Law Commission
Reforming the law

# Updating the Land Registration Act 2002

HC 1336

Law Com No 380

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(Law Com No 380)

# Updating the Land Registration Act 2002

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 19 July 2018

HC 1336



This publication is available at www.gov.uk/government/publications.

Any enquiries regarding this publication should be sent to us at enquiries@lawcommission.gov.uk

ISBN 978-1-5286-0706-3

CCS0718056128 07/18

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

# The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 14 June 2018.

The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk.

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## GLOSSARY

We use the following terms within this Report.

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| *Absolute title / Title absolute* | A title in the register is given one of four grades of title. Absolute title is the best class of title which can be awarded by HM Land Registry. See also *possessory title* and *qualified title*. |
| *Adverse possession* | Possession of land without the permission of the owner. An adverse possessor acquires a *freehold estate in the land* from the time he or she enters adverse possession. This estate is inferior to the true owner's superior estate. Where title is not registered, over time adverse possession extinguishes the true owner's estate. In registered land, title is not extinguished, and instead over time the adverse possessor can apply to be registered as the proprietor of the title. |
| *Agreed notice* | A type of notice which is entered in the register in respect of an interest affecting a registered estate or charge. An agreed notice may only be entered if the applicant is the registered proprietor, the registered proprietor has consented to the entry, or the registrar is satisfied as to the validity of the applicant's claim. See also *unilateral notice*. |
| *Alienate / alienation* | The disposal of or dealing with an interest in land. The term is most often used in relation to disposals of a *leasehold estate*. It can include a transfer of the interest as well as the grant of a derivative interest out of the interest such as a sub-lease or a charge. |
| *Appurtenant* | A right is appurtenant to an estate if the estate has the benefit of the right; the right is then often described as being annexed to the estate. |
| *Benefit* | A person has the benefit of a right if he or she is entitled to exercise the right and to enforce it. An *estate in land* is said to have the benefit of a right where a person's enjoyment or enforcement of the right is dependent on him or her being the current owner of that estate. |
| *Burden* | A person is subject to the burden of an interest if he or she is required to comply with the obligations that it creates. An *estate in land* is said to be subject to the burden of an interest where being the current owner of the estate carries the obligation to comply with and give effect to the interest. |

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| *Caution against first registration* | A caution against first registration may be lodged by a person who is entitled to an interest affecting an unregistered *estate in land*. The registrar must give notice of a subsequent application for registration of the unregistered estate to the person who lodged the caution. This notice affords the person with the benefit of the interest affecting the estate an opportunity to submit that the interest should be protected in the register. |
| *Chancel repair liability* | An owner of land subject to chancel repair liability is liable to pay for or contribute to repairs of the chancel of a church. |
| *Chargee* | A person with the benefit of a charge over a property. In the law of registered land, a chargee is also known as a mortgagee as the pre-eminent form of legal mortgage in registered land is called a charge by way of legal mortgage. |
| *Chargor* | A person who grants a charge over an interest or estate in land. See also *chargee*. |
| *Charging order* | An order of the court which imposes a charge upon the property of a debtor with the purpose of securing a debt owed as a result of a judgment or order of the court. |
| *Chief Land Registrar / registrar* | The head of HM Land Registry, who is appointed by the Secretary of State to be both Chief Land Registrar and Chief Executive of HM Land Registry. |
| *Consultation Paper* | Updating the Land Registration Act 2002: A Consultation Paper (2016) Law Commission Consultation Paper No 227. |
| *Copyhold* | A historic form of tenure of land by which a person held land from the lord of a manor. Copyhold land was subject to customary incidents and certain rights which were vested in the lord of the manor. All copyhold land has now been converted to freehold through a process known as enfranchisement. |
| *Curtain principle* | One of the three basic principles underpinning title registration. This principle says that a curtain is drawn across the register against any trusts. Hence, the register does not record beneficial ownership of land.<br><br>See also *insurance principle* and *mirror principle*. |
| *Customary rights* | Rights of historic origin exercisable by inhabitants of a particular local area, such as the right to play sports on a piece of land or the right to hold an annual fair. |

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| *Day list* | A record kept by HM Land Registry showing the date and time at which every pending application against a registered title is made, including applications for a priority search. See also *priority search*. |
| *Demise* | The grant of a *leasehold estate*. The term is also used to describe the area leased. |
| *Derivative interest* | A dependent or subordinate *estate* or *interest* in land that is granted out of or created from another. For example, a *lease* is derived from a *freehold* or superior lease. |
| *Derivative interest under a trust* | An interest that is granted out of a beneficial interest under a trust. For example, a *charging order* over a beneficial interest under a trust. |
| *Disponee* | A person to whom an interest or estate in land is granted or conveyed. Such transfers are often referred to as dispositions. For example, a purchaser of a *freehold* or *leasehold estate*, a tenant under a lease, a *chargee*, or a person who is granted an *easement*. For ease, we frequently simply refer to a disponee as a purchaser. See also *disponor*. |
| *Disponor* | A person who grants or conveys an interest or estate in land to another in a disposition. See also *disponee*. |
| *Easement* | A proprietary right which enables a proprietor of an estate to make some limited use of land belonging to someone else. Examples include rights of way or rights to light or support. |
| *Electronic conveyancing* | We use the term electronic conveyancing to describe a process of dealing with land whereby all or part of the disposition occurs online. |
| *Equitable interest in land* | Equitable interests are interests in land that were historically recognised by particular courts, known as the Courts of Equity, and are now recognised by courts in the exercise of their equitable jurisdiction. Like legal interests, equitable interests confer a right over land that the person with the benefit of the interest does not own. Under section 4(1) of the Law of Property Act 1925, new types of equitable interests may only be created by statute. |
| *Estate contract* | A contract for the creation or transfer of an interest or estate in land, for example, a contract for sale or an agreement for a lease. The term also includes options to purchase and rights of pre-emption. An estate contract is an *equitable interest in land*. |

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| *Estate in land* | A right to land that confers use or possession of the land for a period of time. In this publication we refer to the freehold estate (which has a potentially indefinite duration) and the leasehold estate (which lasts for a fixed duration). Those who hold a freehold or long leasehold estate are colloquially known as owners of land. |
| *Fee simple (absolute in possession)* | Another name for a *freehold* estate. The term is now primarily associated with freehold estates in unregistered land. |
| *Freehold* | An *estate in land* which potentially lasts forever. A freehold estate is one of the two legal *estates in land* which can be registered with its own title (the other being certain *leasehold estates*). |
| *Grant* | The express creation of an estate or interest in land, for example, a lease or an easement. |
| *Home right* | A statutory right of occupation under section 30 of the Family Law Act 1996. The right enables a spouse or civil partner to occupy a dwelling-house which is the matrimonial home or civil partnership home (as the case may be). |
| *Indemnity covenant* | A promise by one person to undertake obligations held by another person, which includes a promise to reimburse that other person in the event that the obligations are not complied with and the other person suffers loss as a result. |
| *Insurance principle* | One of the three basic principles underpinning title registration. The register operates as a guarantee of title. The insurance principle means that if the register is shown to be incorrect, those who suffer loss as a result are compensated by HM Land Registry.<br><br>See also *curtain principle* and *mirror principle*. |
| *Issue estoppel* | An issue estoppel will arise if a court determines a question of fact or law between the parties, which is essential to the outcome of the decision and within the court's jurisdiction. The parties will be prevented from re-litigating the issue in the future. |
| *Keeper of the Registers of Scotland* | The title given to the person responsible for leading the Registers of Scotland and managing and controlling the Land Register of Scotland. The Scottish equivalent of the *Chief Land Registrar*. |
| *Law Com No 254 / Our 1998 Consultation Paper* | Land Registration for the Twenty-First Century (1998) Law Commission Consultation Paper No 254. |

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| *Law Com No 271 / Our 2001 Report* | Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com No 271. |
| *Lease / Leasehold estate* | An *estate in land* of a fixed duration, arising when a person with a more extensive estate in the land (the landlord or lessor) grants a right to exclusive possession of the land for a term to another person (the tenant or lessee). Legal leases are one of two *estates in land* which can be registered with their own title (the other being the *freehold estate*). |
| *Legal interest in land* | One of the limited number of rights affecting land (listed in section 1(2) of the Law of Property Act 1925) that are recognised by the common law jurisdiction of the courts. Interests confer a right over land that the person with the benefit of the interest does not own. For example, a right of way. |
| *Licence* | A permission to do something on another's land which would otherwise amount to a trespass. A licence confers no proprietary right in the land. |
| *LRA 1925* | Land Registration Act 1925. |
| *LRA 2002* | Land Registration Act 2002. |
| *LRR 1925* | Land Registration Rules 1925. |
| *LRR 2003* | Land Registration Rules 2003. |
| *Manorial rights* | Rights held by lords of former *copyhold* land, such as the right to fish, hunt or shoot or the right to hold fairs and markets. Manorial rights can also include rights to mines and minerals, although not all rights to mines and minerals are manorial in origin. Manorial rights were retained by the lord of the manor when copyhold land was enfranchised. |
| *Minor interests* | The name given in the Land Registration Act 1925 to rights in land that are neither registered with their own title nor overriding interests. The term is still sometimes used to describe this category of rights in connection with the Land Registration Act 2002, but it is not used in the statute. |
| *Mirror principle* | One of the three basic principles underpinning title registration. This principle reflects the aim that the register provides an accurate and complete reflection of property rights in relation to a piece of land. This aim sometimes gives way to countervailing policy choices.<br><br>See also *curtain principle* and *insurance principle*. |

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| *Nemo dat quod non habet (Nemo dat)* | A common law principle that no one can convey what he or she does not own. The principle is commonly referred to by lawyers in the abbreviated form of its Latin name: nemo dat. |
| *Overreaching* | The doctrine of overreaching is a means by which some interests in land, particularly beneficial interests under a trust, are removed from the land on a disposition and attach to the proceeds of sale. |
| *Overriding interest* | An interest which is binding on a first registered proprietor following first registration of an estate in land, or on a *disponee* following a registered disposition of a registered estate or charge, notwithstanding that the interest has not been noted in the register. |
| *Parol lease* | A short lease for three years or less for market rent with no additional premium. Parol leases do not need to be made in writing in order to operate at law. |
| *Positive covenant* | A covenant – being a promise usually contained in a deed – that requires the owner of the burdened estate to do something or spend money in order to comply with the covenant for the benefit of the benefiting estate. |
| *Possessory title* | One of the classes of title with which a proprietor may be registered (see also *absolute title* and *qualified title*). Registration with possessory title does not affect the enforcement of any estate, right or interest adverse to, or in derogation of, the proprietor's title subsisting at the time of registration. |
| *Postpone* | Postpone is the term used in the LRA 2002 which allows a registrable disposition to take *priority* over a pre-existing estate or interest. |
| *Prescription / Prescriptive acquisition* | Acquisition of rights by long use. For example, a right of way which has been acquired by virtue of usage of the way for the requisite period. |
| *Priority* | Priority refers to the order in which interests are enforceable and which interests prevail over others. The priority rules for unregistered land and for registered land are different. |
| *Priority search* | A search of the register that grants a priority period within which an applicant can lodge an application for registration. Entries made in the register during the priority period are postponed to the disposition in respect of which the priority search has been made, provided the application for registration of that disposition is lodged within the priority period. |

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| *Profit à prendre* | A proprietary right to remove the products of natural growth from someone else's land; a common example is a right to cut turf, or to take game or fish. Unlike an easement, a profit need not benefit an estate in land. |
| *Proprietary estoppel* | An equitable principle through which a person obtains a claim against an owner of an estate in land, which may lead to the creation of rights in the land in that person's favour. Proprietary estoppel arises where the owner of land assures a person that he or she has or will acquire rights in the land and that person acts to his or her detriment in reliance on the assurance. |
| *Qualified title* | One of the classes of title with which a proprietor may be registered (see also *absolute title* and *possessory title*). Registration with qualified title does not affect the enforcement of any estate, right or interest which appears from the register to be excepted from the effect of registration. |
| *Registrable disposition* | A disposition which is required to be completed by registration under section 27 of the Land Registration Act 2002. A registrable disposition does not operate at law until the relevant registration requirements are met. Registrable dispositions include transfers, the grant of a lease for a term of more than seven years and the grant of a legal charge. |
| *Registrar* | See *Chief Land Registrar*. |
| *Registration gap* | The period between completion of a disposition and its registration. It is made of up two distinct periods: first, the gap between completion of the disposition and the application for registration being submitted to HM Land Registry; and secondly, the gap between the time the application for registration of the disposition is submitted and the time the application is completed by HM Land Registry. |
| *Requisition* | An enquiry raised by HM Land Registry of an applicant for registration. The requisition may require the applicant to provide information or additional documentation before the application can be completed. Failure to comply with a requisition within the time frame laid down may result in the application being rejected. |
| *Restriction* | An entry in the register that regulates the circumstances in which a disposition of a registered estate or charge can be the subject of an entry in the register. |
| *Restrictive covenant* | A covenant – being a promise usually contained in a deed – that restricts the use that the owner of the burdened estate can make of its land. The covenant is enforceable by the owner of the benefiting estate. |

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| *Reversion* | The name given to the estate out of which a *lease* has been granted, for the duration of the lease. |
| *Tribunal* | A judicial body that performs some of the same functions as courts in specialist areas. In this paper we use Tribunal as shorthand for the Land Registration Division of the First-tier Tribunal (Property Chamber). The Tribunal operates primarily to determine disputes arising out of applications made to HM Land Registry. |
| *Trust of land* | A legal relationship by which land is held in law by up to four persons (known as trustees) for the benefit of themselves or others (those with the benefit are called beneficiaries). The trustees have powers of management and sale, while the beneficiaries have the right to enjoy the land, either through occupation or receipt of profits and the proceeds of sale. |
| *Unilateral notice* | A type of notice which is entered in the register in respect of an interest affecting a registered estate or charge. A unilateral notice may be entered without the consent of the relevant proprietor. The applicant is not required to satisfy the registrar that his or her claim is valid and does not need to support the claim to the interest with any evidence. Contrast an *agreed notice*. |

# Chapter 1: Introduction

## INTRODUCTION

1.1 Most people only encounter the land registration system when they buy or sell a house. Even then, contact will be usually minimal as the detailed legal work will be undertaken by the conveyancer. The impact of the registration system is most likely only to be felt in terms of the legal costs of the property transaction.

1.2 For some people, the experience will be much more involved. Property owners who become involved in disputes about their land – for example relating to boundaries – will realise the importance of the registration system to the value and enjoyment of their properties. Likewise, the comparatively small number of people affected by registration fraud quickly appreciate the significance of land registration law.

1.3 Companies involved in land ownership, legal professionals working on land transactions and the banks and other organisations that lend on the security of land will have a much more sophisticated understanding of land registration. Their businesses rely on the effectiveness of the registration system and so are directly affected by the technical operation of the law.

1.4 The broader impact of the land registration system is reflected in the work of the World Bank, which has highlighted the importance of a registration system for the property market, for business and for the wider economy. The World Bank has identified a range of benefits, including transparency, reducing bribery, increasing investment and enabling the proper assessment of taxes. The Bank's *Doing Business 2018* report explained:

> When parties engage in a property transaction, it is essential that they obtain legally reliable information regarding the actual property involved in the transaction. The availability of information on the property – as well as its owners or creditors – helps to eliminate uncertainty over property rights or obligations that may encumber the property. In the absence of any public records or any related rights to a property, the transaction costs can become overwhelming, risking that ownership becomes untraceable.[1]

1.5 With approximately 25 million registered titles,[2] any inefficiencies, uncertainties or problems in the land registration system have the capacity to have a significant impact on the property market in England and Wales. While most transactions are problem-free, everybody dealing with land risks being affected by the technical legal issues that we talk about in this Report. Weaknesses in the law result in greater costs to individuals,

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1 World Bank Group, *Doing Business 2018: Reforming to Create Jobs* (October 2017) p 53, http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf (last visited 4 July 2018).

2 There are approximately 25 million registered titles covering 85% of land in England and Wales: HM Land Registry, *Business Strategy 2017 to 2022* (November 2017) pp 11 and 15.

and also greater overall costs in running the system, which are in turn passed onto individuals (via the fees that HM Land Registry charges).

## BACKGROUND TO OUR CURRENT WORK

### The LRA 2002 and Land Registration for the Twenty-First Century

1.6 As we explained in our Consultation Paper,[3] the current land registration system is the result of legal developments over many years. The most recent piece of legislation, the Land Registration Act 2002, was a major reform of the law; it repealed and replaced its predecessor, the Land Registration Act 1925 and achieved a great deal of modernisation. The Land Registration Act 2002 was the result of a joint project carried out by the Law Commission and HM Land Registry culminating in a joint report, Land Registration for the Twenty-First Century.[4] In this Report we refer to the Act as the "LRA 2002" and to Land Registration for the Twenty-First Century as "our 2001 Report".

1.7 The current project has aimed to update the LRA 2002 in the light of experience of its operation. The Act was brought into force on 13 October 2003 and has now operated successfully for nearly 15 years. But unsurprisingly in such a far-reaching piece of legislation, it has become clear that in a number of areas there is scope for clarification or amendment.[5]

1.8 Our project to update the LRA 2002 is wide in scope; we have considered a range of issues spanning the whole of the legislation. However, our work is not fundamental in its nature. We do not seek to reformulate the LRA 2002. Instead, our aim has been to improve specific aspects of the operation of the legislation within the existing legal framework. As a result, this Report focuses on a range of discrete, and often technical, issues affecting the system of land registration.

### Changing landscape since the LRA 2002

1.9 The landscape within which land registration operates has altered considerably since the LRA 2002 came into force. This change is particularly noticeable in some aspects of the regime. There has been an increase in incidents of registered title fraud, the legal consequences of which have proved difficult to resolve.[6] These developments have brought into sharp focus the provisions of the LRA 2002 enabling the register to be changed, and the circumstances in which a person is entitled to an indemnity from HM Land Registry for losses suffered. Another area affected by developments since 2003 is electronic conveyancing. Technology has not advanced in the way that was predicted at the time of the legislation, which has meant that the particular scheme of electronic conveyancing anticipated by the Act has not come to fruition.

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3 Consultation Paper, Ch 1.

4 Law Com No 271.

5 See eg, the critique of the LRA 2002 in S Gardner, "The Land Registration Act 2002 – the Show on the Road" (2014) 77 *Modern Law Review* 763.

6 Eg, in 2006 / 2007, HM Land Registry made indemnity payments for 24 claims in respect of fraud, totalling £2 million. In 2016 / 2017, it made indemnity payments for 53 claims, totalling £5 million. See HM Land Registry, *Annual Report and Accounts 2006 / 2007* (July 2007) and *Annual Report and Accounts 2016 / 2017* (September 2017).

1.10 We have also witnessed the global economic crisis and a domestic recession, which impacted significantly on the property market.[7] The market has since improved, and HM Land Registry's annual report for 2016 to 2017 notes that it dealt with the highest volume of applications since the market crash in 2008 to 2009.[8] Notwithstanding, the effects of these events continue to be felt: they shape attitudes to mortgage-lending decisions and therefore to property transactions.[9] HM Land Registry has also experienced considerable change since the LRA 2002 came into force, including a restructuring of its workforce and the closure of some offices. While our project is not directly concerned with HM Land Registry's operations and resources, changes to the operational structure can bring to light pressure points in the underpinning law.[10]

### Origins of the project

1.11 The current project on land registration was commenced as part of the Law Commission's Twelfth Programme of Law Reform.[11]

1.12 We first raised the possibility of a review of the LRA 2002 when we asked the public what areas of the Law we should include in our Twelfth Programme.[12] We explained at that time that discussions with HM Land Registry suggested that there might be scope for a review of the Act. We asked consultees to tell us whether the Law Commission should take on a project.

1.13 In the light of the responses to our consultation on the Twelfth Programme we concluded that there was a need for a broad examination of the LRA 2002. The project was supported by HM Land Registry and by the then Department for Business, Innovation and Skills,[13] the Government department which sponsors HM Land Registry and is answerable for HM Land Registry in Parliament.[14]

1.14 In July 2014, we announced the scope of the project in our Twelfth Programme of Law Reform as follows:

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7 See eg C Campos, A Dent, R Fry and A Reid, *Impact of the Recession, Regional Trends 43* (Office for National Statistics, November 2010). The report notes a rapid decrease in property sales during late 2007 and through 2008, with a reduction of 40% in sales in the year up to the second quarter of 2008: p 40.

8 HM Land Registry, *Annual Report and Accounts 2016 / 17* (September 2017) p 12.

9 The recession led to a comprehensive review of the mortgage market: Financial Services Authority, *Mortgage Market Review* (October 2009).

10 Eg, some consultees explained to us that resource limitations at HM Land Registry caused delays in applications being completed, which by extending the length of the registration gap, exacerbated the risk of problems that can arise during that period.

11 (2014) Law Com No 354.

12 See Law Commission suggestion – Land Registration (2013), https://consult.justice.gov.uk/law-commission/12th_programme/supporting_documents/Website%20document%20%20Law%20Com%20suggestion%20%20PDF%20%20land%20registration%20review.pdf (last visited 4 July 2018).

13 Now called the Department for Business, Energy and Industrial Strategy.

14 HM Land Registry is a non-ministerial Government department and trading fund. It is also an Executive Agency of the Department for Business, Energy and Industrial Strategy. See HM Land Registry, *Business Strategy 2017 to 2022* (November 2017) para 1.

> This project will comprise a wide-ranging review of the 2002 Act, with a view to amendment where elements of the Act could be improved in the light of experience with its operation. There is evidence that, in some areas, revision or clarification is needed. The Twelfth Programme consultation revealed a range of often highly technical issues that have important commercial implications for Land Registry and its stakeholders, including mortgage providers.
>
> In particular, this project will examine the extent of Land Registry's guarantee of title, rectification and alteration of the register, and the impact of fraud. The project will also re-examine the legal framework for electronic conveyancing. We will consider how technology might be harnessed to reduce the time and resources required to process applications, while maintaining the reliability of the register and public confidence in it.[15]

1.15 The project commenced in early 2015, following preliminary work in the second half of 2014.

## POLICY DEVELOPMENTS DURING THE PROJECT

1.16 This project has proceeded against a backdrop of evolving Government policy in relation to HM Land Registry and other registration-related areas.

1.17 The recommendations that we have made are the independent conclusions of the Law Commission. Where appropriate, we have borne in mind wider policy developments in relation to land registration. We have done so because, to operate effectively, our recommendations need to reflect the broader context within which the LRA 2002 operates.

### Privatisation and HM Land Registry

1.18 The question of whether HM Land Registry operations should be moved into the private sector was never a matter that fell within the scope of the Law Commission's work. Nevertheless, the question has been at large throughout a significant proportion of our project.

1.19 When we announced in July 2014 that we would undertake our independent review of the LRA 2002, the Government had floated a proposal to create a new service delivery company to have responsibility for processes relating to land registration.[16] The Government's position at that time was that while it continued to believe that there could be benefits in creating an arm's length service delivery company, no decision had yet been taken.[17] Following indications that a further consultation would take place,[18] on 24 March 2016 the Government published a consultation document on moving HM Land

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15 Twelfth Programme of Law Reform (2014) Law Com No 354, paras 2.15 to 2.16.

16 Department for Business, Innovation and Skills, *Introduction of a Land Registry Service Delivery Company: Government Response* (July 2014).

17 Above, part 2, paras 9 and 10.

18 HM Treasury, *Spending Review and Autumn Statement 2015* (November 2015) Cm 9162, para 1.302; HM Treasury*, Budget 2016* (March 2016) para 2.25.

Registry operations to the private sector.[19] At the time of that publication, the provisional policy contained in our Consultation Paper had already been finalised, albeit against the backdrop of the Government's previous announcements which had placed particular focus on how HM Land Registry might operate in the future.

1.20 We acknowledged in our Consultation Paper that potential changes to HM Land Registry might impact on consultees' views on some of the issues we were examining. We were confident, however, that all the issues discussed in the Consultation Paper would remain significant in practice irrespective of any decision by the Government on the ownership of HM Land Registry.[20]

1.21 Following its consultation, the Government decided not to proceed with privatisation of HM Land Registry. The Autumn Statement 2016 provided:

> Following consultation the Government has decided that HM Land Registry should focus on becoming a more digital data-driven registration business, and to do this will remain in the public sector. Modernisation will maximise the value of HM Land Registry to the economy, and should be completed without a need for significant Exchequer investment.[21]

1.22 Although the privatisation of HM Land Registry operations is not proceeding, concerns about privatisation featured in many consultees' responses, colouring their views of some of our provisional proposals and questions on reform. These concerns were particularly evident in responses to our consultation on indemnity in Chapter 14 and electronic conveyancing in Chapter 20.

1.23 In many cases, we have felt able to conclude that some of consultees' concerns about the possible operation of some of our provisional proposals are alleviated by the Government's announcement. However, we have been careful not to dismiss consultees' comments merely because they appear to be based on concerns about privatisation.

### Completion of the register

1.24 Currently, around 85% of land in England and Wales is registered. There has been a long-standing ambition to increase the proportion of registered land.

1.25 In February 2017 the Government published a White Paper on housing.[22] The paper set out the Government's intention to complete the land register, outlining a goal of "comprehensive land registration" (and the elimination of unregistered land) by 2030.[23] The stated aim is that all publicly held land in the areas of greatest housing need should be registered by 2020, with the rest to follow by 2025. In response, HM Land Registry

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19 Department for Business, Innovation and Skills, *Consultation on Moving Land Registry Operations into the Private Sector* (March 2016).

20 See Consultation Paper, para 1.32.

21 Autumn Statement 2016 (November 2016) Cm 9362, para 1.66.

22 Fixing our Broken Housing Market (2017) Cm 9352.

23 Above, para 1.18.

has “a prioritised programme of work that will seek to reduce [the percentage of land which remains unregistered] as much as possible, and unify conveyancing processes”.[24]

### Transparency

1.26 The Government’s White Paper on housing also indicated a commitment to increasing the transparency of the land register:

> The Government proposes to improve the availability of data about wider interests in land. There are numerous ways of exercising control over land, short of ownership, such as through an option to purchase land or as a beneficiary of a restrictive covenant. There is a risk that because these agreements are not recorded in a way that is transparent to the public local communities are unable to know who stands to benefit fully from a planning permission. They could also inhibit competition because SMEs [small and medium enterprises] and other new entrants find it harder to acquire land. There is the additional risk that this land may sit in a “land bank” once an option has been acquired without the prospect of development.[25]

1.27 The paper indicated that the Government will consult on improving the transparency of contractual arrangements used to control land, and on how the register can better reflect wider interests in land with the intention of providing a ‘clear line of sight’ across a piece of land setting out who owns, controls or has an interest in it.[26] The White Paper did not itself ask any consultation questions about the transparency of the register and the issue was not further addressed in the Government response to the White Paper consultation.[27] The proposed further consultation on reforming the register has not yet taken place.

1.28 In October 2017 there were further indications that Government policy may be moving towards greater transparency of documents on the face of the register of title. The Government issued a call for evidence entitled *Improving the Home Buying and Selling Process* [28] which made the following reference to transparency:

> To provide a firm foundation for a digital revolution in conveyancing, the Government will continue to work with HM Land Registry to explore how data on property, such as leases, restrictions, covenants and easements, can be made available more easily. The Government believes that this will improve the transparency of the purchase

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24 HM Land Registry, *Annual Report and Accounts 2016/17* (September 2017) p 24. See also HM Land Registry, *Business Strategy 2017 to 2022* (November 2017).

25 Fixing our Broken Housing Market (2017) Cm 9352, para 1.19.

26 Above, para 1.20.

27 Ministry of Housing, Communities and Local Government, *Government Response to the Housing White Paper Consultation: Fixing our Broken Housing Market* (March 2018).

28 Department for Communities and Local Government*, Improving the Home Buying and Selling Process: Call for Evidence* (October 2017). The Department for Communities and Local Government is now the Ministry of Housing, Communities and Local Government.

process and allow the private sector to create innovative ways to use this information.[29]

1.29 In the Government response to its call for evidence, the Government reaffirmed its intention to make information on property more easily available in order to improve the conveyancing process.[30]

### Beneficial ownership by overseas entities

1.30 In April 2017 the Department for Business, Energy and Industrial Strategy published a call for evidence on proposals for a register showing who owns and controls overseas companies and other legal entities that own UK property.[31] This followed a March 2016 discussion paper on enhancing the transparency of beneficial ownership of foreign companies that purchase land or property in England and Wales.[32]

1.31 The Government published its response to the call for evidence in March of this year.[33] The response confirms plans to implement the register, with an intention to publish a draft Bill for scrutiny this summer and to introduce the Bill to Parliament early in the second Parliamentary Session.

## OUR RELATIONSHIP WITH HM LAND REGISTRY AND THE GOVERNMENT

1.32 The Law Commission is an independent statutory body.

1.33 In line with common practice, the Government agreed to make a financial contribution to the Law Commission towards the costs of this project. That contribution is being paid by HM Land Registry as the body most closely interested in our work. The contribution supplements the Law Commission's core Government funding to enable the Commission to conduct a broader range of work than core funding alone would allow. The Commission has been funded by the Government since its inception and conducts its projects independently of the Government and other stakeholders, regardless of the funding arrangements agreed for our law reform projects.

1.34 Unlike the project leading to the 2001 Report, this project has not been conducted jointly with HM Land Registry. However, in undertaking our project, we have worked closely with HM Land Registry staff to understand HM Land Registry's practice, the operational implications of problems with the current law and the impact of potential changes to the law. The discussions that we have had have helped us to identify proposals for reform that we consider are workable in practice and therefore are likely to be successful. The

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29 Above, para 18.

30 Ministry of Housing, Communities and Local Government, *Improving the Home Buying and Selling Process: Summary of Responses to the Call for Evidence and Government Response* (April 2018) para 84 (local land charges), para 109 (public sector datasets), and para 144 (provision of information by the seller).

31 Department for Business, Energy and Industrial Strategy, *Overseas companies and other legal entities beneficial ownership register: call for evidence* (April 2017).

32 Department for Business, Innovation and Skills, *Enhancing Transparency of Beneficial Ownership Information of Foreign Companies Undertaking Certain Economic Activities in the UK* (March 2016).

33 Department for Business, Energy and Industrial Strategy, *A register of beneficial owners of overseas companies and other legal entities: Government response* (March 2018).

recommendations for reform in this Report have been discussed with HM Land Registry, but have been reached independently by us.

## THE CONSULTATION

1.35 We published our Consultation Paper, Updating the Land Registration Act 2002, on 31 March 2016.

1.36 The consultation period closed on 30 June 2016. In addition to the many consultation events we attended, we received 70 responses to our Consultation Paper from a wide range of individuals and groups. Respondents included representative bodies and groups, law firms and other organisations, and a range of individuals including academics, judges, practitioners and members of the public. A list of the meetings and events that we attended, and of the consultees who responded to our Consultation Paper is set out in Appendix 3.

1.37 Many of our consultees provided thorough and detailed responses. Details of the responses we received are set out in the analysis of responses.[34]

1.38 We are extremely grateful to all those who responded to us in writing or who participated in meetings and events. This is a complex area and we were greatly assisted by the expertise of those who engaged with us.

1.39 The Law Commission is a consultative body, and consultation has proved very important in this project. Our review of the law in the Consultation Paper was broad and comprehensive in its scope: our consultation questions, many of which made provisional proposals for reform, totalled 122.[35] We therefore received consultees' thoughts on a wide range of issues in land registration law. Consultees detailed their experience of the law in practice, telling us whether reform is necessary, and also expressed their views as to whether reform is desirable.

1.40 Consultation has been invaluable in formulating our policy. What we have learned from our consultation has shaped our policy; consequently, our policy has evolved, and been refined, since the Consultation Paper stage.

1.41 In most cases, the views of consultees have helped us make a detailed recommendation for reform. However, in other cases, it has led to us not recommending reform at all. On some points, we learned from our consultation exercise that the law works in practice, or that reform is not justified, particularly reform that would add complexity to an already complex area within the LRA 2002. In these cases, we have come to the view that the best course of action is not to amend the LRA 2002. On other questions, where in the Consultation Paper we thought that the law was unclear, consultation did not suggest that any lack of clarity was a cause for concern, so the bar for legislative reform was not met. In these cases, we had to balance the desire for greater certainty, with the risk that reform of the LRA 2002 could imply that the law has

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34 https://www.lawcom.gov.uk/project/updating-the-land-registration-act-2002/.

35 Consultation Paper, Ch 22.

changed. Ultimately, consultation has guided us towards the priorities that should underlie reform of the law of land registration.

