Beneficial Ownership of Royalties in Bilateral Tax Treaties

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CHAPTER 5

BENEFICIAL OWNERSHIP:
DOMESTIC MEANING

5.1. INTRODUCTION

This chapter investigates the domestic meaning of beneficial ownership in those states in which the term is recognized for purposes of domestic law. The term “beneficial ownership” is not defined for purposes of its use in Article 12 of the OECD Model. In order to establish its meaning for purposes of international tax treaties, the domestic meaning thereof may provide important clues. As is argued in 6.3.2.1., such domestic meaning should be taken as the starting point for finding the international tax meaning.

As far as domestic law is concerned, beneficial ownership is a term which is mainly used by states which form part of the common law family. This chapter therefore focuses on the domestic meaning of the term in England, the United States, Australia and Canada, all common law states. The position in civil law states is briefly stated.

5.2. ENGLAND/UNITED KINGDOM

There is more than one reason why the meaning of beneficial ownership in the domestic law of England should receive special attention. In the first place, as evidenced from the fact that beneficial ownership is used in more than fifty provisions in English tax law, as well as the court decisions discussed below, England appears to be the state where the term is most widely used and where its meaning is most settled. Second, as is discussed in more detail in 6.3.2.2., beneficial ownership was used in some United Kingdom tax treaties before its incorporation into the OECD Model in 1977, and the United Kingdom was represented in the OECD Working Party which incorporated the term into the OECD Model. It is therefore likely that the meaning ascribed to beneficial ownership by this
Working Party was strongly influenced by the English domestic meaning.

5.2.1. Meaning of beneficial ownership

There are a number of English tax cases dealing with the meaning of beneficial ownership, quite a few of them involving either exemption from stamp duty on certain transfers of property between companies where more than a fixed percentage of the shares of one of the companies are beneficially owned by the other or the transfer of losses for income tax purposes between group companies in similar circumstances.

A few things should be kept in mind when reading through the next section. The first, which is in agreement with the position of ownership in England as discussed in Chapter 4, is to note the legal, as opposed to an economic, approach by the English courts on the determination of beneficial ownership. The second is to note that beneficial ownership is used in many situations apart from trusts. Too often investigations into beneficial ownership begin and end with a discussion of the situation in respect of trusts. Another factor is that the courts in England do not distinguish between beneficial ownership for tax purposes and non-tax purposes. A last point is that, of the fourteen cases discussed, ten deal with beneficial ownership of shares, two with ships, one with real estate and one with copyright. Shares, ships, fixed property and copyright are all examples of things which can only have one beneficial owner at any particular time. This is in contrast with the beneficial ownership of royalty payments. A whole chain of persons can be beneficial owners of royalty payments in respect of the same underlying intellectual property (see also 6.3.2.10.).

One of the most often quoted phrases on the meaning of benefi­
cial ownership is that by Lord Diplock in Ayerst (Inspector of Taxes) v. C&K (Construction) Ltd:

My lords, the concept of legal ownership of property, which did not carry with it the right of the owner to enjoy the fruits of it or dispose of it for his own benefit, owed its origin to the Court of Chancery. The archetype is the trust. The “legal ownership” of the trust property is in the trustee, but he holds it not for his own benefit but for the benefit of the cestui que trustent or beneficiaries. On the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements, which became vested in different persons: the “legal ownership” in the trustee, and what came to be called the “beneficial ownership” in the cestui que trust. 203

Lord Diplock further explained the meaning of beneficial own­ership as a term of legal art, descriptive of the proprietary interest in its assets of a company. 204

In Wood Preservation Ltd v. Prior (Inspector of Taxes), Lord Donovan declined to give a meaning, holding that it would be rash to attempt an exhaustive definition of beneficial ownership. His colleague, Harman L.J., though, was less reserved, holding beneficial ownership to mean:

An ownership which is not merely the legal ownership by the mere fact of being on the register but the right at least to some extent to deal with the property as your own. 205

In J Sainsbury plc v. O’Connor (Inspector of Taxes), Nourse L.J. said the following:

It means ownership for your own benefit as opposed to ownership as trustee for another. It exists either where there is no division of legal and beneficial ownership or where legal ownership is vested in one person and the beneficial ownership ... in another. 206

Rowland, after discussing some of the aforementioned cases, comments as follows on the question: what is beneficial ownership?

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204. Id. at 348.
205. (1968) 45 TC 112, CA, at 132-133.
It is reasonably clear that this is the bundle of rights required to allow enjoyment of an asset by the owner but falling short of, or distinct from, legal title. It is generally where the real value in an asset lies even though a transfer of the legal title will be required in some cases for official recognition of ownership [emphasis added].

The English courts further thoroughly considered the question of whether beneficial ownership has, in addition to a legal meaning, also an ordinary meaning. In Parway Estates Ltd v. Commissioners of Inland Revenue, Upjohn J., in the High Court, gave acceptance to a meaning of beneficial ownership in its popular or ordinary sense. But this view was rejected by Jenkins L.J. in the Court of Appeal, holding that it seems difficult to ascribe any different meaning to those words from their legal meaning, and that little assistance can be derived from speculation as to what an ordinary person would take them to mean in their popular sense. The view that beneficial ownership must be construed according to its legal meaning, unless there is something in the context of the section which requires one to do otherwise, has subsequently been confirmed by the court.

5.2.2. Tests applied by the courts

It is relevant to investigate the different tests applied by the courts to determine whether beneficial ownership has been transferred. In Wood Preservation, a case dealing with the issue of whether a condition in a sales contract is such that the transfer of beneficial ownership to the purchaser is postponed, the test applied in the High Court was to ask whether the purchaser could have called for specific performance. Goff J. answered the question in the affirmative. The condition was solely for the benefit of the purchaser.

208. (1957) 45 TC 135, Ch D, at 142.
and could at any time be waived by him. Because of the purchaser’s ability to at any time require specific performance of the contract, Goff J. found that beneficial interest had sufficiently passed to the purchaser. But in the Court of Appeal things took a different turn. Instead of asking whether the purchasers could obtain specific performance by waiving the condition in their favour, the Court of Appeal analysed the nature and extent of the rights retained by the vendor, pending the waiver. Lord Donovan summarized the argument for the Crown:

First, Silexine could not have disposed of the shares to anybody else ... Second, it could not declare or pay any bonus or dividend on its shares ... Third, it would have been bound at any time actually to transfer the shares if British Ratin waived the condition in question ... The shares (in a word) were like a tree which the owner could not sell and could not cut down and of which he could enjoy none of the fruit. ... But if one finds, as here, that the company ... though still the legal owner of the shares, is bereft of the rights of selling or disposing or enjoying the fruits of these shares, then, bearing in mind the purposes of section 17, I have in the end concluded that it would be a misuse of language to say that it still remained the beneficial owner of these shares.211

His colleague Harman L.J. agreed: “There was no benefit at all in their ownership: it was a mere legal shell ... They were tied hand and foot.”212 The third judge, Widgery L.J., at first considered applying another test, that is, by looking at whether beneficial ownership had reached the purchaser. He argued that where an unquestionable owner enters into a contract of sale he should be regarded as remaining beneficial owner until that interest has passed to the purchaser. In his view, if that was the right test, then, because the beneficial ownership had not reached British Ratin it remained at the material time in the original owners. He concluded, however, as follows:

But I have been persuaded that ... one must not look so much at whether beneficial ownership has reached the purchaser: one must examine the situation of the vendor and ask whether the legal ownership, which unquestionably remained in him, retained the attributes of beneficial ownership for the purposes of the section.213

211. Wood Preservation, supra note 205, at 132.
212. Wood Preservation, supra note 205, at 133.
213. Wood Preservation, supra note 205, at 133.
In *Sainsbury* the facts were that the taxpayer (Sainsbury) entered into negotiations with a Belgium company (GB) for setting up a joint venture company in the United Kingdom. The initial intention was for Sainsbury to hold 70% and GB to hold 30% of the shares, but in order to allow Sainsbury to take advantage of the group relief provisions, its percentage was changed to 75%. A separate agreement was therefore reached in terms of which Sainsbury granting GB a call option and GB granting Sainsbury a put option in respect of 5% of the shares, neither of the options to be exercised within five years. In the event, neither option was exercised. The question for the court to decide was whether Sainsbury was the beneficial owner of the whole of its 75% holding for purposes of the Income and Corporations Taxes Act 1970, notwithstanding GB’s option to purchase 5% of the share capital after five years.

In the Court of Appeal, LLoyd L.J. at first seemed to prefer the test of asking whether the purchasers could have called for specific performance. Realizing, however, that he was bound by the decision in *Wood Preservation*, he in the end applied the test of looking into the nature and extent of the rights retained by Sainsbury in relation to the 5%. The *ratio decidendi* of *Wood Preservation* was interpreted very narrowly by Lloyd L.J., as indeed by his colleague Nourse L.J., namely that in order for Sainsbury not to be the beneficial owner, it would have to be found that it was bereft of all rights which would normally attach to that parcel of shares, so that its ownership was nothing more than a legal shell.

Counsel for the Crown submitted that the cumulative effect of the fact that Sainsbury had no right to dispose of its shares for five years, had no expectation of any dividend during the five year period and would have to sell the option shares at a deflated price, was such as to deprive Sainsbury of all fruits of ownership. Lloyd L.J. rejected this argument. He pointed out that the first two factors apply not only to the 5% but also to the remaining 70%. He did not believe that the third factor made all the difference. In respect of the dividends, the question was not whether Sainsbury required the consent of GB before a dividend could be paid, or whether a payment of dividend

was likely or not. The question is rather whether Sainsbury would have received the dividend if it had been paid. The answer is in the affirmative. In the end, he was not persuaded that Sainsbury’s rights in relation to the shares were no more than a legal shell. Sainsbury was the beneficial owner of the 5%.

