A scrutiny of powers of sale arising under an equitable mortgage; a case for reining these in

The two dimensional function of a mortgage as both a contract and an interest in land oils the wheels of the property market and provides a choice of flexible methods of matching the needs of a borrower and those of a lender. This applies equally in commercial and domestic settings. An array of circumstances exist which can give rise to the mortgage relationship. Normally those circumstances result in the creation of a legal mortgage. Nevertheless a perhaps surprising number of circumstances may lead only to an equitable mortgage. Furthermore those occasions may not necessarily emerge in the context of the financial arrangements of borrower and lender. Equitable mortgages may emerge from more informal, private, and perhaps inter-family dealings. A strong rationale remains for different treatment of the powers of sale of a mortgagee, if that mortgage is an equitable one. An approach which seeks to assimilate the powers of an equitable mortgagee with those of a legal mortgagee, it is suggested, is misplaced. In addition the question of what an equitable mortgagee has power to sell has not been resolved satisfactorily, despite some recent developments which may indicate otherwise.

Most mortgages of land are legal mortgages. They are created by a charge, which must be made in the form of a deed\(^1\). The deed must state that the charge is made by way of legal mortgage. Since the Land Registration Act 2002 came into force on 13 October 2003, mortgages over land with registered title can only be created in this way. A mortgage over a registered title is a registrable disposition under Section 27 Land Registration Act 2002. It will become a legal mortgage only when it is

\(^1\) Law of Property Act 1925 s52(1)
entered in the Charges Register of the title affected. If successfully so registered, the legal mortgagee will possess a choice of remedies if the mortgagor is unable to repay the borrowing timeously. The weightiest of these remedies is the existence of the right to possession and exercise of the power of sale. The inherent right of a mortgagee to possession is firmly entrenched if the mortgage in question is a legal mortgage – even when there is no court order authorising it. The rights of equitable mortgagees have received less attention. (The situations in which equitable mortgages are created are considered further below.)

The inherent right of an equitable mortgagee to possession similar to that of a legal mortgagee has never been so firmly entrenched. Until recently the view prevailed that an order of the court, putting an equitable mortgagee into possession, was a pre-requisite to such an equitable mortgagee being able to exercise a power of sale. The case of Swift 1st Ltd v Colin, which was a rare case involving an equitable mortgage, might be thought to represent a narrowing of the gap between the rights of a legal mortgagee and those of an equitable mortgagee. This article will illustrate why, in the context of an equitable mortgage, allowing a re-possession and sale by the mortgagee without an order of the Court is an undesirable step too far, and argues that there are dangers in giving the decision in Swift 1st v Colin a significance greater than its own singular facts merits. Neither has the difficult question of whether a power of sale arising under an equitable mortgage can validly confer both legal and equitable title on a purchaser been satisfactorily addressed.

Powers of sale in legal mortgages

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2 Snell’s Equity 32nd Edn p. 1058 “An equitable mortgagee has no legal estate. It is usually thought that an equitable mortgagee is unable to take possession (or receive rents and profits) without an order of the Court or express provision in the mortgage.”

3 [2011] EWHC 2410 (Ch), [2012] Ch206
If the mortgage in question is a legal mortgage rather than an equitable mortgage the starting point is that a mortgagee can take possession of the mortgaged property as soon as the mortgage has been properly executed, unless the terms of the mortgage deed agreed between the mortgagor and the mortgagee expressly or impliedly postpone this right. Harman J. in Four Maids Ltd v Dudley Marshall (Properties) Ltd\(^4\) confirmed that: “the right of the mortgagee to possession in the absence of some contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right.” In practice entry into possession without obtaining a possession order from the court is rare because of the mortgagee’s fear of criminal or civil liability\(^5\) and is accordingly normally confined to circumstances where the mortgagor wishes voluntarily to surrender possession to the mortgagee, and when the property is unoccupied. Nevertheless the legal mortgagee’s right to possession without a court order is not in doubt. Legal mortgages are commonly professionally drafted documents, employed by large institutional lenders and normally executed after legal advice. Therefore even in the rare instances when the actions of such a commercial lender are not be subject to any scrutiny by a court before repossession takes place, the actions of institutional lenders are nevertheless subject to other forms of control in the public domain. These include oversight by the Council of Mortgage Lenders, the Financial Conduct Authority, the Financial Ombudsman Service, as well as the British Bankers’ Association Codes of Conduct.