1.42 The reforms to the land registration scheme we recommend are those which, after serious consideration, we think are necessary and justified. While some are concerned with isolated aspects of land registration law, these reforms are still significant in the circumstances in which they will apply. Others concern aspects of the law which underpin the operation of the LRA 2002, such as the provisions on alteration and rectification of the register and indemnity. Collectively, our reforms will make the law more efficient, certain, and fair, and will promote the principles underlying the LRA 2002.

## STRUCTURE OF THIS REPORT AND RECOMMENDATIONS

1.43 This Report comprises 22 chapters.

(1) This chapter introduces our project on land registration and the contents of the Report.

(2) Chapter 2 addresses some general issues about the purpose of the register of title and the scope of this review of the LRA 2002.

(3) In Chapter 3, we examine the provisions of the LRA 2002 governing when an unregistered legal estate can or must be registered. We recommend the introduction of new triggers for the compulsory registration of estates in mines and minerals and for discontinuous leases. We also consider the minimum term for registrable leases and whether freeholds are duplicated on the enlargement of very long leases.

(4) Chapter 4 examines the "twilight period": the period of time between a disposition of unregistered land triggering compulsory first registration and the completion of first registration. We consider both the first phase of the twilight period (from the triggering disposition to the application for first registration) and the second phase (from the application for first registration to the completion of registration). We recommend that the priority rules governing unregistered land should apply to interests created during the first phase and, where first registration is not successfully completed, to interests created during the second phase. Chapter 4 also considers cautions against first registration and we recommend that a person with a derivative interest under a trust should be able to apply for a caution against the estate to which the trust relates.

(5) We discuss owner's powers (conferred by sections 23, 24 and 26 of the LRA 2002) in Chapter 5. Our recommendation is that the owner's powers of a person who is entitled to be registered should not be limited by the fact that he or she has not yet been registered and so has not yet acquired legal title. We make further recommendations in relation to limitations on the powers of disposition of a person entitled to be registered or of a trustee of land, to clarify that a disponee is not bound by limitations which are not reflected by an entry in the register. We also discuss the registration gap (the period of time between the completion of a disposition and its registration) and explain why we are not making any recommendations for reform in relation to it.

(6) In Chapter 6, we discuss the priority rules in sections 28 to 30 of the LRA 2002. We examine the rationales behind and operation of these rules, and explain why we decided not to recommend introducing a new priority rule into the Act in respect of interests that are noted in the register.

(7) Chapter 7 concerns valuable consideration. Only dispositions made for valuable consideration attract the protection of the special priority rule in section 29 of the LRA 2002. Chapter 7 considers whether the meaning of "valuable consideration" in the LRA 2002 should be clarified. We recommend removal of the exclusion of nominal consideration from the definition of "valuable consideration" in section 132 of the LRA 2002 and an amendment of section 86 (concerning bankruptcy) to avoid any conflict with insolvency law.

(8) Chapter 8 discusses two matters. First, we examine the use of unilateral notices to protect interests that ceased to be overriding on 12 October 2013. We recommend that where a person applies for a unilateral notice in respect of such a former overriding interest and there has been a registered disposition of the affected title since 12 October 2013, the applicant should be required to give reasons why the interest still binds the title. Secondly, we examine the interaction between the protection of unregistrable leases under section 29(4) of the LRA 2002 and protection given to registrable dispositions by priority searches under section 72. We find that that there are no problems in practice with the interaction between these provisions.

(9) In Chapter 9 we discuss unilateral notices, focussing in particular upon the difficulties faced by registered proprietors in challenging groundless notices. We recommend the introduction of a scheme whereby, if a registered proprietor applies to cancel a unilateral notice (no matter when it was entered), the beneficiary of the notice will have to respond within a prescribed period with evidence to satisfy the registrar of the validity of his or her claim. We then examine the power of insolvency practitioners and attorneys to apply to cancel a unilateral notice but make no recommendations for reform because we think the law is sufficiently clear on this point. We conclude the chapter with our recommendation that it should be possible for the beneficiaries of an agreed notice to be identified in the notice and for the notice to be updated where the identity of the beneficiaries has subsequently changed.

(10) We examine in Chapter 10 the use of restrictions to protect contractual obligations. We recommend that the Secretary of State should have the power, following consultation, to make land registration rules regulating the types of contractual obligation that may be protected by a restriction. Chapter 10 then considers restrictions to protect charging orders over interests under trusts of land. We make recommendations to clarify the court's power to order the entry of these restrictions, to regulate the form in which they must be entered, and to ensure applications for their entry are not notifiable.

(11) Chapter 11 considers overriding interests, which bind on first registration or a registered disposition despite not being protected in the register. We focus on estate contracts, the registration of the benefit of an interest, and interests that

have previously been registered. We explain that we do not think that a clear case for reform has been made.

(12) Chapter 12 considers the recording of lease variations and documents ancillary to leases in the register; we recommend that the land registration rules (the LRR 2003) should be amended to make provision for recording variations of a lease which do not amount to the grant of a new lease.

(13) The court and the registrar have the power under schedule 4 to the LRA 2002 to alter the register in order to correct a mistake (and for a number of other purposes). An alteration that corrects a mistake and that prejudices the title of a registered proprietor is a "rectification" of the register. In Chapter 13, we make the following recommendations.

(a) We recommend clarifying that the ability to seek rectification under schedule 4 is not a proprietary right.

(b) We then set out a new scheme for rectification which we recommend be introduced. Our scheme provides protection to a former proprietor in possession who has lost his or her estate due to a mistake, restricts the grounds on which a mortgagee can resist rectification, and introduces a ten-year longstop after which rectification can only take place in limited circumstances.

(c) A further recommendation concerns when an entry in the register which derives from an earlier mistake should itself count as a mistake.

(d) We make recommendations about when the holder of a derivative interest in land should be able to obtain rectification and, if the interest has lost priority due to a mistake, have the loss of priority reversed.

(e) We discuss multiple registration – where the same land is mistakenly included in two separate estates – and clarify the power to remove multiple registrations and how it should be exercised.

(f) We conclude the chapter by examining first registration and making recommendations about when a first registered proprietor should be entitled to an indemnity and about when the holder of a former overriding interest should be entitled to rectification.

(14) In Chapter 14 we discuss the provisions in the LRA 2002 which enable a person to claim an indemnity from HM Land Registry for losses arising from mistakes in the register or in the registration process. We also discuss the ability of HM Land Registry to recover indemnity payments from those who have contributed to the loss, focussing in particular on problems of identity fraud. We make the following recommendations.

(a) We recommend the introduction of a limited statutory duty of care for professional conveyancers, which will be complied with by following reasonable, mandatory, steps to verify identity. The steps to be taken will be provided by HM Land Registry following consultation. The duty of care

will not affect the ability of a person to claim an indemnity from HM Land Registry. HM Land Registry will, however, be able to recover the indemnity from a person subject to the duty of care who has not complied with the mandatory steps. The provision of mandatory steps will provide greater certainty to conveyancers than exists under the current law as to what is required of them in relation to identity checks. Conveyancers who follow the mandatory steps will not risk being liable to reimburse HM Land Registry for an indemnity paid, if it transpires that the transfer was the result of identity fraud.

(b) We also discuss and make recommendations to clarify the limitation periods that apply to different types of claim for an indemnity and to the registrar's rights of recourse.

(c) We further recommend an alteration to the date on which an interest in land should be valued for the purposes of an indemnity.

(15) Chapter 15 considers the general boundaries rule in section 60 of the LRA 2002. We draw a distinction between boundary disputes (where a proposed alteration of a boundary shown in the register of title would not prejudicially affect the title of a registered proprietor) and property disputes (where there would be prejudicial effect). We recommend the introduction of a statutory list of factors which the registrar, court or Tribunal should consider in distinguishing between boundary and property disputes. We further recommend the introduction of a rule-making power to allow further factors to be added to the list.

(16) In Chapter 16, we consider the differences in the registration requirements for short leases and for the easements which benefit them. We recommend relaxing the registration requirements for easements granted in the same deed as a short lease, and extending overriding interest protection to easements which benefit parol leases.

(17) We consider adverse possession and the provisions of schedule 6 to the LRA 2002 in Chapter 17. We make recommendations intended to resolve a range of problems arising from the operation of these provisions.

(a) Our first recommendation is intended to regulate the circumstances in which an adverse possessor may make repeated applications for registration.

(b) Secondly, we recommend that where an applicant has relied on paragraph 5(4) of schedule 6, he or she must apply within 12 months of the time when his or her reasonable belief that the land was his or hers ended.

(c) Thirdly, where a person becomes the first registered proprietor of title to land which has in fact been extinguished by an adverse possessor, we make a recommendation about when an application by the adverse possessor to alter the register will qualify as an application for rectification.

(d) Fourthly, we recommend that an application for first registration cannot be made by an adverse possessor before the unregistered proprietor's superior title has been extinguished.

(e) Finally, where an adverse possessor is incorrectly registered with possessory title when the superior title has not yet been extinguished, we recommend that the period of adverse possession should continue to run.

(18) In Chapter 18, we consider the "tacking" of further advances, which is where an earlier secured lender makes an additional loan which has priority over a subsequent secured lender. We recommend amending the tacking provisions of the LRA 2002 to facilitate tacking in the syndicated lending market.

(19) Chapter 19 is concerned with sub-charges – a charge over a mortgage debt. We make recommendations to ensure that purchasers buying property from mortgagees are protected from limitations on a mortgagee's power to deal with the property which are not reflected in the register.

(20) We discuss electronic conveyancing in Chapter 20. We do not propose a new system for electronic conveyancing. Instead, we examine how particular issues with the scheme for electronic conveyancing in the LRA 2002 may be resolved. We recommend the introduction of a new power to make electronic conveyancing mandatory without requiring simultaneous completion and registration. We also make a recommendation aimed at delegating the decision about when to end paper-based conveyancing for specific types of disposition to the Chief Land Registrar, after the Secretary of State has decided generally to "switch off" paper-based conveyancing. Finally, we make a recommendation to ensure that overreaching can take place where two or more trustees delegate or grant to a single conveyancer the power to sign an electronic conveyance and give receipt for capital money.

(21) In Chapter 21, we consider the jurisdiction of the Tribunal. The chapter focusses on the Tribunal's jurisdiction in relation to applications for a determined boundary, equities by estoppel and beneficial interests. Where an application for a determined boundary under section 60(3) of the LRA 2002 is referred to the Tribunal, we recommend that the Tribunal should have a statutory power to decide where the boundary lies and the power to direct the registrar as to how it should be reflected in the register. We also recommend that the Tribunal should have a statutory power to determine how equities by estoppel should be satisfied and to declare the extent of beneficial interests in land.

(22) A list of all of our recommendations is set out in Chapter 22.

1.44 The draft Bill that will enact our recommendations, together with the explanatory notes, is set out in Appendices 1 and 2. Appendix 3 lists consultees who responded to our Consultation Paper, and the consultation events that we attended. Appendix 4 contains flow charts which illustrate the current system for objecting to a unilateral notice, and the system under our recommendation in Chapter 9.

1.45 As with all of our work, we have sought to find consensus among stakeholders to enable us to draw up final recommendations for reform that will be acceptable to all parties. We

are aware, however, that consensus is not always possible. Our ultimate aim has been to devise recommendations for reform which balance the needs and requirements of all stakeholders, including property owners, practitioners, HM Land Registry and ultimately all taxpayers, as the land registration system is underpinned by a state guarantee.[36]

1.46 Sometimes those interests will coincide; at other times they may diverge. We have made the recommendations that we think, in the light of the responses to our consultation, are as a matter of principle in the best interests of further developing a clear, effective and efficient land registration law.

1.47 The recommendations apply to England and Wales only, which is the scope of operation of the LRA 2002; Scotland and Northern Ireland have their own separate systems of land registration law.

## OTHER DOCUMENTS PUBLISHED ALONGSIDE THIS REPORT

1.48 In addition to this Report, we are publishing a number of other documents:

(1) A summary: this provides an overview of the Report. Land registration is a technical and complex area of law and by necessity this Report explores difficult issues at a high level of detail. While many of the topics that we discuss are primarily of interest to legal professionals (especially conveyancers), aspects of our work will be of interest to a wider audience. We have tried to draft the Report in an accessible style, but inevitably many of the technical issues involved are unlikely to be understood fully by non-experts who are not familiar with their operation. The summary provides a simpler overview of some of the key issues that we have considered and our major recommendations for reform. Non-expert readers may also wish to refer to Chapter 2 of our Consultation Paper, which provides an introduction to the registration system.

(2) An impact assessment: this sets out our assessment of the likely economic and other impacts of our recommended reforms.

(3) An analysis of responses: this describes and breaks down the responses to our consultation. The analysis contains a more detailed account of what consultees said to us than it is possible to give in the Report. The analysis should be read alongside the relevant policy discussion in the Report which explains how we reached our conclusions in the light of consultees' comments.

## THANKS AND ACKNOWLEDGEMENTS

1.49 We are grateful to all of those individuals and organisations who responded to our Twelfth Programme consultation about potential land registration reform and to the Consultation Paper that preceded this Report. We would also like to express our thanks to all of those with whom we have met and corresponded with during the course of the project. We are extremely grateful to those who organised the consultation events, listed in Appendix 3, including the Commercial Real Estate Legal Association. We are also grateful to individuals and organisations who helped us gather data for our impact

[36] The indemnity scheme contained in the LRA 2002 is funded by fees paid to HM Land Registry, but in the event of a catastrophic loss the costs would ultimately be borne by taxpayers.

assessment, including the British Geological Survey, Adrian McClinton, the Conveyancing Association, and Peter Williams, and to those with whom we had post-consultation discussions, including Richard Calnan, Roger Hawkins, the British Aggregates Association, and the mines and minerals team at Knights 1759.

1.50 We extend our thanks, in particular, to Judge Siobhan McGrath, President of the First-tier Tribunal, Property Chamber; Judge Elizabeth Cooke, Principal Judge of the Land Registration Division of the Property Chamber of the First-tier Tribunal; Dr Charles Harpum QC (Hon); Diane Latter; and Sian Skerratt-Williams.

1.51 We are grateful for the work of HM Land Registry staff, in particular, the advisory group coordinated by Alasdair Lewis and Colin Oakley, for their helpful cooperation during the course of the project.

1.52 At different stages of the project we have been able to draw on the expertise of Professor Martin Dixon, Amy Goymour, Dr Emma Lees, the Law Society Conveyancing and Land Law Committee, Warren Gordon, Stephen Watterson, and Edward Cousins. We are grateful to them for their contributions.

1.53 This Report has been prepared by Elizabeth Welch (team lawyer), Christopher Pulman and Joshua Griffin (research assistants) and Matthew Jolley (team manager). Camilla Chorfi and Gregory Hill acted as consultants assisting in particular with matters relating to the draft Bill accompanying this Report. We are grateful to Sarah Dawe, Susannah Trigg and Samihah El-Gindy for their work at earlier stages of the process leading to this Report.

# Chapter 2: The purpose of the register and the scope of our Report

## THE PURPOSE OF THE REGISTER

2.1 In Chapter 2 of our Consultation Paper, we outlined how and why the system of registration of title operates. In doing so, we noted the three basic principles underpinning systems of title registration that were identified by Sir Theodore Ruoff.[1] First, the "mirror principle" that the register should provide an accurate and complete reflection of property rights in relation to a piece of land. Secondly, the "curtain principle" that a curtain should be drawn across the register against any trusts. Thirdly, the "insurance principle" that those who suffer loss when the register is found to be incorrect should be entitled to an indemnity.

2.2 These principles continue to inform the operation of land registration systems across the world. They capture the key features a system of registration must have in order to achieve the core purpose of a register of title, which is to make conveyancing faster, easier and cheaper. That core purpose has remained unchanged since registration of title was first introduced in England and Wales in the 19th century.

2.3 That is not to say, however, that the land registration system has not evolved throughout that time. Arguably, the three basic principles have led to an expansion of the core purpose, to place importance on certainty and reliability of the register as standalone objectives. Moreover, some of the developments in the law of registered land have reflected an acknowledgement that the register serves other purposes that are not directly related to making conveyancing better from the point of view of those buying and selling land. For example, since 3 December 1990 the register has been an open register and has provided greater transparency in land ownership.[2] The change to an open register was made on the basis of recommendations by the Law Commission in our Second Report on Land Registration: Inspection of the Register.[3] In that report, we explained:

> Opening the Register of Title would appear to us, as to the great majority of those who gave us their views, to represent a welcome modernisation of the law. It would also be consistent with the principle that 'In an open society there should be freedom of information and publication.' That principle is not, in our opinion, here contradicted by any other prevailing principle.[4]

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1 T B F Ruoff, *An Englishman Looks at the Torrens System* (1957) pp 7 to 14. Consultation Paper, paras 2.15 to 2.20.

2 Land Registration Act 1988, brought into force by SI 1990 No 1359.

3 Law Commission No 148 (1986).

4 Above, para 20.

2.4 As we have seen in Chapter 1, the register of title continues to be subject to wider Government policy objectives beyond its core function, including the objective of using the register to increase transparency.

2.5 In our review of the LRA 2002, we have again considered the purpose of the register. Some of the topics that we consider in this Report – for example, indemnity in Chapter 14 – touch directly on the underlying principles that support the core function of the register: in that case, the insurance principle. Even where those principles have not directly been in issue, our review has raised questions about the purpose of the register. For example, Chapter 10 examines restrictions, which regulate the circumstances in which a disposition of the registered estate or charge may be the subject of an entry in the register.[5] We consider the extent to which it is legitimate for restrictions to be used to protect contractual rights. Some consultees think that it is beyond the purpose of the register to enable entries to be made in respect of contractual rights. But such entries are permitted by the LRA 2002 (and were permitted by the previous legislation)[6] and provide a practical benefit by helping to ensure that registered proprietors do not act in breach of contract.

2.6 Further, in Chapter 12 we consider the extent to which variations made to leases should be recorded in the register. Consultation responses revealed a difference of opinion between consultees about the purpose of the register. Some took a "purist" approach that the register should be confined to a register "of title". Some saw the benefit of recording in the register information about a title, which would be of use, for example, to an intending purchaser of the registered estate.

2.7 It is essential that the core function of the register of providing faster, easier and cheaper conveyancing, is not hindered. Similarly, Ruoff's principles that underpin that function should be respected, although those principles are not absolute and, as we noted in our Consultation Paper, may give way to countervailing policy choices.[7] Beyond these considerations, however, we have taken a practical and functional approach to the register in making our recommendations. The register of title is a working document, which is used by a variety of people for different purposes in relation to their dealings with land. Our central concern has been to ensure that the register works most effectively for all of those who use it.

## THE SCOPE OF OUR REPORT

2.8 Our project has been confined to a review of the LRA 2002. In our 2001 Report we explained the "fundamental objective" of the draft LRA 2002 was that:

> under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any

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5 LRA 2002, s 40(1).

6 LRA 1925, s 58(1); LRA 2002, s 42(1)(a) and (c); Law Com No 254, paras 6.28 to 6.36; Law Com No 271, para 6.40(2).

7 Consultation Paper, para 2.17.

given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections.[8]

2.9 As we explain in Chapter 20, electronic conveyancing has not developed in accordance with the model anticipated by the LRA 2002. However, our review of the Act has generally led us to endorse the principle of providing a complete and accurate picture of the state of a title. For example, our recommendations in Chapter 3 in respect of mines and minerals are directed at bringing rights in mines and minerals that are held apart from the surface onto the register. We also make recommendations in that chapter to bring unregistered discontinuous leases onto the register. On occasion, our review has persuaded us that a limited departure from this fundamental principle is appropriate. In Chapter 16, we recommend extending slightly the circumstances in which easements are overriding interests and so bind disponees of land without being in the register. Our amendments are confined to easements in short leases, where we consider that there are strong countervailing arguments for aligning the formality requirements for the creation of the easement with those for the creation of the lease.

2.10 The LRA 2002 is the primary statute that governs land registration, but land registration does not exist in a vacuum. It has never been intended that the LRA 2002 or the legislation it succeeded should provide a self-contained legal "code" for land registration. Land registration law developed from, and depends upon, the general law of property. That said, the precise relationship between the LRA 2002 and the general law has often been a source of debate. We do not think that it is a question that can be answered in the abstract, although the division is usually (if not invariably) clear from the context in which the Act operates. For example, schedule 6 to the LRA 2002 provides a self-contained scheme for determining how title to registered land can be obtained through adverse possession. However, the Act defines what constitutes adverse possession by reference to the general law. A person making an application for title under schedule 6 must therefore look to the general law to determine whether he or she is in adverse possession of land.

2.11 In recommending changes to the Act, we have generally taken the view that the Act draws from the general law, and need not make provision for matters that are readily answered by reference to the general law. For example, in considering who is entitled to exercise owner's powers in Chapter 5 of this Report, we have concluded that the question of who is an owner is decided by the general law, and it is not necessary for further provision to be made in the LRA 2002. In Chapter 7, we take the view that what constitutes "valuable consideration" is a matter that should be left to the general law.

2.12 We have not in this project been able to make recommendations on matters that fall within the general law. In our Consultation Paper, we identified two areas that we had decided were outside the scope of our project because they raised issues of the general law: manorial rights and chancel repair liability, and overreaching and the protection of beneficial interests.[9] In this Report, we consider aspects relating to the registration consequences of these topics. We have not, however, been able to address substantive concerns relating to them as part of this project. We appreciate that, as a result, we have not been able to go as far in some of our recommendations for reform as some

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8 Law Com No 271, para 1.5.

9 Consultation Paper, paras 1.19 to 1.20.

consultees would have liked us to do. Consultees' views have, however, informed the projects that we have included in our Thirteenth Programme of Law Reform.

2.13 In relation to manorial rights, in Chapter 8 we discuss interests which, under the LRA 2002, ceased to be overriding interests on 12 October 2013. As from that date, these interests have only bound a disponee under a registered disposition if protected by a notice in the register. We recommend an amendment of the LRA 2002 to reinforce this policy. One of the interests that ceased to be overriding is chancel repair liability. Consultees highlighted the problems that chancel repair liability gives rise to in practice and encouraged us to go further to ensure that the liability will only be binding on a registered disposition if registered.

2.14 It is undoubtedly the case that the policy of the LRA 2002 was that chancel repair liability should bind on a registered disposition only if protected in the register. Doubts have persisted as to whether in fact that is the case because of uncertainties as to the legal nature of chancel repair liability. In this Report, we are able to deal only with the registration consequences of chancel repair liability, not with the legal nature of the liability, which is a matter for the general law. However, our Thirteenth Programme of Law Reform includes a new project on chancel repair and registered land, which will enable us to examine and resolve the underlying issue.[10]

2.15 In respect of overreaching, we are unable to consider the doctrine generally as a part of this project. However, we have considered the specific instances of overlap between the doctrine of overreaching and land registration. We consider in Chapter 5 the relationship between owner's powers and overreaching. In Chapter 20 we discuss the operation of overreaching in the context of electronic conveyancing. We make recommendations for reform to ensure that overreaching is able to take place when two trustees appoint a single conveyancer as agent or attorney to act on their behalf, so that the conveyancer's electronic signature can be used in a disposition. Our Thirteenth Programme includes a scoping study on modernising trust law.[11] That project may provide an opportunity to consider whether a substantive examination of the operation of overreaching is required.

### Our Consultation Paper and Thirteenth Programme of Law Reform

2.16 Our Consultation Paper for this project was published a few months before we began our public consultation on the Thirteenth Programme of Law Reform. With that in mind, we used the Consultation Paper to invite views on whether two areas of law which fell outside the scope of the project should be considered for inclusion in our new programme. First, we invited consultees to provide views on the severity and extent of problems with the Landlord and Tenant (Covenants) Act 1995.[12] Secondly, we invited views on whether we should conduct a law reform project on mortgages of land.[13]

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10 Thirteenth Programme of Law Reform (2017) Law Com No 377, paras 2.30 to 2.31.

11 Above, paras 2.23 to 2.26.

12 Consultation Paper, para 12.48.

13 Consultation Paper, para 18.7.

2.17 We are grateful to the consultees who responded to these questions. These responses were considered in conjunction with responses that were received from our programme consultation. In the event, projects on neither of these areas are included in our Thirteenth Programme.

2.18 In relation to mortgages, our discussions with the Ministry of Justice and HM Treasury led us to believe that the Government was unlikely to give an undertaking that it had a serious intention to take forward reform in this area as is required under our Protocol.[14] Since the publication of our Consultation Paper, however, we have published our final report and draft Bill on goods mortgages, and we have considered mortgages in that context.[15]

2.19 In relation to the Landlord and Tenant (Covenants) Act 1995, we explained in our Thirteenth Programme report that the Department for Communities and Local Government (as it then was) had said that, while it recognises that commercial leasehold could be improved, other departmental priorities mean that it is not able to support such a project at the moment.[16] A project on commercial leasehold, including the 1995 Act, could be undertaken in the future if supported by the Government. Given the extent of problems we have been told about in relation to the operation of the 1995 Act and other legislation (in particular, the Landlord and Tenant Act 1954), we hope that this work will be able to take place.

### New issues raised by consultees

2.20 In their consultation responses, consultees raised a number of new issues. By and large, we have not made recommendations in respect of these issues. In many cases, that is because the issues raised were about the general law and so out of scope (such as issues relating to overreaching and chancel repair liability) or were points of practice rather than issues with the law of land registration. In other cases, the issues were only raised by one or two consultees, and we did not feel able to recommend reform without broader evidence of the extent of the problem and support for reform, particularly as some of these issues (such as the triggers for compulsory registration) touch on fundamental questions of land registration policy.

2.21 Finally, in this chapter we comment on one issue that was raised by several consultees concerning clutter in the register. We have not made a recommendation for reform in respect of this issue, as we think that it is an issue of practice, rather than of law reform. Our consultation responses suggest, however, that it is a matter of some concern.

### Clutter in the register

2.22 On a variety of topics, consultees raised issues about "clutter" in the register. Generally, the clutter consultees complained of was notices, restrictions or cautions that, in their

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14 Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission (2010) Law Com No 321, para 6(2).

15 From Bills of Sale to Goods Mortgages (2017) Law Com No 376, paras 6.28 to 6.35. On 14 May 2018, the Government announced that it will not bring forward the Law Commission's Good Mortgages Bill in the immediate future: HM Treasury, *Good Mortgages Bill: Response to Consultation* (May 2018).

16 Thirteenth Programme of Law Reform (2017) Law Com No 377, para 4.11.

view, remain in the register after the interests or rights they protect appear to be spent. For example, consultees suggested that new procedures should be introduced to remove: notices protecting leases which have expired;[17] bankruptcy notices when the bankruptcy is discharged;[18] unilateral notices on completion of the document referred to in the notice;[19] cautions against first registration of a leasehold title when the lease has expired;[20] and notices protecting rights effectively eliminated under section 237 of Town and Country Planning Act 1990 (now section 204 of the Housing and Planning Act 2006).[21]

2.23 In our view, none of these concerns reveal problems with the law in relation to land registration. Sufficient provisions exist within the LRA 2002 and the LRR 2003 to cancel or remove various entries from the register. In some cases, there are limits as to who can make such applications.[22] However, anyone can apply to bring the register up to date,[23] or to alter the cautions register.[24] These are useful catch-all applications to remove clutter from the register. Consultees did not present us with any instances in which it is impossible to make an application to remove an entry from the register.[25]

2.24 It seems appropriate to us that applications should generally have to be made to remove entries from the register. Those with the benefit of an interest or right are in the best position to know if the interest has come to an end and so to provide the necessary evidence to HM Land Registry that the entry protecting it can be removed. We acknowledge that, in some circumstances, the person with the benefit of the interest or right might have no particular incentive to remove the entry when the interest or right has come to an end. However, in those cases, other parties can make an application to have the entry removed if they can demonstrate that the entry is otiose.

2.25 We acknowledge that it might be difficult for a party who was not the beneficiary of the right or interest to satisfy the registrar that it has come to an end. However, in our view, it would be problematic to require HM Land Registry to remove entries from the register automatically, absent this evidence. This point is most clear in relation to leases, which can continue beyond their stated terms due to security of tenure provisions.[26]

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17 Taylor Wessing LLP. This issue was raised by other stakeholders prior to the Consultation Paper.

18 The Chartered Institute of Legal Executives.

19 Taylor Wessing LLP and the Berkeley Group.

20 The London Property Support Lawyers Group.

21 Burges Salmon LLP.

22 For example, to cancel a caution, the applicant must be the owner of the legal estate or a legal estate derived out of the legal estate: LRA 2002, s 18(1); LRR 2003, r 45.

23 In Form AP1; LRA 2002, s 65; LRR 2003, rr 13 and 128.

24 In Form AP1; LRA 2002, s 21; LRR 2003, rr 13 and 50.

25 Under r 87 of the LRR 2003, if the registrar is satisfied that the interest protected by the notice (other than a unilateral or home rights notice) has come to an end, the registrar can either cancel the notice or "make an entry in the register that the interest so protected has come to an end". It would seem unusual and unnecessary to leave the notice in the register with a note that the interest it protects had come to an end. HM Land Registry confirmed that its practice is to cancel entries once satisfied that the interest has come to an end.

26 In the Landlord and Tenant Act 1954 and the Local Government and Housing Act 1989.

# Chapter 3: Registrable estates

## INTRODUCTION

3.1 In this chapter, we consider a number of discrete issues concerning the provisions of the LRA 2002 that deal with registrable estates.[1] These provisions determine which unregistered legal estates can or must be registered for the first time. In general, the estates in land which can be registered are freehold estates, and leasehold estates which have a term of more than seven years remaining.[2] Compulsory registration of a registrable estate in land can be triggered by various types of disposition.[3]

3.2 This chapter is divided into the following four parts, each dealing with one of the separate issues that we identified in the Consultation Paper:

(1) mines and minerals;

(2) discontinuous leases;

(3) the minimum term for registrable leases; and

(4) the duplication of freeholds upon enlargement of leasehold estates.

## MINES AND MINERALS

3.3 Mines and minerals are defined in the LRA 2002 as including "any strata or seam of minerals or substances in or under any land, and powers of working and extracting any such minerals or substances".[4] Rights in mines and minerals can take a number of different legal forms, such as manorial rights and profits à prendre. We focus on estates in mines and minerals – meaning a freehold or leasehold estate in land which includes mines and minerals[5] – because most of the issues surrounding first registration arise only in relation to estates.

3.4 In particular, we focus on three issues that stakeholders have raised in relation to the registration of mines and minerals.[6] These three issues are:

(1) triggers for compulsory first registration;

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1 LRA 2002, ss 3 and 4.

2 LRA 2002, s 3(1)(a) and (3), s 4(2)(b). It is also possible to register a rentcharge, franchise or profit à prendre in gross: LRA 2002, s 3(1)(b) to (d).

3 LRA 2002, ss 4 to 7.

4 LRA 2002, s 132(1); Law of Property Act 1925, s 205(1)(ix).

5 LRA 2002, s 132(1); Law of Property Act 1925, s 1(1).

6 Consultation Paper, paras 3.35 to 3.42. We also noted that a number of issues raised by stakeholders during our review of the LRA 2002 related to the ownership of mines and minerals and surrounding law, beyond the scope of this review.

(2) notification of surface owners; and

(3) the use of cautions against first registration of surface land.

Terms used in the context of mines and minerals

*Surface title*: an estate in land which includes the surface of that land.

*Surface owner*: the proprietor of the surface title.

*Estate in mines and minerals*: an estate in land which includes mines and minerals (whether or not held apart from the surface).

**Current law**

3.5 The general rule is that an owner of the surface land owns the strata beneath it, including any mines and minerals.

3.6 However, this rule does not apply if the strata have been alienated to someone else, whether by conveyance, at common law or by statute.[7] It is possible for mines and minerals to have been alienated in a variety of (often historic) ways. For example, mines and minerals may have been alienated by enfranchisement of copyhold land,[8] by enclosure,[9] or by adverse possession.[10] As a result, it is often difficult to ascertain whether mines and minerals have been alienated and, if so, to whom.

3.7 Moreover, certain minerals are not privately owned, regardless of the ownership of the surface land. Gold and silver[11] and oil and gas[12] are vested in the Crown. Coal and coal mines are generally vested in the Coal Authority.[13]

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7 *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, [2011] 1 AC 380 at [27].

8 The conversion of copyhold, a medieval form or tenure, into the modern forms of tenure, namely freehold or leasehold.

9 The enclosure of land involved the lord of the manor taking common land into private ownership to the exclusion of the rights of his or her manorial tenants. Enclosure could be by agreement, by court decree of by legislation.

10 See further in HM Land Registry, *Practice Guide 65: registration of mines and minerals* (April 2018) para 3.

11 *The Case of Mines* [1568] 1 Plowd 310; Royal Mines Act 1688; *Attorney General v Morgan* [1891] 2 Ch 432.