Counsel for the Crown’s last argument is relevant regarding the question of how many rights need to be held in order to constitute beneficial ownership: All parties seemingly in agreement that Sainsbury was bereft of some of the rights of ownership whilst retaining the rest, counsel invited the court to balance the rights retained with those lost in order to determine whether Sainsbury’s ownership was or was not beneficial. But, Lloyd L.J., again finding sanctuary in the very narrow ratio decidendi in Wood Preservation of only having to decide whether ownership is a mere legal shell, was not willing to perform such a balancing act, which he found too difficult, holding: “How ... could one ever draw the line?”

From the above discussion it can be concluded that looking into the nature and extent of the rights held by different persons is the correct test for determining beneficial ownership.

For the sake of completeness, though, it is appropriate to refer also to other tests which were considered by the court. In Wood Preservation in the High Court, Counsel for the Crown submitted that the true test is: has the vendor been deprived of the right to dispose of the shares for his own benefit and has that right passed to the purchaser? Goff J., however, rejected the presence of a right to dispose of shares for the owners’ benefit as the test of beneficial ownership. There is no suggestion in any of the judgements in the Court of Appeal that he was wrong in rejecting the test which had been proposed. In the High Court in Sainsbury, Millett J. made his contribution to the arguments on the real test. He first agreed with Goff J. that an unfettered freedom of disposition is not an essential feature of beneficial ownership. He gave several examples, amongst others a grantor of an option, of parties subject to limitations on their freedom of disposition, but who remain the beneficial owners as

216. Sainsbury, supra note 206, at 329.
217. Wood Preservation, supra note 205, at 126.
218. [1990] STC 516, Ch D, at 531-533.
long as they retain their rights to the beneficial enjoyment of the shares and of any income derived therefrom. In his opinion, it is necessary to distinguish between the inability to dispose of shares and the inability to do so for your own benefit. In the second place, in the judge’s view, beneficial ownership has nothing to do with control:

The right to the beneficial enjoyment of any dividends which may be declared in respect of shares is certainly an important feature of beneficial ownership, though it is not the only, nor necessarily the most important, way in which the trading profits of a subsidiary can be enjoyed by its parent. But the right to the beneficial receipt of any dividends which are declared must be distinguished from the right to cause them to be declared: “beneficial ownership” has nothing to do with control.

Nor did the judge accept that beneficial ownership involved the hope of gain or the risk of loss:

I do not accept what lies behind the Crown’s submission that the beneficial ownership of shares necessarily involves the hope of gain or the risk of loss. ... Any such requirement [that the value of the shares must be capable of fluctuation or must reflect the changing profitability or value of the company] would substitute an economic test for a legal one and confuse the existence of legal rights with their value. “Beneficial ownership” has nothing to do with value or the economic attributes of ownership.

Although the submission that GB, and not Sainsbury, had the hope of gain and the risk of loss was therefore an irrelevant consideration in the judge’s view, he added that it fails for another reason: “it is true, but only if the options were exercised.”

In finding that Sainsbury’s equitable ownership was no empty husk, Millett J. attached particular importance to the fact that Sainsbury was entitled to include the net assets and trading profits, if any, of its subsidiary in its consolidated group accounts subject only to a contra provision for a minority interest of 25% (not 30%).

5.2.3. Beneficial ownership in suspension

Is it possible for beneficial ownership to be in suspension? In other words, can one have a situation where no party holds the be-
neficial ownership in an asset, or must the beneficial ownership always be in someone? The court has identified several special instances where beneficial ownership are suspended, such as property held by a trustee in bankruptcy, the property of a company in liquidation, the estate of a deceased person in course of administration, or assets vested in a custodian of enemy property.\textsuperscript{219} But, what about transactions other than these special instances? Can beneficial ownership be suspended in “normal” commercial circumstances?

Lord Greene, in \textit{The English Sewing Cotton Company Ltd v. Commissioners of Inland Revenue}\textsuperscript{220} did not think that suspension was possible, holding that, if anyone says that the appellant has lost part of its beneficial interest, that proposition, in order to be established, can only be established if it can be shown that it has gone somewhere. His view was supported by LLoyd L.J. and Nourse L.J. in \textit{Sainsbury}, the first mentioned holding\textsuperscript{221} that it is difficult, at any rate in the case of a contract, to see how the equitable ownership could have become severed from the legal ownership unless it had passed to somebody else. As discussed in 5.2.2., this view was also strongly supported by Widgery L.J. in \textit{Wood Preservation}.

Lord Donovon, however, in \textit{Wood Preservation}, felt differently. In his view the fact that the seller in that case ceased to be the beneficial owner does not necessarily mean that the purchaser became the beneficial owner while the condition remained operative, because it is possible for property to lack any beneficial owner for a time.\textsuperscript{222} It therefore appears that this issue remains unresolved.\textsuperscript{223}

5.2.4. Decisions by the courts

As a conclusion to the discussion of the legal principles derived from the English court cases, it is appropriate to look at the actual findings of the courts. The actual findings by the courts provide further insight into the meaning of beneficial ownership.

\textsuperscript{219} \textit{Sainsbury}, supra note 206, at 325.
\textsuperscript{220} [1947] ATC 79, CA, at 81.
\textsuperscript{221} \textit{Sainsbury}, supra note 206, at 325 and 331.
\textsuperscript{222} \textit{Wood Preservation}, supra note 205, at 132.
\textsuperscript{223} See also Rowland, supra note 207, at 186.
In *Lysaght v. Edwards* the court had to decide on the status of a contract for the purchase of real estate, where the vendor died before the completion of the transaction. The relevant and often quoted finding by the court is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser. In *English Sewing Cotton Company* the shares held by the taxpayer in another company were pledged as security for a loan, blank transfers of the shares were deposited and the dividends applied to service the loan. Lord Greene held that the effect of a mortgage transaction is not that it deprives the mortgagor of its beneficial ownership of the shares. In *Parway Estates* the principle was confirmed that, in the case of an absolute and unconditional contract, the equitable or beneficial ownership of the subject matter (shares in this case) becomes vested in the purchaser at the time when the contract is executed, notwithstanding the fact that there were, as in any contract, mutual obligations to be fulfilled by the parties after signing the contract.

*Leigh Spinners Ltd v. Commissioners of Inland Revenue* may be very relevant to the question of whether a person who is obliged to pay on any royalties received, can be regarded as the beneficial owner of the royalties. In that case, as part of a transaction, the appellant company formed a new company, transferred its assets to that company and then transferred the shares in the new company to other persons. All this took place within a matter of a few days. The court found that the appellant company was not the beneficial owner of the shares in the new company because, from the moment the new company was formed, the appellant was under an obligation to transfer the shares in it to someone else. The situation in *Holmleigh (Holdings) Ltd v. Commissioners of Inland Revenue* is comparable to that in *Leigh Spinners*, the most relevant difference being the fact that the new companies were formed before entering into the agreement to transfer the shares in them. The Court held that the holding company was the beneficial owner of the shares up to the date when

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224. (1876) 2 Ch D 499.
225. (1956) 46 TC 425, Ch D.
226. (1956) 46 TC 435, Ch D. See also *Inland Revenue Commissioners v. Ufitec Group Ltd* [1977] 3 All ER 924, QB.
the agreement was entered into. On the date of agreement the holding company lost its beneficial ownership.

*Rodwell Securities* is an important case, confirming that the corporate veil must be respected. Pennycuick J. found that the holding company was the beneficial owner of the shares of its direct subsidiary, but that it was not the beneficial owner of the assets of the subsidiary. The subsidiary was the beneficial owner of its assets. When there is a chain of controlled companies, the parent company may very well have a controlling interest right down the line, but does not own any of the assets of the subsidiaries. In reaching this decision the judge placed great importance on the fact that the relevant section in the governing act referred to “beneficial ownership” and not to “controlling interest”, and did not contain the words “directly or indirectly”. In *Brooklands Selangor Holdings* the facts were that a holding company had to transfer shares in its subsidiary and at the same time also transfer certain of its assets to the subsidiary. It was found that because all the operations comprised in the transaction were performed at the same time as part of a single transaction, the holding company was no longer the beneficial owner of the shares in the subsidiary at the time when the assets were transferred.

The facts in *The Andrea Ursula*\(^ {227} \) and *I Congresso Del Partido* were very similar, both dealing with the question of whether a ship under demise charter, or in possession of operators and managers, was “beneficially owned as respects all the shares therein”. The question was answered in the affirmative in the first mentioned case, Brandon J. holding that the expression “beneficially owned” is capable of more than one meaning. In the last mentioned case, however, Goff J. declined to follow the decision by Brandon J., holding that the words “beneficially owned as respects all the shares therein” refer only to cases of equitable ownership, whether or not accompanied by legal ownership, and are not wide enough to include cases of possession and control without ownership, however full and complete such possession and control may be. He continued by saying that a demise charterer has, within limits defined by contract, the beneficial use of the ship. He does not, however, have the beneficial

\(^{227}\) [1971] 2 WLR 681, QB.
ownership as respect all the shares in the ship. He also rejected the view that the words “beneficially owned as respect all the shares therein” as being capable of more than one meaning.

In Ayerst it was held that a company in liquidation and therefore deprived of all possibility of enjoying the fruits of the property or disposing of it for its own benefit, although retaining legal ownership, is divested of the beneficial ownership of its assets.

