

## Law Quarterly Review

2002

### The general principles of overreaching and the reforms of 1925

Graham Battersby

Graham Ferris

**Subject:** Real property

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

**Legislation:** Land Registration Act 1925 s.18

Law of Property Act 1925 s.2

#### \*L.Q.R. 270 INTRODUCTION

OVERREACHING is a term most commonly defined as the process of transferring equitable interests under a trust from a specific piece of land to the capital money received from the purchaser (including a lessee or mortgagee) of a legal estate in that land. However, the transfer of equitable interests from specific property to capital money is a process that is familiar in trusts of personalty<sup>1</sup>; this process is also “overreaching”, although rarely called such. Again, the process by which the ownership of a legal estate in land is transformed into a claim against the purchase money in a mortgagee’s hands is familiar from the law of mortgages. It occurs whenever a mortgagee exercises its power of sale; this is also a form of overreaching. Therefore, to be adequate to the task, an account of overreaching must be able to incorporate the possibility of the overreaching of legal interests. Further, any account of overreaching that aspires to the status of a principled account of the process must also be able to include within its purview both trusts of land and trusts of personalty. Any account that treats the process, as opposed to the term, as one that is limited to the law of real property undermines the policy of harmonising the law of real and personal property effected by the 1925 property legislation. Happily, an account of overreaching was written in 1990 that gave us an approach that was principled, and flexible enough to provide the starting point of all analysis for the foreseeable future.

In 1990 Charles Harpum published a truly seminal article, “Overreaching, Trustees’ Powers and the Reform of the 1925 Legislation”,<sup>2</sup> which clarified the nature of the process of overreaching. Peter Gibson L.J., in *State Bank of India v. Sood*,<sup>3</sup> largely adopted the analysis:

“As is explained by Charles Harpum in his illuminating article ... overreaching is the process whereby existing interests are subordinated to a later interest or estate created pursuant to a trust or power. Mr Harpum arrived at that statement of the true nature of overreaching by a consideration of the effect of the exercise of powers of disposition in a settlement ... He argued cogently that a transaction made by a person within the dispositive powers conferred upon him \*L.Q.R. 271 will overreach equitable interests in the property the subject of the disposition, but ultra vires dispositions will not.”<sup>4</sup>

The latest edition of the leading textbook on land law, Megarry and Wade, *Law of Real Property*, has adopted this analysis.<sup>5</sup> The enactment of the Trusts of Land and Appointment of Trustees Act 1996 (subsequently abbreviated as TLATA) sounded the death knell for the only alternative analysis of overreaching that had any currency, an explanation of overreaching that, in the case of the trust for sale, relied on the doctrine of conversion. Anybody persisting with such an analysis after 1996 would be forced to conclude that the operation of overreaching upon a conveyance, or transfer, of land had been significantly reduced by the Act.<sup>6</sup> The present authors have accepted elsewhere the essential correctness of Harpum’s analysis.<sup>7</sup> However, there are two areas in which a return to “Overreaching, Trustees’ Powers and the Reform of the 1925 Legislation” remains necessary. That article left some questions less than fully considered, and it also reached some conclusions that the authors feel unable to endorse. These issues are considered here, in the hope that a full analytical framework will be provided for any further study of overreaching. Indeed, this article is intended to be a prelude to an examination of overreaching of equitable interests in land after TLATA and more recent legislation.<sup>8</sup>

We take it as established by Harpum that under the statutory scheme created by the Law of Property Act 1925 (subsequently abbreviated as LPA) the existence of a trust for sale of land was meant to be

apparent on the face of the title to land.<sup>9</sup> Therefore, the extent of the powers of the trustees for sale would normally be apparent to a purchaser.<sup>10</sup> The common law provided that overreaching would occur whenever a trustee, or some other person with a power to dispose of property, made a disposition within their powers.<sup>11</sup> This ability to overreach was not bestowed by the 1925 *\*L.Q.R. 272* legislation, and was not an ability unique to trustees.<sup>12</sup> The corollary of overreaching being an *intra vires* use of a limited owner's powers was that an *ultra vires* disposition would not overreach.<sup>13</sup> Although trustees for sale were not unique in being able to overreach, their status as trustees had certain implications for the way in which overreaching operated within the context of a trust for sale. Trustees for sale held the legal estate in the land, and could rely upon their legal title to effect the conveyance of a legal interest to a purchaser.<sup>14</sup> Therefore, when discussing the "powers" of trustees for sale we are in fact discussing their authority to act, and it is unauthorised dispositions that would not overreach. Given that the trustees' capacity to pass a legal interest was conferred by their legal title, a legal estate could pass, regardless of whether the disposition was unauthorised or *ultra vires*. There is no room within this analysis for the operation of the doctrine of conversion,<sup>15</sup> nor do we need to look to section 2 of the LPA for the origins of the trustees' ability to overreach.<sup>16</sup> Therefore, the primary service performed by section 2 for purchasers must be to limit the application of the doctrine of notice.<sup>17</sup> The section was not meant to, nor did it, allow an *ultra vires* disposition by trustees for sale to overreach, and a disposition by trustees for sale outside their powers did not have an overreaching effect.<sup>18</sup> Thus, our starting point in analysing overreaching is the essential correctness of Harpum's reasoning in his article, which we have attempted to summarise above.

We rely heavily on Harpum's analysis, but the other side of the coin is that those areas in which we feel it is deficient, or even wrong, are of particular importance. The role assigned to section 2 of the LPA was never very clearly demarcated, perhaps the natural result of an analysis that aimed to demonstrate that section 2 could not provide the foundation of overreaching, but was ancillary to the general law. We feel that this neglect of the true role of section 2 of the LPA led Harpum into error when he suggested that *Hodgson v. Marks*<sup>19</sup> was wrongly decided.<sup>20</sup> Although the peculiar problems of a bare trustee with no powers of disposition cannot arise after the passage of TLATA,<sup>21</sup> we feel that the decision in *Hodgson v. Marks* was clearly right, and that the authority of the case is untouched *\*L.Q.R. 273* by Harpum's analysis. Harpum also assigned what we consider to be an entirely inappropriate function to section 18 of the Land Registration Act 1925 (subsequently abbreviated as LRA), when he argued that it granted powers of disposition to trustees for sale of land. It was this error that led him to conclude that *City of London Building Society v. Flegg*<sup>22</sup> was decided *per incuriam*.<sup>23</sup> Some of their Lordships' observations in *Flegg* must now be considered as misconceived, deriving as they do from the rejected analysis of overreaching, as a process which relied upon the doctrine of conversion.<sup>24</sup> However, their Lordships also gave emphasis to the crucial role of the powers of disposition of trustees for sale in overreaching, and this aspect of the decision is supported by Harpum's analysis. Although we have dealt elsewhere with the suggestion that trustees for sale of registered land had different powers of disposition from trustees for sale of unregistered land prior to 1996,<sup>25</sup> the continued vitality of what we consider an error forces us to return to this issue.

This article attempts both to extend and develop the analysis of overreaching. Overreaching by mortgagees, by trustees of land, and by tenants for life is each considered. As each of these overreachers possesses different attributes, the comparison is instructive. The analyses confirm the importance of clarity as to the nature of the powers bestowed upon owners of property interests for a proper understanding of the effect of a disposition by such owners. With the benefit of this insight we return to the problem identified above, of the true nature of the powers granted by section 18 of the LRA.<sup>26</sup> This preliminary analysis prepares the way for a consideration of the role of section 2 of the LPA in the operation of overreaching. Although not all the difficulties presented by overreaching are dealt with, in particular the impact of recent legislation<sup>27</sup> is only touched upon, the articulation of the principles of overreaching provides the necessary first stage of any future analysis in this area.

## THE NATURE OF POWERS

It is necessary to note an ambiguity present in the word "power". "Power" can mean ability to act; thus one has the power to raise one's arm. "Power" can mean authority to act; thus one can empower an agent to act on one's behalf. It follows that, if trustees attempt to exceed their powers, their action will either be ineffective (as they lacked the ability), or effective but *\*L.Q.R. 274* wrong (as the act was unauthorised).<sup>28</sup> However, the situation is more complex than this. The grant of a power may give both ability and authority to act. Therefore, there is more than one possible effect upon a third party of an *ultra vires* disposition. If the grant of a power is the grant of authority, there may be more than one possible outcome.<sup>29</sup> However, if the grant of a power is the grant of an ability, then an *ultra vires*

transaction will simply be of no effect.<sup>30</sup>

### ***A power that combines ability and authority--the mortgagee's power of sale***

We have already differentiated between two distinct meanings of the word "power". However the word can carry intermediate meanings denoting elements of both ability and authority. An example of a mixed power is the mortgagee's power of sale after 1926.

