

## Law Quarterly Review

2003

### The general principles of overreaching and the modern legislative reforms, 1996-2002

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**Subject:** Equity. **Other related subjects:** Banking and finance. Trusts

**Keywords:** Equitable interests; Life tenants; Mortgagees; Overreaching; Trustees

**Legislation:** Trusts of Land and Appointment of Trustees Act 1996

Land Registration Act 2002

#### **\*L.Q.R. 94 INTRODUCTION**

IN an earlier article published in this journal, "The General Principles of Overreaching and the Reforms of 1925",<sup>1</sup> we analysed the general principles of overreaching in the context of the reforming legislation of 1925. Our principal conclusions may be summarised as follows:

(1) Overreaching occurs when a limited owner of property exercises an authority to dispose of that property.

(2) Section 18 of the Land Registration Act 1925 (subsequently abbreviated as LRA 1925) confers a power (or ability) to dispose, not an authority; therefore, in the case of registered land as in the case of unregistered land, the authority of trustees for sale to deal with the legal estate had to be found in section 28(1) of the Law of Property Act 1925 (subsequently abbreviated as LPA), and similarly since 1996 the authority of trustees of land must be found in section 6 of the Trusts of Land and Appointment of Trustees Act 1996 (subsequently abbreviated as TLATA).

(3) The role of section 2(1) of LPA, in relation to a disposition by trustees of land (and previously trustees for sale), is to protect purchasers from an improper exercise of the authority that would otherwise be a breach of trust, but for section 2(1) to be activated the disposition must be *intra vires* and the statutory requirements respecting the payment of capital money must be complied with.

(4) In relation to the exercise of a mortgagee's power of sale (which is a combination of ability and authority), the wide protective effect of section 2(1)(iii) gives way to the narrower protection afforded to a purchaser by section 104(2) of LPA.

In this present article we intend to build on those conclusions, carrying forward the analysis to a consideration of the modern legislative reforms brought about by TLATA, the Trustee Act 2000 (subsequently abbreviated as TA 2000) and the Land Registration Act 2002 (subsequently abbreviated **\*L.Q.R. 95** as LRA 2002). We attempt to establish the current law of overreaching by two of the most important overreachers, trustees of land and mortgagees. The first stage of this analysis examines the statutory schemes for trustees' powers as laid down by TLATA and TA 2000. The second stage is concerned with the provisions of TLATA which provide protection to purchasers of land from trustees. The third and last stage is concerned with the provisions of LRA 2002, which establishes a novel scheme of protection for purchasers of registered land from trustees and mortgagees. The Act confers on purchasers from trustees the protection denied to them by TLATA, in order to facilitate the operation of overreaching; the effect is to make the protection of purchasers of registered land roughly equivalent to, but stronger than, that afforded to purchasers of unregistered land. In respect of purchasers from mortgagees, the Act proceeds by drawing a clear distinction between registered and unregistered land, so that a purchaser of registered land will be protected when the equivalent purchaser of unregistered land will not.

Each of these Acts was preceded by a report of the Law Commission<sup>2</sup>; indeed, taken together, the three Acts may be regarded as constituting a coherent package of reform. Those reports may be used to assist in construing the relevant provisions.<sup>3</sup>

## THE POWERS OF TRUSTEES OF LAND

The powers of trustees of land are granted by TLATA, and the powers of trustees of personalty are granted by TA 2000. TA 2000 made several amendments to TLATA and it is necessary to consider both Acts together. LRA 2002 does not grant powers of disposition to trustees of land as trustees.<sup>4</sup> TLATA remains the most important Act in this area.

### **Section 6(1) of TLATA and section 8(3) of TA 2000**

Although not the only provision of TLATA that grants powers to trustees of land,<sup>5</sup> the most important is section 6(1), which provides: “For the **\*L.Q.R. 96** purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.”

There is no indication that the grant of powers by the subsection is anything other than a grant of authority.<sup>6</sup> Section 8(3) of TA 2000 makes a very similar grant of powers to the grant by section 6(1) of TLATA. The section 8(3) grant is to any trustee that acquires land using the power to acquire land granted by section 8(1) of TA 2000.<sup>7</sup> TA 2000 amended section 6(3) of TLATA, which now effectively incorporates section 8(1) of TA 2000 into TLATA. Therefore, section 8(3) of TA 2000 will apply generally to trustees of land if the land held by the trustees was acquired after the commencement of TA 2000.<sup>8</sup> At law trustees of land are absolute owners, it is only equity that recognises the trust. It would be otiose to grant the powers of a legal owner to a legal owner. We submit that section 6(1) of TLATA and section 8(3) of TA 2000 bestow not ability but authority, and that this construction is unavoidable when the sections are read in the light of the law as it existed prior to 1996. In this regard neither TLATA nor TA 2000 was a radical reform.<sup>9</sup>

Section 6(1) of TLATA did make a significant change to the approach to trustees' powers when compared with section 28 of LPA. TLATA authorises any type of transaction, rather than granting specified powers which are considered necessary to the efficient administration of the trust.<sup>10</sup> This constitutes a rejection of an older approach, evidenced in the 1925 legislation, which sought to control trustees by setting explicit limitations on their powers. Rather than refusing trustees the authority to make hazardous dispositions, such as mortgages (unless the purpose of the **\*L.Q.R. 97** mortgage is to discharge a prior encumbrance),<sup>11</sup> TLATA allows trustees to make any type of disposition. This avoids the problem of trustees being faced with an invidious choice between, on the one hand, accepting the limitations on their powers and acting in a way that disadvantages their beneficiaries, and, on the other hand, risking “judicious breaches of trust”,<sup>12</sup> i.e. breaches of trust which work to the advantage of the beneficiaries. The benefits of a flexible regime that does not require constant attention from the legislature to keep it responsive to felt needs are manifest. However, there are costs associated with such a regime. The security of beneficiaries may be weakened if they cannot restrain their trustees from entering into transactions in which risk is inherent.<sup>13</sup> Beneficiaries of a trust may find it more difficult to constrain the actions of their trustees. Where the trustees are exercising a discretion, unless the trustees' decision is wholly unreasonable, a court is likely to resist any request to substitute its own decision for that of the trustees. For our purposes the new regime presents problems of policy whenever third parties are potentially affected by the acts of the trustees. Either, we must allow that third parties can be affected by breaches of duty that are difficult to establish, or the interests of the beneficiaries must be prevented from affecting purchasers.

This shift in approach also means that, when section 6(1) of TLATA, or section 8(3) of TA 2000, applies, either *ultra vires* dispositions will no longer be possible, or the expression “*ultra vires*” must take on a new meaning. If we accept that overreaching before 1996 operated only when a disposition was *intra vires*, then the operation of overreaching is likely to be fundamentally affected by the new approach to the grant of powers to trustees. If section 6(1) of TLATA, or section 8(3) of TA 2000, stood alone our submission would be that the view Harpum wrote to counter in “Overreaching, Trustees' Powers and the Reform of the 1925 Legislation”<sup>14</sup> (that any conveyance of a legal estate would overreach the beneficial interests under a trust for sale, by force of section 2 of the LPA, provided only that any capital money arising was paid to two trustees or a **\*L.Q.R. 98** trust corporation) would have become the law in respect of trusts of land. The extension of trustees' powers to any act that a legal owner could perform leaves all possible actions *intra vires*, and the limitation on the operation of section 2 identified by Harpum becomes a chimera.

However, sections 6(1) of TLATA and 8(3) of TA 2000 do not stand alone; by its own provisions section 6 purports to limit the exercise of the generous powers it grants to trustees of land.

Subsections (5), (6), and (8) all purport to impose limits upon trustees of land. These limitations also apply to section 8(3) of TA 2000, as section 9(2) of TA 2000 preserves all statutory restrictions upon or exclusions of the powers granted by section 8.<sup>15</sup> This feature of TA 2000 enables us largely to ignore the section 8(3) grant of powers to trustees in the following discussion, as any effective limitation of the powers granted by section 6(1) of TLATA will be equally effective to limit the powers granted by section 8(3) of TA 2000. A new section 6(9) of TLATA has been enacted by TA 2000, which subjects trustees of land to the statutory duty of care laid down in section 1 of TA 2000.<sup>16</sup> Sections 7(3) and 11(1) of TLATA respectively require trustees of land to obtain the consent of beneficiaries, and to consult with them before acting. Section 8(1) of TLATA allows a settlor to exclude or restrict any or all of the powers granted by section 6(1), and presumably has the effect that the trustees have then only the powers granted by the settlor. In a similar fashion section 9(2) of TA 2000 allows a settlor to exclude or restrict any or all of the powers granted by section 8 of TA 2000. Section 8(2) of TLATA allows a settlor to make it a condition precedent that a consent be obtained prior to the use of a power by the trustees. Section 16 of TLATA is concerned to protect purchasers from the risk of taking land from trustees when that land is still subject to the equitable interest of the beneficiaries. The present extent of the operation of section 2 of LPA can only be ascertained by an examination of these provisions of TLATA. In the context of the present statutory scheme the term “*ultra vires*” takes on a new meaning: a conveyance is *ultra vires* when it is made in breach of a provision of TLATA, breach of which prevents the general grant of powers by section 6(1) from applying. This approach to the meaning of “*ultra vires*” is defensible, as when trustees of land execute a conveyance that is not authorised by section 6(1) (or some other section of TLATA, or that is not authorised by their trust instrument, when the operation of section 6 has been excluded by their settlor) they are not empowered to make that conveyance. However, the argument does not rest upon the propriety of this use of “*ultra vires*”, because the real issue is not whether a conveyance is **\*L.Q.R. 99** *intra* or *ultra vires*, but whether it is a conveyance that is capable of overreaching the equitable interests under the trust. We need to establish which, if any, conveyances by trustees of land taking place after the passage of TLATA are incapable of overreaching the equitable interests under the trust. Thus our analysis will seek to ascertain the effect upon the operation of section 2 of LPA of various breaches of TLATA by trustees of land.

### **Section 8 of TLATA and section 9(2) of TA 2000**

Section 8(1) provides: “Sections 6 and 7 do not apply in the case of a trust of land created by a disposition in so far as provision to the effect that they do not apply is made by the disposition.”

Thus, it seems a settlor could create a trust of land in which the trustees had no powers of disposition.<sup>17</sup> Such trustees could pass a legal estate, but any disposition would be void in equity. Under such a settlement a conveyance by the trustees would be incapable of overreaching the equitable interests under the trust, and, therefore, section 2 of LPA would not apply. It is more likely that section 8(1) of TLATA will be used to create trusts in which trustees have limited powers of disposition, but exactly the same considerations apply to an *ultra vires* conveyance by such trustees as apply to a disposition by trustees with no powers.

Section 8(2) provides: “If the disposition creating such a trust makes provision requiring any consent to be obtained to the exercise of any power conferred by s.6 or 7, the power may not be exercised without that consent.”

