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The reform of property law and the Land Registration Act 2002: a risk assessment

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Land Registration Act 1925 s.70 (1)

***Conv. 136** The Land Registration Act 2002 has been received with much critical acclaim, and rightly so. It is a work of monumental importance and monumental effort. As is well known, the Act of 2002, which is now set for entry into force on October 13, 2003, is designed to revolutionise conveyancing in England and Wales and to bring the land registration system established by the 1925 Land Registration Act into the modern age.¹ In fact, in terms of its underlying rationale, the Act of 2002 shares much with its 1925 counterpart. Both were born of the recognition that the systems they were designed to replace were (and are) no longer suitable for the social and economic conditions of the time. The 1925 Act is still seen by some as an interloper, polluting the purity of the historic principles of property law and the 2002 Act arouses suspicion in those who are now comfortable with the 1925 legislation. Both reflect the new “technology” of their age (the introduction of the widespread use of registers and e-commerce respectively) and it was just as uncertain whether the system of the 1925 Act would work as it is now uncertain whether electronic conveyancing will actually deliver all the anticipated benefits. Fundamentally, both Acts are directed principally to simplifying the processes by which land transactions are carried out and substantive changes found in the two pieces of legislation can be regarded as supportive of this primary purpose.² Of course, the Land Registration Act 1925 had partner legislation and while the Act of 2002 is very clearly “transaction driven”, it of necessity also indulges in wide ranging substantive law reform. As one would expect, this reform is firmly anchored to the primary goal of e-conveyancing and, for the most part, the reasons for the changes are persuasive assuming e-conveyancing is in place.³ But, that system is not yet with us.

***Conv. 137** The following analysis does not deny that e-conveyancing is needed, nor does it embark on a detailed assessment of the provisions of the Act directly concerned with its implementation.⁴ However, while much attention is rightly given to the fundamental purpose of the 2002 Act, it is important to assess the considerable impact it will have on those “everyday” principles of land registration that currently regulate over £2000 billion worth of property.⁵ As has been said already, most of these substantive changes are designed to facilitate the new conveyancing processes and to ensure that we move from registration of title to a system where it “will be the fact of registration and registration alone that confers title”.⁶ Yet, given that these substantive changes are certain to come into force before the e-conveyancing provisions, what will be their impact in an e-conveyancing-free climate? More importantly, is there a possibility that the substantive law reforms will produce unwelcome or unexpected effects because they are not located in an e-conveyancing system? Is it possible that the effect of the substantive reforms will be different before and after the introduction of e-conveyancing and, most of all, is there an opportunity for the courts to exploit any uncertainties in the legislation to undo or undermine the system of e-conveyancing before it becomes operative? Of course, it must be accepted at the outset that the substantive reforms were not designed to stand alone, even if they could in fact be justified without the conveyancing imperative, and this consideration alone may stay the judicial hand. However, it bears repetition that many of the changes actually will stand-alone for a period of time--perhaps a considerable period of time--and they will come into effect without the protective cloak of e-conveyancing. They will change the face of land of registered title before the first byte of e-conveyancing.

A: The transformation of overriding interests into interests that override: Schedules 1 and 3

There is, perhaps, no other creation of the Land Registration Act 1925 that has aroused as much fierce comment as the infamous s.70(1) and its list of overriding interests. The fact that there is a category of property right that can bind a purchaser of a registered **Conv. 138* title without either that interest appearing on the register or necessarily being discoverable is thought by many to be anathema to the very idea of a registration system. To others, among which the present author can be counted, there is nothing inherently wrong with a category of non-registrable binding right, even in a system of land registration, provided that the category is well-bounded, well known and can be justified by reference to some stronger legal, social or economic need. Indeed, policy might well dictate that there should be a class of right that binds a registered title irrespective of registration. Obligations of general public utility, such as the burden of maintaining sea walls and public rights of way, are an obvious example. But, "policy" can mean more than this and it could be thought socially and economically politic to ensure that the property rights of those who do not have the protection of a formal acknowledgement of their rights, but who nevertheless occupy land as their home, should be protected without the need to register. For, theory aside, the act of registration "against" another's land, even when it is not the land of one's emotional partner, is readily seen as an hostile act.

Of course, it is unarguable that changes to land law and land use have turned s.70(1) of the LRA 1925 into a different creature from that envisaged by the drafters of 1925 Act. The development of principles permitting (some might say encouraging) the informal acquisition of interests in land--such as resulting and constructive trusts and proprietary estoppel--have dramatically increased both the chance that an adverse right might exist and that it might be undiscoverable, being neither materially recorded nor necessarily obvious to the prudent purchaser. Likewise, the rise of a different kind of "purchaser", the institutional mortgagee, and the importance of such lending to the domestic economy has both exposed the latent power of s.70(1) and released a tidal wave of litigation. So, despite the fact that the case against overriding interests is not watertight, there are powerful arguments in favour of reform even without the imperative of e-conveyancing. When that imperative is taken into account, with its goal of making the register both the evidence and the origin of a person's title achieved on-line with the absolute minimum of additional enquiries, it is clear that reform cannot be put off. The very point of e-conveyancing where the act of electronic registration is to be the act of creation or transfer of a property right would be undone if it were possible to claim protection for rights created off-register through a substantial category of overriding interests. Thus, it is with some **Conv. 139* justification that the Law Commission saw the existence of overriding interests as the "major obstacle" to its reforms⁷ and although there was a brief flirtation with the idea of abolishing the concept altogether, in the result the 2002 Act lays the axe to the tree with some vigour by both minimising the occasions on which an "interest that overrides" can affect a registered title and by encouraging the registration of interests that might otherwise take effect as such. Conversely, if these reforms are not effective, then the dream of e-conveyancing as it is currently set out in the Act will be unattainable.

