

# Trusteeship, Ostensible Authority, and Land Registration: the category error in *Wishart*

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*Summary (50 words): This article sets out the relationship between trusteeship, agency, and the doctrine of ostensible authority. It argues that the judgment in Wishart v Credit and Mercantile incorrectly conflated the rules concerning the authority of trustees and agents, and also rested on a misunderstanding of the Land Registration Act 2002.*

*Abstract: This article sets out the relationship between trusteeship, agency, and the doctrine of ostensible authority. It argues that the decision of the Court of Appeal in Wishart v Credit and Mercantile incorrectly conflated the rules concerning the authority of trustees and agents in way which creates wider problems for the law of trusts. It contends that the decision rested on a misunderstanding of the Brocklesby principle, the doctrine of ostensible authority more generally, as well as the scope and purpose of the Land Registration Act 2002. It will be suggested that later courts should depart from the reasoning in the judgment insofar as it concerns both the general law and the rules governing registered land.*

## I. Introduction

It is uncontroversial that different legal rules apply to different legal areas. After all, taxonomies of law are designed to group together like cases with like, to make the law more consistent in its application. That is not to say that one set of facts cannot trigger a range of legal responses or that common rules are applied to a range of areas of law. A set of facts which illustrates the proposition very neatly is one in which A entrusts his property to B to manage.<sup>1</sup> Such an arrangement can give rise to a relationship of trusteeship, agency, or indeed both relationships at once, as in cases concerning nominees and some types of *Quistclose* arrangement.<sup>2</sup> The similarity in the scenarios which can give rise to trusteeship and agency are reflected in the common legal doctrines applied to trustees and agents entrusted with the assets of their principal. Both types of office holder owe fiduciary duties,<sup>3</sup> duties of care and skill,<sup>4</sup> and custodial duties<sup>5</sup> in respect of any assets they manage.

It makes sense, therefore, to accept that a given set of facts can trigger multiple legal responses. However, to recognise that facts which always create one type of legal relationship *by definition* also create another, would fundamentally alter the working of our

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<sup>1</sup> This shorthand of A as principal, B as agent or trustee, and C as a third party will be used throughout this article.

<sup>2</sup> Those facts, of course, might also give rise to a contract of bailment.

<sup>3</sup> Peter Watts and Francis Reynolds (eds), *Bowstead & Reynolds on Agency* (20th edn, London 2014) 6–032 to 6–109; Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2010) 8 (agents); 8, 11, 36 (trustees).

<sup>4</sup> Watts and Reynolds (n 3) 6–015; Tucker et al (ed), *Lewin on Trusts* (2015) paras 34–001 to 34–014.

<sup>5</sup> See Charles Mitchell, ‘Stewardship of property and liability to account’ [2015] Conv 215; Hayton et al (eds) *Underhill and Hayton: Law relating to Trusts and Trustees* (2010) Article 50.

legal categories. This is the apparent effect of the Court of Appeal's reasoning in *Wishart v Credit and Mercantile Plc*,<sup>6</sup> which provides that where A authorises B to hold assets on trust for A's benefit (in whole or in part), that B will always be treated as an agent of A, with ostensible authority to bind A's interest in the trust assets. The decision was justified by Sales LJ as an application of the principle rooted in *Brocklesby v Temperance Permanent Building Society*,<sup>7</sup> as interpreted by the Court of Appeal in *Abbey National v Cann*,<sup>8</sup> which he treated as binding authority upon him.

This article seeks to challenge the proposition that the doctrine of ostensible authority, a doctrine of the law of agency, ought to be applied *in banc* to trusts cases of the kind outlined above. Such an application is supported neither by principle nor authority. This will be demonstrated as follows. Part II of this article will set out the orthodox relationship between trusteeship, agency, and the doctrine of ostensible authority. Part III will demonstrate how *Wishart* in its application of the *Brocklesby* principle departs from this orthodox position. Part IV will examine the authorities governing the *Brocklesby* principle, its scope, and the extent to which it has been modified by later statute and common law, before evaluating the contention that the Court of Appeal in *Wishart* was bound by authority to reach the conclusion it did. Part V will then show the problematic implications of applying the doctrine of ostensible authority to the law of trusts, and Part VI will suggest how *Wishart* should be treated by later courts.

This analysis will show that applying ostensible authority to all trusts arising from B holding assets for A's benefit would fundamentally alter the nature of such trusts; undermine the land registration rules; and be inconsistent with the policy concerns underlying the courts' reasoning in cases like *William & Glyn's Bank v Boland*<sup>9</sup> and *Royal Bank of Scotland v Etridge*.<sup>10</sup> It will further be contended that the court in *Wishart* was not as a matter of authority bound to apply the *Brocklesby* principle in the way it did, on the basis of both common law and statutory authority.

## II. Orthodoxy

### 1. Ostensible Authority and Agency

The doctrine of ostensible authority, sometimes referred to as apparent authority, provides that where A holds out B as having authority to bind him, and C deals with B in reliance on that representation, then B is treated as having authority to bind A vis-à-vis C, without reference to the actual terms of B's authority.<sup>11</sup> A variant of the principle, sometimes referred to as 'ostensible ownership', provides that where A enables B to appear as owner of A's property, or as otherwise having powers to dispose of it, then B will be able to sell, charge, or pledge that property.<sup>12</sup>

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<sup>6</sup> [2015] EWCA Civ 655; [2015] 2 P & CR 15.

<sup>7</sup> [1895] AC 173.

<sup>8</sup> (1989) 57 P & CR 381.

<sup>9</sup> [1980] 3 WLR 138.

<sup>10</sup> [2001] UKHL 44; [2002] 2 AC 773.

<sup>11</sup> 3-001. More generally see 3-004 to 3-006. Distinctions are sometimes drawn between 'ostensible authority', 'ostensible ownership' and 'usual' or 'inherent' authority, although judges and commentators do not all use the terms in the same way, or indeed as discrete categories. For an overview of the different uses of the terms see Watts and Reynolds (n 3) 3-004 to 3-006, 8-126 to 8-128.

