

# Ownership Beneath: Transparency of Land Ownership in Times of Economic Crime

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**Abstract**—This article considers ‘ownership beneath’ in light of the Economic Crime (Transparency and Enforcement) Act 2022, which has introduced a new Schedule 4A into the Land Registration Act 2002. The legislation, with notable exceptions, requires overseas entities to publicly reveal their beneficial owners, with criminal and land law consequences if transparency requirements are not met. The article explores how ownership beneath operates and can be made more transparent, noting the three different forms of beneficial ownership employed: as control, behind a trust and as a consequence. Emphasising the distinctive nature of beneficial ownership of land, the analysis recommends amending ECTEA 2022 to focus on land ownership, not merely landowning overseas entities, facilitating greater transparency by expanding the definition of registrable beneficial owners, closing the loophole where information is not available and requiring public disclosure of most trust information.

**Keywords:** economic crime, land, property, beneficial ownership, land registration, trusts, transparency

## 1. Introduction

Just after the jurist William Blackstone made his famous statement that ownership constitutes ‘sole and despotic dominion’, he raised a deeper question, asking how land ownership is obtained. ‘Pleased as we are with the possession,’ Blackstone wrote, ‘we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title.’<sup>1</sup> Today, we still consider a statement of ownership sufficient, even if no longer proven by ‘a set of words upon parchment’, regarding further inquiries to be ‘useless and even troublesome in common life’.<sup>2</sup> As Blackstone noted in 1766, we prefer not to look beneath.

Registration now offers landowners ownership protected by a state guarantee,<sup>3</sup> facilitating conveyancing and promoting market confidence in

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<sup>1</sup> W Blackstone, *Commentaries on the Laws of England*, vol II (1766).

<sup>2</sup> *ibid.*

<sup>3</sup> LRA 2002, s 58. Subject to possible rectification and alteration, Schedules 4 and 8.

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transactions, making them swifter, if not yet synchronous.<sup>4</sup> Yet, despite moving from parchment to a more transparent system of registration, ownership beneath, by which we mean how land came to be acquired and how it is held, often remains obscure. Individuals, companies and trusts can hold land in multiple combinations, often for tax advantages, most of which are entirely legal. Such ownership structures, located both in the UK and offshore, including in so-called ‘secrecy jurisdictions’,<sup>5</sup> are rarely evident on the face of the register.

Appreciating who owns land and how is critical to untangling transactions when investigating economic crime. In the UK, the Economic Crime (Transparency and Enforcement) Act 2022 (ECTEA 2022), introduced a new Schedule 4A into the Land Registration Act 2002 (LRA 2002),<sup>6</sup> requiring overseas entities (OEs) to reveal their beneficial owners with criminal and land law consequences if transparency requirements are not met. This new legislation extends initiatives to promote transparency for companies and trusts, although some of the framework’s provisions do not—we suggest—go far enough. We identify two key weaknesses in ECTEA 2022: a definition of a registrable beneficial owner that does not require all beneficial owners to be disclosed, including not submitting information (provisions we call ‘the loopholes’); and privacy for beneficiaries of a land-owning OE trust. In addition to these legislative defects, we also suggest that ECTEA 2022 illustrates uncertainty about the nature of the beneficial ownership itself.

To explore the concept of ownership beneath, this article proceeds as follows. Section 2 provides an overview of ECTEA 2022’s disclosure regime, then section 3 considers three different forms of beneficial ownership used in the Act—beneficial ownership as control, behind a trust and as a consequence of non-compliance—contrasting them with beneficial ownership of land. Section 4 explains the transparency rules for companies, trusts and land, before section 5 provides an overview of the models of beneficial ownership. Section 6 proposes reforms and section 7 concludes. Although ECTEA 2022 applies across the whole of the UK, the legal analysis here confines itself to English and Welsh law.

## 2. Obscuring and Revealing Ownership

### A. Land and Economic Crime

By its very nature, the scale of economic crime is hard to assess: one recent House of Commons Treasury Committee report noted that ‘it is exceptionally difficult to measure economic crime, given [that] those undertaking it are actively trying

<sup>4</sup> Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380, HC 1336, 2018) para 20.11.

<sup>5</sup> Joint Committee on the Draft Registration of Overseas Entities Bill, *Report of Session 2017–19* (2019, HL 358, HC 2009) 11.

<sup>6</sup> As implemented by *inter alia* the Land Registration (Amendment) Rules 2022, SI 2022/730; the Register of Overseas Entities (Verification and Provision of Information) (Amendment) Regulations 2022, SI 2022/725; the Register of Overseas Entities (Delivery, Protection and Trust Services) Regulations 2022, SI 2022/870 (ROE(DPTS) Regulations 2022).

to hide it'.<sup>7</sup> Nevertheless, one estimate identified £6.7 billion worth of UK property bought with 'suspect wealth', characterised as a 'personal safety-deposit box' for dirty money.<sup>8</sup> The National Crime Agency estimates that high-end money laundering methods are used to launder over £100 billion each year through the UK or through UK corporate structures,<sup>9</sup> while the government notes that corporate entities and trusts remain 'an attractive method to launder illicit funds, particularly in the purchase of UK property which faces a high risk from money laundering'.<sup>10</sup>

Although crime prevention measures have been strengthened in recent years, including imposing money laundering requirements on regulated professionals,<sup>11</sup> legislative progress on beneficial ownership has been slow. Change was proposed in 2016 and the draft Registration of Overseas Entities Bill was published in 2018, yet even by early January 2022 the government's Fraud Minister had resigned, citing, amongst other concerns, 'a foolish decision ... to kill off ... Economic Crime Bill'.<sup>12</sup> With Russia's invasion of Ukraine in February 2022, the political climate changed swiftly, and the 2021–22 ECTE Bill sped through Parliament, passing the Commons in a single day on 7 March 2022, producing ECTEA 2022.

### B. The ECTEA 2022 Framework

ECTEA 2022 has three goals:<sup>13</sup> (i) to inhibit the use of land for money laundering purposes by creating a publicly accessible register on beneficial ownership; (ii) to reform the UK's unexplained wealth order regime; and (iii) to amend both sanctions and financial sanctions legislation.<sup>14</sup> The Act is supplemented by the Economic Crime and Corporate Transparency (ECCT) Act 23,<sup>15</sup> with its commitment to strengthening Companies House and tightening the ECTEA 2022 framework. These changes are accompanied by a growing cultural focus on 'enablers'—lawyers, accountants, estate agents and PR specialists—who may inadvertently, carelessly or deliberately facilitate money laundering.<sup>16</sup>

ECTEA 2022's central mechanism for beneficial ownership is the Register of Overseas Entities (ROE).<sup>17</sup> This takes its cue from company law's People with

<sup>7</sup> Joint Committee on the Draft Registration of Overseas Entities Bill (n 5) 10.

<sup>8</sup> House of Commons Foreign Affairs Committee, *The Cost of Complacency: Illicit Finance and the War in Ukraine: Second Report of Session 2022–23* (2022, HC 168) 8.

<sup>9</sup> HM Government, *2023–2026 Economic Crime Plan* (2023) 10.

<sup>10</sup> *ibid* 17.

<sup>11</sup> The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, 692/2017 (Money Laundering Regulations 2017).

<sup>12</sup> Letter from Lord Agnew to the Prime Minister, 24 January 2022 <<https://twitter.com/faisalislam/status/1485931348900597763>> accessed 25 August 2023.

<sup>13</sup> Economic Crime (Transparency and Enforcement Act) Explanatory Notes, para 21.

<sup>14</sup> The measures in the Act reform how sanctions are imposed, how sanctions are reviewed and how challenges to sanctions are dealt with.

<sup>15</sup> See also Money Laundering Regulations 2017.

<sup>16</sup> Intelligence and Security Committee, *Russia: Presented to Parliament Pursuant to Section 3 of the Justice and Security Act 2013* (2020) 15.

<sup>17</sup> ECTEA 2022, s 1.

Significant Control (PSC) register<sup>18</sup> extending its reach to overseas entities if they own UK property.<sup>19</sup> An ‘overseas entity’ is defined simply as a ‘a legal entity that is governed by the law of a country or territory outside the United Kingdom’, where ‘legal entity’ means a body corporate, partnership or other entity that is a legal person under the law by which it is governed.<sup>20</sup> This includes companies, limited liability partnerships (LLPs) and trustees, but not beneficiaries of trusts.

OE's owning or wishing to own land must take ‘reasonable steps’<sup>21</sup> to supply verified information on their ‘registrable beneficial owners’, who must, once identified, reply within a month<sup>22</sup> and, if they are the beneficial owner, confirm, correct or provide the requisite information to the OE.<sup>23</sup> Once registered, OE's are allocated an overseas entity identification number (OE ID). OE registration is required by registered proprietors who acquired their estates on or after 1999 in England and Wales, 2014 in Scotland and 2022 in Northern Ireland, the dates from when the respective land registries first started to systematically collect overseas ownership data.<sup>24</sup> Registered OE's must update their information on an annual basis,<sup>25</sup> and provide further information required by Companies House under the ECCT Act 2023.<sup>26</sup> An OE must provide their ID to the relevant land registry when buying, leasing, transferring or registering charges against the land.<sup>27</sup> We refer to these obligations as ECTEA 2022's ‘transparency requirements’.

The ROE went live on 1 August 2022, following a six-month transition period, with all applications required to be completed by 31 January 2023. While nearly 20,000 overseas entity owners had registered by this deadline, around 7,000 overseas entities remained unregistered.<sup>28</sup> By August 2023, nearly 29,000 OE's had registered, although at least 11,600 titles (either freehold or leasehold), known to be owned by an overseas company, were still missing.<sup>29</sup> Early data indicated that

<sup>18</sup> The PSC test was introduced by the Small Business, Enterprise and Employment Act 2015.

<sup>19</sup> The PSC rules apply only to UK companies regardless of which assets a company owns.

<sup>20</sup> ECTEA 2022, s 2.

<sup>21</sup> *ibid* s 12(2).

<sup>22</sup> *ibid* s 12(5).

<sup>23</sup> *ibid* ss 12(3) and 13(1). The required information is set out in Part 3 of Schedule 1 to ECTEA 2022. On verification, see s 16 ECTEA 2022; the Register of Overseas Entities (Verification and Provision of Information) Regulations 2022, SI 2022/725.

<sup>24</sup> ECTEA 2022, Schedule 3, inserting LRA, Schedule 4A, para 3. Some earlier data exists but is not covered by ECTEA 2022.

<sup>25</sup> ECTEA 2022, s7, not in force at the time of writing.

<sup>26</sup> In accordance with a notice under s 1092A of the Companies Act 2006 (power of registrar to require information), inserted by s 83 of the ECCT Act 2023. A similar provision is incorporated into Land Registration Act 2002, Schedule 4A, para 8.

<sup>27</sup> HM Land Registry, *Practice Guide 78: Overseas Entities*, updated July 2023 <[www.gov.uk/government/publications/overseas-companies-and-limited-liability-partnerships-pg78/practice-guide-78-overseas-companies-and-limited-liability-partnerships](http://www.gov.uk/government/publications/overseas-companies-and-limited-liability-partnerships-pg78/practice-guide-78-overseas-companies-and-limited-liability-partnerships)> accessed 25 August 2023.

<sup>28</sup> Answer by Kevin Hollinrake MP, Foreign Companies: Registration, Question for Department for Business, Energy and Industrial Strategy, UIN 136763, tabled on 31 January 2023 <<https://questions-statements.parliament.uk/written-questions/detail/2023-01-31/136763>> accessed 25 August 2023.