On the other hand by their very nature, equitable mortgages may be created and exist in a more informal manner. If a person has only an equitable interest in land,\(^4\) [1957] Ch317 [1957] 2 AU E.R. 35, at para 36
\(^5\) Criminal Law Act 1977 s6(1)
he can only create an equitable mortgage over that interest. Equitable mortgages do not have to be created by deed, the only formality being the requirement for some written form and that is to be signed.\(^6\) In First National Securities Ltd v Hegarty\(^7\) an equitable mortgage occurred when a legal co-owner of a house perpetrated a fraud involving an impersonator of his wife, who was the other co-owner. His wife’s signature was forged. The forged document was held to create an equitable charge against the forger’s half-share of the house.

A contract to create a legal mortgage has been held to create an equitable mortgage provided that it complies with Section 2 Law of Property (Miscellaneous Provisions) Act 1989 and is signed by all parties and comprises a written record of all agreed terms. Also an equitable charge can be created when a will or settlement contains a devise of land charged with the payment of a sum of money.\(^8\) Prior to the Law of Property (Miscellaneous Provisions) Act 1989 an equitable mortgage could be created merely by deposit of title deeds with the intention of providing security for a loan, though this is no longer possible.

It follows from the fact that the holder of only an equitable interest in land can create an equitable charge over his interest that any other owner – equitable or legal owner – need not necessarily have notice of any such encumbrance. There is no requirement anywhere to give such notice.

Indeed one method of severing a joint tenancy sometimes employed in practice (if the whereabouts of the other joint owner cannot be located and therefore giving the more usual actual notice of severance is not possible), is to create an equitable

\(^6\) Law of Property Act 1925 s53(1) (c)
\(^7\) [1985] QB 850
mortgage over a joint owner’s equitable interest. This has the effect of severing the joint tenancy. The co-owner will not have any notice. An indebted joint owner of property may then create an equitable mortgage over his beneficial interest in favour of a creditor. All this can quite legitimately take place without the co-owner knowing anything. It is probably unlikely that a mainstream bank would be happy with a security of this nature but as between families, business associates, and partnerships it may be more acceptable. Equitable mortgages can indeed validly exist in an altogether more private and informal environment.

Conversely a legal mortgage will have been created in a more informed environment. All legal estate owners must participate in creating a legal mortgage over that estate and it must be created by deed. Given that equitable mortgages can be created with much less formality than legal mortgages, the rights of the equitable mortgagee warrant close examination. As mentioned earlier, for many years there was substantial doubt that an equitable mortgagee had the same intrinsic right to possession of the mortgaged property as was enjoyed by the legal mortgagee. Harman J. in Barclays Bank Ltd v Bird\(^9\) said that the right of an equitable mortgagee is “to come to court and take out a summons asking for possession. It does not matter from that point of view that the mortgage is equitable. The only limitation on the equitable mortgage in that respect is that he has no right to possession until the court gives it to him.” In Royal Bank of Canada v Nicholson\(^10\) it was emphasised that “the right of an equitable mortgagee was to ask for a court for an order for possession.” In Ladup Ltd v Williams & Glyns Bank plc\(^11\) Warner J commented “there is no doubt that the primary remedies of a person entitled to such an equitable

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\(^8\) Re Owen \(\{1894\} 3\) Ch 220
\(^9\) \([1954]\) Ch 274 at para 280t
\(^10\) 110 DLR (3d) at 765-766
\(^11\) \([1985]\) 1 WLR 851
charge are to apply to the court for an order for sale or for the appointment of a receiver. An equitable chargee, since he has neither a legal estate nor the benefit of a contract to create one, cannot foreclose or take possession.” It seemed clear that if it was an equitable mortgagee, a court order was required first.

The desirability of a court order prior to possession for mortgages generally had been examined, however, both judicially and by commentators\(^\text{12}\). In particular following s36(1) Administration of Justice Act 1970, doubts were raised whether a mortgagee could enter into possession without a court order, because the legislation was designed to give courts considerable discretion before allowing mortgagors to be evicted from their homes. The 1970 act did not specifically refer to either legal or equitable mortgages so must apply to both. In Centrax Trustees Ltd v Ross\(^\text{13}\), Goulding J appeared to regard s36(1) as encouragement to courts to be able to intervene in a protective manner in order to give relief to mortgagors. He referred to parliament as having “given legislative shelter” and called it “social legislation”.