Apart from the change of name,⁸ the first change is that the Act now recognises that the effect of an interest that overrides depends on whether it is challenging a first registration or a disposition of a title that is already registered. Interests overriding a first registration are dealt with in Sch.1 (and made effective by ss.11(4)(b) and 12(4)(c)) and those overriding a registered disposition are dealt with in Sch.3 (and made effective by ss.29(2)(a)(ii) and 30(2)(a)(ii)) and the plain effect is that more interests will override under Sch.1 than Sch.3. There is a double rationale for this. First, that the act of first registration itself (being in this sense purely administrative) should neither enhance nor diminish the effect of a proprietary right over land. That which did not bind before should not bind after first registration and vice versa.⁹ Of this principle surely there can be little complaint. For example, although para.2 of Sch.1 confers overriding status on an "interest belonging to a person in actual occupation, so far as relating to land of which he is in actual occupation", this can refer only to those rights which, at the time of first registration, are already binding on the applicant.¹⁰ Likewise, equitable easements required to be (but not) protected as Class D(iii) land charges under s.2(5)(iii) of the LCA 1972 cannot gain protection by first registration because they are excluded from Sch.1.¹¹

**Conv. 140* The second rationale is that, given the aim is to ensure that the register reflects as accurately as possible the legal state of the land, the interval between a first registration and a registered disposition is seen as an opportunity to bring more rights on to the register (even if they could override) and to deny overriding status thereafter to those that contradict the paramount policies of the Act. In consequence, there is a duty under s.71(b) for the person applying for registration of a disposition to disclose information about rights which may fall within Sch.3,¹² not least because the

scope of Sch.3 is more narrowly drawn than Sch.1. Two further points may be made here. First, that it remains to be seen whether the combination of an efficient e-conveyancing system, the s.71 duty and the penalty of voidness (where it operates) really does encourage registration of rights in the interval between first registration and the first registered disposition. This rather suggests a degree of knowledge and understanding on the part of right holders (and their advisers) that might not exist. Secondly, given that the legislation denies continuing overriding status to certain property rights on the occasion of a registered disposition irrespective of the circumstances surrounding that disposition and despite the fact that they were effective at first registration, might there be cause for a challenge under human rights legislation for a deprivation of property contrary to Art.1 Protocol 1 of the European Convention?¹³ Of course, it remains to be seen whether many (or any) rights will in practice cease to be overriding on a registered disposition where they were overriding on a first registration because of the LRA 2002.¹⁴ For example, a right may be effective at first registration against the applicant simply because he created the right and its subsequent voidness against a purchaser under a registrable disposition will be nothing more than a repeat of the rule we have now as to transactions concerning third parties. Thus, where A grants an option to purchase unregistered land to X which is not then registered as a land charge under LCA 1972, this remains effective against A after A applies for voluntary first registration because A granted it. If A then sells under registered disposition to B, the **Conv. 141* option is not an interest that overrides under Sch.3 (absent discoverable actual occupation) and so is voided. But, it is voided not because of a difference between Sch.1 and Sch.3, but because of an application of normal principles of land registration. So, for a human rights challenge to arise, we would be looking for a right binding at first registration because of Sch.1, but ceasing to bind on a registrable disposition because of Sch.3. A possible example is where A conveys an unregistered title to B subject to X's legal easement which binds B in the normal way. B applies for first registration of title and the legal easement becomes an interest that overrides under Sch.1, assuming it is not entered on the register. Should B then convey to C by registered disposition, X's right would not override C's estate under Sch.3 unless the legal easement was registered under the Commons Registration Act 1965, within the actual knowledge of C, obvious on a reasonably careful inspection of the land or X had exercised the right within the previous year. The effect of Sch.3 in these (admittedly unusual) circumstances would be to deny effectiveness to a right guaranteed under Sch.1 without any "fault" or action by X.¹⁵ Indeed, although B will be under a duty to provide information that would have ensured that the legal easement could have been entered on the register,¹⁶ B's failure presumably cannot affect the innocent and unknowing owner of the legal easement. Of course, much will turn on how courts interpret Sch.3, particularly the provisions concerning the discoverability of legal easements and actual occupation. Nevertheless, the differences between Schs 1 and 3 and the potential for differing interpretations of the limiting provisions of the latter could be a recipe for litigation and uncertainty.

B: Re-defining interests that override

In addition to this re-classification of "interests that override", the Act also radically alters the type of right that can have overriding status in the first place. The result is a considerably slimmer set of rights under both Schedules than those that take effect under the LRA 1925. The following section discusses whether these reforms are open to criticism, either in principle or because they leave too much uncertainty that may be exploited **Conv. 142* by a result-oriented judiciary operating in an e-conveyancing-free climate.

