would have owed a duty had it taken the claimants into care; but as it was, it did not assume responsibility for the claimants' safety merely by virtue of "investigating and monitoring the claimants' position", while the mother's "anxiety" to be rehoused did not "amount to reliance" (at [81]). The fact-intensive quality of this part of Lord Reed's judgment suggests that the case could have been better dealt with on breach and causation grounds. The errors committed by the council did not clearly lead to actionable damage. A jurisprudence focused on "duty" inevitably means that a more nuanced account of what amounts to fault in complex settings such as this will be slow to emerge.

In the light of Lord Reed's judgments in *Robinson* and *GN*, it may be difficult to maintain the idea that there are special "policy" factors limiting the tortious liabilities of public bodies, although some of these may reappear in future under the heading of the "statutory framing" of the common law duty of care, which continues to be relevant (Lord Reed at [75]). But should the liabilities of public and private sector defendants be so closely aligned? Private law, in conjunction with liability insurance, prices risks and entities are generally able to diffuse and absorb the costs of managing them. Local authorities, on the other hand, are providing public goods for which no effective price mechanism exists. They cannot use insolvency law or the corporate form to shield themselves from excessive liabilities in the same way that their private sector counterparts can. Rules on joint liability effectively make them defendants of last resort for risks run by others. It is difficult to see why there shouldn't be a special regime for public torts.

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OVERREACHING AND TRUSTS OF LAND

"THE doctrine of overreaching is a means by which some interests in land, particularly beneficial interests under a trust, are removed from the land on a disposition and attach to the proceeds of sale" (Law Com No 380 (2018), xvi). The doctrine matters in "priority disputes": cases where several parties claim an interest in a single asset, and each argues that he is entitled to enjoy his interest free of the claims of the others.

Baker v Craggs [2018] Ch. 617 involved a priority dispute. *A* (Mr. and Mrs. Charlton) had sold and conveyed land to *B* (Mr. Craggs). Before *B* registered the conveyance, and so acquired legal title to the land, *A* granted a legal easement over that same land to *C* (Mr. and Mrs. Baker). Did B's equitable title pending registration have priority over the easement granted to *C*? *C* argued that it did not: at the time the easement was granted,

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A held the land on vendor-purchaser constructive trust for *B*, *A* exercised their powers as trustees in granting the easement, and by so doing overreached *B*'s interest.

Henderson L.J., with the agreement of Patten L.J. and Flaux L.J., ruled that *B* was not bound by the easement, reversing the judgment of Newey J. in the High Court. *A*'s grant of the easement did not overreach *B*'s interest for two reasons.

First, section 2(1) of the Law of Property Act ("LPA") 1925 provides that only the grant of a "legal estate in land" can overreach an equitable interest under a trust: a term which does not include an easement. *A* could not overreach *B*'s interest by granting an *easement* to *C*.

Second, under section 27(2) of the LPA 1925, an equitable interest under a trust of can *only* be overreached where trustees dispose of trust assets in return for new value which is due at the time of the disposition. On the facts, (1) the easement was first created by the grant to *C*, and so could not have been a trust asset before that time and (2) the money *C* had paid *A* was not specifically consideration for the easement (it was the purchase price for land that *C* bought from *A*, the dominant tenement of the easement), and so was not paid in return for the easement.

Both limbs of the Court of Appeal's reasoning are likely to split opinion, and the decision is at the sharp end of the debate about what explains a trustee's ability to "overreach" a beneficiary's interest in a trust of land.

Henderson L.J.'s answer to this question is clear: the *only* reason trustees of land can overreach beneficial interests is section 2 of the LPA 1925. Section 2(1) says that it is the grant of a "legal estate" which allows overreaching to happen, and so a purchaser has no grounds for arguing that the grant of an interest of another type is capable of overreaching beneficial interests. To those who see overreaching as rooted in section 2(1), the judgment in *Baker v Craggs* will make perfect sense: after all the term "legal estate" does not usually refer to an easement. As Junita Roche has shown, despite the inconsistent uses of the term "legal estate" in the LPA 1925, its drafting history shows that the term as used in section 2(1) was not intended to include an easement: [2018] C.L.J. 600.

