1)(c). While the complexity in this area makes excellent fodder for law examiners setting problem questions for students, that is little comfort for courts, legal advisors, and litigants who have to deal with these issues in practice.