12 Petroleum Act 1998, s 2. Shale gas is vested in the Crown as a result of this provision; fracking (the process of extracting shale gas) is therefore not relevant to the issues discussed in this chapter.

13 Coal Industry Act 1994, s 7(3).

Registration of estates in mines and minerals

3.8 On first registration of a parcel of land, if the registrar is satisfied that the mines and minerals are included in (or excluded from) the applicant's title, then the registrar must make a note in the register to that effect.[14]

3.9 Absent sufficient evidence of title to mines and minerals, the registrar will not enter a note including the mines and minerals in the register of title of the surface land. The title will be silent as to whether the ownership of the mines and minerals is also vested in the surface owner. If the title is silent, then it is inconclusive as to the ownership of the mines and minerals. However, in accordance with the general rule set out above,[15] ownership of the mines and minerals may be within the surface owner's title even in the absence of an express note.[16]

3.10 If a surface title, as registered, includes mines and minerals, then a disposition of that estate would have to be completed by registration by virtue of section 27. The requirement for registration includes a disposition which separates the mines and minerals from the surface title, either by the transfer of part of the estate which relates to mines and minerals or the grant of a lease in those mines and minerals for a term of more than seven years.

3.11 Because mines and minerals fall within the general definition of "land", whether or not held with rights to the surface,[17] it is possible to register voluntarily an estate in mines and minerals held apart from the surface under the LRA 2002.[18]

3.12 However, mines and minerals held apart from the surface are excluded from the definition of land for the purposes of section 4, the provision which governs compulsory first registration.[19] As a result, a disposition of such an estate will never trigger compulsory first registration.

3.13 If registered, estates are registered with one of four grades of title. Most estates are registered with absolute title, which is the strongest grade of title. Estates in mines and minerals are, however, usually only registered with the weaker grade of "qualified title".[20] Registration with this grade of title is a result of the difficulties in establishing title to estates in mines and minerals given the various ways in which these rights may be alienated from surface title. We outlined the limited circumstances in which absolute title will be granted in the Consultation Paper.[21]

3.14 However, once an estate in mines and minerals is registered, a registrable disposition of the estate must also be registered in accordance with section 27 of the LRA 2002.

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14 LRR 2003, r 32.

15 See para 3.5 above.

16 Consultation Paper, paras 3.37 and 3.38.

17 Law of Property Act 1925, s 205(1)(ix); LRA 2002, s 132(1).

18 LRA 2002, s 3(1)(a).

19 LRA 2002, s 4(9).

20 HM Land Registry, *Practice Guide 65: Registration of mines and minerals* (April 2018) para 2.2.

21 Consultation Paper, para 3.25.

Therefore, although there is no compulsory registration of estates in mines and minerals, registration of any subsequent disposition is required once the estate is registered voluntarily.

### Application of indemnity provisions to mines and minerals

3.15 As we explain in Chapters 13 and 14, registration of title operates as a guarantee of title. This guarantee is backed up by an indemnity promise. However, indemnity is generally unavailable in relation to estates in mines and minerals; they only benefit from the title guarantee and indemnity scheme in limited circumstances. In part, this limitation arises because of the registration with qualified title; title will not be guaranteed to the extent that it is qualified. Additionally, a specific limitation of the indemnity scheme in relation to estates in mines and minerals is contained in the LRA 2002, although its scope is not entirely clear. As a result, registration is less beneficial for proprietors of estates in mines and minerals than for proprietors of other estates.

3.16 Paragraph 2 of schedule 8 to the LRA 2002 states that an indemnity is only payable in relation to mines or minerals (or the existence of any right to work the mines and minerals) if it is noted in the register that the title to the registered estate concerned includes the mines or minerals. The use of the word "includes" may suggest that a note is only entered on a surface title including mines and minerals, but not on a title which entirely consists of mines and minerals held apart from the surface.

3.17 HM Land Registry's Practice Guide 65 clarifies, to an extent, the circumstances in which an indemnity is available for an estate in mines and minerals. We understand HM Land Registry's position to be as follows.

(1) If a registered title to surface land includes a note to the effect referred to in schedule 8, paragraph 2 to the LRA 2002, any estate in mines and minerals which is subsequently transferred out of, or granted from, that estate will also include such a note on its register of title. As a result, the indemnity scheme will apply.

(2) If on first registration an estate in mines and minerals is registered with absolute title, HM Land Registry will enter a note to the effect referred to in schedule 8, paragraph 2 to the LRA 2002.[22] As a result, the indemnity scheme will apply.

## Compulsory triggers for first registration

3.18 As we explained above, the triggers for compulsory first registration in the LRA 2002 do not apply to estates in mines and minerals held apart from the surface.[23] The LRA 1925 similarly excluded mines and minerals from compulsory registration.[24] As a result, existing titles to mines and minerals are often unregistered, and the land registration system allows this situation to remain.

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22 HM Land Registry, *Practice Guide 65: registration of mines and minerals* (June 2015). This is supported by C Harpum and J Bignall, *Registered Land: Law Practice under the Land Registration Act 2002* (2004).

23 See para 3.12 above. S 4(9) excludes mines and minerals held apart from the surface from the definition of "land" for the purposes of compulsory registration.

24 LRA 1925, s 120(1).

3.19 The policy of excluding mines and minerals from compulsory first registration appears to flow from the complexity and difficulty in establishing ownership of mines and minerals. However, as we explained in the Consultation Paper, this complexity and difficulty is potentially exacerbated by the lack of compulsory registration. If more estates in mines and minerals were registered, it would be easier to establish who owned them. We considered that some of these difficulties could be resolved by requiring first registration of estates in mines and minerals held apart from the surface in circumstances which indicated an intention to exploit the mines and minerals. [25]

3.20 Nevertheless, as we acknowledged in the Consultation Paper, the registration of estates in mines and minerals can be costly and time-consuming, given the nature of these estates. It is arguable that the cost outweighs the benefit of registration, especially given that estates in mines and minerals are typically registered with qualified title and do not benefit from the indemnity scheme.[26]

### Consultation and discussion

3.21 In the Consultation Paper, we posed two related questions about compulsory first registration. First, we asked consultees for their views about introducing two new triggers for compulsory first registration:

(1) where mines and minerals are separated from an unregistered legal estate; and

(2) where an unregistered estate in mines and minerals held apart from the surface is transferred.[27]

3.22 We considered that dispositions in these circumstances often reflect an intention to exploit the mines and minerals, and are less likely to involve difficulties in proof of ownership.[28]

3.23 Secondly, we asked consultees to share their experiences of the extent to which the absence of compulsory registration of estates in mines and minerals causes problems in practice.[29]

### New triggers for compulsory first registration

3.24 Of the 19 consultees who responded, approximately two thirds supported the introduction of new compulsory triggers for first registration of estates in mines and minerals. Support came from a range of consultees including a number of practitioner organisations such as the Law Society and the Conveyancing Association. However, HM Land Registry was strongly opposed to an expansion of compulsory registration to estates in mines and minerals.

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25 Consultation Paper, paras 3.36 and 3.53.

26 Consultation Paper, para 3.57.

27 Consultation Paper, para 3.59.

28 Consultation Paper, paras 3.54 to 3.56.

29 Consultation Paper, para 3.60.

### Scope of the new triggers

3.25 A few consultees in favour of introducing new triggers nonetheless had concerns about the impact of compulsory first registration. Christopher Jessel said that it would be unfair to require compulsory registration for certain transactions, such as gifts, assents and appointments of new trustees. He explained that in these cases, it may be impractical or not economically sensible for the parties to prove title to the mines and minerals to the satisfaction of HM Land Registry. Mr Jessel noted that it could be particularly problematic where mines and minerals fall within assents in general terms or including "sweeping up" clauses. These methods are used to ensure that the entirety of a person's property, whether or not its full extent is known, is included in a disposition, which may then unknowingly include an estate in mines and minerals.[30]

3.26 Similarly, the Bar Council also noted that a requirement of compulsory registration may place a burden on those who inherit estates in mines and minerals, but thought that the burden was "likely to be a modest one".

3.27 The City of Westminster and Holborn Law Society, which was against the introduction of new triggers, echoed these concerns. It thought that compulsory first registration would be problematic for certain dispositions such as assents, gifts and reservation of mines and minerals on grant of surface title.

3.28 In the light of these concerns, we have reconsidered the scope of the potential new triggers for compulsory registration of mines and minerals.

3.29 It seems to us that there is a strong case for a new trigger where mines and minerals are separated from the surface title. Where there is a newly created title comprising mines and minerals, it is more likely that evidence of title will be readily available, together with a sufficient degree of certainty as to the extent of the title. As a result, there will be less difficulty in meeting the requirements of proof necessary to apply for registration, in contrast with applications based on a historic separation of mines and minerals. We also believe that the creation of a new estate in mines and minerals suggests an intention to exploit the mines and minerals. In our view, in these circumstances it is reasonable to expect the estate to be registered.

3.30 However, the position is more complicated in relation to the transfer of an existing estate in mines and minerals held apart from the surface. On the one hand, we recognise that a gratuitous transfer of such an estate does not necessarily reflect an intention to exploit it. We additionally recognise that it may not be easy for the parties to prove title to the estate, as the relevant evidence may not be readily available. We expect this would particularly be true in inheritance and trusts cases. On the other hand, where such an estate is sold, we think that there is likely to be an intention to exploit it as well as sufficient evidence to prove title. Indeed, consultees suggested that there is likely to be some evidence of ownership available when money is being paid for the estate.

3.31 As a result, we have modified our proposals in relation to the second trigger, to limit it to cases where an estate in mines and minerals held apart from the surface is transferred *for valuable consideration*. Thus, we would exclude from compulsory first

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[30] Christopher Jessel also made a number of suggestions for reform of mines and minerals which were beyond the scope of this project. For more detail, see the analysis of responses.

registration dispositions such as a gift, an assent and the appointment of a new trustee. We think this approach is proportionate, balancing the desirability of registration against its costs and difficulties in certain situations.

3.32 We believe that there are benefits in framing the policy in this way. We are targeting the dispositions where the property interest in the mines and minerals is more likely to be exploited, providing valuable information to surface owners. Simultaneously, we are limiting the burden, in terms of resources, on applicants for registration and HM Land Registry by confining compulsory registration to situations in which the documentation necessary to establish a mines and minerals title (even a qualified one) is likely to exist and to have already been assembled for the purposes of the transaction.

3.33 We have not modified the first trigger for compulsory registration that we suggested in the Consultation Paper, namely the separation of mines and minerals from the surface land. Whether for valuable consideration or not, we think this separation is likely to indicate an intention to exploit mines and minerals.

### In favour of new triggers for compulsory first registration

3.34 The majority of consultees supported new triggers for compulsory registration, and thought that it would improve the transparency and completeness of the register. The London Property Support Lawyers Group expressed the view that increased triggers for compulsory registration would allow surface owners to have "a clear appreciation of their land ownership and the rights that affect them". Everyman Legal and the Chartered Institute of Legal Executives described the change as being sensible and the National Trust considered that it would be a useful change.

3.35 Moreover, some consultees thought that registration would facilitate dealings with estates in mines and minerals. The Law Society noted that registration increases the value of such rights, as it indicates to buyers "whether the seller's title is sufficient to satisfy the HM Land Registry that it is title absolute, or falls short of the mark and is qualified". It reported that a voluntary registration often precedes a sale of a mines and minerals title.

### Against the introduction of new triggers for compulsory first registration

3.36 Five consultees, including HM Land Registry, were opposed to introducing triggers for compulsory registration of mines and minerals.

3.37 The Chancery Bar Association did not consider that compulsory registration was justified, particularly given that in most instances only qualified title to the mines and minerals would be awarded. However, it qualified its response, stating that its view might be different if "the [other] responses … show clearly that the lack of compulsory registration causes practical problems".

3.38 The City of Westminster and Holborn Law Society argued that the disadvantages of compulsory first registration would outweigh its advantages. It noted the resource implications the new triggers would have for HM Land Registry and estate owners. Its objection was partially based on a concern that registration would be an undue burden for the parties to certain dispositions, such as gifts. We think that we have addressed

these concerns, in relation to the second trigger, by limiting it to a transfer for valuable consideration.[31]

3.39 However, the City of Westminster and Holborn Law Society conceded that there is a case for first registration where mines and minerals are severed from the surface land by a disposition for value, as there is likely to be evidence of ownership. However, it considered that voluntary first registration would be likely in these cases, and that the provisions on voluntary registration are sufficient.

3.40 In our view, we think that the voluntary registration provisions are insufficient to bring mines and minerals on to the register. In particular, much of the benefit of bringing these interests on to the register is transparency for surface owners, who have no control of whether mines and minerals are voluntarily registered.

3.41 In its response, HM Land Registry considered that the current law was based on "sound, practical considerations". Due to the complexity of the law in this area, it thought that compulsory registration would cause significant issues for, and raise a large number of disputes between, owners of mines and minerals and surface owners. In post-consultation discussions, HM Land Registry confirmed that view and further argued that it may be inappropriate to require estates in mines and minerals titles to be subject to compulsory registration, when the underlying law of mines and minerals is complex and in need of reform.

3.42 In addition, HM Land Registry noted its goal of achieving comprehensive registration, which supports the wider Government agenda as expressed in the Housing White Paper.[32] It highlighted that, at this point in time, HM Land Registry's goal in respect of comprehensive registration was only in respect of surface land. HM Land Registry explained that introducing compulsory registration of mines and minerals at the same time that it is trying to complete the register of surface titles may well have significant resource implications. Therefore, HM Land Registry suggested that the staging of compulsory registration would need to be carefully considered and the benefits of those stages assessed.

3.43 HM Land Registry also explained that first registration of mines and minerals estates is resource intensive. We explored with HM Land Registry how it would manage any increased costs and resource implications that flow from compulsory registration of mines and minerals. HM Land Registry has indicated that, depending on the increase in the number of applications, it could be to draw resources from other areas to deal with the increase in work. If there were to be a substantial number of new applications, HM Land Registry indicated that it would have the option of adjusting the fees it charges to absorb these increased costs.

3.44 We recognise that applications for first registration of mines and minerals are among the most complex applications to be reviewed by HM Land Registry.[33] In considering

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31 See para 3.31 above.

32 Fixing our Broken Housing Market (2017) Cm 9352, paras 1.17 to 1.20, outlines the Government's goal of "comprehensive land registration", or the elimination of unregistered land, by 2030, and a register that better reflects "wider interests in land".

33 Consultation Paper, para 3.57.

the introduction of additional triggers for compulsory registration of mines and minerals, the resource implications for HM Land Registry and the cost to applicants must be weighed against the benefits of these new triggers.

3.45 We query the extent of the concerns raised by HM Land Registry, in particular given our modified proposal to limit the second trigger to transfers for valuable consideration. As previously noted, because such dispositions currently take place off the register, it is difficult to know the number of interests that would be caught by the new triggers for compulsory registration. However, our modified proposal is targeted at transactions where the necessary information is likely to be available: we expect that the vendor will have had to produce the evidence of his or her title as part of the transfer or grant of the mines and minerals estate. We therefore do not think that the applications for registration that will arise based on our recommendation will be as difficult to assess, and therefore as resource intensive, as HM Land Registry fears.

### Problems in practice?

3.46 In order to assess the necessity of reform, we invited consultees to share their experiences of the extent to which the lack of compulsory registration of estates in mines and minerals causes problems in practice.

3.47 Fifteen consultees responded to this question. Responses were roughly split between consultees who had experienced problems in practice and those who had not. We note that the consultees who had experienced problems in practice included the Law Society, the City of Westminster and Holborn Law Society, and the Chartered Institute of Legal Executives. That these practitioner bodies were each aware of problems in practice suggests that a broad section of the legal profession has experienced problems in practice.

3.48 A number of consultees noted that problems exist in practice but that they could not elaborate due to confidentiality concerns.

### Invisibility of titles causing problems in practice

3.49 The Law Society highlighted a number of areas of concern, in particular that the lack of visibility of mines and minerals titles was having an adverse impact on development. It explained that uncertainty regarding the existence or extent of mines and minerals rights gives rise to costs and delays to development while surveys are undertaken and risks assessed, in addition to delays in the event of indemnity insurance claims. These experiences were affirmed by the Chartered Institute of Legal Executives. It reported an example of a developer experiencing significant cost and delay when a mines and minerals issue arose, which had not been apparent in earlier dealing with the land.

3.50 Further (and relevant to our discussion of the next consultation question), the Law Society argued that HM Land Registry should note on a surface title that mines and minerals are excluded even if a mines and minerals title is only registered with qualified title. It explained that this practice would enhance visibility of mines and minerals. It hypothesised that the only uncertainty in cases of qualified title was whether another party may come along with a stronger claim (over and above that of the title holder and surface owner).

### Mines and minerals owners using uncertainty to their advantage

3.51 Linked to the lack of visibility of interests in mines and minerals were concerns that owners of such interests may take advantage of the resulting uncertainty, including evidence from consultees of "ransom claims" being made.

3.52 Burges Salmon LLP noted that uncertainty about the extent of mines and minerals rights enhances the bargaining position of a (potential) holder of mines and minerals against a proposed developer of the surface land.

3.53 Together with Adrian Broomfield, Burges Salmon LLP reported examples of mines and minerals rights holders extracting "ransom payments" from developers wishing to pursue a surface development who are keen to do so with an unequivocally "clear" title. Similarly, the London Property Support Lawyers Group thought that the requirement to register would discourage people from making spurious claims to own mines and minerals in order to extract payment from developers, who often find it easier to negotiate than engage in this complex area of law.

3.54 Burges Salmon LLP and Adrian Broomfield both noted the specific example of wind farm developments. Wind farm developments require deep foundations. Such developments therefore raise uncertainty about whether the development will interfere with the mines and minerals estate. The negative impact of this uncertainty arguably would be curtailed if a larger number of mines and minerals titles were brought on to the register, as developers would be aware of the existence of the rights at an early stage.

### Other responses

3.55 Roughly half of the consultees who responded indicated they had not experienced any issues in practice arising from a lack of compulsory first registration of mines and minerals.

3.56 Speaking of the problems that it had seen in practice, the City of Westminster and Holborn Law Society argued that the root cause was not the lack of registration of mines and minerals interests but rather the difficulties of proving ownership below the surface when there has been no recent relevant mining activity.

3.57 Several consultees raised issues with identifying the existence or extent of interests in mines and minerals and the additional costs and delays arising from these problems. Most of these responses did not directly touch on the issue of lack of registration and added weight to the argument that greater clarity is required in the broader area of mines and minerals law. In the Consultation Paper, we noted the broader concerns regarding the law of mines and minerals; however, these issues are beyond the scope of this project.[34]

[34] Consultation Paper, paras 3.44 to 3.46.

### Post-consultation discussions

3.58 As we did not receive any consultation responses from those who practise primarily in the mines and minerals sector, we sought the views of the British Aggregates Association and the mines and minerals team at Knights 1759 (jointly).

3.59 In post-consultation discussions, the British Aggregates Association and the mines and minerals team at Knights 1759 jointly were "generally in principle supportive" of expanding compulsory registration to estates in mines and minerals held apart from the surface. They considered that our provisional proposal would improve transparency and consistency.

3.60 They noted that there could be practical issues for introducing compulsory registration: legal practitioners unfamiliar with mines and minerals might need to undertake suitable training, and HM Land Registry might need to be provided with additional resources. It suggested that a long lead-in period could enable training and resources to be provided.

3.61 We think that our modified recommendation should minimise these practical concerns. The new triggers for compulsory registration will apply only to transactions where the legal practitioners are familiar with the law relating to mines and minerals, and where much of the material needed for registration will already be prepared.

### Recommendation

3.62 With the support of most consultees, we recommend the introduction of new triggers for compulsory registration of estates in mines and minerals. As we explained at paragraph 3.31 and following above, we have modified our proposal so that transfers of mines and minerals estates that are already separated from the surface land are only captured if made for valuable consideration.

3.63 We acknowledge the views of some consultees that the cost of registering estates in mines and minerals will outweigh the advantages of registration. However, as we have explained, we have clarified our proposal to apply new triggers for first registration to those dispositions in which the advantages of registration will be the greatest, but the costs of registration the lowest. By restricting our proposals to dispositions that indicate an intention to exploit, registration will only be compulsory in cases in which evidence is likely to be readily available, lowering the costs of first registration. Further, costs will decrease as more and more estates in mines and minerals are registered, because there will be fewer unregistered estates to be caught by the new triggers. We acknowledge that on first registration of most estates in mines and minerals, the registered proprietor will probably only get qualified title and will be unable to benefit from the indemnity provisions. Nonetheless, we think that there are significant advantages in registering mines and minerals estates that are likely to be exploited. Namely, the registration of mines and minerals estates will increase transparency and assist in ascertaining ownership of estates in mines and minerals.

3.64 In the Consultation Paper, we only discussed new triggers for compulsory registration in cases where there is a transfer of the unregistered legal estate, whether the mines and minerals were already separated from the surface or not. On reflection, we think that compulsory registration should also be triggered by the grant of a leasehold estate in mines and minerals held apart from the surface, in order to be consistent with the existing triggers for compulsory registration.

3.65 The grant of a leasehold estate can amount to a separation of the mines and minerals from the surface land: the landlord may own the surface land and mines and minerals, but may choose to grant only a lease in respect of the mines and minerals. In these cases, we think compulsory registration should be triggered whether the disposition is for valuable consideration or not. This treatment will align with the treatment of a separation of the mines and minerals by transfer, our original first trigger.

3.66 Conversely, a lease may be granted out of an estate in mines and minerals held apart from the surface. In order for its grant to be treated in the same way as a transfer of an estate in mines and minerals held apart from the surface, compulsory registration should only be triggered if the grant is for valuable consideration.

**Recommendation 1.**

3.67 We recommend the introduction of new compulsory triggers for registration of an estate in mines and minerals in the following instances:

(1) where mines and minerals are separated from a freehold estate, or a leasehold estate for a term exceeding seven years, following a transfer for valuable or other consideration, or by way of gift;

(2) where mines and minerals are separated from an unregistered legal estate following the grant of a lease for a term exceeding seven years for valuable or other consideration, or by way of gift;

(3) where an unregistered freehold estate in mines and minerals held apart from the surface, or a leasehold estate for a term exceeding seven years in mines and minerals held apart from the surface, is transferred for valuable consideration; and

(4) where a lease of a term exceeding seven years is granted out of an unregistered estate in mines and minerals held apart from the surface for valuable consideration.

3.68 Clause 1 will give effect to this recommendation. It will insert four new paragraphs into subsection 4(1) of the LRA 2002, each corresponding to one of the four new triggers for compulsory first registration.

3.69 The clause introduces compulsory registration for estates in land; namely freehold and leasehold estates.[35] Consistent with the existing triggers for compulsory first registration in section 4(1), the new triggers only apply to leasehold estates for a term exceeding seven years. Grants or transfers of short leases and interests (as opposed to estates) in mines and minerals will not trigger compulsory first registration.

[35] See LRA 2002, s 3(1)(a); Law of Property Act 1925, s 1(1). Thus, a franchise or a profit à prendre in gross in mines and minerals would not be subject to compulsory first registration.

3.70 The amendments extend to demesne land, meaning Crown land.[36] Subsection (7) will amend section 80(3) of the LRA 2002 so that the grant of an estate in mines and minerals out of demesne land will trigger compulsory first registration. Compulsory registration is triggered even if the grant is not for valuable consideration because, in our view, even without valuable consideration, the separation of the estate in mines and minerals from the demesne of the surface land indicates an intention to exploit those mines and minerals.

3.71 The clause will also ensure that if compulsory registration of such an estate is triggered, it ceases to be overriding.[37]

3.72 Clause 2 will make special provision for coal, most of which is owned by the Coal Authority. Estates in mines and minerals which consist of, or include, coal and which are derived from the Coal Authority will not be subject to compulsory registration. The policy reasons for requiring registration have less force for these estates.[38] The provision will align coal with the position for other state-owned mines and minerals.[39]

3.73 The minority of estates in coal which remained in private ownership[40] (and thus are not derived from the Coal Authority) will be subject to compulsory registration. Therefore, the requirements of registration will apply to persons other than the Coal Authority, regardless of the nature of the mineral. If compulsory registration of an estate in mines and minerals including coal is triggered, it will cease to be an overriding interest.[41]

3.74 The amendments made by these clauses will apply to dispositions that are made after the provisions come into force.[42]

**Notification of surface owners**

3.75 As noted above, on application for first registration, rights to mines and minerals are most likely to be registered with qualified title rather than absolute title.[43] Because the qualified title will not prejudice any pre-existing estate or right in the mines and minerals, HM Land Registry's current practice is not to notify surface owners of an application for first registration where it is proposed to register the mines and minerals interest with

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36 Specifically land belonging to Her Majesty in right of the Crown which is not held for an estate in fee simple absolute in possession: LRA 2002, s 132(1).

37 These are leasehold estates in mines and minerals which are granted (i) before 13 October 2013 for a term not exceeding 21 years (see para 12 of sch 12 to the LRA 2002); (ii) before 1898 where the landlord's estate was registered before 1898 (sch 3, para 8); and (iii) where the landlord's estate was registered between 1898 and 1925 inclusive, before that estate was registered (sch 3, para 9).

38 There is more transparency for these estates because there is a public register of licences to mine coal. See Coal Industry Act 1994, s 35.

39 Gold, silver, oil and gas do not fall within the LRA 2002 at all because they are not property rights, but burdens under the general law. See Law Com No 254, paras 4.36 and 5.97.

40 Coal Act 1938, s 5.

41 LRA 2002, schs 1 and 3, para 7.

42 All of the clauses in the draft Bill apply to dispositions or applications made after the provisions come into force, unless otherwise stated.

43 See para 3.13 above.

qualified title. Thus, a surface owner is rarely given the opportunity to object to registration of a title to mines and minerals below the surface of his or her land. In contrast, a surface owner would be given the opportunity in other cases, for example, in relation to an interest in mines and minerals which comprises a manorial right. Such an interest can be protected by the entry of a unilateral notice, in which case the registered proprietor of the surface title will always be notified, thus giving him or her the opportunity to apply to cancel the notice.[44]

3.76 This practice creates two problems, as we outlined in the Consultation Paper. First, the absence of notification deprives the surface owner of the opportunity to object to the application for registration of the title to the mines and minerals, and to, for example, establish that he or she does have a better title to the mines and minerals at the time of registration. In addition, the surface owner may remain ignorant of the title to the mines and minerals until he or she wishes to dispose of the surface land; this ignorance may be problematic if the surface owner undertakes development without consideration of its impact on the mines and minerals title.[45]

3.77 These problems could be dealt with by a new policy under which HM Land Registry would notify surface owners of an application to register mines and minerals, regardless of the grade of title intended to be granted.

3.78 However, there are some potential disadvantages to such a policy. Notification could cause stress and confusion for ordinary landowners. It is foreseeable that on notification of an application to register a mines and minerals estate with qualified title, surface owners could perceive that mines and minerals have been removed from their title, and may spend money unnecessarily trying to prevent registration of the estate. The policy could also be potentially burdensome for HM Land Registry. In particular, a requirement to notify could have resource implications for HM Land Registry in relation to those who, for historic reasons, own title to mines and minerals over a large area; notification of surface owners in such situations would be a large administrative task.

### Consultation

3.79 We did not make a provisional proposal in respect of notification in the Consultation Paper. Instead, we asked consultees for their views as to whether surface owners should be notified of an application to register title to mines of minerals, regardless of the grade of title to be registered.

3.80 Most of the 22 consultees who responded to this question were in favour of notification to the surface owner, regardless of the grade of title of the proposed mines and minerals estate. However, we note that HM Land Registry again expressed strong opposition to any call for amendment in this area.

### In favour of notification

3.81 Most consultees in favour of wider notification, including the Chancery Bar Association and City of London Law Society Land Law Committee, considered that it would facilitate

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44 LRA 2002, ss 35 and 36. We discuss the procedure to enter and object to a unilateral notice in more detail in Ch 9.

45 Consultation Paper, para 3.61.

conveyancing and resolve problems in practice. The London Property Support Lawyers Group described notification as "arguably the single most important issue arising out of the registration of mines and minerals". It gave the example of a case in which a firm had, as part of a transaction, almost certified that a title was free of third-party interests before discovering, by chance, an application to register mines and minerals. It explained that its members now carry out additional index map searches where mines and minerals may have an impact on a transaction, increasing the workload on both the parties and HM Land Registry. Similarly, the Chancery Bar Association thought that facilitating conveyancing outweighed the disadvantages of notification, including any inconvenience or stress to surface owners.

3.82 Similarly, Pinsent Masons LLP and Christopher Jessel argued that it was better for the issue to be resolved at the earlier stage of registration, rather than, for example, when a surface owner seeks to sell or mortgage his or her property.

3.83 Two consultees noted that there are other practical benefits to notifying surface owners. Nigel Madeley explained that, even if the surface owner did not dispute the title to the mines and minerals, he or she could want to object to how the title is to be recorded in the register. Christopher Jessel said that notification would make it easier for the surface owner to contact the mineral owner.

3.84 Some consultees, including Dr Charles Harpum QC (Hon) and the Law Society, considered that surface owners were entitled to be notified of applications to register mines and minerals due to the general rule that the owner of the surface land owns mines and minerals beneath it. Therefore, the surface owner is entitled to know if someone claims that those mines and minerals have been alienated from his or her land. The Law Society similarly argued that there is no reason to differentiate between absolute or qualified title; in its view, the surface owner's title is affected either way.

3.85 The Bar Council and the City of Westminster and Holborn Law Society expressed support for the view that surface owners should be notified, but qualified their responses by providing that notification must be weighed pragmatically against the resource implications of notification for HM Land Registry.

### Against increased notification

3.86 Some consultees were against increased notification. These consultees, including HM Land Registry, maintained that the alarm and stress that notification would cause for surface owners was not justified.

3.87 Adrian Broomfield cited his experiences of "calls from angry and confused parties who perceive that something has been taken away from them which was actually never conveyed or belonged to them in the first place". He suggested that ordinary surface owners might find it difficult to understand that ownership of land can be divided vertically.

3.88 HM Land Registry also expressed concern at the prospect of surface owners being notified of an application for registration of an estate in mines and minerals with qualified title. It thought that notification would lead to the surface owner incurring costs in seeking legal advice to understand the notice, and possibly in bringing an objection to the registration, which was likely to be groundless. In addition, HM Land Registry was

concerned that surface owners may regard the notice received as a signal of an intention to work the mines and minerals which, in its experience, leads to requests from advisers or MPs for further information from HM Land Registry. These enquiries are time-consuming but ultimately something to which HM Land Registry cannot satisfactorily respond.

3.89 In contrast to the disadvantages, HM Land Registry did not think that there was any obvious benefit to notifying the surface owners of applications to register mines and minerals with qualified title. It took the view that the surface owner is not prejudiced by registration of a mines and minerals estate with qualified title; if the surface owner has a superior title, it will not be affected by registration.

### Post-consultation discussions

3.90 In post-consultation discussions, the British Aggregates Association and the mines and minerals team at Knights 1759 jointly indicated that HM Land Registry's practice was "not helpful in practice" because it fails to provide proper transparency, and merely stores up problems for the future.

### Discussion

3.91 The majority of consultees were in favour of expanding the circumstances in which surface owners are notified of applications to register an estate in mines and minerals to include when the estate is registered with qualified title. We agree with consultees that there is a strong case for notifying surface owners due to the general rule that they own mines and minerals below their land unless it has been alienated.

3.92 In addition, evidence from consultees indicates that the failure to notify surface owners is causing problems in practice. We agree with HM Land Registry that any title that the surface owner has to mines and minerals is not prejudiced by registration of an estate in the mines and minerals with qualified title. However, we do not agree that there is no prejudice to the surface owner: registration of qualified title can adversely affect the surface owner if, for example, he or she wants to sell, mortgage or develop the land. Based on consultees' responses, we are convinced that there would be real practical benefit to increasing notification of surface owners.

3.93 However, the merits of notification must be balanced against the disadvantages, namely the alarm caused to surface owners and the cost to HM Land Registry. In our view, the benefits of increased notification outweigh the potential disadvantages.

3.94 We accept that notification could cause stress and confusion to ordinary homeowners. Nonetheless, we do not expect this issue to be as significant as consultees suggested.

