STEP Briefing Note: Settled land – not yet dead

INTRODUCTION

The ability to create a new trust under the Settled Land Act 1925 (SLA) ceased on 31 December 1996.1

Such trusts arise where the land gifted was not subject to an immediate and binding trust for sale (e.g. I give my house to Joe for life to be sold following his death). They may have been created deliberately, or by accident.

Despite the time lapse since the ability to create a Settled Land Act trust ceased, many continue to exist, although knowledge of the rules relating to them is being diluted over time.

This Briefing Note is divided into eight parts:

1. What happens to the land when the (last) tenant for life dies?
2. Sale of land by the tenant for life
3. Investment powers of the tenant for life and the SLA Trustees
4. The purchase and/or exchange of land
5. The rights to a grant on the death of the tenant for life
6. Tenant for life: powers of delegation
7. Legal capacity and the tenant for life
8. A miscellany

1 – WHAT HAPPENS TO THE LAND WHEN THE (LAST) TENANT FOR LIFE DIES?

It is settled law that the legal title in the settled land vests in the personal representative of the last tenant for life (the PRs)2, so that only they may give a good legal title. However, that can often be misconstrued as vesting in the PRs all the powers and duties of the settled land act trustees (the SLA Trustees). It is not unknown for the PRs proceeding to sell the land, or to assent it to the persons named as beneficiaries in the will under which the trust arose, without first contacting the SLA Trustees.

However, the PRs involvement should be limited to giving good title at the direction of the SLA Trustees. The powers and duties in relation to the land remain with the SLA Trustees, who could require title to the land to be vested in them.

Where the land is to be sold, the SLA Trustees should be setting the marketing strategy and agreeing the sale price, etc., with the PRs acting as nominee only in the transaction. Similarly, if the land is to be assented to the beneficiaries then entitled, it must be for the SLA Trustees to instruct the PRs accordingly. While the PRs may have access to the terms of the original trust, only the SLA Trustees will necessarily have been given notice of any dealings that may have occurred with the remainder interests. The beneficiaries may have assigned, or sold all or a part of their interest to third parties and the PRs could therefore leave themselves open to a claim if they proceed to deal with the land without reference to the SLA Trustees, whose interest should be noted as a restriction on the land title.

To ensure that the right beneficiaries receive the benefit of the settled land following the death of the tenant for life, and to ensure the PRs are appropriately protected from any potential claim, it is important that the PRs identify the SLA Trustees and obtain appropriate instructions from them.

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1 s2(1) Trusts of Land and Appointment of Trustees Act 1996
2 Re Bridgett and Hayes’ Contract [1928] Ch. 163


2 – SALE OF LAND BY THE TENANT FOR LIFE

When land is subject to the SLA, the legal title will normally be vested in the tenant for life\(^3\), so that the tenant for life is a trustee of both the legal title and their statutory powers.

Where the tenant for life is entitled to call for the legal title to be vested in them, until that happens dealings with the property are effectively paralysed and no dispositions can be effected (other than by a personal representative).\(^4\)

Once legal title to the settled land is vested in the tenant for life, they have all the powers of management and sale. It should be noted, however, that the power of sale\(^5\) is suspended if, at any time, there are no SLA Trustees.\(^6\)

While the tenant for life is a trustee (in the broad sense) and can legitimately exercise their powers with their own interests in mind, they are required to have regard to the interests of other parties entitled to benefit under the settlement and cannot, therefore, act exclusively in their own interests.

Accordingly, when a tenant for life decides to sell any, or all, of the property subject to the SLA trust, they should approach the transaction in the same manner as would a trustee, obtaining appropriate advice on the manner of sale and marketing to achieve the best price.

As a trustee of their powers, if the tenant for life exercises them inappropriately (e.g. selling property at an undervalue), they are liable to the other beneficiaries for any loss to the trust fund.

The power of sale allows the tenant for life to contract to sell without the intervention of the SLA Trustees although, in order to provide good title to any purchaser, the SLA Trustees are required to remove the restriction on title that should have been registered at HM Land Registry when the vesting assent in favour of the tenant for life was granted.