The LPA introduced the legal charge to land law, and the old form of mortgage by conveyance of the legal estate with a provision for re-conveyance was specifically abolished.<sup>31</sup> Prior to this legislation a mortgagee held a legal estate, and had an express power of sale contained in the deed of mortgage, or a statutory power of sale conferred prior to 1926 by section 19 of the Conveyancing and Law of Property Act 1881.<sup>32</sup> A power of sale was not needed in order to allow a mortgagee to transfer its legal estate; it was able to do this by right of its legal estate. Therefore, a mortgagee with no legal estate, *i.e.* an equitable mortgagee, could not convey a legal estate, and the power of sale granted by section 19 was irrelevant to the issue. In *Re Hodson and Howe's Contract*<sup>33</sup> Cotton L.J. refused to accept that section 19 was in any way concerned with the conveyance of legal estates: "Now what is a power of sale in a mortgage? \***L.Q.R. 275** It is an equitable authority, which enables the mortgagee to sell so as to give the purchaser the estate discharged from the equity of redemption. What is there in the Act to enable a mere equitable mortgagee to convey the legal estate?"<sup>34</sup> The power of a legal mortgagee to convey a legal estate was rooted in its own legal estate and the powers of disposition conferred by that estate; to cite Cotton L.J. in the later case of *Re Harwood*: "a power of sale in a mortgage is nothing but an authority to defeat the equity of redemption, and when the mortgagee sells he transfers the legal estate not by means of a power but by virtue of his legal ownership".<sup>35</sup>

The denial of the legal estate to a legal chargee carries implications for the law. Section 101 of the LPA grants the holder of a legal charge a power of sale, which when exercised will pass the legal fee simple of the mortgagor.<sup>36</sup> As a mortgagee holding a legal charge never holds the fee simple in the land, the power of sale granted by section 101 must grant the ability to convey that estate to the mortgagor. The same analysis applies to a mortgage by demise in respect of the reversion vested in the mortgagor. This change means that the mortgagee's power of sale is the grant of one of the few remaining examples after 1926 of the ability to transfer a legal estate that is not vested in the transferee.<sup>37</sup>

The nature of a mortgagee's power of sale means that some dispositions, if attempted by a mortgagee, will be invalid in law. The power granted is one of sale; therefore, the grant of a legal charge of the fee simple,<sup>38</sup> or the grant of an option over the fee simple,<sup>39</sup> by a mortgagee in purported exercise of its power of sale would be void. Similarly, a purported sale by a mortgagee to itself is void at law,<sup>40</sup> as is a conveyance to a purchaser when the power of sale has not arisen.<sup>41</sup> Since the consequences of a legally invalid, or void, conveyance would be so serious for purchasers from mortgagees, we can expect that the existence and extent of the power should be capable of easy and sure ascertainment by a purchaser, as this ensures the validity in law of an exercise of the power. Of course, once the existence of a power of sale, and the validity in law of its exercise, have been demonstrated, there remains the possibility that a mortgagee may act wrongly, leading to some infirmity in a conveyance to a purchaser. \***L.Q.R. 276** However, such an infirmity will operate only in equity. Structurally the position of the mortgagee after 1925 is analogous to the position of the holder of a legal power of appointment prior to 1926. The distinction between factors that can operate to invalidate a conveyance at law and factors that can operate only in equity seems to underlie the legislative distinction between the power of sale arising and the power of sale being exercisable.<sup>42</sup> A purported exercise of a power that has not arisen is void at law, but an improper exercise of an existing power before it becomes properly exercisable is merely void in equity. Before the power arises the mortgagee lacks the ability to sell the fee simple. Once the power has arisen, but before a case for its exercise arises, the mortgagee lacks the authority to sell.<sup>43</sup>

### ***The nature of the powers conferred on trustees of land prior to 1996***

We are concerned here with the dispositive powers of trustees, their powers to sell, lease, mortgage or otherwise dispose of land held on trust.<sup>44</sup> Such powers may be used in the course of the administration of a trust, when trustees sell land in order to acquire some other investment.<sup>45</sup> Such powers may be used to account to those entitled to the trust property in equity, by transfer of land held on trust to a beneficiary, or by a disposition to a third party and a subsequent payment to a beneficiary.<sup>46</sup> Although for negotiable property, such as money, anyone is able to pass the legal title to the property (irrespective of the title of the person transferring the money), the general rule is that a

transfer by any persons without a good title to the property will be nugatory.<sup>47</sup> We do not mean any implication that dispositive powers are those involved in the distribution of the trust property to the beneficiaries in contradistinction to administrative powers.<sup>48</sup> By “dispositive powers” we do not mean to imply any contrast with \***L.Q.R. 277** dispositive duties.<sup>49</sup> For present purposes, a duty to dispose of the trust property in a certain way is merely a power so to dispose of the property coupled with a personal obligation on the trustee to exercise that power, and the nature of the power is unaffected by the existence of the obligation.

Cases dealing with a mortgagee's power of sale prior to 1926 are directly analogous to the law dealing with trustees' powers of disposition.<sup>50</sup> On the strength of that analogy we feel it is correct to apply the words of Cotton L.J. in *Re Harwood* to trustees' powers,<sup>51</sup> which would provide the following statement of the law: a power of disposition in a trust is nothing but an authority to defeat the equitable interests of the beneficiaries, and when the trustees sell they transfer the legal estate not by means of a power but by virtue of their legal ownership.

Before 1996 the dispositive powers of trustees of a statutory trust for sale had two sources. A trust for sale imposed a duty upon the trustees to sell the land, which by necessary implication granted a power to sell. Section 28(1) of the LPA conferred upon trustees for sale all the powers granted to a tenant for life and the trustees of a settlement under the Settled Land Act 1925 (subsequently abbreviated to SLA). Thus, in effect an extensive list of powers was incorporated into the LPA, but the sum of those powers fell short of the powers of an absolute owner, so that the SLA powers delimited the extent of the powers of trustees for sale. The limitation on the power to mortgage land subject to a trust for sale was felt to be particularly onerous, and in practice the trustees' powers were often expressly enlarged in a professionally drafted trust instrument.<sup>52</sup> Thus, in express trusts for sale the powers of the trustees had a third source, the provisions of the trust instrument. There is no reason to differentiate between the implied power of sale, the powers granted by section 28 of the LPA, and any express powers granted by the conveyance to the trustees.

### ***Did section 28 grant the ability to act or the authority to act?***

As legal owners of an estate in land trustees for sale have always had the power to make dispositions of the legal estate, or of interests therein. Thus, when in case law a transaction was described as *ultra vires*, in this context, it did not connote a lack of the ability to effect such a transaction, but a lack of authority. An early explanation of this is contained in Lord Eldon's \***L.Q.R. 278** judgment in the 1820 case of *Bowes v. East London Water Works Company*<sup>53</sup> :

“I take it the rule of law is, where a person has an interest [legal estate] and also an authority [power], that a lease not made according to that authority [power], though not good under it [the power], will be good, taking effect out of the interest [legal estate]; ... The devise and the power taken together, seem to amount to this, that though they [the trustees] were to have the whole interest [legal estate], yet they were not to make leases ... [of certain descriptions]”.<sup>54</sup>

The grant of a restricted “power” to lease was not truly the grant of the ability to act at all; as legal owners the trustees could, and did, grant valid leases that exceeded the terms of the power. The question was: “whether the leases they have made [which exceeded the terms of the power] by virtue of that interest [legal estate] are to be considered, under all the circumstances, as abuses of their trust”. In short, the view of Lord Eldon was that the lease took effect as a legal estate, because it was derived out of the legal estate vested in the trustees, but its creation was a breach of trust because it was not within the limited leasing power conferred on the trustees. Recognising this distinction, the present authors dislike the use of the term *ultra vires* in this area. The expression encourages a confounding of the two different meanings of the word “power”. One error that this confusion can lead to, that a transaction that is outside the powers of a trustee is therefore void at law, was adverted to by Lord Eldon<sup>55</sup> : “The decree [of Sir Robert Gifford V.-C.] declares the leases to be void; by which I presume, it is to be understood that they were void in equity<sup>56</sup> ; for the lessors having the legal estate, the power did not restrain their facility of dealing with it at law; but [it may be] ... that they were not at liberty to deal with it except in the manner prescribed [by the power].” It would be better to refer to “unauthorised transactions” and avoid the confusion, but we are all constrained by past and current usage.

A review of the law between 1820 and 1925 confirms the continuing validity of Lord Eldon's analysis. Prior to the enactment of the 1925 Property Acts the position of a purchaser for value of a legal estate buying from trustees, having established that legal title was vested in his vendors, depended upon two factors: first, whether the sale was a due execution of the trust; if not, then second, whether the

purchaser had any notice of the existence of the trust, as notice of a trust would carry notice of the terms **\*L.Q.R. 279** of the trust, and hence whether the conveyance to the purchaser was in breach of trust. A sale made in due execution of the trust passed an unencumbered title to the purchaser regardless of notice; this was known as overreaching. Thus, if the existence of a trust was apparent from the abstract of title, or from other sources,<sup>57</sup> a purchaser was obliged to investigate the terms of the trust in order to ensure that it was properly executed by the sale. A power in the trustees to grant a receipt absolving a purchaser from enquiry into the due execution of the trust did not necessarily protect a purchaser.<sup>58</sup> Any breach of trust, even a “technical” breach of trust,<sup>59</sup> even a breach of trust that was “the best [bargain] that could have been made under the circumstances” and wholly beneficial to the beneficiaries,<sup>60</sup> even a breach of trust made in accordance with the opinion of counsel,<sup>61</sup> rendered a purchaser potentially liable to the equitable interests of the beneficiaries.<sup>62</sup> Thus two fundamental principles can be identified: first, that the trustees as legal owners could dispose of legal interests in the land; second, that any breach of trust rendered a purchaser liable to the beneficiaries' interests, unless the purchaser was “equity's darling”.<sup>63</sup> An *ultra vires* breach of trust was simply one type of breach of trust, and carried no different consequences from any other type of breach. The only difference between an *ultra vires* breach of trust and most *intra vires* breaches of trust was that the *ultra vires* breach of trust prevented overreaching occurring even when both the trustees and the purchaser were acting in good faith, a situation which could lead to unfair gains by the beneficiaries at the purchaser's expense.<sup>64</sup>

There is nothing contained in the LPA to cast doubt upon the basic principle, that trustees can dispose of their legal interests even when acting outside their authority, which derives of course from the relationship between the courts of law and equity. Rather than interfere with the **\*L.Q.R. 280** effective disposition of legal estates and interests, the LPA facilitated such dispositions. The changes introduced in 1925 were to the operation of the process known as overreaching, and to the operation of the doctrine of notice. Therefore, the basic principle remained intact, and continues to do so unless TLATA has made some change to it.

