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The construction of sub-section 6(5) of the Trusts of Land and Appointment of Trustees Act 1996: when is a "right" not a "right"?

Graham Ferris

Edward Bramley

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***CONVPL 39** In 1996 the Trusts of Land and Appointment of Trustees Act 1996 ("the Act") reformed the law governing trusts of land. The Act was intended to simplify the conceptual structure of the law, ridding the law of such subtleties as the statutory trust for sale and the doctrine of conversion.¹ The Act also contained provisions regulating the relationship between trustees and beneficiaries of trusts of land. It is one of these intra-trust provisions, subs.6(5), that will be the focus of this article. Obviously, the subsection is merely a part of the statutory scheme and needs to be considered within this context. By s.6 trustees of land were given extensive powers (ss.6(1), 6(2), 6(3), and 6(4))² the use of which was constrained (ss.6(5), 6(6), 6(7), and 6(8)). The Act also gave a statutory right of occupation to beneficiaries with an interest in possession (s.12) and new powers to trustees designed to allow trustees to control and mediate disputes between beneficiaries over occupation of trust land (s.13). Recourse to the courts was provided for by s.14. Section 15, for the first time, gave statutory guidance to the court on the exercise of its powers following an application under s.14.³ Section 15 of the Act effectively gave statutory form to the doctrine of the secondary purpose of the trust for sale of land, which had been developed in the courts in connection with the statutory discretion to order the sale of land held on trust.⁴

***CONVPL 40** This article is concerned with the interpretation of subs.6(5) of the Act. It is submitted that the provision is in part directed to an unresolved difficulty that arose from the doctrine of the secondary purpose of trusts for sale, and that it should be read as a counterpart to the provisions of s.15 of the Act. It is accepted that the proposed construction of the subsection is not a necessary reading of the provision. However, it is argued that it is the best construction available, and as such is the preferred construction to adopt. Subs.6(5) provides:

"In exercising the powers conferred by this section trustees shall have regard to the rights of the beneficiaries."

On first acquaintance this appears to be an absurdly over cautious affirmation of the duty of a trustee to hold property for the benefit of those entitled to the property in equity. However, it is beyond credence that the courts would not recognise the duty imposed on all trustees to act with loyalty towards their beneficiaries. Indeed it has been argued that such loyalty is the sine qua non for the very existence of a trust.⁵ To construe the subsection as merely imposing the duty of a trustee upon trustees renders the provision otiose. It assumes that Parliament felt the need to offer a basic primer on trust law to the judiciary.

Further, the reference to "the rights of the beneficiaries" creates a peculiar tension in the wording of the subsection. It seems rather weak to insist that trustees "have regard" to the rights of beneficiaries, as trustees owe legally enforceable duties that are the correlatives of those rights. To impose a duty to "have regard to rights" in the face of a duty to honour those rights seems absurd. It is difficult to imagine what is added to a duty by the injunction to have regard to the right that imposes the very same duty.

Thus, the provision demands some construction that can deal with the apparent pointlessness of the statutory words. Although it remains possible that the provision is merely the result of an abundance

of caution on the part of the legislature this must be a construction of last resort for two reasons. First, the duty of a court in construing a statute is to find the intention that existed upon enactment, the presumption is that Parliament does not act ***CONVPL 41** without purpose. Secondly, the words used are not well suited for confirming the duty owed by trustees to their beneficiaries, they suggest something less than legal duty. This doubt is confirmed by subs.6(6) of the Act which prohibits the use of the statutory powers: "in contravention of ... any rule of law or equity". Any action by the trustees in breach of their duty to the beneficiaries would be taken in contravention of a "rule ... of equity", it would be a breach of trust. Thus, the Act imposes the duties of trustees on the trustees by subs.6(6).⁶ To suppose that subs.6(5) performs the same task in a more obscure manner is a construction of despair. Therefore, unable to construe the provision from a naïve reading alone we must look for clues to the meaning of subs.6(5). There are two sources for such clues immediately available, a closer consideration of the words of the subsection, and a reading of the subsection with regard to other provisions of the Act.

If we start with a closer consideration of the words of subs.6(5). The provision uses the expression, "have regard to the rights of the beneficiaries". This expression is similar to an earlier statutory expression contained in s.107(1) of the Settled Land Act 1925, substantially re-enacting s.53 of the Settled Land Act 1882. Section 53 provided that:

"... a tenant for life shall, in exercising any power under this Act, have regard to the interests of all the parties entitled under the settlement".