However, if a tenant for life intends to sell settled land\(^7\), they must give notice of such intention separately to each SLA Trustee and, if known to the tenant for life, to the solicitor for the trustees by registered post\(^8\) at least one month before entering into such transaction\(^9\). It is open to the SLA Trustees, in writing, to waive the notice period or accept a shorter notice period. If no valid notice is served, the tenant for life cannot enforce an action for specific performance of the transaction.

The SLA Trustees have only a limited responsibility when the tenant for life is selling settled land, their primary duty being to receive capital monies arising from any transactions. They can, however, request details of the transaction and advice, to be satisfied that the tenant for life is complying with their duty to obtain the best price. If the SLA Trustees consider the transaction to be at significant undervalue, or otherwise objectionable, they may seek an injunction to prevent the transaction completing. Such a course of action is also available to the other beneficiaries, who might prefer to be able to control any challenge, leaving the SLA Trustees in a relatively ‘neutral’ position.

When the sale of settled land completes, the capital monies must be paid over to the SLA Trustees, to be invested or applied in accordance with the terms of the trust. The tenant for life has no power or authority to direct their payment elsewhere.

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3 The exceptions being where the tenant for life is a minor, or there is no current tenant for life
4 s13 SLA
5 or exchange, lease, mortgage, or charge or grant an option in respect of any of the settled land
6 Re Bentley [1885] 54 L.J.Ch.752
7 or exchange, lease, mortgage, or charge or grant an option in respect of any of the settled land
8 while the legislation still refers to notices being sent by ‘posting registered letters’, following cessation of Registered Post, an alternative means of delivery, provided the notice is signed for, should suffice
9 s101 SLA
3 – INVESTMENT POWERS OF THE TENANT FOR LIFE AND THE SLA TRUSTEES

The SLA, in its original form, set out that the investment, or other application, of capital monies by the SLA Trustees was to be at the direction of the tenant for life, and only in default thereof by the trustees (subject to any consent required or other direction within the trust instrument). In any event, any investments were to be in the names of, or under the control of, the SLA Trustees.\(^{10}\)

This changed on 1 February 2001, when the Trustee Act 2000 came into effect. While retaining the requirement that investments were to be in the names of, or under the control of the SLA Trustees, the investment powers were vested in those trustees. These powers are not unfettered, though, as they remain subject to any ‘consent required or direction given by the settlement’.

In exercising their investment powers, the SLA Trustees are required ‘so far as practicable’ to consult the tenant for life,\(^{11}\) and are also required to give effect to the tenant for life’s wishes ‘so far as consistent with the general interest of the settlement’.\(^{12}\)

This new provision applies to the application of any capital monies, whether they are to be invested in stocks and shares, or used to buy or improve land or other real property. However, it does not affect the tenant for life’s powers to manage land, or to sell, exchange, etc., land, the title of which is (or should be) vested in them.\(^{13}\)

While SLA Trustees are empowered to engage professional investment managers to advise on the investment portfolio, they must consult the tenant for life in relation to any investment changes.\(^{14}\)

The change made in 2001 is more substantial than might appear at first sight.

Under the ‘old’ regime, the SLA Trustees were required to invest at the direction of the tenant for life. The tenant for life’s power was fiduciary in nature\(^{15}\) and, provided they acted in good faith, they had effective control of the capital of the trust fund, as SLA Trustees were bound to carry out their instructions, subject only to satisfying themselves that the price was reasonable and proper.\(^{16}\) While the tenant for life was required to consider the interests of the trust generally, they were able to prefer their own interests.

Under the ‘new’ regime the SLA Trustees:

- need to consult with the tenant for life and give effect to their wishes so far as they are consistent with the general interest of the settlement;
- however, if it is not ‘practicable to do so’, they need not consult.

As the investment discretion is now with the SLA Trustees, a sensible approach is for them to formulate their investment proposals and put them to the tenant for life. When formulating such proposals, the SLA Trustees need to consider both the purpose of the trust and the interests of all those interested in the trust.

