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VANDERVELL v. *I.R.C.*: A CASE OF OVERREACHING

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EVERY year, those who teach the law of trusts face a dry and difficult task: explaining the formalities which govern the creation and disposition of equitable interests. As part of that thankless task, they have to address section 53(1)(*c*) of the Law of Property Act 1925, which provides that:

> a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

They also have to explain the House of Lords' interpretation of this provision in *Vandervell* v. *I.R.C.*[1] That is not a simple thing to do. Those parts of the case which address section 53(1)(*c*), and its requirement of formality for the disposition of an equitable interest, are far from easy to understand. They are equally difficult to justify as a matter of legal principle. Nevertheless, their Lordships' approach to section 53(1)(*c*) has some very important consequences for everyday commerce. It means that the beneficiary of assets held by a nominee can, without any formality, instruct the nominee to dispose of the assets, and the nominee can then lawfully do so, free of the beneficiary's equitable interest in them. This is very convenient. Shares and securities are very commonly held by nominees. Beneficiaries frequently give their nominees unsigned instructions to deal with such assets: oral instructions, telephone instructions or, nowadays, electronic instructions *via* the internet. Nominees want to be able to act on those instructions without committing a breach of trust; and a purchaser who buys shares or securities wants to acquire them free of any trusts binding the vendor.[2]

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1 [1967] 2 A.C. 291 (H.L.), hereafter "*Vandervell*".

2 The defence of bona fide purchase for value without notice does not meet the needs of trustees (nominees) or purchasers. The defence gives no protection to a trustee. As far as purchasers are concerned, the defence does nothing to protect donees, and it exposes purchasers for value to all the uncertainties of the doctrine of notice.

An adequate explanation of *Vandervell* is therefore still useful, even such a long time after the case itself. This article seeks to explain *Vandervell* in terms of overreaching. In that case, a trustee, in due exercise of its powers, transferred legal title to a trust asset, thereby overreaching the equitable interest in the asset. Consequently, the recipient of the asset acquired legal title to it free of the equitable interest, even though the trustee received nothing in exchange for the asset. This explanation puts the facts of *Vandervell* outside the scope of section 53(1)(*c*). Understanding *Vandervell* in terms of overreaching—a familiar and well-established doctrine—has another significant advantage. If *Vandervell* is truly an example of overreaching, the large body of case law about overreaching can be used to establish the practical consequences and limits of the decision: if *Vandervell* is correctly understood as a case of overreaching, then law relating to overreaching can be used to determine what happens in various circumstances when a nominee, acting on instructions from his beneficiary, deals with an asset he holds for that beneficiary.

The *Vandervell* Case

The facts of the case are by now so well known that they can be restated here in abbreviated form. Vandervell was a successful businessman, whose wealth was principally represented by his shares in an engineering company, Vandervell Products Ltd. In 1952, Vandervell transferred 100,000 "A" shares in the company to National Provincial Bank Ltd. On 7th November of that year, he executed a deed directing the Bank to hold the shares on trust as security for certain payments to his former wife under their divorce settlement. In 1958, another deed released the shares from that security; consequently, the Bank held legal title to the shares as bare trustee for Vandervell. By then, Vandervell wished to make a gift to the Royal College of Surgeons, in order to found a Chair of Pharmacology. In order to make the proposed gift "tax-efficient",[3] an aim redolent with irony in the light of subsequent events, Vandervell's advisors came up with the following plan. Vandervell, as absolute beneficial owner of the 100,000 "A" shares, would instruct the Bank to execute a stock transfer form in respect of the shares, but the Bank was to leave the name of the transferee blank. The form, and the certificate for the shares, were then to be handed to the Royal College. Once it received them, the Royal College was to insert its name in the form, as transferee of the shares, then have

[3] A useful description of the intended tax planning appears in Parker & Mellows, *The Modern Law of Trusts* (7th edn. by A.J. Oakley, Sweet & Maxwell, London, 1998), p. 54, note 64.

the shares registered in its name, and so become their legal and beneficial owner.[4] At the same time, the Royal College would grant an option for a company associated with Vandervell to repurchase the shares at a very low price. Once the Royal College owned the shares, Vandervell Products Ltd. would declare a dividend on them, which the Royal College was to keep by way of endowment. The option would then be exercised, so that Vandervell would regain control of the shares, as he wished. This plan was put into effect, but the Inland Revenue assessed Vandervell to surtax on the dividends received by the Royal College.[5] The Revenue sought to justify its assessment in two ways.

First, it submitted that Vandervell remained beneficial owner of the shares at the time the dividend was declared, so that the dividend was payable to him, and consequently formed part of his taxable income, whatever subsequently happened to it. The Revenue's argument was as follows. The transaction as contemplated involved Vandervell disposing of his equitable interest in the shares to the Royal College. Such a disposition could only be made using signed writing, by reason of section 53(1)(*c*) of the Law of Property Act 1925. There was no signed writing. Consequently, the Royal College only ever acquired legal title to the shares, and Vandervell remained entitled to them in equity. The House of Lords rejected this argument, though the basis of its decision is difficult to discern. This article is an attempt to explain that decision.

Unfortunately for Vandervell, however, the Revenue's second submission succeeded, and he was held liable to surtax on the dividends. The Revenue argued, and the House of Lords accepted, that Vandervell was beneficially entitled to the option to repurchase the shares. Under section 415 of the Income Tax Act 1952, a person who gave away property, but retained some interest in it, was to be treated for the purposes of surtax as entitled to any income arising from the property. (The aim of this section was to make it impossible for a taxpayer both to escape surtax on any income arising from assets, by giving them to someone else, and yet

[4] It appears that the Royal College was intended to become beneficial owner of the shares: *Vandervell* at p. 310. As the Royal College was, and is, a charitable corporation, it could either have held the shares beneficially, as an accretion to its corporate capital, to be applied for the charitable purposes of the corporation, or it could have held them subject to some charitable trust, *stricto sensu*, for the advancement of education—in particular, the foundation of the Chair in Pharmacology. How a charitable corporation may hold property is examined in *Liverpool and District Hospital for Diseases of the Heart* v. *A.-G.* [1981] Ch. 193. This article proceeds on the basis that the Royal College did indeed become beneficial owner of the shares. The possibility that the Royal College held the shares subject to some charitable trust is explored in the text to note 72 below. As will be seen, the explanation of *Vandervell* in terms of overreaching is not affected by how the Royal College held the shares.