(i) Rights recognised as within section 70(1) of the LRA 1925 but now omitted from Schedules 1 and 3 of the LRA 2002

Under the new scheme, there are a number of deliberate omissions from both Schedules. First, equitable easements no longer fall within either Schedule, despite being overriding interests under the LRA 1925 after *Celsteel v Alton*. Interestingly, however, Law Commission Report No.254 originally proposed that expressly granted easements should lose overriding status (because being expressly created they should be registered), but that all impliedly granted easements should continue to be overriding.¹⁷ That is, that overriding status should be triggered by the method of easement creation (express or implied) rather than the effect of creation (legal or equitable). The 2002 Act, however, uses the legal/equitable distinction as the touchstone for inclusion within the Schedules. In consequence, impliedly granted equitable easements do not enjoy overriding status, even though they are by definition not expressly mentioned in a written instrument and so may easily be overlooked for registration.¹⁸ This will have two immediate consequences. First, impliedly created equitable easements of necessity, common intention or under the rule in *Wheeldon v Burrows* will no

longer carry overriding status.¹⁹ Secondly, easements generated by proprietary estoppel and now the inchoate equity that precedes it²⁰ will have no protection unless the crystallisation of the estoppel (if any) has resulted in an entry on the register.²¹ Once again, while the policy behind this move is clear enough, it is not beyond possibility that a judge determined to protect the holder of an impliedly granted equitable easement or an estoppel may seek ways of forcing these rights within the Schedules. In this regard, we should note the recent *obiter dicta* in *K Sultana Saeed v Plustrade*,²² which ***Conv. 143** suggests that an easement may qualify as an overriding interest under s.70(1)(g) of the LRA 1925 (and by implication Schs 1 and 3) because the claimant was in actual occupation of the portion of land subject to the easement: in this case, by using the parking space that was granted by the easement. While it is questionable whether use of the easement also qualifies as “actual occupation” of the land, we must be aware of the possibility that the Schedules may be subject to the same kind of flexible interpretation as the judiciary seek to ensure “fairness” in the operation of the Act. So, while making the overriding status of easements dependent on their legal or equitable character, rather than the manner of their creation, appears to support the paramount goal of a fully accurate register, it does not sit well with the policy behind the rules on implied creation and this in turn may lead to imaginative interpretations of the 2002 Act. Will the judiciary be content to insist that a person may not derogate from their grant or indulge in unconscionable conduct but also stand by and watch the right destroyed on sale if that result can be avoided by a *Celsteel* or *K Sultana Saeed* style interpretation?

A second change is that the rights of adverse possessors *per se* will no longer be overriding, although whether this will have major practical implications is uncertain. Thus, while there is no equivalent of s.70(1)(f) of the LRA 1925, the rights of adverse possessors will override if supported by “actual occupation” of the land within the respective terms of the Schedules. In consequences, an absent adverse possessor has no protection, but this compromise between the rights of the purchasing third party and the adverse possessor was well supported by the consultation process.²³ Of course, there may be difficulties over the meaning of “actual occupation”, especially under Sch.3 in relation to (semi-) derelict land where the acts of adverse possession may be slight and the evidence of “discoverable” actual occupation very slim. Importantly, the rights of persons who have acquired the right to be registered as proprietor (*i.e.* who have completed the relevant period of adverse possession) but who have left the land without such registration also will cease to be overriding, unless the issue is one of first registration where the applicant will be bound by the rights of adverse possessors of which he had notice, irrespective of actual occupation (ss.11(4)(c) and 14(4)(d)). Although this is clearly an attack on the very notion of adverse possession, it does ***Conv. 144** in fact serve two policy masters: it further protects a purchaser from undiscoverable and unregistered rights; and it confirms the idea that in an effective registration system possession alone should not generate title.²⁴ It also supports--probably unintentionally--one of the justifications for adverse possession by disapplying the claim of one who is not utilising the land economically or socially.

Thirdly, overriding status is no longer accorded to the rights of persons in receipt of rents and profits of the land. As is well known, this sat uncomfortably within s.70(1)(g), although it is clear from Report No.254 that the proposal to remove the status was controversial, especially as it might cause substantial loss to intermediate landlords holding leases of over 21 years who had failed to register their titles.²⁵ In the result, in Report No.271, the Commission took the view that the risk of “hard cases” would be much reduced when full e-conveyancing took hold because it would then be impossible to create long leaseholds without electronic registration: there would be no such thing as a valid, but unregistered and non-overriding long lease. Of course, there might be other examples of hardship--*e.g.* a landlord under an equitable underlease of seven years or less who has further sublet²⁶ --but as a whole the provisions are a reasonable compromise between the need to produce an accurate register and the claims of those with adverse rights over the land.²⁷ At least, they will come to be a reasonable compromise when e-conveyancing operates.

Finally, there are other miscellaneous rights omitted from the Schedules that currently have a home in s.70(1). Chancel repair liabilities are omitted because they are no longer enforceable following *Aston Cantlow etc PCC v Wallbank*.²⁸ In addition, rights guaranteed under s.70(1)(h) of the LRA 1925, being rights in respect of possessory, qualified or good leasehold title that are excepted from the effect of registration are no longer overriding ***Conv. 145** because they are dealt with more appropriately and were an anomaly under the 1925 legislation.²⁹

(ii) Redefining “short” legal leases

Paragraphs 1 of Schs 1 and 3 provide that legal leases not exceeding seven years from the date of

the grant shall override a first registration or a registered disposition respectively. Although there are some exceptions where overriding status is denied for special types of short lease (the more so for Sch.3),³⁰ this is the obvious counterpart to s.70(1)(k) of the LRA 1925, save that the qualifying period is reduced.³¹ The rationale is both practical and designed to support the e-conveyancing revolution. It seems that the average length of a business lease is now some 10 years and it is undesirable that this most common of legal estates should escape substantive registration. Likewise, not only does the existence of large numbers of binding longer leases impair the integrity of the register, the advent of e-conveyancing, with its “simultaneous” registration/creation provisions will provide a simple and relatively inexpensive way of bringing these rights on to the register. Consequently, leasehold estates of over seven years (or with more than seven years left to run on assignment) are registrable as unique titles under the LRA 2002.³² Without doubt, these changes will advance the aims of the 2002 Act considerably and the introduction of e-conveyancing should ensure that the Registry is not drowned in a flood of new registrable titles. However, the burden could become unmanageable if the changes are brought into effect significantly before the introduction of e-conveyancing.