It is then for the tenant for life to decide if they wish to adopt those proposals, or make their own counter-proposals.

Where the tenant for life submits their own proposals (wishes), the SLA Trustees are exercising a supervisory jurisdiction for the protection of the trust. If proposals cannot be agreed with the

\(^{10}\) s75(2) SLA (repealed with effect from 1 February 2001)

\(^{11}\) s75(4)(a) SLA, as inserted by Schedule 2, Part II, para 10, Trustee Act 2000

\(^{12}\) s75(4)(b) SLA, as inserted by Schedule 2, Part II, para 10, Trustee Act 2000

\(^{13}\) In accordance with s.4(2) SLA

\(^{14}\) s75(4B) SLA, as inserted by Schedule 2, Part II, para 10, Trustee Act 2000

\(^{15}\) Under the SLA, the tenant for life is a trustee of their statutory powers

\(^{16}\) Re Hart’s Will Trusts [1943] 2 All ER 557 (see also Lewin on Trusts, 18th Edition at 35.73)
tenant for life, the SLA Trustees can re-formulate them, if they believe they can achieve common
ground.

If there is no prospect of coming to an accord, the SLA Trustees may consider that, having
consulted with the tenant for life, they can proceed with the proposed transactions on the basis
that they are consistent with the general interest of the settlement (whereas the wishes of the
tenant for life are not). Specialist advice should probably be sought to clarify the levels of
protection available to trustees in this position. Where a 'stalemate' exists, the better course may
well be to apply to court for directions.

The requirement to consult the tenant for life 'so far as practicable', does not remove the need
to consult, even if the SLA Trustees anticipate the tenant for life will put forward inappropriate
wishes. However, it will relieve the SLA Trustees from that duty where the tenant for life is
incapable of acting or is otherwise incapable of communicating their wishes.

4 – THE PURCHASE AND/OR EXCHANGE OF LAND

Purchase of land

Where further land is purchased in a ‘strict settlement’ (i.e. an SLA trust), the power of
investment is with the SLA Trustees, who should manage the transaction. This is the case
regardless whether or not there remains relevant property within the trust.

It is very important to understand the expression 'relevant property'. It includes any land or
personal chattels subject to the ‘old’ regime. It is possible to preserve the ‘old’ regime by
retaining only a minor piece of land within the trust, perhaps only a small parcel of land such as
a wayleave, a manor or even a right such as an easement. While chattels can be relevant
property, if they ‘pass with the land’, if the land has all been disposed of the connection will have
been broken and it would be ill-advised to rely upon the existence of settled chattels alone to
preserve the ‘old’ regime.

Where there is no relevant property, the land purchased into the trust will be subject to a trust of
land, and legal title vested in the SLA Trustees. If all relevant property within a trust is disposed
of, whether by sale or otherwise, so that the trust includes only the capital proceeds thereof, it
becomes a trust of land. If any land, or an interest in land, is subsequently acquired in the trust,
the trust will remain a trust of land and will not re-enter the ‘old’ regime.

Where relevant property is continuously within the trust, the ‘old’ regime will apply, and any
further land purchased should be vested in the name of the tenant for life. The SLA Trustees will
be the party contracting to make the purchase. They should instruct solicitors and obtain the
various reports and surveys required to enable them to be satisfied that: (i) the transaction is
both consistent with the general interest of the trust; and (ii) the price being paid is appropriate.
When the transaction completes they might take the legal title into their own name and
immediately execute a vesting assent in favour of the tenant for life, or the contract could provide