### ***The nature of the powers of the tenant for life under the Settled Land Act 1925***

The position of the tenant for life under a settlement governed by the SLA is anomalous. Even though the legal fee simple is vested in the tenant for life by the SLA, any disposition not authorised by statute or by the settlement is made “void” by section 18(1)(a), and section 18(1)(b) enacts that a conveyance can “only take effect” if the provisions relating to payment of capital moneys are met. This means that despite being the legal estate holder the tenant for life cannot dispose of a legal interest in the land simply by dint of his legal estate, and that any *ultra vires* disposition will be absolutely void. There is little doubt that this anomaly owes much to history, and little to principle. Historically it was the SLA that first gave the legal fee simple to the tenant for life, and the best explanation for the provisions of section 18 is that it anachronistically continues to treat the tenant for life as a limited legal owner.<sup>65</sup>

The effect of section 18 of the SLA has been subject to criticism for many years, both because it is contrary to principle to treat an estate owner as if he were the holder of a mere power, and because the section has potentially mischievous effects. Harold Potter observed:

“The essential difficulty is derived from the fact that formerly there were limited estates with additional powers. Now there is a theoretically unlimited estate, a fee simple, to which it is inappropriate at law to attach powers either of enjoyment or disposition, but which in effect has been shorn of all its legal ‘rights’ of disposition and to which apparently there is an attempt to attach ‘powers’. This is a confusion between the position of trustees who have unlimited rights of disposition which may be affected by equitable limitations against a purchaser with notice and the old limited estates which at law did not enable its owner to dispose at all of any less limited estate. Actually these notions are quite inconsistent.”<sup>66</sup>

Potential dangers to purchasers, created by section 18 of the SLA, were identified by Mr Withers.<sup>67</sup> The sanguine assumption of his critics,<sup>68</sup> that **\*L.Q.R. 281** the judges would somehow construct a solution from the provisions of the Act, was proved wrong by *Weston v. Henshaw*,<sup>69</sup> which illustrated how section 18 could work injustice, even though the SLA scheme should have alerted the purchaser to the danger.<sup>70</sup>

In short we should not expect to gain any guidance as to legal principle from the provisions of the SLA in this respect. The position of the tenant for life as a legal owner that needs the grant of powers to dispose of his estate is the exception that proves the rule. The legislation is anomalous, prone to

produce injustice, and since 1996 a part of our law that has diminishing importance.<sup>71</sup> There will eventually come a time when the anomaly can be forgotten.<sup>72</sup>

### ***The nature of the powers granted by section 18 of the Land Registration Act 1925***

Prior to Harpum's article there was a feeling that the doctrine of conversion had some role to play within the operation of overreaching.<sup>73</sup> This approach continued to haunt discussion of overreaching until the abolition of the doctrine of conversion by TLATA rendered it untenable.<sup>74</sup> Unfortunately, the very article that sounded the death knell of this error promulgated another misunderstanding that threatens to become a new mistaken orthodoxy. In his seminal article Charles Harpum argued that the powers of trustees for sale of registered land were granted by section 18 of the LRA. This argument seems to have been accepted by the Court of Appeal in *State \*L.Q.R. 282 Bank of India v. Sood*.<sup>75</sup> In the most recent edition of Megarry and Wade, *Law of Real Property*, Harpum has dropped the explicit argument that section 18 of the LRA governs the point,<sup>76</sup> but the general approach remains the same, and *Sood* is the key authority cited. Finally, in a recent note written by Martin Dixon the possible role of section 18 as the grantor of powers to trustees is once more raised.<sup>77</sup>

Section 18 of the LRA grants to a registered proprietor of land those powers to deal with the land that are the normal incidents of legal ownership of unregistered land. The grant is made to any registered proprietor, and bestows the necessary power to deal with registered land on a single absolute owner in exactly the same way as it grants powers of disposition to owners who happen to be trustees. The ability to deal with registered land is conferred by statute,<sup>78</sup> which also limits the modes of dealing with registered land.<sup>79</sup> When a restriction is placed on the register of title of a piece of land it prevents any dealing with the legal estate in that land which does not comply with the terms of the restriction. This is effected by the refusal of the Land Registrar to record a transaction which does not comply with a relevant restriction.<sup>80</sup> As dealings with the legal estate must be perfected by registration,<sup>81</sup> any disposition not falling within the terms of the restriction must have an effect in equity alone,<sup>82</sup> or no effect. The register records legal title,<sup>83</sup> and not equitable title,<sup>84</sup> and a purchaser must rely upon the state of the register on a question of legal title.<sup>85</sup> It is of course essential that the ability of a registered proprietor to *\*L.Q.R. 283* deal with the legal title is respected if the system of registered title is to function.<sup>86</sup> There is no reason to suppose that any conflict existed between the operation of section 18 of the LRA and the operation of section 28 of the LPA.<sup>87</sup> Upon the same reasoning, section 6 of TLATA grants an authority to trustees of land to deal with the legal estate, an authority that presumes the ability to so deal granted by section 18 of the LRA.<sup>88</sup> There is no structural difference in this respect between registered and unregistered land.

The leading authority in this area is *City of London Building Society v. Flegg*.<sup>89</sup> The speech of Lord Oliver of Aylmerton was quite unambiguous on the source of the powers of trustees for sale of registered land: "In the instant case the exercise by the registered proprietors of the powers conferred on trustees for sale by section 28(1) of the Law of Property Act 1925 had the effect of overreaching the interests of the respondents under the statutory trusts"<sup>90</sup>; "The trustees' power to mortgage the land was exercised when the charge was executed and the money was advanced and it was, under section 28 of the Law of Property Act 1925, at this point that the interests of the appellants were overreached".<sup>91</sup> As we have pointed out elsewhere, section 18 of the LRA was cited to the House in argument, and was expressly referred to by Lord Templeman in his speech.<sup>92</sup> There seems to be neither room, nor cause, to suggest that the decision in *Flegg* was *per incuriam*, and as mentioned above this is one particular in which we feel unable to follow Harpum's reasoning.

### **THE ROLE IN OVERREACHING OF SECTION 2 OF THE LAW OF PROPERTY ACT 1925**

We have shown that the powers of trustees for sale under the old statutory regime acted as authority, from which it follows that an *ultra vires* conveyance is a type of unauthorised conveyance. Harpum showed that *\*L.Q.R. 284* under the old statutory regime an *ultra vires* conveyance by trustees for sale of land did not result in an overreaching conveyance, because section 2 of the LPA operated only if there had been a prior conveyance of a legal estate in land that was capable of overreaching the equitable interests of the beneficiaries.<sup>93</sup> An *ultra vires* conveyance was not capable of so over-reaching, and a purchaser taking under an *ultra vires* conveyance was denied the assistance of section 2. What we have yet to demonstrate is that the operation of section 2 was vital to the process of overreaching under the old statutory regime. Whilst it is fairly easy to identify dicta that give prominence to section 2 in the context of overreaching,<sup>94</sup> none of these dicta give us much guidance as to the function of section 2 in overreaching. Once the function of section 2 has been identified, we can proceed to consider what limitations apply to its operation. We will then have a description of the

role of the section within the process of overreaching of equitable interests in land.

One of Harpum's express aims in writing his article was to scotch an error he detected in the reasoning of the Law Commission on the role of section 2 in overreaching.<sup>95</sup> Harpum felt that section 2 was being seen as the source of overreaching and that this error was obstructing a true understanding of the nature of overreaching, which rested on the powers of limited owners.<sup>96</sup> In practical terms this error led to the assertion that any conveyance of a legal estate to a purchaser would overreach provided the requirements for the payment of capital money were met, and therefore (by implication) that an *ultra vires* conveyance would have this effect. The success of Harpum in reducing section 2 to a subsidiary role left the ambit of that role unclear. Given his starting point, no concentrated attention was given to other provisions of the 1925 legislation that operated to protect purchasers upon a conveyance, or transfer, of a legal estate in land.

### ***An abundance of caution?***

The opening words of section 2(1) of the LPA provide that: "A conveyance to a purchaser of a legal estate in land shall overreach any equitable interest \***L.Q.R. 285** or power affecting that estate, whether or not he has notice thereof".<sup>97</sup> A conveyance must fall within one of the types of conveyance listed in paragraphs (i)-(iv) of section 2(1); if such a conveyance falls within paragraphs (i)-(iii) it must be "capable" of overreaching the equitable interest or power; capital money must be paid to the appropriate person, or people. The section then exempts certain interests from its operation.<sup>98</sup> We have accepted that Harpum's article correctly identified the crucial importance of the expression "capable of being overreached" in paragraphs (i)-(iii).<sup>99</sup> The effect of these words is that only an *intra vires* conveyance will activate section 2.

Harpum suggested that section 2 was "necessary to abrogate the principle that a purchaser, dealing with a person whom he knew to be a trustee, had notice of the terms of the trust".<sup>100</sup> However, the conveyances listed in section 2(1), paragraphs (i)-(iv), were all capable of overreaching equitable interests despite notice thereof.<sup>101</sup> If the opening words of section 2(1) were operative, they must have protected purchasers from notice of something which could have prevented the conveyance from having an overreaching effect. Mere notice of the trust would not prevent the overreaching effect of a conveyance; "statements commonly found in textbooks, to the effect that a purchaser of property having notice of equitable interests affecting it is bound by them, are misleading unless they except a purchaser who acquires the property from a legal owner duly exercising an authority to overreach the equitable interests in question".<sup>102</sup>

A possible construction of the opening words of section 2 is that they were enacted out of an abundance of caution, and that they give no substantive protection to purchasers of legal estates in land. The legislation of 1925 formed a connected scheme, and in construing section 2 we have to take into account other provisions in the Acts that provide protection to purchasers from taking subject to equitable interests.<sup>103</sup> Some of these \***L.Q.R. 286** provisions restrict the protection they offer, either by requiring some quality in the purchaser, or by denying protection in certain circumstances. Thus good faith is required of purchasers by section 110 of the SLA<sup>104</sup>; protection is denied to a purchaser acting in collusion by section 13(2) of the Trustee Act 1925<sup>105</sup>; only in the absence of facts revealed by the investigation of title to the contrary can a purchaser rely upon the presumption that an assent or conveyance made by a personal representative was properly made to the person entitled to the legal estate under the provisions of section 36(7) of the Administration of Estates Act 1925<sup>106</sup>; and section 29(1) of the LPA only operated "unless the contrary appears".<sup>107</sup> A common provision, the effect of which is less than clear, is that "a purchaser shall not be concerned to see ..." whether there is some particular type of defect in the equitable title to the land.<sup>108</sup> Section 26 of the LPA deemed consents sufficient,<sup>109</sup> or not required.<sup>110</sup>