<sup>12</sup> *ibid* 8-129 to 8-138. For factors see 8-143 to 8-159.

Accordingly, the doctrine of ostensible authority regulates priorities disputes between A and C in cases where an agent acts without actual authority. Where A holds B out as his agent, and authorises him to act as such, he creates a risk that third parties will be misled into thinking B was authorised to act for A in ways he was not. It therefore makes sense for A to bear any loss arising from this risk materialising, provided that C had no reason to know that B was acting beyond the scope of his authority.<sup>13</sup> Indeed, the rules on point ultimately benefit principals, in that they allow third parties to deal with agents confidently. In the absence of such a doctrine third parties might be more reluctant to do dealings with agents, therefore limiting the business that could be carried out using an agent. The rules also incentivise principals to take care in choosing who they employ as agents, presumably reducing the number of fraudulent agents.

## 2. Trusteeship and the bona fide purchaser for value without notice defence

On orthodox principles, the doctrine of ostensible authority has been applied to determine when agents acting without actual authority should be able to bind their principals, but the doctrine has never been applied to determine when a trustee acting in breach of trust can bind the beneficiary. The applicability of the doctrine to trusts was specifically rejected a number of times,<sup>14</sup> and *Bowstead & Reynolds* makes clear that the doctrine of 'ostensible ownership' is 'inapplicable where the principal vests property in the agent as trustee'.<sup>15</sup>

Instead, where a trustee disposed of trust assets without authority under the terms of the trust, the bona fide purchaser for value defence would determine whether the beneficiary's rights were bound. In its modern form, the rule provides that a bona fide purchaser for value of legal title to trust assets, without notice of the trust, will take that title free of the beneficiary's interest.<sup>16</sup> The defence continues to determine which unauthorised actions of a trustee will bind third parties in cases concerning trusts of personalty, and a few cases concerning unregistered land.<sup>17</sup>

It should be emphasised that the bona fide purchaser for value defence differs from the doctrine of ostensible authority in four main ways, although both doctrines play the same function. First, a purchaser of trust assets disposed of in breach of trust can only take those assets free of the beneficiary's interest if they are a bona fide purchaser of *legal title* for *value*. This is significant in that it means:

(a) an agent who gives an equitable charge (or other interest less than legal title<sup>18</sup>) to a third party can bind his principal under the doctrine of ostensible authority, in a way a trustee acting beyond the terms of his powers cannot bind his beneficiary.

(b) under the doctrine of ostensible authority, an agent can bind his principal by making a gratuitous disposition in a way a trustee acting beyond the terms of his powers cannot bind his beneficiary.

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<sup>13</sup> *ibid* art 73.

<sup>14</sup> *Shropshire Union Railways and Canal Co v R* (1875) LR 7 HL 496; *Carritt v Real and Personal Advance Co* (1889) 42 Ch D 263; *Burgis v Constantine* [1908] 2 KB 484 (CA).

<sup>15</sup> *Watts and Reynolds* (n 3) 8–131.

<sup>16</sup> *Tucker et al* (n 4) 41–117 to 41–142.

<sup>17</sup> *ibid*. The only cases it applies to are those involving a grant of leases for 7 years or less, or an assignment or mortgage of existing unregistered leases which have 7 years or less to run, for details see Harpum et al (ed), *Megarry & Wade: The Law of Real Property* (2012) 8–005 to 8–025.

<sup>18</sup> For instance, presumably a declaration of trust by the agent over his principal's assets could have the same effect.

Secondly, the doctrine of ostensible authority could allow an agent to bind both the credit and the property of his principal, whereas the bona fide purchaser defence applies only to trust property. Indeed, unless the trust deed gives the trustees power to grant charges over the trust assets, there is typically no way for a trust creditor to claim trust assets other than by subrogation to the trustee's own rights.<sup>19</sup>

Thirdly, the rationales of the doctrines are different. As above, the doctrine of ostensible authority is justified by the fact that a principal has held out his agent as having authority to bind him, and a third party has relied on that representation.<sup>20</sup> The principal has therefore created the risk of third parties being misled into thinking the agent has authority he does not have, and so should be liable for any loss caused by that risk materialising. The bona fide purchaser defence cannot be understood in this way. The point is made most clear by the fact that the rule applies regardless of whether the beneficiary of a trust is also its settlor. Where this is not the case, while the existence of the trust creates the risk that third parties might be misled into thinking that the trustee is beneficially entitled to the trust assets, and so authorised to deal with them in any way he wishes, any 'holding out' is made by the settlor, not the beneficiary. The point is made especially stark by the fact that a beneficiary of a trust might not even know of her status as such. Instead, the defence's incidents are best understood as stemming from Chancery's historical preference for creditors for value, and its role in preventing fraud.<sup>21</sup>

This leads onto the fourth and final point. The essence of the right of a beneficiary under a trust is that he is allowed a property right to trust assets which prima facie binds third parties, without having to oversee or interfere with the trustee's management of the trust assets. While it makes sense to have rules to incentivise principals to oversee their agents, as by definition they will appoint their agents, the nature of a trust beneficiary's rights would be fundamentally altered were a trustee treated as having authority to bind the beneficiary's rights in all cases. The significance of such a potential change was recognised Lord Cairns LC in *Shropshire Union Railways and Canal Co v R*.<sup>22</sup> His Lordship rejected an argument that a single trustee of shares, by being given legal title to those shares, had ostensible authority always to bind the beneficiary's interest in those shares. He argued that doing so would put an 'equitable owner...under some measure of obligation with regard to his duty of watching his trustee', and in so doing would 'cut down' the 'large, well-known, recognised, and admitted system of trusts in this country'.<sup>23</sup>

### 3. Statute and Trusts of Registered Land

In the above section we have seen the differences between the doctrine of ostensible authority and the bona fide purchaser defence in trusts law. The law concerning trusts of

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<sup>19</sup> See Trusts Law Committee, *Rights of Creditors Against Trustees and Trust Funds Consultation Paper* (London 1997); *Rights of Creditors Against Trustees and Trust Funds Report* (London 1999).