17 While the language of the ‘new’ regime might be taken to suggest this as a possibility, it has yet to be
tested in the courts
18 s75(4)(a) SLA (as amended)
19 See section 3 of this Guidance Note for investment powers of the tenant for life and the SLA Trustees
20 Personal chattels may form ‘settled land’ if settled so as to be enjoyed with, and pass with the land –
Megarry & Wade, The Law of Real Property, 6th edition at 8-041. While such chattels are often referred
to as ‘heirlooms’, few heirlooms are actually subject to SLA trusts
21 Section 117 SLA – definition of ‘Land’
22 Section 75(2)(b) SLA (as amended)
23 While, technically, when property is sold and the proceeds used to purchase replacement property,
there is a period of time when no land is actually held, for the purposes of the SLA regime the
simultaneous sale and purchase of land will not terminate the application of the ‘old’ regime. Where the
purchase by the SLA Trustees completes the day after the sale, though, this is fatal to the continuation of
the ‘old’ regime
for the legal title to be conveyed direct to the tenant for life. In either case, the appropriate restriction needs to be registered against the legal title, identifying the SLA Trustees’ interest.

Exchange of land

Despite the dramatic changes to the ‘old’ regime due to both the Trusts of Land and Appointment of Trustees Act 1996 and the Trustee Act 2000, the tenant for life’s powers of exchange are unaltered, other than if the exchange involves the application of capital money from the trust (over which the SLA Trustees have the discretion).

As with a sale, at least one month before entering into such transaction, the tenant for life must give notice of such intention separately to each SLA Trustee and, if known to the tenant for life, to the solicitor for the trustees by registered post. It is open to the SLA Trustees, in writing, to waive the notice period, or accept a shorter notice period. If no valid notice is served, the tenant for life may not be able to enforce an action for specific performance of the transaction.

5 – THE RIGHTS TO A GRANT ON THE DEATH OF THE TENANT FOR LIFE

On the death of a sole tenant for life (or the last survivor of joint tenants for life), where trust property is held in the names of the SLA Trustees no grant is required as the property remains in their name(s). A grant is only required when trust property is held in the name of the tenant for life.

The entitlement to a grant on the death of the tenant for life is dependent on:

1. whether any trust property is vested in the tenant for life; and
2. if the trust continues to be a Settled Land Act trust after the death.

To the extent that trust property is vested in the tenant for life, a grant should be obtained in order to deal with that property. The identity of the person entitled to a grant to deal with the settled land will depend upon whether, or not, it continues to be ‘settled land’.

If the property continues to be ‘settled land’, the SLA Trustees are entitled to a grant of letters of administration limited to the settled land. A ‘Save and Except’ grant will be issued to the personal representatives dealing with the tenant for life’s personal estate. Individual applications need to be made for each grant and the applicants are liable for any inheritance tax due in respect of their separate titles.

When, upon the death of the tenant for life, the trust property ceases to be settled land, the legal estate in any trust property vested in the tenant for life will vest in their general personal representatives. No separate grant limited to the settled land will normally be issued (but see below). When applying for the grant, the personal representatives will be required to pay any inheritance tax then due on the assets passing under their title (which will include the settled land). However, they are entitled to recover from the SLA Trustees/the former settled land, the IHT and interest paid in respect of the settled land.

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24 s38(iii) SLA
25 While s101 SLA still states such notices shall be given by ‘posting registered letters’, the main reason for this is likely to provide evidence of receipt, and an alternative means of delivery, provided the notice is signed for, may be sufficient
26 Rule 29 Non-Contentious Probate Rules 1987 (SI 1987/2024). CARE: During the recent review of the Non-contentious Probate Court Rules, it was proposed that the right of SLA Trustees to a grant be abolished. The Rules have yet to be finalised and there is no certainty that this proposal will remain. Readers will need to consider this note in connection with the new Rules, once they are published.
Once they have obtained the grant, the personal representatives should liaise with the SLA Trustees to identify what the SLA Trustees want to do with the property, now vested in the personal representatives 27

Difficulties arise, though, where the estate of the tenant for life is small, or they are insolvent. In the first case, those entitled to take a grant may be unwilling to incur the expense of doing so and, in the second instance, those entitled to the grant may well not want to administer an insolvent estate (which could involve personal liability).