The profusion of specific provisions protective of purchasers allows the possibility that the opening words of section 2(1) were enacted out of an abundance of caution, and had no effect.<sup>111</sup> The legislation could have been intended to meet every possible risk to a purchaser by an express provision acting like a statutory sticking plaster, protecting purchasers from each and every conceivable risk. The primary purpose of section 2(1) could have been to protect holders of equitable interests, preventing their interests from being overreached when capital money was paid to a single trustee, \***L.Q.R. 287** not being a trust corporation. A consideration of the rest of the section suggests such a construction is wrong. The section referred to the "protection afforded by this section to the purchaser of a legal estate",<sup>112</sup> and showed an anxiety that the protection given by subsection 2(1) could be construed as extending the overreaching effects of a conveyance further than was intended, rather than that it had no effect.<sup>113</sup>

It seems then that there is no immediately obvious role for the opening words of section 2 within the statutory scheme laid down in 1925, yet general principles of statutory construction, judicial dicta, and the provisions of the section suggest that the words were intended to have some definite effect. If we can identify some risk that was not specifically provided against elsewhere, then we can assess the suitability of section 2 for meeting that risk to purchasers.

### **Intra vires but wrong?**

If we accept that section 2 was ill suited to protecting against an *ultra vires* breach of trust, then perhaps we should consider the possibility that the section was designed to protect a purchaser from the effects of an *intra vires* breach of trust. As today, before 1926 a trustee was bound to exercise any power vested in him as trustee "in a reasonable and proper manner"<sup>114</sup>; failure to do so was a breach of trust. If a purchaser had notice of this breach of trust then he took subject to the beneficiaries' interest.<sup>115</sup> The various ways in which trustees can commit a breach of trust are limited only by the bounds of human ingenuity and incompetence. The technique we have likened to applying sticking plasters would lead to an absurd proliferation of such "plasters" if each and every conceivable breach of trust was met by a specific statutory provision. For every power capable of being exercised by trustees it would be necessary to provide how a misuse of that power would, or would not, affect a purchaser. A constant review of the resulting patchwork of plasters would then be needed, to ensure it was **\*L.Q.R. 288** not inadequate owing to the discovery of new forms of breach of trust unforeseen in 1925. Purchasers needed protection from the application of a general principle of the law, and this would be best effected by a general exclusion of that principle. The risk that followed a breach of duty by trustees was transmitted to purchasers via the doctrine of notice, and section 2(1) operated to prevent any type of notice from affecting purchasers. Section 2(1) seems well suited to the task of giving purchasers immunity from the risks that formerly followed upon trustees' failure to satisfy the standards of probity and care demanded by equity.

The risk posed to purchasers by trustees effecting a disposition which exceeded their powers was to be met by the provision of generous statutory powers of disposition. This left the risk posed by trustees misusing those powers unaffected. The case law provided sufficient examples of purchasers being affected by trustees' misfeasance to show that the risk was not insignificant. Thus, trustees dealt with the trust property as if it belonged to them absolutely, either with fraudulent intent,<sup>116</sup> or innocently<sup>117</sup>; trustees failed to exercise such care and judgment as equity required when using their powers<sup>118</sup>; equitable mortgagors, who were treated as trustees, deliberately concealed equitable interests to borrow twice on the same security, which had the incidental effect of destroying the first lender's security.<sup>119</sup> If we broaden our review to take in those cases that were classified as equitable frauds on a power, we discover a rich diversity of inappropriate behaviour<sup>120</sup>: trustees used their powers of appointment to try and bring about the breakdown of a beneficiary's marriage<sup>121</sup>; tenants for life used their statutory powers to grant leases and easements designed to intimidate remaindermen into compliance with their wishes<sup>122</sup>; tenants for life used their powers in high-minded but inappropriate ways, to encourage public sobriety<sup>123</sup>; and in low-minded and inappropriate ways, to obtain a bribe,<sup>124</sup> to secure a benefit after the tenant **\*L.Q.R. 289** for life's interest had determined,<sup>125</sup> or to spite the remaindermen.<sup>126</sup> Such abuses could affect purchasers, and the protection offered to purchasers by the doctrine of notice was limited by judicial willingness to hold that purchasers were put on inquiry, and that failure to inquire was notice of whatever might have been discovered.<sup>127</sup> The examples given above were all part of the common learning of conveyancers in 1925, and there is every reason to suppose that the 1925 legislation was intended to make provision for the risks posed to purchasers by such breaches of trust. Such a role for section 2 avoids the error identified by Harpum, of viewing the section as a panacea, yet leaves the section an important role consonant with the judicial view that it is an essential part of the overreaching machinery introduced by the 1925 legislation.

Let us apply this analysis to the question of the validity of the decision in *Hodgson v. Marks*.<sup>128</sup> Mrs Hodgson had transferred the legal title to her home to Mr Evans under such circumstances that a resulting trust arose in her favour. Mr Evans was a bare trustee for Mrs Hodgson, but he transferred the property to a purchaser for value, Mr Marks, without the knowledge or authority of Mrs Hodgson. Mrs Hodgson had been in actual occupation of the house at the time of the transfer, and therefore her interests were overriding under section 70(1)(g) of the LRA. The Court of Appeal held that Mr Marks took the land subject to Mrs Hodgson's interest. Harpum suggested that section 18 of the LRA operated to grant Mr Evans, as bare trustee, powers of disposition, and the transfer to Mr Marks was therefore *intra vires*. Further, section 14 of the Trustee Act 1925 gave Mr Evans, as a trustee, the power to give a valid receipt for the purchase price.<sup>129</sup> Therefore, the sale was capable of

overreaching the equitable interest of Mrs Hodgson independently of section 2 of the LPA and the Court of Appeal had been wrong to hold Mr Marks bound by her interest.

We have already explained why we reject this construction of section 18 of the LRA. However, if we accept that Mr Evans had a power of sale, granted by section 1 of the Trustee Investments Act 1961, and the power to give a discharging receipt, granted by section 14 of the Trustee Act 1925, then the Court of Appeal would still have been right to conclude that the *\*L.Q.R. 290* conveyance by Mr Evans had not overreached the equitable interest of Mrs Hodgson. Quite clearly the transfer to Mr Evans was in breach of trust, and a purchaser takes subject to the equitable interests of beneficiaries if they have notice that their title was transferred to them in breach of trust. In registered land the relevant concept is not notice, but occupation. As section 2 of the LPA did not operate, since there was no trust for sale, and capital money had been paid to a single trustee, Mr Marks took subject to Mrs Hodgson's equitable interest in the land. Harpum's argument suffers from making the incorrect assumption that because an *intra vires* conveyance *can* overreach then it *will* overreach. This is not the case, unless section 2 of the LPA is operating to shield purchasers from being affected by notice of impropriety on the part of the trustees.

### ***Limitations on the operation of section 2***

We have identified a role for section 2 of the LPA. The section operated whenever there was a sale by trustees for sale, but not upon a sale by trustees with a mere power of sale.<sup>130</sup> It now falls to consider what, if any, limitations applied to the operation of the section.

### ***The disposition had to be intra vires***

We take it as established that only an *intra vires* conveyance by trustees for sale could activate section 2 of the LPA. If correct then this analysis should be applicable to the other paragraphs of section 2(1). Paragraphs (i) and (iv) do not raise any problems.<sup>131</sup> Paragraph (iii) deals with a conveyance "by a mortgagee or personal representative in the exercise of his paramount powers". The word "exercise" is noteworthy in this context. The law regarding the use of a mortgagee's power of sale distinguishes between the power "arising" and the power becoming "exercisable".<sup>132</sup> As a matter *\*L.Q.R. 291* of language one cannot exercise that which is not yet exercisable. We should therefore find some provision other than section 2 of the LPA operating to protect purchasers who take under a conveyance made when the mortgagees' power of sale has arisen but is not yet exercisable, as section 2 cannot operate on such an occasion. The matter is provided for by section 104(2)(a) and (b) of the LPA.<sup>133</sup> Section 104(2) operates in two distinct ways: it declares that "a purchaser's title will not be impeachable" on listed grounds, and it restricts the operation of the doctrine of notice. It seems fairly clear that, without section 104(2)(a) and (b), the general law would view a purported exercise of a power of sale that had not become exercisable as void in equity.<sup>134</sup> This may explain the exceptional resort to a mechanism of protection that is not reliant upon the doctrine of notice,<sup>135</sup> but which makes a purchaser's title unimpeachable. In so providing, the section effectively empowers the mortgagee to convey free of the mortgagor's equity of redemption when the power to do so under section 101 of the LPA is not exercisable.

### ***The statutory requirements respecting the payment of capital money (when a conveyance was made by trustees for sale) had to be complied with***

These statutory requirements were contained in section 27 of the LPA, and therefore it was common form to refer to the operation of section 2 and section 27 of the LPA.<sup>136</sup> It was in part to dispel the fog that surrounded this linked pair of sections that Harpum wrote. The requirement that "the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees for sale, except where *\*L.Q.R. 292* the trustee is a trust corporation" was laid down in section 27(2). The requirement could not be ousted by any contrary intention expressed in any document that created the trust for sale. A purchaser was concerned to ensure that the subsection was complied with, in order to obtain a good receipt for his purchase money, and to ensure that section 2 operated. Section 27(1) is a quite separate provision, which frees purchasers from the need to inquire into either the administration of the trust for sale prior to the sale, or into the disposition of the proceeds of sale in the trustees' hands.<sup>137</sup>

An analysis of overreaching that gave a role to the doctrine of conversion gave unwarranted prominence to section 27(1) of the LPA. Nevertheless, that was formerly the predominant judicial approach. It was held that the interests of beneficiaries were "interests in personality", they were not

“owners of equitable interests in realty”, and

“the whole purpose of the trust for sale is to make sure by shifting the equitable interests away from the land and into the proceeds of sale, that a purchaser of the land takes free from the equitable interests. To hold these to be equitable interests in the land itself would be to frustrate this purpose. Even to hold that they have equitable interests in the land for a limited period, namely, until the land is sold, would, we think, be inconsistent with the trust for sale being an ‘immediate’ trust for sale working an immediate conversion.”<sup>138</sup>

If this dictum was correct then section 2 of the LPA had no clearly discernible role to play, and the only interests in any property under a trust for sale were in the rents and profits before the sale, and in the proceeds of the sale after sale. It is the trust of the rents and profits and proceeds that is the concern of section 27(1), and therefore the section is likely to be viewed as the more important of the two sections when considering the pairing of section 2 and section 27 of the LPA.