Thus, if a settlement provides that a consent is required before any disposition of the land subject to the trust, then the trustees may not use their section 6(1) powers without first obtaining that consent.<sup>18</sup> The result is that a conveyance made without obtaining the requisite consent would be void in equity, and incapable of overreaching equitable interests under the trust. If the trustees are denied their section 6(1) powers unless they obtain a consent, then any purported exercise of those powers without that consent must be ineffective, and, therefore, section 2 of LPA cannot operate in favour of a purchaser.<sup>19</sup>

**\*L.Q.R. 100** Unfortunately we must abandon at this point our assumption that the grant of powers to trustees by section 8(3) of TA 2000 can be subsumed in our consideration of the section 6(1) of TLATA grant. Although we can suggest no reason for any distinction, except inadvertence, it is clear on the face of TLATA that sections 8(1) and 8(2) do not apply to the grant of powers by section 8(3) of TA 2000. However, the provisions of section 9(2) of TA 2000 seem sufficiently wide to allow a settlor to use express provisions in the trust instrument either to cut down the trustees' powers, or to prevent the trustees exercising their powers without first obtaining a consent. We shall be forced to return to

this quirk of TA 2000 when we consider the provisions of section 16(3) of TLATA.

### **Section 6(5)**

Section 6(5) of TLATA has been described as “An odd, even gnomic, utterance of the legislature”,<sup>20</sup> and its construction poses peculiar difficulties. Section 6(5) provides: “In exercising the powers conferred by this section trustees shall have regard to the rights of the beneficiaries.”

The expression “have regard to the rights of the beneficiaries” has no obvious and clear meaning that is not already encompassed by the designation “trustees”. The expression has a statutory forebear in section 107(1) of the Settled Land Act 1925 (subsequently abbreviated as SLA), substantially re-enacting section 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”, but the section went on: “and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties”. The effect of the opening words was to identify the people to whom a beneficially entitled limited owner owed the duties of a trustee, and to define those actions in which he owed them the duty of a trustee. It seems otiose to place trustees under an obligation to have regard to the rights of their beneficiaries. The expression “have regard to the interests” has been given a broad interpretation in the context of section 53 of the Settled Land Act 1882. In *Re Marquis of Ailesbury's Settled Estates*, 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.”<sup>21</sup> We have suggested elsewhere that section 6(5) may have been drafted so as to forbid acts which were taken in disregard of the potential rights of beneficiaries; in particular, the potential right of a beneficiary to live on land held by the trust, if some land were acquired for *\*L.Q.R. 101* that purpose by the trustees.<sup>22</sup> The authorities on section 53 of the Settled Land Act 1882 suggest that the reach, and uncertainty in application, of section 6(5) of TLATA may be greater than we first suggested.

We hope to explore the nature of section 6(5) in greater depth elsewhere. However, it is appropriate to indicate here the outlines of our provisional conclusions. Land is property of a peculiar kind; among its essential and distinguishing qualities we may note that it is enduring, immovable, and specific. The relationship between land and the occupiers of land is also peculiar; its essential qualities can be discerned by a consideration of the emotional resonance of the word “home”. Land is of course a valuable asset, but, as recognised by the courts before the passage of TLATA, to treat land as merely an asset of value is to ignore both a primordial emotional, and an important practical, aspect of land which serves as a home to its occupants. Undoubtedly TLATA gave a statutory endorsement to the courts' recognition of the unique qualities of land when held on trust. To state this in terms of the trustees' duty, trustees of land are required to consider matters which would not need consideration by trustees of personalty. Section 6(5) imposes this duty on trustees of land in statutory form, a duty to consider non-financial matters when exercising their powers, and is the corollary of section 15 of TLATA.<sup>23</sup>

It is implicit in our consideration of the purpose of section 6(5) that the statutory words, “In exercising the powers conferred by this section”, are not an entirely satisfactory form of expression. It is surely at the stage of considering whether, and if so how, to exercise their powers that trustees are bound to “have regard to the rights of the beneficiaries”. Although a breach of section 6(5) would not be complete until after a disposition had been made in disregard of the rights of the beneficiaries, compliance with section 6(5) would have to occur prior to any disposition. The legislative intention would have been better expressed if section 6(5) read: “When deciding whether, and if so how, to exercise the powers conferred by this section the trustees shall have regard to the rights of the beneficiaries.”

The language of section 6 is insufficient for any firm conclusion as to the intended effect of a breach of section 6(5) on the grant of powers by section 6(1). The mandatory words of section 6(5) have led us to suppose that a disposition in breach of section 6(5) was not a disposition undertaken by trustees of land “for the purposes of exercising their functions as trustees”, and was, therefore, not authorised by section 6(1).<sup>24</sup> However, a closer, *\*L.Q.R. 102* although still incomplete, analysis of section 6(5) suggests a contrary conclusion. Section 6(5) seems to be concerned with regulating the decision-making of trustees of land, and not with their authority to act. Any grant of authority to act coupled with a discretion as to how that authority should be used entails the risk that the holders of the authority will make an error in exercising their discretion. Certainly before the passage of TLATA such an error on the part of trustees would have left a conveyance *intra vires*. There seems to be no

clear legislative intention to change the law in this regard, and we conclude that a breach of section 6(5) may not render a conveyance *ultra vires*. In other words, there is no clear legislative intention to deny the authority conferred by section 6(1) to trustees acting in breach of section 6(5). Rather, the reference to the conferring of powers in section 6(5) is necessary to identify the occasions on which the duty is imposed on the trustees. If a breach of section 6(5) does not negate the operation of section 6(1) then such a disposition falls within the operation of section 2 of LPA and a purchaser can shelter behind its provisions.

### **Section 6(6)**

Section 6(6) of TLATA provides: “The powers conferred by this section shall not be exercised in contravention of, or of any order made in pursuance of, any other enactment or any rule of law or equity.”

We take this to mean that the powers of trustees of land shall not be used, *inter alia*, in breach of trust.<sup>25</sup> Thus, section 6(6) operates if trustees make a disposition in breach of trust. The language is mandatory: the statutory powers “shall not” be used in breach of section 6(6). Therefore, a conveyance in breach of section 6(6) is not an exercise of the powers at all. Section 6(1) grants the authority to make any type of disposition, but section 6(6) prevents the use of that extensive authority in breach of trust, thus limiting the operation of section 6(1).<sup>26</sup>

By its express terms section 6(6) is concerned with the exercise of trustees' powers, rather than the personal liability of trustees, or the regulation of disputes between trustees and beneficiaries. It is the powers that shall not be exercised, not the trustees who should not exercise them. Any construction which attempts to limit the operation of section 6(6) to the personal liability of trustees, or to the regulation of relationships *\*L.Q.R. 103* internal to the trust, renders section 6(6) ineffective.<sup>27</sup> It is inconceivable that the courts would have read section 6(1) as giving trustees the right to act in ways that breached rules of law, equity or statute. There is no indication that beneficiaries' remedies against trustees are enhanced by section 6(6). Finally, reading section 6(6) as restricted in its operation to the relationship between the trustees and the beneficiaries would render later provisions of TLATA otiose.<sup>28</sup>

Prior to the passage of TLATA, section 2 of LPA protected purchasers from being affected by the sort of misfeasance that many breaches of section 6(6) of TLATA entail. Section 2 applied upon an *intra vires* conveyance in breach of trust, as an *intra vires* conveyance was inherently capable of overreaching the equitable interests in the land, and would do so unless some factor (e.g. a breach of trust) operated to prevent overreaching (which factor could be operative only if a purchaser had notice, which section 2 precluded). If section 6(6) limits the operation of section 6(1), then section 2(1) of LPA cannot come to the aid of a purchaser who takes a conveyance in breach of section 6(6), because that conveyance is not capable of overreaching the equitable interests under the trust. Thus, section 6(6) of TLATA drastically reduces the effective role of section 2 of LPA.

The extent of this curtailment can be ascertained only by a careful consideration of section 6(6) itself. Section 6(6) contains an internal restriction on its operation: the section does not apply upon a breach of some other provision of TLATA. There is also an external limit to the operation of the section: section 6(6) affects the protection available to purchasers of land from trustees by limiting the operation of section 2 of LPA, but other statutory provisions protective of purchasers, what we have described elsewhere as “statutory sticking plasters”, are still in place.<sup>29</sup>

### **Section 6(8)**

Section 6(8) of TLATA provides:

“Where any enactment other than this section confers on trustees authority to act subject to any restriction, limitation or condition, trustees of land may not exercise the powers conferred by this section to do any act which they are prevented from doing under the enactment by reason of the restriction, limitation or condition.”

*\*L.Q.R. 104* The statutory language resembles that of section 8(2), and it seems likely that the same result is intended. Thus, a conveyance in breach of section 6(8) will not be an exercise of the section 6(1) powers. If the trustees are not exercising the powers granted by section 6(1) then their acts are *ultra vires*, and the conveyance is incapable of overreaching the equitable interests under the trust. Therefore, section 2(1) of LPA would not apply upon such a conveyance to a purchaser.



## Section 6(9)

Section 6(9) of TLATA provides<sup>30</sup> : “The duty of care under section 1 of the Trustee Act 2000 applies to trustees of land when exercising the powers conferred by this section.”

Section 1 of TA 2000 provides<sup>31</sup> :

“(1) Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular--(a) to any special knowledge or experience that he has or holds himself out as having, and (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.”

There seems little reason to doubt that section 6(9) is directed at an *intra vires* use of the trustees' powers. The nature of TA 2000 has been described as “deregulatory”,<sup>32</sup> and it grants to trustees more extensive powers of investment, and delegation, than they enjoyed under earlier statutory regimes.<sup>33</sup> Given the generally permissive tone of TA 2000, the statute could be expected to use the clearest of words if it was intended to render a negligent use of the trustees' powers invalid in equity. The primary purpose of section 6(9) must be considered to be the imposition of personal liability upon trustees who act in a negligent fashion in the exercise of their powers. The words of section 6(9) “when exercising the powers conferred by this section” are clearly appropriate to an *intra vires* but wrongful use of those powers. Therefore, a breach of section 6(9) cannot affect a **\*L.Q.R. 105** purchaser of the trust land, provided that the other requirements of section 2 of LPA are met.

### ***The relationships between section 6(6) and sections 6(5) and 6(9)***

We have concluded above that a breach of section 6(6) renders a disposition *ultra vires*, whereas a breach of sections 6(5) or 6(9) renders a disposition wrong but *intra vires*. This differentiation between the effect of a breach of section 6(6) and sections 6(5) and 6(9) is supported by the respective statutory words. Section 6(6) provides that the section 6(1) powers “shall not be used”. Sections 6(5) and 6(9) presuppose a use of the same powers in an improper way. Section 6(5) begins with the words “In exercising the powers”, and section 6(9) imposes a duty upon trustees “when exercising the powers”. Therefore, it is important to consider the relationship between section 6(6) and sections 6(5) and 6(9) because the consequences for purchasers of breaches of the sections by trustees are potentially different.