Where the estate is small, the SLA Trustees could reasonably pay the costs of obtaining a grant so as to avoid a ‘stalemate’ and a paralysis of the ability to deal with the principal trust asset. During any period of paralysis, the SLA Trustees would be unable to account to the beneficiaries for the trust property.

In cases where the tenant for life may be insolvent, a stalemate has arisen (as above), or significant liabilities may attach to whoever assumes responsibility for the tenant for life’s estate, the SLA Trustees could consider applying for a grant of letters of administration limited to the settled land. Such an application would normally be made to the District Probate Registrar inviting them to exercise their discretion under s.116 Supreme Court Act 1981. In making the application, it will be important to explain both the background and the mischief that the making of such a grant will avoid.

If there is a delay in the obtaining of a grant due to, say, a probate dispute, rather than a discussion as to who will fund the application, it is probably more appropriate to negotiate the issue of a grant ad colligenda bona than it is to ask the court to exercise its discretion under s.116. However, at that time the SLA Trustees will no doubt be seeking specific advice in the context of the particular dispute.

**Note**

It should be noted that where a Settled Land Act trust has become a trust of land, in accordance with the **Trusts of Land and Appointment of Trustees Act 1996**, legal title to the trust property should be vested in the SLA Trustees, or their nominee(s). Accordingly, there should be no need in such cases for a grant to be obtained to deal with any of the trust assets.

6 – TENANT FOR LIFE: POWERS OF DELEGATION 28

While the overall scheme of the SLA gives the tenant for life powers (and duties) to manage the trust property, the tenant for life does not necessarily need to do it personally, but may delegate aspects of their role. 29

Unless specifically provided for within the trust instrument 30, a tenant for life’s ability to delegate is governed by s.25 **Trustee Act 1925** 31. Whilst a property and financial affairs lasting power of attorney (LPA) may also be used (adapted as appropriate), the restrictions below apply to any s.25 delegation, and may nullify any advantages of using an LPA 32.

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27 See Section 1 of this Guidance Note for detail on the separate positions of personal representatives and SLA Trustees

28 The question of capacity – both mental and legal – see section 7 of this Guidance Note: Legal capacity and the tenant for life

29 The powers of investment are discussed in section 3: Investment powers of the tenant for life and the SLA Trustees

30 Although unusual for any trust instrument to set up a dedicated arrangement for the tenant for life to delegate their powers and/or discretions, it is not without precedent

31 As last amended by s5 **Trustee Delegation Act 1999**

32 No reference is made to enduring powers of attorney as any which might have qualified as s.25 powers should, by now, have long expired
The trust instrument may limit the tenant for life’s ability to delegate, or may extend it (e.g. the ability to allow an attorney to sub-delegate must be specified within the trust instrument if it is to be permitted).

s.25 limits the delegation by any individual power to a period not exceeding 12 months\(^33\). Whilst this does not prevent the tenant for life executing a series of such powers, covering consecutive periods, such wholesale delegation might bring into question if such delegation is in good faith or an attempt by the tenant for life to dispose of their powers and discretions.

When making a s.25 power, an individual tenant for life must, within seven days of giving the power\(^34\), give written notice to the following:

- the SLA Trustees
- each other person, if any, who, together with the donor of the power, constitutes the ‘tenant for life’.

The notice must specify:

- the date from which the power is to be effective
- duration of the power
- the donee of the power
- why the power is given, and
- any limitation on the donee’s ability to exercise the individual tenant for life’s powers and discretions.

A failure by the tenant for life to give the requisite notice(s), as above, does not invalidate any transactions entered into by the attorney with third parties (provided such third parties are not aware of the failure). However, the power itself will not have been validly granted and the tenant for life will be liable for any actual or perceived loss arising to the trust as a result of the transactions\(^35\).

A s.25 power may be granted to an individual, a trust corporation, or to two or more persons (who may act either jointly or jointly and severally).

The delegated authority remains vested in both the tenant for life (as principal) and, where instructions from the attorney conflict with those of the tenant for life, the latter’s should normally take preference. However, this may depend upon the particular circumstances of each instance.