It should be noted that it was "interests" rather than rights to which regard had to be given, and that s.53 proceeded to impose the duties of a trustee upon the tenant for life, so the peculiar problems posed by subs.6(5) do not arise with s.53. The expression "have regard to the interests" has been given a broad interpretation in the context of s.53 of the Settled Land Act 1882. In *Marquis of Ailesbury's Settled Estates, Re*, Lindley L.J. said:

"The expression 'have regard to the interests' means, I think, that he is to consider all the interests in the widest sense - not merely pecuniary interests, but wishes and sentimental feelings, and so on."⁷

***CONVPL 42** The authorities on s.53 of the Settled Land Act 1882 suggest that the reach of subs.6(5) may be greater than first appears.

However, the expression being construed in the s.53 cases was, "have regard to the interests" which might have a quite different meaning to, "have regard to the rights". Within the context of s.53 the word "interests" could have referred to either property interests (narrow reading) or to the advantage of a person (wider reading) without any strain. The word "rights" in subs.6(5) is difficult to read as meaning anything less than legal right within the statutory context. We have suggested elsewhere that perhaps subs.6(5) refers to potential rights that might arise if the trustees use their powers in a certain way.⁸ Specifically, we suggested that when trustees are considering whether to buy land using the proceeds from the sale of trust land, land that could be available for occupation by a beneficiary, the trustees should have regard to the potential right of occupation of the new land under s.12 of the Act.⁹

This approach remains plausible in the light of the case law on s.53. However, we feel the best construction of subs.6(5) will be informed by considering the subsection to be linked with the provisions of s.15 of the Act. There are two reasons to look towards s.15. First, s.15 uses the same expression "have regard" as subs.6(5). Secondly, we are alerted to the possibility that the expression "have regard to the rights" calls for an unusually broad range of matters to be considered. Section 15 demands attention be given to the housing needs of minors, various "purposes", secured creditors, and relative values of beneficial interests--as eclectic a collection as could be desired.

Section 15 of the Act, which gives guidance to the court hearing an application under s.14 of the Act, provides:

"Matters relevant in determining applications

15.(1)The matters to which the court is to have regard in determining an application for an order under section 14 include-

- (a) the intentions of the person or persons (if any) who created the trust;
- (b) the purposes for which the property subject to the trust is held;

(c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home;

***CONVPL 43** (d) the interests of any secured creditor of any beneficiary.

(2)

(3) In the case of any other application, other than one relating to the exercise of the power mentioned in section 6(2), the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests).

(4)”

Subsection 15(2) is concerned with applications arising from the use by trustees of the powers granted by s.13. Subsection 15(4) is concerned with insolvent beneficiaries.

It will be remembered that the aspect of subs.6(5) which caused the greatest difficulty is the reference to the “rights of the beneficiaries”. The puzzle that faces anyone who attempts to construe the subsection is to identify a purpose behind imposing a duty upon trustees to have regard to that which already binds them. When we looked to previous legislation for clues we were forced back onto the word “rights” as the lynchpin of the problem of construction. The expression “have regard to” could indicate an unusually broad type of duty, one outside the normal duties enforced against trustees.¹⁰ However, the expression is limited by that which is given regard to, in s.6(5) the “rights of the beneficiaries”. If there are rights enjoyed by the beneficiaries which do not arise from the equitable interest of the beneficiaries, then it is possible that subs.6(5) is primarily directed to the protection of these “rights”. If these rights do not arise from the equitable interests held by the beneficiaries they will not necessarily bind the trustees under the general law. The obscurity of subs.6(5) will become explicable if it is caused by the need to refer to rights which are not aspects of the equitable interest within the traditional confines of the trust. Section 15 gives statutory recognition to rights that formerly arose as a consequence of the “secondary purpose” of the trust for sale, and these very rights have been the subject of critical analysis because they cannot be fitted easily into the traditional property rights analysis of equitable ownership.