[5] Surtax was the forerunner of income tax at higher rates.

still to retain rights in the assets.[6]) As Vandervell retained an interest in the shares during the tax years in question—his interest in the option to repurchase them—the Revenue had correctly assessed Vandervell to surtax on the dividends under section 415.

The reasons their Lordships gave for rejecting the Revenue's first submission have been subject to much criticism over the years,[7] though both their Lordships,[8] and commentators, have recognised the practical utility of the decision:

> This [the decision in *Vandervell*] accords ... with commercial convenience (*e.g.*, where a stockbroker or bank nominee holds the legal title to shares in trust for A and A directs the shares to be transferred to X, it would be most inconvenient for signed writing by A to be required in addition to signed writing by the legal transferor).[9]

Though the concept was nowhere applied in the case,[10] *Vandervell* can be explained by overreaching.

OVERREACHING

"Overreaching, as the doctrine is now understood, is the process whereby a purchaser of property takes it free from any interests or powers, which attach instead to the proceeds of sale."[11] Overreaching is the consequence of exercising a power (or executing a trust) by which an earlier interest may be subordinated to a later interest.[12] Generally, trustees overreach an interest when they have the right as against their beneficiaries to make the disposition in question—that is, power to dispose of a trust asset without thereby committing any breach of trust. The due exercise of such a power, by definition, is not a breach of trust, and so gives rise to no claim against the trustees, nor

6 Section 415 of the Income Tax Act 1952 has long since been repealed. Its current equivalent is section 660A of the Income and Corporation Taxes Act 1988, as supplemented by other provisions in Part XV, Chapter 1A of the 1988 Act.

7 See, for example, Underhill & Hayton, *The Law of Trusts and Trustees* (15th edn. by D.J. Hayton, Butterworths, London, 1995), pp. 214–216; Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies* (3rd edn., Butterworths, Sydney, 1992), paragraphs [718]–[729]; Parker & Mellows, *op. cit.* note 3, pp. 54–56, and Hanbury & Martin, *Modern Equity*, (16th edn. by J.E. Martin, Sweet & Maxwell, London, 2001), pp. 84–86.

8 *Vandervell*, at p. 312, *per* Lord Upjohn.

9 Underhill & Hayton, *op. cit.* note 7, p. 215. See also Meagher, Gummow & Lehane, *op. cit.* note 7, and Parker & Mellows, *op. cit.* note 3.

10 It was mentioned, once, in the submissions of Goulding Q.C. for the Inland Revenue Commissioners: *Vandervell*, at p. 303. Mr Goulding sought to contrast the effect of the transaction at issue with overreaching.

11 Harpum, "Overreaching, Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277 (hereafter, "Harpum, *Overreaching*"). Mr. Harpum does not imply that there *must* be capital monies generated for overreaching to occur: *ibid*., at p. 282, approved by the Court of Appeal in *State Bank of India* v. *Sood* [1997] Ch. 276, 281 *per* Peter Gibson L.J. See also Fox, "Overreaching", chapter 4 in P. Birks and A. Pretto (eds.), *Breach of Trust* (Hart Publishing, Oxford, 2002), and the text to note 22 below.

12 Harpum, *Overreaching*, at p. 282.

any consequent claim against the recipient of the trust asset. The recipient therefore holds the asset free of the beneficiaries' rights. Overreaching has occurred. Strictly, however, what is vital is that the trustees purporting to dispose of the asset free of the prior interest have power to do so *at least in so far as the purchaser is concerned.* Consequently, if the terms of a trust provide that a purchaser is not to be affected by some breach of trust committed in the course of the disposition by which he receives a trust asset,[13] then overreaching will still occur, even if such a breach of trust has been committed. The crucial fact is that the trustees still have power *in so far as the purchaser is concerned* to dispose of the trust asset to him. Consequently, the purchaser will acquire title to the asset free of the beneficiaries' rights: though they might sue their trustees, the beneficiaries simply have insufficient title to sue the purchaser. Overreaching has still occurred.[14]

Overreaching does not depend upon doctrines of estoppel. A purchaser takes free of the beneficial interests in a trust asset when the trustees make an overreaching transfer of the asset because the trustees' power of disposition ranks in priority to those interests, and so, therefore, does any right created by an effective exercise of the power.[15]

Overreaching does not require statutory authority,[16] though statute imposes some further conditions if beneficial interests in land are to be validly overreached. Where land is held on trust, any capital monies arising from a dealing with the land must be paid to all the trustees concerned, and they must be at least two in number, or a trust corporation, but not more than four in number if the trust is private.[17]

Powers to overreach an equitable interest—rights to deal with an asset free of any equitable interest in it—may be conferred on trustees expressly,[18] or they may be implied.[19] The source of a

[13] See, *e.g*, Trusts of Land and Appointment of Trustees Act 1996, s. 16(1), (2).

[14] See Fox, *op cit*. note 11, at pp. 99–100. For completeness, it should be remembered that there are some limitations on how far the terms of a trust may exonerate a purchaser from the effects of a breach of trust—see, for example, Law of Property Act 1925, ss. 2 and 27(2) as regards the payment to trustees of capital proceeds from land.

[15] An explanation of *Vandervell* based on estoppel would surely fail: on the facts of the case, it would be very difficult, if not impossible, to establish any (detrimental) reliance by the Royal College which would found an estoppel in its favour and against Vandervell.

[16] Harpum, *Overreaching*, at p. 278.

[17] See principally Law of Property Act 1925, ss. 2 and 27 (minimum of two trustees, or a trust corporation) and Trustee Act 1925, s. 34 together with Land Registration Act 1925, s. 95 (maximum of four trustees). If no capital monies arise from a disposition of land, section 27 does not apply: *State Bank of India* v. *Sood* [1997] Ch. 276. Equally, section 27 does not oblige the payment of capital monies from land to more than one *executor*.

[18] It is very common for trust deeds to confer such powers expressly: see, for example, *The Encyclopaedia of Forms and Precedents* (5th edn., by Lord Millett and others, Butterworths, London, 1997), Volume 40(1), Form 3, at clauses 3(1) and (2); Form 4, Schedule, at clauses 1, 3, 5, 6, 7, and 15.