3.95 First, we do not expect that our policy will result in the same sort of widespread notification of surface owners that resulted from applications to register unilateral notices in relation to manorial rights before they lost their status as overriding interests on 13 October 2013. The "sunset clause" under which such interests ceased to be overriding prompted a large number of protective applications, which caused distress

to a number of landowners, and was the subject of a report by the Justice Committee.[46] The situation with unilateral notices was different: no evidence is required for an application to enter a unilateral notice,[47] and the deadline created by the "sunset clause" encouraged a large number of applications over a short period of time. There will be no such "cliff edge" for applications to register estates in mines and minerals arising from our recommendation. Registrations will be made over time as and when transactions are completed. We also understand that HM Land Registry would use the lessons learned from its experience with the sunset clause, and so would be in a better position to limit stress and confusion in homeowners.

3.96 Secondly, we think surface owners would prefer to know about, and be able to raise an objection to, registration of an estate in mines and minerals at the time of the application for registration. Even if an objection is unlikely to succeed, notification at the time of application may avoid later delays when a surface title owner is proceeding with a sale of his or her land. We acknowledge, however, that if registration were not to be discovered until some dealing with the land were to be taking place, then the surface owner would be likely to be receiving legal advice at the time.

3.97 We also accept that increased notifications would incur costs to HM Land Registry, particularly in assessing objections and responding to enquiries. However, as we explained above, we think the extent of these objections will be less than HM Land Registry expects: the lack of a sunset clause and the lessons learned suggest that compulsory registration of mines and minerals will differ from the experience with manorial rights. Further, it is true that the administrative task of notifying surface owners can be costly, due to the fact that estates in mines and minerals can cover large areas of land. Nonetheless, we expect that, to an extent, the cost of notification can be absorbed by fees.

3.98 We think it is important to consider this policy in the light of our Recommendation 1 above to increase the triggers for compulsory registration.

3.99 With more transactions subject to compulsory registration, more applications will be made to HM Land Registry to register mines and minerals estates. If the circumstances in which HM Land Registry must notify surface owners are also increased, more notifications will have to be made to surface owners. We therefore accept that the combined effect of both proposals will impact on resourcing at HM Land Registry.

3.100 On the other hand it would, in our view, be inappropriate to increase the circumstances in which an estate in mines and minerals is compulsorily registrable, without widening the circumstances in which a surface owner is notified. Consultees in favour of increased compulsory registration emphasised that it enhances the completeness and transparency of the register. We consider that without providing for notification of the application to register, the benefits of a more complete register, and of transparency, cannot be realised.

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46 Justice Committee, Manorial Rights (HC 657, January 2015) p 3. See Consultation Paper, para 9.122 and following.

47 A topic covered in Chs 8 and 9 of this Report.

Recommendation

3.101 On balance, we are in favour of surface title owners receiving notification of an application to register an estate in mines and minerals beneath the surface, regardless of the class of title with which it is proposed to register the estate.

**Recommendation 2.**

3.102 We recommend that surface owners should be notified of an application to register an estate in mines and minerals beneath their land, regardless of whether it is to be registered with qualified or absolute title.

3.103 This recommendation can be implemented by an amendment of the LRR 2003. We suggest an amendment of rule 25, which deals with applications for first registration of an estate in mines and minerals held apart from the surface. The existing provision would become paragraph (1), with a paragraph (2) as follows.

> (2) The registrar must give notice of the application to each registered proprietor of a freehold or leasehold estate in land under which the mines and minerals lie.

**Use of cautions against first registration of surface land**

3.104 A person with an interest in unregistered land is able to protect that interest in the event the underlying estate is registered in the future by lodging a caution against first registration. The cautioner (the person lodging the caution) will be notified by the registrar if there is an application for first registration of the legal estate which is affected by their interest.[48] As a result, the cautioner will be able to ensure that his or her interest is reflected in the register of title of the newly registered legal estate, by applying for his or her interest to be protected in the register.

3.105 A person with an estate in mines and minerals may wish to protect his or her interest by lodging a caution against first registration of the surface land. At present, it is possible to lodge a caution against first registration of the surface land in respect of an estate in mines and minerals which includes powers over the surface (for example, a right to access or to work the mines).[49]

3.106 However, where the estate does not include powers over the surface, it is unclear whether the LRA 2002 allows a caution to be entered. Section 15(3) states that "no caution may be lodged… by virtue of ownership of a freehold estate in land, or a leasehold estate in land granted for a term of which more than seven years are unexpired". The aim of this provision is to prevent an owner of an unregistered estate from lodging a caution instead of registering his or her own estate. This aim does not necessarily preclude cautions against the surface title: the cautioner is not entering a caution against his or her *own* estate in mines and minerals, but against the separate estate held by the surface owner.

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48 LRA 2002, ss 15 and 16.

49 By virtue of LRA 2002, s 15(1)(b).

3.107 In our Consultation Paper, we argued that enabling the owner of an unregistered estate in mines and minerals to lodge a caution may benefit potential purchasers of the unregistered land and aid conveyancing by bringing to light claims to mines and minerals. Conversely, we also stated that some could argue that a caution in relation to the wholly separate surface land may be a barrier to dealings with that estate.[50]

### Consultation

3.108 We did not make any provisional proposals in relation to this issue as we took the view that the arguments surrounding the entry of cautions in respect of mines and minerals were finely balanced. Instead, we asked consultees an open question, seeking their views as to whether the law should be clarified to allow an owner of mines and minerals to lodge a caution against first registration of the surface title.[51]

3.109 In total, 21 consultees responded to this question. Since we asked an open question, it is not easy to determine from consultation responses precisely the proportion of consultees who were for and against this potential clarification of the law. Nonetheless, we consider that consultees, including many of the practitioner organisations, were marginally in favour of permitting a caution to be lodged in these circumstances, but that their support was lukewarm rather than enthusiastic. In contrast, consultees who thought that it should not be possible to enter a caution generally had strong views.

### In favour of permitting a caution to be lodged

3.110 Many of the consultees who thought it should be possible to lodge a caution considered that these cautions would provide important information in the register. For example, the Bar Council stated that there would be "benefit to a purchaser in knowing that another party claims mines and minerals under the land in question". More generally, the Law Society thought that cautions would "raise awareness" among conveyancers that mines and minerals may be separated from surface title.

3.111 In addition, the City of Westminster and Holborn Law Society argued that the use of cautions was a "convenient" way to ensure that new surface titles will take account of unregistered estates in mines and minerals, as the expense of voluntary first registration over a very large area may not otherwise be warranted. It acknowledged that, if the mines and minerals were not excluded on first registration, the mines and minerals owner will not be precluded from "coming along later" to correct the position. However, in the Society's view, "it is better to be able to address the point when there is first registration of the surface land".

### Against permitting a caution to be lodged

3.112 Many consultees thought that it should not be possible to lodge a caution on the basis that a person with an unregistered estate in mines and minerals should instead apply for first registration. Dr Harpum highlighted that an applicant for first registration has to prove his or her title to the satisfaction of HM Land Registry, whereas a caution can be lodged without any proof or evidence of the interest claimed. Thus, it would be possible for a person to lodge a caution in respect of an estate in mines and minerals, detracting from the value of the surface title by suggesting that there is an ongoing legal dispute,

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50 Consultation Paper, paras 3.49 and 3.50.

51 Consultation Paper, para 3.51.

even if he or she is unable to prove the existence of his or her estate. The London Property Support Lawyers Group thought that the ability to enter a caution where no right in respect of the surface land is claimed went against the purpose of cautions, namely notifying those with specific rights over unregistered land of first registration of that land.

3.113 Several practitioners, including the London Property Support Lawyers Group and Burges Salmon LLP, were concerned that cautions in respect of mines and minerals interests would hinder conveyancing. These consultees considered that these cautions would require additional investigations by conveyancers, especially given that the cautioner is not required to prove the existence of his or her interest. HM Land Registry pointed out that if more cautions against first registration are made, the need to notify the cautioner of a subsequent application for first registration will delay completion of that registration.

3.114 Some consultees were also concerned that the presence of a caution would unnecessarily cause alarm and distress to surface owners. In particular, they were concerned that cautions could be used to pressure surface owners into the payment of money in exchange for the removal of the caution or release of mines and minerals rights. They were also concerned that cautions could impede dealings with the surface title.

3.115 Dr Harpum also emphasised that permitting cautions to be entered would discourage first registration of estates in mines and minerals, undermining the objective of total registration. Both Dr Harpum and Michael Hall argued that section 15(3) of the LRA 2002 should instead be clarified to exclude the ability to lodge a caution in cases where "the estate could be registered with its own title".

### Discussion

3.116 Taken as a whole, consultee responses largely reflected our conclusion in the Consultation Paper that the arguments in favour and against permitting cautions to be lodged are finely balanced.

3.117 On one hand, the fact that the LRA 2002 currently allows the holder of an estate in mines and minerals with powers over the surface to enter a caution against first registration indicates that such an entry is an appropriate form of protection. The lodging of a caution against first registration of the surface title could be a powerful tool for the owner of an estate in mines and minerals to assert his or her rights in the event of (for example) a development of the surface land.[52]

3.118 On the other hand, cautions may lead to delays in conveyancing, and cause unnecessary distress or alarm to surface owners on first registration. It may be a preferable policy to require holders of rights in mines and minerals to apply for first registration of their estate, especially given the requirements of proof for first registration.

3.119 As the arguments are so finely balanced, we have decided against making any recommendations for reform to clarify the law in relation to the lodging of cautions in

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[52] Consultation Paper, para 3.43.

respect of estates in mines and minerals. However, the other recommendation in this chapter relating to triggers for compulsory first registration will bring more estates in mines and minerals onto the register. Where an estate in mines and minerals becomes registered as a result of Recommendation 1, the issue of entering a caution falls away.[53]

## DISCONTINUOUS LEASES

### Current law

3.120 A discontinuous lease grants to the tenant a right to possession which is split into separate time periods. The most common example is a timeshare arrangement for a holiday home, where a tenant might have a right to possess the property for two weeks each year for ten years. By their nature, discontinuous leases are difficult for purchasers to discover; the tenant is, most of the time, unlikely to be in possession.

3.121 The term of the discontinuous lease is equal to the sum of the individual periods of possession, rather than the number of years for which the lease will last. For example, if a lease gives a tenant the right to possess for two weeks per year for ten years, the term of the lease will be 20 weeks (rather than ten years).

3.122 Due to the way the term is calculated, discontinuous leases often fall short of the minimum length leases must be to be capable of being registered or noted in the register.

3.123 In general, an unregistered lease is subject to compulsory first registration only if its remaining term exceeds seven years at the time of the event that triggers first registration.[54] Discontinuous leases will commonly fall short of the minimum term of seven years. For example, a lease granting a right to possession for one week a year would have to last for over 364 years for its term to exceed seven years. As a result, the grant or transfer of an unregistered discontinuous lease rarely triggers compulsory first registration.[55]

3.124 The position is different for grants of discontinuous leases out of registered land: the grant of a discontinuous lease of any length is required to be completed by registration by virtue of section 27(2)(b)(iii) of the LRA 2002.[56]

3.125 In other words, the registration requirements applicable to discontinuous leases depend entirely on whether the landlord's freehold estate is registered.

3.126 Although unregistered discontinuous leases will rarely be subject to compulsory first registration, the LRA 2002 specifically provides for the voluntary first registration for discontinuous leases of any length.

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53 See para 3.67 above.

54 LRA 2002, ss 4(2)(b) and 27(2)(b)(i).

55 Note that if a tenant's term under a discontinuous lease happens to commence more than three months after the date of the grant, the lease may be subject to compulsory registration under s 4(1)(d).

56 If not discontinuous, a lease out of registered land would have to be granted for a term of more than seven years from the date of the grant for registration to be compulsory: s 27(2)(b)(i).

3.127 When a lease is registered, it is given its own title number and a notice is also entered on the landlord's register of title.[57] However, section 33(b) of the LRA 2002 prevents the entry of a notice in respect of a lease which is both for a term of three years or less, and not subject to compulsory first registration. Discontinuous leases are not subject to compulsory registration, and will often be for a term which is shorter than three years. For example, the lease mentioned above which grants a right to possession for one week a year would still have to last for over 156 years for its term to exceed three years.

3.128 Thus, it is not possible to apply for a notice in respect of many discontinuous leases. Even where a discontinuous lease is voluntarily registered, it is common that no notice will be entered on the landlord's title. The discontinuous lease will not be apparent to the purchaser of the landlord's title, but it will still bind the purchaser because it will be an overriding interest.[58]

3.129 Compulsory first registration of discontinuous leases would rectify this problem prospectively; new discontinuous leases would no longer fall within section 33(b) because they would be required to be registered.[59] However, it would still remain impossible to note an already registered discontinuous lease on the landlord's register of title.

**Consultation and discussion**

3.130 In the Consultation Paper, we provisionally proposed that the grant of a discontinuous lease out of a qualifying estate[60] should trigger compulsory first registration. We also proposed that, regardless of whether compulsory registration applied, discontinuous leases should be capable of being noted in the register.[61]

3.131 Both of these proposals were well supported by the vast majority of consultees.

Registration of the grant of a discontinuous lease out of a qualifying estate

3.132 Almost all of the 24 consultees who responded agreed with our proposal to apply the requirement of registration to the grant of a discontinuous lease out of a qualifying estate.

3.133 Several consultees, including the London Property Support Lawyers Group and Dr Harpum, described this proposal as "sensible". The Law Society thought that compulsory registration was desirable "in order to give a full picture of qualifying interests" and would "also assist in increasing the number of registrable interests". Similarly, the National Trust said that it would be helpful to have a public record of such arrangements.

3.134 The three consultees who did not agree with the proposal raised two concerns. First, Nigel Madeley (who opposed our proposal) suggested that compulsory registration

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57 LRA 2002, sch 2, para 3.

58 By virtue of schs 1 and 3, para 1.

59 LRA 2002, s 33(b)(ii).

60 LRA 2002, s 4(2): an unregistered freehold estate in land or an unregistered leasehold estate in land which at the time of the transfer, grant or creation, has more than seven years to run.

61 Consultation Paper, paras 3.78 and 3.79.

could cause clutter in the landlord's register of title, for example, if 26 people had a discontinuous lease to possess the same property for two weeks a year. The City of Westminster and Holborn Law Society (who opposed our proposal) and Christopher Jessel (who expressed other views) explained that, in common cases of discontinuous leases, the parties have not been legally advised. Therefore, the tenants will not be aware of the requirement to register the lease, especially if it is not clear whether in fact a lease (rather than a licence) has been granted. One example given was a letting of community premises to an organisation for recreational use every Sunday for a year.

3.135 These points would have force if our proposal were to reform the registration requirements for all discontinuous leases. However, as we explained in the Consultation Paper, discontinuous leases granted out of registered land are already compulsorily registrable, regardless of the length of the term.[62] Therefore, if these issues caused problems in practice, then they should already have arisen under the current law. We have received no evidence of problems along these lines. Our proposal simply imposes the same registration requirements for discontinuous leases, whether the landlord's title is registered or not. As we stated in the Consultation Paper, it is for this reason that we believe the proposal would not have a wide impact.

### Notice on the landlord's title regardless of term of discontinuous lease

3.136 Twenty-three consultees responded to our provisional proposal that a discontinuous lease should be able to be protected by a notice, regardless of the length of the lease, or whether it is compulsorily registrable. All but one consultee agreed, though most of them provided no further comment. Some consultees repeated their view that the proposal was "sensible".

### Recommendations for reform

3.137 We received overwhelming support from consultees for our proposals to bring discontinuous leases onto the register, contributing towards achieving the aim of total registration, an important goal of the LRA 2002.[63] Moreover, consultees did not provide any evidence that requiring registration would cause problems in practice.

3.138 In the Consultation Paper, our proposals focussed on the grant of a discontinuous lease. However, on reflection, we think that the arguments for compulsory registration apply equally to the transfer of an existing discontinuous lease. Given that discontinuous leases with a term of more than seven years can last for a long period of time,[64] we think it is important that existing discontinuous leases are brought onto the register.

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62 LRA 2002, s 27(2)(b)(iii). See Consultation Paper, para 3.70.

63 The Government has renewed its commitment to this in the recent Housing White Paper, Fixing our Broken Housing Market (2017) Cm 9352. See n 32 above.

64 See para 3.123 above.

**Recommendation 3.**

3.139 We recommend that the requirement of compulsory first registration should apply to the transfer of a discontinuous lease and to the grant of a discontinuous lease out of a qualifying estate.

**Recommendation 4.**

3.140 We recommend that it should be possible to enter a notice in respect of any discontinuous lease in the register of title of the landlord's estate.

3.141 Clause 3 will implement these recommendations. Subsection (2) will insert two new triggers for compulsory registration into section 4(1) of the LRA 2002.

3.142 In order to ensure that these new requirements for compulsory first registration are effective, clause 3 also ensures that once the requirement for first registration has been triggered, the discontinuous lease can no longer be protected as an overriding interest. Subsections (4) and (5) will therefore amend paragraph 1 of schedules 1 and 3 to the LRA 2002 so that such discontinuous leases cease to be overriding interests. Similarly, subsection (7) will ensure that a discontinuous lease which was granted before the LRA 2002 came into force will lose its overriding status once it is transferred. Subsection (6) will ensure that existing discontinuous leases retain their overriding status unless they are transferred after the amendment comes into force.

3.143 Subsection (3) will implement Recommendation 4 by inserting a new subsection (2) into section 33 of the LRA 2002 to provide that discontinuous leases of any length can be noted in the register. It is already possible to enter a notice in respect of any lease which is required to be registered.[65] As a result, this amendment will in practice benefit those discontinuous leases to which Recommendation 3 does not apply: existing discontinuous leases which have not been transferred after the amendments come into force. These leases will continue to be overriding interests, but it will also be possible to enter notices in respect of them.

3.144 The amendments made by clause 3 will apply to applications that are made after those amendments come into force.

## THE LENGTH OF LEASE WHICH IS REGISTRABLE

### Current law

3.145 As we explained above, it is usually only possible to register leases which are for a term exceeding seven years.[66] The seven-year minimum term is a reduction from the 21-

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65 LRA 2002, s 33(b)(ii).

66 LRA 2002, ss 3(3).

year minimum term under the LRA 1925. The reduction in the LRA 2002 sought to improve the completeness and accuracy of the register.[67]

3.146 In the Consultation Paper, we considered whether the minimum term should be further reduced to three years.[68] At the time of the enactment of the LRA 2002, it was envisaged that the minimum term would eventually be reduced to three years.[69] We provisionally concluded that, at the moment, the benefits of reducing the term to three years are minimal, and outweighed by the disadvantages of increasing the number of registrable leases.[70]

3.147 Reducing the minimum term would bring benefits. Most obviously, bringing more leases onto the register is consistent with the ideal of a complete and accurate register of title. Relatedly, it would reflect the change in commercial practice that has seen the reduction of the term of business leases. In the Consultation Paper, we noted that such leases are now typically granted for under seven years (and would therefore not be registrable).[71] The most recent data suggests that the length of terms of business leases is slowly increasing and is now "around" seven years.[72] This increase may mean that a greater proportion of business leases already meet the minimum term for registration. Nevertheless, a reduction of the minimum term for registration for three years would ensure that shorter business leases are registered. At the time of our 2001 Report, a reduction of the minimum term was also linked to bringing such leases into the scheme of electronic conveyancing envisaged in the 2001 Report.[73] We think it is premature to consider this factor as a significant one, given that the development of electronic conveyancing is at an earlier stage than anticipated in our 2001 Report.[74]

3.148 On the other hand, the practical advantages of registration are less significant for short leases. As we explained in the Consultation Paper, tenants of short leases are unlikely to convey the registered title, or to rely on the guarantee of title.[75] Moreover, in most cases, short leases are easily discoverable; registration therefore provides minimal benefit to purchasers of the landlord's estate.

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67 Law Com No 271, para 3.16.

68 Three years is the "logical break-off point" because some leases shorter than three years can be created without a deed. See Consultation Paper, para 3.85.

69 Law Com No 271, para 3.17; Consultation Paper, paras 3.84 to 3.85. See also LRA 2002, ss 33(b) and 118 which lay the groundwork for such a reduction.

70 Consultation Paper, para 3.94.

71 Consultation Paper, para 3.86.

72 Property Industry Alliance, *Property Data Report* (2017) p 12, https://www.bpf.org.uk/sites/default/files/resources/PIA-Property-Data-Report-2017.PDF (last visited 4 July 2018). The fact that the average length of a business lease reduced from the "traditional" 25-year lease was a factor in the change between the LRA 1925 and LRA 2002: see Law Com No 254, para 3.7.

73 Law Com No 271, para 3.17.

74 Consultation Paper, para 3.85.

75 Consultation Paper, paras 3.88 and 3.89. In general, tenants of short leases are unlikely to transfer or grant a lease out of their lease; the fact that conveyancing is simpler under the LRA 2002 than unregistered land will not affect them.

3.149 Reducing the minimum term of mandatorily registrable leases would also impose costs and potentially delay. Extending registration to leases of between three and seven years would impose additional administrative burden for the parties and HM Land Registry in order to register such leases. The landlord would also have to ensure that notices in respect of such leases are removed from his or her register of title to ensure that it does not become cluttered with entries in respect of short leases.

**Consultation**

3.150 We provisionally proposed in the Consultation Paper that there should be no change to the threshold of the length of lease which is registrable under the LRA 2002.[76]

3.151 The majority of the 26 consultees who responded to this question agreed with our proposal.

Support for the proposal – no change for the minimum term

3.152 By and large, consultees who agreed with the provisional proposal cited reasons given in the Consultation Paper in support of their view.

3.153 Many consultees, including the Law Society, the London Property Support Lawyers Group and the Property Litigation Association, noted the administrative burden and cost for both landlords and tenants. Consultees cited registration fees and the need to draw up a plan which meets HM Land Registry's requirements. Further, the Law Society noted the additional burden on HM Land Registry's resources.

3.154 Even the Conveyancing Association, which disagreed with the proposal and advocated for a reduction of the registration threshold to require registration of all leases, thought that the threshold should only be reduced "when digital signatures are available to enable this to be dealt with entirely electronically and the cost to the parties minimal".

3.155 Consultees typically framed their concerns about increased costs in the light of the minimal benefits that they thought registration would bring. For example, the Law Society and National Trust echoed the views that we expressed in the Consultation Paper that short leases are likely to be easy for a purchaser to discover, so there is less of an obvious benefit to registration. Moreover, registration risks cluttering the landlord's register of title.

3.156 Three consultees, including the National Trust and City of Westminster and Holborn Law Society, explained that parties to a short lease will rarely receive legal advice, especially in an agricultural context. As a result, they risk being caught unawares by any new requirement to register.

Opposition – in favour of reducing the minimum term

3.157 Four consultees disagreed with our proposal to leave the length of registrable lease unchanged. These consultees valued a more comprehensive register in order to better reflect the landlord's title.

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[76] Consultation Paper, para 3.94.

3.158 Dr Harpum rejected the view that the cost of registration was a significant administrative burden. He explained that one of the objectives behind the LRA 2002 bringing shorter leases into the register was to catch most business leases. He said that business leases are now increasingly being granted for a term of five years and "often continue for a significantly longer period under the continuation provisions of Part II of Landlord and Tenant Act 1954". He suggested that "the time has come for leases granted for more than three years to be made registrable".

3.159 Some of the other consultees who disagreed also argued that the change in practice as regards the typical length of commercial leases justified reducing the minimum term. In contrast, the Law Society thought that the trend was a reason to leave the minimum term at seven years: it explained that the administrative costs of registration would be greater as a larger number of leases would be affected.

3.160 Dr Aruna Nair suggested that the balance between administrative burden and completeness of the register could be achieved by reducing the minimum term for the purposes of priority only. A lease with a term between three and seven years could still be granted without registration, but it would no longer override a registered disposition by virtue of being a short lease, under paragraph 1 of schedule 3. Instead its priority would be postponed to a registered disposition unless the lessee was in actual occupation (and so the lease would override under paragraph 2 of schedule 3) or the lease was protected by notice.[77] We agree that this suggestion could provide a balance between reducing the cost to the parties of creating a lease and protecting a purchaser of the landlord's estate. However, our concern with this suggestion is that decoupling registration requirements from priority protection for short leases would cause confusion and complexity.

**Discussion and recommendation**

3.161 We acknowledge that bringing short leases onto the register would make the register a more complete record of title. However, this benefit appears to be the only clear advantage of doing so. The other benefits registration can secure – for example, easier conveyancing, and a state guarantee of title – appear to be less significant in the context of short leases, which in practice are unlikely to be alienated. When evaluating the costs and benefits of requiring registration, it appears that there is a diminishing return, to all parties, the shorter the lease.

3.162 We would also be cautious about reducing the minimum term for registrable leases based on the average length of a business lease, especially given that (as we have noted in paragraph 3.147 above) the average term has been slowly increasing in the last few years.

3.163 We do not recommend that there should be a change in the length of lease which is registrable under the LRA 2002.

3.164 Dr Harpum and the Society of Licensed Conveyancers both argued that, if a reduction in the threshold was not made on this occasion, it ought to be kept under review for the future. Given the power in section 118 of the LRA 2002, this threshold will remain under

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77 LRA 2002, s 29(2)(b)(i).

review and, echoing the Conveyancing Association's response, is likely to be revisited when electronic conveyancing is introduced in relation to leases.

## DUPLICATION OF FEES SIMPLE UPON ENLARGEMENT OF LEASEHOLD ESTATES

### Current law

3.165 Under the Law of Property Act 1925, it is possible for a long leaseholder to "enlarge" (in other words, convert) his or her leasehold estate into a freehold estate.

3.166 Section 153 provides for the enlargement of leases granted for a term of at least 300 years, which have at least 200 years remaining, and under which no rent, or only nominal rent, is payable.[78] In certain circumstances enlargement is not available; for example, where the landlord has a right of redemption or if the tenant has breached a condition entitling the landlord to determine the lease.[79]

3.167 A person can enlarge his or her lease by executing a deed.[80] The effect of enlargement is that the leaseholder "acquires and has in the land a fee simple instead of a term [of years absolute]",[81] but the fee simple is subject to the same existing rights and obligations as the lease.[82]

3.168 Section 153 is ambiguous as to the effect of enlargement. In particular, it does not provide what happens to the landlord's freehold estate following enlargement of the lease.

3.169 On one view, enlargement brings the landlord's estate to an end because it is not possible to have multiple freehold estates of the same land.[83] In *Earl Cadogan v Panagopoulos* it was suggested that the landlord's title does not survive enlargement, but this point did not form a binding part of the decision.[84]

3.170 Another view is that the landlord's title survives enlargement of the lease. We take the view, as we explained in the Consultation Paper,[85] that it is possible for more than one freehold estate to exist in the same piece of land. We explained that the fact that the only legal freehold estate which is capable of existing at law is "an estate in fee simple absolute in possession" does not prevent multiple freehold estates. In this context,

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78 Law of Property Act 1925, s 153(2). It includes rent not exceeding the yearly sum of one pound which has not been collected or paid for more than 20 years: s 153(4).

79 Law of Property Act 1925, ss 153(1)(a) and (2)(i).

80 Above, s 153(6).

81 Above, s 153(7).

82 Above, s 153(8).

83 See eg C Jessel, "Concurrent fees simple and the Land Registration Act 2002" (2014) 130 *Law Quarterly Review* 587.

84 [2010] EWCA Civ 1259, [2011] Ch 177.

85 Consultation Paper, para 3.5. We also took this view in our 1998 Consultation Paper: see Law Com No 254, para 10.23.

"absolute" means that the estate is not determinable on any specific event,[86] and "in possession" means that the estate is not in reversion.[87] There is some support in section 153 for this view. For example, section 153 refers to the acquisition of "*a* fee simple", rather than *the* fee simple.[88] It also provides for the continued enforceability of leasehold covenants, suggesting that the landlord has an estate to which the continuing rights are annexed.

3.171 In the light of this uncertainty, a question arises as to the effect of enlargement on the landlord's register of title. HM Land Registry receives a small number of applications each year for lease enlargements. Previously, upon enlargement of a lease, HM Land Registry would close the register entry in respect of the landlord's freehold title.[89]

3.172 However, from March 2013, HM Land Registry announced that it would cease to close the landlord's title.[90] Instead, it now enters a note in the register of title stating that the estate may have been determined by section 153.[91]

3.173 As we explained in the Consultation Paper, there are two reasons for HM Land Registry's current practice.[92] First, the closure of title may expose HM Land Registry to indemnity claims if the landlord's title survives the operation of section 153. Secondly, the closure of the landlord's title may amount to a breach of the Human Rights Act 1998, namely deprivation of property without compensation.[93]

### Consultation

3.174 As we considered that HM Land Registry's practice was borne out of legitimate concerns about closure of the landlord's title, we did not make any provisional proposal to change it.

3.175 Instead, we invited consultees to share their experiences of HM Land Registry's practice of allowing the landlord's title to remain in the register following a lease enlargement

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86 Law Com No 254, para 10.23; *Megarry & Wade: The Law of Real Property* (8th ed 2012) ("*Megarry & Wade*") para 6-013.

87 *Megarry & Wade*, para 6-017. *Megarry & Wade* does, however, assume that the reversion is extinguished upon enlargement: para 18-094.

88 Law of Property Act 1925, s 153(6) and (7). The words "the fee simple" do appear in subsection (10), but only in the context of "the fee simple *so acquired*" (emphasis added).

89 Consultation Paper, para 3.9.

90 HM Land Registry, *Landnet 35* (April 2013) p 3, http://webarchive.nationalarchives.gov.uk/20140712070453/http://www.landregistry.gov.uk/professional/landnet/landnet-35#guide-mark-4 (last visited 4 July 2018).

91 *Ruoff & Roper: Registered Conveyancing* (looseleaf ed 2017), para 26.029: "an entry will appear in the property register to show that if the effect of s 153 of the Law of Property Act 1925 is to determine the former landlord's estate, then the estate has determined".

92 Consultation Paper, paras 3.11 and 3.12.

93 Human Rights Act 1998, s 6. See also s 1(1)(b), and Articles 1 to 3 of the First Protocol to the European Convention of Human Rights.

under section 153. In particular, we asked consultees whether they had experienced problems in practice.[94]

3.176 Nineteen consultees responded to this question. Some of these consultees had experience with enlargement under section 153; however, none had experience of HM Land Registry's current practice. Many consultees, including the London Property Support Lawyers Group and the Law Society, emphasised that lease enlargement under section 153 is rare. We received a mixture of views from consultees on HM Land Registry's current practice.

### Support for the current practice

3.177 Eight consultees indicated support for HM Land Registry's practice, including the London Property Support Lawyers Group and the Chancery Bar Association. These consultees considered the current practice to be "sensible" due to the uncertainty in section 153. Adrian Broomfield made the practical point that allowing the landlord's freehold title to remain in the register is helpful for audit trail purposes.

3.178 Even some consultees who did not agree with HM Land Registry's current practice suggested that taking a cautious approach was "understandable".[95]

### Other views

3.179 Five consultees who responded expressed other views, with varying degrees of support for HM Land Registry's current practice. Many of these consultees considered that the practice has both advantages and disadvantages. For example, the City of London Law Society Land Law Committee "understood" HM Land Registry's cautious approach, but said that it causes "consternation" amongst practitioners.

3.180 Some consultees thought that the landlord's interest should be recorded in a different form, rather than as a freehold estate. Christopher Jessel considered that the landlord's remaining interest is likely to be either an incorporeal or equitable estate, and that the legislation should be amended to allow such an interest to be recorded in these circumstances. In a similar vein, Everyman Legal suggested that the landlord's interest should be recorded as a "residuary freehold".

### Disagreement with HM Land Registry's practice

3.181 Six consultees disagreed with HM Land Registry's current practice, preferring closure of the landlord's title. A primary concern of many consultees was whether the intention of section 153 of the Law of Property Act 1925 could have been to have two freehold titles relating to the same land. The Chancery Bar Association described this possibility as "controversial", even if theoretically possible. Many of the practitioners who responded to this question, including the Law Society, Hogan Lovells International LLP and the Conveyancing Association, described the practice as potentially "confusing".

3.182 Some of these consultees also thought that the uncertainty created by the current practice gives rise to problems. For example, Howard Kennedy LLP explained that

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94 Consultation Paper, para 3.14.

95 Law Society (who disagreed with the current practice) and the Conveyancing Association (who expressed other views).

having two freeholds in the register would mean that they both had "doubtful value". Burges Salmon LLP suggested that it could lead to complications in the context of compulsory purchase.

### Suggestions for law reform

3.183 Some consultees argued that the effect of section 153 on the landlord's title should be clarified. These consultees, which included the Chancery Bar Association, the City of Westminster and Holborn Law Society and the Society of Licensed Conveyancers, had a range of views on HM Land Registry's current practice. However, as we explained in the Consultation Paper, the effect of section 153 is outside the scope of our project. Section 153 of the Law of Property Act 1925 operates in registered and unregistered land and so the effect of its application on the landlord's title is not a land registration issue.[96]

### Positive covenants

3.184 Around a quarter of the consultees who responded, including the Society of Licensed Conveyancers and the Conveyancing Association, discussed the use of section 153 to enable positive covenants to run with a freehold estate. As the enlarged estate is subject to the same rights and obligations as contained in the lease,[97] the grant of a long lease which is then enlarged could be used to make positive covenants enforceable against a freehold estate. There was a mixture of views as to whether enlargement is commonly or effectively used for this purpose.