In truth, section 27 was merely one of the statutory sticking plasters, dealing with one type of breach of trust, the misapplication of purchase money.<sup>139</sup> Such a provision was never capable of freeing land from an equitable interest. If the only breach of trust were a subsequent misapplication of the purchase money, then a purchaser could rely upon section 27, and the breach would not invalidate an otherwise overreaching conveyance. The section had no effect on any other breach of trust which might prevent overreaching from taking place, if the purchaser had notice of that **\*L.Q.R. 293** breach. It was section 2 of the LPA that had the effect of allowing an equitable interest to be shifted from land following a conveyance of a legal estate in breach of trust.

In this regard the decision of the Court of Appeal in *State Bank of India v. Sood* should mark the end of any misapprehension.<sup>140</sup> As, on the assumed facts, there was no capital money paid at the time of the grant of the mortgage, the receipt element of section 27 of the LPA could have no application. It was argued that the payment of some capital money to at least two trustees was an essential element in any overreaching conveyance.<sup>141</sup> This argument was rightly rejected by the court<sup>142</sup>: “The statutory requirements governing capital money ... can only apply to those conveyances giving rise to capital money”. If the statutory requirements for the payment of capital money to two trustees do not always need to be complied with, then they cannot form the basis for overreaching; rather they are a limitation on the process of overreaching, which process has its source in the dispositive powers of trustees.

### ***Section 2 gave way where a particular type of breach of trust was addressed by another specific statutory provision***

Any consideration of the effects of section 2 of the LPA seems absent from the case law concerning the use of a mortgagee's power of sale. Some cases are explicable on the grounds that section 2(1) could not have operated, *i.e.* when the power of sale had not arisen, or was not exercisable, but there are other cases, in which there was no issue as to the power having both arisen and become exercisable. The law is usually taken from *Lord Waring v. London and Manchester Assurance Co.*, in which Crossman J. said: “Of course, if the purchaser becomes aware, during that period, of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then, in my judgment, he gets no good title on taking the conveyance.”<sup>143</sup> If section 2(1) of the LPA applied to the exercise of the mortgagee's power of sale (as one might anticipate from section 2(1)(iii)), then this dictum would seem extremely heterodox, given that the word “purchaser” was defined as not requiring good faith in section 2.<sup>144</sup> No doubt the reason is that section 104(2) of the LPA has such a wide-ranging effect. As we have shown above, the section protects a **\*L.Q.R. 294** purchaser from being adversely affected by the use of a power of sale which has arisen but which is not exercisable, and, therefore, it operates when section 2 could not aid a purchaser. But, section 104(2)(d) also provides protection to a purchaser when: “... the power [of sale conferred by section 101 of the Law of Property Act 1925] was otherwise [*i.e.* in some way not provided for by paragraphs (a) to (c) of the section] improperly or irregularly exercised”. Section 2 has no application in this area of law because a specific provision covers the entire field of its potential operation, and it is the weaker protection granted by section 104(2) that is available to purchasers from a mortgagee conveying a legal estate in pursuance of its power of sale.<sup>145</sup>

This construction of the relationship between sections 2(1) and 104(2) of the LPA has three interesting effects. First, it keeps the operation of the rather draconian provisions of section 2 within reasonable bounds. Second, it means that when construing provisions that offer protection to purchasers other than section 2 (those provisions we have elsewhere referred to as “statutory sticking

plasters”), such provisions may properly be regarded as providing a limited protection to purchasers if in the absence of any of those provisions section 2 would apply. Third, it allows for the possibility that the removal of a provision protective of purchasers might have the effect of extending the operation of section 2, and thereby counter-intuitively extending the protection of purchasers.<sup>146</sup>

## CONCLUSION

Overreaching is the corollary of the grant to a limited owner of powers of disposition. If the due exercise of such powers did not overreach then the grant of the powers would be illusory, and the limited owner armed with those powers would be forced to obtain the endorsement of the grantor to any disposition. The utility for property owners, and for purchasers, of the possibility of overreaching is therefore obvious. However, problems arise when limited owners exceed or misuse their powers of disposition; conflicting claims then arise. Purchasers will be threatened by a rigid insistence that only a due exercise of the powers will be effective, but, on the other hand, an overly liberal willingness to condone defects in the exercise of the powers will threaten the owners of interests in the property. The essential difficulty is a classic problem of property law: the balancing of conflicting claims to the same property.

**\*L.Q.R. 295** Our analysis has concentrated on the operation of overreaching in the context of transactions that are intimately familiar on a practical level in our time: sales and mortgages effected by trustees holding land for the benefit of co-owners, and the exercise by a mortgagee of the statutory power of sale. We have found that the existing literature, even Harpum, did not provide a completely satisfactory analysis. The effects of a sale or other disposition by two trustees, and a sale by a mortgagee exercising the statutory power of sale, are, of course, well established, and most treatments of the subject have contented themselves with establishing what happens, without delving into the question of why (or precisely how).

We have sought to fill the gap. We submit that, of the difficulties posed to any analysis into the principles that underlie overreaching, the ambiguity contained in the word “power” deserves principal mention. This is apparent from our analysis of the nature of a mortgagee’s statutory power of sale; this constitutes both the grant of an ability and an authority, but the relationship between this point and the distinction between the power arising and becoming exercisable, has not always been apparent in the literature.<sup>147</sup> The operation of section 104(2) of the LPA, in both allowing overreaching to occur, and shielding purchasers from the consequences of an improper exercise of the power, has not previously been the subject of precise analysis. Similarly, the central importance of section 2 of the LPA has not been in doubt since Harpum wrote, but there has been no clear analysis of its function and operation. We hope that this article, complementing Harpum’s, will provide the much-needed basis of principle for future analyses of the law of overreaching.

GRAHAM FERRIS.<sup>148</sup>

GRAHAM BATTERSBY.<sup>149</sup>

L.Q.R. 2002, 118(Apr), 270-295

1. As in a sale of chattels under Law of Property Act 1925, s.130(5), or the variation of investments in a trust fund. For the concept of a fund, which is closely related to this species of overreaching, see Lawson and Rudden, *Introduction to the Law of Property* (2nd ed., 1975) at p. 38.

2. [1990] C.L.J. 277. There is a useful summary of overreaching (in relation to land) in Megarry and Wade, *Law of Real Property* (6th ed., ed. Harpum, 2000), paras 4-073 to 4-082.

3. [1997] Ch. 276.

4. *ibid.*, at p. 281D.

5. *Supra*, n. 2 at paras 8-157 *et seq.*

6. Owing to the abolition of the doctrine of conversion by s.3, and the statutory trust for sale by s.5.

7. 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. 171 *et seq.*
8. TLATA enacted a radical reform of the statutory regime governing the powers of trustees of land. The Trustee Act 2000 (subsequently TA 2000) has amended TLATA. However, it seems unlikely that TA 2000 was intended to effect any structural change to the statutory regime that governs the powers of trustees of land and the protection of purchasers from trustees of land. At the time of writing the Land Registration Bill 2001 (subsequently LRB 2001) is before Parliament; if enacted the Bill will have a significant impact on overreaching upon a disposition of registered land: see LRB 2001, cl. 26 and cl. 52. However, the framers of the Bill assume that the new provisions will operate within the context of the pre-existing law of overreaching.
9. [1990] C.L.J. 277 at pp. 296-303.
10. Bailey, "Trusts and Titles" (1944) 8 C.L.J. 36, was perhaps the first to notice a potential danger to purchasers posed by documents off the title that might determine both the existence of a trust for sale, and the contents of which might indicate that the conveyance to the purchaser was in breach of trust. There was also a doubt, never fully resolved, whether a trustee for sale's statutory powers could be cut down by express provisions in the trust instrument.
11. [1990] C.L.J. 277 at pp. 277-278 and 279-282.
12. *ibid.*, at pp. 293-294. Overreaching can affect legal estates as well as equitable interests. The most common examples after 1925 are the powers of both mortgagors and mortgagees to grant leases: see LPA, s.99, and the powers of mortgagees to pass a legal title they never held when exercising their power of sale. Before 1925 the most prominent "overreachers" were tenants for life under a settlement, exercising their statutory powers of disposition under the Settled Land Act 1882.
13. *ibid.*, at pp. 279-284, 292, 294-296, and 331.
14. *ibid.*, at pp. 280-282.
15. *ibid.*, at pp. 278-279.
16. *ibid.*, at pp. 290-293.
17. *ibid.*, at p. 290, explaining the purpose of the Law of Property Act 1922, s.3(1).
18. *ibid.*, at pp. 283-304.
19. [1971] Ch. 892. See also *Collings v. Lee* [2001] 2 All E.R. 332.
20. See [1990] C.L.J. 277 at p. 310, n. 83.
21. See TLATA, s.1(2).
22. [1988] A.C. 54.
23. See [1990] C.L.J. 277 at pp. 307-309.
24. [1988] A.C. 54 at pp. 78A and 82-83.
25. See [1990] C.L.J. 277 at pp. 304-310 for Harpum's argument; [1998] Conv. 168 at pp. 180-183 for ours; we return to this question below.
26. The projected replacement of LRA, s.18, by LRB 2001, cl. 23, should not affect the analysis of this issue.
27. See n. 8.
28. I may have the power (*i.e.* ability) to punch my enemy in the face, but I certainly do not have the authority to do so, because such an act will ordinarily constitute both a tort and a criminal offence: *i.e.* I have the power with a duty not to exercise it.
29. The disposition may give a claim to the original property in the purchaser's hands, which is good despite prejudicing the purchaser