If a paternalistic role for the court was envisaged by the 1970 Act, it could only be invoked if the jurisdiction of the court is engaged. If it remained possible for a lender to repossess a mortgaged property without a prior court order – which had long been the case for legal mortgages, but was not considered to be the case for equitable mortgages – then the powers given to the court by the 1970 Act are rendered otiose and, possibly faintly absurd. Nevertheless in Ropaigealach v Barclays Bank plc the Court of Appeal concluded that it was not possible to be satisfied that Parliament had intended a mortgagee’s common law right to take possession to be exercisable only following a court order, because the wording of the section did not specifically say

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\(^{13}\) [1979] 2 All ER 952, at para 955f
so. The Court of Appeal concluded that it could not construe the words which had been used other than in their literal and natural meaning. In reaching this conclusion evident discomfort emerged, in particular, in the judgement of Clark L. J. He said that he did so “with considerable reluctance”\(^\text{14}\) and pointed out that the outcome which arose was that there was a “curious anomaly in the powers of the court to afford relief to mortgagors against mortgagees who wished to take possession of mortgaged dwelling houses.” He added “it does however strike me as very curious that mortgagors should only have protection in the case where the mortgagee chooses to take legal proceedings and not in the case where he chooses simply to enter the property.” No differentiation was made between legal or equitable mortgages in the decision in that case, though it concerned a properly registered legal mortgage.

The mortgagors’ appeal was dismissed and leave to appeal to the House of Lords was refused. That outcome was unfortunate and has been rightly criticised. Dixon has pointed out\(^\text{15}\) that there are risks when “marginal mortgage lenders”, as opposed to more “reputable institutional lenders” might be attracted by the surprising ease of securing possession by self help. He suggested that a desirable solution would be to convert the right of possession into a genuine remedy, enforceable by court action only. He questioned whether the mortgagee should be given “a pre-eminent right to the land rather than a controllable remedy”. Such a change would require statutory intervention, but there have been no moves in that direction since.

\[^{14}\text{At para 283B of his judgement}\]
\[^{15}\text{Dixon 1999 CLJ 281 “Sorry, we’ve sold your home: Mortgages and their possessory rights”}\]
from a solicitor when it was executed. The more informal and private circumstances in which equitable mortgages can be created however, coupled with the fact that it is entirely possible for a co-owner of a legal estate to be unaware of an equitable mortgage having been created by the other owner, still justified the view that if the mortgage was an equitable one, a court order was nevertheless needed prior to repossession and sale\textsuperscript{16}. There was no reference to equitable mortgages in the arguments in Ropaigealach, and accordingly no reason to suppose that the need for a court order, if it was an equitable mortgage, had altered.

\textbf{A shift in approach?}

The matter recently again arose for consideration in the case of Swift 1\textsuperscript{st} Ltd v Colin.\textsuperscript{17} It is most unfortunate that because of the particular facts in Swift 1\textsuperscript{st}, the only party represented was the claimant equitable mortgagee. The mortgagors neither objected to anything the mortgagees were doing, nor appeared at the hearing. Swift 1\textsuperscript{st} Ltd had provided a loan to the mortgagors. A prior mortgagee had caused administrative difficulties in the registration of Swift 1\textsuperscript{st} Ltd’s charge on the charges register and it was never properly registered. However a notice of it had been entered on the register. Swift 1\textsuperscript{st} Ltd executed the appropriate Land Registry transfer\textsuperscript{18} seeking to sell the house in exercise of its power of sale. The Land Registry declined to register that transfer to the purchasers from Swift 1\textsuperscript{st} Ltd, because of the uncertainty as to whether this was possible without a court order. However no-one was actually opposing that registration application. A significant consideration is that the mortgage in favour of Swift 1\textsuperscript{st} Ltd was a standard form deed by a commercial lender expressed to be a legal charge. It had been appropriately  

\textsuperscript{16} Emmet on Title – para 25.223 “There is no modern authority” in support of the opinion that an equitable mortgagee may take possession against the mortgagor without an order of the court.