It is possible that breaches of 6(6) that are also breaches of sections 6(5) and 6(9) are excluded from section 6(6) by its words, which refer to “a contravention of ... any other enactment”, as a breach of sections 6(5) or 6(9) constitutes a breach of TLATA itself and not of any other enactment. If this is so then any overlap in the operation of section 6(6) and sections 6(5) and 6(9) will oust the operation of section 6(6). As most breaches of trust will be either dispositions made without proper regard to the interests of beneficiaries or dispositions made without exercising due care, such a construction will effect a very significant limitation upon the operation of section 6(6), effectively lifting breaches of trust outside its operation. Therefore, construing section 6(6) as operating only when no other provision of TLATA applies, combined with a broad construction of sections 6(5) and 6(9), results in most dispositions made in breach of trust being capable of overreaching the interests of the beneficiaries of a trust of land.

It is possible that section 6(5) is intended to reach only those actions of trustees of land that would otherwise not be breaches of section 6(6). This would entail no overlap with section 6(6), and would assign to section 6(5) the task of imposing a new statutory duty specific to trustees of land. Such a relationship between sections 6(5) and 6(6) can be supported by the statutory language. Breaches of section 6(6) cannot as a matter of logic also be breaches of section 6(5), because section 6(5) can only operate upon an exercise of the trustees' powers, and any attempt to exercise those powers in breach of section 6(6) is ineffective. Therefore, compliance with section 6(6) must precede violation of section 6(5).

The same reasoning can be applied to the words of section 6(6) and section 6(9) to the same effect. However, in this context this line of **\*L.Q.R. 106** reasoning is unconvincing. Prior to the enactment of section 6(9) trustees of land were subject to equitable duties of care which were not substantially different from the new statutory duty of care.<sup>34</sup> The intention behind the enactment of section 6(9) was surely the identification of what constitutes a breach of trust, *i.e.* it lays down the relevant standard of care applicable to trustees of land. This suggests a construction of sections 6(6) and 6(9) as neither

exclusive nor overlapping in their operation but complementary. Section 6(9) identifies conduct that breaches section 6(6). There are problems in adopting this approach to the relationship between sections 6(5) and 6(6). Sections 16(1) and 16(2) of TLATA, which are discussed below, clearly distinguish between breaches of sections 6(5) and 6(6). This precludes giving a complementary construction to sections 6(5) and 6(6), as TLATA envisages that a disposition can be independently in breach of either, or both, of the sections.

Thus, it is possible that a disposition being in breach of sections 6(5) or 6(9) ousts the operation of section 6(6), or, conversely, that a disposition being in breach of section 6(6) ousts the operation of sections 6(5) and 6(9). It is also possible that sections 6(6) and 6(9) are complementary, with section 6(9) identifying the standard required to be met by trustees of land in order to avoid breaching section 6(6). However, there are great difficulties in construing sections 6(5) and 6(6) as being complementary. In conclusion there is very little that can be asserted with certainty about the relationship between these sections, other than that it may be important to a purchaser from trustees of land.

### **Section 11(1)**

Section 11(1) of TLATA provides that trustees of land shall consult their legally competent beneficiaries with an interest in possession in the land whenever the trustees exercise any function relating to that land. The requirement is not absolute, but is subject to consultation being practicable and the wishes of the beneficiaries being consonant with the general interests of the trust. Intra-beneficiary disputes are to be resolved by having the majority interests (by value) prevail.<sup>35</sup> The section is effectively a partial re-enactment of section 26(3) of LPA, which provided a duty of consultation, and gave protection to purchasers from a failure by trustees to consult beneficiaries. The word “function” must be treated as synonymous *\*L.Q.R. 107* with “power” in this context, for our purposes at least.<sup>36</sup> The language is mandatory and is directed to the trustees when exercising their powers. Prima facie the common use of the word “function” in sections 6(1) and 11(1) shows an intention to link the operation of the two sections; however this is not so: it is clear that the word “function” must carry different meanings in the two sections. In section 6(1) the reference to the trustees' functions cannot be a reference to their powers; the trustees are granted powers in order to exercise their functions as trustees, and clearly the relevant functions must be logically prior to the powers granted. By contrast, in section 11(1) the trustees' functions are largely equated with the trustees' dispositive powers.<sup>37</sup> The pre-TLATA case law is of little assistance on the question whether a purchaser could be adversely affected by a breach of section 26(3) of LPA.<sup>38</sup> In the absence of any policy considerations affecting the question it might be concluded that the use of mandatory words in section 11(1) suggests that an act done in breach of that statutory injunction should be considered an act that is not carried out by the trustees for the purpose of exercising their functions as trustees, and therefore outside the powers granted by section 6(1) of TLATA.

### **Other provisions of TLATA and section 2 of LPA**

Some powers granted by TLATA are not dispositive.<sup>39</sup> Section 9 could be described as dispositive, but it is better viewed as creative of new powers of disposition vested in the delegate.<sup>40</sup> Sections 6(2) and 7(1) grant powers of disposition, but a conveyance pursuant to these sections cannot possibly activate section 2 of LPA, as they both involve the conveyance of the land to the beneficiaries. Section 10 operates to regulate the situation that arises *\*L.Q.R. 108* when a settlor requires more than two consents to a transaction, or when a consent is unobtainable owing to minority; it is largely a re-enactment of section 26 of LPA and raises no issues that call for any fuller treatment here.

## **SECTION 16 OF THE TRUSTS OF LAND AND APPOINTMENT OF TRUSTEES ACT 1996**

Section 16 of TLATA is headed “Protection of purchasers”. The provisions of sections 16(1), (2), (3)(b), and 16(5) are all directed towards providing purchaser protection. Section 16(3)(a) and (4) both impose duties on trustees. Section 16(6) and (7) limit the operation of the section.

### **Section 16(1)**

Section 16(1) provides: “A purchaser of land which is or has been subject to a trust need not be concerned to see that any requirement imposed on the trustees by section 6(5), 7(3) or 11(1) has been complied with.”

We have already examined section 6(5) at some length, and section 11(1) more briefly. Section 7

provides that trustees of land may partition the land in certain circumstances, and in the manner laid down in the section. By force of section 7(3) the trustees must obtain the consent of the beneficiaries before effecting a partition.<sup>41</sup> In effect section 7 re-enacts part of section 28(3) of LPA, which gave trustees for sale the power to partition land and pay equality money to beneficiaries if appropriate; section 28(3) both included a consent requirement and protected purchasers from being affected by a failure of the trustees to obtain that consent.<sup>42</sup>

Section 16(1) clearly releases a purchaser of unregistered land from any duty to make inquiries as to whether trustees have complied with sections 6(5), 7(3), and 11(1),<sup>43</sup> and thus, excludes constructive notice. "Purchaser" is defined without reference to good faith, so there is no presumption that actual notice would affect a purchaser,<sup>44</sup> and actual or imputed notice may also be excluded.

### **Sections 16(2) and 16(3)(b)**

Section 16(2) provides:

"Where--(a) trustees of land who convey land which (immediately before it is conveyed) is subject to the trust contravene s.6(6) or (8), \***L.Q.R. 109** but (b) the purchaser of the land from the trustees has no actual notice of the contravention, the contravention does not invalidate the conveyance."

Section 16(3) provides:

"Where the powers of trustees of land are limited by virtue of s.8--(a) the trustees shall take all reasonable steps to bring the limitation to the notice of any purchaser of the land from them, but (b) the limitation does not invalidate any conveyance by the trustees to a purchaser who has no actual notice of the limitation."

These subsections appear to assume that a purchaser with actual notice of a contravention of sections 6(6), 6(8), 8(1), or 8(2)<sup>45</sup> takes an invalid conveyance. Further, as the section has no provisions that would operate to invalidate a conveyance, subsections (2) and (3)(b) of section 16 seem to assume that an invalid conveyance is the natural result of a conveyance in breach of sections 6(6), 6(8), 8(1), or 8(2), to a purchaser with notice of that breach. Finally, if the section is protective of purchasers, then it must operate by reducing the chance of a purchaser taking an invalid conveyance, presumably by preventing constructive notice of the breach from invalidating a conveyance.<sup>46</sup>

### **Three possible meanings of "invalidate" in section 16**

The first issue to be resolved must be the meaning of the expressions "invalidate the conveyance" and "invalidate any conveyance". Read in isolation the phrases appear free from ambiguity: they mean that a purported conveyance has no effect, and this is the first possible construction we will consider. These words have been construed by Nicholas Hopkins to mean that a purported conveyance of land by trustees of land will not convey the legal title to that land, if the purchaser knows of the breach.<sup>47</sup> Thus the words "invalidate the conveyance" are read synonymously with "the conveyance will be void". The courts have often faced the challenge of deciding what the legislature has meant when imposing invalidity on transactions. When construing the word "void" in section 47 of the Bankruptcy Act 1883 Vaughan Williams J. observed: "It is quite \***L.Q.R. 110** plain the word 'void' may mean 'voidable', and there are several reasons why it should receive that construction in this Act."<sup>48</sup> However, it has been said that the onus lies "upon those who would cut down or qualify the effect of these words to shew some ground, either from the nature of the case, or from authority, for doing so".<sup>49</sup> The types of grounds that can be shown were enumerated by Kekewich J.:

"the cases in which the less strict meaning is allowable may be divided into three classes: 1. Where, as a matter of construction according to ordinary rules, that is the sense of the language used; 2. Where the strict meaning would defeat the Act itself; and 3. Where that strict meaning would be inconsistent with some other statute or principle which there is no apparent intention to disturb."<sup>50</sup>

There are several reasons for rejecting Hopkins' construction. Let us start with Kekewich J.'s first class, the natural meaning of the words used. The heading of section 16 should be taken as a guide to the meaning of the section it heads,<sup>51</sup> and the heading is "Protection of Purchasers". If section 16 can have the effect of rendering a conveyance invalid at law then in this respect it is not protective of purchasers. The words of the section assume that a conveyance will be invalid as the result of the action of either the general law or some other provision of TLATA. They are not appropriate to impose



invalidity in law, or any other form of invalidity.

A more telling reason for rejecting Hopkins' construction falls into Kekewich J.'s third class, the damage his reading inflicts on long established legal principle. Trustees of land are capable of disposing of their legal estate, and no breach of sections 6(6), 6(8), 8(1), or 8(2) can affect that ability, which is inherent in them as legal owners. Any construction that gives provisions of section 16 invalidating effects in law would be a reading of the section which offends against this very long established principle. The words of section 16(2) and (3) will not bear such a weight. The provisions of section 16 need to be read in conjunction with sections 6(6), 6(8), 8(1), and 8(2), and since there is nothing in those sections which would lead to a conveyance being invalid at law, there is no **\*L.Q.R. 111** ground for reading section 16 as referring to invalidity at law.<sup>52</sup> Finally, on the language used, the operative (protective) parts of sections 16(2) and 16(3) restrict the operation of the doctrine of notice; such an approach is fully consonant with the invalidity being restricted to invalidity in equity. This construction reflects the analysis of trustee' powers by Lord Eldon in *Bowes v East London Water Works Company*,<sup>53</sup> who so construed the words of Sir Gifford Roberts' decree, and it is founded upon the same legal principles.