[19] See, *e.g*., Trusts of Land and Appointment of Trustees Act 1996, ss. 6–9, and Trustee Act 2000, ss. 11–27.

trustee's power to overreach an interest, to subordinate it to a later interest, is nevertheless immaterial: overreaching occurs simply because the trustees have effectively exercised some power of theirs to subordinate an earlier interest to a later interest.

Finally, it should be remembered that overreaching can operate in relation to personalty, just as in relation to realty,[20] although a single trustee can make an overreaching disposition of personalty. The facts of *Vandervell* can now be analysed with this description of overreaching in mind.

THE OVERREACHING TRANSFER IN *VANDERVELL*

Before any of the relevant transactions occurred, National Provincial Bank held legal title to the shares as nominee for Vandervell. The Bank could pass legal ownership of those shares to a purchaser, whether or not Vandervell consented, simply by virtue of, and as an incident of, that legal title. Nevertheless, the Bank had no inherent power to dispose of its legal title to the shares free of Vandervell's equitable interest in them: it was merely a bare trustee of the shares for Vandervell.

By contrast, the Bank could have sold the shares free of that interest if it had been given power to do so—for example, in the trust deed under which it held the shares. Any such sale would be a simple case of overreaching. The Bank would transfer legal ownership of the shares to a purchaser, receiving the purchase price in exchange. The Bank's ability to transfer the shares at law would again simply be an incident of owning them at law. In addition, the transfer would be within the scope of the Bank's powers as trustee. Consequently, Vandervell could not have sued the Bank for breach of trust in respect of the transfer, nor could he bring any claim against the purchaser in respect of the shares. The purchaser would therefore have acquired legal title to the shares free of Vandervell's equitable interest in them, yet there would have been no disposition of that interest: "In no sense do trustees when they exercise a power of sale and repurchase dispose of equitable interests."[21]

If the Bank had held the shares for Vandervell under a deed by which it had power to give away trust property free of his rights, and the Bank had exercised that power, the donee would still have acquired legal title to the shares, free of Vandervell's equitable interest, by application of exactly the same reasoning: overreaching need not generate sale proceeds, though most commonly it does

[20] Harpum, *Overreaching*, at pp. 277–278.
[21] *Vandervell*, at p. 303, *per* Goulding Q.C., arguing for the Inland Revenue Commissioners.

so.[22] In fact, gratuitous overreaching is not as unusual as might be thought. It often happens when trustees exercise a power of theirs to pay or transfer trust assets to someone who is not absolutely entitled to that property. Such "powers to advance capital" or "powers of advancement" are commonplace in settlements: powers of advancement in favour of life tenants are often inserted into trust deeds,[23] and a power of advancement in favour of certain contingent, or future, beneficiaries of capital is implied by section 32 of the Trustee Act 1925. If trustees have such a power, and they exercise it by conveying a trust asset to an object of the power, free of any trusts, they will overreach prior equitable interests in the asset, even though the transaction is entirely gratuitous.

There is an evident problem, however. In *Vandervell*, National Provincial Bank did not have power under a trust instrument to sell the shares, let alone some power to give the shares away free of the trusts affecting them. Vandervell did, however, direct the Bank to transfer legal ownership of the shares, in order that the recipient should become their beneficial owner, free of his equitable interest. The Bank complied with that instruction. Consequently, Vandervell could not bring a claim against the Bank for breach of trust in respect of the transfer. For the same reason, Vandervell could not bring a claim against the Royal College in respect of the shares, even though the Royal College knew that the Bank had held the shares as trustee for Vandervell. In other words, the transfer of legal title to the shares overreached Vandervell's equitable interest in them, leaving the Royal College as their legal and beneficial owner.[24]

It is clear that an overreaching conveyance by trustees does not amount to a disposition within section 53(1)(*c*) of the Law of Property Act 1925: such a conveyance is a disposition of legal title, free of an equitable interest. Indeed, counsel for the Inland Revenue Commissioners accepted this characterisation of overreaching in *Vandervell* itself.[25] Nevertheless, it is not yet safe to

[22] *State Bank of India* v. *Sood* [1997] Ch. 276.

[23] See, for example, *The Encyclopaedia of Forms and Precedents, op. cit.* note 18, Volume 40(2), Form 465, at clause 2.2.

[24] In his article "Beneficiaries and Transferring Trustees" (1967) 31 Conv. (N.S.) 175, Mr. Spencer offers an explanation of *Vandervell* based on the fact that the Bank did not commit a breach of trust when it transferred the shares to the Royal College. Unfortunately, Mr. Spencer did not relate this important insight to overreaching: rather, he simply argued that transfer of a legal interest carries the beneficial interest with it in the absence of a breach of trust. Overreaching does not depend simply on the absence of a breach of trust. Overreaching turns on the propriety of a transaction *from the purchaser's point of view*, not on the propriety of the transaction *from the beneficiary's point of view* (*i.e.*, whether there was a breach of trust): see the section above, headed "Overreaching". Mr. Spencer's analysis is followed in Battersby, "Formalities for the Disposition of Equitable Interests under a Trust" [1979] Conv. 17, 24–25.

[25] See note 21 above, and the accompanying text.

conclude that section 53(1)(*c*) has no relevance to the facts of *Vandervell*.

The Power to Overreach in *Vandervell*

What must now be examined more carefully is Vandervell's prior instruction to the Bank, when he told the Bank to execute a transfer of the shares. Was that instruction within section 53(1)(*c*), and so invalidated for want of formality if the statute were applied correctly? To put the question in more general terms, when an absolutely entitled beneficiary authorises or instructs his trustees to deal with trust assets in a way that would otherwise amount to a breach of trust, does such authorisation or instruction amount to a disposition of his interest, within section 53(1)(*c*)?