In Wood Preservation the sales contract was subject to a condition. Authority was quoted to the effect that ordinarily, where the mutual obligation of sale and purchase is subject to a condition precedent, the property does not pass so long as the condition remains unperformed. In this case, however, it was found that after acceptance of the offer from the purchaser, the position of the vendor was such that, even before the condition was met, he had parted with all the rights of selling or disposing the shares or enjoying the fruits thereof and that he therefore lost his beneficial ownership. In Sainsbury it was found that the legal owner of shares, subject to a call and put option, retained beneficial ownership of the shares.

5.2.5. Beneficial ownership and intellectual property

Since this study deals with beneficial ownership of royalties, it is appropriate to briefly investigate the use of beneficial ownership in respect of intellectual property in England. Bainbridge explains that in situations where there is a dispute as to whether an assignment of copyright took place, the court may be willing to use equitable principles to infer beneficial ownership. One such case was Warner v. Gestetner Ltd in which Warner, who was an expert in the drawing of cats, agreed orally to produce some drawings to be used by Gestetner to promote a new product at a trade fair. Gestetner

228. A.G.J. Berg, “Options and Beneficial Ownership”, The Law Quarterly Review 1992/1, at 20, criticizes this decision on the basis that the judgements incorrectly assume that, until a call option is exercised, there is a single entire equitable interest which remains in the grantor.


subsequently used the drawings for promotional literature and Warner complained that this went beyond the agreement and infringed his copyright. The express and implied terms of the oral agreement between the parties were in dispute, in particular, what rights had passed — a beneficial interest in copyright, an exclusive licence or a limited licence. Warner remained the owner of the copyright in the drawings because it had not been assigned to Gestetner. Whitford J. found that, in order to give business efficacy to the agreement, he could imply a term granting beneficial interest of the copyright to Gestetner. Bainbridge concludes that the copyright, thus, had two owners, one at law and one at equity, and Gestetner, as beneficial owner, could deal with the work as it wished, Warner’s legal interest in the copyright being of little practical significance. According to Bainbridge the case can be criticized because it completely ignores the effect of Section 90 of the Copyright, Designs and Patents Act 1988 which clearly requires that an assignment of copyright must be in writing signed by or on behalf of the assignor.231

The importance afforded to beneficial ownership (in contrast with legal ownership) in the above case is in line with the discussion in the rest of this section on England.

Anderson explains the use of the term “beneficial ownership” in conveyancing transactions in England. A typical phrase in a contract for the assignment of intellectual property reads: “X hereby assigns, as beneficial owner, the Patents to Y ...” Under section 76 of the Law of Property Act 1925, certain provisions are implied in a conveyance, where the party conveying the property is expressed to do so as beneficial owner.232 These implied covenants, listed in the Second Schedule to the aforementioned Act, in the case of conveyances for valuable consideration can be summarized as:

1. *title*: that the person conveying has full powers to convey;
2. *quiet enjoyment*: that the purchaser will have “quiet enjoyment” of the property;

231. Bainbridge, supra note 229, at 73.
232. Section 76 was repealed by the Law of Property Act 1994.
freedom from encumbrances: that the property is conveyed free from any charge or other encumbrance, claims or demands except those stated in the conveyance;

(4) further assurances: that the person conveying will, when required, execute further documents and take further actions as may be necessary to enable a full transfer of the property to be effected. 233

The Law of Property Act is an example of a statute which does contain a definition of beneficial ownership. That definition is arbitrary, however, and for purposes of the specific statute only and cannot be applied as a general definition to be used outside the ambit of the statute.

5.2.6. Beneficial versus equitable ownership

In the English cases on the matter the term equitable ownership is often used in conjunction with beneficial ownership. It is therefore necessary to investigate the relationship between these terms. The importance of the matter is mainly the fact that the term “equitable ownership” is well understood in English law. Should the meaning thereof therefore be the same as beneficial ownership, it will remove most of the uncertainty as to the meaning of beneficial ownership.

David explains that equity is a series of remedies which evolved mainly in the fifteenth and sixteenth centuries and applied by the court of the chancellor in order to complete, and occasionally correct, the common law. Today it forms an integral part of English law. David continues that, rather than speaking of the common law system and the rules of equity – which is usually done to show the complementary character of equity – it is well founded today to speak of two branches of English law. 234 Whereas the common law adopts the

position that ownership is indivisible, equity allows divided ownership – legal title being in one person and beneficial ownership (or equitable ownership) in another.\textsuperscript{235} The term “equitable owner” has therefore come to be used in technical contrast to the legal owner.\textsuperscript{236} An example of equitable ownership is in the case of a purchaser under a specifically enforceable contract.\textsuperscript{237}

The \textit{Wood Preservation}\textsuperscript{238} and \textit{Brooklands Selangor Holdings}\textsuperscript{239} cases created some uncertainty as to whether the meaning of these two terms are synonymous. In the Court of Appeal in \textit{Sainsbury}, these two cases, as well as others, were thoroughly analysed, with both LLoyd L.J. and Nourse L.J. appearing to have little doubt that beneficial ownership and equitable ownership are the same thing.\textsuperscript{240} They were bound, however, by the decision of the Court of Appeal in \textit{Wood Preservation}, the effect of which was to draw a distinction between the beneficial ownership and equitable ownership of the shares. In terms of the foregoing cases, the answer to this matter remains uncertain.\textsuperscript{241}

The matter is further complicated by the fact that the term “an equity” does not have a single meaning. According to Baker, it may

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\item \textsuperscript{235} Andrew P. Bell, \textit{Modern Law of Personal Property in England and Ireland}, 1989, at 67 and 155-156; Roy Goode, \textit{Commercial Law}, 1996, at 42-44. It is, therefore, strictly speaking, not correct to refer to beneficial ownership as a common law notion. On the contrary, beneficial ownership is associated with equity. It is correct, however, as is done throughout this study, to refer to beneficial ownership as a notion used in the domestic law of the common law states. See also Zweigert, \textit{supra} note 234, at 95.
\item \textsuperscript{236} \textit{Black’s Law Dictionary}, 1990, at 896.
\item \textsuperscript{237} \textit{Sainsbury}, \textit{supra} note 206, at 325.
\item \textsuperscript{238} \textit{Wood Preservation}, \textit{supra} note 205, at 130.
\item \textsuperscript{239} \textit{Brooklands Selangor Holdings}, \textit{supra} note 210, at 91.
\item \textsuperscript{240} \textit{Sainsbury}, \textit{supra} note 206, at 325 and 330.
\item \textsuperscript{241} For further discussion on this uncertainty, see Rowland, \textit{supra} note 207, at 186; Robin Speed, “Beneficial Ownership”, \textit{Australian Tax Review} 1997/3, at 45-46.
\end{itemize}
have four different meanings.\textsuperscript{242} Despite the uncertainty referred to above, several other authorities equate beneficial ownership with equitable ownership.\textsuperscript{243}

5.2.6.1. Nature of beneficial ownership rights

Following from the discussion above, is the question of the nature of beneficial ownership rights. How does it compare with legal ownership rights? In 4.2.1, it was stated that (legal) ownership in England is a property right, the significance of which is that it binds third parties and that it can be assigned.

Several commentators point out that equitable ownership conferred at first only a right \textit{in personam}, a right to compel the trustee personally to perform his trust.\textsuperscript{244} Over time, however, the list of persons against whom equitable rights can be enforced was extended until finally, equitable rights became enforceable against all except a purchaser without notice.\textsuperscript{245}

The distinction between legal rights and equitable rights can be summarized as follow: “Legal rights are good against all the world; equitable rights are good against all persons except a bona fide purchaser of a legal estate for value without notice, and those claiming under such a purchaser.”\textsuperscript{246}

Baker comments that it is possible to treat equitable rights as rights \textit{in rem}, but concedes that there is an alternative view that

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\item \textsuperscript{242} P.V. Baker and P. St. J. Langan, \textit{Snell’s Principles of Equity}, 1982, at 23: “Usually it means an equitable interest in property, i.e. some right of ownership enforced by equity but not by the common law. Sometimes, however, it means a ‘mere equity,’ which is a procedural right ancillary to some right of property ... Thirdly, it may mean a ‘floating equity,’ a term which may be used to describe the interest of a beneficiary under a will or intestacy in any property of the deceased which he hopes to receive ... Fourthly, the right to obtain an injunction or other equitable remedy is sometimes called an equity.”
\item \textsuperscript{243} See, for example, Bell, \textit{supra} note 235, at 153; \textit{Black’s Law Dictionary}, infra note 440.
\item \textsuperscript{244} Robert Megarry and H.W.R. Wade, \textit{The Law of Real Property}, 1975, at 113; Baker, \textit{supra} note 242, at 23; Goode, \textit{supra} note 235, at 43; Bell, \textit{supra} note 235, at 154.
\item \textsuperscript{245} Baker, \textit{supra} note 242, at 23.
\item \textsuperscript{246} Megarry, \textit{supra} note 244, at 114, quoting Maitland.
\end{itemize}
because they cannot be enforced against a purchaser without notice of them, they cannot be regarded as rights in rem, at any rate not in the same way as legal rights are rights in rem. In terms of this view, Baker continues, they should best be regarded as hybrids, for they are clearly more than rights in personam. Goode mentions that the interest of a beneficiary under a trust has developed into a full-blooded property interest. The House of Lords held that a beneficiary under a trust has a property interest in the income arising from the securities which constituted the trust fund.

In summary: English law distinguishes between legal and equitable (or beneficial) property rights. Where these are not in the same person, the result is divided ownership, legal ownership being in one person and beneficial ownership in another. The legal right of ownership binds the whole world. Of specific importance for this study is that the right of beneficial ownership is more than a personal right – it binds the whole world, except a bona fide purchaser of a legal estate for value without notice.