Hopkins advanced a statutory precedent for his construction of section 16, so we need to consider this. He argued that section 18(1)(a) and (b) of the SLA provide "the closest analogy" for reading "invalidate the conveyance" as meaning "invalidate the conveyance at law".<sup>54</sup> There is a superficial similarity. However, there are strong reasons to reject any reliance upon this analogy.<sup>55</sup> Even if we were tempted to lean on this analogy, the statutory provisions are not essentially similar. Section 18 of SLA uses clear and positive words to impose invalidity, whereas, if section 16 imposes any invalidity, it does so by implication, and a more natural construction would seek the imposition of invalidity elsewhere.

In rejecting a construction of "invalidity" as meaning legal invalidity, we identified our second possible construction of "invalidity" as meaning equitable invalidity. Our construction of section 8(1) and (2) led to the conclusion that a conveyance in breach of those provisions would render the conveyance void in equity, and therefore incapable of overreaching the equitable interests in the land subject to the trust. This conclusion is fully consonant with the provisions of section 16(3)(b), if the expression "invalidate any conveyance" is read as meaning invalidate such a conveyance in equity. Our construction of sections 6(6) and 6(8) concluded that a breach of either would result in an *ultra vires*, or unauthorised, conveyance. Such a conveyance would not operate in equity under the general law, and therefore could also be described as an invalid conveyance in equity.<sup>56</sup> Thus, it seems that reading "invalidate the conveyance" as "invalidate the conveyance in equity" produces a construction of the **\*L.Q.R. 112** provisions that harmonises with both the general law and with the other relevant sections of TLATA.

This construction of "invalidity" in section 16, that it refers to an invalidity in equity caused by the operation of sections 6(6), 6(8), 8(1) and 8(2), is consonant with our conclusions in regard to the operation of section 2 of LPA.<sup>57</sup> If a conveyance is invalid in equity then it is incapable of overreaching any equitable interest in the land conveyed.<sup>58</sup> This effect of a breach of sections 6(6), 6(8), 8(1) or 8(2) on the operation of section 2 of LPA in turn is consonant with our construction of "invalidity" in section 16. As the operation of sections 6(6), 6(8), 8(1) and 8(2) limit the operation of section 2(1) of LPA, TLATA meets this new threat to purchasers by enacting protective provisions that operate where section 2(1) cannot. This gives a sensible role to sections 16(2) and 16(3), which protect purchasers from being affected by the wrongdoing of trustees of land in conveying to them the land subject to the trust, a protection that would be unnecessary if section 2(1) of LPA applied to such conveyances.<sup>59</sup> This explains why sections 16(2) and 16(3) operate when there are two, or more, trustees; there remains the question whether the provisions operate upon a conveyance by a single trustee. As the plural includes the singular, unless a contrary intention applies, the words are capable of being read as protecting a purchaser who takes a conveyance from a single trustee of land.<sup>60</sup>

If section 16(2) applies upon a conveyance by a single trustee of land then a conveyance made by a single trustee in breach of section 6(6) or (8) would presumably be capable of passing a good equitable title: if the conveyance is not invalid in equity it must be valid in equity. Section 16(2) excludes the rule in *Hunt v Luck*,<sup>61</sup> and so would presumably reverse the result in *Kingsnorth Trust Co. Ltd v Tizard*.<sup>62</sup> In that case Mr Tizard was the owner of a legal estate in land, which he held upon trust for himself and his wife. In breach of trust Mr Tizard mortgaged the land to Kingsnorth Finance Co. Ltd. Mr Tizard deliberately misled Kingsnorth Finance Co. Ltd as to his personal circumstances, and as to the true state of the equitable interests in the land. The conveyance by way of legal mortgage in *Tizard* would have been a breach of section 6(6), if that section had been in force at the

time the conveyance was made. At the time of the mortgage the mortgagee had constructive notice but no actual knowledge of the *\*L.Q.R. 113* existence of Mrs Tizard, and was certainly unaware of her equitable interest in the land. If section 16(2) operates upon a conveyance by a single trustee, then the mortgagee could have sheltered behind its protective provisions. It is difficult to believe that such a result could have been intended.

The results of applying section 16(3)(b) to a conveyance of land by a single trustee with no powers of disposition are similar. If a purchaser has no actual notice of the limitations on the trustee's powers then he will take free of the equitable interests in the land, even though the beneficiary is in occupation of the land. The purchaser cannot rely upon section 2(1) of LPA, but relies upon section 16(3)(b) instead. This change in the law would have been unheralded, and unnoticed by commentators.

The surprising effects of allowing purchasers from a single trustee to shelter behind the provisions of sections 16(2) and 16(3)(b) lead us to consider a third possible construction of "invalidity" in section 16. It is accepted that the grant of powers to trustees should include the case of a single trustee.<sup>63</sup> Therefore, it would be bizarre if the same statutory wording did not have the same effect in section 16. Furthermore, if we conclude that in section 16 the plural "trustees" does not include the singular then a purchaser from a single trustee, being a trust corporation, could not shelter behind the provisions of section 26. This presents a problem because a single trustee being a trust corporation should be able to effect an overreaching conveyance following which a purchaser could shelter behind the provisions of section 2 of LPA without the need to examine the trust instrument.

In the light of our earlier construction of section 2 of LPA "invalid" might be taken as synonymous with "incapable of overreaching the equitable interests under the trust". Under this construction section 16 contains an implied reference to section 2 of LPA. If correct then sections 16(2) and 16(3) allow section 2 of LPA to operate, unless a purchaser has actual notice of a breach of sections 6(6), 6(8), or 8. This construction differs from the second construction because, in the absence of the other requirements for the operation of section 2 of LPA, sections 16(2) and 16(3) will not protect a purchaser. Therefore, this third reading denies any independent effect to sections 16(2) and 16(3), and treats the protection offered by these sections as wholly effected by the operation of section 2 of LPA. Therefore, the authority of *Kingsnorth Trust Co Ltd v Tizard* would *\*L.Q.R. 114* be unaffected by allowing section 16(2) to operate upon a conveyance by a single trustee.

There is some support for the third construction of "invalidity" in the draft Bill contained in the Law Commission Report that TLATA was enacted to give effect to.<sup>64</sup> The precursor of section 16(3)(b) was section 28A(2)(b) of LPA which would have provided: "in favour of a purchaser without such notice such a limitation shall not invalidate any exercise of those powers".

The word "invalidate" was applied to the exercise of the trustees' powers, and not to the disposition itself. A valid exercise of a dispositive power by a trustee is presumably an *intra vires*, or authorised, use of the power. In the context of a limitation of the powers of trustees of land the meaning seems to be that a statutory authority to act outside that limitation is deemed to exist for the benefit of a purchaser. However, if the disposition was in breach of trust for any reason other than it being technically *ultra vires* a purchaser could not rely upon section 28(2)(b) of LPA for protection, and the doctrine of notice would operate unless the conveyance met the requirements of section 2 of LPA. Thus, the effective protection offered by section 28(2)(b) would have been limited to honest technical breaches of trust<sup>65</sup> and those where, but for a limitation of the trustees' powers, section 2 of LPA would have applied. When TLATA was enacted, "invalidity" was applied to the conveyance, and the essential link between the statutory intention and the powers of the trustees was obscured. Treating invalidity as tied to the potential operation of section 2 of LPA reunites the statutory protection with the authority of the trustees to act, as was originally intended.

It is submitted that the first reading of "invalidity" should be rejected, and that the third reading should be adopted. The third reading should be preferred to the second because it avoids the problems the second reading creates when a single trustee makes a disposition, and ties the protection firmly to the appropriate question of the trustees' powers. It is accepted that it is not a natural reading of the word, and on this basis the second construction might be preferred. However, the third construction gains some support from the oddly passive terms of sections 16(2) and 16(3), provisions which do not "validate" but prevent "invalidity". The intention seems to be that the breaches dealt with by the sections do not affect the essential character of the dispositions when relied upon by a purchaser. The provisions come close to meaning "the position of a purchaser is unaffected by these breaches unless the purchaser had actual notice of *\*L.Q.R. 115* them", and this intention can be given effect by

the third reading, which gives the sections the most limited application necessary to effect this end.

### **Section 16 and TA 2000**

When TA 2000 inserted section 6(9) into TLATA it made no amendment to section 16. There is no provision for the protection of purchasers of land following a breach of the statutory duty of care in TA 2000. We submit that this omission is not an error, but is founded upon a correct legislative understanding of the effects of section 2 of the LPA. There is no need to protect purchasers from the equitable interests of beneficiaries in land conveyed *intra vires* but negligently, as section 2 of LPA already operates to prevent them being affected.

It has already been noted above that section 8(1) of TLATA makes no provision for limiting the powers granted by section 8(3) of TA 2000. As is clear from the above discussion, section 16(3) of TLATA makes no provision for the limitation of the powers granted by section 8(3) of TA 2000, as provided for by section 9 of TA 2000. If the section 8(3) grant of powers is capable of operating independently of the section 6(1) grant of powers then there is a potentially serious lacuna in purchaser protection. Section 8(3) was enacted to allow trustees of personalty to grant a mortgage in order to finance the purchase of land.<sup>66</sup> Before the acquisition of land the grant of powers in section 6(1) cannot apply, and therefore the pre-acquisition contract and grant of a mortgage would be an *ultra vires* breach of trust. After the acquisition of the land section 8(3) becomes redundant, as section 1 of TLATA will apply,<sup>67</sup> and the section 6(1) grant of powers will be available to the trustees. Unfortunately the drafting of section 8(3) of TA 2000 suffers from the same weakness as section 6(5) of TLATA; in express terms the section does not apply when it should (when trustees of personalty propose to acquire land),<sup>68</sup> but does apply when it is redundant (after the acquisition of land by trustees who were formerly trustees of personalty but are now also trustees of land).<sup>69</sup>

It would not be apparent to a purchaser from trustees that had relied upon the section 8(3) grant of power that the trustees were originally trustees of **\*L.Q.R. 116** personalty, and that it was therefore necessary to examine the original trust instrument which may have restricted their powers, as provided for by section 9 of TA 2000. Nor could section 16(3)(b) shield such a purchaser, as it applies only to limitations on the trustees' powers effected by virtue of section 8 of TLATA. The solution to the problem must be to treat section 8(3) as inoperative, and redundant, as soon as its purpose has been fulfilled, *i.e.* as soon as land has been acquired by trustees of personalty. When trustees of land dispose of that land they do so pursuant to the section 6(1) grant of powers, regardless of whether the land was acquired under the section 8(1) power to acquire land,<sup>70</sup> or under the power granted by the old sections 6(3) and 6(4) of TLATA, or pursuant to a power contained in the trust instrument.

If we are allowed this rather brutal treatment of section 8(3) of TA 2000, the only purchaser that is at risk from the lacuna is an acquisition mortgagee. However, since the decision in *Abbey National Building Society v Cann*<sup>71</sup> such a mortgagee can presumably rely upon the special status of an acquisition mortgagee's interest. In the words of Lord Oliver of Aylmerton:

"The reality is that a purchaser of land who relies upon a building society or bank loan for the completion of his purchase never in fact acquires anything but an equity of redemption, for the land is, from the very inception, charged with the amount of the loan without which it could never have been transferred at all and it was never intended that it should be otherwise."<sup>72</sup>

The alternative would be to demand that the trust instrument be put into the abstract of title. This would be a remarkably retrograde step in unregistered conveyancing, and a startling result of TA 2000, which is the result of a self-proclaimed modernising report of the Law Commission.