<sup>29</sup> Arun Advani, Cesar Poux, Anna Powell-Smith and Andy Summers, ‘Catch Me if You Can: Gaps in the Register of Overseas Entities’ (September 2023) CAGE working paper no 680 <[https://warwick.ac.uk/fac/soc/economics/research/centres/cage/publications/workingpapers/2023/catch\\_me\\_if\\_you\\_can\\_gaps\\_in\\_the\\_register\\_of\\_overseas\\_entities/](https://warwick.ac.uk/fac/soc/economics/research/centres/cage/publications/workingpapers/2023/catch_me_if_you_can_gaps_in_the_register_of_overseas_entities/)>. This report contains an excellent analysis of many of the data gaps in the ECTEA 2022 framework, including their legal underpinning.

there was limited geographic diversity: 30.1% of the newly registered overseas entities were incorporated in the British Virgin Islands (BVI), 20% in Jersey and a further 12% in the Isle of Man, while nearly three-quarters were based in the BVI, Jersey, the Isle of Man, Guernsey or Luxembourg.<sup>30</sup> Overall, Advani and others estimate that as of August 2023, 71% of the 152,000 properties registered on the ROE either lacked information about their beneficial owners or had information that was publicly inaccessible.<sup>31</sup>

*(i) Registrable beneficial ownership*

ECTEA 2022's test for 'registrable beneficial ownership' draws on company law's PSC test, introduced in 2016 and underpinning the PSC register.<sup>32</sup> The Act has four analogous tests for a registrable beneficial owner: (i) whenever X (the beneficial owner) holds more than 25% of the company's shares; (ii) whenever X holds more than 25% of the company's voting rights in Y (the legal entity); (iii) where X has the right to appoint or remove a majority of the board of directors; or (iv) where X has significant influence or control by having the right to exercise, or actually exercises, significant influence or control over Y. An OE can state either that it has 'reasonable cause to believe that there is at least one registrable beneficial owner that it has not identified' or that 'the entity is not able to provide the required information about one or more of the registrable beneficial owners it has identified', or both these statements can apply.<sup>33</sup> Registration can be completed, and an OE ID allocated, even without this information on beneficial ownership (the loophole for companies and other entities). Overall, Advani and others estimate that 10% of OEs have not registered any beneficial owners, affecting around 11,000 properties.<sup>34</sup>

ECTEA 2022 has a fifth test that diverges from the PSC formulation if the OE is owned by trustees. Here, the condition for beneficial ownership is that a trustee can be a registrable beneficial owner if they meet the quantitative criteria in (i)–(iv) and have the right to or actually exercise significant control in relation to the trust.<sup>35</sup> Trust beneficiaries are not registrable beneficial owners and there is an option to supply only 'so much of that information [about the trust] as the overseas entity has been able to obtain'<sup>36</sup> (the trusts 'loophole'). Even if trust information is supplied to Companies House this is classed as 'protected'

<sup>30</sup> Rowena Mason, Pamela Duncan and Rob Davies, 'Thousands of Offshore Companies with UK Property Still Not Stating Real Owners', *The Guardian* (London, 30 January 2023) <[www.theguardian.com/uk-news/2023/jan/30/offshore-companies-with-uk-property-not-stating-beneficial-owners](https://www.theguardian.com/uk-news/2023/jan/30/offshore-companies-with-uk-property-not-stating-beneficial-owners)> accessed 25 August 2023.

<sup>31</sup> Advani and others (n 29).

<sup>32</sup> Small Business, Enterprise and Employment Act 2015, inserting a new Part 21A and Schedules 1A and 1B into the Companies Act 2006; the Register of People with Significant Control Regulations 2016. The PSC regime also applies to LLPs. The Limited Liability Partnerships (Register of People with Significant Control) Regulations 2016 (the LLP Regulations) apply Part 21A of and Schedules 1A and 1B to the Companies Act 2006 and the PSC Regulations to LLPs, with appropriate modifications.

<sup>33</sup> ECTEA 2022, s 4(1) and (2).

<sup>34</sup> Advani and others (n 29).

<sup>35</sup> ECTEA 2022, s 6.

<sup>36</sup> *ibid* s 4(3).

and not publicly available.<sup>37</sup> Many overseas trustees are avoiding transparency altogether, particularly if they are unregulated.<sup>38</sup> Advani and others suggest that for at least 3% of OEs acting as trustees, this information is not reported to Companies House, with no trust information reported in the UK for around 17,000 properties.<sup>39</sup>

(ii) *Effects of non-compliance*

Failing to update the register and delivering, or causing to be delivered, misleading, false or deceptive information, including attempting to hide behind a nominee,<sup>40</sup> all constitute a criminal offence under ECTEA 2022, punishable by a daily fine of up to £2500 or imprisonment for up to the permitted maximum, committed by both the entity and every officer of the entity.<sup>41</sup> There are also land law consequences since ECTEA 2022 updates the LRA 2002, requiring His Majesty's Land Registry (HMLR) to enter a restriction in the register for each 'qualifying estate' (a freehold or lease longer than seven years) owned by a registrable OE.<sup>42</sup> Until the restriction is complied with, dispositions of that qualifying estate cannot be completed by registration<sup>43</sup> and so cannot operate 'at law' under section 27(1) LRA 2002 unless they fall into one of a small number of exceptions or if registration is compelled by the Secretary of State.<sup>44</sup>

### 3. Beneficial Ownership

One of ECTEA 2022's most striking features is that it uses three different concepts of beneficial ownership without clearly distinguishing between them. The first echoes company law's PSC test, focusing on control. The second draws on trusts law, protecting privacy. The third draws on beneficial ownership as a consequence, arising through the land registration process if, after a lack of compliance, the registrable disposition cannot take effect 'at law'.<sup>45</sup> These three formulations differ from a fourth conception of beneficial ownership in land, discussed below.

<sup>37</sup> *ibid* s 22(c) ECTEA 2022 (These provisions may be changed by regulations following s23(2) and s24A ECTEA 2022, as implemented by ECCT 2023).

<sup>38</sup> Advani and others (n 29) distinguish between situations where the OE is owned by a regulated trust (and ECTEA 2022 applies), where the OE is owned by an unregulated trust (where it does not) and where the trust is owned by the OE (where the Trusts Registration Scheme regime, discussed below in s 4, applies). An unregulated trust generally has a private, rather than a professional, trustee. For the regulations applying to a regulated trustee, see the ROE(DPTS) Regulations 2022. Some of these definitions have been tightened by the ECCT Act 2023, ss 161 and 162.

<sup>39</sup> Advani and others (n 29).

<sup>40</sup> HM Government, *Factsheet: Beneficial Ownership* (November 2022) <[www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-beneficial-ownership](https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/factsheet-beneficial-ownership)> accessed 25 August 2023.

<sup>41</sup> ECTEA 2022, ss 8 and 15, in relation to updating. See also the Register of Overseas Entities (Penalties and Northern Ireland Dispositions) Regulations 2023, 2023/696; Companies House, *Register of Overseas Entities: Approach to Enforcement* (2023).

<sup>42</sup> LRA 2002, Schedule 4A, as inserted by ECTEA 2022, Schedule 3, Part 1. See HM Land Registry, *Practice Guide* 78 (n 27).

<sup>43</sup> The affected dispositions are those in s 27(2)(a), (b)(i) or (f), that is, a transfer, lease of more than seven years or legal charge.

<sup>44</sup> ECTEA 2022, s 34.

<sup>45</sup> LRA 2002, Schedule 4A, para 4(2)(b)–(f) and s 27(1).



### A. Beneficial Ownership as Control

The first, PSC-inspired, use of beneficial ownership distinguishes between an OE's registrable beneficial owner and someone who is merely a shareholder, since a registrable beneficial owner must either exceed the quantitative threshold or exercise 'significant influence or control'.<sup>46</sup> While the PSC rules do not themselves use the term 'beneficial ownership',<sup>47</sup> the phrase has become a widely used descriptor, not least due to the EU origins of these anti-money laundering rules.<sup>48</sup> Company disclosure is justified both as a deterrent to economic crime and as a *quid pro quo* for incorporation, including the benefit of limited liability for business owners, estimated to be worth around £9.6 billion per year.<sup>49</sup>

By drawing on PSC rules and introducing beneficial ownership as control, ECTEA 2022's definition of registrable beneficial ownership provides a way to avoid entry on the ROE by allocating shares beneath the 25% threshold. Even though these limits are supplemented by the fourth test of 'significant influence or control', which could include beneficial owners not caught by the threshold, 'significance' is interpreted as 'over and above the control you would expect a typical director or shareholder to exercise',<sup>50</sup> raising a high bar for inclusion. If there is no registrable beneficial owner (that is, no beneficial owner exceeds the thresholds or exercises 'significance or control'), the OE can still be entered on the ROE and receive an OE ID, despite the lack of declaration as to beneficial ownership (the loophole).<sup>51</sup> While the rationale for the PSC quantitative thresholds is conventionally explained as avoiding a register of shareholders,<sup>52</sup> thereby maintaining some privacy for companies, the rationale for this loophole is harder to justify. It presumably rests on the assumption that beneficial owners who cannot reasonably be found do not exercise control.

### B. Beneficial Ownership behind a Trust

The second use of beneficial ownership relies on trusts law. ECTEA 2022 does not specifically include beneficiaries under a trust in its definition of a registrable beneficial owner, focusing on the trust, the entity, instead. Further, even if

<sup>46</sup> ECTEA 2022, s 6.

<sup>47</sup> See eg the Small Business, Enterprise and Employment Act 2015; Register of People with Significant Control Regulations 2016, 339/2016.

<sup>48</sup> eg HM Government, *Factsheet: Beneficial Ownership* (updated 20 June 2023); Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

<sup>49</sup> Department of Business, Energy and Industrial Strategy, *Understanding the Reasons for Incorporation Final Report—Policy Summary* (2001) BEIS Research Paper No 2021/058. See also Charlotte Villiers, *Corporate Reporting and Company Law* (CUP 2006).

<sup>50</sup> ECTEA 2022, Explanatory Notes, para 27.

<sup>51</sup> ECTEA 2022, s 4(1) and (2).

<sup>52</sup> HL Deb 14 March 2022, vol 820, col 58. The Secretary of State can remove ECTEA 2022's quantitative limits by making regulations using the affirmative resolution procedure in Schedule 2, Part 6 ECTEA 2022.

information about a trust is provided by the trustees as registrable beneficial owners, this is categorised as ‘protected’ and is not generally publicly available.<sup>53</sup> The consequence of this exclusion is that ECTEA 2022 provides greater privacy to beneficial ownership held behind a trust than through other OEs. Though see the possibility to introduce regulations under s23(2) and s24A ECTEA 2022, as amended by ECCT Act 2023. This differentiation is conventionally justified by the use of trusts in family tax planning as well as the conscience-based relationship between trustee and beneficiary.<sup>54</sup>

These conventions supplement a further argument that there is a conceptual issue underlying trust registration, apparent when trusts are compared with other legal entities. It is said, for instance, that a company is a ‘legal person’ in the sense that it is capable of holding rights and being subject to legal duties.<sup>55</sup> While a company needs individuals to agree to its creation by subscribing to its articles of association, it is the very act of registration that brings a company into existence so that public registers are an inherent part of the creation and existence of a company where disclosure is the *quid pro quo* for incorporation.<sup>56</sup> A trust, by contrast, has no separate legal personality.<sup>57</sup> To say that a person, A, holds property rights ‘upon trust’ is merely to say that A is not holding the rights for themselves, but for another person or purpose. Without a distinct legal personality, there is no obvious ‘thing’ to be registered with a trust, which is better understood as a relationship. With beneficial ownership liminal and often discretionary, the most that registers can do is record a trustee’s duties or the beneficiary’s interest, both of which are frequently vague and ill-defined. The distinctive understanding of beneficial ownership behind a trust, runs the argument, renders the contours of any trusts register more ambiguous and contested than, say, a companies register.