248. It is noticeable that the authorities in England mostly refer to the “interests” of a beneficial owner, as opposed to his “rights”. Black’s Law Dictionary, 1990, defines “interest” as: “The most general term that can be employed to denote a right, claim, title or legal share in something ... More particularly it means a right to have the advantage accruing from anything, but less than title.” In order to contrast it with personal rights, however, this study will refer to the property rights of the beneficial owner.


250. Archer-Shee v. Baker (HM Inspector of Taxes) [1927] AC 844, HL. On the same facts, however, it was held in Archer-Shee v. Garland [1931] AC 212, HL, that, according to the law of New York, the beneficiary had no property interest, but only a chose in action available against the trustee.

251. See also Bell, supra note 235, at 6.

252. Lord Diplock in Ayerst, supra note 203. See also Goode, supra note 235, at 43.
5.2.7. Beneficial ownership and trusts

It is on purpose that trusts are discussed in the last section under England. The discussion on England up to this point has shown that beneficial ownership is used in many instances other than in connection with trusts and proves the point that the meaning of beneficial ownership, including the international meaning thereof, should not be studied only, or primarily, in relation to trusts. A study of trusts is useful to explain the distinction between a legal and a beneficial owner. Some of the cases discussed above (for example, *Leigh Spinners*) is, however, much more helpful in order to determine the beneficial owner in royalty conduit situations for purposes of bilateral tax treaties, than is the concept of a formal trust.

Is the beneficiary of a trust under all circumstances the beneficial owner of income flowing to the trust? The answer is no. Although the beneficiary is the beneficial owner where he has a vested right to the income, no specific beneficiary can be regarded as a beneficial owner until the trustees have exercised their discretion, in the case where the trustees have a discretion on how to allocate the income. In the last mentioned case no specific beneficiary has any property right to income until an allocation is made for his benefit. He has no enforceable right and is in no position to deal with any of the income of the trust as his own.

But who then is the beneficial owner in the case where the trustees have not yet exercised their discretion? Clearly the trustee is not the beneficial owner. One possible answer is that the beneficiaries as a group should be regarded as the beneficial owner. This

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254. For a similar view in the United States, see *Engineered Timber Sales Inc v. Commissioner*, 74 T.C. 808 (1980), at 836.
255. See also Avery Jones, *supra* note 253, at 392-394.
256. See also Speed, *supra* note 241, at 49-50.
257. Phillip Baker, *Double Taxation Conventions and International Tax Law*, 1994, at 230. See also the discussion on New Zealand in 6.2.11.
argument is based on the premise that whilst no one in particular has any rights to the income, some, or all of them, eventually benefit therefrom and that the group, as a whole, is therefore the beneficial owner.

Another possibility is that beneficial ownership is in suspension until the trustees make an allocation. In Sainsbury the examples provided by LLoyd L.J. of beneficial ownership in suspension include property held by a trustee in bankruptcy and the estate of a deceased person in the course of administration (see 5.2.3.).258 It can be argued that the position in a trust where the trustees have discretionary powers also falls in this category, until an allocation is made.

Trusts are also helpful in putting perspective on the role of “control” as far as beneficial ownership is concerned. Although the trustees may have extensive rights and control to decide on how to divide income, that control is not exercised for their own benefit and they are therefore not beneficial owners.

5.3. UNITED STATES

Beneficial ownership is a term well known in the United States. Reference to “the equitable or beneficial owner of the land” is for example found in a Supreme Court case in 1888.259 When the search term “beneficial owner*” is entered into a database260 containing United States tax cases since 1942, more than a thousand hits are recorded. In addition, beneficial owner is also used in other United States statutes, such as the ones for Commerce and Trade, and Banks and Banking. Apart from some references to beneficial owner and beneficial ownership in the IRC,261 the term also appears in the Treasury Regulations. From the case law it appears that the notion of

258. See, however, Canada: Catherine A. Brown, “The Transfer of Property on Death: Ownership, Control, and Vesting”, Canadian Tax Journal 1994/6, at 1454, where it is stated: “At common law, legal and beneficial ownership of the deceased’s assets passes to the executor by virtue of his office.”
261. For example, Sections 871 (tax on nonresident individuals) and 881 (tax on foreign corporations).
beneficial ownership is mostly used to determine when a transfer or sale of property has been completed or to determine a shareholder for purposes of tax on dividends. For example: Where bare legal title is retained by the seller, the sale shall be deemed to have occurred at the time and place of passage to the buyer of beneficial ownership and the risk of loss;\textsuperscript{262} A transfer of property occurs when a person acquires a beneficial ownership interest in such property;\textsuperscript{263} “By now it is well settled that record ownership of stock, standing alone, is not determinative in answering the question as to who is required to include in gross income any dividends attributable to such stock. Rather, beneficial ownership is the controlling factor.”\textsuperscript{264}

In many instances where it appears in tax cases, beneficial ownership is used without any reference to its meaning, as if the meaning is well known and requires no explanation. Some of the cases which do explore the meaning are discussed below. There are, however, not the same in-depth discussion and development of the term from case-to-case as in England.

All the United States cases discussed in this section deal with taxation. As was the case with the discussion of ownership for tax purposes in the United States in 4.3, the investigation below reveals a strong presence of the substance over form principle in the decisions on beneficial ownership. It is important to closely investigate the relationship between these two notions in order to see whether there is a meaning for beneficial ownership which is unclouded by any substance over form influence.

5.3.1. Control

One of the earliest references to beneficial ownership is by the Supreme Court in \textit{Montana Catholic Missions v. Missoula County}.\textsuperscript{265} In this case the plaintiff, an institution of public charity,

\textsuperscript{262} Treasury Regulations, Section 1.861-7(c).
\textsuperscript{263} Treasury Regulations, Section 1.83-3(a).
\textsuperscript{265} 200 U.S. 118 (1906).
established a mission among the Flathead Indians with directions to teach, educate, enlighten, and care for the Indians. With an exclusive view to provide means for the carrying on of the work the plaintiff acquired a large band of cattle, which roamed over and fed upon the Indian reservation. Some of the cattle were annually sold. The county of Missoula demanded county taxes upon all cattle owned. The plaintiff resisted this claim on the basis that the entire beneficial use or ownership of the property (cattle) was in tribal Indians, and that it was therefore, by law, not subject to taxation. Mr. Justice Peckham held as follows:

The expression “beneficial use” or “beneficial ownership or interest” in property is quite frequent in the law, and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf. And one is also said to have the beneficial ownership of land who has done everything to entitle him to a patent from the government, and who, therefore, has the legal right to such patent, and all that remains to be done is for the proper officer to issue it. ... In such case the land is taxable to such owner, though he has not the legal title. He is the beneficial owner.266

In this case the judge found that the Indians had neither any legal nor equitable title to the property, neither had they any legal or equitable right to its beneficial use. The property was owned unconditionally and absolutely by the plaintiff who, as the owner, may at any time abandon its present manner of using them and may devote them to any other purpose it may choose, and the Indians would have no legal right of complaint. In Engineered Timber Sales, Scott J., referring to the above-mentioned case, remarked: “Since that time, the States have used this concept of control to represent beneficial ownership.”267

266. Id. at 127-128.
267. Engineered Timber Sales, supra note 254, at 836.
5.3.2. Economic benefits

A study reveals that another criterion, namely that of economic benefits, was later added by the courts to the criterion of control as a test for beneficial ownership. It was put as follows in *Anthony Yelencsics and Norma Yelencsics, et al. v. Commissioner*: “Beneficial ownership is marked by command over property or enjoyment of its economic benefits.”

*Anderson v. Commissioner* is referred to as authority for the above statement and it is appropriate to analyze this case in some detail. The facts were that the taxpayers transferred some of their shares to members of their respective families. After the transfers the taxpayers continued to manage and direct the affairs of the corporation in the same manner as before. Dividends on the shares transferred were borrowed from the transferees by the taxpayers and devoted to their own business or personal use and not to the support of the family members. A few years after the original transfer the taxpayers reacquired the shares from their children. Promissory notes were issued for the borrowing of dividends, unpaid interest and the reacquiring of shares, but these notes were often changed by the taxpayers who obviously controlled the affairs of their children, all of whom were very young. The dividends on the transferred shares (before reacquiring them) were reported as the income of the wives and children, but this was disputed by the Commissioner who included the dividends in the taxpayers’ gross income. The Tax Court concluded that the alleged gifts were not bona fide, that taxpayers did not intend to relinquish dominion and control over the transferred shares. The Court of Appeals affirmed the decision of the Tax Court, holding:

The Supreme Court has repeatedly said that taxation is an intensely practical process concerned less with legal formalities than with economic realities and that tax consequences flow from the substance rather than the form of a transaction; that command over property or

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268. 74 T.C. 1513 (1980), at 1528.
enjoyment of its economic benefits marks the real owner for federal income tax purposes. ... It seems to be quite clear that mere passage of title to income-producing property through devices which are valid under state law will not insulate the transferor against federal income tax liability unless the passage of title is accompanied by a complete shift of the economic benefits of ownership, direct and indirect.\textsuperscript{270}

The matter of legal relationships and control within a family is rather complicated and it is difficult to extract clear rules from cases on this issue which can be applied to commercial situations. It is, however, important to establish the cut-off points for "command" and "benefits". If the meaning to be ascribed to "command" is the type of command a principal has over a nominee or agent, in other words, if it refers to direct legal rights, then the position in the United States is similar to that in England. If, however, "command" also includes situations where there is no legal right to command, the position differs from that in England. Also the way in which "economic benefits" were dealt with in the above case can be questioned. The taxpayers did enjoy the benefits of the dividends as before, but this was borrowed at interest from the children. The children therefore also derived benefits, although it was not paid in cash. It is necessary to investigate whether other cases throw more light on these issues.