It is, perhaps, easier to describe the effect of Vandervell's instruction in the more precise terminology proposed by Hohfeld.[26] Vandervell's instruction imposed a duty on the Bank to transfer legal ownership of the shares to the recipient nominated by Vandervell, and he held the correlative right to compel the Bank to do this. More importantly, for present purposes, the instruction also conferred an immunity on the Bank from any (equitable) claim by Vandervell in so far as it acted in accordance with his directions. Useful as this description may be, the Hohfeldian description of "immunity" is equivocal for present purposes: an immunity can exist by virtue of a mere personal permission, or for some other reason, for example, by virtue of some status. The problem remains whether or not Vandervell disposed of his interest (or part of it) for the purposes of section 53(1)(*c*) when he conferred the immunity on the Bank, that is, when he gave up some of the "bundle of rights" against the Bank which formed part of his equitable interest. Whatever criticisms may be made about concepts of property, and related ideas such as a disposition of property, a lawyer cannot legitimately avoid engaging with them when addressing the effect of an Act of Parliament which employs those very concepts.

So was Vandervell's instruction to the Bank a disposition of his equitable interest within section 53(1)(*c*)? The better view is that it was not. This view accords with common sense: it is far from obvious to say that a beneficiary disposes of his interest when he authorises his trustee to deal with a trust asset. Sadly, common sense and section 53(1)(*c*) share only a nodding acquaintance. More importantly, however, a hasty conclusion is imprudent, because the word "disposition" has a very wide meaning for the purposes of

[26] See W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1964).

section 53(1)(*c*), given section 205(1)(ii) of the Law of Property Act 1925, which provides that:

> "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and "disposition" includes a conveyance and also a devise, bequest or appointment of property contained in a will; and "dispose of" has a corresponding meaning.[27]

Is there anything in this very broad definition that encompasses Vandervell's instruction to the Bank? The only way the instruction might possibly fall within the definition of "disposition" is if it amounted to a "disclaimer", or a "release", or some other "other assurance of property or an interest therein by any instrument".

Vandervell's instruction was not a disclaimer. There are various reasons for this conclusion.

First, the effective disclaimer of an interest means that the interest vests as if the person disclaiming it did not exist.[28] Thus, if every intended donee of a gift were to disclaim the gift, it would revest in the donor, or his successors:[29] as between intended donor and intended donee(s), but not necessarily otherwise, the gift would be treated as void *ab initio*.[30] If the intended gift were to a group of people jointly, and only some of them disclaimed it, the gift would vest in those of the group who did not disclaim it.[31] Logically, a disclaimer, that is, a simple renunciation or repudiation,[32] could have no other effect. A disclaimer, therefore, does not grant or move an interest to a stranger—someone other than the donor (or his successors), or a joint donee. In particular, Vandervell did not disclaim his equitable interest in the shares to the Royal College. Indeed, application of these principles would most likely preclude Vandervell from effectively disclaiming his equitable interest in the shares at all. Vandervell was settlor of the

[27] The definitions in section 205 only apply to provisions of the Law of Property Act 1925 "unless the context otherwise requires" (*ibid.*). Although the broad definition of "disposition" in section 205(1)(ii) has not always been used in the context of section 53(1)(*c*) (see, *e.g., Re Paradise Motor Co. Ltd.* [1968] 1 W.L.R. 1125, discussed in the text to note 36 below, on the question of whether a "disclaimer" fell within section 53(1)(*c*)), nevertheless, for the purposes of the present article it is useful to test the argument advanced against the widest definition of "disposition".

[28] See generally *J.W. Broomhead (Vic.) Pty. Ltd. v. J.W. Broomhead Pty. Ltd.* [1985] V.R. 891, 930–936 *per* McGarvie J., on the disclaimer of a beneficial interest.

[29] *Mallott* v. *Wilson* [1903] 2 Ch. 494; *Re Parsons* [1943] Ch. 12; *Re Stratton's Disclaimer* [1958] Ch. 42; *Re Paradise Motor Co. Ltd.* [1968] 1 W.L.R. 1125.

[30] Note *Mallott* v. *Wilson* [1903] 2 Ch. 494, 501 *per* Byrne J. See *Re Parsons* [1943] Ch. 12 and *Re Stratton's Disclaimer* [1958] Ch. 42 as to how a disclaimer might not retrospectively affect a third party (in both cases, the Inland Revenue).

[31] *J.W. Broomhead (Vic.) Pty. Ltd.* v. *J.W. Broomhead Pty. Ltd.* [1985] V.R. 891, 935 *per* McGarvie J.

[32] See Co. Litt. 102 a, and note *Doe* d. *Gray* v. *Stanion* (1836) 5 L.J. Ex. (N.S.) 253, 256, on the disclaimer of a lease.

trust, as well as the beneficiary—his equitable interest in the shares was derived out of his own former legal title to them[33]—so if he tried to disclaim the interest, it would return to him as the very person from whom it was derived. The only other possible way to give some effect to such an attempted disclaimer by Vandervell would be to treat it as an abandonment of his interest to the Crown as *bona vacantia*, and manifestly that did not happen. So whatever else it might have been, Vandervell's instruction most certainly was not a disclaimer.

Secondly, disclaimer of an interest granted by deed cannot be made once the deed has been accepted: as Lord Wright put it,[34]

> It was old law that a deed once accepted cannot be disclaimed (Sheppard's Touchstone, p. 70), and I see no ground to think the rule has been changed. It seems to me to be a sound rule. If either party desires at a later date to get rid of the deed, or to divest any estate or interest conveyed by it, that object must be achieved by some procedure between the parties other than disclaimer.

Consequently, Vandervell could not disclaim his interest in the shares, as that interest was derived from deeds of 1952 and 1958,[35] which he had manifestly accepted: indeed, he was responsible for them.

Finally, even if Vandervell's instruction to the Bank could conceivably be regarded as a disclaimer, it would not fall foul of section 53(1)(*c*) by virtue of *Re Paradise Motor Co. Ltd.*,[36] a case which was decided by the Court of Appeal shortly after *Vandervell*. In that case, the Court held that a disclaimer was outside the scope of section 53(1)(*c*), notwithstanding that the definition of "disposition" in section 205(1)(ii) prima facie includes a disclaimer: a disclaimer operates "by way of avoidance, and not by way of disposition".[37] Unfortunately, the Court did not address the definition of "disposition" in section 205(1)(ii), so its conclusion is, perhaps, less convincing than it might be.

Vandervell's instruction to the Bank did not, then, amount to a disclaimer of his equitable interest in the shares. Did it amount to a release of that interest, or (which is practically synonymous) a surrender of it?