***CONVPL 44** The critical analysis of the secondary purpose was judicially articulated in *Burke v Burke* in the Court of Appeal.¹¹ The case was heard following an application under s.17 of the Married Women’s Property Act 1882.¹² The case concerned a house held on trust for sale by a man for himself and his wife in equal shares. The marriage had broken down,¹³ and the man had left the former matrimonial home two years before the litigation. The argument for the occupying beneficiary in *Burke* was that the house had been bought, “to provide a home and a roof over the heads of the two children”, and she and two children of the family still lived there. Therefore, the house should not be sold as the secondary purpose of the trust for sale was still operational. The Court of Appeal rejected this argument because, per Buckley L.J.:¹⁴

“ ... one must look at the matter having regard to the legal and equitable interests subsisting in the property ... the interests of the children in the present case ... are interests which are only incidentally to be taken into consideration ... so far as they affect the equities in the matter as between the two persons entitled to the beneficial interests in the property”.

The argument was that if the children were not beneficiaries of the trust then they had no claim, or right. The “purpose” of the trust did not vest any claim in the children or their mother, because the children had no equitable property interest. That this was indeed the basis of the reasoning is confirmed in the judgment of Lawton L.J.¹⁵ :

“I cannot see why the children should not be beneficiaries under any implied trust which may come into existence on the purchase of the home ... But ... the order of the Registrar ... had in fact decided what the trust was in this case.”

That such an approach was not suitable to the exercise of the statutory discretion vested in the court by s.30 of the Law of Property Act 1925 was confirmed in *Evers’ Trust, Re.*¹⁶ ***CONVPL 45** The enactment of s.15 of the Act makes the point beyond argument (see para.15(1)(c)), the court should give independent consideration to the welfare of children who live in the trust property. However, trustees of land are not subject to the provisions of s.15 of the Act, and they are not required to

exercise the statutory discretion vested in the courts. Trustees of land are duty bound to honour the beneficial interests of their beneficiaries.

In typical cases involving a dispute over the sale of land held subject to a trust the equitable owners of the land are clearly identified, and the nature of their property interests are unproblematic (tenants in common or joint tenants).¹⁷ Together the beneficiaries must hold any rights that arise from the existence of a secondary purpose of the trust. The dispute is typically over whether the court should order a sale of the land at the application of one beneficiary in the face of opposition from another beneficiary. The resolution has not been found by weighing the property interests in dispute. The courts have not simply followed the instructions of the majority beneficiaries by value, although this remains a relevant consideration (see s.15(3)). Rather, the courts have taken into account relationships, events, and legal relations outside of the structure of the co-ownership of the land in dispute.

If this is correct then there are claims held by beneficiaries, or factors the courts will weigh in decision making, that do not derive from the interests of the beneficiaries as equitable owners. We shall refer to these as "incidental rights" as the quality they all share is that they are incidental to equitable ownership. These incidental rights are not established merely by proof of equitable title, the equitable interest forms a necessary but not sufficient condition for the existence of the right. Also, these rights are not an aspect of the equitable property interest in land. Two different trusts of land may give rise to quite different incidental rights despite the fact that each trust of land is formally identical to the other.

These incidental rights are of uncertain provenance. It is now possible to point to a statutory origin for some of them, as a result of the Act (ss.12 and 15).¹⁸ However, it seems they may ***CONVPL 46** arise from an agreement between the beneficiaries¹⁹; from the intention of trustees who acquire land on behalf of the trust²⁰; and from the intention of the original settlor of the trust.²¹ It seems that these incidental rights may on occasion resemble the inchoate rights that follow from circumstances that give rise to proprietary estoppel.²² It seems these incidental rights arise from the circumstance that children rely upon the land held upon trust for their home.²³ Presumably the personal circumstances of occupiers, specifically their health, may give rise to such incidental rights.²⁴ If these rights are not an integral aspect of the beneficial interest, but are as we have suggested incidental rights, this may explain the surface absurdity of subs.6(5).