In \textit{Yelenscics}\textsuperscript{271} the owner of a corporation which was a franchised dealer with General Motors sold all his shares. Because the parties did not want General Motors to know about the change in ownership, however, and also to secure a loan to the purchaser, the shares were not transferred to the purchasers. Applying the command or benefits test, the court found that the purchasers were the beneficial owners of the shares.\textsuperscript{272} They had complete control over the business, were entitled to all profits and bore the risk of loss. The court added the following: "Furthermore, in ascertaining the beneficial owner of stock, the substance of a sale transaction, and not merely its form, will control."\textsuperscript{273}

\begin{itemize}
  \item\textsuperscript{270} Anderson v. Commissioner, supra note 269, at 873.
  \item\textsuperscript{271} Yelenscics, supra note 268.
  \item\textsuperscript{272} See also \textit{Pacific Coast Music Jobbers, Inc. v. Commissioner}, 55 T.C. 866 (1971); \textit{Mayer v. Donelly}, 247 F.2d 322 (5th Cir. 1957).
  \item\textsuperscript{273} Yelenscics, supra note 268, at 1528.
\end{itemize}
In *Cepeda, Eduardo, et ux. v. Commissioner*, the facts were that the taxpayer voluntarily filed for bankruptcy, as a result of which the bankruptcy estate became the legal owner of shares held by the taxpayer. During the period of bankruptcy the taxpayer, however, caused the corporation to advance money to him. The taxpayer resisted the claim by the Commissioner to tax this money as dividends on the basis that the amounts cannot be regarded as dividends in his hands because the bankruptcy estate, not him, owned the shares. The Tax Court noted that the question can be addressed in two separate but related contexts – beneficial ownership and substance over form. With regard to beneficial ownership the control or benefits test was applied. It was found that the taxpayer had control because he was able to cause the corporation to advance funds to him. The taxpayer also clearly incurred substantial economic benefit because of the payments made by the corporation on his behalf. In addition to finding that the taxpayer had beneficial ownership of the shares and that the amounts should therefore be considered dividends, the Tax Court found, in the alternative, that the taxpayer retained the benefits of ownership in terms of the substance over form principle. Parr J. explained as follows:

> In applying this doctrine of substance over form, the Court has looked to the objective economic realities of a transaction rather than the particular form the parties employed. ... A similar analysis of control and command over property as that which determines economic benefit is present in a substance over form determination.

In summary: the Tax Court distinguished beneficial ownership and substance over form as two separate tests, but applied the same principles of command, control and benefits in respect of both tests.

### 5.3.3. Benefits and burdens of ownership

The courts have also used the benefits and burdens test in connection with beneficial ownership. In *Ted F. Merrill and Elizabeth H. Merrill v. Commissioner* it was put as follows:

274. T.C. Memo. 1994-62. This decision was affirmed on alternative grounds in the Court of Appeals, 75 AFTR 2d Par. 95-867 (5th Cir. 1995). The validity of the Tax Court’s decision was therefore not considered.
We must take into consideration ... not only the dates on which bare legal title to the property passed but also the dates on which the benefits and burdens or the incidents of ownership of the property were acquired and disposed of in a closed transaction. 275

In fixing the date when ownership had passed, the court investigated the time at which the purchaser had assumed almost all the incidents, both beneficial and detrimental, of total ownership, and the time after which any appreciation or depreciation of the property's value would have been for all intents and purposes to the benefit or detriment of the new purchaser. Although the term "beneficial ownership" was not used in the above judgement, subsequent courts have used the burdens and benefits criterion in connection with beneficial ownership. 276

Is the benefits and burdens test different from the command or benefits test? Probably not. As is evident from the test for beneficial ownership, as expressed in one of the latest cases on the issue, namely that of Cordes, these two tests are used in the same breath, almost just as alternative ways of putting the test:

Accordingly, this Court must consider not only whether there was a passage of bare legal title, but whether there was a retention or disposition of the benefits and burdens of the incidents of ownership. ... We must consider whether, while the legal ownership or title to the property may have passed, the actual benefits or control associated with stock ownership have remained with the original owner or transferee. 277

5.3.4. Vesting of appreciation and depreciation

It seems that an important clue as to the passing of beneficial ownership is the question of the vesting of any appreciation or depreciation of the property's value. Although the risk of loss is treated by the courts as an inherent element of the beneficial ownership test, the Treasury Regulations cast some doubt on this. In

275. 40 T.C. 66 (1963), at 74.
276. See H. Calvin Walter, et al. v. Commissioner, 85 TNT 17-7 (6th Cir. 1985); Cepeda, supra note 274; Pacific Coast Music Jobbers, supra note 272, at 874.
277. Cordes, supra note 269.
Regulation Section 1.861-7(c), discussed in 5.3. above, it is said that the sale shall be deemed to have occurred at the time and place of passage to the buyer of beneficial ownership and the risk of loss, which seems to suggest that the risk of loss is not part of beneficial ownership. In Regulation Section 1.83-3(a) also discussed in 5.3. above, however, it is stated that an indication that no transfer has occurred is the extent to which the transferee does not incur the risk of a beneficial owner that the value of the property at the time of the transfer will decline substantially. The last mentioned statement suggests that the risk of loss is part of the beneficial ownership test.

5.3.5. Passing of beneficial ownership

It appears that there are no hard and fast rules to determine which, or how many, of the incidents of ownership have to be transferred in order for beneficial ownership to pass. The answer to this question depends on the specific circumstances.278 What is clear, however, is that beneficial ownership does not necessarily pass simultaneously with the first incidents of ownership, neither is it necessary for all incidents of ownership to pass.

In Pacific Coast Music Jobbers, Sterrett J. added further light on the issue by holding that: "In deciding the question, the court looks to that party to the transaction who has the greatest number of the attributes of ownership."279 The aforementioned statement was confirmed in Cordes, with the court adding the following: "We rely upon the objective evidence provided by the party’s overt actions to make that determination."280 It was put somewhat differently in Walter, H. Calvin:

Beneficial ownership passes when sufficient benefits and burdens of ownership pass. In the context of the instant case, NCO’s equitable ownership would have passed to Northshore Ltd when Northshore

278. See also Tennessee Natural Gas Lines, Inc. v. Commissioner, 71 T.C. 74 (1978), at 83.
279. Pacific Coast Music Jobbers, supra note 272, at 874
280. Cordes, supra note 269.
Ltd’s ownership attributes in the Complex outweighed NCO’s ownership attributes.281

In *Dudden, Roger P., et ux. v. Commissioner*, title, burden and expense were described as sufficient incidents of beneficial ownership.282

Further guidelines on how to determine beneficial ownership comes from Goldberg J. in *William B. Wilson v. Commissioner*: “The issue of the appropriate standards for determining beneficial ownership is of course a question of law ..., however, the question of whether an individual meets them and qualifies as a beneficial shareholder is one of fact.”283

*Rupe Investment Corporation v. Commissioner*284 is a good example of a case where the court performed a “balancing act” in order to determine the beneficial owner. The taxpayer, an investment banker, in terms of an agreement with a third party, bought blocks of shares with the purpose to resell it to the third party. The issue for decision was whether the taxpayer was the beneficial owner of the shares. The court pointed out that title and beneficial ownership are often split and record title will not of itself give rise to beneficial ownership. In such circumstances the taxpayer’s naked title and risk assumed, such as it was, must be balanced against the indicia of ownership in another. The court then analysed factors such as who supplied the funds, interest paid, broker’s commission, who dictated conditions, who accepted the risk of loss and was entitled to any enhancement in value, and who had the right to sell the stock and to decide whom to sell it to, and came to the conclusion that the taxpayer was not the beneficial owner. He was a broker, a middleman, the conduit between the former owners and the new owner.

282. 90 TNT 7-11 (8th Cir. 1990).
283. 40 AFTR 2d 77-5883 (560 F.2d 687) (5th Cir. 1977), at 77-5886.
284. 3 AFTR 2d 1276 (5th Cir. 1959).
5.3.6. Conclusion

A first observation is the similarity between the tests for beneficial ownership analysed in this section, and that for ownership for tax purposes, discussed in 4.3. That similarity includes the presence of the substance over form doctrine in both instances. Although the Tax Court above did distinguish beneficial ownership and substance over form as two separate tests, it appears that the same principles of control, command and benefits are applied in both tests. Another similarity is the importance placed on the vesting of any appreciation or depreciation of the property’s value. Different terminology is used by the courts when referring to beneficial ownership. This terminology includes “benefits and burdens of ownership” and “command over property or enjoyment of its economic benefits”, and is often used in conjunction with other terms such as “incidents of ownership”, “ownership attributes” and “indicia of ownership”. Despite the different terminology, however, the case law discussed suggests that the meaning thereof is the same. The important question to answer is whether beneficial ownership always constitutes a right enforceable by law (as opposed to a mere factual situation) in the United States. As far as this issue is concerned, the Supreme Court in Montana Catholic Missions clearly held that the right of beneficial ownership must be recognized by law, and must be able to be enforced by the courts. Lastly, the beneficial owner is the person holding the greatest weight of ownership attributes. A final observation is that, similar to the position in England, all the cases discussed dealt with beneficial ownership of the type of property, such as shares, fixed property, cattle and gilts, which can have only one beneficial owner at any specific time (see also 6.3.2.10.).