The word "release" has been given varying meanings in those cases which have had to consider what amounts to a release of

33 See *Vandervell*, at pp. 295–296, summarised in the section above headed "The *Vandervell* Case".
34 *Lady Naas* v. *Westminster Bank Ltd.* [1940] A.C. 366, 401 *per* Lord Wright.
35 *Vandervell*, at pp. 295–296.
36 [1968] 1 W.L.R. 1125.
37 *Ibid.*, at p. 1143. This somewhat problematic formulation is examined and explained in Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies* (*op. cit.* note 7), at paragraphs [749]–[750].

property, or a release of some interest in property.[38] In *Great Northern Railway* v. *I.R.C.*,[39] a coal mining company had given up its rights in a seam of coal, as required under statute, to a railway company which owned an interest in the land through which the seam ran. The mining company was held thereby to have "released" its interest in the coal to the railway company. In *Garnett* v. *I.R.C.*,[40] the deed dissolving a partnership provided (inter alia) that one of the former partners thereby gave up rights in partnership property to his former partners. This transaction was held to be a "release upon a sale". In *Firth & Sons Ltd.* v. *I.R.C.*,[41] "release" of a security, for the purposes of stamp duty, was said to be something which " … put an end to obligations already in existence". In *Wellesley* v. *Withers*,[42] a "release" was contrasted with a "disclaimer" for the purposes of establishing the effect and consequences of a deed. In short, a release by two joint tenants to the third was held to involve the two individuals yielding up rights they already held in land to the other person interested in the land, whereas a disclaimer by two of three intended joint tenants meant that the two never took any interest in the land, while the third did. What all these cases indicate is that a "release" of property or an interest in it has, as its essence, giving up rights in an asset to someone else already interested in that asset.

The surrender of an equitable interest, like a release, amounts to a disposition of that interest,[43] even though the word "surrender" is not specifically listed in section 205(1)(ii) of the Law of Property Act 1925. The effect of a surrender is like the effect of a release: the person who makes a surrender gives up his rights in an asset or fund, so that others already interested in it now can enjoy it without being subject to those rights.

So did Vandervell's instruction to the Bank amount to a release or surrender of his equitable interest in the shares? If the owner of a limited interest in some assets were to release or surrender that interest, the effect of the principles outlined above would normally be to accelerate the next interest in the assets, so that it took effect immediately.[44] Vandervell's equitable interest in the shares was

[38] Many of these cases involved the interpretation of the word "release" in the stamp duty legislation, so they must be approached with caution when construing section 53(1)(*c*) of the Law of Property Act 1925. Nevertheless, the cases do afford some guidance.
[39] [1899] 2 Q.B. 652, affirmed on another point, [1901] 1 K.B. 416.
[40] (1899) 81 L.T. 633.
[41] [1904] 2 K.B. 205, 207 *per* Channell J.
[42] (1855) 24 L.J.Q.B. (N.S.) 134.
[43] *I.R.C.* v. *Buchanan* [1958] Ch. 289.
[44] *Ibid.* Strictly, what happens following the release, surrender or other termination of a limited interest is a matter of construction: see *Williams on Wills*, (7th edn. by C.H. Sherrin, R.F.D. Barlow and R.A. Wallington, Butterworths, London, 1995), pp. 503–509. Nevertheless, if the

absolute, however, so the only possible effect of giving it up would be to leave the Bank as unencumbered owner of the shares. The facts of *Vandervell* nowhere suggest that the Bank at any time took any further interest in the shares beyond its legal title to them. Vandervell's instruction did not, therefore, amount to a release or surrender of his equitable interest in the shares.

Finally, Vandervell's instruction to the Bank was not some "other assurance of property or an interest therein by any instrument". First, Vandervell may not have given his instruction "by an instrument". Vandervell certainly used a letter to confirm that the shares should be transferred by the Bank to the Royal College;[45] but there is no evidence that the bank received its instructions in writing, that is, by an "instrument".[46] The more important point, however, is that Vandervell's instruction to the Bank amounted simply to his *personal* request and permission for the Bank to deal with the shares, and that did not involve a disposition of his equitable interest. It is difficult to find authority which explores and elucidates the precise nature of a beneficiary's request or permission for his trustee to do an act that would otherwise amount to a breach of trust. That such permission is a personal matter between the trustee and beneficiary concerned, and not an "assurance of property or an interest therein", can nevertheless be inferred from the cases. There are several cases which plainly assume this to be so.[47] However, the old case of *Nail* v. *Punter*[48] makes the point clearly, albeit implicitly. Trustees held funds on trust inter alia for such persons as Mrs. Nail should appoint by will. Mr. Nail was not one of the original beneficiaries of the trust, but at his request trust monies were nevertheless paid to him. Mrs. Nail later sued the trustees for the breach, and judgment was given in her favour. She then died, having by will duly appointed the trust fund to her husband. Mr. Nail then tried to have the judgment enforced as a beneficiary of the trust by virtue of his wife's appointment. The Vice-Chancellor dismissed that claim, as Mr. Nail had concurred in the breach and received funds by virtue of the breach. Now, the vital request and consent from Mr. Nail could only have been a personal matter between him and the trustees, because Mr. Nail had no proprietary interest in

interest next following the released or surrendered interest is capable of taking effect at the time of the release or surrender, it will normally be accelerated.

45 *Vandervell*, at pp. 297–298.

46 *Vandervell*, at pp. 296–298.

47 *Brice* v. *Stokes* (1805) 11 Ves. Jun. 319; 32 E.R. 1111; *Wilkinson* v. *Parry* (1828) 4 Russ. 272; 38 E.R. 808; *Life Association of Scotland* v. *Siddal* (1861) 3 De G.F. & J. 58; 45 E.R. 800.

48 (1832) 5 Sim. 555; 58 E.R. 447. Note the interpretation given to the case in *Crichton* v. *Crichton* [1896] 1 Ch. 870, which indicates the importance of Mr. Nail's concurrence in the breach of trust, as opposed to his receipt of the trust funds.

the trust fund at the time of his request. So a beneficiary's permission or request for his trustee to do something that would otherwise amount to a breach of trust seems not necessarily to involve a disposition of the beneficiary's equitable interest.