There is of course another respect in which these incidental rights are not typical property rights. They do not give rise to a duty to honour the right. They give rise to a duty to consider the right when making a decision. In this respect they resemble the claim of a beneficiary to consideration by trustees exercising a discretionary power to appoint income or capital within a class of beneficiaries. However, the development of the doctrine of the secondary purpose of a trust for sale arose in the exercise of discretion by the court. In the context of the typical case it was the failure of co-owner trustees to agree that led to referral to the courts. This in turn gave rise to the development of principles by the courts to guide and control what was a statutorily unlimited discretion. The law was developed not to control trustees in the exercise of a discretion given to them by the settlor or the general law, but to allow judges to exercise an unlimited discretion in a judicial way. The doctrine illuminated and expanded upon what order it was "fit" to make in the circumstances of co-ownership of land when the relationship between the co-owners ***CONVPL 47** had broken down. Therefore, regard to the claims that arose from the doctrine of the secondary purpose of a trust for sale was not a feature of the trustee beneficiary relationship which the courts enforced upon trustees. The doctrine, and the claims it supported, developed in the course of a judicial exercise of a statutory discretion.

Section 15 of the Act codified and modified the doctrine of the secondary purpose of the trust for sale. It also modified the applicable terminology, as in the new context of the trust of land it became simply the purpose of the trust, as there was no longer a primary purpose of sale in a trust of land. However, the section is directed to the court in the exercise of its discretion to make orders under s.14 of the Act. Therefore, the factors that should guide and constrain the court in exercising its discretion do not necessarily offer any similar guidance to, or impose constraint on, the trustees. However, it would be absurd if trustees did not have regard to the factors that would influence the court when considering an application from a beneficiary who is unhappy with the manner in which the trustees propose to use their powers of management. If trustees are not required, or indeed allowed,²⁵ to take into consideration the factors that the court will consider before making orders under s.14, then the Act could lead to trustees who act properly being effectively overruled by the court also acting properly. If s.6(5) avoids this result then the subsection plays a useful role in the scheme of the Act.

Let us consider a scenario where it seems clear that trustees and a court could reach different conclusions under the law we have outlined. To avoid any possible impact of ss.12 and 13 of the Act upon our reasoning it is necessary to imagine an odd set of facts.²⁶ Let us say a settlor established a trust of a large house for her three children in equal shares; with the express intention that the house should be available to serve as a home ***CONVPL 48** for her children and their families. None of the settlor's children now live in the house. However, the children of one of the beneficiaries do live in the house with their mother. The father of the children wishes the trust of the house to continue, and the occupation of the children and their mother to continue. Until he left the house it had served as their family home, and the children are socially integrated into the area. His siblings want the house to be sold and the proceeds to be divided equally between the three beneficiaries. Consultation confirms that by a two-thirds majority the beneficiaries want an immediate sale of the house.

It is submitted that the trustees are under a duty under the general law to sell the house upon their next review of the investments held on trust.²⁷ Prior to such a sale the trustees should consult with the beneficiaries.²⁸ Having consulted with the beneficiaries there is also a duty on the trustees to sell the house that arises from the consultation.²⁹

Upon reviewing the current investments of the trust the trustees are faced with a choice. They can sell the house: a decision that presumptively favours the interests of most of the beneficiaries. Alternatively, they can retain the house: a decision that favours one beneficiary more than the others, as it allows him to maintain his family at the expense of the trust. The law is clear that the trustees owe their loyalty to the equitable owners of the property as such. They must hold a balance between the interests of the beneficiaries,³⁰ and in this context "interests" means financial interests.³¹ As the court in *Burke* argued, the trustees must attend to the interests of the beneficiaries; not to the interests of the relatives of the beneficiaries. The occupation of the house as a home by minors is irrelevant.

There is also scant foundation for giving the express wishes of the settlor much weight. The normal presumption relating to any specified "purpose" for the creation of the trust would be that the ***CONVPL 49** purpose was a motive for the gift, which would be an absolute gift to the three beneficiaries.³² The trustees may take the expressed wishes of the settlor into account. However, in the event of a conflict between the wishes of the settlor and the beneficiaries the situation has been clear ever since the case of *Saunders*,³³ it is to the beneficiaries as owners that the trustees owe their duties.³⁴ The provisions of s.11 of the Act are entirely consonant with the general law in this respect, although they give rather more influence to the beneficiaries in the management of the trust property than is the norm.³⁵