### **Section 16 and purchasers of unregistered land**

It has been seen how the interaction of the new statutory regime for trustees' powers and section 2 of LPA explains the role and nature of the provisions of section 16 of TLATA. Having examined the specific relevant statutory provisions in detail, we can now make some general observations.

Under the old regime it was assumed that purchasers could rely upon the trustees for sale having the statutory powers of disposition.<sup>73</sup> A purchaser **\*L.Q.R. 117** taking an *intra vires* conveyance could rely upon overreaching operating, provided that any capital money arising on the transaction was paid to two trustees for sale (or a trust corporation). Under the new regime this is no longer so. Section 8 enables a settlor to restrict the powers of trustees of land in any manner that appeals to the settlor, and even if the section 6(1) powers are unrestricted by the settlement any type of transaction may be

made in breach of section 6(6). There is also a possibility that a breach of sections 6(5) or 11(1) may render a conveyance *ultra vires*. It is no longer the case that a conveyance on a sale by two trustees of land will always be capable of overreaching the equitable interests in the land; whether it is capable of so overreaching will depend on two or possibly three factors. First, on whether the trustees were acting in breach of section 6(6) or 6(8). Second, whether the trustees were acting outside the powers granted by the settlor, where the section 8(1) freedom to exclude section 6 has been exercised, or without a consent in breach of section 8(2). Third, possibly, whether the trustees were acting in breach of sections 6(5) or 11(1).

A second problem follows from the first. The factors which could render a conveyance capable of overreaching under the old regime were formal aspects of the transaction, e.g. classification of the conveyance as having been made pursuant to a sale.<sup>74</sup> Although limitations upon the powers of trustees of land imposed by a settlor may require additional inquiries to be made by purchasers, the questions raised by the ability conferred by section 8 to tailor the trustees' powers by express terms does not introduce any qualitative change to the type of inquiries that must be undertaken. This similarity between the old and the new regimes does not extend to breaches of sections 6(5), 6(6), 6(8) and 11(1). Ensuring there has been no breach of these sections involves investigation of facts that are unique and peculiar to each particular conveyance.<sup>75</sup> The investigation of such factors within the context of ordinary conveyancing would be expensive, intrusive, and time consuming.

Thus, the extensive protection offered by section 16 to purchasers from trustees of land is an integral feature of the new regime for trustees' powers. TLATA does not give trustees of land the authority to do anything their fancy may suggest; trustees of land have the power to do anything an absolute owner could do, but these powers are granted only for use in performing their functions as trustees. When trustees of land act in compliance with their duties to their beneficiaries, as laid down in the general law and TLATA, they act *intra vires*, but when they act in breach **\*L.Q.R. 118** of their duties their actions may be characterised as *ultra vires*. An *ultra vires* conveyance is not capable of overreaching the equitable interests in the land, as it is invalid in equity. Therefore, section 16 of TLATA was necessary, to prevent the need for inquiries by purchasers that would encumber and prolong the conveyancing process; such inquiries would have been needed to guard against the risk of purchasers taking subject to the equitable interests of the beneficiaries, interests which were not overreached due to the wrongdoing of the trustees.

In section 16(1) the legislature re-enacted the protective provisions that existed before TLATA.<sup>76</sup> Section 16(2), however, expresses a legislative policy that has shifted since the enactment of section 2 of LPA. Section 2 protected even the purchaser with actual notice of wrongdoing on the part of the trustees for sale.<sup>77</sup> Section 16(2), which now operates in many situations that would formerly have fallen within the ambit of section 2, refuses protection to purchasers with actual notice of relevant trustee wrongdoing. The shift could be characterised as away from giving an absolute primacy to considerations of conveyancing efficiency, and towards strengthening the security of beneficiaries in land held upon trust. In the context of the changes introduced by TLATA, and discussed above, this may be seen as a way of counter-balancing the greater insecurity to which beneficiaries are made subject by the grant of such wide powers to trustees of land. The withdrawal of protection given to beneficiaries by the restrictions on the powers of trustees for sale is compensated for by the extension of potential liability to some purchasers. The legislation carefully continues to shield innocent purchasers, but refuses to shield purchasers who realise that their purchase is made in breach of statutory duties owed by the trustees to the beneficiaries. Section 16(3)(b) extends this new approach to trustees still operating in a context in which the security of beneficiaries is maintained by limiting the powers of trustees to enter into certain types of transactions. As this allows for the possibility of an *ultra vires* conveyance having an overreaching effect, this marks an extension of the protection formerly offered to purchasers, but of course the change introduced by section 8 increased the hazards facing purchasers, and so this **\*L.Q.R. 119** favouring of them is also explicable in the light of the whole package of reform contained in TLATA.

The enactment of section 6(9) of TLATA with no amendment of section 16 does not upset this policy balance. It can be viewed as a welcome redressing of the difficulties posed by the potential width of section 6(6), for it may take negligent breaches of trust outside the ambit of section 6(6). Such breaches of trust can be left safely to the operation of section 2 of LPA. The protection of a purchaser that realises its vendor is incompetent does not raise the same policy strains as the protection of a purchaser that realises its vendor is acting in bad faith. A market economy assumes the moral acceptability of a shrewd purchaser who takes advantage of an incompetent vendor. However, a purchaser who takes advantage of the dishonesty of its vendor should not be countenanced. Outside the statutory regime that governs the transfer of land a receiver of trust property cannot retain the



benefit derived from the receipt of trust property in breach of trust if it would be unconscionable to do so.<sup>78</sup> If personal liability can be justified then so too can the disgorgement of specific property in such circumstances. Section 16 of TLATA seems to be drafted with the purpose of bringing the law of real property more closely into harmony with the general law of property in this respect.

Thus, in the context of unregistered land the provisions of section 16 are capable of being construed in a manner that is consonant with general principles, intelligible in the context of other relevant provisions of TLATA, and explicable in the light of general policy considerations.

### ***The exclusion of registered land from section 16***

Section 16(7) provides: "This section does not apply to registered land."

The meaning of this provision is clear, and we have argued elsewhere that the provision is a legislative error founded upon an incorrect understanding of the operation of land registration.<sup>79</sup> It created a dangerous divergence between the law of unregistered and registered land, divergence that could have posed a serious policy dilemma for the courts when post-TLATA dispositions came to be litigated. It seems this problem has now been addressed, not by alterations to the law of overreaching, but by modification of the law of registered land.

## **THE LAND REGISTRATION ACT 2002**

There were 11 "striking changes" to the law of registered land announced by the Law Commission Report that preceded LRA 2002.<sup>80</sup> Sections 26 **\*L.Q.R. 120** and 52 of LRA 2002, enacted one of these changes, viz. : "in favour of those dealing with them, owners of registered land will be presumed to have unrestricted powers of disposition in the absence of any entry on the register".<sup>81</sup>

### **Section 26**

Section 26 falls into Part 3 of LRA 2002. Part 3 contains nine sections (sections 23 to 31), which are divided under three headings; "Powers of disposition", "Registrable dispositions", and "Effect of dispositions on priority". Section 26 falls under the first heading, together with sections 23 to 25. Section 23 grants powers of disposition. Section 24 identifies the person, or people, to whom the powers are granted. Section 25 requires anyone granted powers of disposition to exercise them in conformity with Land Registration Rules.

Section 26 is headed "Protection of disponees" and provides:

"(1) Subject to subsection (2), a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition. (2) Subsection (1) does not apply to a limitation--(a) reflected by an entry in the register, or (b) imposed by, or under, this Act. (3) This section has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of a disposition)."

The Law Commission Report identifies *ultra vires* dispositions by trustees of land as one mischief section 26 was intended to counter.<sup>82</sup> All the examples given in the Law Commission Report for the operation of section 26 upon a breach of trust by trustees of land suppose a breach of section 8 of TLATA.<sup>83</sup> However, there seems little doubt that the intention is to prevent any limitation on the dispositive powers of trustees of land from affecting a disponee. Therefore, if sections 6(6) and 6(8), or 6(5) and 11(1), limit the lawful exercise of the powers granted by section 6(1) of TLATA then section 26 of the LRA 2002 should operate upon a breach of these sections.

One of us has discussed the construction of section 26 of LRA 2002 elsewhere.<sup>84</sup> However, one advantage of considering section 26 together with the relevant provisions of TLATA and TA 2000 is that the section can be seen in the context of the programme of recent statutory reform. The operative part of section 26 is section 26(1), which provides that a person's use of the powers section 23 of LRA 2002 grants is to be "taken to be free **\*L.Q.R. 121** from any limitation affecting the validity of a disposition". In the context of a disposition by trustees of land the section operates to prevent "invalidity" due to any limitation upon the trustees' powers of disposition. The statutory language echoes that of sections 16(2) and 16(3) of TLATA. Section 26(1) does not purport to affect the validity of the disposition itself, rather it releases the trustees of land from limitations upon their freedom of disposition, but only for the benefit of a disponee, and only so far as necessary to protect a disponee's title (section 26(3)). It would certainly be desirable if the word "validity" in section 26 of LRA 2002



could be construed in the same way as the word “invalidity” in section 16 of TLATA.

One problem posed by section 26 of LRA 2002 is that the Law Commission Report conflates limitations upon legal powers of disposition and limitations upon trustees' powers of disposition.<sup>85</sup> The importance of avoiding this confusion between ability and authority has already been established by the authors elsewhere.<sup>86</sup> Both the Law Commission Report and the Explanatory Notes released with the Land Registration Bill prepared by the Lord Chancellor's Department give prominence to the application of section 26 to dispositions by trustees of land.<sup>87</sup> Whether the section can also cure defects in legal capacity arising from status does not concern us here.<sup>88</sup>

Section 26 of LRA 2002 is intended to operate upon a disposition so as to allow overreaching to take place despite the actual occupation of a beneficiary.<sup>89</sup> In the example given of the operation of the section in the Law Commission Report there are two trustees of land. However, section 26 does not require a disposition by two people with the section 23 powers of disposition for its operation. If a disponee from one trustee of land can rely upon the operation of section 26 to render his title unquestionable then the relationship between section 26 and *Williams & Glyn's Bank v Boland*<sup>90</sup> would be highly problematic. This problem is analytically the same as that we faced when considering a single trustee of unregistered land relying upon section 16 of TLATA. It is submitted that it should be met in the same manner, by reading “validity” as meaning “capable of overreaching the equitable interests under the trust”. This entails viewing section 26 of LRA 2002 as taking effect by allowing section 2 of LPA to operate despite a disposition being *ultra vires* trustees of land. A single trustee, not being a trust corporation, would still be unable to overreach the equitable interests \*L.Q.R. 122 of a beneficiary and the authority of *Williams & Glyn's Bank v Boland* would be secure.<sup>91</sup>

If this construction of section 26(1) is correct then the protection the section provides cannot aid a volunteer disponee, because section 26 alone does not afford any protection and section 2 of LPA only operates upon a “conveyance to a purchaser”. The Law Commission Report does not indicate any reason why a volunteer should be able to shelter behind section 26, and it is submitted this consequence supports the suggested construction of section 26.<sup>92</sup>

Finally, the preservation of a disponee's personal liability in section 26(3) is consonant with our construction of section 26(1). Section 2 of LPA is directed to issues of title and not to questions of personal liability. As section 2 of LPA precludes a purchaser being affected by even express notice it could potentially be construed as barring any action for the knowing receipt of trust property. Thus, the express preservation of a disponee's personal liability avoids any doubt on the issue.