"unfairly": see *Bowes v. East London Water Works Co.* (1820) Jacob 324, 37 E.R. 873, and *Oceanic Steam Navigation Co. v. Sutherland* (1880) 16 Ch. D. 236. The disposition may give rise to a right to elect between a claim against the original property or the proceeds of the transaction the disposition formed a part of, allowing effectively an endorsement of the disposition giving it an overreaching effect *ex post facto*: see *Re Champion* [1893] 1 Ch. 101. The disposition may (it seems) give the court discretion to award whatever remedy seems "equitable" between the parties: see *Tse Kwong Lam v. Wong Chit Sen* [1983] 1 W.L.R. 1349 at p. 1359H. The disposition may give rise to a defeasible claim against the purchaser, owing to the availability of a valid defence, and a personal claim against the holder of the power: see *Jones v. Smith* (1841) 1 Hare 43, 22 E.R. 943; affirmed (1842) 1 Ph. 243, 41 E.R. 624. The disposition may allow a statutory defence to the purchaser, restricting any claim to one in damages against the holder of the power: see LPA, s.104(2).

30. This aspect of the law is most familiar from the law relating to legal powers of appointment: "If an appointment is void at law, no title can be founded upon it": *Cloutte v. Storey* [1911] 1 Ch. 18 at p. 31; Megarry and Wade, *Law of Real Property* (6th ed., ed. Harpum, 2000), paras 10-77 to 10-100.
31. LPA, ss.85-87. A purported mortgage in the old form effects a new form of mortgage by demise: see ss.85(2) and 86(2).
32. 44 & 45 Vict. c. 41. The Trustee Act 1860, 23 & 24 Vict. c. 145, better known as Lord Cranworth's Act, provided an earlier statutory power of sale.
33. (1887) 35 Ch. D. 668.
34. *ibid.*, at p. 672.
35. (1887) 40 Ch. D. 470 at p. 472.
36. LPA, s.88.
37. Megarry and Wade, *Law of Real Property* (5th ed., 1984), at pp. 490-491, give two other examples, a power of attorney, and the power of Settled Land Act trustees.
38. A power of sale did not ordinarily imply a power to mortgage: see *Stroughill v. Anstey* (1852) 22 L.J. Ch. 130; *Devaynes v. Robinson* (1856) 24 Beav. 86; 53 E.R. 289; *Walker v. Southall* (1887) 56 L.T. 882.
39. *Belton v. Bass. Ratcliffe and Gretton Ltd* [1922] 2 Ch. 449.
40. *Williams v. Wellingborough Borough Council* [1975] 1 W.L.R. 1327. The peculiar situation of a local authority wishing to take back a former council house upon non-payment of mortgage is now governed by statute: see Housing Act 1985, s.452, Schedule 17, para. 1 (as amended by the Housing and Planning Act 1986).
41. *Twentieth Century Banking Corporation v. Wilkinson* [1977] Ch. 99.
42. The purpose of this legislative distinction has not always been clear: see Law Com. W.P. No. 99, *Land Mortgages* (1986), at 95.
43. It would appear that the risk to a purchaser of a mortgagee purporting to exercise a power of sale that has not arisen will be removed, for purchasers of registered land, by the enactment of LRB 2001, cl. 52. The Law Commission's Report makes it clear that one intended effect of this provision is to protect a disponee who takes from a mortgagee whose power of sale had not arisen at the time of the transfer: see Law Com. No. 271, *Land Registration for the Twenty-First Century, A Conveyancing Revolution* (2001), Part VII, para. 7.8(2); and Explanatory Notes on Draft Registration Bill, para. 240.
44. In the terms of the current legislation we are not, therefore, concerned with the power granted by TLATA, s.4(1), to postpone the sale of land subject to a trust; nor with the power granted by TLATA, s.6(3), and TA 2000, s.8, in relation to the acquisition of land (the disposition would be of the trust funds used to finance the purchase); nor with the powers granted by TLATA, s.13, which are concerned with the use of trust property and the regulation of the relationship between beneficiaries *inter se*.
45. The relevant current grant of power to sell is made by TLATA, s.6(1).
46. Thus, we are concerned with the powers currently granted by TLATA, ss.6(2) and 7(1), which provide for the conveyance of land held by trustees to their beneficiaries.
47. *Nemo dat quod non habet*.
48. A conveyance to beneficiaries under TLATA, ss.6(2) or 7(1), is the exercise of dispositive powers, but so is a sale to a purchaser under s.6(1).

49. The doctrine of conversion operated when there was a duty to sell, but not where there was a mere power to sell. The reliance upon conversion in some explanations of overreaching allowed this distinction importance that an explanation based upon powers denies to it.
50. Both pre-1926 mortgagees and trustees for sale had the legal estate, but needed the power to overreach the equitable interests in the land of the mortgagor and beneficiary respectively.
51. (1887) 35 Ch. D. 668 at p. 672, quoted *supra* at text to n. 35.
52. See, for example, Key and Elphinstone's, *Precedents in Conveyancing* (15th ed., 1953), Vol. 1 at p. 744.
53. (1820) Jacob 324 at pp. 326-327, 37 E.R. 873 at p. 874.
54. In this and the following quotations the passages in square brackets have been added by the present authors.
55. *ibid.* at pp. 330 and 876, respectively.
56. This accords with the judgment reported at 3 Madd. 374 at p. 383, 56 E.R. 543 at p. 546: "These leases cannot be supported. But if the absolute legal interest be on a trust for the benefit of another, and a limited power of leasing be given to the trustee, then a lease, not according to the power, though good at law in respect of the legal estate of the trustee, will be bad in equity as a breach of trust."
57. Such as occupation by a beneficiary, applying the rule in *Hunt v. Luck* [1902] 1 Ch. 428, or from the correspondence between the parties' solicitors, as in *Re Soden and Alexander's Contract* [1918] 2 Ch. 258.
58. As held in numerous cases with regard to powers to give receipts, whether the power was implied by the general law, or granted expressly: *Watkins v. Cheek* (1825) 2 Sim. & St. 199, 57 E.R. 321; *Stroughill v. Anstey* (1852) 22 L.J. Ch. 130; *Selwyn v. Garfit* (1887) 38 Ch. D. 273; *Walker v. Southall* (1887) 56 L.T. 882; *Re Bourne* [1906] 1 Ch. 113.
59. An argument put by counsel in *Bowes v. East London Water Works Co* (1820) Jacob 324 at p. 325, 37 E.R. 873 at p. 874, was that the breach of trust was merely technical and the trustees had acted in the beneficiaries' best interests; the argument was rejected by the court, although Lord Eldon expressed some sympathy with it, at pp. 328 and 875, respectively.
60. *Oceanic Steam Navigation Company v. Sutherland* (1880) 16 Ch. D. 236 at p. 245, *per* Lush L.J.
61. In *Robinson v. Briggs* (1853) 1 Sm. & Giff. 188, 65 E.R. 81, the active trustee followed the advice of counsel, and created such a complicated series of transactions that this very complexity was a factor giving notice of irregularity to a purchaser.
62. The beneficiaries did not have to assert their claim against the purchaser; when the purchase money still existed in a recoverable form they could take that instead: see *Re Champion* [1893] 1 Ch. 101.
63. A bona fide purchaser for value of a legal estate without notice of the equitable interest.
64. A point conceded by Lord Eldon in *Bowes v. East London Water Works Co*, and regretted by Lush L.J. in *Oceanic Steam Navigation Co v. Sutherland*. See also *Rede v. Oakes* (1864) 4 G. J. & S. 505, 46 E.R. 1015, and *Dunn v. Flood* (1885) 28 Ch. D. 586.
65. Megarry and Wade, *Law of Real Property* (5th ed., 1984) at pp. 341-342; Elliott, "Curing a Defective Lease Granted by a Tenant for Life" (1971) 87 L.Q.R. 338 at p. 341, quoted with approval by Harpum [1990] C.L.J. 277 at pp. 280-281.
66. Potter, "Rents in the Settled Land Curtain" (1946) 10 Conv. (N.S.) 135 at pp. 152-153.
67. Withers, "Settled Land Act 'Curtain'" (1939) 83 S.J. 45.
68. Albery, "The Settled Land Act Curtain" (1939) 4 Conv. (N.S.) 203.
69. [1950] Ch. 510.
70. The tenant for life concealed the existence of any settlement, and purported to mortgage under an earlier title. The trustees of the settlement were in breach of their duty to endorse the title deeds before delivering them into the tenant for life's custody. It was held that SLA, s.1 10 did not apply as the mortgagee did not know he was dealing with a tenant for life under a settlement, and the mortgage was void under SLA, s.18 *cf. Re Morgan's Lease* [1971] 2 All E.R. 235.