This analysis is sympathetic to the reasoning in *Burke*. If one views a trust of land from the perspective of the duties of trustees, who are bound by equitable interests, then any "secondary purpose" must be overridden by the duties correlative to the rights that derive from the property interests of the beneficiaries. The doctrine of the secondary purpose of the trust for sale of land was developed in order to oust the presumption for sale imposed by the trust for sale. However, in the absence of a trust for sale the trustees are still bound to balance any conflicting interests of the beneficiaries in a manner that reflects the property interests of those beneficiaries. The trustees have no power to consider the welfare of those not beneficially entitled to the detriment of those who are beneficially entitled. The starting premise of the Court of Appeal was that the court should exercise its discretion under s.17 of the Married Women's Property Act 1882 in a manner that was consistent with the duties of trustees unless there were exceptional circumstances.³⁶ Thus, one can accept that the court in *Burke* were wrong in their unstated premise, that the statutory discretion should be subject to the same considerations that determine the duties of a trustee faced with the same circumstances. The statutory discretion was not limited by considerations of relative beneficial interests. However, in rejecting the approach of the Court in *Burke*, an approach that would harmonise the trustees' duty and the courts' use of discretion, the alternative was to open up a divergence ***CONVPL 50** between the two. This divergence is made visible if we consider the proper response of a court in our scenario.

The objecting beneficiary can apply to the court under s.14 of the Act. Neither the mother nor the children in occupation have locus standi. The Act directs the court to the factors listed at subs.15(1) and 15(3) upon an application for an order to prevent a sale under s.14. The relevant factors listed at subs.15(1) are: (a) the intention of the settlor; (b) the purposes for which the land is held; (c) the welfare of any minor who occupies the land. Subsection 15(3) indicates that the comparative values of the competing beneficial interests should be taken into account. There is no weighting of the factors listed by the Act. Paragraphs 15(1)(a) and (c), and subs.15(3) clearly apply. It is arguable that para.15(1)(b) also applies.³⁷

The court is required to have regard to the relevant factors. The court is expressly directed to have regard to non-proprietary interests at subs.15(1), paras (a) to (c). Regard is also what is to be given to the “circumstances and wishes” of the holders of the majority equitable interest. This is clearly a far cry from the position laid down at s.11. The wishes of the majority owners are not to be given effect if practicable, merely taken into consideration. Further, the circumstances of the beneficiaries are relevant; they are not asserting a right they are asking to be considered. Undoubtedly, if delaying a sale caused the equitable owners hardship then the court would be more likely to order a sale. If asserting a right such considerations would be inappropriate. Clearly, a court could quite properly not order an immediate sale of the house. As s.14 provides for the court to make whatever order it thinks fit it is likely that a court would seek to encourage or impose some compromise on the beneficiaries.

The doctrine of the purpose of the trust for sale of land was developed to counteract the treatment of land as mere “value”. When used as a home land is more than merely a capital asset.³⁸ In recognition of this social fact the courts insisted, correctly in our view, that the trusts should be treated as trusts of ***CONVPL 51** specific property. The cases concerned homes not investments. The courts recognised this paramount concern of the parties and gave it legal form in the doctrine of the secondary purpose. This development was associated with criticisms of merely technical legal or conveyancing devices, such as the trust for sale and the doctrine of conversion. Parliament endorsed and extended this judicial development in the Act, specifically in s.15. It is this context that must be incorporated into the construction of subs.6(5). The starting point is that a trust of land used by a beneficiary or a family member of a beneficiary as a home is a trust of specific property.

It is submitted that subs.6(5) operates to minimise the gap between the factors that properly influence the decision of the trustees when considering a use of the powers conferred by s.6, and the factors that properly influence the decision of the court as laid down in s.15. If this is correct then the “rights” to which the trustees should have regard pursuant to subs.6(5) are, in our scenario, the claims for consideration that arise from paras 15(1)(a) to (c). When land is being used as a family home, having been acquired for that purpose, those authorities that treat the “purpose” of a trust as legally irrelevant do not apply.³⁹ The balance of interests between beneficiaries is no longer treated as a simple balancing of like against like. The source of these “rights” is not the equitable interest alone; it is the equitable interest plus other circumstances. Thus, subs.6(5) is needed to allow trustees to properly consider the use of their powers in the light of what a court would order if an application was made under s.14. Just as the court must “have regard” to the matters listed in s.15, so the trustees must “have regard” to what we have termed the incidental rights of beneficiaries. These rights are not property rights of an equitable owner, and these “rights” may well include the “wishes and sentimental feelings” of beneficiaries with respect to their home.