## **Section 52**

Sections 51 and 52 of LRA 2002 are concerned, *inter alia*, with a registered mortgagee's power of sale, and the protection of a purchaser from such a mortgagee. The provisions are functionally analogous to sections 23 to 26 of LRA 2002.<sup>93</sup> However, there are differences in the manner by which sections 23 to 26 and sections 51 to 52 effect their functions, which require consideration.

Section 51 declares that the registration of a charge operates “as a charge by deed by way of legal mortgage” thereby ensuring the statutory grant of powers by LPA 1925,<sup>94</sup> including the statutory power of sale granted by section 101(1)(i). Therefore, there is no need for a grant to a registered mortgagee of a power of sale, or any other powers, over the mortgaged land in LRA 2002, and no equivalent to section 23.

**\*L.Q.R. 123** Section 52(1) does not have any analogue to section 26(1). Rather than modifying the legal consequences of an *ultra vires* use of a power section 52 operates by modifying the statutory grant of powers to mortgages. Section 52(1) provides:

“Subject to any entry in the register to the contrary, the proprietor of a registered charge is to be taken to have, in relation to the property subject to the charge, the powers of disposition conferred by law on the owner of a legal mortgage.”

Section 52 would be otiose if it merely treated a proprietor of a registered charge as having the same powers of disposition over the land charged as an unregistered mortgagee, as section 51 leaves the actual grant of these powers clear beyond peradventure. The Law Commission Report informs us that the intention was that a registered proprietor of a charge should be treated as if the power of sale had arisen and become exercisable from the moment of registration.<sup>95</sup> Section 52(1) is expressly subject to section 52(2), which is an analogue of section 26(3), which provides: “Subsection (1) has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the

lawfulness of a disposition).”

Thus, the combined effect of sections 51 and 52 is that a proprietor of a registered charge has the statutory powers of disposition bestowed by LPA 1925. The power of sale both arises and becomes exercisable upon registration of the charge as far as the title of a disponee is concerned. However, as far as the mortgagee and mortgagor *inter se* are concerned any use of the power of sale by a mortgagee before the power has arisen or become exercisable is actionable.

Section 52 could achieve its intended purpose in any of three ways: by a grant of powers effective between registration and the powers arising and becoming exercisable; or by the suspension of those provisions of LPA which render the grant or exercise of the powers granted contingent; or by imposing a statutory fiction that the conditions laid down in LPA have been met. If section 52 operates by granting powers or suspending the operation of the conditions precedent to the grant or exercise of the powers then it is difficult to see how any potential personal liability of a disponee can be maintained, as mortgagees do not hold their powers as fiduciaries for mortgagors.<sup>96</sup> Therefore, it is submitted the section should be construed as imposing a statutory legal fiction which is effective only to the extent necessary to protect title, and which does not preclude evidence rebutting **\*L.Q.R. 124** the fiction on issues of personal liability.<sup>97</sup> Such a construction is consonant with the statutory words “is to be taken to have”, which suggest the section operates through deeming either the law or facts to be other than what they are, and consonant also with the provisions of section 52(2), which preserves any personal liability of either a mortgagee or a disponee following a wrongful disposition.

Section 52 must be taken to be subject to several inherent limitations upon its operation. The section operates subject to any entry on the register to the contrary,<sup>98</sup> and therefore anticipates the potential use of restrictions, whether to preserve the limitations upon mortgagees' powers contained in LPA, or to make effective express limitations on a mortgagee's powers contained in the mortgage. The section does not grant powers of disposition to a person entitled to be registered as proprietor of a charge.<sup>99</sup> The extension of protection to disponees (which would include volunteer disponees) is merely nominal, because LPA does not grant mortgagees any power of gratuitous disposition. A purported sale by the proprietor of a registered charge to itself would still be an invalid use of the power of sale.<sup>100</sup> The section will not protect any express extensions of a mortgagee's powers contained in the mortgage.

Whether section 52 operates upon an *intra vires* but wrongful use of a mortgagee's powers is less certain. The Law Commission Report suggests the intention was to oust the operation of section 104 of LPA entirely.<sup>101</sup> However, if section 52 operates by deeming the power of sale to have arisen and become exercisable it would not touch a collusive or negligent use of the power.<sup>102</sup> In order for section 52 to reach the mischief of collusive or negligent use of the power of sale it would have to deem all exercises of the power of sale by a mortgagee proper and regular<sup>103</sup>; a mortgagee would have to be taken not only to have the power, and the right to exercise it, but to be incapable of exercising the power collusively or negligently. The words of the section are less apposite for such a construction, and it may be that section 104 of LPA will retain a residual role in registered land whenever the issue is the propriety of the exercise of a mortgagee's power of sale.

### **\*L.Q.R. 125 CONCLUSION**

Two issues related to the drafting of TLATA, TA 2000, and LRA 2002 deserve notice. First, all three Acts use words, the meaning of which is not clear and unambiguous, which they do not define. The concept of “validity” in both TLATA and LRA 2002 is a prime example of a word being used in an unusual way without any guidance as to its meaning. Second, the construction of the Acts, and particularly LRA 2002, is extremely difficult without extensive reference to the preceding reports. The restrictive approach of the majority in the House of Lords in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A.G.*<sup>104</sup> to the purposes for which courts can refer to Law Commission Reports may cause difficulty when the courts come to construe the Acts.

When viewed as a whole the statutory reforms contained in TLATA, TA 2000, and LRA 2002 create a legal environment in which the law of overreaching will continue to operate as a central support to the marketability of land. The combined effects of section 16 of TLATA and section 26 of LRA 2002 ensure that in the future purchasers will be able to continue to rely upon conveyances made by two trustees, or a trust corporation, to overreach the interests of beneficiaries of trusts of land. For the period between the coming into force of TLATA and the coming into force of section 26 of LRA 2002 there is a risk of purchasers of registered land falling into the lacunae created by section 16(7) of TLATA.<sup>105</sup> For these purchasers the correct construction of, and relationship between, sections 6(5)

and 6(6) of TLATA, in particular, may be of vital importance.

LRA 2002 introduces a divergence in the law of overreaching in unregistered and registered land. Both purchasers from mortgagees and purchasers from trustees of land are to receive fuller protection than their unregistered land counterparts. This divergence is explained by the priority given to the reliability of the Register in registered conveyancing.<sup>106</sup> Effectively, the duty of ensuring that a disposition is authorised is shifted from purchasers, and replaced by enhanced opportunities for mortgagors and beneficiaries to protect themselves from the risk of unauthorised dispositions by entering restrictions on the Register.<sup>107</sup> The law of registered land is therefore weighted towards marketability and against those with defeasible property interests in the land, unless formal steps are taken to protect those interests, when compared with the law of unregistered land.

There is an attempt in LRA 2002 to redress the balance between purchasers and property owners, as far as is possible without undermining **\*L.Q.R. 126** the reliability of the Register, by preserving the personal liability of purchasers of registered land.<sup>108</sup> This technique gives a new importance to two distinctions. First, the distinction between questions of "title" and questions of "personal liability".<sup>109</sup> Second, the distinction between the courts recognising pre-existing property rights and the courts granting proprietary remedies.<sup>110</sup> The ultimate effect of sections 26 and 52 upon registered conveyancing will depend upon the jurisprudence that develops on these distinctions.

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L.Q.R. 2003, 119(Jan), 94-126

1. (2002) 118 L.Q.R. 270.
2. *Transfer of Land: Trusts of Land*, Law Com. No.181 (1989), and *Transfer of Land: Overreaching: Beneficiaries in Occupation*, Law Com. No.188 (1989), which preceded TLATA; *Trustees' Powers and Duties*, Law Com. No.260 (Scot. Law Com. No.172) (1999), which preceded TA 2000; and *Land Registration for the Twenty-First Century*, Law Com. No.271 (2001), which preceded LRA 2002.
3. *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591.
4. See (2002) 118 L.Q.R. 270 at pp.281-283.
5. Section 4 provides that there will always be "a power for the trustees to postpone sale of the land". Section 6(2) grants the power to bring the trust to an end, by conveying the land to the beneficiaries. Section 6(3) and (4) granted the power to purchase land, and the power to do so for any reason, respectively. TA 2000 amended s.6(3) so that it now provides: "The trustees of land have power to acquire land under the power conferred by section 8 of the Trustee Act 2000". Section 6(4) has been repealed. For these changes see Sch.2, para.45 of TA 2000. Section 7 of TLATA grants the power to bring the trust to an end by partition, and to raise and pay equality money in pursuance of that end. Section 13 confers powers on trustees that allow them to regulate the enjoyment of the trust property. Section 9 permits trustees of land to delegate their powers as trustees to beneficiaries of the trust, but does not expressly refer to the statutory permission as the grant of a power. Section 9(8) of TLATA is repealed and replaced by the operation of ss.21-23 of TA 2000.
6. See (2002) 118 L.Q.R. 270 at pp.273-274 for the distinction between ability and authority.
7. s.8(3) provides: "for the purpose of exercising his functions as a trustee, a trustee who acquires land under this section has all the powers of an absolute owner in relation to the land".
8. For s.6(3) of TLATA see n.5 above in effect s.6(3) incorporates ss.8, 9, and 10 of TA 2000 into TLATA. Section 8(1) of TA 2000 gives a trustee the power to acquire freehold or leasehold land in the UK (an extension of the former s.6(3) power to purchase a legal estate in England or Wales) for any reason (thus reproducing the provisions of the repealed s.6(4)). Section 8(2) is a definition section, and s.8(3) is a grant of powers, which is very similar to s.6(1) of TLATA. For s.9 see n.15 below. Section 10 excludes the operation of s.8 from some trusts (excluding settled land and any trust to which the Universities and College Estates Act 1925 applies) and provides that s.8 will apply to pre-TA 2000 trusts. Sch.1, para.2 of TA 2000 provides that the statutory duty of care created by s.1 of TA will apply to a trustee who acquires any land, or exercises any power in relation to land held on trust. TA 2000 came into operation on February 1, 2001.
9. The possibility that s.6(1) has the effect of granting trustees of land the ability to act is particularly alarming when the provisions of s.8 of TLATA are considered. Section 8 allows a settlor to exclude s.6; if s.6 granted the ability to act then its exclusion would remove that ability. One of the purposes of TLATA was to remove the risk of a bare trustee with no powers of disposition holding land upon trust. Such a trustee could under the pre-1997 law convey a legal estate, but such a conveyance would not overreach the equitable interest in the land. If s.6 grants legal ability its exclusion must be taken to remove that ability, creating the possibility of a trustee with no ability to transfer the trust land. The position is left unchanged by the passage of s.8(3) of TA 2000, as s.9(2) provides that the powers conferred by s.8 can be excluded by the trust instrument.