However, the scale and extent of modern trust creation casts doubt on whether the historical emphasis on conscience and family tax planning should limit transparency, not least given the well-documented use of trusts to facilitate economic crime. For, while the risk of obfuscating ownership in UK-based trusts is considered to be low,<sup>58</sup> offshore trusts are often used in opaque ownership structures. As Mark Thompson, the Chief Operating Officer of the Serious Fraud Office, told the Joint Committee on the 2019 Bill:

<sup>53</sup> ECTEA 2022, s 23.

<sup>54</sup> Jim Brunnsden and Vanessa Houlder, ‘David Cameron’s EU Intervention on Trusts Set Up Tax Loophole’ (London, *Financial Times*, 6 April 2016); HC Deb 24 November 2022, vol 723, col 578. See also Lionel Smith, ‘Massively Discretionary Trusts’ (2017) 70 CLP 17.

<sup>55</sup> Susan Watson, ‘The Corporate Legal Person’ (2019) 19 JCLS 137.

<sup>56</sup> Companies Act 2006, s 7(1)(b). This principle of company law theory is still a matter of some scholarly debate, but the doctrinal provisions are increasingly emphatic. See Jonathan Hardman, ‘The Butterfly Effect: Theoretical Implications of an Apparently Minor Corporate Transparency Proposal’ (2021) 50(4) *Common Law World Review* 180; Charlotte Villiers, *Corporate Reporting and Company Law* (CUP 2006).

<sup>57</sup> *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2019] AC 27, [59(i)].

<sup>58</sup> HM Treasury and Home Office, *National Risk Assessment of Money Laundering and Terrorist Financing* 2020 (December 2020) 100.



[I]t is almost as if there is an offshore fraudsters' manual. I have seen the same structure a number of times. There is typically a discretionary trust at the top, incorporated outside the UK, and then any number of intermediate holding companies ... three, four or five, which could be multiple jurisdictions. Then there are asset-holding companies; for example, a flat in Mayfair is held by one company and a yacht elsewhere is held by another company, and any number of intermediary steps can be inserted in the end. That is what we are up against.<sup>59</sup>

Companies and trusts form part of a mixed economy of property ownership, often used in combination and frequently created 'off the shelf' with corporate trustees. The justification for a distinctive approach to a trust, based on the personal confidence imposed on a trustee with a consequent assumption of privacy, is difficult to justify in the context of ECTEA 2022.<sup>60</sup> We consider this point further in section 5.

### C. Beneficial Ownership as Consequence

ECTEA 2022 also uses beneficial ownership as a consequence of non-compliance. The Act provides that registration of disposals of a qualifying estate (a freehold or lease of more than seven years) cannot be completed until the OE complies with the transparency requirements.<sup>61</sup> Consequently, a non-compliant OE cannot complete a registrable disposition,<sup>62</sup> leaving it or any donee with the consequence that the disposition cannot take effect 'at law' until registration<sup>63</sup> (with both the entity and its directors also having committed a criminal offence).<sup>64</sup> This arrangement creates a form of beneficial ownership.<sup>65</sup>

This beneficial ownership may be temporary. ECTEA 2022's initial approach was that if an overseas entity is not registered or exempt at the time of disposition, it would not be possible to register that disposition subsequently.<sup>66</sup> However, the harshness of this provision, particularly in light of the lack of an event-driven updating duty, led to considerable concern. ECTEA 2022 was consequently revised to provide that although

an overseas entity that fails to comply with the [updating] duty ... is not to be treated as being a 'registered overseas entity' until it remedies the failure ... an overseas entity 'remedies' the failure when it delivers the [updating] statements and information.<sup>67</sup>

<sup>59</sup> Joint Select Committee on the Draft Registration of Overseas Entities Bill, *Corrected Oral Evidence: Draft Registration of Overseas Entities Bill* (HC 2009) Q48.

<sup>60</sup> ECTEA 2022, s 4(3).

<sup>61</sup> LRA 2002, Schedule 4A, para 2 (as revised by ECTEA 2022) provides that: 'No application may be made to register an overseas entity as the proprietor of a qualifying estate unless, at the time of the application, the entity (a) is a registered overseas entity, or (b) is an exempt overseas entity.'

<sup>62</sup> Under s 27(2)(a), (b)(i) or (f) LRA 2002, see LRA 2002, Schedule 4A, para 3(2), inserted by ECTEA 2022, Schedule 3, Part 1.

<sup>63</sup> Under s 27(1) LRA 2002.

<sup>64</sup> LRA 2002, Schedule 4A, para 6(1) and (2), as inserted by ECTEA 2022.

<sup>65</sup> While this is not explicitly stated, such an arrangement may create a trust relationship—for instance, if a registered proprietor transfers an estate to a non-compliant OE. The relationship between a non-compliant OE and a purchaser is likely to be more complex and will depend on the protections given to donees, discussed below.

<sup>66</sup> See the Explanatory Notes to the Economic Crime and Transparency Bill 2021–22, para 249.

<sup>67</sup> LRA 2002, Schedule 4A, para 8, brought into force by the Economic Crime (Transparency and Enforcement) Act 2022 (Commencement No. 3) Regulations 2022, SI 2022/876.

Subsequent compliance with the transparency requirements will now enable registration at a later date.

If a non-compliant OE lacks legal title, there may be implications for third parties, raising early fears of a ‘chilling effect’,<sup>68</sup> particularly since an OE must comply with both initial and updating requirements.<sup>69</sup> Such anxieties are limited by the fact that any potential purchaser, leaseholder or mortgagee will see the restriction entered against the title and so should satisfy themselves through due diligence. Should this fail, any innocent third party may themselves be able to seek redress if they have been affected by an overseas entity’s non-compliance, with the Secretary of State able to consent to the registration of a disposition that would otherwise be incapable of registration.<sup>70</sup>

### D. Dispositions

Beneficial ownership as a consequence is more complicated where a non-compliant OE sells to a purchaser who is covered by the rules for disponees. In land registration law, the consequences of section 27(1) LRA 2002 are modified, so that section 26 LRA 2002 provides that a disposition is valid even without registration, distinguishing validity from lawfulness and priority,<sup>71</sup> conferring a ‘title’ on the donee that cannot be ‘questioned’.<sup>72</sup> Echoing this approach, ECTEA 2022 provides that even if an OE has not complied with the transparency requirements and an offence is committed,<sup>73</sup> so that the disposition cannot be completed by registration, the disposition is valid.<sup>74</sup> According to the Explanatory Notes, this validity avoids ‘situations where a potentially void, voidable or unenforceable transfer causes significant disruption to a chain of conveyances’.<sup>75</sup> However,

<sup>68</sup> Letter from Rt Hon Harriet Harman MP to the Chair, 24 April 2019, Joint Committee on Human Rights—Written evidence (ROE0021) <<https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-registration-of-overseas-entities-bill-committee/draft-registration-of-overseas-entities-bill/written/100968.html>> accessed 25 August 2023.

<sup>69</sup> Joint Committee on the Draft Registration of Overseas Entities Bill (n 5). Ultimately, this is a compromise. The policy aim of inhibiting transactions with overseas entities that have not met the transparency requirements may also affect some transactions with overseas entities that have met their transparency requirements.

<sup>70</sup> The Secretary of State can intervene if they are satisfied that (i) ‘at the time of the disposition the person to whom it was made did not know, and could not reasonably have been expected to know, of the prohibition’ and (ii) ‘that in all the circumstances it would be unjust for the disposition not to be registered’: Schedule 4A, para 5 LRA 2002.

<sup>71</sup> An estate or charge should be taken to be ‘free from any limitation affecting the validity of a disposition’ (s 26(1) LRA 2002). One conventional example is of trustees disposing of an estate in contravention of a limitation on their powers. The disposition to the third party would be valid, but the beneficiaries could still bring an action against the ‘errant trustees’ to determine if the act was lawful: s 26(3) LRA 2002; *Wolstenholme & Cherry’s Annotated Land Registration Act 2002* (Sweet & Maxwell 2003) 51. LRA 2002, s 26(2)(a) is considered below.

<sup>72</sup> LRA 2002, s 26(3).

<sup>73</sup> *ibid* Schedule 4A, para 6(2).

<sup>74</sup> ‘Nothing in this paragraph affects the validity of a disposition made in breach of [the prohibition of registering if prohibited by a restriction]’, Schedule 4A, para 6(3) LRA 2002 as amended by Schedule 3, Part 1 ECTEA 2022.

<sup>75</sup> ECTEA 2022, Explanatory Notes, para 256. This form of words suggests a difference between a valid disposition and legal title, though the consequences of this distinction are not spelled out.

unlike the LRA 2002, ECTEA 2022 does not provide that a disponee will have a 'title' that cannot be 'questioned'<sup>76</sup> and its Explanatory Notes state that a non-compliant OE cannot acquire a legal title.<sup>77</sup>

What is the difference between a valid disposition (or a title that cannot be questioned) and one that operates 'at law' following registration? This issue arises in proposed changes to land registration legislation. Suggesting in 2018 that a valid disponee is 'entitled to be registered' and so has owner's powers under section 24 LRA 2002,<sup>78</sup> the Law Commission premised its call for legislative changes on the observation that common conveyancing and registration practices, particularly for purchase mortgages and sub-sales,<sup>79</sup> facilitate legal effects even before a disposition has been registered. It suggested that owner's powers, including enabling a disponee to 'enter into transfers, leases, charges and so forth',<sup>80</sup> should be legally acknowledged after a disposition but before registration.

While purchase mortgages have long been a conundrum conceptually and are considered unproblematic in practice,<sup>81</sup> with formulations worked out in case law,<sup>82</sup> sub-sales are more challenging. True sub-sales operate where a seller contracts to sell land to an intermediate buyer and, before completion of this top contract, the intermediate buyer contracts to sell the land to a sub-buyer by way of a sub-sale. Completion of the top and sub-sale contracts takes place more or less simultaneously, with completion of the disposition taking place using two transfers. While a doctrinal reading of the LRA 2002 would require each disposition to be registered, this is rarely the case in practice,<sup>83</sup> not least due to tax advantages for the sub-seller,<sup>84</sup> with intermediate buyers often reluctant to register their purchase (and price), which will then become public information. Avoiding registration, whether temporarily<sup>85</sup> or permanently,<sup>86</sup> enables intermediate purchasers to stay hidden 'beneath' the register, relying on section 26 LRA 2002 to confer a valid disposition to the sub-purchaser.<sup>87</sup>

Reflecting existing land registration practice, without commenting on whether an intermediate sale should be registered, the Law Commission, stating that their observations were clarificatory,<sup>88</sup> proposed extending the legislative definition of

<sup>76</sup> There is no provision in ECTEA 2022 equivalent to LRA 2002, s 26(3), though the provision will, presumably, still apply since the two sets of provisions are contained in the same amended legislation.

<sup>77</sup> In the absence of any excuse, 'an overseas entity will not be able to acquire legal title to qualifying estate without having complied with the registration and updating requirements under the Act at the time the application is made to HMLR', ECTEA 2022, Explanatory Notes, explaining LRA 2002, Schedule 4A, para 6(2). This is particularly complex since s 26(3) LRA 2002 is presumably still intended to apply.

<sup>78</sup> The Law Commission's view is that this is already the case, Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.16.

<sup>79</sup> Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.33

<sup>80</sup> *ibid* para 5.168.

<sup>81</sup> *ibid* per Council of Mortgage Lenders.

<sup>82</sup> Notably *Abbey National Building Society v Cann* [1990] UKHL 3.

<sup>83</sup> Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.38.

<sup>84</sup> HMRC, *Stamp Duty Land Tax Manual* <[www.gov.uk/hmrc-internal-manuals/stamp-duty-land-tax-manual/sdlm21580](http://www.gov.uk/hmrc-internal-manuals/stamp-duty-land-tax-manual/sdlm21580)>.

<sup>85</sup> Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.134.

<sup>86</sup> *ibid*, para 5.38.