This construction of subs.6(5) harmonises the factors that the courts take into account upon an application under s.14 and the factors that trustees take into account when deciding how to exercise their s.6 powers. It is odd, if we are correct, that this link was not made expressly. In s.13 of the Act the draftsman explicitly instructed the trustees and the court to have regard to the same listed factors when making a decision on the exercise of the statutory powers which could result in the termination ***CONVPL 52** of a beneficiary's occupation of the trust land.⁴⁰ It may have seemed obvious to the draftsman that the expression “have regard” flagged up the intended linkage between subs.6(5) and s.15. There was no word other than the notoriously plastic word “rights” available to describe the multifarious potential claims of the beneficiaries that it was intended to encompass in subs.6(5).

There is one clear disadvantage of our proposed construction. It is not the obvious meaning of subs.6(5). However, if subs.6(5) had an obvious meaning we would not have engaged upon this analysis. This is an area where clarity of meaning is of great importance. If our hypothetical scenario occurred in fact the legal advisors of the trustees should be able to give clear advice to the trustees on the factors they should consider when deciding how to exercise their powers under the Act. For co-owner trustees the potential problems are avoided by their dual role as trustees and beneficiaries. When they are in agreement any breach of trust will be remedied by that agreement. When they are not in agreement one of them will be forced to seek an order of the court in any event, being unable to act alone.

It seems to us that there are three advantages of our proposed construction.

First, it allows the problem raised by *Burke* to be faced. The Court of Appeal attempted to harmonise the approach of the court in the use of its discretion with the general law governing the decisions of trustees. This approach was rejected, but the question of how the resulting law should be harmonised was not dealt with. If our construction of the Act is accepted then the divergence can be minimised: by

widening the factors that should be taken into account by trustees under subs.6(5). If this is not the effect of subs.6(5), then the divergence continues, and the Act has widened the divergence by enacting s.15.

Secondly, it allows for a principled approach to the future development of the law. If there is a tension between two types of trust: those that give rights to enjoyment of the specific property held by the trust; and those trusts better conceptualised as a fund of value: then it should be possible to approach the difficulties this gives rise to in a principled manner. Our construction forces a consideration of this issue, and thereby encourages a principled development, by opening up the field for argument. It seems likely that the obscurity of subs.6(5) is largely explained by the ***CONVPL 53** absence of such an articulate consideration of this area in the sources.

Thirdly, it allows for a consideration of the nature of the incidental rights we have identified. Some of these rights seem likely to become rights of property; some seem likely to be linked to status; some seem likely to be circumstantial in nature, and endure until circumstances change and no longer. Clarity of analysis should prevent the error of assuming that as all these rights are incidental to beneficial ownership then they are capable of property status in equity. Our analysis suggests that the sole quality these rights have in common is that they are not aspects of equitable property rights, and therefore fall with the bounds of subs.6(5). It is rights that do not bind trustees, as a matter of trust law, that subs.6(5) requires trustees to have regard to.

Senior Lecturer in Law, Nottingham Law School, Nottingham Trent University.

Edward Bramley Professor of Law (Emeritus), University of Sheffield.