(iii) Actual occupation under the LRA 2002

The new provisions concerning the overriding status of the rights of persons in “actual occupation” encapsulate the Act's policy of enhancing free alienability of land under an e-conveyancing system founded on a near-complete electronic register. Specifically, as well as the removal of the “rents and profits” limb of **Conv. 146* s.70(1)(g) for both Schedules,³³ two new provisions are found. First, for both Schedules, the rights of persons in actual occupation are overriding only in so far as they relate to the land occupied by the claimant: in other words, the legal extent of the interest that overrides is to be co-terminus with the extent of the actual occupation. This is a deliberate reversal of *Ferrishurst Ltd v Wallcite Ltd*,³⁴ but in view of the scarce case law it is not demeaning the reform to say it is in the “tidying up” category. Of course, it does reinforce the idea that the role of “actual occupation” is to serve as a warning to prospective purchasers of the existence of adverse rights and not as an absolute safeguard of the efficacy of those rights.

Secondly, and representing a major policy shift, is the re-definition of “actual occupation” under Sch.3. Under the current s.70(1)(g), the rights of persons in actual occupation are overriding whether or not they are discoverable by a purchaser. The purchaser is bound *pro tanto* and is denied the opportunity of walking away from the purchase or taking steps to avoid the overriding interest. Under Sch.3, rights of persons in actual occupation are excluded from overriding status in two situations: first, where enquiries are made of the right holder and he fails to disclose the right in circumstances where he could reasonably be expected to do so; and secondly, where the right holder's actual occupation is not obvious on a reasonably careful inspection of the land and the person who might be bound did not have “actual knowledge” of the interest at the time of the disposition. The first is a reformulation of s.70(1)(g), but it is not so absolute in its penalty for failure to disclose.³⁵ Thus, the right holder loses overriding status (after failure to disclose) only if disclosure could reasonably be expected to be made. Such disclosure might not be reasonably expected where, say, the right holder did not know, and could not reasonably be expected to know, that they actually had a right (*e.g.* in cases of uncrystallised estoppel). While this is a welcome reform, there are uncertainties. For example, is it “reasonable” to expect disclosure when the right holder knows that the consequences of disclosure will be the loss of the family home because the purchaser will take steps to acquire the property free from the right? Presumably it is, because otherwise it will always be permitted to withhold disclosure if that would **Conv. 147* result in the loss of a property right and that would defeat the point of the provision. However, the circumstances in which a person may be asked about their rights are many and varied, and the introduction of a reasonableness criterion must introduce uncertainty that can only be settled by litigation.³⁶

The second limitation on “actual occupation” under Sch.3 is more controversial. It is designed to prevent the overriding status of undiscoverable rights: hence the actual occupation (not the right) must be “obvious” on a reasonably careful inspection of the land and the interest must not be within the “actual knowledge” of the person affected. There are two broad points of interest here. How valid is the principle behind Sch.3 that it is desirable to avoid the bindingness of undiscoverable rights and, secondly, is the limitation in the Schedule likely to be effective in practice? As to the first issue, there is something in the psyche of property lawyers that rebels against a purchaser being bound by rights whose existence they could not possibly discover. We must be careful, however, to distinguish undiscoverable rights from undiscovered ones. There are legions of cases under the LRA 1925 where a purchaser failed to discover an overriding interest--often through simple incompetence. The early

mortgage cases are good examples where sloppy lending practices or the desire to offer mortgages as quickly as possible without regard to the consequences resulted in a plethora of *Boland* type cases. By way of contrast, there are relatively few cases turning on the truly undiscoverable overriding interest: that is, cases where any reasonably prudent purchaser simply could not have discovered the existence of an adverse right and so never had the opportunity to take avoiding action. We might include in the list *Ferrishurst v Wallcite* (now dealt with as above), *Chokkar v Chokkar*³⁷ (the hidden wife in hospital), *Kling v Keston*³⁸ (the occupied garage) and, more recently *Malory v Cheshire Homes*³⁹ (actual occupation through the erection of a fence by the claimant on land believed to belong to the vendor). Others are harder to come by: indeed, so hard that there is little evidence from the case law that there is a problem.⁴⁰ It seems then the relative scarcity of truly ***Conv. 148** undiscoverable interests has not been fully appreciated and that the reform of the “actual occupation” provisions is more the result of a general dislike of non-registrable binding rights than a response to a specific problem within s.70(1)(g). In other words, perhaps this is a reform born of reaction rather than close analysis; of fear of a problem, rather than a problem. Even then, assuming that we accept that it is desirable to prevent a purchaser being bound by an undiscoverable right, it is arguable that Sch.3 should have included some reference to the reasons why the actual occupation is undiscoverable. If the undiscoverability is because of the nature of the right (e.g. *Ferrishurst*) or blameless chance (*Kling*, *Malory*), the balance may be thought to lay with the purchaser for this supports the free alienability of land. Where, however, it is because of some devious act of the vendor (as in *Chokkar*), the absolute rule in Sch.3 serves only to punish the occupier. To be clear about this, the argument here is not that the occupier should always triumph in such cases: it is rather that by resolutely denying overriding status to rights supported by undiscoverable occupation the legislation actually expresses a decisive and unquestioned policy choice in favour of purchasers.⁴¹ It is the lack of a mechanism to counter this policy choice that may prove troublesome. Other policy factors that, in some cases, might re-dress the balance in favour of the undiscoverable occupier are now excluded by the firm rule in Sch.3 and the Act is the poorer for it.