\textsuperscript{17} Swift 1\textsuperscript{st} Limited v Dean Jonathan Colin, Joanna Nichola Colin, Intervo Dis Ticaret Ve Mumessilik Limited ST1, Copex Securities Limited [2011] EWHC 2410
executed by the mortgagors as a deed, although the report of the case does not state whether the document had been explained to the mortgagors and witnessed by a solicitor. Nevertheless that legal charge had never been registered, and accordingly took effect as an equitable mortgage only. Swift 1st Ltd did not apply for an order for possession but proceeded to sell the mortgaged property to Mr and Mrs Colin. Swift 1st Ltd had relied upon the fact that the mortgage had been executed as a deed. The Land Registry had taken the point in correspondence that, as the charge was unregistered, it took effect in equity only and that, as an equitable mortgage, albeit made by deed, the power of sale did not arise. However HHJ Purle QC (sitting as a High Court Judge) regarded this as erroneous. He held that Swift 1st Ltd had full power of sale deriving from Section 101(6) of the Law of Property Act 1925 which conferred various powers upon a mortgagee including a power of sale, where the mortgage is made by deed. It did not matter that it was an equitable mortgage.

The decision in Swift 1st v Colin, on its facts, was not going to produce a controversial outcome for the parties involved. This was an unoccupied property and an unopposed application. The indebtedness of the mortgagors exceeded the sale price of the house anyway, and they had disappeared. It is hard to resist the suspicion that the court was engaged in some form of rubber stamping exercise. Nobody stood to gain if the transfer to Mr and Mrs Colin was not registered.

What HHJ Purle seems to have concluded is that the position all hinges on whether the equitable mortgage or charge was created by a deed. Section 101(1) LPA 1925 provides that a mortgagee, where the mortgage is made by deed, has various

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18 A form TR2
powers including a power of sale. However Section 90(1) LPA 1925 confers on a
court the power to make an order of sale in reference to an equitable mortgage on
land and to vest the property in a purchaser. The two sections do not easily fit
together. In Swift 1st, the Land Registry’s initial refusal to process the application to
register Mr and Mrs Colin’s title was because the charge, being unregistered, took
effect in equity only. In accordance with all previous opinion on the matter, the Land
Registry considered that a power of sale was not thought to be inherent if it was an
equitable mortgage. They considered that a court order was needed first. S101(1)
LPA 1925 does not refer specifically either to legal or equitable mortgages and only
speaks of “mortgages made by deed”.

Nevertheless HHJ Purle simply dismissed the Land Registry’s reservations as
“erroneous”. All that he considered necessary was that it had been created by a
deed. Perhaps surprisingly no consideration was given to the wording of section
90(1) LPA 1925. This is strange because section 90(1) does specifically refer only to
equitable mortgages and the court’s power to order a sale. Section 101 simply
refers to “mortgages” generally and there is no indication in that section as to any
difference between legal and equitable mortgages.

Despite HHJ Purle’s willingness to treat legal and equitable mortgages in the same
way, so long as a deed had been executed (and in spite of S90(1) LPA 1925) it is
suggested that there remain cogent reasons to treat legal mortgages and equitable
mortgage differently. A deed may be present in circumstances in which the facts
might be significantly different from those in Swift 1st. Equitable mortgages of
property may be given by one spouse to secure, by way of a guarantee, the
borrowings of another spouse. Equitable mortgages might be created which are
private mortgages rather than in the standard form of a commercial lender’s charge. Delicate questions of undue influence, fraud, misrepresentation, and uncertainty of the terms of such charges could easily arise. Equitable mortgages might well be more likely to be private mortgages where borrower and lender are connected persons and may even be from within the same family. By their very nature, also, equitable mortgages may be created over only an equitable interest in the property and owners of other equitable interests or the legal estate itself may be unaware of these arrangements. In certain circumstances undue influence is presumed where there is a relationship of “trust and confidence” between parties and evidence might actively be required that someone in the position perhaps of a guarantor exercised an independent mind for an equitable charge to be valid.\textsuperscript{19} For example in Royal Bank of Scotland plc v Etridge (No 2)\textsuperscript{20} the House of Lords set out in very laborious detail the content of legal advice to which a guarantor wife is entitled when entering into a guarantee.

In her commentary on the Etridge case, Diduck\textsuperscript{21} observed that research in the UK and Australia concluded that “many wives acting as guarantors value their relationship over and above any concerns they may have about the transaction, or feel that they have no choice but to sign because of factors such as economic dependence upon their husband, trust in him, fear of violence, an overwhelming sense of obligation, emotional pressure or feeling a duty to protect domestic harmony.” The conjoined appeals in the Etridge case involved eight separate cases of wives alleging they had signed mortgage agreements under the undue influence of their husbands.