<sup>20</sup> Eg see *Freeman & Lockyer v Buckhurst Park Properties* [1964] 2 QB 480, 494 to 498 (per Willimer LJ); Watts and Reynolds (n 3) 3-001. Also see Hudson, 'The True Purpose of Estoppel by Representation' [2015] *Journal of Contract Law* 275.

<sup>21</sup> See Joshua Getzler and Mike Macnair, 'The Firm as Entity before the Companies Acts' in Paul Brand, Kevin Costello and WN Osborough (eds), *Adventures of the Law: Proceedings of the Sixteenth British Legal History Conference* (Dublin 2005).

<sup>22</sup> (n14).

<sup>23</sup> *Ibid* 507-508. Emphasis added.

land, in particular registered land, is no longer wholly<sup>24</sup> governed by Chancery's historical doctrines, and the extent to which dispositions of land made in breach of trust bind beneficiary interests is now determined by statute. The two provisions on point are section 6 of the Trusts of Land and Appointment of Trustees Act 1996, which applies to all trusts of land, and section 29 of the Land Registration Act 2002, which applies only to registered land. Both bear further consideration in that they fundamentally alter the way the priorities rules apply to trusts of land.

Section 6 of TOLATA 1996 concerns the 'General powers of trustees', and provides that 'For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner'. In other words, the section provides that a trustee of land is to be treated as having no limits in equity on his authority or powers under the trust, unless this power is expressly limited.<sup>25</sup> The significance of this is that trustees of land are to be treated as always having the power to bind the beneficiaries of that land, and their dispositions will therefore always overreach the interests of beneficiaries provided the requirements of section 27 of the Law of Property Act 1925 are met. This restriction is an important one: it provides that a beneficiary's interest will not be overreached, unless the conveyance is made by a Trust Corporation or two or more trustees.

Section 29 of the LRA 2002 replaces the bona fide purchaser defence in respect of trusts of registered land.<sup>26</sup> It provides that a purchaser of land for valuable consideration who registers the interest they purchase,<sup>27</sup> will take free of off-register interests affecting the land before the time of disposition, unless those interests are overriding interests under Schedule 3. The most significant category of overriding interests is that of persons in actual occupation under Schedule 3, paragraph 2. It should be noted that beneficial interests under a trust cannot be registered, nor entered on the register as notices, meaning that interests under trusts are always defeated by the section unless they are overriding interests.<sup>28</sup>

The purpose of these statutory provisions is the subject of extensive commentary elsewhere, but it is possible to summarise the arguments on point as follows.<sup>29</sup> The current English law

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<sup>24</sup> See *Paddington Building Society v Mendelsohn* (1985) 50 P & CR 244 at [248] (per Browne Wilkinson LJ).

<sup>25</sup> Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' (1990) CLJ 277-333; Dixon 'Overreaching and the Trusts of Land and Appointment of Trustees Act 1996' [2000] Conv 267; Ferris and Battersby, 'Overreaching and the Trusts of Land and Appointment of Trustees Act 1996 – a Reply to Mr Dixon' (2001) Conv 221. Also see *Bank of India v Sood* [1997] Ch 276, 281-84 and *Shami v Shami* [2012] EWHC 664 (Ch). The trustee's authority to do this can be excluded by the terms of the trust, (TOLATA 1996, s 8), but such limitation will not bind a purchaser without notice of this in cases of unregistered land (TOLATA 1996, s 16). There is no authority on point but, by analogy, presumably a trustee's disposition of registered land will be deemed overreached even if prima facie a breach of the terms of the trust, unless the restriction on the trustee's powers is entered as a restriction on the register under section 40 of the LRA 2002, see McFarlane *The Structure of Property Law* (Oxford 2008), 396-397.

<sup>26</sup> See Charles Harpum, *Registered Land: Law and Practice under the Land Registration Act 2002* (2004) 9.1; Kevin Grey and Susan Grey, *Elements of Land Law* (2009) para 1.4.37 and 8.2.24; Harpum et al (n 17) 7-064.

<sup>27</sup> A legal lease of less than seven years will be treated as if it had been registered, see section 29(4).

<sup>28</sup> LRA 2002, s 33(a).

<sup>29</sup> For section 6 of TOLATA 1996 overreaching see (n25). For well-known examples of literature discussing section 29 and Schedule 3 of the LRA 2002 see Elizabeth Cooke, *The New Law of Land Registration* (2003) chapters 1 and 5; Harpum (n 26) chapters 1, 9, and 11.

regime for trusts of registered land take as a starting point that trustees can freely dispose of the trust assets, binding the beneficiaries. Beneficiaries will typically only be able to claim they keep their beneficial interest and priority where (i) there has not been a disposition by two trustees or Trust Corporation<sup>30</sup> and (ii) the beneficiaries are in actual occupation of the land.<sup>31</sup> The regime is designed to promote the marketability of land, and so favours third party purchasers over beneficiaries except in cases of owner-possessors.

It goes without saying that the policies behind the rules governing priorities disputes in the context of trusts of land are specific, and very different to those underlying the doctrine of ostensible authority. The provisions of the LRA 2002 on point are clearly driven by a recognition that there is need to protect beneficiaries who live in the property in which they have an interest under a trust.

### III. The Problem

The decision *Wishart v Credit Mercantile plc*<sup>32</sup> has challenged the orthodox account of the relationship between trusts and agency set out in Part II. In brief, Sales LJ ruled that beneficiary of a trust of registered land in actual occupation, who had allowed a third party to buy the property on his behalf, was bound by a mortgage entered into by the trustee without authorisation. The decision was justified by Sales LJ on the basis that the beneficiary had given the trustee “free rein” to make arrangements for the acquisition...[and] exercised no supervisory function whatever in relation to what [the trustee] might do to effect the transaction’,<sup>33</sup> by applying what he described as the *Brocklesby* principle, because the beneficiary had furnished the trustee ‘with the means to hold himself out as the true beneficial purchaser’ of the property.<sup>34</sup> In brief, the judgment appears to treat trustees as having ostensible authority to bind the interests of trust beneficiaries in all cases where the beneficiaries have allowed the trustees to hold or acquire legal title to trust assets. The remainder of the article will examine this proposition in light of the orthodox account of the relationship between trusteeship and agency set out above.