However, Henderson L.J.'s interpretation of overreaching is controversial, and at odds with the orthodox account of overreaching adopted by the Court of Appeal in *Bank of India v Sood* [1997] Ch. 276, set out most expansively by Charles Harpum ([1990] C.L.J. 277). According to that view, overreaching is a common law doctrine, best understood as part of the law of powers. It is the legal mechanism whereby one person's interest in an asset is destroyed or loses priority, because another has exercised a power to transfer, or create new interests over, that same asset. While the LPA 1925 modifies how overreaching works, it is not the *source* of trustees' ability to overreach, which is rooted in the powers conferred by the trust's terms. The orthodox view of overreaching fits best with the

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wording of section 2, which says that trustees who convey a legal estate will overreach beneficiary interests either under section 2(2) or "independently of that subsection". Section 2(2) provides an enhanced form of overreaching, which affects a wider range of interests, for dispositions made by trust corporations or court-approved trustees. Outside of that context, section 2 cannot be the root of a trustee's ability to overreach – it simply cross references the common law.

On this orthodox view, the ruling in *Baker v Craggs* is difficult. While Henderson L.J.'s answer to what constitutes a "legal estate" makes good sense, the error was in treating section 2 as *limiting* overreaching to conveyances of legal estates. Imagine a case where *A* (two people) hold land on trust for *B*, and the terms of the trust allow *A* to grant an equitable charge over the land. A then grants an equitable charge to *C*. If overreaching is part of the law of powers, then such a grant ought to overreach B's interest in the land, entirely independently of section 2. Likewise, if the terms of the trust authorised *A* to grant *C* an easement, the grant of that easement should overreach B's interest – regardless of whether an easement is a "legal estate". The ruling in *Baker* instead treats section 2(1) as providing that a trustee can *only* overreach beneficial interests by granting a legal estate: a freehold, leasehold or legal mortgage charge.

It is questionable whether section 2(1) was ever intended to limit overreaching in this way, and here the orthodox view again best fits with the wording of the Act. Section 27(2) of the LPA 1925 does limit when overreaching can occur "Notwithstanding anything to the contrary in the instrument (if any) creating a trust of land", but there is no equivalent statement in section 2(1), which sets out the circumstances in which "a conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate". This explains why Benjamin Cherry, the Act's drafter, said that section 2(1) "collects and states" the ways a conveyance of a legal estate can overreach an equitable interest, but made no reference to it limiting overreaching to cases involving the conveyance of a legal estate (B. Cherry et al., *Wolstenholme & Cherry's Conveyancing Statutes*, vol. I, 12th ed. (London 1932), 232).

Divisions over the nature of overreaching are also likely to split opinion on the second limb of Henderson L.J.'s reasoning, that section 27(2) of the LPA 1925 prevents overreaching where the trustees have received no new value from a purchaser of trust assets. The argument is that a beneficiary's interest has to "shift" from the initial trust assets into a substitute money sum. If there is no such sum for the beneficiary's interest to "shift" into, then his interest in the original trust asset cannot be overreached. On Henderson L.J.'s view then, the LPA 1925 creates the possibility of overreaching, but protects beneficiaries by limiting it to conveyances of legal estates for new value. That reasoning is irreconcilable with the decision in *Bank of India v Sood* [1997] Ch. 276 (CA). Applying the orthodox

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understanding of overreaching, Gibson L.J. ruled that a disposition of land made by trustees could overreach the beneficiaries' interests, even where no new value was paid at the time of the disposition. The issue was simply whether the trustees had the power to make the disposition. Despite this, Henderson L.J. did not discuss *Bank of India v Sood*, and so did not expressly overrule it – though it was cited in the skeleton arguments. Given the conflict, which decision should later courts follow?