<sup>87</sup> Even when a sub-buyer registers their disposition, an unregistered intermediate buyer's details are unlikely to be on the register, creating an information gap.

<sup>88</sup> Law Commission, 'Updating the Land Registration Act 2002: A Consultation Paper' (2016) Consultation Paper No 227, para 5.19; Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.76.

who can formally exercise owner's powers under section 24 LRA 2002 to include disponees. The Commission suggested that if a purchaser has a valid disposition in their favour, then there is an 'entitlement to be registered' (under section 24(2) LRA 2002) so that the donee should be able to benefit from owner's powers, defined by section 23 as 'a disposition of any kind permitted by the general law'.<sup>89</sup> While these proposals were approved by the government in 2021,<sup>90</sup> they raise questions about the nature of owner's powers, which the LRA 2002 defines as the ability to make a disposition.<sup>91</sup> In particular, as the law stands, even if a donee can make the disposition, they are unlikely to be able to serve a notice to quit to any tenants or exercise powers of sale under a mortgage.<sup>92</sup>

The Law Commission's formulation would provide that owner's powers follow a disposition even in the case of a restriction, despite the exception in section 26(2)(a) LRA 2002, if there is a 'limitation' reflected by an entry in the register.<sup>93</sup> This conclusion is not uniformly shared by all practitioners<sup>94</sup> or scholars, who have suggested that a restriction is significant not only in relation to registration, but also has a 'modified significance' in relation to the disposition.<sup>95</sup> Nevertheless, the Law Commission concluded that it 'stand[s] by [its] proposition ... [that a] person need not demonstrate compliance with a restriction at the time of disposition in order to be "entitled to be registered as the proprietor"' so that a donee would be entitled to owner's powers even if the restriction has not been complied with.<sup>96</sup> A restriction, said the Law Commission, is relevant at the time of registration, not at the time of disposition.<sup>97</sup>

<sup>89</sup> Law Commission, *Updating the Land Registration Act 2002* (n 4) paras 5.8, 5.85 and 5.86.

<sup>90</sup> Department for Business, Energy and Industrial Strategy, *Law Commission Review of The Land Registration Act 2002: Government Full Response* (2021).

<sup>91</sup> LRA 2002, s 23(1)(a); see also Law Com, *ibid*, paras 5.8, 5.11 and 5.69: 'these powers of disposition include the ability to make registrable dispositions, dispositions which create legal interests but cannot be registered (such as short leases), and equitable interests' (5.85).

<sup>92</sup> *Stodday Land Ltd v Pye* [2016] EWHC 2454; *Skelwith Leisure v Armstrong* [2015] EWHC 2830. The Law Commission notes the suggestion in *Stodday* that one way to avoid this problem in relation to a notice to quit would be for the disponent to act as the donee's agent during the registration gap: Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.182. This could provide a solution in land law, but would raise broader questions of public policy (alongside any criminal penalties that would apply).

<sup>93</sup> The Commission's view was that: 'a person with a disposition in his or her favour need not establish anything further in order to be entitled to exercise owner's powers. In particular, such a person need not establish that he or she has complied with any of the formalities necessary for a disposition or charge to be registered, such as showing that a restriction could be complied with', Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.16. Ultimately, the restriction would have to be lifted to allow for registration, *D. Cavill (et al) Ruoff & Roper, The Law of Registered Conveyancing*, (Sweet & Maxwell) [44.002].

<sup>94</sup> The Chancery Bar Association and HM Land Registry noted concerns about restrictions in their responses to the Law Commission, suggesting that, if a restriction requires the consent of a person and that consent is not forthcoming, it would be odd to say that the donee has owner's powers, and undesirable for owner's powers to mean that a subsequent disposition or grant must be registered. Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.39. Acknowledging a difference of views, however, the Law Commission confirmed that it 'stand[s] by [the] proposition ... [that a] person need not demonstrate compliance with a restriction at the time of disposition in order to be "entitled to be registered as the proprietor"'.

<sup>95</sup> Some scholars have noted that the promise as to the validity of a disposition under s 26 LRA 2002 should not operate where a restriction is in place even where the disposition is not registered. Stephen Watterson and Amy Goymour, 'A Tale of Three Promises: (3) The Empowerment Promise' in Amy Goymour, Stephen Watterson and Martin Dixon (eds), *New Perspectives on Land Registration* (Hart Publishing 2018) 392–3.

<sup>96</sup> Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.99.

<sup>97</sup> *ibid* 5.103, relying on ss 40 and 41 LRA 2002.

While ECTEA 2022 does not mention owner's powers, and the concept is not explicitly used in Scotland or Northern Ireland, the drafting of the provision confirming the validity of a disposition without the LRA 2002's exception of a limitation 'reflected on the register'<sup>98</sup> would appear to confirm this line of thinking: a non-compliant OE's disposition is valid even without complying with the restriction<sup>99</sup> and they would, if the Law Commission's clarificatory changes are introduced, have owner's powers.<sup>100</sup> In the context of ECTEA 2022, this is despite the government's 2018 statement that a donee from a non-compliant OE would not acquire 'owner's powers to further dispose of the property'.<sup>101</sup>

The consequence of a non-compliant OE being able to grant a valid disposition, including through unregistered sub-sales, raises questions of both principle and practice about possible avoidance under ECTEA 2022. If registered proprietorship cannot be conferred until the restriction is lifted, owner's powers may continue beneath, possibly enabling avoidance by enabling transfers, leases or charges before registration.<sup>102</sup> ECTEA 2022 raises the possibility of extended registration gaps where dispositions may be valid but registration is pending, with no time limit to register a disposition.<sup>103</sup>

Given ECTEA 2022's use of restrictions, which should be evident during due diligence, as well as the Secretary of State's ability to consent to the registration of an otherwise non-compliant disposition, did ECTEA 2022 need to assert the validity of dispositions from a non-compliant OE?<sup>104</sup> The provision raises considerable potential for fraud and avoidance, including through sub-sales. Certainly, the approach is consistent with the Law Commission's view that a person with a disposition in their favour need not establish anything further to exercise owner's powers, including any of the formalities necessary for a registrable disposition to be registered, such as compliance with a restriction or demonstrating that taxes have been paid. The Commission considered compliance with the 'pre-conditions of registration' to be 'counter-productive and unnecessary', risking making 'owner's powers for persons entitled to be registered as the proprietor meaningless'.<sup>105</sup> Their interpretation of the acquisition of owner's powers, simply as a consequence of a valid disposition, rests on this analysis, yet it raises many questions in the context of ECTEA 2022. The consequence is that protection for donees, particularly when coupled with the Law Commission's proposals,

<sup>98</sup> LRA 2002, s 26(2)(a).

<sup>99</sup> LRA 2002, Schedule 4A, para 6(3).

<sup>100</sup> This might already follow from existing case law but is currently an open point.

<sup>101</sup> Department for Business, Energy and Industrial Strategy *Overview Document: Draft Registration of Overseas Entities Bill* (2018) 17. See also Department for Business, Energy and Industrial Strategy, *A Register of Beneficial Owners of Overseas Companies and Other Legal Entities: The Government Response to the Call for Evidence* (2018) 8: 'The Government therefore intends to allow beneficial interest but not legal title to pass to an overseas legal entity that does not have a valid registration number at completion or settlement.'

<sup>102</sup> Though there may be limitations, see *Stodday* (n 92); *Skelwith* (n 92).

<sup>103</sup> For unregistered land, cf s 6 LRA 2002. The Law Commission suggested that to introduce a time limit for registrable dispositions would risk land becoming 'sterilised', even with the possibility of 'reviving' an application, Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.109.

<sup>104</sup> ECTEA 2022, Schedule 4A, para 6(3).

<sup>105</sup> Law Commission, *Updating the Land Registration Act 2002* (n 4) para 5.16.

means that ECTEA 2022 bites at registration but not disposition even though registration has long been considered more than a ‘bolt on’ in land law.<sup>106</sup> As these debates show, beneficial ownership as consequence is a remarkably complex concept.

### *E. Criminal and Land Law*

A second illustration of the complexity inherent in beneficial ownership as consequence arises in the interaction between the criminal and land law consequences of non-compliance with ECTEA 2022. Due diligence by prospective purchasers or mortgagees should reveal the restriction imposed, identifying the OE’s need to comply with transparency requirements. But what would happen if these safeguards were insufficient—if, for instance, a purchaser acquired a property where the OE form had been dishonestly completed or updated and this were only belatedly discovered? Registrable dispositions in breach of the restrictions are an offence punishable by up to five years’ imprisonment and/or a fine,<sup>107</sup> yet if the offence goes undetected, with purchase monies paid to the OE who has acquired their OE ID, the restriction would be lifted and the disposition registered, with the purchaser entered as the new registered proprietor.

If the dishonesty is discovered, mistakes in registration are to be judged at the time the entry is made on the register.<sup>108</sup> As there had been apparent compliance with ECTEA 2022’s requirements before purchase, the restriction should have been lifted and the registration of the disposition would not be a mistake at the time of registration.<sup>109</sup> There would subsequently—when the dishonesty was discovered—be a voidable mistake, but it would not be void from the outset<sup>110</sup> (and it would not necessarily be in the registered proprietor’s interest to disclose any concerns).

The purchaser’s disposition would be valid even if an offence were committed.<sup>111</sup> If they are in possession, rectification is unlikely without consent.<sup>112</sup> If the purchaser is not in possession and there is fraud but no forgery,<sup>113</sup> the situation is likely to be more complex, raising questions about possible retroactive beneficial ownership. While the broad approach to criminality in land registration cases remains an open question of principle,<sup>114</sup> the rectification and alteration

<sup>106</sup> Nicholas Hopkins, ‘Priorities and Sale and Lease Back: A Wrong Question, Much Ado about Nothing and a Story of Tails and Dogs’ (2015) 3 *Conveyancer and Property Lawyer* 245, 252.

<sup>107</sup> ECTEA 2022, Schedule 4A, paras 6(2) and (7).

<sup>108</sup> If, in a non-criminal scenario, a disposition by or to a non-compliant OE is registered despite the restriction, that is, there is a mistake by HMLR, an indemnity might be available, for example, to a donee or third party who has suffered loss under Schedules 4 and 8 LRA 2002.

<sup>109</sup> *NRAM v Evans* [2017] EWCA Civ 1013; *Antoine v Barclays Bank Plc* [2018] EWHC 395 (Ch).

<sup>110</sup> Whether an entry in the Register is a ‘mistake’ must be judged at the time that the entry is made (*NRAM v Evans* (n 109) [52]), the registration is valid ‘until rescinded’ (*Antoine* (n 109) [39]).

<sup>111</sup> ECTEA 2022, Schedule 4A, para 6(3).

<sup>112</sup> LRA 2002, Schedule 4(3), unless there was either fraud or a lack of proper care, or it is for some other reason unjust not to alter the register.

<sup>113</sup> Land Registration Act 2002, Schedule 8, para 1(2)(b).

<sup>114</sup> See eg Lady Justice Eleanor King and Lord Justice Peter Jackson in *Nasrullah v Rashid* [2018] EWCA Civ 2685 [83].



framework has been established to regulate disputes between individual parties, focusing particularly on priority, rather than addressing the relationship between a registered proprietor and the state. While the vendor's dishonest form-filling should have been discovered by Companies House, HMLR would be expected to take the documents at face value. Such an approach places enormous emphasis on the resources required by Companies House to check the validity of the ROE entries.

What would happen if a purchaser, who did not require an OE ID, knew of the dishonesty at the time of registration and they then sold on to an innocent third party (creating an ABC scenario, where neither A nor B is an innocent party)? Would the registration by C (the innocent third party) resolve the subsequently discovered lack of compliance with ECTEA 2022? In *Patel v Mirza*, Lord Toulson laid out the touchstone that 'the law should be coherent and not self-defeating, condoning illegality by giving with the left-hand what it takes with the right hand', suggesting that criminal consequences should not necessarily be relevant to civil disputes.<sup>115</sup> In the context of adverse possession, courts have repeatedly declined to accede to a defence of illegality,<sup>116</sup> primarily by relying on statutory construction.<sup>117</sup> Unlike adverse possession legislation, however, ECTEA 2022 has explicitly considered these issues in relation to disposition,<sup>118</sup> albeit not in relation to registration.