Delegation does not absolve the tenant for life of responsibility for the acts and defaults of their attorney. To the extent that the attorney defaults or acts in breach of their powers, etc., there may be a separate right of action against them by the tenant for life.

There is no power for the tenant for life to remunerate their attorney out of the trust fund. Any payment to the attorney is therefore the subject of a personal agreement between them and the tenant for life.

Whilst it might be noted that a tenant for life can delegate the exercise of their consent to any investment proposals, the tenant for life cannot join in with the SLA Trustee(s) in appointing investment managers to manage the trust investments on a discretionary management basis.

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\(^33\) If no start date is stated, the delegation is assumed to commence on the date of the power; if no time period is specified, the default period is 12 months from the date the power becomes effective.

\(^34\) The seven-day period is from the date the power is given, and not the date from which it is to be effective.

\(^35\) This may also result in the tenant for life losing the protection of being ‘unimpeachable for waste’ in relation to the transaction(s) in question – see also section 8 of this Guidance Note.
s.1 Trustee Delegation Act 1999, (which enables the delegation of a donor’s ‘trustee functions’ by a general power of attorney, or by an enduring power of attorney, where ‘the donor has a beneficial interest in the in land, proceeds or income of the land’), does not apply to the powers and discretions of a tenant for life under the SLA. Although a tenant for life may be a ‘trustee of their powers’, they exercise all such powers as tenant for life, not as a trustee.

7 – LEGAL CAPACITY AND THE TENANT FOR LIFE

The tenant for life is able to exercise their powers and duties whilst they have legal capacity. As identified in section 6 on powers of delegation, above, although they may delegate their powers while they have legal capacity, there is very limited scope to delegate if the tenant for life is lacking capacity.

Any discussion of capacity has the potential to turn into an analysis of the Mental Capacity Act 2005 (MCA). There is much commentary on the MCA elsewhere, and this guidance does not seek to repeat that, other than where directly relevant. However, before touching on mental capacity, let us first consider where the tenant for life lacks legal capacity as they are a minor.

In such a case, the powers and duties vest in the trustees of the settlement (the SLA Trustees) until the tenant for life attains their majority. The SLA Trustees must then convey the legal title to the tenant for life.

When the whereabouts of the tenant for life are unknown, this does not remove from them their powers and duties under the SLA. Unless the tenant for life is declared legally dead, the management of the trust assets could effectively be paralysed. While, at the time of writing, the Ministry of Justice is considering how the interests of missing persons may be safeguarded by the appointment of a guardian, no statutory arrangements are yet in hand.

Turning now to situations where the tenant for life lacks mental capacity, unless there is a valid s25 Enduring Power of Attorney or Lasting Power of Attorney in existence (which is unlikely to be the case), an application will need to be made to the Court of Protection to exercise the powers of the tenant for life. In this respect, it must be borne in mind that, under both the MCA and the common law, ‘capacity’ is decision-specific. The tests for capacity differ – the MCA assumes capacity unless proved otherwise, whereas the common law looks to the balance of probabilities. If it is necessary to apply to the court for authority to enter into a transaction, the court is required to apply the provisions of the MCA that focus on the ‘best interests’ of P (the tenant for life), so that the duties owed to third parties under the Settled Land Act 1925 might only be a factor in the court’s decision.

Accordingly, where there may be doubt if the tenant for life has capacity to enter into a particular transaction, those advising and/or supporting the tenant for life would be well advised to seek an assessment of capacity. This might include identifying if there is any particular time of day when the tenant for life is more, or less, able to make a valid decision. If the contemporaneous

36 This now also extended include a property and financial affairs Lasting Power of Attorney
37 s1(1) Trustee Delegation Act 1999
38 While there are other scenarios set out in the SLA, they are historic situations that are unlikely to arise, e.g. where the first life interest is not to start until the tenant for life marries.
39 s26 SLA
40 Which will normally be age 21 if the trust instrument is dated on or before 31 December 1969, and age 18 if dated later.
42 See Straus, J: Walker and anr v Badmin and others [2015] WTLR493 @ paras 48/49; and Stephen Morris, J: Kicks and anr v Leigh and others [2014] EWHC 3926
43 s1(5) Mental Capacity Act 2005
assessment identifies that the tenant for life is unable to make the decision, and an application to court is required, it will mean that an application may be made in a timely manner. Alternatively, the assessment may identify that the tenant for life is able to make a decision if provided with certain support, to demonstrate the validity of the decision. This is particularly important if the decision could be open to challenge at a later date.