- [71.](#) TLATA, s.3.
- [72.](#) LRB 2001, cl. 26, is probably intended, *inter alia*, to meet this type of risk posed to a purchaser of registered land subject to an undisclosed settlement.
- [73.](#) This misconception had its origin in an attractive, but ultimately misleading, thesis first promulgated by John M. Lightwood in which he suggested that "Under the ordinary doctrine applying to trusts for sale, the sale would not be hindered by the existence of the beneficiaries, nor is it strictly correct that their interests are overreached by the exercise of the trust for sale, though the effect of the sale is usually so stated. Their interests exist in the proceeds of sale and in the rents and profits till sale, and they can only take an interest in the land itself by electing to put an end to the trust for sale." See Lightwood, "Trusts for Sale" (1929) 3 C.L.J. 59 at p. 65.
- [74.](#) See *City of London Building Society v. Flegg* [1988] A.C. 54, *per* Lord Oliver at p. 78A: "... the interests of owners in undivided shares ... are, by virtue of the equitable doctrine of conversion, transferred to the proceeds of sale and the net rents and profits pending sale although, pending the exercise of the trustees' powers, they retain, by judicial construction, some of the incidents of the legal interests which they replaced." See also Lord Oliver at pp. 82-83. The ghost of an analysis based upon conversion still haunts the judgments in this area: see *State Bank of India v. Sood* [1997] Ch. 276 at p. 281B.
- [75.](#) [1997] Ch. 276 at p. 284C. We discussed the decision in *Sood* in our article "The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land" [1998] Conv. 168 at pp. 180-183.
- [76.](#) The decision in *Sood* is adopted as authority for the statement that: "In registered conveyancing it is fundamental that any registered proprietor can exercise all powers of disposition unless some entry on the register exists to curtail or remove those powers" [1997] Ch. 276 at p. 284, quoted in Megarry and Wade, *Law of Real Property* (6th ed., Harpum (ed.), 2000) at para. 8-155. This quotation immediately follows the assertion that purchasers of registered land do not need protection from the risk of taking land subject to equitable interests that have not been overreached owing to a breach of some provision of the 1996 Act. The implication the reader is invited to make seems to be that registered proprietors have powers of disposition that are not limited by any provisions of TLATA, as TLATA is not concerned with registered proprietors as such. However, this is to confuse the abilities of registered proprietors, a matter that is not the concern of TLATA, with the authority of the trustees of land, the very subject with which TLATA is concerned. Trustees of registered land are subject to the same limitations on their powers (*i.e.* their authority to act) as trustees of unregistered land. The implications of excluding s.16 from registered land have already been explored by the present authors, in [1998] Conv. 168, and we intend to return to the issue in a future article. The issue will be deeply affected by the enactment of LRB 2001, cl. 26.
- [77.](#) [2000] Conv. 267.
- [78.](#) LRA, ss.18, 21, 25, 31, 33, 37, 40, 101, 104, 107 and 108.
- [79.](#) LRA, ss.18, 21, 25, 31, 33, 37, 38, 39 and 109.
- [80.](#) LRA, s.58.
- [81.](#) LRA, ss.19, 22, 26, 31 and 33.
- [82.](#) LRA, s.101.
- [83.](#) LRA, ss.2 and 69, hence ss.37, 41, 42, 44, 71, 75, 78, 86, 92, 94, 98 and 111.
- [84.](#) LRA, s.74.
- [85.](#) LRA, s.110.
- [86.](#) This necessity underlies the passage from Ruoff and Roper, *Law and Practice of Registered Conveyancing* (6th ed.) at para. 32-05, which was adopted by Peter Gibson L.J. in *State Bank of India v. Sood* [1997] Ch. 276 at p. 284, and cited in the 6th ed. of *Megarry and Wade* at para. 8-155. See n. 76, *supra*.
- [87.](#) *Contra* Harpum [1990] C.L.J. 277 at p. 306, n. 64.
- [88.](#) If LRB 2001 is enacted there will be no conflict between TLATA, s.6, and LRB 2001, cl. 23. The LRB 2001 has abandoned the statutory drafting technique adopted in 1925, of listing those dispositions a registered proprietor is able to make, and has substituted a grant of the power to make any disposition, subject to exclusions. This drafting preference cannot affect the nature of the powers bestowed, and the arguments in the text apply equally to cl. 23.
- [89.](#) [1988] A.C. 54.

90. *ibid.* at p. 90E.
91. *ibid.* at p. 91G.
92. Ferris and Battersby, "Overreaching and the Trusts of Land and Appointment of Trustees Act 1996--a Reply to Mr Dixon" [2001] Conv. 221. The citation is recorded at [1988] A.C. 54 at p. 64D; the reference in Lord Templeman's speech is at p. 72F.
93. [1990] C.L.J. 277 at pp. 294-295: "A conveyance by trustees for sale will only overreach interests which are capable of being overreached either pursuant to section 2(2), or 'independently of that subsection'. Trustees for sale can only overreach if the transaction is one which they are empowered to make."
94. *City of London Building Society v. Flegg* [1988] A.C. 54 at pp. 78B, 81D, 83E-F, 85D; *State Bank of India v. Sood* [1997] Ch. 276 at pp. 281G-282E; *Birmingham Midshires Mortgage Services Ltd v. Sabarwal* (2000) 80 P. & C.R. 256, noted by Dixon [2000] Conv. 267.
95. [1990] C.L.J. 277 especially at pp. 277, 279, 294, 309.
96. Harpum, in [1990] C.L.J. 277 at p. 279, suggested that the error "seems to rest on the assumption that the provisions of the Law of Property Act 1925 provide a self-contained code for the operation of overreaching".
97. "Purchaser" means "a person who acquires an interest in or charge on property for money or money's worth": LPA, s.205(xxi). The opening words of the section were not amended by TLATA. It is submitted that "A conveyance ... of a legal estate" means the transfer of the estate, and not the instrument of conveyance. There are dicta which suggest the contrary in *City of London Building Society v. Flegg* [1988] A.C. 54 at p. 91C and G; for an analysis of this aspect of *Flegg*, see Ferris, "Structural Differences Between Registered and Unregistered Land Law", in Jackson and Wilde (eds), *Contemporary Property Law* (1999) Vol. 1, at p. 143. Where a conveyance of unregistered land is concerned, the possibility of an apparent trust for sale masking an actual settlement of land would produce a similar position: see SLA, s.18, and Bailey, "Trusts and Titles" (1942) 8 C.L.J. 36. There is no reason to suppose that TLATA has had any effect on this point.
98. See LPA, s.2(4) and (5).
99. The equivalent expression is "bound by" in para. (iv).
100. [1990] C.L.J. 277 at p. 290, explaining the purpose of the Law of Property Act 1922, s.3(1), which became the opening words of LPA, s.2(1).
101. These were (i) a conveyance made under the powers conferred by the SLA (or any additional powers conferred by the settlement); (ii) a conveyance by trustees for sale; (iii) a conveyance by a mortgagee or personal representative in the exercise of their paramount powers; (iv) a conveyance made under an order of court. Para. (ii) was amended by TLATA so as to refer to trustees of land.
102. Bailey, "Trusts and Titles" (1942) 8 C.L.J. 36 at 37.
103. Some of these provisions have subsequently been amended or repealed.
104. Although only s.110(1) expressly requires good faith, the definition of purchaser at s.117(1)(xxi) requires good faith and value.
105. Which protects a purchaser taking under a contract which is subject to unnecessarily depreciatory special conditions.
106. Which provides that the assent or conveyance itself is sufficient evidence of its own validity in this respect unless notice of a previous assent or conveyance was placed on or annexed to the probate or administration. However this does not mean that no evidence other than a notice on or annexed to the probate or administration can affect the purchaser with notice: see *Re Duce and Boots Cash Chemists (Southern) Ltd's Contract* [1937] Ch. 642.
107. This provision protected a lessee acting in reliance upon a written and signed delegation of leasing powers by trustees for sale. It was repealed by TLATA.
108. The LPA provided that a purchaser was not concerned with compliance with ss.24(1) or 26(3), nor with compliance with the consent requirement of s.28(3); these sections were repealed by TLATA. A purchaser of a legal estate was not concerned with directions in a trust for sale respecting the use of a power to postpone sale, s.25(1); nor with the trusts affecting the purchase price (and rents and profits pending sale), s.27(1). TLATA repealed s.25 and amended s.27. The SLA provides that purchasers are not concerned to see that notice is given to, nor consent obtained from, assignees of the tenant for life's estate in specified circumstances: s.104(4) and (5). The Trustee Act 1925, s.17, provides that no "purchaser or mortgagee" is concerned to see that trustees to whom they paid or advanced money had need of the money, nor that the amount raised was justified, nor to the application of the money. Unlike the LPA the Trustee Act 1925 does not define "purchaser", and whether good faith should be implied by the word, or not, must remain an open question. Outside of the

LPA, Part 1, and the Land Charges Act 1925 (now Land Charges Act 1972) good faith was usually imported by the word "purchaser": see LRA, s.3(xxi); SLA, s.117(1)(xxi); LPA, s.205(1)(xxi); Administration of Estates Act 1925, s.55(1)(xviii), but see ss.36(11) and 41(8). TLATA makes use of a very similar expression at s.16(1).