3.185 Some of these consultees called for reform of the law of covenants. As noted by the Law Society in its consultation response, we have already made recommendations to reform this area of law in our report Making Land Work: Easements, Covenants and Profits à Prendre.[98] Once enacted,[99] the reforms proposed in our 2011 report will provide an alternate means for ensuring that positive obligations run with the land. These reforms should reduce the incentive to create long leasehold estates that are capable of enlargement. The question raised here will remain a legacy issue only for existing long leasehold estates.

## Discussion

3.186 We note that section 153 of the Law of Property Act 1925 is not clear in its operation, and that some consultees are concerned that HM Land Registry's current practice gives rise to problems. We consider, however, that the difficulties arise because of the underlying uncertainty in section 153, which is not a matter that can be resolved by this project. In view of that uncertainty, we moreover agree that HM Land Registry's current approach is sensible. We therefore make no recommendations for reform on this point.

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96 Consultation Paper, para 3.7.

97 Law of Property Act 1925, s 153(8).

98 (2011) Law Com No 327.

99 The Government announced on 18 May 2016 that it intended to bring forward proposals in a draft Law of Property Bill to respond to the recommendations in the report. See Ch 10, para 10.78 below, and Fixing our Broken Housing Market (2017) Cm 9352, paras 1.21 and A35; Department for Communities and Local Government, *Tackling Unfair Practices in the Leasehold Market: Summary of Consultation Responses and Government Response* (December 2017) para 36.

# Chapter 4: First registration

## INTRODUCTION

4.1 Turning from triggers for first registration, we now consider issues arising in relation to first registration. Our focus is on how the priority of interests created during the twilight period may be protected, and the protection available to a derivative interest under a trust[1] affecting unregistered land.

4.2 The "twilight period" is the term used to describe the period of time between a disposition of unregistered land triggering compulsory first registration and registration of the land under the LRA 2002. There are two phases within the twilight period:

(1) the time between the disposition which triggers compulsory first registration and the making of the application for registration;[2] and

(2) the time between the making of the application and the registration of the disposition by HM Land Registry.

4.3 In our consultation, we exclusively focussed on the first phase. We asked consultees whether problems might arise in determining priorities before an application is made. We asked both about dealings that occur after first registration is triggered and about dealings within the same transaction as the disposition that triggers first registration. In relation to both cases we considered the current uncertainty over whether the principles governing registered or of unregistered land apply.

4.4 In the Consultation Paper, we did not consider whether reform was necessary in relation to the second phase of the twilight period, based on our assessment that problems should not occur during this time because, once an application is made, HM Land Registry will allocate a provisional title number against which further applications can be lodged.[3] However, on reflection, we now think that there is some uncertainty about the priority of interests created during the second phase if the application for registration is subsequently cancelled by HM Land Registry.[4]

4.5 Although consultees did not provide concrete evidence of any problems in practice in relation to the priority period, most were in favour of reform. Therefore, we make recommendations to clarify the priority rules which govern the twilight period. We recommend that the priority rules governing unregistered land, and in particular the Land Charges Act 1972, should apply to interests arising during the first phase of the

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1 Please see the Glossary. Please also see the explanation at para 4.74 and following below.

2 The date the application is made is interpreted to be the date the application is received by HM Land Registry or the date it is entered on the day list, whichever is earlier: see LRR 2003, r 15.

3 Consultation Paper, para 4.6.

4 "Cancel" is the term used by the LRR 2003 to describe the refusal of an application by the registrar. The term "reject" is also used, but it tends to be used in cases in which the registrar refuses an application immediately upon receipt because it is substantially defective. See LRR 2003, r 16.

twilight period. We further recommend that the priority rules of unregistered land should apply during the second phase of the twilight period if the application for registration is cancelled so that the land does not become registered land.[5]

4.6 We also considered protection of derivative interests on first registration. With the support of the majority of consultees, we recommend that that it should be clarified that a person with a derivative interest under a trust can apply for a caution against first registration.

## THE PRIORITY REGIMES IN UNREGISTERED LAND AND REGISTERED LAND

4.7 The rules that govern the priority of interests in unregistered land differ from the rules governing registered land.

4.8 Generally speaking, in unregistered land, legal rights bind anyone taking an interest in the land.[6] Equitable rights will also bind those taking a subsequent interest in the land, with an important exception: they do not bind a purchaser in good faith and for value of a legal estate without notice of the equitable rights (called the doctrine of notice). The doctrine of notice is modified, and its importance reduced, by statute. First, it is modified by the requirement imposed by the Land Charges Act 1972 that certain equitable interests (for example, equitable easements, estate contracts and restrictive covenants)[7] must be entered on the land charges register in order to bind subsequent purchasers.[8] Secondly, it is also modified by the doctrine of overreaching, which enables beneficial interests under a trust to be overreached, again regardless of notice.[9]

4.9 By contrast, the priority of interests in registered land is governed by the provisions in the LRA 2002. We discuss priority in registered land in more detail in Chapters 8 and 9. Put briefly, section 28 of the Act provides the general rule that an interest created first in time will bind, or take priority over, subsequently granted interests. However, this rule is subject to a significant exception in section 29.[10] The special priority rule in section 29 provides that interests are postponed by a registered disposition for valuable consideration unless they are protected in the register at the time of registration or unless they fall into the limited category of overriding interests. With the exception of overriding interests (which we discuss in more detail in Chapter 11), the priority of interests in registered land is therefore protected by an entry in the register of title. The entry takes the form of a notice in the register.[11]

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5 In particular, that s 74 of the LRA 2002 will never operate to mean that the effective date of registration is prior to the creation of interests during the second phase of the twilight period.

6 The one exception is the puisne mortgage, which is governed by the Land Charges Act 1972. A puisne mortgage is a mortgage not protected by deposit of the title deeds of the estate. It is therefore usually a second or subsequent mortgage.

7 For the types of interest which must be registered as a Land Charge, see Land Charges Act 1972, s 2.

8 Land Charges Act 1972, s 4; Consultation Paper, para 4.2.

9 Law of Property Act 1925, s 2(1).

10 The equivalent priority rule for registered dispositions of registered charges is found in s 30.

11 For an explanation of notices, see Ch 9 at paras 9.1 to 9.18 below.

## PRIORITY PROTECTION DURING THE TWILIGHT PERIOD

4.10 The twilight period arises when there has been a disposition of unregistered land that triggers the requirement for first registration under section 4 of the LRA 2002. Once compulsory registration is triggered, the responsible estate owner, or his or her successor in title, must apply for registration within two months.[12] The twilight period is therefore a transitional period during which the governing system switches from that of unregistered land to registered land. The rules of unregistered and registered conveyancing interact at this point of transition. There is therefore potential for them to come into conflict.

### The relevant provisions

4.11 As we explained in the Consultation Paper, there is no comprehensive framework that applies during the twilight period. As a result, vexing questions arise about the priority of interests created during this time.[13]

4.12 A number of provisions are relevant to consider how priority is determined during the twilight period. They largely speak to when land is considered "registered", and so govern when the rules requiring completion by registration and the priority provisions in the LRA 2002 apply (because these rules apply to "registered land").[14]

4.13 There are a number of relevant provisions in the LRA 2002 and LRR 2003.

4.14 First, section 132(1) of the LRA 2002 defines "registered land" (for our purposes) as a "legal estate to which the title is entered in the register". Secondly, section 74 governs the effective date a title is entered in the register: in paragraph (a) it provides that an application for registration of an unregistered estate has effect from the time of the making of the application. Based on these two provisions, if and when an application is in fact registered, it will be considered to have been registered since the making of the application (which in turn is interpreted to be the date the application is received by HM Land Registry and entered on the day list).[15] Registration therefore appears to extend to the start of the second phase of the twilight period, making the land "registered land" for the purposes of the LRA 2002 during that time. However, if an application for registration is made, but the registration is not ultimately completed, then section 74 has no effect. In such a case, the land simply remains unregistered land.

4.15 These two provisions must be read together with paragraph 1(1)(a) of schedule 10 to the LRA 2002. Paragraph 1(1)(a) provides for the making of rules "applying this Act to a pre-registration dealing with a registrable legal estate" (that is a dealing with land for which first registration has been triggered and which takes place before the making of

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12 LRA 2002, ss 4 and 6. The period can be extended on application to the registrar: LRA 2002, s 6(5); HM Land Registry, *Practice Guide 1: First Registrations* (March 2018) para 4.7.

13 Consultation Paper, para 4.7 and following.

14 The LRA 2002 generally refers to "registered estate or charges", which is the meaning of "registered land" under s 132(1): see LRA 2002, ss 27(1), 28(2), 29(1), 30(1), 32(1), 34(1), 40(1), and 42(1).

15 LRR 2003, r 15.

an application)[16] "as if the dealing had taken place after the date of first registration of the estate". This rule-making power therefore allows rules to be created that apply the LRA 2002 to the first phase of the twilight period. A similar rule-making power was not necessary for dispositions which take place during the second phase of the twilight period, on the basis that section 74 already applies the LRA 2002 to dispositions made after the application for first registration.

4.16 Rule 38 in the LRR 2003, which was made under paragraph 1 of schedule 10, applies the LRA 2002 to dispositions during the first phase of the twilight period.[17] It provides:

> (1) If, while a person is subject to a duty under section 6 of the Act to make an application to be registered as proprietor of a legal estate, there is a dealing with that estate, then the Act applies to that dealing as if the dealing had taken place after the date of first registration of that estate.
>
> (2) The registration of any dealing falling within paragraph (1) that is delivered for registration with the application made pursuant to section 6 has effect from the time of the making of that application.

4.17 Based on these provisions, it appears that the LRA 2002 applies to both phases of the twilight period. However, it is not clear how the rules governing priority under the LRA 2002 are able to apply during the first phase of the twilight period. As we explained at paragraph 4.9 above, the priority of interests in registered land is dependent on the interest being entered in the register. In the first phase of the twilight period there is no register of title in which an entry can be made.

4.18 However, these provisions of the LRA 2002 and the LRR 2003 are not the end of the story. The Land Charges Act 1972 sets out the limits of its own application. Section 14 of the Land Charges Act 1972 excludes the Act from applying to matters affecting registered land. It provides:

> (1) This Act shall not apply to instruments or matters required to be registered or re-registered on or after 1st January 1926, if and so far as they affect registered land, and can be protected under the Land Registration Act 2002.
>
> (2) Nothing in this Act imposes on the registrar any obligation to ascertain whether or not an instrument or matter affects registered land.
>
> (3) Where an instrument executed on or after 27th July 1971 conveys, grants or assigns an estate in land and creates a land charge affecting that estate, this Act shall not apply to the land charge, so far as it affects that estate, if under section 7 of the Land Registration Act 2002 (effect of failure to comply with requirement of registration) the instrument will, unless the necessary application for registration under that Act is made within the time allowed by or under section 6 of that Act, become void so far as respects the conveyance, grant or assignment of that estate.

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16 LRA 2002, sch 10, para 1(2).

17 Consultation Paper, para 4.11.

4.19 This provision in the Land Charges Act 1972 raises two questions about interests created during the twilight period. First, does the land affected by these interests count as "registered land"? Secondly, can such interests be protected under the LRA 2002?

4.20 In the Consultation Paper, we took the view that these provisions do not clearly align with one another and appear to be insufficient to determine priority in all cases.[18] Below we explain, using examples, the uncertainty that arises during the different phases in the twilight period.

**The first phase of the twilight period**

4.21 The current law is most uncertain about how priorities are determined during the first phase of the twilight period. The uncertainty can best be illustrated by examples.

Dealing in the same instrument as the disposition which triggers compulsory registration

4.22 The first example, in figure 1 below, involves a scenario in which an interest is created in the same instrument as the disposition which triggers compulsory first registration.

Figure 1: dealing in the same instrument which triggers first registration

A sells part of his or her unregistered freehold to B, triggering compulsory first registration. In the deed effecting the conveyance, B enters into a restrictive covenant in favour of A's retained land.

B then sells the freehold to C. C applies for first registration.[19]

4.23 Section 14(3) of the Land Charges Act 1972 prohibits A from protecting the covenant on the land charges register. It is not clear whether rule 38 of the LRR 2003 applies such that all the rules governing registered land apply. However, if rule 38 does apply, it is not clear how A is able to engage with the land registration scheme to protect the priority of his or her interest in relation to C, which in the normal course of events should be protected by a notice.[20]

4.24 Although arguably the law in this scenario is not entirely clear, in practice the priority of the interest will be protected from subsequent dispositions. That is because HM Land Registry does not require an application to enter a notice under the LRA 2002 to guarantee the priority of an interest created in the instrument which triggers first registration.[21] When an interest is created in the same document as the instrument effecting the disposition triggering first registration, problems do not arise because of the rules governing the disclosure of interests on first registration. In applying for

18 Consultation Paper, paras 4.9 to 4.32.

19 See Consultation Paper, para 4.10 and 4.18.

20 LRA 2002, ss 32 and 34.

21 LRR 2003, r 28(2)(b); and HM Land Registry, *Practice Guide 1: First Registrations* (March 2018) para 4.3.11.

registration, C is required to lodge documents in support of his or her title, including the conveyance from A to B. A's restrictive covenant would therefore be revealed. As a consequence, there is an exception to the requirement to disclose overriding interests: interests which are apparent from the deeds and documents of title lodged with an application do not otherwise need to be disclosed.[22] Once the registrar creates the register, the priority question therefore does not appear to pose a problem. Extrapolating about what will happen on application, C can therefore ascertain that he or she will be bound by A's restrictive covenant.[23]

4.25 We also noted in the Consultation Paper that A might be able to apply for a caution against first registration. A caution against first registration results in the cautioner being notified of an application for first registration, and given an opportunity to object. Significantly, however, a caution does not confer priority.[24] HM Land Registry recommends that persons benefiting from a dealing during the first phase of the twilight period (other than a transfer, lease or charge) protect their interest in the interim by entering a caution against first registration.[25] However, a caution can only be entered against an unregistered legal estate and, given the various provisions in the LRA 2002, it is not clear that the land counts as being "unregistered". That said, because the application for registration has not yet been made, it is not clear how the registrar, on receiving an application to lodge a caution, would be able to conclude anything other than that the land is unregistered.

### Dealing is after the disposition which triggers compulsory registration

4.26 The example in figure 2 involves a scenario in which an interest is created after the disposition which triggers compulsory first registration, but before the application for registration is made.

Figure 2: dealing after the disposition triggering first registration

A sells part of his or her unregistered freehold to B, triggering compulsory first registration.

B then enters into a restrictive covenant in favour of land owned by C.

B then sells the freehold to D. D applies for first registration.[26]

4.27 According to rule 38, the LRA 2002 will apply to both the grant of C's restrictive covenant and the transfer from B to D. Arguably, therefore, the relative priorities of C's and D's interests should be determined as if the process for first registration has been

22 LRA 2002, s 71(a); LRR 2003, rr 24 and 28.

23 Consultation Paper, paras 4.22 and 4.24.

24 LRA 2002, ss 15 and 16. Consultation Paper, para 4.23.

25 HM Land Registry, *Practice Guide 1: First Registrations* (March 2018) paras 7.2 and 7.4.

26 See Consultation Paper, para 4.25.

completed. However, C cannot apply to have a notice entered to protect the priority of his or her restrictive covenant, because there is no title, even provisional, in which to enter the notice. C is in the position of having to hope that his or her interest is disclosed to the registrar by D when D applies for first registration. Although D should send the document creating the restrictive covenant to the registrar as part of the application for first registration,[27] D may not in fact be aware of the restrictive covenant. In so far as expecting D to disclose the covenant is a (imperfect) practical solution to this scenario, it raises the question of whether D is in fact bound by the restrictive covenant.[28]

4.28 It is not clear, but it might be the case that C can apply to enter a land charge to protect the priority of his or her interest. That is, despite rule 38 purporting to apply registered land principles, the Land Charges Act 1972 might still apply. Section 14(1) of the Land Charges Act 1972 disapplies the Act in cases in which the matter "affect[s] registered land, and can be protected under the Land Registration Act 2002". Given that the restrictive covenant cannot be protected under the LRA 2002 as there is no register of title in which to enter a notice, the land charges regime may still apply. On reflection, we think this is the most likely interpretation of the current law.[29] HM Land Registry recommends that persons with the benefit of an equitable interest[30] who are themselves unable to apply for substantive first registration should apply for a land charge.[31] This outcome would be useful from C's perspective, because entry of the land charge will allow D to discover the existence of the restrictive covenant, and ensure that it comes to the registrar's attention when he or she applies for first registration.[32]

4.29 However, if the Land Charges Act 1972 does apply, failure to register the restrictive covenant as a land charge could mean that D, and any subsequent disponees of the estate, would not be bound. The current law is unclear as to whether the land charges regime is employed, and the consequences of not complying with it. This uncertainty creates a risk for C, who understandably may not appreciate that entering a land charge is necessary.[33]

4.30 It is also unclear whether C could enter a caution against first registration. Based on rule 38 of the LRR 2003, the LRA 2002 applies to the grant of the restrictive covenant, such that the land could be considered registered for the purposes of the LRA 2002. On this reading of rule 38, a caution could not be entered.[34]

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27 HM Land Registry, *Practice Guide 1: First Registrations* (March 2018) para 4.4.4. We note, however, that LRA 2002, s 71 and LRR 2003, r 28 only require disclosure of overriding interests and not other property rights (including the restrictive covenant in the example in figure 2).

28 Consultation Paper, para 4.26.

29 Consultation Paper, paras 4.27 and 4.28.

30 Most interests granted during the twilight period will be equitable, due to the application of the requirement to complete a disposition by registration in s 27(1) of the LRA 2002, which will apply due to r 38 of the LRR 2003.

31 HM Land Registry, *Practice Guide 1: First Registrations* (March 2018) paras 7.2, 7.3.2 and 7.4.

32 Above para 4.4.5; LRR 2003, r 30.

33 Consultation Paper, para 4.30.

34 Consultation Paper, para 4.31.

### The second phase of the twilight period

4.31 In the Consultation Paper, we explained our view that problems are unlikely to arise when there has been a disposition after an application for first registration has been made. Once a provisional title number is allocated, further applications can be lodged and official searches made in the usual manner.[35] However, problems could arise if the application for registration is cancelled. Through the provision of extensive practice guidance, HM Land Registry attempts to support conveyancers to limit the number of applications that will be rejected or cancelled,[36] so this risk on first registration is small. We nevertheless think that it is worth considering. This problem is illustrated in figure 3.

Figure 3: dealing after the application for first registration

A sells part of his or her unregistered freehold to B, triggering compulsory first registration.

B applies for first registration. Shortly after, B enters into a restrictive covenant in favour of land owned by C. C applies for a notice to be entered to protect the priority of his or her restrictive covenant.

B's application for first registration is incomplete, and B does not respond to requisitions by the registrar. B's application for first registration is cancelled.

4.32 Section 7 of the LRA 2002 sets out the consequences of failing to register in the time specified when compulsory first registration is triggered: the transfer or grant becomes void as regards the legal estate, and legal title reverts to the original seller, A. Significantly, for our purposes, it appears that the LRA 2002 does not apply to determine priority. Pursuant to section 74, C might have assumed that the LRA 2002 would apply, because section 74 backdates the time of registration to the time of the making of the application. However, because the application was cancelled, the estate does not fall within the meaning of registered land pursuant to section 132(1) of the LRA 2002. As HM Land Registry notes in its practice guide, if an application for first registration is cancelled, any application to register a later dealing with the land will also be cancelled.[37] Therefore, C's interest has not been protected by the application to enter the notice. In retrospect, C should have applied to protect his or her restrictive covenant by a land charge.

4.33 Therefore, those with the benefit of an interest created during the second phase of the twilight period will be faced with ambiguity over which regime will ultimately govern priority; the applicable regime cannot be known until registration. If registration is

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35 Consultation Paper, para 4.6. See HM Land Registry, *Practice Guide 1: First Registrations* (March 2018) para 7.6.

36 See generally HM Land Registry, *Practice Guide 49: Return and Rejection of Applications for Registration* (April 2018); HM Land Registry, *Practice Guide 50: Requisition and Cancellation Procedures* (March 2018).

37 HM Land Registry, *Practice Guide 1: First Registrations* (March 2018) para 7.

unsuccessful, then the land is unregistered land, whatever the parties may have assumed.[38]

4.34 As we explained above, our consultation focussed on the first phase of the twilight period. Some consultees nevertheless said that problems can arise during the second phase. We return to concerns about the second phase of the twilight period below.

### Consultation

4.35 As we explored in the Consultation Paper, not only is it unclear which regime applies to the first phase of the twilight period, neither the registered nor the unregistered regime is designed with the protection of dispositions arising during the twilight period in mind. We explained that applying unregistered land principles to the first phase of the twilight period, in particular, the doctrine of notice and the application of the Land Charges Act 1972,[39] was possible, but might not be palatable. On the other hand, applying the rules of registered land might be conceptually appealing, but it may not be possible in practice because there is no register of title on which a notice can be entered to protect the priority of an interest.[40]

4.36 It was our provisional view that one conveyancing regime – either unregistered or registered – should apply to govern the first phase of the twilight period. However, we were unsure whether the theoretical problems we identified had caused any difficulties in practice and, moreover, we noted that commercial workarounds might prevent difficulties from arising.[41]

4.37 We therefore looked to consultees for evidence of problems and views on the form of protection that should be available during the twilight period. We invited them to provide us with evidence of problems in practice encountered in conveyancing during the twilight period, and invited their views as to the form of protection that should be provided to dispositions during this period.[42]

#### Evidence of problems in practice

4.38 Twelve consultees responded to our call for evidence about difficulties arising in practice during the twilight period.

4.39 Only one had encountered a problem with the twilight period in practice: Dr Charles Harpum QC (Hon) had encountered a problem "just once", shortly after the LRA 2002 had come into force, but could not recall the details of the problem.

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38 For a case arising under the LRA 1925 in which the application for first registration was cancelled, see *Sainsbury's Supermarkets v Olympia Homes* [2005] EWHC 1235 (Ch), [2006] 1 P & CR 17. In that case, a person with the benefit of an interest created during the twilight period applied for a caution against dealings, and then a caution against registration, but not for a land charge under the Land Charges Act 1972. We note however that this interest was created during the first phase of the twilight period.

39 Including the exception in s 14(3) of the Land Charges Act 1972.

40 Consultation Paper, paras 4.15 to 4.32.

41 Consultation Paper, paras 4.32 and 4.33.

42 Consultation Paper, paras 4.34 and 4.35.

4.40 Indeed, Michael Hall and Taylor Wessing LLP noted that twilight period disputes are rare because the majority of land is already registered. They are also rare due to conveyancing practices that prevent problems from arising. The City of Westminster and Holborn Law Society, the London Property Support Lawyers Group (endorsed by Pinsent Masons LLP), and Michael Hall all noted the role that voluntary first registration can play in avoiding difficulties. If the owner of unregistered land voluntarily registers his or her estate in advance of a conveyance, then problems with the twilight period are avoided. The Law Society and Michael Hall also advised that cross-contractual undertakings can encourage prompt applications for registration and notification of rights to third parties. Other consultees also noted practices that conveyancers use to prevent problems from arising.

4.41 Nevertheless, many of the consultees who responded expressed concern about the potential for problems. Although not having any personal experience, Nigel Madeley was of the opinion that problems do arise. He cited a case that we had noted in the Consultation Paper – where the application for registration was cancelled – as demonstrating "that when things go wrong, they go very wrong".[43] Other consultees, including the Law Society and the Society of Licensed Conveyancers, suggested that the twilight period has the potential to be problematic and advocated reform of this "anomalous"[44] area of law. The Bar Council considered that the Consultation Paper demonstrated the case for reform. It supported reform to ensure that the law is "clear what protection is available and clear how to achieve it". The Bar Council said that this protection should be based on clear rules that protect the beneficiary of the interest while also enabling a later purchaser to discover pre-existing rights.

4.42 Although the Consultation Paper focussed on the first part of the twilight period, several consultees expressed frustration about delays occurring during the second part of the twilight period.[45] Other consultees agreed with our view in the Consultation Paper that, despite any delays in registration, disputes are unlikely to arise during the latter part of the twilight period because a title number will have been allocated and so priority searches can be undertaken as usual.[46] Moreover, as Amy Goymour noted, it may be difficult to apply unregistered land principles to the period after the application for registration, given that registration is backdated to the application date.[47] However, Nigel Madeley identified the complexity that arises if an application for registration is cancelled. He explained that because applications can be cancelled, it is difficult for someone with the benefit of an interest that is not substantively registrable on first registration "to get real (as opposed to personal contractual) protection". His preference was for the unregistered conveyancing system to be the default option.

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43 *Sainsbury's Supermarkets v Olympia Homes* [2005] EWHC 1235 (Ch), [2006] 1 P & CR 17, noted in Consultation Paper, para 4.27 n 49.

44 The Law Society.

45 Everyman Legal, Michael Hall, Taylor Wessing LLP, the Berkeley Group, and Nigel Madeley.

46 The London Property Support Lawyers Group (endorsed by Pinsent Masons LLP and Howard Kennedy LLP) and Michael Hall. See Consultation Paper, para 4.6.

47 With respect to the consultation question at Consultation Paper, para 4.35.

### Which regime should apply

4.43 Twenty consultees responded to our invitation to express a view about the form of protection that should be provided to dispositions that take place during the first phase of the twilight period. They fell into three broad categories: those who thought that the unregistered conveyancing regime should apply; those who thought that the registered conveyancing regime should apply; and those who suggested novel protective measures.

4.44 However, some consultees did not support reform, or did not strongly support reform, at all. For example, HM Land Registry did not clearly express a view on what system was preferable, and stated that the current law is adequate. In its view, any potential problems can be mitigated by submitting applications for registration quickly.

4.45 Similarly, although Dr Harpum preferred to apply registered land principles, he did not expressly support legislative reform. He explained that the twilight period was intentionally left unaddressed within the LRA 2002 in order to ensure that first registration happened as soon as possible after the triggering disposition.

### Unregistered land principles should apply

4.46 Six consultees expressed a preference for the principles of unregistered land to govern the first part of the priority period, including the Bar Council, the Society of Licensed Conveyancers and some academics.

4.47 The Bar Council argued that priority during the twilight period should be based on clear rules that ensure the priority of interests and enable disponees to discover them. It preferred the application of unregistered land rules because no new machinery would need to be created; indeed, it suggested that amendments to section 14(3) of the Land Charges Act 1972 and rule 38 of the LRR 2003 is all that would be needed. Moreover, in the Bar Council's view, conveyancers are already familiar with unregistered land principles (although not all consultees agreed on this point).[48] The Society of Licensed Conveyancers made similar points, noting that applying the Land Charges Act 1972 would remove uncertainty and require little in the way of change.

4.48 Dr Aruna Nair advocated a "new statutory framework" in which to apply unregistered land principles, except in respect of land charges granted in the disposition triggering first registration. She argued that the principle of reliance on the register has no application when there is not yet a register of title. Moreover, she explained that unregistered land principles would better protect implied and informally created interests. She suggested that the person applying for first registration might have actual or constructive notice of such interests, which might not be protected as overriding interests under the LRA 2002 (for example, because the beneficiary of the right is not in actual occupation).[49]

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[48] The Society of Licensed Conveyancers agreed that conveyancers are familiar with unregistered conveyancing rules. However, the London Property Support Lawyers Group (endorsed by Pinsent Masons LLP) offered the conflicting view that many lawyers lack experience with unregistered titles.

[49] Interests that affect the estate should be disclosed by the person applying for first registration under the LRR 2003, r 28.

4.49 Consultees who thought the unregistered land regime should apply to the first phase of the twilight period did not all agree that a land charge granted in the disposition triggering first registration should not be required to be registered as a land charge in order to bind disponees. Currently, a land charge need not and cannot be entered. Dr Nair thought that this approach should continue; the doctrine of notice should govern instead. The Society of Licensed Conveyancers disagreed, arguing that the requirement to register a land charge should apply regardless of whether the interest was created in the disposition triggering first registration or not. It explained:

> The provisions of the Land Charges Act 1972 are familiar to conveyancers. The process of creating notice by registration of a land charge works, removes the current uncertainty, and does the least damage to the existing law.

### Registered land principles should apply

4.50 Six other consultees, including the Law Society, the Chancery Bar Association and Dr Harpum, suggested that the principles of registered land should apply to the twilight period. Many justified this view on the basis of the preference of conveyancers to work within the LRA 2002 principles and the logic of applying registered land principles to conveyances which would be registered in time. However, some consultees who supported the application of registered land principles accepted that it would be difficult to devise practical solutions.

4.51 The Law Society was in favour of registered land principles governing the twilight period. It suggested that practitioners would prefer to conduct conveyances as if first registration had been completed, and would moreover prefer to follow the requirements in the LRR 2003 than to undertake land charge searches.

4.52 Dr Harpum and Pinsent Masons LLP thought that it was logical for the registered land regime to apply to twilight period dispositions given that the dispositions would, in the future, be registered. Pinsent Masons LLP conceded, however, that it would "be difficult to devise a protective mechanism within [the registered land] system that is both practical and proportionate".

4.53 Conversely, Christopher Jessel, who was also in favour of registered land principles applying, thought that interests created during the first phase of the twilight period could be protected by the existing provisions governing first registration. In particular, he explained that the person applying for first registration is required to disclose all rights affecting the estate;[50] in his view, should the person fail to disclose a right, its omission would be a mistake in the register.[51] Christopher Jessel said that the beneficiary of the right would then be able to apply for alteration of the register. We do not think that an application for alteration of the register can itself solve the issue, since the assessment as to whether there is a mistake in the register must be determined based on whether the interest did in fact have priority; the rules of priority still need to be clear.[52]

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50 Specifically, within Form FR1, the form for first registration.

51 We discuss this issue in Ch 13: see paras 13.229 to 13.270 below.

52 See also LRA 2002, s 71(a).

4.54 The Chancery Bar Association argued that it was preferable for registered land principles to apply. It suggested that the LRA 2002, which operates by title numbers, is better than the land charges regime, which operates by reference to the names of estate owners. It therefore suggested that a person who has been granted an interest should be able to lodge a caution against first registration.

### Other mechanisms

4.55 Five consultees also mooted novel protective mechanisms. These mechanisms would require changes to either the unregistered or registered conveyancing regimes, to introduce a novel form of protective entry. They included a system of co-application for first registration,[53] a land charges search with priority,[54] "a system for protective applications",[55] cautions against first registration that protect priority,[56] provisional title numbers for intending disponees of unregistered land,[57] and a "Pending Application Registration Notice".[58] The detail of these suggestions can be found in the analysis of responses.

4.56 We considered these suggestions for bespoke solutions to apply to dealings within the twilight period. However, we have not proceeded to recommend the implementation of any of them. First, consultees generally did not express support for any one of these solutions in particular. Secondly, creating a novel and specific form of protective entry for twilight period dealings would introduce complexity into the scheme for land registration which we do not think is warranted. Moreover, the solutions were not without their own difficulties, which, in some cases, the consultee making the suggestion acknowledged. Finally, the suggestions offered procedural solutions which do not answer the prior, and in our view, fundamental question: do the priority rules in the LRA 2002 apply, or do the rules in unregistered land apply?

4.57 We have instead pursued reform that seeks to clarify the answer to that fundamental question.

## Discussion

4.58 Consultees provided little evidence of any problems with the twilight period arising in practice. Nevertheless, the risks of problems arising are real rather than theoretical and many consultees who responded were in favour of reform. We do not think it is acceptable for the law to be unclear on as fundamental a question as the point in time at which land moves from the unregistered to the registered land regime, and therefore as to the relevant priority rules. We moreover do not think it is sufficient to rely on practice, including the current rules for ensuring that interests are disclosed by the first

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53 Nigel Madeley.

54 The Conveyancing Association.

55 The City of Westminster and Holborn Law Society.

56 Pinsent Masons LLP.

57 Pinsent Masons LLP.

58 The Law Society.

registered proprietor, to prevent problems from arising, when the actual position of the priority of the interest is uncertain. In our view, there is benefit in providing certainty.