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1. Sections 1 and 3.
2. The provision is now contained in s.8 of the Trustee Act 2000.
3. Prior to the Act such applications had been made under s.30 of the Law of Property Act 1925.
4. Section 15 is reproduced below. The section was construed in *Mortgage Corp. v Shaire* [2001] Ch. 743 Ch D. The doctrine of the secondary purpose of a trust for sale, sometimes known as the "underlying purpose" or "collateral object", was developed in the following cases: *Buchanon-Wollaston's Conveyance, Re* [1939] Ch. 738 CA; *Mayo, Re* [1943] Ch. 302 Ch D; *Jones v Challenger* [1961] 1 Q.B. 176 CA; *Rawlings v Rawlings* [1964] P. 398 CA; *Williams v Williams* [1976] Ch. 278 CA (Civ Div); *Evers' Trust, Re* [1980] 1 W.L.R. 1327 CA (Civ Div); *Citro, Re* [1991] Ch. 142 CA (Civ Div).
5. See David Hayton "The irreducible core content of trusteeship" (1996) 5 *Journal of International Trust and Corporate Planning* 3, and the "irreducible core of obligations" recognised by Millett L.J. in *Armitage v Nurse* [1998] Ch. 241 CA (Civ Div) at 253H.
6. We have suggested elsewhere that s.6(6) prevents the use of a power in breach of its provisions from acting as an exercise for the statutory authority to act. Hence, the provision is not otiose as it plays an important role in regulation of third party rights over land held upon a trust of land. See [1998] 62 Conv. 168; (2002) 118 L.Q.R. 270 and (2003) 119 L.Q.R. 100.
7. *Marquis of Ailesbury's Settled Estates, Re* [1892] 1 Ch. 506 CA at 536, and see Bowen L.J. to like effect at 541.
8. Graham Battersby and Graham Ferris "The impact of the Trusts of Land and Appointment of Trustees Act 1996 on purchasers of registered land" [1998] 62 Conv. 168 at 174.
9. A construction seemingly accepted: Dr Charles Harpum, Stuart Bridge and Dr Martin Dixon *Megarry and Wade: The Law of Real Property*, 6th edn, (London: Sweet & Maxwell, 2000) pp.8-136, fn.98.
10. Usually protecting and advancing the financial interests of the beneficiaries is the essential duty of trustees, see *Cowan v Scargill* [1985] Ch. 270 Ch D; *Harries v Church Commissioners for England* [1992] 1 W.L.R. 1241 Ch D.
11. *Burke v Burke* [1974] 1 W.L.R. 1063 CA (Civ Div).
12. There is no material difference between the discretion given to the court by s.17 of the Married Women's Property Act 1882 and s.30 of

the Law of Property Act 1925 for our purposes; see *Evers' Trust, Re* [1980] 1 W.L.R. 1327 CA (Civ Div) at 1333.

13. A decree nisi had been made.
14. *Burke v Burke* [1974] 1 W.L.R. 1063 CA (Civ Div) at 1068.
15. *Burke v Burke* [1974] 1 W.L.R. 1063 CA (Civ Div) at 1069.
16. *Evers' Trust, Re* [1980] 1 W.L.R. 1327 CA (Civ Div). *Burke v Burke* was also disapproved of because it resolved the issues without reference to the family courts, which had extensive powers not available to the court under a s.17 application, see *Williams v Williams* [1976] Ch. 278 CA (Civ Div).
17. Whether such interests exist, and if so the extent of them, is often very problematic: see *Oxley v Hiscock* [2004] EWCA Civ 546; [2004] 3 W.L.R. 715; Graham Battersby "Oxley v Hiscock in the Court of Appeal: the search for principle continues" (2005) 17 C.F.L.Q. 259 and *Stack v Dowden* [2007] UKHL 17; [2007] 1 F.L.R. 1858; Graham Battersby "Ownership of the family home: *Stack v Dowden* in the House of Lords" (2008) 20 C.F.L.Q. 255.
18. The contingent right of occupation granted by s.12.
19. Either in the form of a contract, as in *Buchanan-Wollaston's Conveyance, Re* [1939] Ch. 217 Ch D, or from an informal agreement between the beneficiaries at the time they acquired the property, as in *Jones v Challenger* [1961] 1 Q.B. 176 CA. Now, presumably, via s.15(1) paras (a) or (b) of the Act. The exact relationship intended between paras (a) and (b) is problematic. Perhaps, (a) is directed to intentions that precede the creation of the trust, and (b) is directed towards purposes deduced from the use of the land subject to the trust. Plausibly, (a) is directed towards trusts of land set up by a third party settlor and (b) is directed to the more common shared ownership situation.
20. See originally s.6(4) of the Act, now s.8 of the Trustee Act 2000.
21. Sections 12(1)(a) and 15(1)(a).
22. *Jones v Jones* [1977] 1 W.L.R. 438 CA (Civ Div).
23. See s.15(1)(c).
24. See dictum in *Burke v Burke* [1974] 1 W.L.R. 1063 Ca (Civ Div) at 1068: "if ... the one who was in occupation had some infirm or aged relative ..." See also cases under s.335A of the Insolvency Act 1986 on what constitutes "exceptional circumstances": *Bailey, Re* [1997] 1 W.L.R. 353; *Judd v Brown* [1998] 2 F.L.R. 360 Ch D; *Raval, Re* [1998] 2 F.L.R. 718 Ch D; *Claughton v Charalamabous* [1999] 1 F.L.R. 740 Ch D.
25. See *Hastings-Bass (Deceased), Re* [1975] Ch. 25 CA (Civ Div). The courts are inclined to a robust view of how trustees approach decision making, and allow a "common sense" approach to what factors may be considered, see *Nestle v National Westminster Bank Plc* [1993] 1 W.L.R. 1260 CA (Civ Div) at 1279.
26. It is submitted that the right of occupation was not intended to structure the exercise by the trustees of their power of sale. Sections 12 and 13 are primarily concerned with the management of land held on trust, rather than the decision whether to hold the land on trust. The Act carefully aligns the factors that should be considered by the trustees and by the court for the purposes of ss.12 and 13 at s.13(8). Also, s.15(2) is directed to disputes about the s.13 power, whilst s.15(3) is directed to all other disputes, including over sale. It is assumed that use of s.6(2) would merely change the identity of the party who would need to apply to the court. With non-beneficiary trustees the trustees could act unanimously to sell, and the objecting beneficiary would have to apply to the court. With beneficiary trustees the objecting beneficiary could block any moves to proceed to a sale, by refusing to agree, forcing the other trustees to apply to the court.
27. On the duty to review investments see s.4(2) of the Trustee Act 2000 and *Nestle v National Westminster Bank Plc* [1993] 1 W.L.R. 1260 CA (Civ Div).
28. Section 11(1)(a) of the Act.
29. Section 11(1)(b) of the Act.
30. See *Pauling's ST (No. 2), Re* [1963] Ch. 576 at 586 and the need to "preserve an equitable balance". The more familiar occasion for the difficulty is the balance between different classes of beneficiary, traditionally giving rise to "rules" such as the rule in *Howe v Earl of Dartmouth* (1802) 7 Ves. Jr. 137 Ct of Chancery; but also playing a vital role in such contemporary cases as *Nestle v National Westminster Bank Plc* [1993] 1 W.L.R. 1260 CA (Civ Div).
- 31.