### IV. The Authorities

#### 1. *Brocklesby v Temperance Permanent Building Society*

In *Wishart*, the application of the doctrine of ostensible authority to trusts law was said to be rooted in the decision in *Brocklesby v Temperance Permanent Building Society*.<sup>35</sup> The facts of the case can be summarised as follows. A and B were father and son, and partners in a solicitors firm. A authorised B to borrow £2250 on the security of mortgages and real property belonging to A. B, on the security in question, borrowed £3600 instead. The House of Lords had to decide whether to allow A to redeem the security by paying only £2,250 to the mortgagee—that is to say the sum B was authorised to borrow—or whether to treat the mortgage as securing the full £3,600 borrowed by B. Accordingly, the main issue before the court was whether B had bound A under the doctrine of ostensible authority on the basis that A had given B the title deeds to his properties.

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<sup>30</sup> LPA 1925, s 2; TOLATA 1996, s6.

<sup>31</sup> LRA 2002, Schedule 3, paragraph 2.

<sup>32</sup> (n6).

<sup>33</sup> *Ibid* at [57].

<sup>34</sup> *Ibid*.

<sup>35</sup> (n7).

The House of Lords ultimately found in favour of the mortgagee. In the leading judgment, which was echoed in the reasoning of the rest of the court, Lord Herschell LC made clear that B did have actual authority as an agent to borrow money on the mortgage deeds and, further, there were no facts to indicate to the lenders 'that [B] was limited to a borrowing power of £2250, or to put [the mortgagee] upon inquiry in any respect with reference to any such limit of authority. The transaction was a perfectly natural one'.<sup>36</sup> In brief, the fact that B had authority to borrow £2250 on the deed was sufficient to confer upon him ostensible authority to borrow more than that sum, as there were no circumstances to put lenders on notice of the limitations of the agent's authority. Lord Herschell LC justified his decision using the doctrine of ostensible authority.<sup>37</sup> A had held B out as having authority to bind A vis-à-vis the lender-mortgagee. In particular, A had created the risk that third parties would think B was entitled to borrow more than £2250 on the security of the title deeds, and so it was right that A bear the loss caused by that risk materialising. It is clear therefore that the case was entirely concerned with agency, and the question of when the doctrine of ostensible authority could apply in respect of an agent entrusted with title deeds who had actual authority to borrow money.

## 2. *Rimmer v Webster*

The applicability of *Brocklesby* was considered by Farwell J in the Chancery Division of the High Court in *Rimmer v Webster*.<sup>38</sup> A transferred shares into B's name, with the intention that B (a broker) should sell the shares, and give the proceeds to A. The transfer stated that A had *sold* the shares to B, and B had paid, though B had not done so. B later mortgaged the shares to C. B became a bankrupt and died, and A sought to recover the shares from B's estate. C claimed that its mortgage over the shares had priority over A's claim.

The main issue before the court was the applicability of the doctrine of ostensible authority as stated in *Brocklesby*. For A, it was argued that *Brocklesby* and the doctrine of ostensible authority simply did not apply because B had been a trustee for A, and not an agent, and the cases in which it was decided that the doctrine did not apply to trusts were cited.<sup>39</sup> For C, it was argued that B was an agent for A: A had employed B as a broker to sell shares on his behalf. The fact that legal title was transferred to B, making him a trustee de facto, did not prevent B from also being an agent for A.

Farwell J ruled for C, effectively finding that B had been both an agent *and* trustee. He ruled that A transferring legal title to B upon trust for A's benefit was not sufficient to give B ostensible authority to bind A's rights:

A man is entitled to...vest his property in the name of another person and hand him the title-deeds, without thereby giving rise to any implication inconsistent with his own beneficial title, [ie he could settle property on trust for himself] because his acts are in accordance with the common usage of mankind; and no other member of the community, therefore, is entitled to allege that such a course of action contains any invitation to him to act, from which a duty to him can be inferred.<sup>40</sup>

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<sup>36</sup> Ibid 179-180.

<sup>37</sup> Ibid 181.

<sup>38</sup> [1902] 2 Ch 163.

<sup>39</sup> See (n14).

<sup>40</sup> (n38) 172.

However, on the facts of the case, A was deemed to have given his agent B ‘the means of representing himself as the beneficial owner’ of A’s shares, and so had been held out to the world as having authority to bind A’s interest in the shares.<sup>41</sup> On that basis, B was treated as having ostensible authority over the shares. The judgment recognises that the doctrine of ostensible authority does not apply to trustees per se, but that cases *can* arise in which a trustee is already the agent of a settlor-beneficiary. It would be arbitrary to treat the fact that a principal transferred legal title to the agent as preventing the doctrine from operating. It is important to emphasise that Farwell J did not see A giving B management powers and indicia of title as *automatically* conferring upon B ostensible authority to bind A: some further circumstance would be needed. On the facts, that circumstance was the pre-existing agency relationship between A and B, but Farwell J set out no rules for determining what other facts might suffice.