Secondly, even if we accept that change was necessary, is the form of Sch.3 the best that could be achieved. It may be, but the jury is still out. As noted, it is the actual occupation (not the right) that must be “obvious” on a “reasonably careful inspection” of the land. This then, is very firmly not intended to be a re-incarnation of the doctrine of notice and we can but hope that Her Majesty's judges do not interpret it this way.⁴² These judges will, of course, have to determine what “obvious” means, along with what amounts to a “reasonably careful” inspection, and as each case must be determined by its own facts, this Schedule may well turn out to be a litigation generator. This will be bad enough, but the impulse to litigate is likely to come from purchasers, especially institutional lenders, who will argue that the actual ***Conv. 149** occupation was not discoverable and that they should escape being affected by the right. Moreover, if courts take a narrow view of the paragraph, there may well be an erosion of the current law and perhaps even the undiscovered (but discoverable) occupation may not be thought sufficient to generate an interest that overrides. This will not be consistent with the language or purpose behind the Schedule, but there must be a concern that many of the *Boland* type cases will now be decided in favour of the lender simply because the lender did not discover the occupation.⁴³ The author does, of course, accept that many of these fears may prove unfounded. However, it is submitted that this change to the “actual occupation” provisions is driven more by a desire to protect purchasers from anticipated fears than by any overbearing practical considerations. It seems the right thing to have done. Let us hope that it turns out to be so.

(iv) Legal easements

As noted above, legal easements are also treated differently under LRA 2002. As regards Sch.1, all legal easements not otherwise entered on the register are included because first registration should neither enhance nor restrict the bindingness of a proprietary right. However, under Sch.3 the category is restricted, once again because of the policy that only discoverable rights should be overriding or, in the case of easements, also if they are used relatively frequently.⁴⁴ Consequently, a legal easement overrides under Sch.3 if, but only if, it is registered under the Commons Registration Act 1965, or it is actually known of by the purchaser, or it is obvious on a reasonably careful inspection of the land, or it has been exercised within one year prior to the relevant disposition.⁴⁵ In truth, this list of qualifying legal easements may prove to be comprehensive and come the advent of e-conveyancing, all expressly created easements will by definition be entered on the register. Thus, the paragraph will apply in the main to impliedly created easements and many of these may find their way on to the Register through the disclosure provisions. Of course, there may be some interpretative difficulties over “obvious on a reasonably careful inspection”, especially in relation to long-disused land ***Conv.**

150 where the “one year use” clause may not apply. Yet, when measured against the policy aims of the legislation and the dictates of e-conveyancing, these provisions strike a fair compromise between purchasers and users of land.

(v) Time restricted rights

Finally, we should note that the overriding status of a group of rights is time limited under the Act. Section 117 specifies that five types of right will cease to have overriding status under both Schedules 10 years after the Act is brought into force. These are a miscellany of rights, some feudal, some historic and include franchises, manorial rights, crown rents, non-statutory rights in respect of a sea wall or river embankment and corn rents. They are to be phased out because most can no longer be created and those that are extant should be registered by the right holder who is usually aware of their existence. Of course, the last point is debatable, but the Law Commission believe that this removal of status is justified as matter of land registration policy and will not contravene human rights provisions.⁴⁶ Once again, while the consultation process revealed this to be a supportable hope, only time will tell whether the relevant provisions will be free from human rights attack.

C: The emasculation of adverse possession in relation to registered land

The essential features of Pt 9 of the 2002 Act are well known, but the basic point is that no period of adverse possession will of itself give a registered title to the possessor. There is no period of limitation in respect of claims to recover possession of registered land.⁴⁷ In its place, an adverse possessor is given the right to apply to be registered as proprietor after a minimum period of 10 years adverse possession, itself to be calculated according to the current principles.⁴⁸ This application requires the Registrar to notify the registered proprietor (and certain other persons) of the application.⁴⁹ The persons notified then have a further period to be ***Conv. 151** determined by Rules to serve a counter-notice.⁵⁰ If the persons notified do not serve a counter-notice claiming the benefit of the Act, the applicant “is entitled” to be registered as proprietor of the estate in respect of which he applied.⁵¹ If an appropriate counter-notice is served, then subject to three exceptions, the application to register must be rejected and the registered proprietor is given two years to take possession proceedings against the adverse possessor. Failure to take such proceedings entitles the adverse possessor to apply for, and be given, registration at the expiry of the two-year period.⁵²

This simple scheme does, of course, mean the end of adverse possession as a threat to the security of registered title, save in cases where the registered proprietor genuinely has no use for the land (and does not wish to keep it) or if one of the exceptions applies. Adverse possession for any length of time (e.g. 50 years) will not of itself confer title and the registered proprietor will always be warned before the possibility of losing their estate arises.⁵³ A direct and intended consequence will be the voluntary registration of large areas of unregistered land, especially in those cases where the estate owner has difficulty keeping track of the state of their land and wishes to utilise the warnings given by the registrar.