5.4. AUSTRALIA

“Beneficial owner” is a term well known in the domestic law of Australia. It appeared as early as 1919 in Section 78 of the New South Wales Conveyancing Act of that year. When the search term “beneficial owner*” is entered into a database of Australian court
cases, hits are recorded in almost 800 cases. In addition, hits are recorded in more than thirty different statutes, which include not only the Income Tax Assessment Act 1936 and the Stamp Duties and Taxes Act 1987, but also non-tax related statutes such as the Broadcasting Act 1942 and Companies Act 1981. The term appears in more than thirty sections in the Income Tax Assessment Act 1936 and deals with issues such as the carrying forward of company losses and bad debt deductions. Although there are some arbitrary definitions of beneficial owner for purposes of specific sections, there is not a general definition of the term in the Income Tax Assessment Act 1936.

It is, therefore, somewhat surprising that in a state where the use of beneficial ownership is so widespread, research revealed no in-depth discussion or analysis of the meaning of the term by the courts. There are some hints by the courts as to its meaning, but nowhere are there any suggestions as to the proper tests to apply in order to determine beneficial ownership.

In Dalgety Downs Pastoral Co Pty Ltd v. Federal Commissioner of Taxation it was held that “beneficially” serves more naturally the purpose of excluding the case of a holding for the benefit of others. In Federal Commissioner of Taxation v. Casuarina Pty Ltd the court accepted that the relevant shares were owned beneficially by the company because there was no evidence of any agreement that the shares or any of the rights attached to them were to be held on behalf of some other person. The recent decision in Bellinz Pty Ltd v. The Commissioner of Taxation is another example of a case where beneficial ownership is used without explaining its meaning. In that case Merkel J. held that a lessee of plant and equipment, under a lease which contains an option to purchase, is not the owner of that equipment, despite the fact that the lessee had extensive

286. For example, for purposes of Sections 50D, 50H and 50J, the beneficial owner of shares is defined (Section 50J(6)) as any person with a voting, dividend or a capital interest in a company.
287. (1952) 86 CLR 335, at 342.
rights in respect of the plant and equipment. In the course of the judgement the following references were made to beneficial ownership:

The divisible rights of ownership can give rise to difficulty in identifying the “owner” of particular property in some circumstances. The division of proprietary rights... between the owner and a hirer under a hire purchase is one example. ... The division of rights between a legal and a beneficial owner of property is another example. In such cases an enquiry as to “ownership” must have regard to the purpose for which the enquiry is being made.

And further on:

I agree that a beneficial owner will be an owner and that a person with only a “contingent right to become the owner at a future date” will not be an owner for the purposes of s 54(1).

Speed, also, could not come forward with any Australian cases clearly defining the meaning of beneficial ownership. In his article on the issue he refers to long standing legislative usage of the term, but comments that such long standing usage does not necessarily confer clear meaning. He concludes that: “The words ‘beneficial ownership’ and their derivatives, like ‘ownership’, have no historical or contemporary universal meaning.”

5.5. CANADA

Canada is another state where beneficial ownership is used in domestic law. The term appears in just more than a handful of sections in the Income Tax Act and in two parts of the Income Tax Regulations. For example, in terms of Section 79(2) of the Income Tax Act, property is surrendered at any time by a person to another person where the beneficial ownership of the property is acquired or reacquired from the person by the other person. A search for “bene-
ficial owner” or variants of the term in a database of Canadian tax cases, recorded more than a thousand hits.

As was the case in Australia, though, one struggles to find an in-depth analysis by the courts of the meaning of the term. Revenue Canada issued an Interpretation Bulletin, explaining the meaning of beneficial ownership as follows:

3. The term “beneficial ownership” is used to describe the type of ownership of a person who is entitled to the use and benefit of the property whether or not that person has concurrent legal ownership. A person who has beneficial ownership rights but not legal ownership can enforce those rights against the holder of the legal title. For example, beneficial ownership frequently arises when property is held in trust for a person in circumstances where, according to the terms of the trust, that person has authority to instruct the trustees to deal with the property as requested.

4. Beneficial ownership must be distinguished, however, from the other types of physical possession of property which a person may enjoy. For example, a tenant of a property, or a person who is allowed to occupy it only because the true owner has no objection, is not the beneficial owner of the property. In determining whether a person has beneficial ownership, one should consider such factors as the right to possession, the right to collect rents, the right to call for the mortgaging of the property, the right to transfer title by sale or by will, the obligation to repair, the obligation to pay property taxes and other relevant rights and obligations. Not all of these incidents of ownership need occur concurrently before it is concluded that the person has beneficial ownership of the property, which is a question of fact in each particular case.

The views expressed in the Interpretation Bulletin appear to be in line with the position in England and it is unfortunate that no authority is provided for such views.

Couture C.J., in Fortin & Moreau Inc. v. Ministre du Revenu national, describes the beneficial owner of property as the one to whom ownership belongs subsequent to a transaction (when the purchaser has all incidents of title, such as possession, use and risk,

although legal title may remain in the vendor as security), but who will receive title to the property at a later date. According to Marceau J.A., in *Mount Royal/Walsh Inc. v. Ship “Jensin Star” et al.*, the expression “beneficial owner” serves to include someone who stands behind the registered owner in situations where the latter functions merely as an intermediary, like a trustee, a legal representative, or an agent.

Two Canadian cases, dealing with succession duties and estate duty, provide some valuable arguments which are at the heart of the meaning of beneficial ownership in group situations, and may also reflect on conduit entity and back-to-back situations. These are the cases of *Cowan v. Nova Scotia (Minister of Finance)*, firstly in the Trial Division of the Supreme Court of Nova Scotia and thereafter in the Appeal Division of the same Court, and the case of *Jodrey Estate v. Nova Scotia (Minister of Finance)* in the Supreme Court of Canada.

Both these cases concerned an estate duty planning device whereby assets were not bequeathed directly to family members, but to subsidiaries of companies in which the family members held all the shares. The issue for decision was whether the parent company in each case was beneficially entitled to the assets bequeathed to its subsidiary. Although the relevant term to be interpreted was “beneficially entitled”, the meaning of “beneficially owned” was discussed in detail in both cases.

Both MacKeigan C.J. in *Cowan* and the majority (four to three) in *Jodrey* found that the parent companies were beneficially entitled to, and the beneficial owners of, the assets of their subsidiaries. This view was strongly disputed by the three dissenting judges in *Jodrey*.

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In *Cowan* in the Appeal Division, MacKeigan C.J.,\(^{299}\) based his decision on a view that a company *may*, depending on its make-up and status, become the beneficial owner of the assets of its subsidiary. In this case, he found, the subsidiaries were merely nominal owners of the assets. He considered the English decision of *Rodwell Securities* (see 5.2.4.), in which it was held that a company is not the beneficial owner of the assets of its subsidiary, inapplicable and not quite accurate. That case, in his opinion, dealt with a different statute and the judge there did not have to consider the issue of control in the way he felt himself obliged to do. Each parent company wholly owned and controlled its subsidiary. The parent by that control has the right and power to cause the subsidiary to pass any necessary shareholder and director resolutions, and to convey and transfer the property to it, with any transfer documents completed. In *Jodrey*, Martland J., giving the judgement on behalf of the majority, said that in finding that the parent is the beneficial owner of the assets of the subsidiary, does not result in the lifting of the corporate veil.\(^{300}\) The point in issue in the appeal, in his opinion, was that by virtue of its total control over the subsidiary company, the parent company was in a legal position to compel it to deal with its assets in the manner dictated by the parent company.\(^{301}\)

The above arguments sound very convincing, until one reads the arguments by Dickson J., who delivered the dissenting judgement in *Jodrey*. His comments include the following (references omitted):

> The creation of a power over property does not in any way vest the property in the donee, though the exercise of the power may do so. ... In my opinion, the link between the disposition on the one hand and the persons who were said to benefit on the other is much too tenuous and, indeed, is in law non-existent. A person does not become liable to tax under the Succession Duty Act, by reason of a disposition, merely because it later turns out as a result of a whole series of events, ... he is better off than he would have been if the disposition had not been made. Only persons who receive a benefit from the disposition itself, are caught by the provisions of the statute. ... Here, ... the parent company has no standing or capacity to sue for and recover the estate...

\(^{299}\) *Cowan, supra* note 297, at paragraph 24-30.

\(^{300}\) *Jodrey, supra* note 298, at paragraph 46.

\(^{301}\) *Jodrey, supra* note 298, at paragraph 56.
assets. ... [T]he subsidiary is the beneficial owner of the residue and it alone can sue the estate to obtain legal title of those assets. ... [T]he decisions of principle of the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets other than to receive, during the existence of the company, a share of the profits, ... and, after its winding up, a proportional share of its assets. ... With respect, shareholding control does not give beneficial ownership of corporate assets. ... I think the lower courts were clearly wrong in law ... in confusing concepts of control and ownership.\footnote{302}

It therefore appears that the importance to be given to the issue of control is central to the question of beneficial ownership. This study supports the dissenting judgement above. A parent company, as indeed an option holder or a lessee with an option to purchase, do have the power to become the owners of the relevant assets, but until the time that the power is exercised, such persons cannot be said to be the beneficial owners of the assets.

There is another way, though, to reconcile the opinions above, namely if it is looked upon from an agency point of view. MacKeigan C.J., in Cowan, in finding that a company \textit{may} be the beneficial owner of the assets of its subsidiary, and that the subsidiary in that case was merely a nominal owner, made the following reference to agency:

Sometimes the respective rights and duties of the beneficial owner and the nominal owner may be spelled out in a formal trust agreement. ... In other cases, a trust or agency agreement may be oral. Again, the relationship may be inferred from the control exercised by the beneficial owner over the nominal owner.\footnote{303}

If MacKeigan's decision was based on the fact that there was an agency agreement between the parent and the subsidiary, then one has to agree with his finding. Dickson J., in fact, agreed to this by the following statement, with reference to authority on company law:

\textbf{[E]xceptional cases in which the courts have felt themselves able to ignore the corporate entity and treat the individual shareholders as entitled to its property ... are grouped under headings such as agency, trust,}
fraud or improper conduct, public policy, quasi-criminal cases and group enterprises [emphasis added].