We can consider possible effects through the example of a sub-sale. If A fraudulently complies with ECTEA 2022's transparency requirements, receiving an OE ID, which B, an intermediate buyer, knows to be fraudulent, A can transfer the estate to B, and B can transfer to C, without—under current land registration practices—B being registered as proprietor. When C registers the disposition, they become the registered proprietor and the restriction would be lifted as A has (albeit fraudulently) complied with ECTEA 2022's transparency requirements. While A could sell to C directly, using B as an intermediary may make it harder to prove B's knowledge of the fraud, particularly if either A, B or both have by then dissolved themselves.<sup>119</sup> Such a scenario may become even harder to unravel if further sub-sales exist creating a chain including D, E and F, where the validity of each disposition is protected, justified as preventing 'significant disruption to a chain of conveyances'.<sup>120</sup>

Of course, given the ability to declare nil beneficial ownership through the loopholes,<sup>121</sup> the risk of fraud is limited, though it remains plausible. While beneficial ownership as consequence might collide with other forms of equitable

<sup>115</sup> It is not clear that any action here would be a 'civil dispute', raising a broader question of who would seek to avoid the disposition, since, unlike many land registration fraud cases, it is the disclosure framework that is (effectively) being defrauded, rather than an innocent third party.

<sup>116</sup> *Best v Chief Land Registrar* [2015] EWCA Civ 17.

<sup>117</sup> *Nasrullah* (n 114) [74].

<sup>118</sup> LRA 2002, Schedule 4A, paras 6(2) and (3).

<sup>119</sup> As it would be unlikely to be in C's interest to raise any concerns, this would most likely be a consequence of a criminal investigation.

<sup>120</sup> ECTEA 2022, Explanatory Notes, para 256. This form of words suggests a difference between a valid disposition and legal title, though the consequences of this distinction are not spelled out.

<sup>121</sup> ECTEA 2022, s 4(1)–(3).

interest, it is possible that once the restriction has been lifted and a new proprietor has been registered, the transaction will not be disturbed. If this is the case, then the combined effect of the LRA 2002 provisions, common law rules and ECTEA 2022 appears to enable property to be 'laundered', particularly through the use of sub-sales. The best strategy for an OE concerned about disclosure may be to comply, or appear to comply, with the transparency requirements and then sell the estate, perhaps through one or more intermediaries. At a policy level, if the objective is to disincentivise opaque ownership of land, this strategy may be effective, bringing properties back into more transparent ownership. From a legal point of view, however, the approach is complex.

### F. Beneficial Ownership of Land

Untangling these different conceptions of beneficial ownership raises the question how we understand beneficial ownership in land. While ownership has been widely theorised,<sup>122</sup> beneficial ownership is less studied by philosophers, proving of greater interest to lawyers.<sup>123</sup> ECTEA 2022 has used concepts of beneficial ownership as control, behind a trust and as consequence, and does not engage closely with beneficial ownership in land law, where beneficiaries are not distinguished by the size or nature of their interest. Here, any beneficial owner 'with an interest in possession' has a statutory right to occupy,<sup>124</sup> while beneficiaries also have a common law right to occupation pending sale.<sup>125</sup> The nature of beneficial ownership in land is not settled, with some scholars rejecting the use of the term beneficial 'ownership', suggesting that it more accurate to understand beneficial interests as 'rights against rights',<sup>126</sup> given the second-order nature of many rights in equity.<sup>127</sup> They propose that it is more accurate to talk of 'trust rights' rather than beneficial or equitable 'ownership', although these debates

<sup>122</sup> The literature here is extensive; see eg Stephen R Munzer, *A Theory of Property* (CUP 1990); JW Harris, *Property and Justice* (OUP 2002); Jeremy Waldron, Property and Ownership, *The Stanford Encyclopedia of Philosophy* (2004); Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (OUP 2003); Gregory S Alexander and Eduardo M Penalver, *Property and Community* (OUP, 2010); Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Routledge 2019); James E Penner, *Property Rights: A Re-Examination* (OUP 2020); Luke Rostill, *Possession, Relative Title, and Ownership in English Law* (OUP 2021).

<sup>123</sup> See Harris (n 122) 1996. Rudden noted that 'the split between legal and equitable "ownership" seems to reflect that between things as thing and things as wealth for, as we have just seen, the trustee has no lawful access to the latter', Bernard Rudden, 'Things as Thing and Things as Wealth' (1994) 14 OJLS 81, 89. See also, Lionel Smith, 'Trust and Patrimony' (2008) 38 *Revue General de Droit* 379; Sinead Agnew and Ben McFarlane, 'The Paradox of the Equitable Proprietary Claim' in Ben McFarlane and Sinead Agnew (eds), *Modern Studies in Property Law* (Hart Publishing 2019) 303. For a different use of the concept, see Kevin Gray, 'Equitable Property' (1994) 47 CLP 157, 213, where he suggests that equitable property 'engrafts the conscience of community' onto property relations.

<sup>124</sup> Trusts of Land and Trustees Act (TLATA) 1996, s 12.

<sup>125</sup> *Bull v Bull* [1955] 1 QB 234, approved in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487. On the difference between occupation and possession, see *Ansa Logistics v Towerbeg Ltd* [2012] EWHC 3651. For a definition of possession, see *Clarence House Ltd v National Westminster Bank Plc* [2010] 1 WLR 1216, 1230.

<sup>126</sup> There is a growing body of scholarship here, see particularly Lionel Smith, 'Trust and Patrimony' (n 123); 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) LQR 129; Agnew and McFarlane (n 123); Ben McFarlane and Robert Stevens, 'What's Special about Equity? Rights about Rights' in Dennis Klimchuk, Iris Samet and Henry E Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020) 191.

<sup>127</sup> Henry Smith, 'Fusing the Equitable Function in Private Law' in K Barker and others (eds), *Private Law in the 21st Century* (Hart Publishing 2017) 173.

still need to be set against the statutory land law framework. While space limits a fuller discussion, these discussions are clearly complex, and do not fit neatly into ECTEA 2022's assumptions. They echo the general point, however, that conceptions of beneficial ownership in land draw neither on quantitative thresholds nor on significance of control,<sup>128</sup> the formulation underpinning ECTEA 2022's test for registrable beneficial ownership.

One response to this argument that beneficial ownership of land is distinctive, and that ECTEA 2022 should have drawn on an understanding of beneficial ownership in land without quantitative limits and 'nil returns', rather than on a concept of beneficial ownership as control, is that ECTEA 2022 is concerned with land-owning OEs, where beneficial ownership as control is appropriate, rather than focusing on land owning itself. However, the government has repeatedly suggested that the legislation addresses overseas land holding rather than just the entities through which the land is held.<sup>129</sup> ECTEA 2022's quantitative thresholds and loopholes were not needed for the definition of registrable beneficial ownership and trust beneficiaries could have been categorised as beneficial owners under ECTEA 2022 as they are in money laundering legislation.<sup>130</sup> These were policy choices.

## 4. Transparency

### A. Land and Companies

ECTEA 2022 can be seen as part of a broader movement to increase transparency about land ownership, building on company law's growing transparency under PSC rules. Land registry titles have been publicly available since 1990,<sup>131</sup> before which only persons interested under a writ or order for enforcing a judgment against registered land or a registered charge could apply to inspect the then private land register.<sup>132</sup> With around 88% of all land ownership in England and Wales now registered and an aim to achieve comprehensive registration by 2030,<sup>133</sup> ownership without registration will become largely impossible, with ownership information publicly available from HMLR's website for a small fee. Company land ownership has similarly been publicly available since 2017, with policy proposals increasingly acknowledging the public interest in opening up information on land ownership, including rights of pre-emption, options and estate contracts,<sup>134</sup> to inform local governments and communities, as well

<sup>128</sup> These questions could be raised at a more theoretical level, eg an owner's agenda-setting ability, see Larissa Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 UTLJ 275. Control may also be relevant in the distinction between occupation and possession, see William Swadling, 'Opening the Numerus Clausus' (2000) 116 LQJ 354; *Ansa Logistics v Towerbeg Ltd* [2012] EWHC 3651. However, these are not debates that ECTEA 2022's drafters have engaged with, leaving these broader questions of land law to one side.

<sup>129</sup> For an overview of such statements, see Advani and others (n 29).

<sup>130</sup> Money Laundering Regulations, reg 6. This formulation is also used in the Levelling Up and Regeneration Bill's transparency provisions in Part 11.

<sup>131</sup> The Land Registration (Open Register) Rules 1990/1362.

<sup>132</sup> LRA 1925, ss 59(2) and 112, repealed by LRA 2002.

<sup>133</sup> HMLR, *Annual Report and Accounts* (2022–23, HC 1456).

<sup>134</sup> Ministry of Levelling Up, Housing and Communities, *Transparency and Competition, A Call for Evidence on Data on Land Control* (2020).

as to facilitate development.<sup>135</sup> Greater transparency is also introduced by the Levelling-Up and Regeneration Act 2023, aiming to meet commitments made in the 2017 Housing White Paper as well as to comply with ECTEA 2022 and for ‘wider national security and macroeconomic purposes’.<sup>136</sup>

### B. Trusts

Transparency provisions have also been introduced for trusts, although this information is only publicly available in the case of a ‘legitimate interest’,<sup>137</sup> which Advani and others consider to be ‘virtually impossible in practice’.<sup>138</sup> The Trust Registration Service (TRS) was introduced in light of the 2017 Money Laundering Regulations’ requirement for His Majesty’s Revenue and Customs (HMRC) to maintain a ‘register of beneficial ownership’ and came into operation that year.<sup>139</sup> Save for some excepted categories, all UK-based trusts, and non-resident trusts that own land or become liable for UK taxes, must now be registered on the TRS. For non-resident trusts, this applies only to land acquired since 6 October 2020.<sup>140</sup> The register provides an online service where trustees can enter the details of their trusts,<sup>141</sup> requiring information about the trust, including the names and details of the trustees and settlor, as well as details on the assets held by the trust and the names and details of any beneficiary of the trust. Where there is no specific beneficiary, the trustees have to give details of the ‘class’ of beneficiaries. Under the TRS, a failure to register a trust can result in a penalty of up to £5000 if HMRC considers the failure to be deliberate.<sup>142</sup>

Individuals have long used trusts to obscure their ownership of assets, often to avoid tax. In a number of celebrated cases, HMRC unsuccessfully argued that such trusts should be ‘transparent’, so that the potential beneficiaries are treated as the ‘true owners’ of the fund (and, hence, liable to various taxes on its value).<sup>143</sup> When these attempts failed, HMRC’s response was to target other parties involved in the trust, namely the trustees<sup>144</sup> and, in some cases, the settlor.<sup>145</sup> It is not clear whether the same tactic can be used to combat money laundering, where the aim is to promote transparency rather than to raise tax. Indeed, the trust registers already require information about the settlor and trustees; the main gap which the ROE could have filled is information on the beneficial owner.<sup>146</sup>

<sup>135</sup> Levelling Up and Regeneration Bill 2022–23, Part 9.

<sup>136</sup> *ibid* Explanatory Notes, para 1012. See Part 11 of the Bill.

<sup>137</sup> HMRC Internal Manual, *Trusts Registration Service Manual*, TRSM 60020.

<sup>138</sup> Advani and others (n 29) 21.

<sup>139</sup> Money Laundering Regulations 2017, reg 45.

<sup>140</sup> HMRC Internal Manual (n 137) TRSM10030.