### 3. *Burgis v Constantine*

The decision in *Rimmer* was considered by the Court of Appeal in *Burgis v Constantine*.<sup>42</sup> One of the judges who heard the case was Farwell LJ, the same judge who decided *Rimmer* in the High Court. It is odd that *Brocklesby* and *Rimmer* have been cited by modern courts as setting the scope of the *Brocklesby* principle, but that *Burgis* has not. The case clarifies the relationship between the principle in relation to both agency and trusts, and also shows how the doctrine of ostensible authority was seen to interact with a statutory registration regime: that created by the Merchant Shipping Act 1894.<sup>43</sup>

The facts of the case are as follows. A and B intended to set up a company to own a ship, A transferred his shares of the ship in to B’s name, which were duly registered in B’s name in the manner required by the Merchant Shipping Act 1894. The scheme was later abandoned, but B kept the shares in his name, and A did not seek re-conveyance. B later mortgaged the shares to C. If the formalities for the mortgage of the shares had complied with the Merchant Shipping Act 1894, then C as a donee of their registered owner would have taken free of A’s interests, which were off the register.<sup>44</sup> Indeed, beneficial interests in trusts for shares of ships could not be registered.<sup>45</sup> For reasons which are unimportant, the statutory requirements were not complied with.<sup>46</sup> C nevertheless claimed priority over A, citing *Rimmer* in support of the proposition that B had ostensible authority to mortgage the shares to C.

The issue in the case therefore came down to whether C, unable to rely on a statutory defence to A’s claim, could nevertheless appeal to the doctrine of ostensible authority. A’s counsel argued that he could not, and that the doctrine was not triggered by the mere fact that A had given legal title to B. C’s counsel contended that A transferring legal title to B was sufficient to effectively make B an agent of A, and so able to bind A’s property under the doctrine of ostensible authority.

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<sup>41</sup> Ibid 172 to 173.

<sup>42</sup> (n14).

<sup>43</sup> 57 & 58 Vic c 60.

<sup>44</sup> The Act provided that the donee of a transfer made according to the Act would take free of interests which were off the register of interests in ships. The proper form for mortgaging a share was provided for by section 31 and Schedule 1 of the Act. Equitable interests could not be entered upon the register, see sections 56 and 57.

<sup>45</sup> Ibid.

<sup>46</sup> (n43). The form presented to the registrar for registration of the mortgage was not filled in, see (n14) 491.



At trial, the High Court found for A, and the decision was affirmed by the Court of Appeal, for two reasons. First, it was held unanimously that as the Merchant Shipping Act 1894 provided a defence to purchasers from registered owners, that it must implicitly have superseded any alternative general law avenue of redress for such purchasers. In particular, it was emphasised that the fact the statute prevented beneficial shares being placed on the register showed that the defence in the Act was meant to be exhaustive, and excluded general law principles.<sup>47</sup> This first point is one to which many modern land lawyers will be sympathetic.

Secondly, it was ruled that the mere fact that A had put title in B's name (and the fact A had not recovered the title after their venture was abandoned), was not sufficient to confer upon B ostensible authority to bind A. In particular, Fletcher Moulton LJ and Farwell LJ emphasised that A's actions could not be seen to make B an agent of A with authority to bind him in this way. Of particular interest is Farwell LJ's explanation of his reasoning in *Rimmer*. In particular, he emphasised that in *Rimmer* he had *not* decided that trustees would all have ostensible authority to bind beneficiaries, but that they would only do so in circumstances where the trustee was deemed to have ostensible authority under the 'usual doctrines of agency', and that '[t]he observations relied upon by the defendant's counsel [in *Rimmer*]...were directed to the question of agency, not of trusteeship'.<sup>48</sup> On the facts of *Rimmer* and indeed *Brocklesby*, this point was uncontroversial: both cases involved expressly appointed commercial agents.

#### 4. The pre-*Wishart* home ownership cases

As shown above, the decision in both *Brocklesby* and *Rimmer* were commercial agency cases decided at the turn of the nineteenth century, concerning the scope of an agent's authority to bind the property of his principal. In a number of late twentieth century and early twenty first century cases, courts dealing with non-commercial cases concerning joint ownership and trusts of land have purported to apply the doctrine of ostensible authority or, as they have termed it, the *Brocklesby* principle.

In the following cases, B purchased a house for A, or for A and B, and then mortgaged it to C. It is worthy of note that in these cases A was aware that B would have had to take out a mortgage to purchase the house. In *Abbey National v Cann*<sup>49</sup> Dillon LJ in the Court of Appeal (with the agreement of the rest of the court), held that the fact that A knew B was buying a property for them jointly, but did not have the sums to do so, meant that A had authorised B to mortgage the property.<sup>50</sup> B was treated as an agent with authority to raise mortgage money and under *Brocklesby*, therefore had ostensible authority to raise any sum on the mortgage: the fact B had raised more than he was authorised to was irrelevant. The reasoning was approved of obiter by Lord Oliver in the House of Lords on appeal in the same case.<sup>51</sup> The reasoning in *Cann* was echoed in two later High Court cases. In *Thompson v Foy*,<sup>52</sup> Lewison J ruled that a party with authority to mortgage property had ostensible authority to mortgage it beyond the scope of his actual authority. He considered the reasoning in *Cann*, as going beyond an inquiry as to the actual consent of the parties, and involving 'a much broader principle, akin to estoppel', presumably referencing the

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<sup>47</sup> (n14) 494 to 495, 502.

<sup>48</sup> *Ibid* 503.

<sup>49</sup> (n8).

<sup>50</sup> *Ibid*, 392 to 393.

<sup>51</sup> [1991] 1 AC 56, 94-95.

<sup>52</sup> [2009] EWHC 1076 (Ch); [2010] 1 P & CR 16.

doctrine of ostensible authority. The same principles were set out in *Bank of Scotland v Hussain*,<sup>53</sup> where Newey J saw the *Brocklesby* principle as wider than either the doctrine of ostensible authority in agency cases, or an enquiry as to whether A consented, or indeed estoppel.<sup>54</sup> These cases were relied upon as authority in *Wishart*.<sup>55</sup>

It is clear in *all* these cases that A had given B implied *actual* authority to mortgage the property, because A was aware that B could not have purchased the property without a mortgage. For this reason, as in *Brocklesby* itself, B had ostensible authority to raise *any sum* by mortgaging the property without reference to the limitations of his actual authority. Accordingly, the cases do not stand for the proposition that B would have had ostensible authority to bind A, if A had *never* authorised B to mortgage the property. The point is made most clearly in *Skipton Building Society v Clayton*.<sup>56</sup> In that case, Sir Christopher Slade in the Court of Appeal emphasised the centrality of A's actual consent in *Cann*. On this basis, he ruled that A could not be bound by a mortgage taken out by B where A was unaware of the mortgage, or (on the facts of the case) where A (lessees rather than trust beneficiaries) were unaware that their rights would be affected by a mortgage (taken out by the freehold owner). It should be stressed that this is the most recent pre-*Wishart* Court of Appeal case concerning the *Brocklesby* principle.