\textsuperscript{19} Credit Lyonnaise Bank Nederland NV v Burch [1997] 1 AU ER 144
\textsuperscript{20} 2 AC 773
\textsuperscript{21} Alison Diduck, Commentary on Royal Bank of Scotland plc v Etridge (No 2) in “Feminist Judgements From Theory to Practice” Hart 2010
Whilst undue influence is not confined to equitable mortgages and might also be present if the mortgage was a legal one, nevertheless the more informal, private, and family relationships in which an equitable mortgage may be created makes the risk of undue influence even greater. The various possibilities of undue influence, fraud, misrepresentation and the uncertainty and informality which might surround the creation of an equitable mortgage – even if a deed is signed – present compelling reasons for the jurisdiction of the court to be engaged prior to any purported exercise of a power of sale under an equitable mortgage as a self-help remedy. The need for judicial scrutiny of arrangements surrounding equitable mortgages is arguably more forceful than is the case with legal mortgages. The singular facts of Swift 1st v Colin ought not to be taken as opening the doors for an equitable mortgagee being able to sell the mortgaged property without a court order22 yet it seems that this might be what is happening. The Land Registry’s instruction manual now states “a chargee of registered land, where the charge is created by deed but who has only an equitable charge will also have the powers of disposition that are given by the general law to a legal mortgagee (Swift 1st Ltd v Colin [2011])”. The implication now being that an equitable mortgage by deed, and a legal mortgage do not differ, in possessing an inherent power of sale without a court order (though there is no suggestion that equitable mortgages which have not been created by deed should permit the mortgagee to sell without a court order).

Such a conclusion is undesirable. There must be serious concerns about any risk of a person being deprived of property rights through a routine administrative application process to the Land Registry in exercise of a purported power of sale.

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22 Heller, in The Property Law Journal, 6 February 2012, referred to the decision in Swift 1st Ltd as controversial, doubted its correctness and expressed the hope that it was just a “one off”.
without any form of court order. Such transactions ought first to engage in due judicial process so that the process of discovery will lead to any uncertainties or irregularities concerning the charge being ironed out before an application to the Land Registry for the registration of a sale is lodged. Such uncertainties and irregularities are more likely to be present in cases of equitable mortgages. The strength of any documents the mortgagee is relying on can be appropriately tested. Without such an engagement of the judicial process in the first place, the Land Registry may be put into the undesirable position of unwittingly facilitating clandestine transactions in land following perhaps questionable documentation. It is now entirely possible for the legal owners of land over which there subsists an equitable mortgage, to find that their land has been conveyed by the equitable mortgagee without any knowledge of what has happened. This is wrong in principle and undesirable in practice. The European Convention on Human Rights (incorporated into English Law by the Human Rights Act 1998 Schedule 1) guarantees the right to a “fair and public hearing” (and the implicit right of access to adjudication by a court) in Article 6. In property law generally self-help remedies such as forfeiture of leases by re-entry by the landlord, and distress, are castigated as “inimical to a society in which the rule of law prevails”.

What can be sold?

A further difficulty with the power of sale arising under equitable charges is demonstrated when the question is asked as to what the equitable mortgagee is able to sell. An equitable mortgage may exist only over an equitable interest in a property. Can any sale be of the legal estate or merely the equitable interest? Again

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23 Gray and Gray, Elements of Land Law Fifth Edition (referring to Lesapo v North West Agricultural Bank 1999 (12) BCLR 1420
Swift 1st Ltd v Colin is being perceived as resolving this question. However again it is submitted that it is dangerous to regard it as having effectively done so.

In Re: Hodson and Howes’ Contract\(^{24}\) it was suggested that the power to sell which a mortgagee possessed was to sell the “mortgaged property”. Therefore if a mortgagee only had an equitable interest, this gave him only the power to sell what he had. The legal interest may well have been vested in others. This was logical. A man in possession of an equitable interest in a field cannot convey the field. That is something which only the legal estate owner can do. Accordingly if a mortgagee of that equitable interest seeks to sell following a repossession of that mortgaged equitable interest, it is hard to see how by some process of transmutation the equitable interest can be enlarged to enable the equitable mortgagee to convey the legal estate. It is not inconceivable that holders of other property rights in that same field and the owners of the legal estate itself may be completely unaware of the equitable mortgage. Re: Hodson and Howe’s Contract was a case concerning the wording of the 1881 Conveyancing Act\(^{25}\). This gave the mortgagee power to convey the property sold for “such an estate and interest therein as is the subject of the mortgage”. The court held that what was “subject to the mortgage” was the equitable estate and interest vested in the mortgagee. The mortgagee could only convey all he had. He could not convey the legal estate. The law appeared settled for many years.