In *Jodrey*, however, Dickson J. found there was no hard evidence of agency nor was agency argued before the court, and the facts also did not fit easily into any of the other categories mentioned.

Following from the above, is the question of the meaning of agency. Does it only exist in cases of formal agency agreements or can it also be inferred from situations where one party exercises excessive control over another party? This question, which is further discussed in 6.3.2.10.2., is important for purposes of determining beneficial ownership in group situations. For the moment, though, one possible conclusion from the discussion above is that a parent company is not the beneficial owner of the assets of its subsidiary, unless the subsidiary holds those assets as the agent or nominee of the parent.

### 5.6. CIVIL LAW STATES

According to Avery Jones, the position in civil law states is as follows: The expressions equivalent to beneficial ownership are not used in internal law in Italy, Germany or the Netherlands. In France *bénéficiaire effectif* is sometimes used in administrative circulars.

In Belgium there is one reference to beneficial ownership in internal law.
The facts in a Dutch Supreme Court (Hoge Raad) decision\(^{309}\) were such that in any of the common law states discussed above the question of beneficial ownership would almost certainly have arisen. It is therefore relevant to look at the way in which the Court dealt with the matter. The case concerned the participation exemption in Section 13 of the Companies Tax Act.\(^{310}\) In terms of the participation exemption, and provided certain conditions are met, a shareholder is not taxed on dividends and capital gains in the investment company, neither can the shareholder claim capital losses in that company. The facts of the case were as follows: For strategic reasons an agreement was entered into between A and XBV in terms of which A would acquire shares in BVC. A would purport to be the shareholder towards the outside world and have the shares registered in his name, but in reality XBV would be the shareholder. XBV would finance the purchase and bear all risk. A had to follow all instructions from XBV regarding the shareholding and also had to transfer the shares in the name of XBV if so instructed. The issue under dispute was a loss claimed by XBV on the contention that it had no participation in BVC and was therefore entitled to claim the loss.

The question to be decided by the lower court (Gerechtshof) was whether XBV had participation in BVC. It was not disputed that in terms of the civil law (civielrechtelijk) XBV was not the owner of the shares. The lower court found that XBV had full economic interest in the shares, it was the economic owner (economisch eigenaar). The position of A, as far as the civil law ownership of the shares was concerned, was no more than that of a puppet (stroman). Any interpretation that in order to qualify for participation you have to be the economic as well as legal owner (juridisch eigenaar) has the effect of not satisfying the purpose of the participation exemption. XBV, as economic owner, therefore had participation in BVC and was not allowed to take the loss into account.

The decision by the lower court was upheld by the Supreme Court who found that “shareholder” in Section 13 should be interpreted to include not only the owner of the shares but also those per-

\(^{309}\) Hoge Raad, 16 October 1985, No. 23 033, BNB 1986/118.
\(^{310}\) Wet op de vennootschapsbelasting 1969. Section 13 has since been amended.
sons whose legal relationship with the owner is such that the full interest in the shares accrues to them and not the owner.

The fact that modern property law in the Netherlands distinguishes between legal and economic ownership is confirmed by Pitlo.\textsuperscript{311} As an example he refers to the practice whereby immovable property is sold, payment takes place and full possession and risk passes to the purchaser, but no legal transfer takes place. The reason for this is to avoid the payment of transfer tax.\textsuperscript{312} Another example is where shares in a company are transferred to a tax-exempt foundation (\textit{stichting administratiekantoor}), which then administers the shares and issues certificates to the shareholders. Legally the foundation is the owner, but the certificate holders are the beneficiaries.

In conclusion: It may be true that the expression “beneficial ownership” is not used in the Netherlands, but the similarity between the notion of beneficial ownership in the common law states and that of economic ownership in the Netherlands cannot be overlooked.

From a legal point of view there is, however, an important difference between beneficial ownership in the common law states, and economic ownership in the Netherlands. Beneficial ownership is the result of divided ownership between the legal and beneficial owner (see 5.2.6.). The beneficial owner therefore holds ownership rights, which binds (almost) everyone (see 5.2.6.1.). The relationship between the economic owner and legal owner in the Netherlands, on the other hand, at least in the circumstances discussed in this section, is contractual, binding only the contracting parties.\textsuperscript{313}


\textsuperscript{312} This loophole has been closed. Section 2 of the \textit{Wet op belastingen van rechtsverkeer} 1970, now refers to the verkrijging van economische eigendom. See also: J.W. Zwemmer, “Het wetsvoorstel tot heffing van overdrachtsbelasting over de verkrijging van economische eigendom”, \textit{Weekblad voor Privaatrecht, Notariaat en Registratie} 1995/22 July, at 457.

\textsuperscript{313} Pitlo, supra note 311, at 201; Asser, supra note 311, at 399.
5.7. LEASING AND HIRING

In terms of the cases discussed in this chapter that deal with leasing, a lessee or a hirer is not the beneficial owner of the asset which is the subject of the agreement. If one thinks of lease agreements with long lease periods (including ninety nine-year leases) or financial leases where the lessee holds almost all rights of use and other benefits from the asset and may even bear most of the burdens such as repairs and insurance, it becomes relevant to find out why this situation cannot be regarded as beneficial ownership. Such an investigation can provide important clues as to the meaning of beneficial ownership.

Bellinz, discussed in 5.4. on Australia, is a good case to start the investigation. In that case it was found that the lessee of plant and equipment, under a lease which contains an option to purchase, is not the owner of the plant and equipment and therefore not entitled to claim depreciation in terms of Section 54 (1) of the Income Tax Assessment Act 1936. Although the case concerned the meaning of owner, Merkel J., with his statement of: “I agree that a beneficial owner will be an owner”, by implication held that the lessee is not the beneficial owner. He in fact stated earlier that where the plant is used by the beneficial, rather than the legal, owner, the beneficial owner is entitled to claim depreciation. The taxpayer’s argument was that the word “owned” should be interpreted having regard to commercial reality and from a practical business point of view, rather than upon the juristic classification of legal rights. Bearing in mind the taxpayer’s exclusive right of use, the option which could be expected to be exercised, rights to possession and to exclude others from using or interfering with it, the consequence for all intents and purposes, so the argument goes, was that the plant was owned by the taxpayer.

Merkel made an analysis of ownership rights and pointed out that the property in the goods remains in the owner until the option is exercised, that the lessee has no power to dispose of the goods and no obligation to buy the goods. As ownership rights are divisible, his argument continues, the question must be whether the taxpayer

314. Bellinz, supra note 289.
holds sufficient rights to characterize him as the owner in preference to any other person holding rights over the plant and equipment. In the end Merkel was of the opinion that the rights of the taxpayer were not sufficient to displace the lessor as the owner.

Although Merkel J., in effect, performed a balancing act of ownership rights to get to his answer, this was probably not the main reason for his conclusion. The main reason, it seems, was the legal principle that a lessee is not an owner. He referred to case law to the effect that a hirer with an option to purchase was not regarded as the owner of goods within the legal or natural meaning of owner, and stated that a legal or jurisprudential, rather than a commercial or popular, analysis of rights is required. In his words: “They [the taxpayer] could not point to any decision which treated a lessee with an unexercised option to purchase as an owner of the property the subject of the option”.

The Andrea Ursula and I Congresso Del Partido cases discussed in 5.2.4. on England, are also applicable. In the first mentioned case Brandon J. held that in order to give full effect to Section 3(4) of the Administration of Justice Act 1956, the expression “beneficially owned” had to be given a meaning to cover the case of a ship which though, not legally or equitably owned by a person was in his full possession and control. It includes not only a demise charterer but any other person with similar complete possession and control.315 Goff J., however, in I Congresso Del Partido, declined to follow the finding in Andrea Ursula and was by implication supported in this view by the comments on the case by LLoyd L.J. in the Court of Appeal in Sainsbury.316 According to Goff J. the words “beneficially owned as respects all the shares therein” refer only to cases of equitable ownership, whether or not accompanied by legal ownership, and are not wide enough to include cases of possession and control, however full and complete such possession and control may be. Generally speaking, he continues, the essential characteristic of a demise charter is that it constitutes a contract for hire of the ship, under which the possession of the ship passes to the charterer. He was not aware of any case in which a demise charterer has been

316. Sainsbury, supra note 206, at 325.
described as a beneficial owner. All a demise charterer has, within limits defined by contract, is the beneficial use of a ship.\footnote{317}{I Congresso Del Partido, supra note 210, at 813-814.}

In the Interpretation Bulletin\footnote{318}{Interpretation Bulletin IT-437R, supra note 293.} discussed in 5.5. on Canada, Revenue Canada states that the tenant of a property is not the beneficial owner. \textit{Fortin & Moreau,}\footnote{319}{Fortin & Moreau, supra note 294.} also discussed under Canada, dealt with the question of ownership in the case of a lease of trucks and bins with a purchase option at the end in circumstances where substantially all of the benefits and risks of ownership were transferred to the lessee. Couture C.J. found that the lessee acquired the relevant trucks and bins, but did not own them. Reference was made to case law which makes a distinction between legal and beneficial ownership. Because the lease agreement was executed in the Province of Quebec, however, the Civil Code of the Province of Quebec applied. In terms of the provisions of the Civil Code, the right of ownership is indivisible. In a case of a suspensive condition (the exercise of the option to purchase), ownership is transferred only when the condition is fulfilled.