Once again, this radical reform is justified because it brings security to registered titles so that they may be dealt with efficiently under e-conveyancing. It is also a reflection of a political philosophy that sees adverse possession as “land theft” and as inherently inconsistent with a registration system. Of course, there is merit in both these views: modern expositions of the law on adverse possession appear to have favoured the rights of possessors over the rights of paper owners⁵⁴ and the existence of an off-register mechanism for destroying titles seems to make a mockery of the state guarantee of title. On the other hand, the social and economic justifications for principles of adverse possession have been well documented⁵⁵ and instead of “land theft”, adverse possession can be seen as encouraging “productive land use”. Again, there is nothing inherently contradictory in having principles of adverse possession operate in registered land, at least ***Conv. 152** if those principles are seen positively as a method of transferring title from one person to another instead of a method of unfairly snatching it from them. It is a matter of perception, not of incontrovertible logic. Consequently, given that the Act has chosen to emasculate adverse possession--and so favours one policy perspective--we must be alive to the possibility that there will be some creative interpretation of the relevant provisions by a differently minded judiciary.

It is submitted that this battle will be fought around the interpretation of the three exceptions referred to above: that is, those cases where despite the registered proprietor serving a counter-notice, the applicant may be registered as proprietor. These are, first, where it would be unconscionable because

of estoppel for the registered proprietor to dispossess the applicant and the applicant should in all the circumstances be registered⁵⁶; secondly, where the applicant is for some other reason entitled to be registered as proprietor⁵⁷; and thirdly, where there is a boundary dispute concerning adjoining land, the applicant believing for at least 10 years that the relevant land was his and where the estate to which the application relates has been registered for at least one year.⁵⁸ The third of these is relatively straightforward and preserves the valuable role of adverse possession in settling minor boundary disputes. However, the first two exceptions are of a different order. The first is the more general and may prove to be the opening through which determined judges drive the horse and cart. The examples given by the Law Commission are certainly helpful,⁵⁹ but not only is the very scope of estoppel at best fluid (and at worst entirely discretionary), the words of para.5(2) of Sch.6 admit of a wide variety of interpretations. It is even possible that the courts might develop a *de facto* limitation period where (say) 20 years' adverse possession raises a presumption of estoppel so that it would be proper (absent special circumstances) to grant an application for registration by an adverse possessor even if the paper owner did object. This is not far fetched, as the history of the LRA 1925 is littered with imaginative interpretations of apparently clear statute in order to achieve what the court thinks is a desirable social goal. Even the second exception--that the applicant is for some other reason entitled to the land apart from the adverse possession--may not be quite as rare as is supposed. Not all cases will be as concrete as **Conv. 153* the examples given,⁶⁰ and it is possible to envisage "other entitlements" being manufactured (e.g. through generous use of the remedial constructive trust) in order to trigger the exception. If it proves to be the case, much of the perceived advantage of the reforms will be lost.

Once again, the point here is not that the provisions of the LRA 2002 are flawed or misguided. They reflect powerful arguments of policy and, while not everyone may agree with them, those arguments cannot be dismissed lightly. Of course, some might argue that the provisions on adverse possession are not critical for an effective e-conveyancing system: after all, it cannot be said that the "old law" seriously undermined the 1925 system. However, the more relevant point is that if these doubts are shared by those responsible for implementing and interpreting the LRA 2002, especially in cases of apparent hardship and unfairness, then we may see the re-emergence of a *de facto* limitation period in registered land through imaginative interpretation of the legislation.

D: Formalities for the creation of rights: new procedures and estoppel

Under the LRA 2002, there will be new requirements for the creation and transfer of proprietary rights in registered land. This is an essential feature of e-conveyancing and in time, these new rules will render the distinction between "legal" and "equitable" property rights largely irrelevant in registered land.

The first step will be the implementation of legislation permitting the conclusion of valid contracts and deeds in electronic form. For contracts, this will occur through an Order made under s.8 of the Electronic Communications Act 2000, inserting a new cl.2A into the Law of Property (Miscellaneous Provisions) Act 1989 authorising the conclusion of contracts by electronic media. For deeds, the Order may insert a new s.44A into the Land Registration Act 1925 effectively permitting the electronic creation of documents that are to have the effect of a deed, although this will not be needed if s.91 of the LRA 2002 is brought into force. For a while then, it will be possible to create or transfer proprietary rights either by material (written) contract or deed or by electronic media having the same effect and registration will be required in the same circumstances and for the same reasons **Conv. 154* as under the current law.⁶¹ However, when s.93 enters force, certain dispositions will "only have effect" if they are electronically registered. This is critical and lies at the heart of the e-conveyancing system. It means that it will not be possible at all to create certain types of proprietary right except by electronic registration. The rights subject to these provisions could in due course encompass all registered dispositions and all third party rights capable of protection by the entry of a notice on the register. Clearly, this represents a profound change in the way we perceive and create proprietary rights and obligations. Under the fully operative provisions of the LRA 2002, failure to observe mandatory electronic formalities will not even result in the creation of an equitable right, let alone one existing at law. There is no safety net, no right capable of binding the parties *inter se*, no distinction between legal and equitable rights and no right capable of overriding under Schs 1 or 3 through actual occupation.