109. s.26(1), repealed by TLATA.
110. s.26(2), repealed by TLATA.
111. Provisions in addition to those mentioned in the text are: Administration of Estates Act 1925, ss.36(6), 36(7), 36(8), 37(1) and 41(7); SLA, ss.13, 16(8), 17(3), 35(3), 39(4)(iii), 42(3), 95 and 101(5); LPA, s.104.
112. LPA, s.2(4).
113. s.2(4) and (5).
114. The same words were used in both *Dance v. Goldingham* (1873) 8 Ch. App. 902 at p. 910 and *Dunn v. Flood* (1885) 28 Ch. D. 586 at 591. See *Mortlock v. Buller* (1804) 10 Ves. Jun. 292, 32 E.R. 857; *Robinson v. Briggs* (1853) 1 Sm. & Giff. 188, 65 E.R. 81.
115. This point may be the real import of the distinction between an *ultra vires* and an *intra vires* breach of trust. Notice of the existence of a trust gave a purchaser notice of the trustees' powers, and therefore notice if the conveyance to the purchaser was *ultra vires*. Mere notice of a trust did not import notice that the trustees were acting improperly. Thus in *Dance v. Goldingham* (1873) 8 Ch. App. 902, James L.J. required "notice of the irregularity", and Mellish L.J. required "the purchaser has notice of this" ("this" being a breach of trust), before finding a purchaser affected by a breach of trust. In *Re Bourne* [1906] 1 Ch. 113 at p. 119, the court required "express knowledge" of an intended misapplication of purchase money before a purchaser would be subordinated to one entitled to an equitable lien. In *Watkins v. Cheek* (1825) 2 Sim. & St. 199 at p. 205, 57 E.R. 321 at p. 324, the court held that, although a purchaser could rely on an executor's discharging receipt as a general principle, a purchaser was not protected when there was intrinsic evidence that the transaction was in breach of trust. Such notice made a purchaser "a party to the breach of trust [who] does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor".
116. *Cave v. Cave* (1880) 15 Ch. D. 639; *Young v. Young* (1867) 3 Eq. 801; *Weston v. Henshaw* [1950] Ch. 510; *Boursot v. Savage* (1866) 2 Eq. 134.
117. *Re Champion, Dudley v. Champion* [1893] 1 Ch. 101; *Mogridge v. Clapp* [1892] 3 Ch. 382.
118. *Mortlock v. Buller* (1804) 10 Ves. Jun. 292, 32 E.R. 857; *Robinson v. Briggs* (1853) 1 Sm. & Giff. 188, 65 E.R. 81.
119. *Perham v. Kempster* [1907] 1 Ch. 373.
120. [1990] C.L.J. 277 at pp. 279-280: "Dispositive powers are not inherently different from powers of appointment, and it would be reasonable to expect some parallel to the equitable doctrine of fraud on a power to be applicable to powers of disposition." Of course a "fraud" on a power does not necessarily constitute fraud in the more usual sense of the word: see *Armitage v. Nurse* [1998] Ch. 241 at pp. 252-253, where Millett L.J. describes "frauds on powers" as "a technical doctrine in which the word 'fraud' merely connotes excess of vires". Given the case law on frauds on powers this should not be taken to mean that a fraudulent use of a power is necessarily *ultra vires*; a "misuse of vires" might have been a happier expression.
121. *Topham v. Portland* (1862) 31 Beav. 524, 54 E.R. 1242; (1863) 1 De J. & S. 516, 46 E.R. 205; (1864) 11 H.L.C. 32, 11 E.R. 1242; (1869) 5 Ch. App. 40.
122. *Dowager Duchess of Sutherland v. Duke of Sutherland* [1893] 3 Ch. 169.
123. *In Re Earl Somers (Decd), Cocks v. Lady Henry Somerset* (1895) 11 T.L.R. 567.
124. *Chandler v. Bradley* [1897] 1 Ch. 315.
125. *Middlemas v. Stevens* [1901] 1 Ch. 574.
126. *Wheelwright v. Walker (No 2)* (1883) 31 W.R. 912.
127. *Robinson v. Briggs* (1853) 1 Sm. & Giff. 188, 65 E.R. 81; *Perham v. Kempster* [1907] 1 Ch. 373. If there was a doubt as to the unencumbered beneficial title of a mortgagor the practice seems to have been to extract a statutory declaration from the mortgagor, see *Perham v. Kempster* at 381. For a similar precaution being used when there was doubt over the propriety of an appointment see *Cloutie v. Storey* [1911] 1 Ch. 18 at pp. 23 and 30.

- [128.](#) [1972] Ch. 892. See also the recent similar case of *Collings v. Lee* [2001] 2 All E.R. 332, although *Collings v. Lee* concerned a dispute between a mortgagee and an equitable owner, the major distinction between *Hodgson v. Marks* and *Collings v. Lee* appears to be that in *Collings v. Lee* the transfer to a rogue was made by two trustees for sale.
- [129.](#) [1990] C.L.J. 277 at p. 310, n. 83. As a bare trustee Evans did not fall into the exceptions in Trustee Act 1925, s.14(2).
- [130.](#) *Hodgson v. Marks* [1972] Ch. 892, and text above; also see Bailey, "Trusts and Titles" (1942) 8 C.L.J. 36. It is submitted that this need for a sale explains the failure of LPA, s.2, to operate upon the conveyance to Mr Lee (under the alias Martin Styles) in *Collings v. Lee* [2001] 2 All E.R. 332. Mr Lee was not a purchaser, as he had not acquired an interest for money or money's worth: see LPA, s.205(xxi). Nor could Mr Lee comply with the statutory requirements for the payment of capital money, as s.27(2) LPA is drafted on the assumption that there has been a sale. The *point* was not expressly dealt with by the Court of Appeal. At first instance it had been assumed that Mr and Mrs Collings had only a right to set aside the transfer to Mr Lee/Styles: see [2001] 2 All E.R. 332 at p. 336 c-d. It is not clear whether the court held: (1) that the original interest of Mr and Mrs Collings survived the transfer to Mr Lee/Styles (at p. 337 g), or, (2) the original interest was destroyed by the transfer, but replaced by an identical interest, under an implied, resulting, or constructive trust (at p. 336 j). The argument seems to have turned upon authorities concerned with the imposition of constructive trusts upon fiduciaries involved in malfeasance. Surely, the application of the simple principle that a donee of trust property will receive that property subject to the trust is the preferable approach to the facts.
- [131.](#) Para (i) deals with a conveyance "made under the powers conferred by the Settled Land Act 1925 or any additional powers conferred by a settlement". It seems self-evident that a conveyance that was not made under those powers would not fall within the operation of s.2(1). Para. (iv) deals with a conveyance "made under an order of the court"; the only question of *vires* this raises is one of jurisdiction.
- [132.](#) Megarry and Wade, *Law of Real Property* (6th ed., ed. Harpum, 2000), at para. 19-059. We have suggested above that the question of whether the power has arisen is concerned with legal ability.
- [133.](#) s.104(2) provides: "Where a conveyance is made in exercise of the power of sale conferred by this Act, or any enactment replaced by this Act, the title of the purchaser shall not be impeachable on the ground--(a) that no case had arisen to authorise the sale; or (b) that no notice was given; or (c) where the mortgage was made before the commencement of this Act, that leave of the court, when so required, was not obtained; or (d) whether the mortgage was made before or after such commencement, that the power was improperly or irregularly exercised; and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damaged by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power."
- [134.](#) *Cloutte v. Storey* [1911] 1 Ch. 18.
- [135.](#) This is in marked contrast to most of the provisions enacted to protect purchasers by the 1925 legislation. For example, the operative words of LPA, s.2 are those that provide that overreaching will occur "whether or not he has notice thereof"; those sections that provide that a "purchaser shall not be concerned" with, or to see, or to see or inquire: see LPA, ss.26, 27, and 28, and Trustee Act 1925, s.17, are generally considered to operate by restricting the operation of notice. Even the Land Charges Act 1972 maintains the façade of operating via notice, with registration being deemed notice: see LPA, s.198, and with no other form of notice being able to affect a purchaser: see LPA, s.199(1)(i), and *Midland Bank Trust Co. Ltd v. Green* [1981] A.C. 513. The technique of making a purchaser's title unimpeachable is not unique to LPA, s.104: see Trustee Act 1925, s.13(2). The words of LRB 2001, cl. 26 and cl. 52, seem to echo, in more modern English, the words of LPA, s.104.
- [136.](#) [1988] A.C. 54 at p. 83E, for example.
- [137.](#) See *Birmingham Midshires Mortgage Services Ltd v. Sabherwal* (2000) 80 P. & C.R. 256, as noted by Harpum (2000) 116 L.Q.R. 341 at p. 343.
- [138.](#) *Irani Finance Ltd v. Singh* [1971] Ch. 59, *per* Cross L.J. at pp. 79-80, as cited with approval by Lord Oliver in *City of London Building Society v. Flegg* [1988] A.C. 54 at pp. 82-83.
- [139.](#) *Watkins v. Cheek* (1825) 2 Sim. & St. 199, 57 E.R. 321; *Stroughill v. Anstey* (1852) 22 L.J. Ch. 130, *Selwyn v. Garfit* (1887) 38 Ch. D. 273, *Walker v. Southall* (1887) 56 L.T. 882, *Re Bourne* [1906] 1 Ch. 113. It seems our basic approach to s.27 LPA is shared by Harpum: see (2000) 116 L.Q.R. 341 at p. 343.
- [140.](#) [1997] Ch. 276.
- [141.](#) *ibid.*, at p. 286H.
- [142.](#) *ibid.*, at p. 287H, *per* Peter Gibson L.J.
- [143.](#) [1935] Ch. 310 at p. 318. That passage is cited by Megarry and Wade, *Law of Real Property* (6th ed., ed. Harpum, 2000), para. 19-059. Fisher and Lightwood's *Law of Mortgage* (10th ed., 1988, Tyler (ed.)) at p. 387 cites the case as authority for the statement: "it now appears to be generally accepted that the conveyance may be set aside if the purchaser takes with knowledge of any impropriety in the sale" and gives various authorities to that effect at nn. (u)--(z).

144. The non-application of LPA, s.205(xxi), to the definition of "purchaser" in the Land Charges Act 1925 had a crucial impact upon the approach taken to a purchaser with actual notice of a land charge in *Midland Bank Trust Co. Ltd v. Green* [1980] A.C. 513.
145. s.104 falls within Part III of the LPA and therefore "purchaser" is defined as "a purchaser in good faith for valuable consideration ...": see LPA, s.205(xxi).
146. The relationship with LRB 2001, cl. 26, is different. The intention of the Law Commission and the Land Registry seems to be that cl. 26 should dovetail with LPA, s.2, rather than supplant it. See Law Com. No. 271, Part I, para. 2.15; Part IV, paras 4.3 and 4.10; Part VI, para. 6.40(3). We plan in a future article to make a full analysis of the relationship between cl. 26 and s.2, applying our analytical approach to the overreaching of equitable interests in land in the light of recent legislative changes (TLATA, TA 2000, and what will become the Land Registration Act 2002).
147. Law Com. W.P. No. 99 (1986), *Land Mortgages*, at 95.
148. Senior Lecturer in Law, Nottingham Trent University.
149. Professor of Law, University of Sheffield.

© 2011 Sweet & Maxwell and its Contributors