The discussion in this section so far strongly supports the view that a lessee is not the beneficial owner of the assets which are the subject of the lease.\footnote{320}{In further support of this view, see Goode, supra note 235, at 38-39 and A.M. Honoré, “Ownership”, in A.G. Guest (ed.), Oxford Essays in Jurisprudence, 1961, at 111 on England, and Pitlo, supra note 311, at 200-206 on the Netherlands.} The only view which may indicate the opposite, is that suggested by some of the United States cases on leases and sale-leasebacks, that a lessee is the owner for \textit{tax purposes}.\footnote{321}{See Faber and McDaniel, supra note 125, for a discussion of some of these cases.} As concluded in 4.3., however, those decisions must be seen against the background of the substance over form and anti-avoidance principles applied by the courts. In addition, the Supreme Court in \textit{Frank Lyon Co. v. United States,}\footnote{322}{Frank Lyon Co. v. United States, 435 U.S. 561 (1978).} also discussed in 4.3., by implication confirmed the lessor as the owner in a sale-leaseback transaction.
From the discussion on leasing and hiring, the following can be concluded: Possession and control, however full and complete it may be, is no guarantee for beneficial ownership. Also, beneficial use is not the same as beneficial ownership. Another important factor to realize in respect of the lessor-lessee relationship is that, despite the extensive rights of the lessee, the lessor almost always retains some important rights, such as the right to dispose of. Even where the right to dispose of is impeded by an option to buy, the lessor, in an arm’s length transaction, receives rental income and therefore still has the important right to the income. This distinguishes the situation of the lessor as legal owner with that of an agent or nominee as legal owner. Agents or nominees may receive compensation for acting in that capacity, but do not have the right to beneficial use or income of the property.

5.8. CONCLUSION

According to Vogel, none of the national tax systems of the different states offer a precise definition of the term “beneficial owner”.323 It may be correct that there is no precise statutory definition, but the term certainly has a meaning in at least England, the United States, Australia and Canada and any legal practitioner in any one of those states would probably react very unfavourably to a suggestion that the term has no domestic meaning.

In order to understand the meaning of beneficial ownership it is necessary to realize the distinction between two branches of English law, namely the common law and equity. The common law takes the position that ownership is indivisible and consequently only recognizes legal ownership. Equity, on the other hand, allows divided ownership, with legal title being in one person and beneficial ownership in another. The right of beneficial ownership is a property right that binds the whole world, except a bona fide purchaser of a legal estate for value without notice. In line with the foregoing, the court in Sainsbury concluded that the real test for beneficial owner-

ship is to consider the nature and extent of the rights held by the different parties. The court cases discussed in this chapter provide good insight into the characteristics of beneficial ownership, and the relation between legal and beneficial ownership. These matters are summarized in more detail in 6.3.2.8.1.

Although case law and other legal sources analysed in this chapter in respect of the United States, Australia and Canada did not reveal the same in-depth information on the meaning of beneficial ownership as was the case in the discussion on England, it is submitted that the meaning of beneficial ownership in those states is in accordance with the meaning in England. All these states form part of the common law family.

In terms of the case law discussed, the following categorization of "non-beneficial owners" can be made:

- Persons holding legal title for the benefit of someone else: agents, nominees, middlemen, administrators, trustees, sellers in an unconditional sales agreement.
- Persons who have the power to become beneficial owners, but who have not exercised that power yet: option holders, mortgage holders, holding companies.
- Persons who hold some rights, but whose rights are insufficient to replace someone else as the beneficial owner: lessees, licensees.

As was the case in the previous chapter on ownership, the discussion in this chapter showed that the test for beneficial ownership in England is purely of a legal nature, whereas the United States place a lot of importance on the question of the vesting of any appreciation or depreciation of the property's value, which could be regarded as economic criteria. In England, in *Sainsbury* in the High Court, Millett J. rejected the submission that the beneficial ownership of shares necessarily involves the hope of gain or the risk of loss, holding that any such requirement would substitute an economic test for a legal one and confuse the existence of legal rights with their value. As was the conclusion in the previous chapter on ownership (see 4.2.4.) it is, however, submitted that the real question, also as far as beneficial ownership is concerned, is whether the economic criteria is supported by ownership rights. It is submitted
that in a majority of cases, the vesting of any appreciation or depreciation of the property's value runs with the legal rights and that the respective views (or focus) in England and the United States are therefore not that different. Even in *Sainsbury*, after the option period expired, the benefits and risks temporarily impeded by the option, returned to the beneficial owner.

The statement that beneficial ownership in England is a pure legal test should not be confused with the test of only considering who holds legal title to the property, also referred to as the formalistic approach. With the legal test in England is meant establishing who holds the important ownership rights without reference to the economic value of those rights. As far as the formalistic approach is concerned, it is clear from the domestic law of all the states discussed that mere legal title without any other rights does not constitute beneficial ownership.

The relationship between “control” and beneficial ownership is another important factor. In England, again in *Sainsbury*, it was held that beneficial ownership has nothing to do with control and that the right to the beneficial receipt of any dividends which are declared must be distinguished from the right to cause them to be declared. It should be noted, though, that the negative remarks of the court were aimed at control over dividend declarations. The court in fact confirmed the importance of control over the actual payments by its use of the wording “beneficial receipt of any dividends”. In the United States control is seen as very important, but in terms of the cases discussed only control that results in benefits accruing to the person exercising the control was held to be beneficial ownership. The position of a trustee in a trust confirms that control should only be seen as beneficial ownership if it can be exercised for the benefit of the person controlling.

The real dispute on control, though, is that between the decisions in England (*Rodwell Securities*) and Canada (*Cowan and Jodrey*) on whether the shareholder control by a holding company results in the assets of the subsidiary being beneficially owned by the holding company. This is an important issue and not easy to conclude on. This study, however, supports the decision in England that a holding company is not the beneficial owner of the assets of its subsidiary.
and submits that the decisions in Canada should be distinguished on the basis that in those cases the subsidiaries were found to be mere agents or nominees.

The discussion of the Cowan and Jodrey cases in Canada seems to indicate that the question of whether beneficial ownership exists may relate very closely to the question of whether an agency relationship exists. This issue is further discussed in 6.3.2.10.2.

The decisions by the courts that option holders, mortgage holders and holding companies (see Cowan and Jodrey distinguished above) are not beneficial owners, illustrate an important point. Although such persons all have the power to become (beneficial) owners, they are not owners unless that power is exercised.

Although it seems that the notion of beneficial ownership, as known in the common law states, is not used in the domestic law of civil law states, the principle that someone other than the person holding legal title may hold the economic benefits relating to the property, is not so foreign in at least some civil law states. The distinction between legal and economic ownership in the Netherlands, for example, is very similar to the notion of beneficial ownership. There is, however, an important legal difference between beneficial ownership in the common law states, and economic ownership in the Netherlands. Whereas the right of beneficial ownership is a property right, binding (almost) the whole world, the relationship between the economic owner and legal owner in the Netherlands is contractual, binding only the contracting parties.

The discussion on leasing and hiring provided valuable insight into the meaning of beneficial ownership. It was concluded that possession and control, however full and complete it may be, is no guarantee for beneficial ownership. Also, beneficial use is not the same as beneficial ownership.

According to the courts, there are situations where beneficial ownership can be in suspension. The discussion has shown, though, that a thing can have only one beneficial owner at any specific point in time.324

324. This does not mean that a thing cannot be owned jointly by two or more persons. See Goode, supra note 235, at 39.
The domestic cases on beneficial ownership discussed all dealt with single identifiable assets such as shares, fixed property, machinery, cattle, copyright, etc. As is further discussed in 6.3.2.10., the fact that the beneficial ownership test in bilateral tax treaties has to be applied to a “payment”, which does not always fall into the category of a “single identifiable asset”, complicates the application of that test in tax treaties.

Following to Chapter 5, which investigated the domestic meaning of beneficial ownership, the current chapter investigates the international tax meaning of the term, which is the main focus of this study.

The chapter is structured in two parts. Part one analyses the current available information, such as decisions by the courts, opinions by commentators and governments, and information from the OECD on the international tax meaning of beneficial ownership. In part two, this study makes its own interpretation of the term.

6.2. STATUS QUO

For a term that is supposed to play such an important role in the allocation of treaty benefits and which is included in so many bilateral tax treaties, there are remarkably few court decisions on the international tax meaning of beneficial ownership.

The meaning thereof has been considered by the courts, though, and in addition various commentators and governments have provided their views. As the organization responsible for introducing the term into the wide international tax area, any information from the OECD on its meaning is of major importance. A good starting point for the investigation in the current chapter is therefore to study the material from the aforementioned sources.

32 — The word “wides” is used because, as it was mentioned in the discussion in 6.3.2.2., beneficial ownership was used in certain tax treaties before its introduction into the OECD Model in 1977.
The decisions by the courts that option holders, mortgage holders and holding companies (see Cowan and Jodrey distinguished above) are not beneficial owners, illustrate an important point. Although such persons all have the power to become (beneficial) owners, they are not owners unless that power is exercised.

Although it seems that the notion of beneficial ownership, as known in the common law states, is not used in the domestic law of civil law states, the principle that someone other than the person holding legal title may hold the economic benefits relating to the property, is also foreign in at least some civil law states. The distinction between legal and economic ownership in the Netherlands, for example, is very similar to the notion of beneficial ownership. There is, however, an important legal difference between beneficial ownership in the common law states, and economic ownership in the Netherlands. Whereas the right of beneficial ownership is a property right, binding (almost) the whole world, the relationship between the economic owner and legal owner in the Netherlands is contractual, binding only the contracting parties.

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According to the courts, there are situations where beneficial ownership can be in suspension. The discussion has shown, though, that a thing can have only one beneficial owner at any specific point in time. 26

This does not mean that a thing cannot be owned jointly by two or more persons. See, however, supra note 235, at 39.