In considering the above, it should be borne in mind that while the Court of Protection is required to apply the provisions of the MCA when being asked to authorise a transaction, the application of the ‘best interests’ test (which focuses on the interests of the tenant for life) could result in an unsatisfactory position for other beneficiaries under the trust. However, if the transaction is entered into personally by the tenant for life and the transaction is challenged, common-law principles will apply when considering the validity of the transaction44, which effectively ousts the ‘best interests’ test.

Clearly, though, if there is little likelihood that the tenant for life has capacity to exercise their powers, an application to the Court of Protection will be required to enable the court to consider the exercise the power. While matters might be referred to the court on a decision-by-decision basis, there is no reason why consideration should not be given to seeking the appointment of a deputy to exercise the tenant for life’s powers under the SLA.

Where the tenant for life is outside of the jurisdiction of the Court of Protection, as the tenant for life’s powers will relate to land within the court’s jurisdiction, it will be necessary to make an application to the court rather than seek to rely upon any substituted decision maker appointed in another jurisdiction.

8 – A MISCELLANY

Each section so far in this Guidance Note has addressed a particular issue, but there are a number of significant issues that can be covered briefly, as below.

‘Heirlooms’

Although the SLA deals primarily with the settlement of land, it also allows for the possibility that chattels may be settled with the land or in a manner in which such chattels devolve with, or effectively upon the same trusts as, the land45. These are defined as ‘heirlooms’ – a technical term not to be confused with the more widely acknowledged use of the word.

‘Heirlooms’ are relevant property for the purposes of the Trusts of Land and Appointment of Trustees Act 199646, so that even though an SLA trust includes no land, if it has continued to contain heirlooms it has not become a trust of land (and any land subsequently purchased will be ‘settled land’).

While a tenant for life may sell ‘heirlooms’ and the proceeds may be used to purchase further chattels to be held upon the same trusts, any such sale or purchase ‘shall not be made without an order of the court’47. While a sale of chattels without a court order will be a breach of trust, there is no clear guidance as to the consequences thereof.

On a sale of heirlooms, as with a sale of land, the proceeds should be paid over to the trustees of the settlement (SLA Trustees), who will be the assessable party for any capital gains tax that might be payable as a result of the transaction.

Change of SLA Trustees

Where there is any change of SLA Trustees, the provisions of the Trustee Act 1925 apply to the appointment and/or discharge of trustees of an SLA trust the same as they do to any other trust.

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44 Applying Kicks and anr v Leigh and others [2014] EWHC 3926 (Ch) @ paras 63-66
45 s67 SLA
46 s2(4) Trusts of Land and Appointment of Trustees Act 1996
47 s67(3) SLA – it would seem the SLA Trustees have no power to give consent for sale.
However, where land is vested in the tenant for life, upon such discharge and/or appointment of SLA Trustee(s) a ‘deed of declaration’ is required, supplemental to the vesting assent, identifying the composition of the new body of trustees. Where title to the land is registered, the restriction on title should also be amended to reflect the identity of the new body of trustees. s35(2) SLA specifies the parties who are required to execute the deed of declaration.

**Waste**

While considered an archaic term, ‘waste’ remains relevant in SLA trusts as it is used to help identify both the extent to which a tenant for life may be exonerated for their actions; and the apportionment of receipts between the capital and income arising from various activities involving trust property (as further discussed below).

The tenant for life will not normally be liable for failing to do what they should have done (e.g. non-repair of buildings), unless the trust instrument imposes the obligation upon them. However, unless specifically exonerated, the tenant for life will be liable for doing what they should not have done (e.g. wanton destruction of trust property).