## 5. Ostensible authority and section 29 of the LRA 2002

Before moving onto *Wishart* itself, it should be noted that there is a strong argument that section 29 of the LRA 2002 excluded the doctrine of ostensible authority from cases concerning registered land altogether.

As above, the provision is accepted to have replaced the bona fide purchaser defence in respect of trusts of land,<sup>57</sup> and this begs the question of whether it replaced the doctrine of ostensible authority in relation to land too. Although the doctrine is distinct from the bona fide purchaser defence, as discussed in Part II, it historically played a functionally equivalent role. More specifically, while the extent to which the LRA 2002 modified the general law priorities rules remains a matter of controversy,<sup>58</sup> the drafting and context of section 29 suggest that the provision is deliberately designed to exclude the concept of 'notice' in determining the outcome of priority disputes in relation to registered land.<sup>59</sup> Given that the concept of 'notice' as applied in the bona fide purchase defence appears to be the same as that applied in respect of the doctrine of ostensible authority, it would not make sense for the section to

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<sup>53</sup> [2010] EWHC 2812 (Ch) at [96] to [111].

<sup>54</sup> Ibid at [101] and [102]. The meaning of Newey J's statement here is unclear. The passage he cites in *Bowsted & Reynolds* simply states that entrusting someone with indicia of title, but no actual authority to deal with them, will not trigger the doctrine of ostensible authority as applied according to the *Brocklesby* principle, Watts and Reynolds (n 3) 8–153. It is certainly clear that the fact an agent is acting fraudulently and without actual authority will not prevent him from binding his principal under the doctrine of ostensible authority, ibid 8–063 to 8–066. The suggestion is perhaps that Newey J, obiter, saw that entrusting of indicia of title alone could trigger the *Brocklesby* principle, foreshadowing the ruling in *Wishart*.

<sup>55</sup> (n6) from [49] to [55].

<sup>56</sup> (1993) 25 HLR 596.

<sup>57</sup> See above at Part II.3.

<sup>58</sup> Compare *Paddington* (n24); *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52; 3 WLR 1163 at [96] (per Lady Hale) with Dixon 'The Boland Requiem' [2015] Conv 284.

<sup>59</sup> Text to (n26), (n27), and (n28).

exclude the former doctrine but not the latter.<sup>60</sup> It is therefore seriously arguable that the application of *Brocklesby* in the context of registered land has been excluded by statute. After all, a key purpose of the LRA 2002 is to make the issue of what a purchaser knew or ought to have known irrelevant in relation to priority disputes concerning registered land, the outcome of which instead should be determined by section 29 and Schedule 3. Given that the doctrine of ostensible authority centres entirely on whether a purchaser has any way of knowing whether an agent is acting without actual authority, then surely it has no role to play in registered land disputes? This position supported by the reasoning in *Burgis v Constantine*,<sup>61</sup> where the registration and purchaser provisions of the Merchant Shipping Act 1894 were deemed to exclude purchasers of shares in a ship from relying on the doctrine.

An implication of this reasoning would be that the High Court in *Foy and Hussein*, when dealing with land registered under the LRA 2002, were wrong to apply the 1989 decision of the Court of Appeal in *Cann*.

## 6. *Wishart v Credit and Mercantile Plc*

Having explored the history of the *Brocklesby* principle the decision in *Wishart v Credit and Mercantile* itself can be reconsidered. The facts of the case broadly mirror those considered in the home ownership cases above. A had authorised B to purchase a house for A, which was registered in B's name, and B had mortgaged to C. There were two important differences, however, between the *Wishart* and the cases considered above. First, A and B had business dealings with one another, and B was effectively a commercial agent for A. Secondly, A had not authorised B to mortgage the property, and a mortgage was not necessary for the purchase.

Sales LJ, with the agreement of Tomlinson LJ and Longmore LJ, found that C had priority over A, because A had allowed B 'free rein' in his management of the property, and had not overseen B's exercise of his authority. He justified his decision on the basis of what looks very much like ostensible authority:

The *Brocklesby* principle is not based on actual authority given to the agent, but rather on a combination of factors: actual authority given by the owner of an asset to a person authorised to deal with it in some way on his behalf; where the owner has furnished the agent with the means of holding himself out to a purchaser or lender as the owner of the asset or as having the full authority of the owner to deal with it; together with an omission by the owner to bring to

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<sup>60</sup> The notice requirements for each appear to be very similar, if not identical, compare *Snell's Equity* (2015) para 4-027 to 4-028 (bona fide purchaser) with Watts and Reynolds (n 3) 8–048 (ostensible authority). The test cited in the latter work is in fact taken from a case concerning notice for the purpose of the bona fide purchaser defence, *Feuer Leather Corporation v Frank Johnston & Sons Ltd* (1981) 81/C/2004. The editors of *Bowstead* treat the case as concerning 'constructive trusts' though they see the test as applicable to ostensible authority. It should be noted that the editors appear to conflate the 'notice' test for bona fide purchasers with the 'knowledge' test for knowing receipt, in that they write that in the constructive trusts field *Feuer* has been superseded, cross referencing para 9-136 which concerns knowing receipt. The exact incidents of, and relationship between, the 'notice' requirements for bona fide purchasers and the 'knowledge' requirement for knowing recipients remains controversial, compare *Re Montagu's ST* [1987] Ch 264, 271 (per Megarry VC) with *Sinclair v Versailles* [2012] Ch 453 at [106]–[107] (per Lord Neuberger) and *Credit Agricole Corporation and Investment Bank v Papadimitriou* [2015] UKPC 13 at [33] (per Lord Sumption). Whether or not the notice requirements for ostensible authority and bona fide purchase are exactly the same, it seems uncontroversial that they are very similar, and it is hard to see why the LRA 2002 would have chosen to preserve notice of one type but not the other.