It is difficult to take issue with this scheme if e-conveyancing is to become a reality. There can be no half-way house.⁶² No doubt, however, there will be many occasions after the entry into force of s.93 of the LRA 2002 where paper deeds or contracts are used by parties who fully believe that they are

creating something binding between themselves and perhaps for the future. It may even be that property professionals are slow to appreciate this dramatic change. Furthermore, the position is not made any easier by the fact that access to the electronic system--and hence the ability to create property rights--will be restricted to those with Network Access Agreements. Thus, not only are private individuals denied a simple method of creating or transferring rights in their own property (they cannot use paper), they cannot even use the electronic method without either engaging a property professional or going direct to the Land Registry. In such a climate, which some might see as a denial of a fundamental right to dispose of one's own property, it is likely that a way will be found to give limited effect to the actions of parties genuinely attempting to create property rights, albeit that they failed miserably. The present author has argued elsewhere that proprietary estoppel provides the perfect vehicle for this, being the **Conv. 155* traditional antidote to lack of formality in dealings with land.⁶³ Without rehearsing those arguments in full, it seems likely that proprietary estoppel will be used both to cure defects in the creation of rights where the relevant electronic formalities have not been observed and, more importantly, to ensure that equitable versions of rights do exist when the dictates of s.93 are not observed. Thus, written agreements (be they in the form of a "contract" or a "deed") may well be ineffective under s.93 of the LRA 2002, but may be reborn under the rubric of proprietary estoppel. Perhaps, indeed, this is foreseen by the legislation itself. As we know, s.116 of the LRA 2002 now makes it clear that rights created by estoppel are inherently proprietary, even before they are made concrete by order of the court. Consequently, these inchoate but proprietary equities can bind purchasers to land through Schs 1 and 3, almost certainly under the actual occupation provisions. This has already been accepted in relation to s.70(1)(g) of the LRA 1925--see *Lloyd v Dugdale*⁶⁴--and looks set fair to replicate itself under LRA 2002. Whether this development will be as extensive as the present author fears is of course uncertain. But, if it is, the law of estoppel, propelled in to the limelight by the new electronic formality provisions, could prove the *bête noir* of e-conveyancing.

There is a great deal more to the Land Registration Act 2002 than considered in this essay and as a whole the Act is a veritable masterpiece of legal scholarship and draughtsmanship. October 13, 2003 will be a date as resonant as January 1, 1926, for all the right reasons. It would, however, be surprising if such a mammoth undertaking did not generate critical comment and the above analysis has attempted to highlight areas of current or future concern, particularly with regard to the Act's reform of substantive principles of registration law. The history of the 1925 legislation teaches us that a system so overtly structured to support the free and uncomplicated alienability of land can be tempered--sometimes in the teeth of clear statutory words--in favour of occupiers of land and other third parties who appear to "deserve" protection whatever the statute might say. There is no doubt in the mind of the present author that the same will happen again to the LRA 2002--like it or not. Whether that will occur in respect of the provisions discussed above is an open question. However, given that so much of the Act is designed to support **Conv. 156* e-conveyancing, but given also that the substantive changes to property law necessary to support it will (indeed must) occur before that system becomes a reality, there will be a period of time during which the substantive law has changed but the system it is designed to support is not in place. That may well be the time of most risk, or most opportunity, depending on one's point of view. How the substantive reforming provisions of the LRA 2002 will be interpreted without the protective cloak of e-conveyancing is one of the most intriguing questions facing land registration in the twenty-first century. Will they be interpreted and applied in support of e-conveyancing or will they by design or accident be interpreted in a way that reduces its effect?

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Conv. 2003, Mar/Apr, 136-156

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1. Fully functioning electronic conveyancing is optimistically set for 2006: see LCD consultation document, *e-conveyancing, A Land Registration Consultation*, May 2002.
 2. Law Commission Report No.271 at para.1.6 notes that "virtually all the changes that the Bill makes to the present law flow directly" from the e-conveyancing imperative.
 3. The current author has reservations about the need for wholesale reform of the law of adverse possession as a logical consequence of e-conveyancing. See below at n.56.
 4. See D. Capps, "Conveyancing in the Twenty-first Century: An Outline of Electronic Conveyancing and Electronic Signatures [2002] Conv. 443.

5. Chief Land Registrar's estimate of the value of titles guaranteed under the 1925 legislation.
6. Report No.271 at para.1.10.
7. *ibid.* at para.8.1.
8. Perhaps the intention is to indicate that pre-Act interpretations of "overriding interests" should not carry over?
9. An exception is where an adverse possessor has completed the limitation period before first registration, but then moves out of actual occupation. The right will not then bind a first registered proprietor (as it would under LRA 1925) unless he has notice of it, LRA 2002, s.11(4)(c).
10. Report No.271, para.8.1. Such rights are binding prior to first registration primarily because the applicant has notice of them (they not being registrable land charges). Registered land charges would be automatically entered against the title.
11. They are also excluded from Sch.3, reversing *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 W.L.R. 204. Where first registration is voluntary, the applicant who has granted rights to another will remain bound *inter partes* by such rights irrespective of Sch.1. A well-advised owner who has granted rights could sell in order to defeat unregistered (but registrable) land charges, rather than apply for first registration himself. Perhaps such an owner could sell to their wife, as in *Midland Bank v Green*.
12. r.55 draft rules. The duty applies to applicants for first registration with regard to Sch.1, s.71(a) and draft r.27. There is no penalty for failure to comply. Under s.37, "if it appears to the registrar that a registered estate is subject to an unregistered interest" he may enter a notice in respect of Sch.1 rights (with some exceptions: see s.33), thus removing their overriding status.
13. Report No.271 at para.8.89 discuss the impact of human rights law on those overriding interests that will be phased out, but not in respect of rights lost because of the differences between in Schs 1 and 3.
14. Of course, the fact that only "a few" property rights may be denied is hardly a defence to a human rights challenge.
15. Unless the "fault" is not ensuring the easement is noted on the title at first registration.
16. s.71, LRA 2002.
17. Report No.254 at para.5.24.
18. Under the transitional provisions, any easement or profit which is an overriding interest at the time the Act comes into force, but would cease to be under Sch.3, retains its overriding status, Sch.12, para.9.
19. The usual practice of excluding implied creation by express terms may offer some relief assuming the parties have been legally advised. Given that we are concerned with informal written instruments, this may not be the case.
20. s.116, LRA 2002.
21. At first registration it may be that an estoppel easement will bind the first registered proprietor if he has notice of it under s.11(5), LRA 2002. However, the section seems to be directed at interests that deny the new proprietor the benefit of his estate *qua* owner, rather than interests which simply limit that estate.
22. [2001] EWCA 2011.
23. Report No.271, para.8.78, noting an approval of over 80% of those who commented.
24. Under the transitional provisions, an adverse possessor who has satisfied the limitation period has three years from the entry into force of the Act to apply for registration as proprietor, irrespective of whether he was in actual occupation, Sch.12, paras 7 and 11.
25. Report No.254 at paras 5.64-5.68.
26. This person is not in actual occupation and has no title to register. Their lease would not be overriding under Schs 1 or 3.
27. Under the transitional provisions, any person holding an overriding interest by virtue of receipt of rent and profits will retain it under Sch.3 until they cease to receive such rent and profits, Sch.12, para.8.
28. [2001] 3 W.L.R. 1323. An appeal to the House of Lords is underway. It may be that the Law Commission's pragmatic decision not to deal with such liabilities will be regretted, especially as they can be undiscoverable.
29. Report No.271, paras 2.103 *et seq.* and ss.12(6), 12(7) and 12(8).
30. For Sch.1 see s.4(1)(b)(d)(e) and note certain reversionary leases are excluded because they can be hard to discover. The same exclusions apply to Sch.3, with the addition of excluded leases granted out of registered land and two additional exclusions found in s.27(2).