10. An approach which has been extended to trustees of personalty by TA 2000.
11. The position under the combined operation of s.28 of LPA and s.71 of the Settled Land Act 1925.
12. An expression attributed to Selwyn L.J. by Lindley M.R. in *Perrins v Bellamy* [1899] 1 Ch. 797 at p.798, and by Lord Lindley in *National Trustees Company of Australasia Ltd v General Finance Company of Australasia Ltd* [1905] A.C. 373 at p.376. See *Target Holdings Ltd v Redfern* [1996] 1 A.C. 421 at p.433G.
13. The counter-proposals for reform made by Harpum, "Overreaching, Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277 at p.331, recognised that giving power to trustees to enter into "second" mortgages, *i.e.* non-acquisition mortgages, is likely to lead to beneficiaries losing the security that would otherwise exist from having their trust property in the form of land. Harpum proposed to limit the mortgaging power of the trustees of land to two purposes: acquisition of the land, and raising money for improvements to the land. The use of trust land as security for loans--whether the money is intended to be used for speculative investment, as in *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200, or to finance a lifestyle beyond the means of the trustees, as in *City of London Building Society v Flegg* [1988] A.C. 54--leaves beneficiaries less secure.
14. [1990] C.L.J. 276.
15. s.9 of TA 2000 provides: "The powers conferred by this Part [Pt III which comprises ss.8, 9 and 10] are--(a) in addition to powers conferred on trustees otherwise than by this part, but (b) subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation."
16. Sch.2, para.45(3).
17. In future it will be prudent to exclude the grant of powers by s.8 of TA 2000 to effect this odd purpose. Hopkins, in "The Trusts of Land and Appointment of Trustees Act 1996" [1996] Conv. 411, concluded that a settlor could create a trust under which his trustees had no power of alienation, and although his view has been challenged (see Angela Sydenham [1997] Conv. 242), his reply at p.243 is persuasive. The view that settlors can create trusts of "inalienable" land (subject to the law of perpetuities) seems to be generally accepted: *e.g.* Megarry and Wade, *Law of Real Property* (6th ed., Harpum, ed., 2000), paras 7-150 and 8-140; on the nature of the inalienability, see Smith, *Property Law* (4th ed., 2003), p.316.
18. s.8(2) should be read in conjunction with s.10 for the position that arises if a settlor requires multiple consents, or if a consent cannot be obtained due to a minority.
19. Law Com. No.271 lends support to this construction of s.8, which it identifies as the cause of a potential mischief which s.26 of LRA 2002 is intended to overcome: see paras 2.15, n.33, 4.10 and 4.11.
20. Kenny and Kenny, *Current Law Statutes* (1996), Vol.2, p.47/6.
21. [1892] 1 Ch. 506 at p.536, and see Bowen L.J. to like effect at p.541.
22. [1998] Conv. 168 at p.174.
23. If we disregard ss.15(1)(d) and 15(4), which protect the interests of third parties to the trust, s.15 can be viewed as endorsing and enshrining in statute the pre-TLATA refusal by the courts to regard land as simply an asset of value. The trust for sale of land imposed by ss.34-36 of LPA whenever there was concurrent co-ownership of land was denied substantive effect in intra-trust disputes by treating it as a technical conveyancing device never intended to alter the essential nature of trusts of land as trusts of specific property.
24. [1998] Conv. 168 at pp.173-175, and [2001] Conv. 221 at pp.223 and 225.
25. Megarry and Wade, *Law of Real Property* (6th ed., Harpum ed., 2000), para.8-136 offers the following construction: "Thus the trustees are not authorised to act in a breach of trust or to engage in conduct that would in some other way contravene their fiduciary obligations. Nor may they delegate any functions which, as trustees, they could not otherwise delegate."
26. Kenny and Kenny, *Current Law Statutes* (1996), Vol.2, c.47 at 47/6, note that: "the literal effect of s.6(6) is that any exercise of a power in breach of any rule of law or equity is void". They proceed to consider the relationship between s.6(6) and s.6(1), and conclude that innocent purchasers will be protected from any claim based on a failure to comply with s.6(6), but that "a purchase with an improper purpose may, as it always has been, be challenged by the beneficiaries".
27. As suggested by Dixon, "Overreaching and the Trusts of Land and Appointment of Trustees Act 1996" [2000] Conv. 267 at p.269; our reply is in Ferris and Battersby, "Overreaching and the Trusts of Land and Appointment of Trustees Act 1996--a Reply to Mr Dixon" [2001] Conv. 221 at p.227.
- 28.

- s.16(2) of TLATA; see *infra*.
- [29.](#) (2002) 118 L.Q.R. 270 at p.286.
- [30.](#) Sch.2, Pt 2, para.45(3) of TA 2000.
- [31.](#) The duty also applies when a trustee acquires land or exercises any power in relation to land: see Sch.1, para.2 of TA 2000.
- [32.](#) Lord Chancellor's Department Press Release 24/11/2000.
- [33.](#) Law Com. No.260 contains the following critique at p.6: "The Trustee Investments Act is now out of date. It operates in a way, which is needlessly restrictive, particularly in its requirements for 'fundsplitting'. The application of the Act is frequently excluded in modern trusts but, where the Act applies, it normally does so to the detriment of the trust." Section 3(1) of TA 2000 provides: "Subject to the provisions of this Part, a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust." Modern investment practices made the retention of the legal title by the trustees an inconvenience; this has been remedied by a new statutory power to appoint nominees, granted by s.16 of TA 2000.
- [34.](#) Law Com. No.260, at para.3.24(3).
- [35.](#) s.11(1): "The trustees of land shall in the exercise of any function relating to land subject to the trust--(a) so far as practicable, consult the beneficiaries of full age and beneficially entitled to an interest in possession in the land, and (b) so far as consistent with the general interest of the trust, give effect to the wishes of those beneficiaries, or (in case of dispute) of the majority (according to the value of their combined interests)."
- [36.](#) "Function" is used in connection with trustees of land in several places in TLATA. Section 6(1) uses the expression "functions as trustees" to refer to the role of trustees. Section 9(1) uses the same expression, "functions as trustees", apparently in reference to the powers of trustees; see also s.9(2), in which "functions" must mean powers, and s.9(7), which imposes upon a beneficiary those duties which bound the trustees whilst they retained the "functions". Section 10, which refers to the "exercise by the trustees of any function", must also mean power. Section 18 uses the expression "functions of personal representatives" to indicate the role of personal representatives, a similar usage to s.6(1). Thus, the word is used with at least two meanings within TLATA; "function" is not defined by the Act.
- [37.](#) Although the expression "The trustees of land shall in the exercise of any function relating to the land" in s.11(1) could conceivably refer to some duties it cannot be meant to apply to some duties (e.g. the duty not to allow the interest of the trustees to be in conflict with the interests of the beneficiaries). The most natural reading of the expression is that "any function" refers to the use of the trustees' powers. This construction is confirmed by s.11(2)(c). Peter Gibson L.J. in *Notting Hill Housing Trust v Brackley* [2001] EWCA Civ 601; [2002] H.L.R. 10, paras 8-15 and 23 treats the word "function" in s.11(1) as synonymous with "powers and duties".
- [38.](#) In *Waller v Waller* [1967] 1 W.L.R. 451, the purchaser under a contract of sale was adversely affected by an injunction issued against the trustee for sale, who had entered into the contract without consulting a beneficiary. But, the purchaser was not before the court, and the injunction was granted only on an undertaking that he was to be joined in the action, at which point he would have had liberty to apply for the discharge of the injunction. There is no report of any application by the purchaser to discharge the injunction.
- [39.](#) ss.4(1), 6(2), 6(3), and 13.
- [40.](#) A conveyance under a power of attorney is the creation of a legal power of disposition: see Megarry and Wade, *Law of Real Property* (6th ed., Harpum ed., 2000), para.10-080.
- [41.](#) s.7(3): "Before exercising their powers under subsection (2) the trustees shall obtain the consent of each of those beneficiaries."
- [42.](#) s.16(1) of TLATA provides that purchasers "need not be concerned to see ... "; s.28(3) of LPA (and s.26(3) of LPA) provided that purchasers "shall not be concerned to see ..." It is not thought that this indicates any change in legislative intention.
- [43.](#) s.16(1) read with s.16(7).
- [44.](#) s.23(1) of TLATA and s.205(xxi) of LPA; for the importance of the omission of a requirement of good faith see *Midland Bank Trust Co. Ltd v Green* [1981] A.C. 513.
- [45.](#) By "a contravention of s.8(1)" we mean to indicate a conveyance which is *ultra vires* the express powers granted by a settlor who has excluded the operation of s.6(1). By "a contravention of s.8(2)" we mean to indicate a conveyance made without a consent that was required by a settlor, and therefore in breach of s.8(2).
- [46.](#) We have argued elsewhere that the expression "actual notice" should be read as including what is often called "imputed notice"; [1998] Conv. 168 at pp.177-178. It seems that Harpum has adopted the arguments we advanced there: see Megarry and Wade, *Law of Real Property* (6th ed., Harpum ed., 2000), para.8-153, text to n.84.