In short, Vandervell's instruction to the Bank was neither a disclaimer, nor a release, nor a surrender, nor an assurance of property, nor an assurance of some interest in property. Enough of the negative. Enough of what the instruction was not. What of the positive? Is it possible to establish the true legal nature of the instruction from the facts of the case? In principle, the correct characterisation of the instruction should emerge from a comparison between the interest Vandervell had before the transaction which might amount to a disposition, and the interest he had after that transaction. Before he gave his instruction to the Bank, Vandervell was entitled to the shares in equity "absolutely or as he might direct".[49] For the reasons given above, that instruction did not dispose of Vandervell's equitable interest in the shares. So after Vandervell instructed the Bank to execute a transfer of the shares, but before the Royal College was registered as their legal owner, Vandervell was still entitled to the shares in equity absolutely or as he might direct. The instruction alone did not change Vandervell's equitable entitlement to the shares.[50] What Vandervell therefore did was to give his personal instruction to the Bank, requiring it to deal with the shares.

Summary and Consequences

The explanation for *Vandervell* proposed in this article therefore has two aspects. First, when Vandervell instructed the Bank to execute a transfer of the shares, that instruction was outside the scope of section 53(1)(*c*). Secondly, when legal ownership of the shares passed from the Bank to the Royal College, that transfer overreached Vandervell's equitable interest in the shares, and was likewise outside the scope of section 53(1)(*c*). This explanation of *Vandervell* rests crucially, therefore, on the overreaching transfer of

[49] These words are taken from the case stated by the Inland Revenue, on the basis of which both the Revenue and Vandervell fought the appeal before the House of Lords: *Vandervell*, at p. 296. Indeed, a mere nominee implicitly holds assets for a beneficiary "absolutely or as he might direct". A person who entrusts shares to a nominee, therefore, does not need to insert a proviso to the effect that the nominee may transfer the shares on receiving instructions from the beneficiary, as suggested by Mr. Spencer (*op. cit.* note 24, at p. 181).

[50] This conclusion is drawn from the foregoing analysis. Lord Wilberforce apparently took the view that Vandervell's mere instruction did change the equitable rights to the shares, basing his view on *Re Rose* [1949] Ch. 78: *Vandervell*, at p. 330. With respect, Lord Wilberforce's view is open to serious question: see the text to note 62 below.

legal title to the shares.[51] Until that transfer, Vandervell remained equitable owner of the shares. That transfer deprived him of his equitable ownership of the shares.

An explanation of *Vandervell* in terms of overreaching may therefore go some way towards justifying Lord Upjohn's dicta that "the greater [*i.e.*, legal ownership of the shares] includes the less [*i.e.*, the equitable interest in them]",[52] and that section 53(1)(*c*) is "directed to cases where dealings with the equitable estate are divorced from the legal estate".[53] If *Vandervell* is correctly explained as an application of overreaching, then it is true to say that the equitable interest was only affected because of an overreaching transfer of the greater (legal) interest. It is also true to say that there was no dealing with the equitable estate divorced from the legal estate.

Furthermore, this explanation of *Vandervell* provides a reason why a nominee who sells trust assets on the instructions of his beneficiary (rather than giving them away, as in *Vandervell* itself) then holds the proceeds on the same trusts as the original assets, unless other arrangements have been made. The trust of the proceeds is simply the consequence of overreaching.[54] So, where a nominee sells or exchanges trust assets in an overreaching transaction, the beneficiary's interest in those assets attaches to the proceeds of the sale or exchange, automatically and without more, unless the nominee and beneficiary have made some agreement to the contrary—for example, a nominee and beneficiary could provide that the nominee should be entitled to use the proceeds of a trust asset sold on the beneficiary's instructions, and later simply account to the beneficiary for a particular amount.[55] Overreaching, therefore, can explain other aspects of dealings by nominees, beyond those which occurred in *Vandervell* itself. That is one of the advantages of explaining the case in terms of overreaching.[56]

[51] This article need not, and does not, consider precisely when legal title to shares passes. When *registered* shares are transferred, legal title to the shares passes when the transferee is placed on the company's register of members. See, *e.g., International Credit and Investment Co. (Overseas) Ltd.* v. *Adham* [1994] 1 B.C.L.C. 66, and, more generally, *Buckley on the Companies Acts* (15th edn. by Dame Mary Arden and others, Butterworths, London, 2000), commentary on sections 182 and 183 of the Companies Act 1985.

[52] *Vandervell*, at p. 311.

[53] *Vandervell*, at p. 312.

[54] See Harpum, *Overreaching*.

[55] Statute too can, and sometimes does, alter the position. For example, when securities (or other investments) are sold by a nominee regulated under the Financial Services and Markets Act 2000, the proceeds of sale will be subject to Section 9.3 of the Conduct of Business Rules (made under sections 138 and 139 of the Act). Those rules stipulate when such proceeds must be held on trust, and what are the terms of any such trust, in both cases to the exclusion of the general law.

[56] Compare Spencer, *op. cit.* note 24. Mr. Spencer's explanation does not address other possible dealings by a nominee at the instigation of his beneficiary.

Such an explanation of *Vandervell*, however, has much more use yet. It can be used to suggest just how wide an effect the case should have, and it might even thereby provide answers for various questions beloved of examiners in equity. Some examples could be helpful.

If Vandervell had changed his mind before legal title to the shares was transferred, and he had informed the Bank of his new decision, the Bank could not have lawfully transferred the shares. Vandervell's original instruction was revocable: that instruction did not amount to a disposition of Vandervell's equitable interest,[57] it was not contractually binding, and it did not found an estoppel such that Vandervell could not resile from his instruction.[58] Vandervell's subsequent countermand to the Bank would have revoked the initial instruction. If the Bank had nevertheless gone on, and transferred legal ownership of the shares to the Royal College, the transfer would have amounted to a breach of trust by the Bank. In those circumstances, *Vandervell's* equitable interest would not have been overreached, and it would have bound the Royal College in accordance with the normal rules of priority: the Royal College was a donee, and therefore could never have claimed to be a bona fide purchaser of legal title to the shares *for value* and without notice of Vandervell's rights.