4.59 In the Consultation Paper, we explained that the risk of problems arising during the second phase of the twilight period was low. However, one consultee, Nigel Madeley, made the point that problems can arise if the application for registration is cancelled. Indeed, an application being cancelled is what happened in *Sainsbury's Supermarkets v Olympia Homes*,[59] although the question of priority in that case was between an interest created before the application was made and a subsequent purchase. Although, as we noted in paragraph 4.31 above, HM Land Registry provides extensive practice guidance about first registration to support conveyancers,[60] it remains a risk that an application could be rejected or cancelled. On reflection, we therefore think that any solution we propose should also address the second phase of the twilight period if, and only if, the application for registration is unsuccessful such that the land does not become registered land.

4.60 Given the lack of examples of current problems, and the absence of consensus on the nature that reform should take, we propose a solution that is as simple as possible (keeping in mind the complexity of this area of law). In particular, we think that it would risk creating unnecessary complexity as well as unintended consequences to introduce a complicated or novel solution, such as creating a specific scheme of priority under the registered land system or introducing an entirely novel form of protection.

4.61 Reliance on the register has no sensible application when there is not yet a provisional register of title, or when the application for first registration, together with applications made based on the provisional register of title, are cancelled. Therefore, it seems to us that it is only sensible to apply unregistered land principles in these situations. Although we are sympathetic with the view that it would be conceptually more satisfying to apply registered land principles, they simply cannot be applied in these situations in a straightforward way.

4.62 On this basis, we recommend that the principles of unregistered land should apply to govern priority during the first phase of the twilight period and, if the application for registration is unsuccessful, during the second phase of the twilight period. The principles of priority in unregistered land are clear and, we think, sufficiently well understood (although we acknowledge that we received conflicting views on the extent to which conveyancers are familiar with them). Moreover, implementing unregistered land principles requires the least intervention in the current legislation and, moreover, requires the least amount of change to current practices on first registration.[61]

4.63 It is important to note that we do not recommend any alteration to rule 38 of the LRR 2003, which generally applies the LRA 2002 to any dealings of land once the requirement for compulsory first registration has been triggered under section 4 of the LRA 2002. We also do not recommend amendment of section 7, which provides that a

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59 [2005] EWHC 1235 (Ch), [2006] 1 P & CR 17, decided under the LRA 1925.

60 See generally HM Land Registry, *Practice Guide 49: Return and Rejection of Applications for Registration* (April 2018); HM Land Registry, *Practice Guide 50: Requisition and Cancellation Procedures* (March 2018).

61 In accordance with the guidance in HM Land Registry, *Practice Guide 1: First Registrations* (March 2018) para 7.

failure to comply with the requirement of first registration means that legal title reverts to the original vendor. These provisions, together with section 27(1), ensure that many interests created during the twilight period do not operate at law until registered. Furthermore, many interests that might be created are incapable of operating at law in any event, for example, a restrictive covenant. Accordingly, many interests granted during the twilight period will be equitable and so capable of priority protection under the Land Charge Act 1972.

4.64 We consider that section 14(3) of the Land Charges Act 1972 should remain in place. Therefore, it will continue to be unnecessary, and impossible, to protect an interest granted within the disposition that triggers first registration by registration under the Land Charges Act 1972. A person benefiting from a land charge granted within a disposition triggering first registration should not need to apply to register the charge under the Act in order for it to bind the disponee or any subsequent disponees because the charge will be apparent from the title deeds, and so disponees will have notice of the charge.[62]

4.65 We emphasise that our recommendation does not make any change to the determination of priorities for the second phase of the twilight period where the application for registration is ultimately successful. Since most applications for first registration will be successful, our recommendations will apply only exceptionally to the second phase of the twilight period. Once an application for registration has been made, and registration is successful, the mechanisms of the LRA 2002 apply straightforwardly: a provisional title number is given and priority searches can be made. Interests created after the application for first registration can therefore be protected in the ordinary way: by application for a notice or, if applicable, by the overriding interest provisions. This system works well for users of the land registration system and for HM Land Registry and so we see no reason to depart from it.

**Recommendations**

**Recommendation 5.**

4.66 We recommend that the priority rules governing unregistered land should apply to dispositions arising after compulsory first registration has been triggered under section 4 of the LRA 2002, but before the application for first registration to HM Land Registry is made. However, section 14(3) of the Land Charges Act 1972 should continue to provide that it is neither possible nor necessary to protect under the Act a land charge that is created within the same instrument as a disposition of an unregistered estate that triggers first registration under the LRA 2002.

4.67 Therefore, a land charge created during the first phase of the twilight period (that is not created within the same instrument as a disposition of an unregistered estate that

[62] Or, if r 38 of the LRR 2003 does not apply to this interest, and the interest is in fact legal (for example, an easement), it will exist at law, and so bind subsequent disponees.

triggers first registration under the LRA 2002) must be protected under the Land Charges Act 1972 in order for it to bind disponees of the grantor of the charge.

**Recommendation 6.**

4.68 We recommend that it should be clarified that, if registration is unsuccessful after a disposition triggers compulsory first registration under section 4 of the LRA 2002, the priority rules governing unregistered land should apply to interests created after the application for first registration was made.

4.69 Therefore, to protect against a loss of priority should registration fail, an interest created during the second phase of the twilight period can be protected by way of a land charge under the Land Charges Act 1972. However, we emphasise that, if an application succeeds (as will happen in the majority of cases), interests created during the second phase will be protected under the LRA 2002 by applying for a notice. An interest may be registered as a land charge during the second phase as an insurance measure in case registration fails, but it will provide no protection if registration succeeds.

4.70 Clause 5 enacts Recommendations 5 and 6.

4.71 First, clause 5 amends the definition of "registered land" in section 17(1) of the Land Charges Act 1972 to clarify that land is not considered as registered for the purposes of that Act until registration is actually completed, rather than from the time of the application for first registration is made. It therefore disapplies section 74 of the LRA 2002 or rule 38 of the LRR 2003 to the degree that they imply otherwise. Consequently, it remains possible to register a land charge up until the point that the affected estate is registered.

4.72 Secondly, clause 5 amends section 74 of the LRA 2002 by inserting a new subsection. Although a land charge may be registered during the second phase, subsection (2) provides that, if the first registration of the affected estate is successful, there will be no adverse consequences under the Land Charges Act 1972 if a land charge was not registered. This amendment will ensure that, where the land is successfully registered, the priority rules under the LRA 2002 will govern the second phase of the twilight period. In particular, it will prevent any argument from being made that, despite a notice being entered under the LRA 2002, the interest has lost priority due to a failure to apply for a land charge.

4.73 Accordingly, interests created during the first phase of the twilight period (except those granted in the same document as the conveyance that triggers the requirement for first registration) should be protected by a land charge, if they fall within one of the classes of land charge. Interests created during the second phase of the twilight period should be protected under the LRA 2002 in the ordinary way by application for registration or entry of a notice. However, they should also be protected by entry of a land charge under the Land Charges Act 1972 in case the application for registration is rejected or cancelled. During the second phase of the twilight period, it is only once the application for registration is successful (or, as the case may be, unsuccessful) that it will be clear which rules for priority – either those for unregistered or registered land – will apply.

## PROTECTION OF DERIVATIVE INTERESTS

4.74 Finally, we briefly turn to the point of whether a person with a derivative interest under a trust[63] is entitled to apply for a caution against first registration.

4.75 Pursuant to section 15 of the LRA 2002, a person can lodge a caution against the registration of title to an unregistered legal estate if (among other circumstances) he or she is "entitled to an interest affecting" that legal estate. However, if a person's interest affects a beneficial interest under a trust of a legal estate rather than the legal estate itself, it is not clear whether that person could apply to lodge a caution.

4.76 We suggested that the position should be clarified, and HM Land Registry's current practice of allowing an application for a caution in these circumstances put on a secure statutory footing.[64]

### Consultation

4.77 We therefore provisionally proposed to make clear that a person with a derivative interest under a trust may apply for a caution against first registration of the legal estate to which the trust relates.[65]

4.78 Nineteen of the 23 consultees who responded to this question agreed: HM Land Registry, the Law Society, and Dr Harpum were included among them.

4.79 Two consultees supported the proposal in order to give authority for HM Land Registry's current practice.[66] Dr Harpum suggested that the law already provides for the entry of a caution, confirming that the provisional proposal was the intention behind the LRA 2002. Two consultees agreed with a point we made in the Consultation Paper, that allowing a caution to be lodged would have the practical benefit of giving persons with a derivative interest the opportunity to apply for a restriction on first registration.[67]

4.80 In their responses to this question a number of consultees rehearsed arguments about whether beneficiaries of direct interests under trusts should be able to lodge a caution against first registration.[68] We explained in the Consultation Paper that they can do so.[69] On this point, Christopher Jessel observed that our provisional proposal would eliminate

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63 A derivative interest is an interest created or granted out of another interest. In particular, a derivative interest under a trust is an interest which is granted out of a beneficial interest. Examples include a charge of a beneficial interest, or where a beneficial interest is declared or found to be held on a sub-trust. See Consultation Paper, para 10.34.

64 Consultation Paper, paras 4.36 to 4.38.

65 Consultation Paper, para 4.39.

66 Professor Warren Barr and Professor Debra Morris jointly, and the London Property Support Lawyers Group.

67 Nigel Madeley (who expressed other views) and the Law Society. See Consultation Paper, para 4.38.

68 Including Michael Hall and Nigel Madeley.

69 Consultation Paper, para 4.36.

concern about whether a caution can be lodged when it is difficult to determine whether the person has a direct beneficial interest or a derivative interest.[70]

4.81 The City of Westminster and Holborn Law Society and the Society of Licensed Conveyancers disagreed with the proposal. They considered that it erodes the curtain principle[71] and that it may cause problems if the beneficial interest that is the subject of the caution is overreached. Similarly, Nigel Madeley, who expressed other views, argued that although the provisional proposal was pragmatic, derivative interests under a trust should not be the subject of a caution against first registration as a matter of principle: he said, "it is up to the beneficiary to make sure that the trust is evidenced from the deeds".

4.82 Everyman Legal supported the provisional proposal in principle, but expressed concern that a widespread uptake could make the register cluttered.

**Recommendation**

4.83 Generally, the curtain principle dictates that beneficial interests should be kept off the register. However, the LRA 2002 provides a mechanism to ensure that overreaching of beneficial interests take place. That mechanism is in the form of a restriction.[72] A Form A restriction is entered when an estate is held on trust specifically to ensure that overreaching occurs. Absent exceptional circumstances, no other form of restriction can be entered in order to protect beneficial interests under a trust.[73] Typically, a Form A restriction will be entered by the registrar automatically, or on application by the trustees.[74] A beneficiary of the trust can also apply for a Form A restriction, and moreover, in our view, a person with a derivative interest under the trust can also apply if a Form A restriction has not yet been entered.[75]

4.84 In our view, it makes good sense to ensure that a holder of a derivative interest under a trust can lodge a caution against first registration if the beneficiaries have failed to do so. It will make it more likely that a restriction will be entered when the land is registered. It will therefore reinforce the existing mechanism in the LRA 2002 that ensures that overreaching of beneficial interests takes place.

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70 Christopher Jessel commented that this question overlapped with our question at para 3.51 of the Consultation Paper, about whether the owner of an estate in mines and minerals held apart from the surface land should be able to lodge a caution against first registration of the surface. As we explain in Ch 3 at paras 3.116 to 3.119 above, we have not made a recommendation along those lines. Therefore, we have not considered Christopher Jessel's suggestion that a holder of a derivative interest in minerals under a trust should be able to lodge a caution against the surface title.

71 See the Glossary.

72 LRA 2002, s 42(1)(b).

73 We note in Ch 10 that the beneficiary of the derivative interest cannot apply for a separate restriction. In most circumstances, the Form A restriction is the only appropriate restriction in respect of beneficial interests under a trust. If a Form A restriction has not been entered, then the holder of the derivative interest under the trust may apply for entry of a Form A restriction: see Ch 10, paras 10.87 to 10.88 below. See also Consultation Paper, paras 10.43 to 10.46.

74 See LRA 2002, s 44(1) and LRR 2003, rr 94 and 95.

75 An application for a restriction can be made by anyone with "a sufficient interest" in ensuring that overreaching occurs: see LRA 2002, ss 42(1)(b) and 43(1)(c). See also LRR 2003, r 93(a); and HM Land Registry, *Practice Guide 24: Private Trusts of Land* (April 2018) para 2.1.4.

4.85 Moreover, we disagree that our policy will result in clutter of the register. The existing law allows for restrictions to be entered to protect interests under trusts, and we are not expanding or otherwise amending the basis on which restrictions can be entered. We therefore do not see how clutter of the register could arise from our recommendation.

**Recommendation 7.**

4.86 We recommend that it should be made clear that a person with a derivative interest under a trust may apply for a caution against first registration of the legal estate to which the trust relates.

4.87 Recommendation 7 is implemented by clause 6. Clause 6 will amend section 15 of the LRA 2002, to provide that an interest affecting a beneficial interest in a qualifying estate amounts to an interest affecting a qualifying estate, for the purposes of the section.

# Chapter 5: Owner's powers

## INTRODUCTION

5.1 Part of the principle that the register is a complete and accurate statement of title is that an owner's powers of disposition (and limitations on those powers) should be apparent from the register. This principle is reflected in the concept of owner's powers, addressed in sections 23, 24 and 26 of the LRA 2002. We considered owner's powers, as well as the registration gap,[1] in Chapter 5 of the Consultation Paper.

5.2 In the Consultation Paper we made two provisional proposals about owner's powers. These proposals concerned, first who can exercise owner's powers, and secondly the scope of owner's powers. Consultees expressed strong agreement with our provisional proposals, but at the same time raised challenging questions. The questions they posed made us re-consider our proposals. Although our policy is the same as it was in the Consultation Paper, we have refined how we have expressed our policy in response to the points consultees raised.

5.3 We no longer think it is necessary to make a recommendation to amend the LRA 2002 to clarify who is entitled to exercise owner's powers. In working through the issues consultees raised, we have come to the conclusion that the law on this point is sufficiently clear as it stands.

5.4 The uncertainty arises in respect of the scope of owner's powers.[2] We make three recommendations for reform of the LRA 2002 to address their scope. These recommendations are more limited, and are more precise, than our second provisional proposal in the Consultation Paper.[3]

5.5 This chapter also briefly considers the registration gap, the period of time between completion of a disposition and its registration. We discussed the registration gap in the Consultation Paper,[4] but we did not ask any consultation questions in respect of it. Nevertheless, some consultees commented on the registration gap in their consultation

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1 The registration gap refers to the time between completion of a disposition and registration of that disposition by HM Land Registry. See Consultation Paper, paras 5.67 to 5.85.

2 Amy Goymour and Stephen Watterson have recently and comprehensively considered the many issues that arise in interpreting the owner's powers provision in the LRA 2002. See "A Tale of Three Promises: (3) The Empowerment Promise", in A Goymour, S Watterson and M Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (2018) pp 379 to 409.

3 We also make a related recommendation in Ch 19. To address uncertainty arising from the case law in relation to the powers of chargees, we recommend that the LRA 2002 should be amended to clarify that the owner's powers provisions in s 23(2) are confined to the power of disposition in respect of the registered charge itself, and do not confer a power to make a disposition of the property subject to the charge: see para 19.28 and following below.

4 Consultation Paper, para 5.67 and following.

responses. We remain of the view that law reform is not appropriate or necessary to address concerns arising from the registration gap.

## OWNER'S POWERS

5.6 Within the LRA 2002, the powers of an owner of registered land to dispose of his or her land are encompassed in the concept of "owner's powers". The provisions governing owner's powers are found in sections 23 to 26.

5.7 Although the LRA 2002 introduced the term "owner's powers", the concept of the powers themselves was not new. Their origin can be found in the LRA 1925. The LRA 2002 was intended to simplify and clarify the existing law on an owner's powers of disposition.

5.8 As we explained in the Consultation Paper,[5] section 24 provides that the registered proprietor or a person who is "entitled to be registered as the proprietor" is entitled to exercise owner's powers in relation to a registered estate or charge. Section 23 defines the scope of owner's powers: it provides that owner's powers consist of the power to make a disposition of any kind permitted by the general law.[6] These powers of disposition include the ability to make registrable dispositions,[7] dispositions which create legal interests but cannot be registered (such as short leases), and equitable interests.[8]

5.9 Section 26 protects disponees if an owner's powers have been limited, by "prevent[ing] the title of the disponee being questioned".[9] The effect of section 26 is to protect disponees from limitations on an owner's powers of disposition that are not themselves entered in the register or imposed by the LRA 2002. As section 26(3) makes clear, the fact that the disponee is protected does not mean that the registered proprietor or person entitled to be registered as the proprietor is considered to have acted lawfully, if in fact he or she has not done so. The disponor is not shielded from accountability for his or her unlawful conduct. Section 26 operates only to protect the purchaser. The purchaser is able to presume that, save for what is apparent from the register, there are no legal or equitable limitations on the owner's ability to dispose of the land that will affect the validity of the disposition. This point is crucial: it means that the purchaser, mortgagee or other disponee can proceed without looking behind the register and, after the disposition, his or her title cannot be questioned.[10]

5.10 The fact that the disponee's title cannot be questioned means, in particular, that the disponee's registration is not a mistake (which provides the basis for an application to

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5 We explained owner's powers at paras 5.1 to 5.15.

6 In addition to the general law, the owner's powers also include the power to create legal charges with payment of money over a registered estate or over indebtedness secured by a registered charge: LRA 2002, s 23(1)(b) and (2)(b).

7 Under LRA 2002, s 27.

8 See *Wontner's Guide to Land Registry Practice* (22nd ed 2009) para 10-001.

9 Law Com No 271, para 4.9.

10 Subject, as we discuss at length below, to the title being the subject of a "mistake" capable of being subject to rectification.

alter the register)[11] merely because a limitation on the disponor's powers of disposition, which was not reflected by an entry in the register, would render the disposition invalid.[12] This does not mean, however, that owner's powers cure a mistake in the register. We may have expressed this point too broadly in the Consultation Paper, failing to convey this nuance.[13] We clarify below that a mistake in the register (for example, the registration of a fraudulent transfer) cannot be "cured" by an onward disposition by a registered proprietor exercising his or her owner's powers.[14]

5.11 We emphasise that the concept of owner's powers is concerned only with the registration consequences of a disposition and the nature of the title obtained by the disponee. Owner's powers mean that the disponee obtains a good title; however, a disponor who has acted unlawfully may still be personally liable to third parties under the general law. For example, a disponor who transferred the land in breach of trust may still be liable to the beneficiaries for the breach of trust, even though the disponee's title is secure. Owner's powers also do not determine priorities between interests: the priority of a registered disposition in relation to other pre-existing interests is determined in accordance with section 29 (or section 30, in respect of registered charges).[15]

## CONCERNS WITH THE CURRENT LAW

5.12 As we identified in the Consultation Paper, there is uncertainty about the application and scope of owner's powers. Both the right of persons entitled to be registered as the proprietor to exercise owner's powers and the scope of owner's powers have generated uncertainty in the case law and among commentators.[16] We therefore considered two questions.

(1) Who can exercise owner's powers?

(2) What is the scope of owner's powers?

### Who can exercise owner's powers?

5.13 Section 24 provides that both the registered proprietor and a person entitled to be registered as the proprietor are entitled to exercise owner's powers. The latter has raised questions, since who is entitled to be registered is not defined in the LRA 2002. We therefore considered what a person must do to be entitled to be registered as the proprietor.

5.14 We explained our view in the Consultation Paper that a disposition of the freehold, a registrable lease, or a registrable charge in a person's favour makes that person entitled

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11 We discuss the concept of a mistake in the context of the LRA 2002 in Ch 13.

12 In contrast, an omission by HM Land Registry to put a restriction in the register, or the removal of a restriction, may be a mistake. We discuss this discrete point more at paras 5.157 to 5.159 below.

13 In particular, at para 5.11.

14 See paras 5.91 and 5.127 below.

15 We consider priorities, and in particular s 29, in detail in Chs 8, 9 and 10.

16 Consultation Paper, paras 5.16 to 5.17.

to be registered as the proprietor. Therefore, he or she is entitled to exercise owner's powers.

5.15 We based our interpretation on two things: first the origin of owner's powers within the LRA 1925, under which a disposition or charge in a person's favour was sufficient for a person to dispose of or charge land;[17] and secondly the purpose of owner's powers in the LRA 2002. The latter is particularly significant: extending owner's powers to persons entitled to be registered as the proprietor enables common conveyancing practices, specifically purchase mortgages and sub-sales. In both cases purchasers make dispositions of their estate before becoming registered as the proprietor. In effect, the extension of owner's powers to persons who are entitled to be registered as proprietor, but are not yet registered, ensures that a disponee can exercise owner's powers during the registration gap: the period of time between the completion of the disposition and the registration of the disponee.[18]

5.16 In the Consultation Paper, we explained our view that a person with a disposition in his or her favour need not establish anything further in order to be entitled to exercise owner's powers. In particular, such a person need not establish that he or she has complied with any of the formalities necessary for a disposition or charge to be registered, such as showing that a restriction could be complied with or obtaining a Stamp Duty Land Tax ("SDLT") certificate. Requiring compliance with the pre-conditions of registration, in our view, is counter-productive and unnecessary, and risks making owner's powers for persons entitled to be registered as the proprietor meaningless.[19]

5.17 Accordingly, we made a provisional proposal that the LRA 2002 make clear that a person with the benefit of a transfer or grant of a registrable estate or charge in his or her favour is entitled to be registered as proprietor.[20]

**What is the scope of owner's powers?**

5.18 As we explained in the Consultation Paper, courts have reached conflicting conclusions as to the scope of owner's powers. Arguably, the uncertainty arises from the wording of section 23, which defines owner's powers by reference to what is permitted by the "general law". This in turn has given rise to debates over the extent to which the common law, equity, or other statutory instruments limit owner's powers. We considered two examples in the Consultation Paper:

(1) the common law principle that no one can convey what he or she does not own (*nemo dat quod non habet*); and

(2) trustees' powers of disposition.[21]

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17 LRA 1925, s 37.

18 Consultation Paper, paras 5.18 to 5.29.

19 Consultation Paper, paras 5.27 to 5.29.

20 Consultation Paper, para 5.30.

21 Consultation Paper, paras 5.31 to 5.34.

Uncertainty surrounding *nemo dat*

5.19 By virtue of section 27(1) of the LRA 2002, before dispositions that are required to be registered are in fact registered, they have no effect at law. Consequently, persons who are entitled to be registered as the proprietor only have an equitable interest in the registered estate. The question then arises as to whether a person entitled to be registered as the proprietor can exercise owner's powers by making a legal disposition. To put the question another way: does *nemo dat* apply to the exercise of owner's powers?[22]

5.20 As we explained in the Consultation Paper,[23] courts have reached inconsistent conclusions on this point. In *Bank of Scotland plc v King*[24] and *Redstone Mortgage plc v Welch*,[25] the courts appeared to find that *nemo dat* did not limit owner's powers. However, in *Scott v Southern Pacific Mortgages Ltd*,[26] the High Court and Court of Appeal determined that a purchaser who had not yet become registered as the proprietor was unable to create a legal lease during the registration gap, because *nemo dat* continued to apply to the exercise of owner's powers. The court in *Skelwith (Leisure) Ltd v Armstrong* followed suit, finding that *nemo dat* applied to the exercise of owner's powers.[27] Clarity is therefore needed.

5.21 We argued that the common law principle of *nemo dat* should not limit owner's powers. We believe that this policy reflects the intention behind the LRA 2002 and is necessary to fulfil the original purpose of extending owner's powers to persons entitled to be registered as the proprietor, that is, to allow common conveyancing practices.[28]

5.22 In the Consultation Paper, we also noted that, as a consequence of our proposal, the conclusion in respect of *nemo dat* in *Scott v Southern Pacific Mortgages Ltd*[29] would be reversed. Reversing the decision would allow a person entitled to be registered as the proprietor to create a legal short lease; however, we noted that this reversal would not

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22 Consultation Paper, para 5.35.

23 At paras 5.36 to 5.44.

24 [2007] EWHC 2747 (Ch), [2008] 1 EGLR 65 at [68].

25 [2009] EGLR 71, (2009) 36 EG 98 at [70] to [71].

26 Respectively, [2010] EWHC 2991 (Ch) at [61] to [63]; and [2012] EWCA Civ 17, [2012] 1 WLR 1521 at [58] to [61]. When the case reached the Supreme Court, the case was resolved on the first preliminary issue so the Supreme Court did not determine the *nemo dat* point; however, Lady Hale discussed the registration gap in her judgment at [113] to [114]: [2014] UKSC 52, [2015] AC 385.

27 *Skelwith (Leisure) Ltd v Armstrong* [2015] EWHC 2830 (Ch), [2016] 2 WLR 144 at [57] to [58]. The Court also determined that owner's powers under s 23(2) include the power of a chargee to deal with the charged property; we disagree with this conclusion, and make a recommendation in relation to it in Ch 19, para 19.34 below.

28 Consultation Paper, paras 5.45 to 5.51.

29 Respectively, [2010] EWHC 2991 (Ch); and [2012] EWCA Civ 17, [2012] 1 WLR 1521. Note, the *nemo dat* point is not addressed by the Supreme Court decision at [2014] UKSC 52, [2015] AC 385, which affirmed the Court of Appeal's decision on other grounds. We note that the other consequences of the Supreme Court's decision – that a purchaser cannot create a property right in favour of a third party prior to completion of the purchase – is in tension with our view of the status of estate contracts; because this is a point of the general law of property, it is outside the scope of our project.

mean that a short lease would have priority over a purchase mortgage, a point we explore further in Chapter 8.[30]

### Other limitations: trustees' powers of disposition

5.23 The main example of other limitations on owner's powers is trustees' powers of disposition, the effect of which in registered land has been an enduring subject of debate. We explored this issue in the Consultation Paper.[31]

5.24 In the past, the LRA 1925 was believed to provide adequate protection to purchasers of registered land because the Act gave trustees who were registered proprietors the same powers as non-trustees, namely unlimited powers of disposition. The Trusts of Land and Appointment of Trustees Act 1996 assumed the same, providing protection from beneficial interests to purchasers of unregistered land, but not to purchasers of registered land who were thought to be already protected.[32] However, in an article published in 1998, Graham Ferris and Professor Graham Battersby disagreed that purchasers of registered land were protected under the LRA 1925. They suggested that a purchaser's title would be burdened by beneficial interests even though the trust was not noted in the register, where the trustees acted outside of their powers (referred to as acting ultra vires). They further argued that this problem had been exacerbated by the Trusts of Land and Appointment of Trustees Act 1996 because, in their view, the 1996 Act extended the circumstances in which trustees would be considered to have acted outside their powers.[33]

5.25 Although not everyone agreed with the so-called Ferris and Battersby effect, the LRA 2002 was intended to address this issue. The LRA 2002 gave trustees, along with all others entitled to exercise owner's powers, the right to exercise owner's powers free from any limitation affecting the validity of a disposition in favour of the disponee.

5.26 However, some doubt remains over the extent to which a disponee of registered land can be affected by limitations on the powers of trustees not reflected in the register. Notably, in 2009 Judge Purle QC in *HSBC Bank plc v Dyche*[34] doubted that the requirements for overreaching of the beneficial interest (a mechanism which protects purchasers from beneficial interests by removing the interests from the land and attaching them to the proceeds of sale in the hands of the trustees) were satisfied by the unauthorised disposition and charge of registered land. In doing so, he implicitly

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30 Consultation Paper, paras 5.52 to 5.53. See Ch 8, para 8.68 and following below.

31 Consultation Paper, paras 5.54 to 5.61.

32 Trusts of Land and Appointment of Trustees Act 1996, s 16.

33 G Ferris and G Battersby, "The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land" [1998] *Conveyancer and Property Lawyer* 168. See also E Cooke, *The New Law of Land Registration* (2003) pp 65 to 66; *Megarry & Wade*, para 12-034 n 300; B McFarlane, N Hopkins and S Nield, *Land Law: Text, Cases, and Materials* (3rd ed 2015) paras 2.2.4 n 17 and 4.2.2 n 57.

34 [2009] EWHC 2954 (Ch), [2010] BPIR 138. This case was decided under the LRA 1925, and did not directly consider the provisions relating to the powers of the registered proprietor in the LRA 1925 or the LRA 2002. Nevertheless, by doubting that overreaching occurred on a transfer by two trustees, the effect of the provisions for owner's powers are cast into doubt.

endorsed Ferris and Battersby's argument on the effect of the Trusts of Land and Appointment of Trustees Act 1996.

5.27 In the Consultation Paper we argued that the wording of section 23, which defines owner's powers by reference to what is permitted by the "general law", refers to the types of disposition a freehold owner can make, not circumstances in which types of dispositions can be made. We proposed to clarify this point.[35]

## CONSULTATION

5.28 We made two provisional proposals in relation to owner's powers in the Consultation Paper.

(1) Who can exercise owner's powers: we provisionally proposed that the LRA 2002 should make express provision that a person who has a transfer or grant of a registrable estate or charge in his or her favour is "entitled to be registered as the proprietor" of that estate or charge.[36]

(2) What is the scope of owner's powers: we provisionally proposed that, for the purpose of preventing the title of a disponee being questioned, the exercise of owner's powers should not be limited by:

(a) the principle of *nemo dat*;

(b) other limitations imposed by the common law, equity or statute; or

(c) any other limitations other than those reflected by an entry in the register or imposed under the LRA 2002.[37]

5.29 A wide variety of consultees responded to these consultation questions. Most consultees agreed with both proposals. However, some consultees, in particular barristers and academics, raised difficult conceptual issues in relation to owner's powers that required careful consideration in order for us to determine our final recommendations.

5.30 We first consider the responses of consultees, identifying different themes and issues they identified. We then respond to consultees' points and make recommendations.

### Who can exercise owner's powers?

5.31 A clear majority of consultees supported our provisional proposal that express provision should be made such that a person who has a transfer or grant in his or her favour is entitled to be registered as the proprietor: 22 agreed, none disagreed, and four expressed other views.

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35 Consultation Paper, paras 5.62 and 5.63.

36 Consultation Paper, para 5.30.

37 Consultation Paper, para 5.63.

### Clarity

5.32 Among those consultees who agreed, some highlighted the increased clarity and removal of doubt the proposal would bring, in particular in respect of purchase mortgages, sub-sales and leasebacks. The London Property Support Lawyers Group suggested that express provision would be of practical use, particularly in terms of the clarity it would bring for purchase mortgages and sub-sales, both common transactions. Pinsent Masons LLP suggested that reform should make it clear that entitlement to exercise owner's powers should be triggered by completion of the transfer or grant, not submission of a duly completed application to HM Land Registry. We made the same point in the Consultation Paper.[38]

### The risks of legislative amendment

5.33 Conversely, some consultees who supported the provisional proposal said that they were unaware of any problems in interpreting the current wording of the owner's powers provisions on this point, suggesting that there is no need for reform of the LRA 2002. Although the Council of Mortgage Lenders agreed that a purchaser must be able to exercise owner's powers in order for the current mortgage process to be workable, it said it did not have any evidence that the current wording of the LRA 2002 caused problems in practice. The Chancery Bar Association agreed that the law should be clarified, but suggested that it was only necessary if there is serious doubt about the position of disponees prior to registration. Berwin Leighton Paisner LLP suggested that our recommendation reflects the interpretation the courts have already given the owner's powers provision. Similarly, Dr Charles Harpum QC (Hon), who supported the proposals on the basis that they were what had been intended by the LRA 2002, expressed surprise that there had been any doubt.

5.34 Two consultees issued a word of caution about reform on this point. HM Land Registry and the Society of Licensed Conveyancers both noted that to provide expressly in statute what was now implied would require careful consideration and drafting, to guard against inadvertent effects. In particular, the Society of Licensed Conveyancers warned that any express provision about who is entitled to be registered as proprietor would have to be comprehensive, otherwise it would risk creating problems.

### Concerns about fraud

5.35 Among the consultees who expressed other views, two raised concerns about the implications of the proposal in the light of fraud.

5.36 For a person to be entitled to be registered as the proprietor, Michael Hall argued that the disposition in the person's favour must be valid: someone benefiting from a forged transfer or against whom there was an unpaid seller's lien (meaning the purchaser has not paid the full purchase price) should not benefit from owner's powers. Consequently, in his view, the exception to *nemo dat* once a transfer is registered should not be extended to transfers pre-registration.

5.37 The Chancery Bar Association explained that its support for our proposal was based on the presumption that "transfer" or "grant" meant a valid transfer or grant, meaning not a

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[38] Consultation Paper, paras 5.27 and 5.29.

forgery. It therefore cautioned that our second proposal about *nemo dat* would give owner's powers to disponees of forged transfers.