<sup>61</sup> See text to (n47).

the attention of a person dealing with the agent any limitation that exists as to the extent of the actual authority of the agent. This combination of factors creates a situation in which it is fair, as between the owner of the asset and the innocent purchaser or lender, that the owner should bear the risk of fraud on the part of the agent whom he has set in motion and provided (albeit unwittingly) with the means of perpetrating the fraud.<sup>62</sup>

Applying these principles, Sales LJ ruled that A had to be bound by C, because A, in allowing B to purchase the property for A in B's own name, had enabled B to hold himself as having authority to bind A's interest. He cited *Brocklesby*, *Rimmer*, and the pre-*Wishart* home ownership cases in support of this proposition.

This conclusion is difficult to justify both as a matter of both authority and principle. First, the court does not appear to have fully considered whether the doctrine of ostensible authority was applicable to registered land. Sales LJ seems to have accepted that the *Brocklesby* did apply, because of the requirement that an 'overriding interest' under the LRA 2002 be one with priority against a purchaser under the general law. However, this reasoning does not deal with the question of whether section 29 of the LRA 2002 superseded the doctrine of ostensible authority in the same way it superseded the bona fide purchaser defence.<sup>63</sup>

Secondly, it is not clear how A's failure to oversee B's management of the assets amounted to a 'holding out' of B's authority. Is it seriously suggested that C's position would have been affected if A, behind the scenes, had overseen B's conduct, but B had nevertheless managed to mortgage the property to C?

Thirdly, *Brocklesby* and the pre-*Wishart* homeownership cases only concerned scenarios where B was authorised to mortgage A's property, but charged the property beyond the sum authorised by A. A's actual consent to B's mortgaging the property was central to these cases, as emphasised in *Skipton Building Society v Clayton*, which should have been formally binding on the court in *Wishart* (given that the court did not consider the LRA 2002 to have superseded the application of *Brocklesby* to registered land). The only case which suggested that A, by conferring legal title and authority to deal with property upon B, *could* give B ostensible authority was *Rimmer*. However, as above, Farwell LJ in *Rimmer* and *Burgis* did not state that this would always be the case, and only found ostensible authority on the facts of *Rimmer* because of the pre-existing agency relationship between A and B. The absence of such a relationship justified the court in *Burgis* reaching the opposite conclusion. The difficulty with *Wishart* is that it suggests that *all* cases where A gives B title or indicia of title that B will have ostensible authority to bind A *without any additional factor*. Although Sales LJ justified his reasoning by reference to the fact that A had left B to manage the property and its purpose, for such 'negligence' to confer ostensible authority upon B, according to the authorities some further element would have been needed to create a duty between A and C.<sup>64</sup> Although, on the facts of the case, B was a commercial agent for A, Sales LJ did not rely on this in his reasoning.

The conclusion therefore goes further than previous judgments, and is hard to justify as a matter of policy. Is it now to be thought that C will automatically take priority over A whenever A entrusts his or her affairs to B under the doctrine of ostensible authority, even

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<sup>62</sup> (n6) at [52].

<sup>63</sup> See Part IV.5.

<sup>64</sup> See *Rimmer* (n14) 172.

where A's actual consent was procured by misrepresentation or undue influence?<sup>65</sup> Are we to understand that in all cases where A gives B money to purchase property which he is to hold on trust and manage, that B will have complete authority to bind A if A does not oversee B's transaction and management? As Dixon has argued, a general rule of this type would certainly seem to fly in the face of *William & Glyn's Bank v Boland*.<sup>66</sup>

## V. Implications: the authority of trustees

This fifth part of this article will consider the possible implications of the decision in *Wishart* for trusts law, and will focus on the effect of the decision on the authority of trustees and the rights of beneficiaries. As above, the doctrine of 'ostensible authority' historically was applied to cases of agency but not to cases of trusts, and 'transplanting' it to trusts law creates issues in relation to both trusts of land and personalty.

### 1. Which types of trusts does the decision affect?

Sales LJ's reasoning in *Wishart* suggests that the doctrine of ostensible authority will be applied to any case where A allows B to put trust property in which A has an interest in B's name alone, even where A has not given B any specific orders relating to the purchase of trust assets or management of the fund. This factual scenario could presumably involve cases of land or personalty, and would usually encompass (i) purchase money resulting trusts, (ii) express trusts in favour of a settlor and (iii) cases where B acquires (or already has) legal title to realty under which A has (or acquires) a purely equitable share under a common intention constructive trust. In such cases, the trustee will be treated as having authority to dispose of or bind A's interest in favour of third parties regardless of the terms of the trust. In the following two sections the different effects of the decision on trusts of realty and personalty will be considered. In those sections the term 'trusts' will be used to refer to the three types of trust affected by *Wishart*.

### 2. Trusts of Realty

In cases of the type outlined above, where the trust in question concerns realty, *Wishart* has the effect of removing one of the few remaining safeguards available to beneficiaries of such trusts. Although section 6 of TOLATA provides that trustees are already treated as *prima facie* having authority to bind beneficiaries' interests, at present a trustee will only bind a beneficiary's interest where the disposition is made by two or more trustees or a Trust Corporation, thereby triggering overreaching. In such cases, the beneficiaries of a trust have a right to claim trust assets. The decision in *Wishart*, by transplanting the agency rule into trusts, would seem to short circuit this mechanism. The decision effectively removes the 'two-trustee' rule, by allowing purchasers to gain priority over beneficiaries in all cases simply under the doctrine of ostensible authority. For instance, imagine a scenario where husband and wife buy a house, and the wife allows her husband to put the house in his name alone, and gives him no other instructions. Later, the husband mortgages the property without his wife's consent. Under *Wishart*, the mortgagee would have priority automatically, simply due to the existence of the trust: though no overreaching could occur, and even if the mortgagee had not registered the mortgage. Further, if the mortgagee had sought the wife's consent, obtained her signature, but had failed to follow the *Etridge* protocol, and the signature turned out to be procured by misrepresentation or undue influence, under the ratio

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<sup>65</sup> *Royal Bank of Scotland v Etridge* (n10).