47. Hopkins [1996] Conv. 411 at p.427. This construction also seems to be accepted by the Land Registry Practice Leaflet No.13 at E2.2 at p.16.
48. *Re Brall* [1893] 2 Q.B. 381 at p.384.
49. *President and Governors of the Magdalen Hospital v Knotts* (1879) 4 App. Cas. 324 at p.332, *per* Lord Cairns. The whole passage reads: "The words used by the Legislature in the Statute of Elizabeth [13 Eliz. c.10] are precise, and as strong as it is possible to make them. The statute declares that every lease, such as is the one before your Lordships, shall be 'utterly void and of none effect to all intents constructions, and purposes, any law, custom or usage to the contrary, anyways notwithstanding.' The onus lies, as it seems to me, upon those who would cut down or qualify the effect of these words ... "Clearly the words of ss.16(2) and 16(3) fall far short of the words before the House in *Magdalen Hospital v Knotts*.
50. *Churcher v Martin* (1889) 42 Ch.D. 312 at p.317.
51. Bennion, *Statutory Interpretation* (2nd ed., 1992), ss.255, 510-512.
52. It could be argued that s.16(2) operates as a proviso, or even a saving, to s.6, in which case any derivation of the positive (conveyances will be invalidated) by implication from the negative (does not invalidate the conveyance) is to be treated with caution: see Bennion, *Statutory Interpretation* (2nd ed., 1992) at sections 242, 243 and 492-496. There is no precursor for s.16(2) in the draft Bill annexed to Law Com. No.181, but s.16(3)(b) had an earlier incarnation as s.28A(2)(b) of LPA, as incorporated by cl.4 of the draft Bill (see text following n.64 *infra* ). The origin of the expression "invalidate the conveyance" appears to be rec.10.10, at pp.19-20: "there will be no derogation from the principle that a purchaser should not be required to examine a trust instrument to determine the validity of a conveyance. Therefore, we recommend that purchasers should not be affected by an express limitation of the trustees' powers unless they have notice of that limitation." There is no support here for a departure from the principle that trustees are able to convey their legal estate.
53. (1820) Jacob 324 at 330; 37 E.R. 873 at p.876.
54. [1996] Conv. 411 at p.427.
55. See (2002) 118 L.Q.R. 270 at pp.280-281.
56. (1820) Jacob 324 at p.330; 37 E.R. 873 at p.876.
57. See (2002) 118 L.Q.R. 270 at pp.283-294.
58. A purchaser taking under a legally invalid conveyance would also be unable to shelter behind s.2 of LPA, as the section requires "A conveyance to a purchaser of a legal estate".
59. Prima facie an alternative possibility does exist. If, contrary to our analysis, s.2 of LPA applied despite a breach of ss.6(6), 6(8), 8(1), or 8(2), then ss.16(2) and 16(3)(b) would act as statutory sticking plasters which would oust the operation of s.2. However, they would not be protective of purchasers, as s.2 provides a fuller protection than ss.16(2) and 16(3)(b).
60. Interpretation Act 1978, s.6(c).
61. [1902] 1 Ch. 428.
62. [1986] 1 W.L.R. 783.
63. Such a construction will harmonise with the statutory requirements set out for overreaching to occur in s.27 of LPA; if a trust corporation could never convey land subject to a trust to a purchaser *intra vires* (*i.e.* in the exercise of its s.6(1) powers) then the incorporation in s.2(1)(ii) of the provision for the payment of capital money to a single trustee where that trustee is a trust corporation via s.27 of LPA would be otiose. Further, one of the aims of TLATA was to avoid the possibility of a trustee with no powers of disposition. This purpose would clearly be frustrated by preventing the s.6(1) grant from operating when there is a single trustee of land. Finally, the power to acquire land is granted by s.8(1) of TA 2000 to "a trustee", as is the s.8(3) grant of the powers of an absolute owner.
64. Law Com. No.181.
65. Thus meeting complaints that dispositions by trustees in "judicious breach of trust" that were *ultra vires* in equity could result in fortuitous and unfair gains by beneficiaries at the expense of purchasers. See *Bowes v East London Water Works Co* (1820) Jacob 324; 37 E.R. 873, and *Oceanic Steam Navigation v Sutherland* (1880) 16 Ch.D. 236.
- 66.

Law Com. No.260, p.29, para.2.44.

67. s.1(1) of TLATA provides: "In this Act: (a) 'trust of land' means (subject to sub-s.3) any trust of property which consists of or includes land, and (b) 'trustees of land' means trustees of a trust of land."
68. For s.8(3) see n.7 above. The grant could possibly be read as including a trustee in the process of acquiring the land, however, the later reference to "the land" must be read as "the land so acquired", which makes the natural reading of the section one that treats "acquires" as referring to a completed past event, rather than a presently occurring process. The most unnatural reading of all, that "acquires" should be read as "intends to acquire", is apparently the intended meaning.
69. The explanatory notes to the draft Bill confirm that there was no intention to confer on trustees acquiring land under s.8(1) a different set of powers from the powers conferred on all trustees of land by section 6(1): see Law Com. No.260, p.103.
70. The acquisition of land under the powers contained in s.8(1) is the trigger for the operation of s.8(3).
71. [1991] 1 A.C. 56.
72. [1991] 1 A.C. 56 at p.93B.
73. Whether this assumption was correct is contentious: see Megarry and Wade, *Law of Real Property* (5th ed., 1984), at pp.394-395.
74. Or classification of a mortgage as one made in order to discharge an incumbrance on the land held on trust for sale, as in *City of London B.S. v Flegg* [1988] A.C. 54.
75. These potentially invalidating factors could include the following: the trustees' knowledge of a sentimental attachment of the beneficiaries to a house (breach of s.6(5)); the trustees' self-interest in selling land for development, where they hold neighbouring land which will benefit from that development (breach of s.6(6)); the history of the consultation process with the beneficiaries (breach of s.11(1)).
76. Whether this resulted in the law remaining unchanged is less clear. The construction, and therefore the effect, of the new provisions must be influenced by the new context in which they operate. If a breach of ss.6(5) or 11(1) renders a conveyance *ultra vires*, then s.16(1) can be construed as a wholly protective provision, and, given the exclusion of any requirement for good faith in the definition of purchaser, is probably meant to protect even a purchaser with actual notice of a breach of ss.6(5) or 11(1). This explains the different approach taken by s.16(1) and ss.16(2) and 16(3)(b). However, if, a breach of ss.6(5) and 11(1) leaves a conveyance *intra vires*, then s.16(1) was enacted to restrict the application of s.2 of LPA, and, as there would be no difference in the effects of the two sections if s.16(1) protected a purchaser with actual notice, the presumption that s.16(1) was enacted for some purpose means it should not be construed as protecting a purchaser with actual notice of a breach of ss.6(5) or 11(1). Different considerations apply to a breach of s.7(3).
77. *City of London B.S. v Flegg* [1988] A.C. 54 at p.83F.
78. *BCCI (Overseas) Ltd v Akindele* [2000] 4 All E.R. 221.
79. Ferris and Battersby, "The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land" [1998] Conv. 168 at pp.179-185; Ferris and Battersby [2001] Conv. 221 at p.227.
80. Law Com. No.271 at paras 1.11-1.14.
81. *ibid.*, at para.1.14.
82. *ibid.*, at paras 4.2(2) and 4(3), and 9.30(2).
83. *ibid.*, at paras 2.15 n.33 (breach of s.8(2)), 4.10 (breach of s.8(2)), 4.11 (breach of s.8(1)).
84. Ferris, *Modern Studies in Property Law*, Vol.2, forthcoming.
85. Law Com. No.271, paras 2.15, at nn.28 (legal power) and 33 (trustees' powers), and 4.3.
86. (2002) 118 L.Q.R. 270 at pp.273-283.
87. Explanatory notes at para.59.

- [88.](#) See Ferris, *Modern Studies in Property Law*, Vol.2, forthcoming.
- [89.](#) Law Com. No.271 at para.4.10.
- [90.](#) [1981] A.C. 487.
- [91.](#) In correspondence Charles Harpum suggested that the continued validity of the two trustee rule may be preserved by the words of s.23: "to make any disposition of any kind permitted by the general law". However, s.23 does not define the effects of a disposition; the reference to "any disposition ... permitted" refers to the types of dispositions s.23 enables a registered proprietor to make. The effects of a disposition by a trustee, or trustees, of land upon a beneficiary's interests are determined by the general law (including ss.2 and 27 of LPA) and by s.26 of LRA 2002. If the requirement of two trustees is to be preserved then it must be done through the construction of s.26.
- [92.](#) In correspondence Charles Harpum suggested that the reason a volunteer may be able to take advantage of s.26 was to give effect to the principle set out at Law Com. No.271, para.1.5. He further explained that the risk of an invalid disposition should not fall on disponees, whether volunteers or not. It is submitted that a volunteer disponee should not be preferred to a beneficiary in occupation, because as a volunteer he or she has lost nothing if her interest is deferred (and would be unjustly enriched at the expense of the beneficiary if given priority). The integrity of the register is a principle of primary importance in the context of market transactions only, not upon gifts.
- [93.](#) Law Com. No.271, at paras 2.15 nn.30 and 32, 4.8 n.15, 9.30(2) n.80.
- [94.](#) See ss.87(1) and 101 of LPA.
- [95.](#) Law Com. No.271, at paras 7.7-7.8.
- [96.](#) Law Com. No.271, at para.7.7 n.31 suggests there may be an action for wrongful interference with a contract upon a sale. However, if s.52 grants the power to sell, or suspends the conditions which prevent it arising or becomes exercisable, it is difficult to see what the wrongful interference complained of could be.
- [97.](#) An irrebuttable fiction that a power had arisen and become exercisable does not import any statutory authority for a wrong, which remains a wrong throughout, but one the law cannot recognise in connection with issues of title.
- [98.](#) But not subject to any provision of LRA 2002 to the contrary; there is no provision equivalent to s.26(2)(b) of LRA 2002.
- [99.](#) Contrary to the position of a person entitled to be registered as the proprietor of a registered estate or charge, at s.24(b) of LRA 2002.
- [100.](#) *Williams v Wellingborough B.C.* [1975] 1 W.L.R. 1327.
- [101.](#) Law Com. No.271, at para.7.8(1), which seems to assume that the problems of a power being exercisable and the propriety of its exercise are a single issue.
- [102.](#) As provided for by s.104(2)(d) of LPA. See *Cuckmere Brick Co. Ltd v Mutual Finance Ltd* [1971] Ch. 949; *Tse Kwong Lam v Wong Chit Sen* [1983] 1 W.L.R. 1349. For an extension of this approach to other powers of mortgagees see *Medforth v Blake* [2000] Ch. 86.
- [103.](#) To adopt the language of s.104(2)(d) of LPA.
- [104.](#) [1975] A.C. 591.
- [105.](#) TLATA came into force on January 1, 1997. The Land Registry seems to be assuming that the relevant part of LRA 2002 will come into force in October 2003.
- [106.](#) Law Com. No.271, at paras 1.5 and 2.15.
- [107.](#) ss.26(1) and 52(1) of LRA 2002.
- [108.](#) ss.26(3) and 52(2) of LRA 2002.
- [109.](#) *Lys v Prowsa Developments Ltd* [1982] 1 W.L.R. 1044 used just this distinction to justify holding a purchaser bound by an unprotected minor interest. We have noted how the Court of Appeal in *Collings v Lee* [2001] 2 All E.R. 332 seemed at times to treat the trust in that case as if it were novel: see (2002) 118 L.Q.R. 270 at n.130. Contrast these cases with the reasoning in *Foskett v McKeown* [2001] A.C. 102 at pp.108G-109C and 126-127. It must be inherently undesirable for the courts to impose personal liability upon purchasers which

coincides precisely with the very defect in title against which the purchaser is protected by legislative provisions.

[110.](#) Thus s.116 of LRA 2002 gives both mere equities and proprietary estoppel the status of full property interests. The remedial character of mere equities is stressed, and the remedial nature of both types of interests is recognised: see Law Com. No.271 at paras 5.29, 5.33(4), and 5.35. An institutional trust (express, resulting, or constructive) would of course be overreached if the requirements of ss.2 and 27 of LPA were met, but the proprietary remedies would not be subject to such overreaching. Given the recognised similarities between constructive trusts and proprietary estoppel, see *Grant v Edwards* [1986] Ch. 638 at p.656G-H; *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107 at pp.132G and 133G, this is almost an invitation to the courts to circumvent the effects of s.26(1) by construing s.26(3) as saving personal liability to a proprietary remedy. For the difficulties this approach can generate for the courts see *Lloyds Bank Plc v Carrick* [1996] 4 All E.R. 603.

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