5.38 The Chancery Bar Association further queried the consequences of our proposal in a sub-sale situation: if the first disposition is invalid and, as is frequently the case, never registered, is the first disposition "validated" by a subsequent disposition by the purchaser? The Chancery Bar Association suggested we consider giving statutory recognition to the concept of "feeding the estoppel", such that the registration of a subsequent disposition would validate previous dispositions; it also suggested that this result may be achieved by our recommendation in relation to the scope of owner's powers and so our first proposal is unnecessary.

### The effect of a restriction

5.39 The Chancery Bar Association and HM Land Registry noted concerns about restrictions. They both suggested that, if a restriction requires the consent of a person and that consent is not forthcoming, it would be odd to say that the disponee has owner's powers, and undesirable for owner's powers to mean that a subsequent disposition or grant must be registered.

### Extension to other categories of person

5.40 Some consultees made comments about whether other categories of person would or should be considered entitled to be registered as the proprietor.

5.41 The Law Society requested that consideration be given to include in any reforms express provision for the personal representatives of a deceased proprietor and trustees in bankruptcy to exercise owner's powers.

5.42 Christopher Jessel suggested that a person entitled to demand a transfer in his or her favour should also be regarded as entitled to be registered, and in particular that the trigger for compulsory first registration in section 4(1)(a) of the LRA 2002 should be extended to apply to the coming to an end of a trust.

5.43 Berwin Leighton Paisner LLP questioned the scope of our first proposal: it wondered whether it would result in beneficiaries of bare trusts and adverse possessors under schedule 6 being considered as persons "entitled to be registered".

## What is the scope of owner's powers?

5.44 The majority of consultees supported our provisional proposal that, for the purpose of preventing the title of a disponee being questioned, the exercise of owner's powers should not be limited by *nemo dat*; other limitations imposed by common law, equity or other legislation; or any limitation other than those reflected by an entry in the register or imposed under the LRA 2002. Twenty agreed, four disagreed, and six expressed other views. Interestingly, solicitors and bodies representing practitioners made up many of the consultees who agreed; academics and barristers were among the consultees who disagreed or expressed other opinions.

### Necessity of clarification

5.45 Consultees generally agreed with the need to clarify these points of law. For example, Dr Harpum strongly supported the proposal and expressed disappointment that the

owner's powers provisions had been misunderstood. The Bar Council described the proposal as essential to promoting the objectives of the LRA 2002, noting that it was an issue that had generated litigation. The Society of Licensed Conveyancers also agreed, saying that if there is any uncertainty due to judicial interpretation of the provisions, it must be resolved as soon as possible, noting that disponees must be protected. Other stakeholders, including the Berkeley Group and the London Property Support Lawyers Group also agreed that the provisional proposals were necessary in order to clarify the law and to protect disponees.

*The principle of* nemo dat *and concerns about fraud*

5.46 Generally, consultees agreed that the principle of *nemo dat* should not limit the ability of a person entitled to be registered as proprietor to convey and grant interests in the land. For example, the Law Society agreed that the principle of *nemo dat* should not limit owner's powers. The Berkeley Group agreed with our conclusion that a purchaser of a registered estate is able to create a short lease that is legal on grant in advance of registration, noting that this point is important given the delays in registration. The London Property Support Lawyers Group agreed that the principle of *nemo dat* should not limit owner's powers; it suggested that "a person entitled to be the registered proprietor should have the same powers to make dispositions as the registered proprietor in order to protect disponees".

5.47 Several consultees raised concerns about fraud or otherwise invalid transfers. In particular, they questioned whether the elimination of *nemo dat* for the purpose of owner's powers would undermine the scheme in the LRA 2002 which would deem invalid transfers as mistakes if entered in the register.

5.48 The most significant response we received on this point was from the Society of Legal Scholars, endorsed by Dr Aruna Nair. The response discussed the importance of *nemo dat* in the LRA 2002 in relation to priority and the doctrine of mistake. The SLS disagreed with the proposal, giving extensive reasons for its disagreement and making its own suggestion for reform. The SLS accepted our view that the decision in *Scott v Southern Pacific Mortgages Ltd*[39] was problematic because it renders section 24(b) – which gives owner's powers to persons entitled to be registered as proprietor – effectively meaningless and prevents the owner's powers provisions from facilitating common transactions like sub-sales and purchase mortgages. However, in its view, our proposal did more than was necessary and would create fresh problems. It understood our proposal to go further than it did, suggesting that we had proposed to "wipe out the *nemo dat* rule entirely in relation to registered land". As the SLS explained, *nemo dat* continues to play an important role within the structure of the LRA 2002. In particular, it stated that *nemo dat* is fundamental to understanding the priority rules (in sections 28 and 29) and the consequence that a void disposition is ineffective to confer rights:

> *Nemo dat* represents a background assumption for [the] registration system. It is the starting point for resolving the questions of priority and title. The statutory adjustments, such as the priority promise in section 29 and the vesting guarantee in section 58, are merely specific exceptions to *nemo dat*. These statutory exceptions are qualified in certain circumstances. For instance, section 29 is qualified by overriding interests and section 58 is in a sense qualified by the availability of rectification. Where these

[39] [2012] EWCA Civ 17, [2012] 1 WLR 1521.

qualifications apply, *nemo dat* continues to have relevance. It is therefore important to ensure *nemo dat* is not indiscriminately removed, as would occur under the Consultation Paper proposal. To do so might have adverse implications for the priority promise and the vesting guarantee.

5.49 The SLS explained that *nemo dat* underlies the system governing priorities in the registration system: it is the underlying principle of the common law rule that first in time prevails, a rule that continues to apply by virtue of section 28 for unregistrable interests, and section 29 for overriding interests. The consequence of eliminating *nemo dat* for registered land would be that sections 28 and 29 would not function as they now do. Accordingly, a person to whom an unregistrable interest were conveyed could take free from all other, pre-existing, unregistered interests, and a person conveyed a registered disposition could take free of overriding interests.

5.50 Moreover, the SLS argued that our proposal to eliminate *nemo dat* for the purposes of owner's powers undermines our proposals in Chapter 13 in relation to mistake and rectification. Mistake is often considered with reference to the ABC scenario. In it, A is the registered proprietor of land, and a fraudster transfers the land to B. B then transfers the land on to C.[40] The SLS made the point that in an ABC scenario rectification is available against C because the registration of C is a mistake. It explained that, without *nemo dat* operating within the owner's powers provisions, there is arguably no basis for determining that the registration of C is mistake, and it would be unclear on what basis C's title could be rectified.

5.51 The SLS suggested we make a more limited reform instead: to reverse *Scott v Southern Pacific Mortgages Ltd*[41] directly by providing that a person entitled to be registered as the proprietor should be entitled to exercise "exactly the same powers as if he were already registered as proprietor of the registered estate". It argued that this suggestion would enable the disponee – the equitable owner – to grant legal rights during the period between completion and registration but would not disrupt the rules of priorities and mistaken registrations.

5.52 Amy Goymour made a similar point: she agreed that it should be clarified that the interpretation of the law on owner's powers in *Scott v Southern Pacific Mortgages Ltd*[42] was incorrect. However, she did not think that express clarification that *nemo dat* did not apply was required. She also suggested that attempted clarification might cause confusion, for example, with regard to overriding interests.

5.53 Other consultees also raised concerns about fraud. The Chancery Bar Association asked whether owner's powers mean that a disponee's entitlement to be registered cannot be challenged; in other words, whether a purchaser from a disponee cannot object to the disponee's title on the ground that the transfer to him or her was forged or otherwise invalid. It said the proposal was unsatisfactory if, by eliminating *nemo dat,* a disponee's title, even if invalid, would be conclusive prior to registration. The Association said, "if this means that a disposition is deemed to be valid for all purposes it is very far-reaching and in our view … unacceptable". It questioned whether dispositions deemed

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40 See figure 4 at para 5.78 below for an illustration of the ABC scenario.

41 [2012] EWCA Civ 17, [2012] 1 WLR 1521.

42 [2012] EWCA Civ 17, [2012] 1 WLR 1521.

invalid pursuant to other legislation or in equity would nevertheless be valid under our proposal.

5.54 Although agreeing with the proposal, Everyman Legal queried the consequences of our proposals in respect of a person purporting to sell what he or she does not own. Michael Hall disagreed with the proposal on the basis that the guarantee of title cannot be extended to a person who has not yet been registered, whose disposition may be a forgery or subject to unpaid vendor's liens. Accordingly, his view is that persons should be registered before dealing with the property.

### Limitations on trustees' powers

5.55 Consultees generally agreed that, if there is uncertainty about whether a purchaser is protected from limitations on trustees' powers, reform was necessary.

5.56 Those who supported our proposal included Professor Battersby, one of the authors of the article that outlined the risks that disponees in registered land face in dealing with trustees. He said the matter needed to be put beyond any doubt: "if there is any danger that [his and Mr Graham Ferris' argument] might be correct, it is a defect which certainly needs to be cured". Although he had understood section 26 as providing the remedy to the problem he and Graham Ferris had outlined, the drafting of section 26(1) had caused difficulties and *HSBC Bank plc v Dyche*[43] casts doubt on that proposition.

5.57 Nigel Madeley also agreed that the limits on trustees' powers should not filter down to disponees. In his view, beneficiaries who accept that their title subsists behind a trust should find their principal protection to be a personal remedy against the trustees. Similarly, the Society of Licensed Conveyancers also agreed, saying that disponees must be protected and should not have to enquire into trustees' powers or interpret trust documents.

5.58 Professor Simon Gardner commented on the interaction between section 26 and overreaching of beneficial interests. The doctrine of overreaching is a means by which some interests in land, particularly beneficial interests under a trust, are removed from the land on a disposition and attach to the proceeds of sale. The mechanism therefore protects purchasers from beneficial interests, and provides the beneficiaries with a claim to the proceeds of sale in place of a claim to the land. The conditions outlined in the Law of Property Act 1925 are required to be met for overreaching to take place.

5.59 Professor Gardner suggested that it could be argued that section 26 protects disponees by facilitating overreaching even if the requirements for overreaching in the Law of Property Act 1925 are not met. Accordingly, in the absence of an appropriate restriction in the register, section 26 could operate to mean that payment of purchase money to only one trustee will overreach beneficial interests, contrary to the rule that purchase money must be paid to two trustees, and thereby reversing the decision in *Williams & Glyn's Bank v Boland*.[44] Professor Gardner suggested that overreaching of beneficial interests should not be permitted when there has been payment to only one trustee.

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43 [2009] EWHC 2954 (Ch), [2010] BPIR 138.

44 [1980] 2 All ER 408.

5.60 Similarly, the Chancery Bar Association, expressing other views, was concerned about the rights of holders of equitable rights, particularly those in actual occupation, against a disponee who had notice of a breach of trust. It expressed concern that the Court of Appeal in a recent case, *Mortgage Express v Lambert*,[45] supported an interpretation of section 26(3) which prevents a person in actual occupation from asserting an equitable interest against a purchaser if that would involve impugning the purchaser's title contrary to section 26. The Chancery Bar Association moreover said that the Law Commission's suggestion in our 2001 Report[46] that a beneficiary could make a claim of personal liability against a disponee (for example, a knowing receipt claim against the disponee if he or she knew of the trustees' breach of trust) was inconsistent with the provision in section 26 that the successor's title could not be questioned. The Chancery Bar Association worried that our provisional proposal further restricted the ability of beneficiaries to make claims for breach of trust beyond what section 26(3) currently provides.[47]

5.61 Christopher Jessel suggested that perhaps section 26 should incorporate the principles of equity, by only preventing the validity of a disponee's title from being questioned if he or she had notice or should have had notice that the trustees were acting beyond their powers.

### Scope of owner's powers for persons entitled to be registered

5.62 Several consultees gave their views about what the scope of owner's powers should be for persons entitled to be registered.

5.63 Michael Mark disagreed with the proposal, specifically in relation to persons who have not yet been registered, based on concerns about how the proposal would work together with restrictions. For example, he explained that on a sale from A to B, B can acquire the property on trust, meaning B is subject to a restriction that A was not. In his view, to allow B to dispose of the property free from the trust prior to registration is wrong because it would deprive the beneficiaries of the trust of an opportunity to protect themselves while depriving them of anything other than a personal remedy against B.

5.64 Christopher Jessel, who expressed other views, suggested that if a person who is entitled to be registered wants to deal with the property without being registered, the person should have to demonstrate his or her entitlement to be registered to the purchaser.

5.65 The Society of Licensed Conveyancers understood our proposal to mean that a purchaser would have "full powers as though they had already been registered as proprietor". We explained in the Consultation Paper that our proposal did not extend this far.[48] In our view, owner's powers only speak to powers of disposition, not all the

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45 [2016] EWCA Civ 555.

46 Law Com No 271, para 4.11.

47 Amy Goymour also raised a concern about the protection of beneficial interests by way of a restriction, suggesting that they should not be excluded from being protected by a notice under LRA 2002, s 33(a). We do not take up this suggestion here, but it might be an issue within our Thirteenth Programme project on modernising trust law: see Thirteenth Programme of Law Reform (2018) Law Com No 377.

48 Consultation Paper, para 5.67 and following.

other powers that vest in a legal owner of land. We touch more on this point in relation to the registration gap, at paragraph 5.175 and following below.

5.66 Replying to the proposal about who is entitled to be registered, Berwin Leighton Paisner LLP expressed concern that if unregistered disponees could enjoy all the benefits of being registered, then they might not be motivated to register dispositions, instead protecting them by notice. To guard against this concern, it made two suggestions. First, it suggested that registrable dispositions that are not lodged for registration within two months should be treated in the same way as dispositions which induce compulsory first registration, meaning that they would become void. Alternatively, it suggested that a disponee who had not lodged his or her application for registration should be excluded from being a person "entitled to be registered".

**DISCUSSION**

5.67 Before discussing the particular issues raised by consultees, we think it is useful to make some general comments about owner's powers.

5.68 Owner's powers have two broad purposes.

5.69 First, owner's powers generally allow a proprietor to make any disposition of the land that he or she could make if the land was unregistered.[49] Absent any entry showing a limit to an owner's powers in the register, a disponee can assume the owner has full powers of disposition; accordingly, a disponee is prevented from having to look behind the register. In accordance with section 26, the validity of a disposition and the disponee's title cannot be questioned on the basis of a limitation that is not reflected in the register. Owner's powers in this sense operate for the benefit of a disponee.

5.70 Secondly, owner's powers assist with the registration gap. Owner's powers allow a proprietor, who has an equitable rather than a legal interest by virtue of not (yet) being registered, to make dispositions of the land which can operate at law (once any registration requirements for that disposition are met). In doing so, owner's powers enable common conveyancing practices, including sub-sales and purchase mortgages.

5.71 It may also be worthwhile stating what owner's powers do not do. Owner's powers do not extend an owner's actual powers of disposition. Therefore, a disposition that is in fact outside the proprietor's powers of disposition is not rendered lawful and the proprietor (and anyone else) remains personally liable, for example, for breaches of trust or other duties. Owner's powers do not determine priority among interests in land. And finally, in our view, owner's powers do not affect overreaching of beneficial interests if the general requirements for overreaching in the Law of Property Act 1925 are not met.

5.72 We considered the purposes of owner's powers in the Consultation Paper. However, we had not considered some of the finer details of how owner's powers would operate in particular situations raised by consultees. Our thinking has evolved based on the points raised by consultees and our recommendations reflect that evolution. In particular, our recommendations are more precise than our provisional proposals and

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[49] E Cooke, *The New Law of Land Registration* (2003) pp 55 and 58. The exceptions are mortgages by demise and legal sub-mortgages: LRA 2002, s 23.

the amendments we propose to make to the LRA 2002 will operate more narrowly than our provisional proposals might have suggested.

5.73 Our general approach to owner's powers, however, remains unchanged. We do not seek to make fundamental changes to owner's powers. Instead, we seek to clarify their operation in the face of ambiguous judicial interpretations.

**Who can exercise owner's powers?**

5.74 Consultees' concerns with our provisional proposal that a person who has a transfer or grant of a registrable estate or charge in his or her favour is "entitled to be registered as the proprietor" of that estate or charge can largely be distilled into two key questions.

(1) Must the transfer or grant be valid in order for the person to be "entitled to be registered as the proprietor"?

(2) Must the person have complied with a restriction in the register in order to be "entitled to be registered as the proprietor"? In particular, when must compliance with a restriction be demonstrated?

5.75 We consider these questions in detail below. We also consider other, more discrete points, raised by consultees.

5.76 Ultimately, we have decided against making a formal recommendation in line with our provisional proposal. In considering consultees' concerns, we have come to the conclusion that the answers are already adequately provided by the general law: in other words, persons are entitled to be registered as the proprietor if they are owners according to the general law. Therefore, amendment of the LRA 2002 is not necessary on this point.

Validity of the transfer or grant

5.77 The LRA 2002 appears unclear as to whether owner's powers apply in situations of invalid transfers. Our provisional proposal did not address this point. Some consultees suggested that persons should only be entitled to be registered as proprietor, and so have owner's powers, if they have a valid transfer or grant of the registered estate in their favour. Some consultees raised this issue more particularly in relation to fraudulent transactions, making the argument that owner's powers should not make fraudulent transactions valid or unimpeachable.

5.78 Consider the classic ABC scenario, illustrated in figure 4 below.

Figure 4: the ABC scenario

A is the registered proprietor, but a fraudster transfers the property to B, who then either transfers or charges the property to C.

5.79 Since B has not dealt with A (the registered proprietor) but with a fraudster, a number of questions arise. Is B "entitled to be registered as the proprietor" and therefore entitled

to exercise owner's powers? What is the nature of B's interest? If B transfers his or her interest to C without first registering it, what is C's interest? Must HM Land Registry register C's interest on the basis of B's apparent owner's powers?

5.80 We think it is clear that owner's powers were not intended to circumvent the ordinary legal consequences of fraud. In a fraudulent transfer from A (the registered proprietor) by a fraudster to B, we think that B is not "entitled to be registered", meaning that HM Land Registry is not required to register B as owner (and would not do so if aware of the fraud). Nor, if B transfers or mortgages the property to C without being registered, must HM Land Registry register C as owner or mortgagee. We take the view that if C is dealing with B who is not yet registered, C takes the risk that B's interest is not registrable and, consequently, neither is C's. As we noted in Chapter 14 of the Consultation Paper, until a fraudulent transfer is registered, the risk of the fraud falls on B;[50] C should not be in a better position than B (and if he were, it would be easy for B to gain protection by transferring the interest on, perhaps to a shell company).

5.81 Further, if B and C become registered before the fraud comes to light, then C's title cannot be questioned on the basis that B did not have owner's powers at the time of the disposition to C, because B was not in fact "entitled to be registered". That result is not, however, a consequence of owner's powers, but a consequence of section 58 of the LRA 2002, which deems the register to be conclusive. Once C is registered, the fact that B did not have owner's powers to transfer (or charge) the land to C is irrelevant, in the same way that once B is registered the fact that the transfer from A to B was forged is irrelevant to the validity of B's title by virtue of section 58.

5.82 Similarly, if B were registered as the proprietor before transferring or charging the land to C, then as a consequence of section 58, HM Land Registry would have to register C: B's title at the time of transfer was conclusive, and as registered proprietor, B had owner's powers, which C should be able to rely on. The point of owner's powers is that a disponee should be able to rely on the register: in the situation where B has not been registered, C is not relying on the register; C is only relying on, and deriving title from, the powers of the disponor, B.

5.83 The same considerations apply to other invalid transfers. For example, we do not think owner's powers should apply to protect a disponee's title in cases when the deed is fundamentally of a different character from what the person intended to sign, called *non est factum* (literally, it is not his or her deed).

5.84 We consider, therefore, that owner's powers do not give a power of disposition where one does not already exist; nor do they save a transaction that is fundamentally invalid. Whether purportedly exercised by registered proprietors or by persons entitled to be registered as proprietor, owner's powers do not cure fraud or other invalid transfers. Like other provisions in the LRA 2002 (with the significant exception of section 58),[51] owner's powers rely on the general law to determine what amounts to a transfer or grant

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50 Consultation Paper, para 14.8.

51 Section 58 provides that, regardless of the underlying general law of property, once a person is registered as proprietor the legal estate is vested in him or her as a consequence of registration.

of an interest in a person's favour: they provide what an owner's powers of disposition are, not who is an owner.

### What makes a transfer or grant "invalid"?

5.85 As we explain below, we have ultimately come to the conclusion that it is not the function of owner's powers to determine who is an owner. Section 58 vests legal title in the registered proprietor, so registered proprietors are owners. The general law determines who is otherwise an owner, and so entitled to be registered as the proprietor.

5.86 We sought to clarify who is entitled to be registered as proprietor in order to clarify that disponees are able to exercise owner's powers. We did so by stating that a person with a transfer or grant of a registrable estate in his or her favour is entitled to be registered as proprietor. However, what amounts to a transfer or grant in a person's favour is determined by the general law or other provisions in the LRA 2002. In our view, that a transfer or grant is valid is an implicit requirement throughout the LRA 2002. We do not seek to amend or modify the law on this point.

5.87 Before coming to that conclusion, we wondered, based on consultees' responses, whether the owner's powers provisions in the LRA 2002 should specifically provide what it means to have a transfer or grant in a person's favour, to ensure that owner's powers attach to valid transfers or grants only. It was the complexity of this issue, and the comprehensive answers provided by the general law, that led us to our conclusion that we should not seek to amend the LRA 2002 on this point.

5.88 In particular, the general law already determines when a disposition is void and when it is not. Under the general law, a void transfer is ineffective to convey any interest to the disponee. A voidable transaction is effective unless and until it is set aside. Consequently, a void disposition does not give the disponee owner's powers, and the saving provision of section 26 does not apply, so that the disponee cannot be said to have a valid title. A voidable disposition that has not been avoided by the date of registration, on the other hand, does give the disponee owner's powers.

5.89 This distinction between void and voidable is relevant for the interpretation of mistake and rectification in the LRA 2002:[52] the registration of a void disposition is a mistake, which is liable to rectification; the registration of a voidable disposition (not rescinded by the date of registration) is not.[53] The question of whether an entry was a mistake is essentially the same question of whether a person has owner's powers: both are asking whether the transfer was valid at the time it was made or at the time it was entered in the register.

5.90 In order for owner's powers and the scheme for mistake and rectification in the LRA 2002 to operate consistently, they must treat dispositions in the same way. If section 26 protects the validity of a disposition from limitations not reflected in the register, then those limitations should not make the registration of that disposition a mistake liable to

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52 We discuss mistake and rectification in detail in Ch 13.

53 *NRAM Ltd v Evans* [2017] EWCA Civ 1013, [2018] 1 WLR 639 at [53] to [59]. See also *Megarry & Wade*, para 7-133 nn 894 and 895; *Emmet and Farrand on Title* (looseleaf ed) paras 9.026 and 9.028; and *Ruoff & Roper*, paras 46.024, 46.025 and 47.006.

rectification. Conversely, if the law deems a void transaction a mistake, HM Land Registry should not be obliged to register a void transaction as a consequence of owner's powers. If owner's powers involved a different view of validity than the concept of mistake, then HM Land Registry would be in the position of being required to make an entry in the register knowing that it was a mistake, which it may then have to indemnify.[54]

5.91 We clarify that we do not mean to say that, once there is a mistake in the register, the exercise of owner's powers cures it. We discuss this point further below.[55] However, if a disposition is a valid exercise of owner's powers, registration of that disposition cannot in and of itself be a mistake.

5.92 We have concluded that we do not need to determine the issue of when a transfer or grant is valid; the general law already does. The general law comprehensively addresses the myriad of circumstances in which a person is an owner of an interest in land or has authority to deal with land.[56] Owner's powers need not replicate it.

### Does requiring a valid transaction undermine the purpose of extending owner's powers to a person entitled to be registered as the proprietor?

5.93 Because a void disposition does not transfer the legal interest or estate to a person, the person is not an owner and so has no right to exercise owner's powers. Owner's powers therefore do not provide protection to purchasers and other disponees who are dealing with a person who is not yet registered as proprietor from the risk that the person is not actually the owner of the land. There is a risk that C, in dealing with B who is not yet registered, may not be able to discover that B has no valid interest because, for example, the earlier conveyance from A to B was fraudulent. We have considered whether this treatment undermines the purpose of extending owner's powers to persons entitled to be registered as the proprietor: does it, in essence, treat the transaction from B to C akin to a transaction in unregistered land, and is that appropriate?

5.94 Dr Simon Cooper has recently argued that a person must take reasonable steps to ensure that dispositions on their face are valid when registered land is conveyed through unregistered instruments, because the register is not conclusive as to these intermediate dealings.[57]

5.95 Christopher Jessel made a similar point in his consultation response. He stated that if a person who is entitled to be registered as the proprietor wants to deal with the property

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54 Once a mistake is already in the register, however, we do think that owner's powers mean that HM Land Registry is obliged to register (or if an objection to the registration of the transfer is accepted, to indemnify the disponee of that transfer) valid transfers from the registered proprietor.

55 See para 5.127 and following below. Note that we make a specific recommendation that a registered disposition that is made after a mistaken entry in the register is also a mistake: see Ch 13, Recommendation 26 at para 13.135, below.

56 People other than disponees are also entitled, by operation of law, to deal with the land. These include personal representatives and trustees in bankruptcy. The right of such persons to exercise owner's powers is already well established. In relation to personal representatives, see LRA 2002, Explanatory Notes on s 24, para 35; LRR 2003, r 162(1). In relation to trustees on bankruptcy, see Insolvency Act 1986, s 306; Law Com No 271, paras 11.39 to 11.41.

57 S Cooper, "Lack of Property Care" (23/01/2016) *Cambridge Centre for Property Law Working Paper*.

without being registered, then he or she must demonstrate his or her entitlement to be registered to the purchaser; for example, by providing an executed transfer and payment of SDLT or the existence and terms of a trust.

5.96 We agree. By virtue of the title guarantee in section 58, dealing with a registered proprietor presents little in the way of risk, because the person's title is conclusive and guaranteed by HM Land Registry. Dealing with a person not yet registered as the proprietor presents more risk: section 58 is not yet engaged, the person's title is not yet conclusive, and so not guaranteed by HM Land Registry. A purchaser dealing with a person entitled to be registered as the proprietor can only rely on the register of title in relation to the transactions prior to the as yet unregistered transaction(s). But the purchaser cannot rely on the register for the (as yet) unregistered transaction(s). This sale inevitably carries more risk.

5.97 The main purpose of extending owner's powers to persons entitled to be registered as the proprietor is to allow for transactions during the registration gap. Owner's powers perform this function, by enabling the transaction to have legal effect in the purchaser's or other disponee's hands. However, owner's powers do not eliminate the unavoidable fact that transactions during the registration gap carry with them more risk.

### Compliance with a limitation reflected by an entry in the register

5.98 A similar point relates to validity and compliance with a restriction.[58] If A transfers to B, but pursuant to a restriction needs the consent of X before transferring, does B need to show compliance with the restriction in order to exercise owner's powers to transfer or mortgage the land to C? And if the restriction is never complied with, what is the position of C: for example, if C is a mortgagee, and the restriction only requires consent to a transfer of the land, can C's mortgage be registered on the basis that B had owner's powers?

5.99 We stated in the Consultation Paper that a person need not demonstrate compliance with a restriction at the time of disposition in order to be "entitled to be registered as the proprietor".[59] We stand by that proposition, but we nevertheless agree with consultees, and in particular HM Land Registry, that it would be undesirable for a disponee's exercise of owner's powers to mean that registration could take place where the disposition failed to comply with a restriction in the register. Such a policy would circumvent the protections afforded by restrictions.

5.100 The question therefore arises as to how to reconcile two apparently conflicting propositions: that a person need not demonstrate compliance with restrictions at the time of the disposition in order to be "entitled to be registered", but cannot actually be registered unless restrictions are complied with.

5.101 HM Land Registry's analysis, implicit in its consultation response, is that whether a person has owner's powers should be considered retrospectively, at the end of

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58 We discuss restrictions in more detail in Ch 10.

59 Consultation Paper, para 5.27.

(potentially) a series of transactions when the application for registration is made.[60] An application for registration therefore unlocks owner's powers.[61] In HM Land Registry's view, a person is not entitled to be registered (and so not entitled to exercise owner's powers) if he or she cannot, in fact, be registered because a restriction prevents the registration. However, provided that there is compliance with the restriction by the time that C applies for registration, the problem is resolved by the doctrine of feeding the estoppel.[62]

5.102 We agree with HM Land Registry's conclusion. However, we disagree with their analysis on this complicated point of law.

5.103 We disagree that it is necessary to rely on the doctrine of feeding the estoppel to reach a conclusion. In our view, the provisions in the LRA 2002 already answer this question. Sections 40 and 41 make clear that compliance with a restriction must be shown at the time of registration: they prevent an entry in respect of a disposition from being entered in the register, but do not prevent a disposition from being made.

5.104 Fundamentally, therefore, we disagree that restrictions are relevant in an assessment of who is entitled to be registered as proprietor. Restrictions can be entered for very broad purposes, including to protect contractual obligations.[63] Restrictions do not determine who is an owner of land; as we explained above, that is a matter of the general law, which is unaffected by restrictions. In our view, rather than dictating whether a person is entitled to exercise owner's powers, restrictions limit the scope of owner's powers from the point of view of a disponee, by preventing a disponee from being registered. The restriction operates by limiting the powers of A, from whom the disposition to C must ultimately be traced back to, as the registered proprietor of the estate; it does not, however, mean that B does not have owner's powers.

5.105 On either view, as long as it is shown at the time of the application for registration that B has complied with a restriction in the register against A's title, C can rely on B's owner's powers to obtain registration (assuming the transfer to C is otherwise valid). If the restriction has not been complied with at the time of registration, however, then C cannot obtain registration.

5.106 Relating to the above point that transactions during the registration gap inevitably pose some risk, this policy will also impose a requirement on C: C will be required to assure him or herself that, at the time of registration of his or her interest, B will be in compliance with the restriction.

5.107 In our view, the same result should follow from a limitation on a disponee's powers (B in our example) that was not yet reflected in the register because B was not yet registered as proprietor. It is not clear that this would be the case based on the current

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60 Relying on the concept of feeding the estoppel as explained in *First National Bank plc v Thompson* [1996] Ch. 231, 241.

61 We believe that the same approach would apply with regard to the completion of a SDLT certificate: it would be assessed retrospectively, at the end of the chain of transactions.

62 Relying on *First National Bank plc v Thompson* [1996] Ch. 231.

63 A point we discuss in more detail in Ch 10.

wording of the LRA 2002, however. We discuss this point at paragraph 5.152 and following below.

### The requirement to apply for registration

5.108 As noted above, in its consultation response, Berwin Leighton Paisner LLP suggested that registrable dispositions that are not lodged for registration within two months should become void. Alternatively, it suggested that a disponee under a registrable disposition who has not lodged his or her application for registration should be excluded from being a person "entitled to be registered" for the purposes of the LRA 2002.

5.109 We do not propose to take forward either of these suggestions. Both would introduce unnecessary complication and would not, in our view, fulfil the functions of owner's powers. The first proposal to render a transaction void on failure to apply for registration could cause title to be sterilised by preventing the owner from dealing with the land. Given that the registered proprietor has divested his or her interest in the land and possibly moved on, it is not clear who would be able to make any dispositions of the land. Berwin Leighton Paisner LLP suggested that it would be possible to "revive" the disposition by late registration; although this might ameliorate the concern about sterilisation, it nevertheless introduces complexity that is not, in our view, necessary. The second proposal, to prevent those who had not yet applied for registration from exercising owner's powers, would fail to facilitate purchase mortgages and sub-sales, two of the major practical functions of owner's powers.

### Other persons entitled to be registered

5.110 Some consultees commented on other categories of persons who could be considered as entitled to be registered as proprietor.