<sup>141</sup> <[www.gov.uk/guidance/register-a-trust-as-a-trustee](https://www.gov.uk/guidance/register-a-trust-as-a-trustee)>. The Money Laundering Regulations 2017 were introduced pursuant to the EU’s 4th Money Laundering Directive ((EU) 2015/849), designed to harmonise the EU’s defence against money laundering activities.

<sup>142</sup> <[www.gov.uk/hmrc-internal-manuals/trust-registration-service-manual/trsm80020](https://www.gov.uk/hmrc-internal-manuals/trust-registration-service-manual/trsm80020)>.

<sup>143</sup> *Re Gartside’s Will Trusts* [1968] AC 553.

<sup>144</sup> In the context of inheritance tax, the main responsibility for tax lies with the trustees: *Inheritance Tax Act 1984*, s 201(1).

<sup>145</sup> *eg* settlors can be liable for income tax and capital gains tax where the trust is settlor-interested. See *Income Tax (Trading and Other Income) Act 2005*, s 624.

<sup>146</sup> This would be particularly useful since ECTEA 2022 is backdated to 1999 in England, while the TRS applies only to land purchased since 6 October 2020.

A more recent tactic adopted by HMRC, which may be instructive for future reforms of the new Economic Crime Act, is the targeting of law firms that promote and facilitate dubious schemes. This is the policy behind the ‘Disclosure of Tax Avoidance Schemes’ (DOTAS) rules.<sup>147</sup> Instead of targeting specific taxpayers, the DOTAS rules impose extensive obligations on law firms that promote schemes designed to avoid tax (often involving the use of trusts). The rules require that law firms caught by the rules give early disclosure of the details of the tax schemes that they are promoting (irrespective of whether the schemes are used by individual taxpayers). The early disclosure allows HMRC to prepare for any action against taxpayers, and also creates an inhibiting effect on the law firms. The basic idea is that if legal firms were to act more responsibly, then there may not be the same proliferation in abusive tax planning schemes, highlighting concerns about enabling behaviours. There are lessons here for the ROE.

### C. Public Accessibility

These initiatives for companies, land and trusts illustrate how ownership data has increasingly been released. One consistent question has been whether such information should be provided only to public authorities or whether it should be publicly available and, if so, to what extent. Under ECTEA 2022, much of a registrable beneficial owner’s data is ‘protected’, making it unavailable for public inspection (including date of birth and residential address, as well as information about a trust).<sup>148</sup>

In December 2022, the issue of transparency was litigated in *Luxembourg Business Registers*,<sup>149</sup> where the European Court of Justice (ECJ) considered changes introduced by the 2018 5th Money Laundering Directive, which required Member States to ensure that information on beneficial ownership is accessible ‘in all cases’ to any member of the general public, who should be able to access ‘at least the name, the month and year of birth and the country of residence and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held’.<sup>150</sup> The ECJ held this provision to be invalid, concluding that it breached article 7 (the right to respect for private and family life, home and communications) as well as article 8 (the right to the protection of personal data) of the EU Charter on Human Rights. While the bulk of the judgment concerned particular aspects of private information—including an owner’s date and place of birth—the ECJ’s conclusion was that the 5th Directive’s provision on public access was invalid.

<sup>147</sup> The legislation behind DOTAS is complex, but the basic scheme was introduced by Part 7 of the Finance Act 2004.

<sup>148</sup> ECTEA 2022, s 22. In contrast to the TRS, under ECTEA 2022 information about a trust is not available even to those who can demonstrate a ‘legitimate interest’.

<sup>149</sup> Case C-37/20 *Luxembourg Business Registers*.

<sup>150</sup> Directive (EU) 2018/843, art 1(15)(c).

While Brexit means that the UK is not bound by this decision, some have set out arguments in favour of ‘competitive advantage in Europe’,<sup>151</sup> raising concern that UK transparency rules create ‘a competitive disadvantage’<sup>152</sup> or inhibit a ‘level playing field’,<sup>153</sup> to justify ending public access to registers in the UK, as well as suggesting that challenges based on privacy rights might also follow in the UK.<sup>154</sup> However, the personal data made publicly available by the Luxembourg Registers was more extensive than that made available by ECTEA 2022, including, for instance, place of birth. Since names and service addresses are the bare minimum required for an ownership register to function, it is highly unlikely that the ROE, constructed on public policy grounds, infringes any privacy provisions.

### 5. Illuminating Structures for Land Ownership

To understand how transparency rules currently affect beneficial ownership of land—as well as the continuing limitations and possible reforms outlined in Section 6—it is useful to understand the range of structures used to hold UK property. The different permutations, which can rely upon a mixture of trusts and companies, engage different registers: the PSC Register, the TRS and now ECTEA 2022’s ROE. These registers have different disclosure requirements, with the PSC Register mostly public, the TRS subject to a ‘legitimate interest’ requirement and the ROE mostly public apart from the loopholes and details relating to trusts.

To explore these structural options for land ownership, we will start with the simple case where legal title to the property is held directly by trustees (Figure 1).

In this example, A, as the freeholder of the land, must be registered on the Land Registry as owner, which is publicly searchable. Whilst a restriction against A’s title may indicate that A holds the title as a trustee, this is not required. However, as A directly owns UK property on trust, then, regardless of whether A is resident in the UK or overseas, A must register the trust on the TRS, and thereby disclose that B is the beneficial owner, though for non-resident trustees this applies only to land acquired since 6 October 2020.<sup>155</sup> As this registration falls solely within the TRS regime, disclosure of B’s beneficial ownership is not a prerequisite to A acquiring legal title to the land, although A will commit an offence if they fail to register.

Different consequences will apply where the parties own the property through a company rather than a trust. If the company is registered overseas, it will trigger

<sup>151</sup> Baker McKenzie, ‘International: General Public’s Access to Information on Beneficial Ownership Deemed Invalid by the CJEU’ (5 December 2022) <<https://insightplus.bakermckenzie.com/bm/tax/international-general-publics-access-to-information-on-beneficial-ownership-deemed-invalid-by-the-cjeu#:~:text=The%20beneficial%20owner%20of%20a,CJEU%20for%20a%20preliminary%20ruling>>.

<sup>152</sup> Clyde & Co, ‘Christmas Comes Early in the EU for Kleptocrats, Terrorists and Money Launderers, 1 December 2022 <[www.clydeco.com/en/insights/2022/12/christmas-comes-early-in-the-eu-for-kleptocrats-te](http://www.clydeco.com/en/insights/2022/12/christmas-comes-early-in-the-eu-for-kleptocrats-te)>.

<sup>153</sup> Macfarlanes, ‘The Future of Corporate Transparency’ (undated) <[www.macfarlanes.com/what-we-think/in-depth/2022/the-future-of-corporate-transparency/](http://www.macfarlanes.com/what-we-think/in-depth/2022/the-future-of-corporate-transparency/)>.

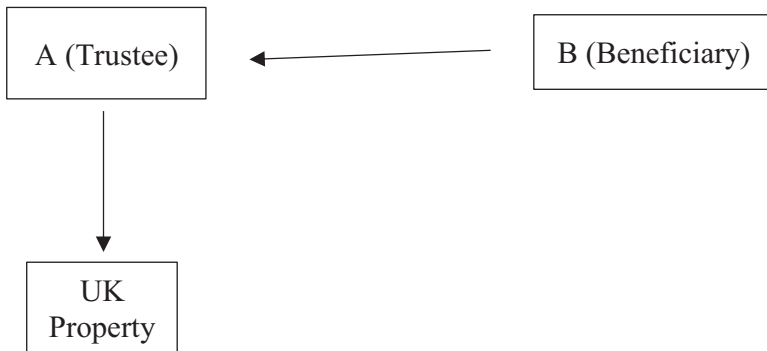
<sup>154</sup> Though this would raise different constitutional separation of powers issues in the UK context.

<sup>155</sup> The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, reg 45(12)–(13).

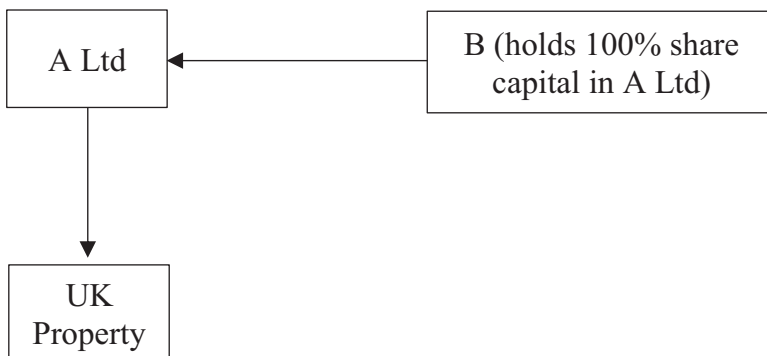


registration requirements on the ROE.<sup>156</sup> Let us say that all of the share capital in a company, A Ltd, which is incorporated in the Cayman Islands, is held by an individual, B. If A Ltd wishes to acquire UK property, it must apply to be registered on the ROE, disclosing B's details (their name, date of birth and service address). Once A Ltd acquires UK property, a search of the ROE will disclose the structure in Figure 2.

The structure in Figure 2 echoes that in Figure 1, as in both cases B is the party that derives the economic benefit from the property and, in all likelihood, is the party exercising de facto control over the land. However, as Figure 2 uses a company rather than a trust, the effect of the ROE is that B's beneficial ownership is now disclosable and publicly searchable on a register as they exceed the quantitative threshold and so have 'control'.<sup>157</sup> Early data from the ROE suggested that about 5800 of the beneficial owners registered so far—about one-third—are



**Figure 1.** Beneficial ownership held through a trust.



**Figure 2.** Beneficial ownership held through a company.

<sup>156</sup> If the company is registered in the UK, similar rules will apply under the PSC register.

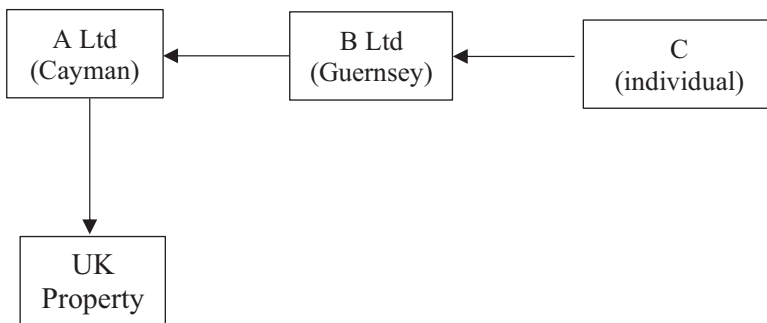
<sup>157</sup> ECTEA 2022, Schedule 2.

named as companies rather than individuals.<sup>158</sup> If, unlike B, the beneficial owners of these companies do not meet the quantitative thresholds of significance and control, then their beneficial ownership will stay opaque.

If a company uses a nominee director, then ECTEA 2022 ‘effectively “looks through” any nominee arrangement’,<sup>159</sup> so that the individual at the end of the ownership chain can be identified. This is the consequence of the thresholds (tests (i)—(iii)), which include both ‘direct’ and ‘indirect’ ownership, so that where an individual owns an overseas entity through a series of holding companies, the legislation provides that shares held by a person as nominee for another should be treated as held by the other (and not by the nominee).<sup>160</sup> This process will also be enhanced in relation to directors, whether corporate or human under the ECCT Act 2023, requiring individual verification for all new and existing registered company directors, people with significant control and those delivering documents to the Registrar.<sup>161</sup>

Nevertheless, as presently drafted, the rules often fail to ensure that beneficial ownership is disclosed. It is possible to limit transparency by using multiple corporate vehicles. Rather than a single individual owning the share capital in A Ltd, the shares might be held by another company, B Ltd, which is incorporated in, say, Guernsey. The share capital in B Ltd might itself be vested in another holding company, C Ltd, registered in, say, Cyprus (Figure 3).