What would be the position if Vandervell had instructed the Bank to execute a transfer of the shares, and had then countermanded his instruction, but the Bank had acted on the instruction without notice of the countermand? In such a situation, a trustee's lack of notice does more than simply provide him with a defence to any personal claim which might be brought against him: the transfer made on the strength of the instruction cannot be impugned in equity, with all the consequences that follow from this fact. This is clear from *Leslie* v. *Baillie*.[59] A legacy was purportedly given to a widow domiciled in Scotland, but in consequence of Scottish law as it then stood, payment should have been made to her deceased husband's personal representative. The trustees had no notice of Scottish law and paid the widow. The late husband's personal representative sued for breach of trust and failed, because the trustees had no notice of his claim. The Court ordered accounts to be taken between the trustees and those claiming some beneficial entitlement to the trust assets on the basis that the trustees' payment was valid. So, if the transfer by the Bank were

[57] See the section above, headed "The Power to Overreach in *Vandervell*".
[58] See note 15 above.
[59] (1843) 2 Y. & C.C.C. 91; 63 E.R. 40. See also *Cothay* v. *Sydenham* (1788) 2 Bro. C.C. 391; 29 E.R. 218.

unimpugnable in equity—if there had been no breach of trust by the Bank—overreaching would still have occurred, and the Royal College would still have acquired good title to the shares. Of course, if the Royal College accepted the shares knowing, or perhaps even on notice, that Vandervell had countermanded the transfer, a trust for Vandervell might be imposed on the shares if it would be unconscionable for the Royal College to benefit from them.[60]

Again, if Vandervell had died after giving his instruction, but before the Bank had acted on it, the Bank should have held the shares on trust for Vandervell's estate. Vandervell's instruction, being personal and revocable, should have been revoked by his death.[61] For reasons given in the previous example, whether the Bank would commit a breach of trust were it to act on Vandervell's instruction after his death—and, therefore, whether overreaching would occur—should depend on whether the Bank had notice that Vandervell's instruction had been revoked, by his death.

Lord Wilberforce, admittedly, took the contrary view.[62] He thought that the Royal College's entitlement to the shares would not have been affected if Vandervell had died before the Royal College had become their legal owner, but after he had done everything necessary to achieve that result. Lord Wilberforce based his opinion on *Re Rose*.[63] With respect, application of *Re Rose* to the facts of *Vandervell* must be open to question. According to *Re Rose*, equity may anticipate the effect of a transfer where the transferor has done everything within his power to make the transfer effectual, albeit that action by some other person may be needed to complete it. Yet the application of *Re Rose* to *Vandervell* begs the very question at issue—whether Vandervell had done all he need to divest himself of his interest, given section 53(1)(*c*) of the Law of Property Act 1925.[64] More importantly, this article takes the bolder view that the principle in *Re Rose* is simply irrelevant to the facts of *Vandervell*, because the Royal College obtained its rights from an overreaching transfer by the Bank. Still, according to the view put forward here, Lord Wilberforce was nevertheless

[60] The courts recognised this type of trust in *Neste Oy* v. *Lloyds Bank plc* [1983] 2 Lloyd's Rep. 658 and *Re Japan Leasing (Europe) Ltd.* [2000] W.T.L.R. 301. See Hayton & Marshall, *Commentary and Cases on the Law of Trusts and Equitable Remedies* (11th edn. by D.J. Hayton, Sweet & Maxwell, London, 2001), at paragraph 6–89.

[61] The authority of an agent to act for his principal is revoked by the principal's death, unless some particular reason exists to render the authority irrevocable: see *Bowstead & Reynolds on Agency* (16th edn. by F.M.B. Reynolds, Sweet & Maxwell, London, 1996), Articles 121, 124 and 125. There is no reason to treat a beneficiary's instruction to his nominee differently; indeed, it would be very odd to make any such distinction.

[62] *Vandervell*, at p. 330.

[63] [1949] Ch. 78.

[64] See Parker & Mellows, *op. cit.* note 3, pp. 55–56.

correct to say that "The case should then be regarded as one in which the appellant himself has, with the intention to make a gift, put the college in a position to become the legal owner of the shares, which the college in fact became",[65] and that "[n]o separate transfer, therefore, of the equitable interest ever came to or needed to be made and there is no room for the operation of the subsection [*i.e.*, section 53(1)(*c*) of the Law of Property Act 1925]";[66] but it is suggested that the better justification for both assertions lies in the application of overreaching to the case, not the principle in *Re Rose*.

What if Vandervell had instructed the Bank to transfer the shares, free of his equitable interest in them, and he could not now resile from his instruction? Suppose that he had contracted to procure a transfer of the shares free of that interest, or that he was for some reason estopped from countermanding his instruction. If the contract or estoppel conferred irrevocable authority on the Bank to transfer the shares (for example, because the Bank was party to the contract in question), then no matter what Vandervell subsequently said, the Bank could lawfully make the transfer, and thereby overreach his equitable interest. Otherwise, if Vandervell could revoke his instruction to the Bank (whatever other obligations he might breach by doing so), the Bank should still have done whatever Vandervell told it. If the Bank failed to do so, its liability would then depend on whether it had notice that it should have done something else, as illustrated earlier. Vandervell's liability to other people would be a separate matter.

In each of the situations considered so far, the recipient of the shares acquired them for his own benefit, just as the Royal College apparently did in *Vandervell* itself.[67] Yet it could have been otherwise. What if trustees had acquired the shares?

For example, *Vandervell* might have directed the Bank to sell the shares to the trustees of another settlement, who could lawfully buy and hold such shares as investments.[68] If he had done so, what then? The sale by the Bank would still have overreached Vandervell's equitable interest in the shares. The trustees of the other settlement would then have acquired the shares subject to the trusts of that settlement. Yet there would have been no disposition of Vandervell's original equitable interest: the new trusts over the shares would have arisen simply because the recipient trustees had lawfully bought the

[65] *Vandervell*, at p. 330.
[66] *Ibid.*
[67] See note 4 above.
[68] It is very likely indeed that trustees will be able to invest lawfully in shares, either by virtue of a power conferred on them expressly (see note 18 above), or by virtue of Part II of the Trustee Act 2000.

shares with monies they had held on those trusts.[69] If Vandervell had directed the Bank to give the shares to the trustees of the other settlement, rather than to sell them, the gift would again have overreached his equitable interest in the shares. Again, the trustees of the other settlement would have acquired the shares subject to the trusts of that settlement, but this time because they had accepted the shares as an addition to the settled property: the recipient trustees' voluntary undertaking to hold the shares for the particular persons or purposes in question would be the factual source of the new trusts. In this case too, there would have been no disposition of Vandervell's original equitable interest in the shares.