To the extent that the tenant for life is either permitted to do something, or exonerated for doing it, they are ‘unimpeachable for waste’ (i.e. absolved from liability). However, where they are not exonerated they are ‘impeachable for waste’ and liable for any detriment arising. Any right of action against the tenant for life is vested in those with the interest in reversion or remainder, who will have a right to bring an action for damages, or to apply for an injunction.

A tenant for life may be both ‘impeachable’ and ‘unimpeachable’ for waste under the trust instrument, depending upon the particular activity in question. Accordingly, it is important to understand the trust instrument and the extent to which it limits, or supports, the tenant for life’s ability to exploit the trust property.

**Mineral rights**

Where the trust includes mineral rights, the tenant for life can mine them (or grant a mining lease not exceeding 100 years), unless they are impeachable for waste and the mine was not open when their life tenancy began.

Where the tenant for life is ‘unimpeachable for waste’, they may open new mines. Unless the trust instrument includes a contrary intention, any premium on the granting of a lease, together with a one-quarter share of the rents and profits arising, is capital money and will need to be accounted for to the SLA Trustees.

Where the tenant for life is ‘impeachable for waste’, they may not grant leases to open new mines; or open new mines. However, the latter prohibition does not apply to the opening of additional mines to a ‘seam’ already being mined. Unless the trust instrument includes a contrary intention, any premium on the granting of a lease, together with a three-quarter share of both the rents and of the net proceeds of sale, is capital money and will need to be accounted for to the SLA Trustees.

**Cut timber**

A tenant for life is only entitled to cut timber if they are ‘unimpeachable for waste’. In such circumstances, they are entitled to retain the profits from the cutting and sale of the timber.

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48 s35 ibid
49 ‘Permissive waste’
50 ‘Equitable waste’
51 Woodhouse v Walker (1880) 5 Q.B.D. 404
52 Lowndes v Norton (1864) 33 L.J.Ch 583
53 s41(ii) SLA
54 s42(4) ibid
55 s42(4) ibid
56 ‘Timber’ usually relates to oak, ash and elm trees of at least 20 years old. However, depending on local custom, in some areas other trees and qualifications might apply.
If ‘impeachable for waste’, subject to the exception below, a tenant for life is only entitled to fell timber with the consent of the SLA Trustees, or an order of the court. A three-quarter share of the net proceeds of sale is capital money and will need to be accounted for to the SLA Trustees.

The exception is where the land is already set aside to produce timber for sale and it is cut periodically – the tenant for life can cut and sell the timber in accordance with appropriate estate management rules as, in these circumstances, the timber is viewed in the same way as an annual crop.

**Repairs and improvements**

Unless relieved by the trust instrument, the tenant for life is responsible for the cost of repair and maintenance of trust property.

Where the tenant for life wishes to make improvements to trust property, SLA Schedule Three sets out what can be paid for out of the trust capital (subject to certain limitations57); or funded by a loan from capital, repayable out of income. Any improvements not identified within Schedule Three are, strictly, payable by the tenant for life. While such matters as the installation of double glazing, central heating or a bathroom might not have been envisaged at the time of the SLA, the cost of these might still be payable out of capital as ‘additions to or alterations in buildings reasonably necessary or proper to enable the same to be let’.58 However, if similar improvements are made to property occupied by the tenant for life, the SLA Trustees, or the court, may permit the cost to be paid out of capital, but require reimbursement by instalments from the tenant for life.59

A final, reflective observation on settled land: it could not arise where, at the outset, the land was in joint ownership as, when held under a joint tenancy or a tenancy-in-common, the land is already subject to a trust for sale.

*This Briefing Note was prepared by Paul Saunders TEP on behalf of the STEP UK Practice Committee*

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57 Schedule Three, Part I, ibid, limits such expenditure to one-half of the annual rental of the settled land.
58 Schedule Three, Part I (xxiii) ibid
59 Schedule Three, Part II (v) ibid