Although this full ownership chain should be disclosed by A Ltd on its registration on the ROE, if A Ltd is not aware of its ultimate beneficial owner, it has the option of returning incomplete information on registration (the loophole).<sup>162</sup> This effectively switches the onus to the relevant public authority to trace the full ownership



**Figure 3.** Beneficial ownership held through a series of companies.

<sup>158</sup> Mason and others (n 30).

<sup>159</sup> HM Government, *Factsheet: Beneficial Ownership* (n 40).

<sup>160</sup> ECTEA 2022, Schedule 2, para 19, echoing Companies Act 2006, Schedule 1A, para 19.

<sup>161</sup> For a critique of these proposals, see Economic Crime and Corporate Transparency Bill Commons Bill Committee, *UK Finance Evidence* (11 November 2022) <<https://bills.parliament.uk/publications/48543/documents/2464>>.

<sup>162</sup> ECTEA 2022, s 4(2).

chain.<sup>163</sup> This is clearly problematic, given the limited resources available for economic crime investigation, and is one reason we recommend (in section 5) that this loophole be reformed. The disclosure of B Ltd's details under ECTEA 2022 may give the authorities the means of tracking down the ultimate beneficial owner, but the trail frequently ends here, particularly if companies are overseas. When information about ownership is layered across jurisdictions, it becomes, in the words of MP Margaret Hodge, 'pretty nigh impossible' to obtain.<sup>164</sup> This is because, although bilateral agreements came into effect with the Crown Dependencies<sup>165</sup> and six British Overseas Territories<sup>166</sup> on sharing beneficial ownership information in July 2017, public company registers are still lacking.<sup>167</sup> An amendment introduced by MPs to the Sanctions and Anti-Money Laundering Act (SAMLA) 2018 had intended to require the UK government to legislate to ensure British Overseas Territories introduce such registers by the end of 2020.<sup>168</sup> However, the government interpreted this provision as enabling overseas territories to introduce their own registers, so that while the British Overseas Territories committed to introduce such registers by the end of 2023 and the Crown Dependencies had committed to do so in 2022 or 2023, so far this has not been done.<sup>169</sup> Arguments in favour of further delay have been made in Crown Dependencies and Overseas Territories following the *Luxembourg Business Registers* decision.<sup>170</sup>

A more significant problem arises where the corporate entity is a trustee, holding its assets for beneficiaries. This could happen in a variation of the above example if B Ltd were a corporate trustee, holding its assets (ie its shares in A Ltd) for a family trust (Figure 4).

In this case, it would be the beneficiaries of the family trust who ultimately enjoy the value of the land, not C, the owner of B Ltd. While C would own B Ltd in this example (through C's holding of B Ltd's share capital), C would effectively own nothing more than a bare trust, as the benefit of B Ltd's assets are held for the benefit of the family trust. Despite this, the details of the family trust need not be disclosed in all cases. This will depend upon the status of B Ltd. If B Ltd

<sup>163</sup> For an overview of these processes, see Ali Shalchi and Federico Mor, 'Registers of Beneficial Ownership', (House of Commons Library, Research Briefing, 3 February 2022).

<sup>164</sup> Economic Crime and Corporate Transparency Bill Deb 2022, col 222 (3 November 2022).

<sup>165</sup> A Crown Dependency is a territory under the sovereignty of the British Crown which does not form part of the UK and is self-governing. The three Crown Dependencies are the Bailiwicks of Jersey and Guernsey, which make up the Channel Islands, and the Isle of Man.

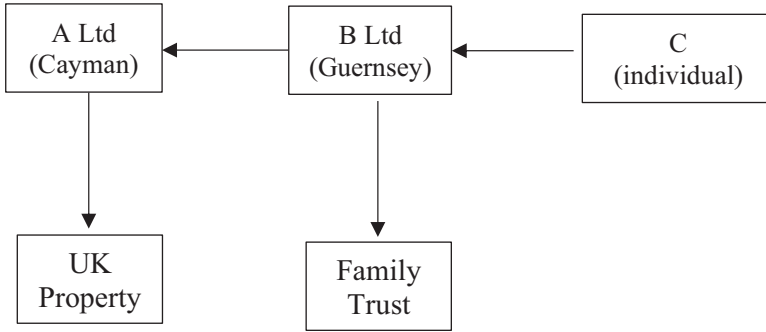
<sup>166</sup> There are 14 British Overseas Territories, 10 of which are permanently inhabited. For a constitutional overview, see Philip Loft, *The Separation of Powers in the UK's Overseas Territories* (November 2022) <<https://commonslibrary.parliament.uk/research-briefings/cbp-9635/>>.

<sup>167</sup> The Cayman Islands have issued a draft Beneficial Ownership Transparency Bill (2023), which would provide public access to information only if the Cabinet makes the requisite Regulations, following an affirmative resolution in the Parliament, see Clause 22(6).

<sup>168</sup> The Money Laundering and Terrorist Financing (Amendment) Regulations 2019.

<sup>169</sup> Draft Orders in Council have been prepared to implement corporate registers as a back-up plan, in accordance with the 2018 SAMLA amendment, yet these have not yet come into force. For an overview of these processes, see Shalchi and Mor (n 163).

<sup>170</sup> Joint statement of the Crown Dependencies on access to registers of beneficial ownership of companies, 22 December 2022 <[www.gov.im/news/2022/dec/22/joint-statement-crown-dependencies-on-access-to-registers-of-beneficial-ownership-of-companies/](https://www.gov.im/news/2022/dec/22/joint-statement-crown-dependencies-on-access-to-registers-of-beneficial-ownership-of-companies/)>.



**Figure 4.** Beneficial ownership held through both companies and a trust.

is a ‘regulated company’<sup>171</sup> (ie a company with shares that are traded on a regulated market) or a ‘regulated provider of trust services’,<sup>172</sup> then B Ltd counts as a ‘registrable beneficial owner’.

The ROE requires a registrable beneficial owner to disclose whether they are a trustee and, if so, give details of the trust, including the names of the beneficiaries and the settlor.<sup>173</sup> As such, B Ltd would need to inform the ROE of the family trust in this case. By contrast, if B Ltd is simply a private company (ie it is not a ‘regulated company’ nor a ‘regulated provider of trust services’), then it is treated as a transparent entity, and the rules look through to C, as the owner of B Ltd. However, because the legislation effectively ignores B Ltd in this instance, it does not require B Ltd to give any details of the family trust. This is an obvious gap in the legislation, where the rules do not require disclosure of ‘beneficial ownership’ in the normal sense.<sup>174</sup>

Difficulties escalate where the ownership chain consists of several trusts, especially where the parties have made use of corporate trustees. At present, the drafting of the legislation can mean that only the first trust is disclosable upon registration, and there is no obligation to inform Companies House about the tail of the ownership chain.<sup>175</sup> Amendments introduced to the ECCT Act 2023 aim to address this problem, preventing parties attempting to obscure ownership by using a chain of trusts and sub-trusts to hide the ultimate beneficial owners.<sup>176</sup> Ultimately, the efficacy of these provisions in exposing beneficial ownership will depend on A Ltd’s ability and willingness to disclose its ownership chain, given that there always remains the possibility of registering with incomplete

<sup>171</sup> ECTEA 2022, Schedule 2, para 7(1)(b).

<sup>172</sup> ROE(DPTS) Regulations 2022, reg 14.

<sup>173</sup> ECTEA 2022, Schedule 2, para 8.

<sup>174</sup> Advani and others (n 29).

<sup>175</sup> The problem is highlighted by reg 14 of the ROE(DPTS) Regulations 2022, which extended the definition of registrable beneficial owner to a ‘trust provider’ subject to regulation in its home jurisdiction. This effectively meant that where A is owned by a series of trusts, only the first trust needs to be disclosed.

<sup>176</sup> ECCT Act 2023, s159.

information (the loophole). Any information about the trust is not publicly available on the ROE and is available only to those with a 'legitimate interest' under the TRS.

## 6. Promoting Transparency

While the ROE may work well in straightforward cases, individuals wishing to hide their ownership or launder illicit monies through UK property are likely to use more complex structures, using a combination of companies and trusts. This has long been understood, as Toulson LJ noted in *R v Richards*.<sup>177</sup>

No self-respecting organised criminal would expect to be caught with high-value property in his own name readily identifiable, particularly since the enactment of legislation which is designed to strip such criminals of their profits. As a matter of standard practice, he is likely to have taken steps to transfer high-value assets to nominee companies, offshore trusts or trusted associates who can be looked upon to harbour the assets until such time as he perceives that the danger has passed ...<sup>178</sup>

Understanding these structures, and the different concepts of beneficial ownership each relies on, is critical to understanding land ownership beneath. Building on this analysis, we propose two changes to ECTEA 2022. The first is to amend the rules on registrable beneficial ownership, abolishing the quantitative thresholds and the loophole, both of which are premised on a formulation of beneficial ownership as control, which is misplaced in the context of land. The second change is to require information about land-owning OEs held on trust to be publicly available, rather than relying on a trust's conception of beneficial ownership, which prioritises privacy.<sup>179</sup>

The first proposal suggests that it should not be possible to comply with ECTEA 2022's transparency requirements without providing information on beneficial ownership.<sup>180</sup> An analogous loophole is widely used on the PSC register, where, by April 2021, over 11,000 companies registered had failed to declare their beneficial ownership.<sup>181</sup> Under ECTEA 2022, media reports on the early registration data of the ROE found that nearly one in ten newly registered overseas entities (1796) did not list a registrable beneficial owner.<sup>182</sup> By August 2023, Advani and others found that 2300 OE owners of 10,600 properties, around

<sup>177</sup> [2008] EWCA Crim 1841, [21]. See also 54-01 *Levin on Trusts*.

<sup>178</sup> *Richards* (n 177) [21].

<sup>179</sup> This information would include a name and service address but not a residential address or date of birth, which are protected information under ECTEA 2022.

<sup>180</sup> ECTEA 2022, ss 4, 7 (updating) and 9 (removal). For different types of missing beneficial owners, including OEs who report only controllers but no beneficial owners and OEs with missing beneficial owners, see Advani and others (n 29).

<sup>181</sup> The Parliamentary Under-Secretary of State for Digital, Culture, Media and Sport, Paul Scully MP, Hansard, House of Commons, Question for Department for Business, Energy and Industrial Strategy, UIN 7743, tabled on 26 May 2021.

<sup>182</sup> Aguilar Garcia, Zeke Hunter-Green and Rowena Mason, 'Almost 13,000 Offshore Companies with UK Property Fail to Declare Owners' *The Guardian* (London, 1 February 2023) <[www.theguardian.com/uk-news/2023/feb/01/almost-13000-offshore-companies-with-uk-property-fail-to-declare-owners](https://www.theguardian.com/uk-news/2023/feb/01/almost-13000-offshore-companies-with-uk-property-fail-to-declare-owners)>.

22%, reported no registrable beneficial owners, with 86% of these stating on their registration that ‘no beneficial owners have been identified’.<sup>183</sup> Even with greater verification checks under the ECCT Act 2023, Companies House will only check identity, not how someone meets (or does not meet) the condition to be a beneficial owner.<sup>184</sup> While Companies House’s role could be enhanced, this would require considerable resources. It would be far more effective to close the loophole, requiring OEs to provide full ownership information. As these figures illustrate, the government’s initial suggestion that it would only be in ‘rare circumstances’ that an overseas entity would be unable to designate beneficial owners under ECTEA 2022<sup>185</sup> is unfounded.

Closing this loophole would be particularly important when chains of companies (and possibly trusts) are used overseas. In these situations, as noted in section 4, the loopholes effectively switch the onus to the relevant public authority to trace the full ownership chain<sup>186</sup>—a problematic outcome, given the limited resources available for economic crime investigation, even with the introduction of the economic crime levy.<sup>187</sup> It is plausible to require an OE to provide the full chain of beneficial ownership information in return for an OE ID and the advantages of registered proprietorship (including the state guarantee<sup>188</sup>), benefits analogous to the *quid pro quo* of company incorporation.