In Re. White Rose Cottage\(^{26}\) the equivalent wording the Law of Property Act 1925 had to be considered\(^{27}\). The case concerned a memorandum of deposit under seal

\(^{24}\) (1887) 35 Ch D 668
\(^{25}\) S21 (1)
\(^{26}\) [1965] Ch 940
\(^{27}\) S104 (1)
– clearly only an equitable mortgage. Nothing was registered, title deeds were merely deposited. At first instance Wilberforce J. had decided that the charge extended to all estates – legal and equitable – and the words “the subject of the mortgage” was the property itself and not just an equitable interest in it. He seemed to take that phrase as referring to a means merely of identifying the property, and nothing more technical than that.

On appeal, however, the case was decided on an entirely different point. As a matter of construction, and on the facts of that particular case, it was held that the sale was by the mortgagor with the concurrence of the mortgagee, and was not a sale by the mortgagee in exercise of its power of sale. Nevertheless Lord Denning made some obiter remarks in which he agreed with Wilberforce J. and regarded “the subject of the mortgage” as both the equitable and legal estate in the mortgaged property. He said “I see no reason why an equitable mortgage, exercising his power of sale, should not be able to convey the legal estate.”

28 At 951 para c

conclusion relying on dicta of Lord Denning MR (with whom Salmon L J agreed) in the latter case. That is therefore also our view here.”

It is noteworthy that the other judge in the Court of Appeal hearing of Re White Rose Cottage was Harman L J. However his judgment centred completely on the construction of the mortgage deed signed in that particular case as conferring an irrevocable power of attorney to convey the mortgagor’s legal estate. Interestingly nothing in Harman L J’s judgment seemed to indicate any change of mind from his views expressed in Barclays Bank v Bird that an equitable mortgagee needs a court order before having the right to possession and sale of the mortgaged property.

Impact of Smith 1st Ltd v Colin
Impact from the decision of Swift 1st v Colin appears to be weighty. Not only does the Land Registry now regard the case as resolving the issue of an equitable mortgagee having an inherent right to possession without any court order, but also that – based on entirely obiter remarks of Lord Denning in the case of Re White Rose Cottage, mentioned in Swift 1st v Colin – an equitable mortgagee can sell that which he does not have, namely the legal estate. It is unfortunate that such a brief unreserved first instant judgment where only one party was represented and in attendance at the hearing, is being afforded such gravitas.

In an environment in which mortgage fraud is increasing, the apparent ability of an equitable mortgagee to be able to repossess and sell a mortgaged property without any form of engagement of the judicial process is likely to aid secretive and fraudulent dealings, rather than safeguard against them. Moreover the protections a court can give to residential mortgagees which have been expressed as being
clearly desirable in the criticisms of the Ropaigealach case, are not available if the
property can be sold without a court order. This is even more worrying if the
mortgage is an equitable one. An equitable mortgage may have been created in
more questionable, informal, and unsupervised circumstances than a legal
mortgage. The case for scrutiny by a court (save for instances where a mortgagor
gives informed consent to a reposssession) is particularly compelling if the mortgage
is only an equitable one. Swift 1st v Colin ought not to be given any especial
significance, and the undesirable prospect of sales which may have been kept
hidden from other legal or equitable owners of the property concerned should be
reined in.

Even more iniquitous is the suggestion that an equitable mortgagee can sell more
than has been mortgaged to him. If an equitable mortgage has been created over a
mere equitable interest in land, for example a beneficial interest under a trust of land,
the suggestion that the legal owners of that land, and indeed owners of the other
beneficial interests, could find that their interests have been sold by the mortgagee of
another’s equitable interest is surely not supportable, and in truth is supported only
by an obiter remark of Lord Denning. Added to this mix the fact that this can all be
done without them necessarily knowing anything about it (because, seemingly, a
court order is now not a pre-requisite) it may be not only unsupportable but
potentially highly suspicious. The undesirability of the law’s apparent move in this
direction is clear. It is an open door for injustice.