31. Under the transitional provisions, legal leases between seven and 21 years remain as overriding interests, Sch.12, para.12.
32. ss.4(1)(c), (2)(b) and 27(2)(b). Eventually, the qualifying period will be reduced to three years so that there will be symmetry between the rules concerning the formality required for the grant of legal leases and their registration.
33. Rights arising under the Settled Land Act 1925 remain excluded, as they were under the 1925 Act, s.86(2), LRA 1925.
34. [1999] Ch. 355.
35. There is no similar limitation in Sch.1 because first registration does not change the extent to which the applicant is bound by pre-existing rights. Disclosure is irrelevant.
36. Again, will it be reasonable to expect disclosure if the right holder has been misled by the vendor of land about the true nature and extent of their rights, or (estoppel aside) been misled by the purchaser about the effect of a proper disclosure?
37. [1984] F.L.R. 313.
38. (1983) 49 P. & C.R. 212.
39. [2002] EWCA Civ 151.
40. Law Comm No.254 refers only to *Kling* (para.4.13), although it does discuss generally the vendor's obligation to disclose latent defects in title (paras 5.71 *et seq.*) Law Comm No.271 relies on No.254. It is not obvious why the existence of a third party's binding right should be equated with a vendor's latent defect in title.
41. Lest we think that this is the Law Commission's responsibility, no other person responding to the consultation argued that undiscoverable actual occupation should continue to be effective.
42. Given that principles of unregistered land still are infiltrated into the registered land system, to unpredictable effect (see most recently *Malory v Cheshire Homes*), we should not be too sanguine.
43. Providing, of course, that the lender does not have "actual knowledge" of the right under para.2c(ii) of Sch.3. This is, indeed a version of notice, but a fair counterweight to the other provisions of para.2 of the Schedule.
44. In contrast, there is no safety net for frequently used rights under the actual occupation provisions. The transitional provisions provide that any easement that is overriding at the time the Act comes into force will retain that status and that all legal easements will be overriding for three years after the Act is brought into force, Sch.12, para.10.
45. Sch.3, para.3.
46. Report No.271 paras 8.88 *et seq.*
47. s.96, LRA 2002 disapplies ss.15, 16 and 17, Limitation Act 1980 for registered land.
48. A successor to a prior adverse possessor may lodge an application (assuming 10 years' possession in total), but a person may not apply if they have dispossessed a former adverse possessor, see Sch.6, para.11. Persons of limited capacity may not make an application, Sch.6, para.8.
49. Sch.6, para.2(1).
50. Expected to be three months, see Report No.271, para.14.32.
51. Sch.6, para.4.
52. Or at such time as the possession proceedings end, Sch.6, paras 6(2) and 7.
53. Much also depends on the simple fact of being able to locate the person to whom notices should be sent.
54. See *Pye Developments v Graham* [2002] 3 All E.R. 865 and M. Thompson, "Adverse Possession: The Abolition of Heresies" [2002] Conv. 480.
55. Report No.254 at 10.5 *et seq.*
56. Sch.6, para.5(2).
57. Sch.6, para.5(3).
58. Sch.6, para.5(4).
59. Report No.271, para.14.42. They may serve to limit judicial eagerness.

- 60. Entitled under will or by uncompleted contract, Report No.271, para.14.43.
- 61. Hence, for a while, failure to register will render the interest purely equitable, s.27(1), LRA 2002.
- 62. A permanent provision specifying that non-electronically registered deeds/contracts created purely equitable interests--perhaps the obvious half-way house--would undermine significantly the goal of a comprehensive register.
- 63. E. Cooke ed. (2003) *Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability*, in *Modern Studies in Property Law*, vol.2.
- 64. [2001] 1 EWCA Civ 1754.

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