The next set of facts to be considered is, perhaps, the most difficult. What if the Bank, at Vandervell's direction, had given the shares to the trustees of another settlement which Vandervell himself had established? There is no single answer to this question.

So long as the court was satisfied that Vandervell had done two distinct things—that he had first created a settlement, and that he had then directed the Bank to transfer the shares to the trustees of that settlement—the result should be the same as in the previous example. Vandervell's initial establishment of one settlement should not affect the correct legal interpretation of his subsequent, and independent, direction to the Bank as trustee of another settlement.

The question would be more difficult to answer had the two events taken place at the same time. In such a case, the precise facts at issue would be vitally important, because the court could reach one of two very different conclusions. On the one hand, the court could take the view that there were still two separate transactions, a transfer of the shares coupled with a declaration of new trusts over them, neither of which amounted to a disposition of Vandervell's subsisting equitable interest, within section 53(1)(*c*) of the Law of Property Act 1925.[70] On the other hand, the court might hold that the creation of the new settlement, and the direction to transfer the shares to the trustees of that settlement, were merely parts of a single scheme, by which Vandervell tried to substitute another person for himself as beneficiary of the shares; and in the light of *Grey* v. *I.R.C.*,[71] that scheme would surely involve a disposition of *Vandervell's* equitable interest in the shares. Such a disposition would fall squarely within section 53(1)(*c*) of the Law of Property Act 1925 and would therefore only be valid if

[69] See the section above, headed "Overreaching".

[70] A declaration of trust, being the creation of a new equitable interest, does not amount to a disposition of a subsisting equitable interest within section 53(1)(*c*) of the Law of Property Act 1925.

[71] [1960] A.C. 1.

embodied in duly signed writing. The limits of the *Vandervell* principle would have been crossed.

So what would be the position if the Royal College had received the shares subject to some trust imposed on them by Vandervell? In order to answer that question, it is necessary to return to the facts of the case.[72] The Royal College might have held the income (the dividends) from the shares on a charitable, educational trust to fund the new Chair of Pharmacology, if it had agreed with Vandervell to use the dividends for that purpose: such an agreement might have demonstrated sufficient intention to create a trust over the dividends,[73] rather than a mere non-binding understanding as to their use. Yet even if the dividends were held on trust, there is no evidence of any trust affecting the shares (the capital): the Royal College gave no undertaking as to how it would use the shares themselves. This is hardly surprising, given the plan devised by Vandervell's advisers: the Royal College was only to hold the shares for a very short time before a company associated with Vandervell exercised the option to acquire them. The imposition of a trust over the income from the shares, and nothing else, surely could not amount to a disposition, within section 53(1)(*c*), of Vandervell's subsisting, absolute, equitable interest. It would amount to the creation of a new trust, outside the scope of section 53(1)(*c*), simply affecting the income from the shares accruing to the Royal College. In other words, there would have been two, genuinely distinct, transactions: first, a transfer of the shares at law to the Royal College, which overreached Vandervell's equitable interest, and secondly, the imposition of a new trust over income from the shares accruing to the Royal College. Neither would have been within section 53(1)(*c*).

By contrast, if Vandervell had not merely directed the Bank to transfer the shares, but had sought also to procure that their new legal owner held them on trust for some third party, he would have done more than merely instruct the Bank to overreach his equitable interest in the shares, and impose a new trust on them: he would have been seeking to replace himself as beneficiary of the shares. Again, in accordance with *Grey* v. *I.R.C.*,[74] that would amount to a disposition of Vandervell's equitable interest in the shares, within section 53(1)(*c*), and duly signed writing would therefore be required for such a transaction to be effective.

[72] See the section above, headed "The *Vandervell* Case".
[73] For the need for certainty of intervention, see *Knight* v. *Knight* (1840) 3 Beav. 148, 173; 49 E.R. 58, 68.
[74] [1960] A.C. 1.

Finally, what if the Bank's title to the shares had been merely equitable? Suppose a stockbroker had held the shares for the Bank, which in turn held them for Vandervell, and Vandervell had directed a transfer of the Bank's equitable title to the Royal College. So long as the Bank transferred its equitable title effectively—with due formality—it would seem that Vandervell's interest should still have been overreached, and the Royal College should have received the Bank's interest free of Vandervell's.

Conclusion

The doctrine of overreaching can be used to explain and justify their Lordships' decision in *Vandervell* that the Royal College of Surgeons got good legal title to 100,000 "A" shares in Vandervell Products Ltd., free of Vandervell's prior equitable interest in them, even though Vandervell had not transferred that interest to the Royal College in accordance with section 53(1)(*c*) of the Law of Property Act 1925. Vandervell, without any need for formality, instructed National Provincial Bank Ltd. to give away its legal title to the shares, free of his equitable interest in them. The shares were transferred to the Royal College, and re-registered in its name, so it acquired good legal title to them. The gift of the shares also overreached Vandervell's equitable interest in them. Consequently, the Royal College acquired the shares free of that interest. No aspect of these transactions amounted to the disposition of a subsisting equitable interest, within section 53(1)(*c*).

This explanation of their Lordships' decision relies on a well understood and well accepted doctrine, overreaching, which is very commonly encountered in the administration of trusts: it does not relegate a case so practically important as *Vandervell* to the status of a useful "anomaly" or "exception". Understanding their Lordships' decision in terms of such a familiar, well known, doctrine has another major benefit. The substantial body of law relating to overreaching can be used to establish the limits within which *Vandervell* should properly be applied: it can be used to establish the consequences which may follow in a variety of circumstances when a nominee, acting on instructions from his beneficiary, deals with an asset he holds for that beneficiary. Finally, this explanation of their Lordships' decision helps to reconcile *Vandervell* with other cases on section 53(1)(*c*), cases which those who teach the law of trusts must explain as best they can.