See *Cowan v Scargill* [1985] Ch. 270 Ch D; *Harries v Church Commissioners for England* [1992] 1 W.L.R. 1241 Ch D.

- [32.](#) See *Bowes (No. 1), Re* [1896] 1 Ch. 507 Ch D; *Andrew's Trust, Re* [1905] 2 Ch. 48 Ch D; *Osoba (Deceased), Re* [1979] 2 All E.R. 393 CA (Civ Div).
- [33.](#) *Saunders v Vautier* (1841) 4 Beav. 115 Ct of Chancery.
- [34.](#) The principle has been confirmed recently in *Goulding v James* [1997] 2 All E.R. 239 CA (Civ Div).
- [35.](#) Normally the remedy of the beneficiaries is to bring the trust to an end, and demand conveyance of the trust fund to themselves. Interestingly, the trustees have the power to force the beneficiaries to become trustees under s.6(2) of the Act.
- [36.](#) The example given was of aged or infirm relatives whose re-housing would pose peculiar difficulties: See *Burke v Burke* [1974] 1 W.L.R. 1063 CA (Civ Div) at 1068.
- [37.](#) The relationship between paras 15(1)(a) and 15(1)(b) suggests that para.15(1)(b) is concerned with events that occur after the creation of the trust that give rise, for example, to an implication that the land held on trust is retained for the purpose of occupation by a beneficiary (or the family of a beneficiary). The most obvious circumstance that might give rise to such an implication is the fact that such occupation has occurred.
- [38.](#) On the rather haphazard legal recognition of the home see: Lorna Fox "Family law creditors and the concept of 'family home': a functional analysis" (2005) 25 L.S. 201 and Lorna Fox *Conceptualising Home: Theories, Laws and Policies* (Oxford: Hart Publishing, 2006).
- [39.](#) See *Bowes (No. 1), Re* [1896] 1 Ch. 507 Ch D; *Andrew's Trust, Re* [1905] 2 Ch. 48 Ch D; *Osoba (Deceased), Re* [1979] 2 All E.R. 393 CA (Civ Div)..
- [40.](#) Sections 13(4) and 13(8). Section 15(2) instructs the court to have regard to the factor set out at para.13(4)(c), both paras 13(4)(a) and 13(4)(b) being reproduced at s.15(1)(a) and (b), when considering any other application relating to the trustees' powers under s.13.