The strongest argument in the loopholes’ favour is that OEs would have to spend time and resource in identifying their beneficial owners. Yet, if ownership chains are so complex that they are hard to identify, it may be even more desirable that they are clarified. A company should be able to identify beneficial owners exercising control or owning more than 25% of shares,<sup>189</sup> while a trustee should be able to obtain the requisite information about the trust.<sup>190</sup> If trustees cannot provide this information, are they adequately fulfilling their duties? This is a live issue, given that Lord Agnew has noted that nearly half of the trusts now registered on the ROE own assets anonymously.<sup>191</sup>

Another, more pragmatic response is that the costs of providing such information are conventionally low. There is no economic justification for the loopholes. In the PSC context, researchers found the financial cost of complying to be ‘relatively small’, ranging from a mean of £287 to a median overall cost of £125, with most businesses concluding that the PSC register had not impacted upon the way they operate.<sup>192</sup> It is not unreasonable to suggest that companies and

<sup>183</sup> Advani and others (n 29) [13].

<sup>184</sup> HM Government, *Factsheet: Identity Verification and Authorised Corporate Service Providers* <[www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/fact-sheet-identity-verification-and-authorised-corporate-service-providers](https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/fact-sheet-identity-verification-and-authorised-corporate-service-providers)>.

<sup>185</sup> Department for Business, Energy and Industrial Strategy, *Guidance for the Registration of Overseas Entities on the UK Register of Overseas Entities: Technical Guidance for Registration and Verification* (2022).

<sup>186</sup> For an overview of these processes, see Shalchi and Mor (n 163).

<sup>187</sup> HM Treasury, *Economic Crime Levy: Funding New Government Action to Tackle Money Laundering* (2020) 2.

<sup>188</sup> LRA 2002, s 58.

<sup>189</sup> ECTEA 2022, s 4(1) and (2).

<sup>190</sup> *ibid* s 4(3).

<sup>191</sup> HC Deb 20 June 2023, vol 831, col 182.

<sup>192</sup> Department for Business, Energy and Industrial Strategy, *Review of the Implementation of the PSC Register* (2019) BEIS Research Paper No 2019/005.



trusts should disclose their registrable beneficial owners in order to receive their OE ID and the benefits of land registration. Effectively reversing the burden of proof onto overseas entities would also echo the approach of Unexplained Wealth Orders.<sup>193</sup>

A related question, also premised on understanding beneficial ownership as control, is whether fragmented ownership should be accorded greater privacy than entire ownership. If an individual owns property directly, their details will be on the land register, publicly available since 1990. We suggest that there should be no greater protection if that ownership is fragmented behind a company or trust. Fragmented ownership should not be given preferential treatment in beneficial ownership of land, where the size and nature of any share is not relevant,<sup>194</sup> by a register predicated on a concept of beneficial ownership as control. The quantitative thresholds in ECTEA 2022's registrable beneficial ownership test should be abolished.<sup>195</sup>

One response to this argument is that the thresholds are a consequence of ECTEA 2022's focus on land-holding OEs, relying on beneficial ownership as control, rather than land holding itself, interpreting beneficial ownership of land. Given the government's rhetorical commitment to uncovering land ownership acquired through economic crime,<sup>196</sup> abolishing the thresholds would avoid this semantic distinction. More fundamentally, acknowledging the social responsibility of land ownership suggests that fragmented ownership should not be permitted to evade transparency. As Murphy writes, we can discern a moral obligation to protect individual entitlements as well as a broader societal norm, committed to sustaining the valuable practice of property without allowing some to free ride on it. The benefits of a coherent and reliable property and registration system 'run to society at large, to the benefits of the institutional system as a whole'.<sup>197</sup>

The second proposal suggests that trust information should be publicly available. There is broad agreement that trusts are both personal arrangements and devices, including both a wider sense as 'a legal structure in which property is held in trust' and a narrower sense of 'an obligation with respect to the benefit of property'.<sup>198</sup> Understanding trusts in the wider sense is critical to tackle economic crime. Trust and company service providers have been identified by the UK National Crime Agency as providing 'the highest risk services provided ... for money laundering. These can enable the laundering of millions of pounds, conceal the ownership of criminal assets and facilitate the movement of money to secrecy jurisdictions.'<sup>199</sup>

<sup>193</sup> Proceeds of Crime Act 2022, Ch 2, as strengthened by ECTEA 2022, Part 2.

<sup>194</sup> TLATA 1996.

<sup>195</sup> The Secretary of State can make this change by Regulations using the affirmative resolution procedure. ECTEA 2022, Schedule 2, Part 6.

<sup>196</sup> Advani and others (n 29).

<sup>197</sup> Liam Murphy, 'The Artificial Morality of Private Law: The Persistence of an Illusion' (2020) 70 UTLJ 453, 464.

<sup>198</sup> Lionel Smith, 'Massively Discretionary Trusts' (n 54) 19.

<sup>199</sup> HM Treasury and Home Office (n 60) 80.

Why, then, treat land-holding trusts differently from other landowners? In their analysis of the ROE, Advani and others found 20,000 UK properties owned by around 7000 trusts.<sup>200</sup> Why should it be possible, to use a phrase from the Law Commission in 1985, for these trusts to hold land ‘as an equivalent to ex-directory phone numbers’?<sup>201</sup> The rhetorical justification rests largely on a conception of trust assets as ‘private’ or ‘family’ wealth, noting trusts’ use for inheritance tax planning.<sup>202</sup> Should ownership beneath these properties be publicly unavailable simply because the owners use a trust?

There are two reasons to resist secrecy. The first is that while we can justify different treatment for children and vulnerable adults, the mere labelling of family trusts as a distinctive form of private wealth is hard to justify. Property is often a source of private or family wealth, and if titles are directly owned, information has been publicly available on the land register since 1990 for almost all adults.<sup>203</sup> It would be quite straightforward to require equivalent land-holding trust information to be publicly available for almost all adults, and so not ‘protected’. This is what Lord Agnew’s amendment attempted to do in the House of Lords, excluding information about children and vulnerable adults, although the amendment has not been taken up in the ECCT Act 2023.<sup>204</sup> Rejecting an analogous proposal, the government argued that ‘trusts are used for legitimate purposes, including to protect the privacy and safety of children, for example, and other vulnerable individuals’.<sup>205</sup> As a descriptive statement, this is undoubtedly correct. Yet, if information about directly owned property is available for almost all adults, it is hard, normatively, to justify why land held for almost all adults behind a trust should be obscured simply because of the use of the trust.

A second reason to resist secrecy is that experience of economic crime has changed the tenor of the debate. Resistance to including trusts has been overcome within the money laundering framework, including the introduction of the TRS. It is clearly evident—on the government’s own evidence—that while the vast majority of trusts will be entirely legitimate, a few ‘rogue structures’<sup>206</sup> will not. Such structures tilt the balance towards disclosure for most adults. To enable proper investigation of economic crime, particularly given the limited resources available to enforcement agencies,<sup>207</sup> it is proportionate to publicly disclose the names of most adult beneficiaries alongside details of the trust.<sup>208</sup>

One possible consequence of such a proposal may be an evolution in drafting. Beneficiaries of a trust can be defined by class rather than name,<sup>209</sup> so that a

<sup>200</sup> Advani and others (n 29).

<sup>201</sup> Law Commission, *Second Report on Land Registration: Inspection of the Register* (Law Com 148, HC 551, 1985) 13. The phrase was applied to company or nominee ownership, though we suggest that it also applies to trusts.

<sup>202</sup> Brunson and Houlder (n 54).

<sup>203</sup> UK companies’ details are then available on the PSC register.

<sup>204</sup> Lords amendment 117 to the ECCT Bill 2022–23, deleting s 22(1)(c) ECA2022. This was successful in the House of Lords but was not taken up in the ECCT Act 2023.

<sup>205</sup> HC Deb 24 November 2022 (n 54).

<sup>206</sup> HM Treasury and Home Office, *Economic Crime Plan 2, 2023–2026* (2023) 17.

<sup>207</sup> House of Commons Treasury Committee, *Economic Crime: Eleventh Report of Session 2021–22* (HC 145).

<sup>208</sup> But not the date of birth or residential address, which would remain protected information.

<sup>209</sup> *eg McPhail v Doulton* [1971] AC 424.

settlor of a non-resident trust may attempt to obscure the fact that they are, in practical terms, controlling and benefiting from the trust by defining the class of beneficiaries in the widest possible manner. So-called 'Red Cross' trusts are a common feature of offshore jurisdictions,<sup>210</sup> where the class of beneficiaries is defined as a charity (such as the Red Cross) and any 'person' who at some future point is 'added to a class of beneficiaries'. Even where the ROE now requires the full ownership chain to be disclosed,<sup>211</sup> if the individual standing at the end of the chain is a trustee holding rights on a wide discretionary trust for future beneficiaries, then effectively the land is ownerless until beneficial interests are actually appointed. As the beneficiaries are not yet known, their names cannot yet be disclosed.

Consequently, if, as the government has suggested,<sup>212</sup> disclosure requirements tighten for trusts, drafting techniques must be kept in view. For, as Lionel Smith has written, an emphasis on trustee discretion alongside a gradual evolution in drafting 'may make it more difficult for judges to notice when a line has been crossed, from what is acceptable to what is impossible'.<sup>213</sup> Courts will need to remain vigilant if ECTEA 2022 is to be reformed to provide greater transparency for trusts.

## 7. Conclusion

'Buy land,' Mark Twain famously advised, 'they're not making it any more.' While not infallible, this has undoubtedly been first-rate investment advice, taken up in economic crime with implications for national security. ECTEA 2022 has begun to address some of these concerns, yet the current framework does not, we suggest, go far enough in part because the legislation has focused on beneficial ownership as control and behind a trust rather than legislating for beneficial ownership of land. To remedy this focusing on beneficial ownership of land and improving policy outcomes, we recommend removing the loophole and quantitative thresholds for fragmented ownership, requiring OEs to submit information for their entire ownership chain. We also suggest that the reliance on beneficial ownership in trust law, emphasising privacy, should be modified under ECTEA 2022, given the known risks of a small number of trusts facilitating economic crime. These changes should be implemented to better reflect the nature of beneficial ownership of land, rather than focusing on the beneficial ownership of land-owning OEs, as control.

Recent world events have catapulted governance on economic crime into political awareness, encouraging us to better understand opaque ownership structures. Foreign land ownership, including the role played by enablers, is a key

<sup>210</sup> See Lionel Smith, 'Massively Discretionary Trusts' (n 54).

<sup>211</sup> ECCT Act 2023, ss 161 and 162.

<sup>212</sup> HL Deb 14 March 2022 (n 52) col 35.

<sup>213</sup> Lionel Smith, 'Massively Discretionary Trusts' (n 54).

policy concern, with scrutiny increasing since the Russian invasion of Ukraine.<sup>214</sup> This unease forms part of a growing trend to include property ownership within broader debates on national security, privately owned infrastructure, economic crime and money laundering, illustrating a growing desire to understand ownership beneath. We need to consider accepted ways of thinking about everyday land law and land registration practices. As Bernard Rudden cautioned: ‘What the law does well is blind its servants. Judges, practitioners, and even jurists grow so accustomed to its rituals that they do not see how deeply weird they are.’<sup>215</sup> It is time for us to see beneath.

<sup>214</sup> House of Commons Foreign Affairs Committee, *The Cost of Complacency: Illicit Finance and the War in Ukraine: Second Report of Session 2022–23* (HC 168) 12.

<sup>215</sup> Bernard Rudden, ‘Things as Thing and Things as Wealth’ (1994) 14 OJLS 81, 81.