It is submitted that the orthodox reasoning applied in *Bank of India v Sood* fits better with the wording of section 27(2), which provides that "the proceeds of sale [of the trust property] or other capital monies shall not be paid or applied by the direction of fewer than two persons as trustees, except where the trust is a trust corporation". In other words, where a disposition of trust land is made in return for new value, there is an additional requirement for overreaching to occur. That new value must be paid according to the instructions of at least two trustees or a trust corporation, otherwise the beneficiaries' interest in the land disposed of will not be overreached. In Cherry's words, "The safeguard against mistake or fraud of having at least two trustees or a trust corporation where capital money falls to be received is a fairly obvious reform" (Cherry et al., *Wolstenholme & Cherry's Conveyancing Statutes*, vol. I, 12th ed., 268). The section does *not* provide that overreaching can *only* happen where trustees are paid new value, as Henderson L.J. suggests in *Baker v Craggs* – this explains provision that "this subsection [s. 27(2)] does not[,] . . . except where capital money arises on the transaction, render it necessary to have more than one trustee". Whereas beneficiaries were protected in cases where no capital monies were payable by the rule that trustees had no power to dispose of trust assets in satisfaction of their pre-existing private debts or fraudulently (C. Dale and G. Streeten, *Lewin on Trusts*, 12th ed. (London 1911), 562–64), section 27(2) was designed to reduce the risk of trustees misappropriating capital monies in cases they were payable.

How then should *Baker v Craggs* have been decided? It is submitted that the court should have applied orthodox principles, and so focused on the trustees' powers when determining whether *B*'s interest had been overreached. TLATA 1996, s. 6(1) by default provides that "For the purpose of exercising their functions as trustees, [have] all the powers of an absolute owner", including the power to grant an easement. As trustees, *A* therefore did have a power to grant the easement to *C* and doing so should have overreached *B*'s interest. Alternatively, it might be argued that TLATA 1996, s. 6(1) does not apply to vendor-purchaser constructive trusts: on the basis that the such trusts are specifically enforceable contracts of the sale of land, the purpose of which would be defeated by recognising the vendor as having "all the powers of an absolute owner". However, even this should not have prevented *B*'s interest being overreached. Section 26 of the Land Registration Act ("LRA") 2002 provides that a purchaser from a registered

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title holder will not be affected by any limitations on the registered title holder's equitable powers to deal with the property – unless that limitation is recorded by a restriction on the register. As the Law Commission has recognised, in the absence of a restriction, under modern law any grant or disposition made by a trustee of registered land will overreach the beneficiaries' interests, (Law Com No 380 (2018) at 5.138 and 5.169). Accordingly, even if *A* had no power to grant an easement, *B* had entered no restriction on the facts *Baker v Craggs*, and so *B*'s interest would have been overreached by the grant of the easement to *C*.

This reasoning raises a broader issue: the conflict between the historical rationale for recognising vendor-purchaser constructive trusts and the protection modern statutes give to third parties vis-à-vis equitable interests in land.

The vendor-purchaser constructive trust arises in part to protect a buyer from third parties to whom the seller might later give an interest in the land being sold. That is why a buyer is recognised as acquiring an interest under a trust which will bind third parties who cannot make out the relevant defence: for registered land that defence is contained in the LRA 2002, s. 29.

However, statute has narrowed this protection. In conjunction, TLATA 1996, s. 6 and the LRA 2002, s. 26, mean that any grant or disposition made by a trustee of registered land will overreach the beneficiaries' interests unless either (1) the trust assets were sold or mortgaged for new value which was not paid to at least two trustees or a trust corporation (LPA 1925, s. 27(2)) or (2) the terms of the trust restrict the trustee's powers of disposition (TLATA 1996, ss. 6, 8) and these restrictions are entered in the Land Registry (LRA 2002, ss. 26, 40).

The decision in *Baker v Craggs* is perhaps best understood as an attempt to push back the tide, rooted in a sense that legislation goes too far in protecting third parties from equitable interests. On an orthodox approach, where two trustees have power under the trust's terms to make a disposition to a third party, the beneficiary's interest will always be overreached by the disposition, whatever the merits of the beneficiary's case. However, on Henderson L.J.'s approach, overreaching will only happen where the trustees have made a conveyance of a legal estate for new value. This means that purchasers will more often have to rely for priority on section 29, and so beneficiaries in actual occupation of the property will be protected by the LRA 2002, Sch. 3, para. 2. Henderson L.J.'s statement (at [4]) that priority disputes should be resolved through section 29 and Schedule 3 is in this sense understandable. However, given that the orthodox approach best fits the wording of the LPA 1925, the deeper question is what degree of reinterpretation is justified to increase the protection the law gives trust beneficiaries.

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