<sup>66</sup> (n9).

of *Wishart* the mortgagee would presumably have priority simply due to the existence of the trust triggering the doctrine of ostensible authority.

This is perilously close to a blanket rule that beneficiaries of such trusts lose priority disputes automatically, rendering Schedule 3 paragraph 2 of the LRA 2002 otiose. It is therefore hard to imagine that the drafters of the LRA 2002 contemplated such a principle as surviving the Act, and would seem to upset any balance between the rights of purchasers and beneficiaries of trusts of land that the law already strikes, in that such a beneficiary would almost never be able assert her right against a third party disponee.<sup>67</sup> Indeed, in policy terms the desirability of a rule which dis-incentivises mortgagee-banks to undertake proper checks before taking mortgage charges is questionable at best.

### 3. Trusts of Personality

*Wishart* itself concerned a trust of land, but the ratio of the decision appears to have further implications for trusts of personality. Whereas section 6 of TOLATA 1996 provides trustees of land with a general authority to dispose of trust assets, there is no equivalent trusts law doctrine governing trusts of personality, and so no general mechanism whereby the interests of beneficiaries of trusts of personality will be bound in favour of disposes of trust assets. However, to treat a trustee of personality as having ostensible authority to bind the beneficiary would be effectively to reverse this position, in that *all* dispositions in favour of third parties would automatically bind beneficiaries, regardless of whether or not they were in breach of trust. In other words, the ratio of *Wishart* would appear to bring about the same end result in priorities disputes concerning trusts of personality of the types set out above, as section 6 effects in respect of trusts of land. Although in many cases a purchaser who manages to successfully invoke the doctrine of ostensible authority would also be able to plead the bona fide purchaser defence, the decision in *Wishart* changes the default position of purchasers of trust assets and, as above, provides additional protection to gratuitous disponees of trustees and those who take equitable charges from trustees.<sup>68</sup>

Indeed, the decision undermines the right of a beneficiary of all such trusts to retain a proprietary interest in trust assets, assert-able against third party disponees, whilst having his property managed by another, free of the 'duty of watching' Lord Cairns LC referred to in *Shropshire Union Railways*.<sup>69</sup>

## VI. Conclusion: What should the law be?

This article opened with the trite observation that different legal rules apply in different legal areas, very often for good reasons, and that doctrines cannot be readily transplanted from one area to another without creating problems. It has been shown that an example of such a troublesome 'transplant' is the decision in *Wishart* to apply *in banc* the doctrine of ostensible authority to cases involving (i) purchase money resulting trusts (ii) express trusts for a settlor and (iii) common intention constructive trusts where one or more beneficial owners do not have legal title. While the doctrine's application in agency cases makes perfect sense, its application in the trusts law context radically alters the nature of the rights of the beneficiaries of such trusts; undermines the land registration rules; and appears inconsistent with the policy concerns underlying the courts' reasoning in cases like *Boland* and *Etridge*.

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<sup>67</sup> Also see Dixon (n58) 285-286.

<sup>68</sup> See above at page 3.

<sup>69</sup> (n14).

Further, the court in *Wishart* was not bound by authority to reach such a conclusion: indeed both the LRA 2002 and *Skipton Building Society v Clayton* militated against the conclusion reached by Sales LJ.

Given the problems created by taking the reasoning in *Wishart*, the natural question arises of how the case should be treated going forward. It is submitted that there are two (not inconsistent) potential ways of doing this.

The first is to emphasise the commercial context of the case and the fact that there was a pre-existing agency relationship between A and B, explaining B's ostensible authority to bind A. This would involve adopting *Skipton* as good law and would justify the result in *Wishart* without creating wider problems for the law of trusts. The merit of this approach is that it allows these problems to be solved simply by reference to the orthodox interpretation of the general law, without having to resolve the ongoing thorny issue of the extent to which the LRA 2002 modified the general law priority rules. It also prevents the reasoning in *Wishart* being applied both within and without the context of registered land.

The second solution would be simpler and is not inconsistent with the first. As above, the doctrine of ostensible authority ought to have been superseded by section 29 of the LRA 2002 in the context of priorities disputes concerning registered land, as the purpose of the section was to exclude consideration of 'notice' from cases of that kind. After all, 'notice' is a key part of the doctrine of ostensible authority. This second solution, however, would only be a partial solution if adopted alone. If the interpretation of the doctrine of ostensible authority in *Wishart* were treated as a correct understanding of the general law, and excluded from trusts of registered land only by the LRA 2002, then the ruling would still affect trusts of other types.

On that basis, this article recommends that both solutions be adopted. On this approach, the reasoning in *Wishart* would be departed from, and the reasoning in *Skipton* be adopted as the correct interpretation of the *Brocklesby* principle. This would prevent *Wishart* from being applied in cases of trusts of unregistered land and personalty. However, the doctrine of ostensible authority would be excluded altogether from cases concerning registered land by section 29 of the LRA 2002. The purpose of that provision is clearly to force courts to determine priority disputes between purchasers of registered land and pre-existing interest holders by reference to the entries on the register and schedule 3 rather than the knowledge (actual or constructive) of the purchaser herself. The question of whether a purchaser *actually* had any way of knowing the extent of a trustee's authority should be irrelevant to this inquiry. *Wishart*, by transplanting an agency doctrine into trusts law, by the back door re-introduces the doctrine of notice into priorities disputes concerning registered land. The reasoning is inconsistent with both the nature of the rights of trust beneficiaries and the aims of the LRA 2002, and so should be departed from by later courts.