5.111 Berwin Leighton Paisner LLP and Everyman Legal said our provisional proposal could suggest that an adverse possessor could be "entitled to be registered". Berwin Leighton Paisner LLP advised that an exception should be carved out to ensure that this interpretation is not adopted. We agree that there are situations in which an adverse possessor might be "entitled to be registered as proprietor" of registered land under the LRA 2002.[64] We do not, however, consider that an exception for adverse possession is necessary. It seems unlikely that any issues relating to this point will arise in practice. It is unlikely that a person would enter into a transaction with an adverse possessor who had not yet been registered as proprietor, given the apparent risk that such a person is

[64] That is, we consider that an adverse possessor might be entitled to be registered in three situations: (1) on an application by the adverse possessor under para 1 of sch 6 to the Act, the adverse possessor is entitled to be registered under para 5 of sch 6 if the registered proprietor of the estate does not require the application to be dealt with under para 5 or if one of the three conditions in para 5 are established; (2) on application by the adverse possessor under para 6 of sch 6, if the adverse possessor fulfils all the requirements necessary to make a further application pursuant to that paragraph; and (3) when the paper owner's title was extinguished prior to the coming into force of the LRA 2002 but after the estate was registered under the LRA 1925, pursuant to para 18 of sch 12 to the LRA 2002, which preserves the right under the LRA 1925. We discuss adverse possession in detail in Ch 17.

not entitled to be registered; if the person did enter into such a transaction, we believe that they would be likely to take steps to protect themselves against the risk.[65]

5.112 The Law Society asked us to consider whether express provision should be made in relation to owner's powers on death or bankruptcy of the sole registered proprietor, specifically allowing the personal representative or trustee in bankruptcy to exercise owner's powers without having to apply to be registered as the proprietor. Under the current law, personal representatives and trustees in bankruptcy are able to exercise owner's powers.[66] Since the ability of these classes of proprietor to exercise owner's powers is well established, we do not think that it is necessary for us to make any recommendations on this point.

5.113 Christopher Jessel suggested that a person who, in accordance with the principle in *Saunders v Vautier*[67] is entitled to demand a transfer in his or her favour, or a person who is entitled to appoint new trustees under the Trusts of Land and Appointment of Trustees Act 1996, should be regarded as entitled to be registered even if legal title is outstanding in the trustees. We disagree. To consider such people as entitled to be registered would extend our provisional proposal by giving owner's powers to a person who is not the legal owner in accordance with the general law, which we think goes too far.

### Drafting

5.114 As noted at paragraphs 5.33 and 5.34 above, some consultees expressed surprise that clarification is required of what "entitled to be registered as the proprietor" means or made the general point that care would be needed in drafting any amendment of section 24 in order to prevent creating other, unanticipated problems.

5.115 We have taken heed of those concerns. After reflecting on them, we are now of the view that it is unnecessary to amend the LRA 2002 in order to clarify that a disponee is "entitled to be registered as the proprietor" for the purpose of owner's powers. On reflection, and in the light of consultees' comments, we consider that the scope of this category of person is determined by the general law.

## What is the scope of owner's powers?

5.116 Consultees raised a number of concerns with our provisional proposal about the scope of owner's powers. Some of these concerns were borne out of a misunderstanding of our proposal; we clarify our policy below. Others raised difficult conceptual issues, which have caused us to refine our policy.

5.117 Some consultees took our provisional proposal too far. They suggested that owner's powers grant a person entitled to be registered all of the powers of a registered proprietor. They do not. Owner's powers are expressly limited to powers of disposition;

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65 For example, if an adverse possession claim relates to a small part of land that is being transferred, the disponee may obtain a statutory declaration from the disponor.

66 In relation to personal representatives, see LRA 2002, Explanatory Notes on s 24, para 35; LRR 2003, r 162(1). In relation to trustees on bankruptcy, see Insolvency Act 1986, s 306; Law Com No 271, paras 11.39 to 11.41.

67 41 ER 482, (1841) Cr & Ph 240.

they do not give an unregistered owner all the powers of a registered, and so legal, proprietor.[68]

5.118 A number of consultees expressed concern that our proposal to eliminate *nemo dat* for the purpose of section 26 would have broader consequences than we intended. In particular, consultees questioned whether eliminating *nemo dat* would operate so that owner's powers would make fraudulent or otherwise invalid transfers valid.

5.119 Consultees also raised issues in respect of the effect of restrictions not yet reflected in the register, both generally and in relation to the exercise of owner's powers by a person entitled to be registered.

5.120 However, as we explain, our general view about the scope of owner's powers remains the same as the view we offered in the Consultation Paper. We think that owner's powers, the power of disposition in section 23, are intended to be broad, to confer on owners all the general powers to convey and grant all the interests that exist in relation to unregistered land.[69] However, this general power is limited by section 26; that is, the powers are conferred for the purpose of protecting disponees. To ensure that the owner's powers provisions are interpreted as intended, we make three recommendations to clarify the provisions.

### The consequences of eliminating *nemo dat* for the purpose of section 26

5.121 The purpose of our provisional proposal is to eliminate *nemo dat* during the registration gap, when B only has an equitable interest because the disposition to B has not yet been registered. B is entitled to be registered (indeed is required to do so in order to complete the disposition);[70] he or she may therefore exercise owner's powers. However, in some cases, courts have determined that B cannot create a legal interest during the registration gap due to *nemo dat*.[71] Generally, consultees agreed with the

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68 For this reason, we disagree with the suggestions of Berwin Leighton Paisner LLP and the Society of Legal Scholars that our proposals mean that a person entitled to be registered has "full powers" as if registered as the proprietor, for example, so that a transferee of a registered charge is able to enforce its rights as a chargee without registration pursuant to owner's powers. See Ch 19 for further discussion of the powers of a chargee under the LRA 2002, where we make a recommendation to address this uncertainty: see para 19.28 and following below. We also disagree with the argument made in *Stodday Land Ltd v Pye* [2016] EWHC 2454 (Ch) that owner's powers would give, after an assignment, the equitable owner of the reversion the authority to serve a notice to quit under the Agricultural Holdings Act 1986, sch 3, case B, when the law requires the legal proprietor to serve the notice (this argument did not succeed because Norris J, in considering the application of *nemo dat*, determined that an equitable owner does not have the power to give notice under the general law).

69 Amy Goymour and Stephen Watterson aptly described it as follows: "Section 23's reference back to the 'general law' thus plays an important role in ensuring that the numerus *clausus principle* is incorporated into the land registration regime": "A Tale of Three Promises: (3) The Empowerment Promise", in A Goymour, S Watterson and M Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (2018) p 382. "Numerus clausus" refers to the rule that the class of rights that can constitute property rights is limited to what the law has already identified as such; that is, no new types of property interest can be created: see Law of Property Act 1925, s 1.

70 LRA 2002, s 27.

71 *Scott v Southern Pacific Mortgages Ltd* [2010] EWHC 2991 (Ch) at [61] to [63]; *Scott v Southern Pacific Mortgages Ltd* [2012] EWCA Civ 17, [2012] 1 WLR 1521 at [58] to [61]; *Skelwith (Leisure) Ltd v Armstrong* [2015] EWHC 2830 (Ch), [2016] 2 WLR 144 at [57] to [58].

need to reverse this point: our proposal is that *nemo dat* should not apply so that B can convey a legal interest or estate to C during the registration gap, to enable common conveyancing practices.[72]

5.122 We explained above consultees' arguments that our provisional proposal about who can exercise owner's powers should only apply to a person with a valid transfer or grant of a registrable estate in his or her favour. We agree, but think this point is already addressed by the general law, and need not be covered in the provisions on owner's powers. However, related to this point is whether our provisional proposal to eliminate *nemo dat* would have the consequence that fraud and other void transfers would be made valid by virtue of owner's powers. *Nemo dat* is why B's unregistered title in cases of fraud is void and we must ensure that *nemo dat* continues to play this role in invalid transactions.

5.123 We do not think our provisional proposal has the consequence of making invalid dispositions valid. It is to be more narrowly construed than some consultees understood it to be: we provisionally proposed that "for the purpose of preventing the title of a disponee being questioned, the exercise of owner's powers of disposition… should not be limited by" *nemo dat*.[73] Our proposal does not obliterate *nemo dat* generally under the LRA 2002, in particular in relation to priorities or for the concept that a void transfer does not confer rights. Our proposal applies only for the purposes of the exercise of owner's powers pursuant to section 26. Consequently, if a fraudster conveys A's property to B, *nemo dat* still governs to say that B has not been conveyed anything at all (the fraudster not having owner's powers to exercise); B therefore is not entitled to be registered, and accordingly is also unable to exercise owner's powers for the benefit of C.

5.124 We see owner's powers as operating in two distinct phases: first applying to the transaction from A to B, and secondly applying to the transaction from B to C. Owner's powers do not operate overall to the transactions from A through to C. Consequently, C cannot argue that, from his or her perspective, without *nemo dat*, the transaction from A to B has been "cured".

5.125 We have ensured that our recommendation, and our amendment of the LRA 2002, only has this narrow effect.

5.126 More difficult is the issue of whether our provisional proposal to eliminate *nemo dat* in relation to owner's powers prevents rectification of any registered dispositions subsequent to a mistake in the register.

5.127 For the doctrine of mistake and rectification to operate, after a fraudulent ABC scenario (illustrated in figure 4 above), if B is registered, or if C is registered without B being

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[72] Which is not to say that C will have a legal estate in advance of registration of the disposition from B to C: if the disposition is required to be registered under s 27, C will not have a legal estate until the disposition is in fact registered. However, C can register the disposition from B to C before B registers the disposition from A to B (subject to C satisfying the registrar that, at the time of registration, B will be in compliance with any restrictions in the register, as we discussed at para 5.104 above). We note the evidence that HM Land Registry requires of C, to establish that B was in fact entitled to exercise owner's powers by having a valid transfer in his or her favour, may make this situation unlikely to arise in practice.

[73] Consultation Paper, para 5.63(1).

registered first, the registration is a mistake. HM Land Registry would not have registered either B or C had it known of the mistake, so neither should be shielded from a claim for rectification of the register on the basis of owner's powers. If B (or C) does get registered, although the registration is a mistake, section 58 gives B (or C) title. Therefore, any alteration of the register will amount to rectification, and loss arising from the rectification may be indemnified pursuant to schedule 8. Furthermore, we think that owner's powers cannot operate such that the onward transfer from B to C (or C to D and so on), after B (or C) is registered, is protected, meaning that the register cannot be rectified against C. Although owner's powers enable the disponee to rely on the register of title (and so HM Land Registry cannot refuse to register any valid onward disposition from the registered proprietor), owner's powers do not mean that the further dispositions are not also mistakes. We agree with the Deputy Adjudicator in *Ajibade v Bank of Scotland*[74] that owner's powers do not prevent the correction of an (earlier) mistake in the register.

5.128 However, some consultees[75] raised concerns that, without *nemo dat* applying to the exercise of owner's powers by B, a registered proprietor, there is no basis for holding that the registration of C in this situation is a mistake. *Nemo dat* allows the transactions after the fraud, despite being registered and so benefiting from the section 58 guarantee, to be unravelled. On reflection, we think that these consultees are correct.

5.129 In order to address this concern, we have drawn a line around our recommendation to eliminate *nemo dat* in the context of owner's powers so that it only applies in relation to persons entitled to be registered as proprietor. As we noted above, the mischief this recommendation seeks to address is the registration gap, in particular, it will ensure that persons entitled to be registered are able to convey legal interests during that period. Although the LRA 2002 currently makes no distinction as to how owner's powers operate for registered proprietors on the one hand, and for persons entitled to be registered as the proprietor on the other, doing so confines our proposal about *nemo dat* to the situations where it is needed. We think that there is merit in both policy and drafting terms in separating out the treatment of registered proprietors and persons entitled to be registered.

5.130 We therefore take this approach in our recommendation and the clause to implement it (which we discuss in more detail at paragraph 5.168 below). By confining our recommendation in respect of *nemo dat* to persons entitled to be registered, we avoid the outcome, identified by consultees, that the doctrine of mistake could no longer apply once a registered proprietor exercised owner's powers.

5.131 This approach bolsters a recommendation we make in relation to mistake in Chapter 13. There, in response to consultees' comments, we recommend that the LRA 2002 should be amended to make it explicit that where a transfer from A to B is fraudulent, registration of C (and any disponee of C) is a mistake.

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74 REF/2006/0163/0174, unreported, 8 April 2008. Specifically, Mr Rhys, acting as Deputy Adjudicator, found that a disposition after the mistaken registration of a disposition is not prevented from being a mistake by s 26.

75 In particular, the Society of Legal Scholars and Dr Aruna Nair. Dr Simon Cooper, in his consultation response to Chs 13 and 14, also made this point, referring us to his paper S Cooper, "Resolving Title Conflicts in Registered Land" (2015) 131 *Law Quarterly Review* 108.

5.132 In taking this approach, we have not needed to pursue the other suggestions of consultees. We think that some of those solutions are flawed.

5.133 We do not agree with the Society of Legal Scholars' suggestion that a person entitled to be registered as the proprietor should be able to exercise "exactly the same powers as if he were already registered as the proprietor of the registered estate". We disagree for three reasons. First, this suggestion does not confine owner's powers to powers of disposition; as we stated above, we believe that owner's powers do not, and should not, give a person entitled to be registered all the powers of a registered proprietor to deal with the legal estate. Secondly, it might allow C to have the benefit of section 26 even in the case of an unregistered forged transfer to B, because once C is registered, section 58 applies to vest a legal estate in him or her. Thirdly, it would not achieve one of the main aims of owner's powers, that is, to ensure that limitations on trustees' powers of disposition not reflected in the register do not affect the validity of a disponee's title, a point conceded by the SLS. We believe that limitations on trustees' powers, or the Ferris and Battersby effect, should be addressed with the LRA 2002, particularly given that they were already meant to have been; we note that many consultees agreed with this clarification of owner's powers.

5.134 We also do not agree with the Chancery Bar Association that the concept of feeding the estoppel is sufficient such that the registration of a subsequent disposition would validate a previous disposition that was invalid. This approach would not work because it would require that B be registered before C is registered, which may not always happen in relation to sub-sales.

5.135 As a consequence of our recommendations, an unusual situation could arise: a mortgage held by C against B's property could appear in the register as against A. Consider the following example: B purchases property from A, and grants a mortgage to C. C registers its mortgage but B does not apply to be registered as proprietor of the estate. The register therefore gives a confusing view of title. We agree that this situation is not ideal; however, we also see it as the logical conclusion of extending owner's powers to persons entitled to be registered and enabling them to convey legal interests in advance of registration.

5.136 Because B has failed to register the disposition from A to B, A is a bare trustee for B. We wonder whether A, in his or her capacity as trustee, could require B to be registered as proprietor (which A might want to do if motivated to address the situation; for example, if C sought to exercise its power of sale against the property). It may be that section 6(2) of the Trusts of Land and Appointment of Trustees Act 1996 allows A to do so. It provides that, when each beneficiary is absolutely entitled to the land, the trustees have the power to convey the land to the beneficiaries, and further that "the beneficiaries shall do whatever is necessary to secure that it vests in them" and "if they fail to do so, the court may make an order requiring them to do so".[76] In any event, we do not think we need to recommend reform to address this point.

[76] A might also be able to apply to alter the register, although may lack sufficient evidence of the transfer for the application to be successful.

Limitations not reflected in the register: the powers of trustees and overreaching

5.137 Many consultees, including Professor Battersby, agreed with our proposal to clarify that owner's powers protect disponees from limitations on trustees' powers of disposition that are not reflected in the register, to ensure that the Ferris and Battersby effect is addressed by the LRA.

5.138 We continue to be of the view that *HSBC plc v Dyche*[77] has cast doubt on whether section 26 of the LRA 2002 is successful in preventing a disponee's title from being questioned on the basis that the registered proprietor, as a trustee, acted outside his or her powers in making the disposition. We therefore recommend amendment of the LRA 2002 to clarify that section 26 protects disponees from limitations on trustees' powers of disposition, so long as those limitations are not reflected by an entry in the register, in the form of a restriction.

5.139 It is also worthwhile for us to comment on the relationship between section 26 and overreaching. As we noted above, overreaching is the means by which some interests in land are removed from the land on a disposition and attach to the proceeds of sale.[78] In the Consultation Paper we stated that the doctrine of overreaching, as a part of the general law and not confined to registered land, is not within the remit of our current project.[79] Although some consultees expressed concern about the operation of owner's powers in relation to the doctrine of overreaching, we remain of the view that we should not make recommendations in relation to overreaching. However, in so far as overreaching interacts with owner's powers in dispositions of registered land, we believe that it is right for us to comment on it.

5.140 Professor Gardner argued that section 26 could operate to allow beneficial interests to be overreached absent the payment of purchase money to at least two trustees, a result that, in his view, should not be permitted. In a similar vein, the Chancery Bar Association expressed concern, based on *Mortgage Express v Lambert* ("*Lambert*"),[80] that a person in actual occupation of land would be prevented from asserting an equitable interest against a disponee as a consequence of owner's powers.

5.141 We do not agree that owner's powers have the effect on overreaching that Professor Gardner suggests. Owner's powers (and in particular section 26) do not cause overreaching to occur.[81] However, overreaching and the operation of owner's powers, in combination with the priority rules in section 29 of the LRA 2002, can effectively achieve the same result: the disponee takes free of the prior equitable interest, and the beneficiary of that interest can only seek a remedy against the trustee personally.[82] We

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77 [2009] EWHC 2954 (Ch), [2010] BPIR 138.

78 See para 5.58 above.

79 Consultation Paper, para 1.20.

80 [2016] EWCA Civ 555, [2016] 3 WLR 1582.

81 We note the argument that overreaching in registered land is governed by land registration statutes has also been advanced by Nicola Jackson: see N Jackson, "Overreaching in Registered Land Law" (2006) 69 *Modern Law Review* 214; N Jackson, "Overreaching and Unauthorised Disposition of Registered Land" [2007] *Conveyancer and Property Lawyer* 120.

82 See Law Com No 271, para 4.10.

understand the concerns expressed by Professor Gardner and the Chancery Bar Association, in the light of the recent decision of the Court of Appeal in *Lambert*[83] in which the distinct roles played by owner's power and section 26 on the one hand, and priorities and section 29 on the other, appears to have been conflated.

5.142 Leaving *Lambert* to one side, the relationship between overreaching and owner's powers is as follows. Where trustees, in the exercise of their owner's powers, sell the land, the beneficial interests are overreached if the conditions for overreaching in the Law of Property Act 1925 are fulfilled.[84] If the conditions for overreaching are not met, then the beneficial interest is not overreached and a priority question arises between the beneficiaries and the disponee. The priority question is answered by reference to section 29 of the LRA 2002. Under section 29, the disponee will take free from the beneficial interest unless the interest is protected as an overriding interest by virtue of the beneficiary being in actual occupation of the land.[85] This outcome is reflected in the seminal decisions of the House of Lords in *Williams & Glyn's Bank Ltd v Boland*[86] and *City of London Building Society v Flegg*.[87]

5.143 *Lambert* appears to cast doubt on this analysis. In that case, Ms Lambert had sold her flat at an undervalue to the registered proprietors (Mr Sinclair and Mr Clement)[88] in a "sale and leaseback" arrangement. Following the purchase, which was funded with bridging finance,[89] the purchasers used the flat as security for a mortgage granted to Mortgage Express. It was held that Ms Lambert had a right to set aside the sale of her flat as an unconscionable bargain and that her right to do so was a property right for the purposes of the priority provisions in the LRA 2002.[90] However, the Court of Appeal held that in the absence of a restriction in the register at the time of the mortgage granted to Mortgage Express, their title could not be questioned, even if Ms Lambert could establish an overriding interest.

5.144 The decision in *Lambert* is a surprising one. It appears to suggest that section 26 "trumps" section 29, so that a disponee can rely on the registered proprietor acting within his or her owner's powers to defeat a claim to an overriding interest. That interpretation is in conflict with (for example) the accepted position in respect of beneficial interests established in *Boland* and *Flegg*. As Professor Martin Dixon has explained, if *Lambert* is correct, "it reduced the role of overriding interests significantly, perhaps rendering them largely otiose, because it gives primacy to section 26 over

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83 *Mortgage Express v Lambert* [2016] EWCA Civ 555, [2016] 3 WLR 1582.

84 Law of Property Act 1925, ss 2 and 27(2).

85 For an illustration of the different between a beneficial interest being overreached, and a disponee taking free from the interest under s 29, see *Haque v Raja* [2016] EWHC 1950 (Ch).

86 [1981] AC 487, [1980] 3 WLR 138.

87 [1988] AC 54, [1987] 2 WLR 1266.

88 Following the sale and subsequent mortgage, the flat had been transferred into the sole name of Mr Sinclair.

89 The precise course the transaction took is relevant in so far as it took the case outside the ratio of *Scott v Southern Pacific* [2014] UKSC 52, [2015] AC 385. If that case had applied, then there would have been no question that Mortgage Express could not be bound my Ms Lambert's property rights, and no priority dispute would have arisen.

90 As a result of the LRA 2002, s 116.

section 29 LRA 2002".[91] We agree with his conclusion that the decision is based on a "misreading" of the combined effect of sections 26 and 29.[92]

5.145 We note that the decision in *Lambert* is based in part on an example given of the effect of section 26 in the joint report of HM Land Registry and the Law Commission that preceded the LRA 2002.[93] In our view, the example used from the 2001 Report does not, in fact, support the reasoning of the Court of Appeal in *Lambert* that reliance on an overriding interest amounts to "the title of a disponee being questioned".[94] In the example we gave in the 2001 Report, the requirements of the Law of Property Act 1925 for overreaching were met, so overreaching did occur. The effect of section 26 in that example was to prevent the beneficiary from arguing that overreaching did not occur. As a result, the beneficiary had no property interest to assert as overriding on a registered disposition.[95]

5.146 We consider that the correct position is sufficiently clear both in the terms of the legislation and in other authorities, that law reform by amendment of the LRA 2002 is neither necessary nor appropriate. Section 26 ensures that, in the hands of the disponee, the disposition is valid. However, it does not do more: section 26 does not determine priorities. Section 29 governs which pre-existing interests are postponed to the registered disposition.

5.147 We also comment on the point of the effect of section 26 more generally. We reiterate that section 26 only operates for the benefit of preventing the validity of a disponee's title from being questioned. Section 26 does not prevent beneficiaries from claiming personally against trustees for breach of trust. It also does not prevent beneficiaries from making personal claims against disponees. This concern, in particular about claims of knowing receipt against disponees, was raised by the Chancery Bar Association.

5.148 Section 26(3) specifically provides:

> This section has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of the disposition).

5.149 In our 2001 Report we explained that, despite owner's powers, knowing receipt claims could continue to be made against disponees:

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91 M Dixon, "Priority, overreaching and surprises under the Land Registration Act 2002" (April 2017) 133 *Law Quarterly Review* 173, 175. See also, A Televantos, "Unconscionable bargains, overreaching and overriding interests" (2016) 75(3) *Cambridge Law Journal* 458.

92 M Dixon, "Priority, overreaching and surprises under the Land Registration Act 2002" (April 2017) 133 *Law Quarterly Review* 173, 176.

93 Law Com No 271, para 4.10.

94 See *Lambert*, at [27] and M Dixon, "Priority, overreaching and surprises under the Land Registration Act 2002" (2017) 133 *Law Quarterly Review* 173, at pp 175 to 176.

95 The Court of Appeal in *Lambert* also held that Mortgage Express's interest had priority over Mrs Lambert because any potential interest would have been overreached, and because any potential interest would have fallen within LRA 2002, sch 3, para 2(b): see *Lambert* at [29] to [42]. We do not comment on these aspects of the decision.

> Although C's title cannot be called into question, the protection given by [section] 26 does not extend to any independent forms of liability to which she might be subject. Thus if C knew of the trustees' breach of trust when the transfer was made, she might be personally accountable in equity for the knowing receipt of trust property transferred in breach of trust.[96]

5.150 Our provisional proposal was couched in similar terms. We note that the matter is not beyond doubt; in particular, the High Court of Australia in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* held (in respect of equivalent Australian legislation) that recipient liability could not be imposed against a defendant who had statutory protection against the beneficiaries' equitable interests.[97] However, the Privy Council has expressed the opposite view.[98]

5.151 We have ensured that our recommendation and our clause to amend the LRA 2002 do not disturb this effect of section 26. Section 26, under the LRA 2002 and under our recommendations, is no impediment to any personal claims that a beneficiary of an equitable interest has, either against the trustees or the disponee; it solely operates to prevent the validity of the disponee's title from being questioned.

### Limitations not reflected in the register: persons entitled to be registered as the proprietor

5.152 A point in relation to the operation of section 26 and limitations arises in relation to persons entitled to be registered, as a qualification to the position in paragraph 5.137 above. Consider the situation illustrated in figure 5.

Figure 5: a limitation on a person entitled to be registered

A transfers to B, and during the transfer a trust is created, imposing a limitation on B's powers of disposition. Under the limitation, any disposition by B requires the consent of X.

Without being registered as the proprietor and so before a restriction can be entered reflecting the limitation on B's powers, B transfers the land to C.

5.153 Since there was no restriction in the register at the time of the transfer to C, does section 26 operate so that the validity of C's interest cannot be questioned and the restriction does not apply to C's interest? More particularly, what if B conveys the land on to C before registering, but is registered (together with a restriction) before C is registered?

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96 Law Com No 271, explanatory notes to the draft Bill, para 122.

97 [2007] HCA 222 at [193] to [198]. This view is supported by M Conaglen and A Goymour, "Knowing Receipt and Registered Land", in C Mitchell (ed), *Resulting and Constructive Trusts* (2010), but doubted by N Hopkins, "Recipient Liability in the Privy Council: *Arthur v Attorney General of the Turks and Caicos Islands*" [2013] *Conveyancer and Property Lawyer* 61.

98 *Arthur v Attorney General of the Turks and Caicos Islands* [2012] UKPC 30. See further *Haque v Raja* [2016] EWHC 1950 (Ch). There, a claim for knowing receipt against a disponee of land who had taken free of a beneficial interest under s 29 (in the absence of overreaching) was accepted in principle, but failed on the facts.

Can C then be registered if the restriction has not been complied with? Further, does the restriction apply to C's title in that case such that C must comply with it in a further disposition? This last issue could arise where, for example, the restriction reflects a covenant in the lease and the disposition from A to B and then to C is an assignment of the lease. It would not arise where a restriction reflected a limitation particular to B; for example where B held the title on trust and, as a result of overreaching, C took title free from the trust.

5.154 In both of the above cases, based on the wording of the current section 26(1)(a), as well as the provisions governing restrictions in sections 40 and 41, it appears that C would not have to comply with the restriction, since it was not "reflected by an entry in the register".

5.155 However, we think that, in both cases, C should be bound by any limitation on B's powers of disposition. Disponees dealing with persons not yet registered as the proprietor face greater risks, and therefore must undertake more due diligence, than disponees dealing with registered proprietors. We discussed this point at paragraphs 5.96 and 5.97 above in relation to the validity of transactions. These points apply equally in respect of limitations on proprietor's powers of disposition. A disponee cannot rely upon the register of title for an (as yet) unregistered transaction: the disponee must satisfy him or herself that the proprietor has the powers of disposition that he or she purports to have. We understand that, in practice, disponees commonly do undertake such due diligence: for example, the solicitor of a mortgagee granting a purchase mortgage will check all title documents in the purchase to ensure that the purchaser can convey the mortgagee a valid charge and so the mortgagee will be able to register that charge.

5.156 We therefore recommend that this point should be clarified in the LRA 2002 to ensure that disponees dealing with persons entitled to be registered are bound by any limitation on the proprietor's powers of disposition not yet protected by a restriction, such that C is bound by the restriction.

### Limitations not reflected in the register: mistaken removal of restrictions

5.157 If a limitation on a registered proprietor's powers of disposition is not reflected by a restriction in the register, section 24 provides that the validity of a disponee's title cannot be questioned. But what if the fact that there was no restriction was itself a mistake?

5.158 If, due to fraud, or as a result of a mistake by HM Land Registry, a restriction was omitted or removed from the register, the person with the benefit of the restriction (X) may be able to seek an indemnity for any loss arising from that mistake. If, however, before the mistake was noticed, the registered proprietor (A) transferred or granted a charge of the land (to B) contrary to the terms of the restriction, it is likely that the onward transfer would not be classed as a mistake. As we have explained, the validity of a disposition is determined by the general law. If the failure to comply with the terms of the restriction only rendered the disposition from A to B voidable, rather than void, the registration of B would not itself be a mistake; according to the general law, the disposition to B would be valid at the point at which B was registered. In that case, while the person who lost the benefit of the restriction would be able to apply for indemnity, the validity of C's title could not be questioned, in accordance with section 26(3).

5.159 We think the law as it stands addresses this point, so we do not make any recommendation in relation to it.

## RECOMMENDATIONS

### Who can exercise owner's powers

5.160 Consultees responded very positively to our first provisional proposal on owner's powers, agreeing that a person who has a transfer or grant of a registrable estate or charge in his or her favour is "entitled to be registered as the proprietor".

5.161 Some consultees raised points about the validity of that transfer or grant, and the time when compliance with a restriction needs to be shown. These points caused us to consider our recommendation and the purpose of owner's powers. That thinking usefully clarified our aims. Our interpretation of the LRA 2002 remains unchanged: we think that disponees, like other owners under the general law, are entitled to be registered as the proprietor and so entitled to exercise owner's powers.

5.162 Of course, in accordance with the provisions in the LRA 2002 and pursuant to the general law, there are other circumstances in which a person is entitled to be registered. Most notably, a person may be entitled to be registered by operation of law, for example on the death or bankruptcy of the proprietor.[99]

5.163 Flowing from our view that the general law provides the answer as to who is an owner and so entitled to be registered, we do not think that the legislation needs to be amended. The LRA 2002 need not spell out every category of persons entitled to be registered as the proprietor. The LRA 2002 in its other provisions and the general law determines this issue. There is no need for the owner's powers provisions to replicate them. We therefore do not make a recommendation to clarify this point.

### The scope of owner's powers

5.164 Given our above discussion, our recommendations in relation to our second provisional proposal, covering the scope of owner's powers, need to be modified, and in particular, made narrower in scope, in order to prevent unintended consequences.

5.165 First, we note that owner's powers only operate for the benefit of disponees, to prevent the validity of their title from being questioned. They do not actually extend an owner's powers of disposition. Because they do not alter the lawfulness of any disposition, they do not shield an owner or a disponee from any personal claims (for example, for breach of trust). The owner's powers provisions already make this point clear. We therefore do not think any recommendations need to be made in respect of it.

5.166 As we explained, owner's powers perform a number of functions. Some of the detail of these functions is not sufficiently clear from the face of the LRA 2002. We think that three clarifications are necessary in order for the owner's powers provisions to achieve what was originally intended.

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[99] LRR 2003, rr 162 to 163 and 168.

**Recommendation 8.**

5.167 We recommend that the LRA 2002 should be clarified such that, in the case of a person entitled to be registered as the proprietor, owner's powers are not limited by reason only of the fact that the person is not yet registered as the proprietor and so merely has an equitable, rather than a legal, title.

5.168 Clause 8 of our draft Bill enacts Recommendation 8. It makes clear that that a person who is entitled to be registered can exercise owner's powers – enter into transfers, leases and charges and so forth – which will take effect as legal interests in the hands of the disponee when the registration requirements (if any)[100] are met. In response to concerns raised by consultees, the clause addresses the issue narrowly, by inserting a new subsection into section 24. The new subsection provides that the fact that a disposition is made by a person who is not the registered proprietor does not, of itself, prevent the disposition from operating at law. It will apply in relation to exercises of owner's powers starting on the day the section comes into force.

**Recommendation 9.**

5.169 We recommend that the owner's powers provisions in the LRA 2002 should be clarified to ensure that any limitation on a trustee's powers of disposition, not reflected by an entry in the register, does not affect the validity of the title of the disponee.

5.170 Clause 9 enacts Recommendation 9, by inserting an amendment into section 26. The amendment states that limitations arising as a result of a trust, which are not reflected by an entry in the register, are included within the limitations against which section 26 protects disponees.

**Recommendation 10.**

5.171 We recommend that the LRA 2002 should be clarified such that a person who is dealing with a person who is entitled to be registered, but is not yet registered as the proprietor, is bound by any limitations on that person's powers of disposition not reflected in the register.

5.172 Clause 10 enacts Recommendation 10. It will amend section 26 by inserting new subsections (2A) and (2B). The effect of the new subsections is that the owner's powers of a person who is entitled to be registered will be subject to additional limitations that do not apply to a person who is the registered proprietor; that is, that a disponee will be bound by a limitation affecting the powers of disposition of the person entitled to be

[100] LRA 2002, s 29(4) deems the grant of an unregistrable lease as registered at the time it is granted. We discuss this point in more detail in Ch 9.

registered which are of a kind that could be reflected by an entry in the register. Purchasers and others dealing with a person who is not yet registered as the proprietor of the estate will therefore be required to undertake due diligence to discover if the disponee in fact has the powers of disposition he or she purports to have. It will apply to exercises of owner's powers starting on the day the section comes into force.

### Concurrency of powers

5.173 We explained in the Consultation Paper that because the LRA 2002 confers owner's powers of disposition on both the registered proprietor and the person entitled to be registered as the proprietor, each has a concurrent right to exercise owner's powers over the land. We did not make any provisional proposals on this point, on the basis that trust law addresses any problems: after a transfer, the registered proprietor holds the legal title on trust for the disponee, and so would be personally liable for breach of trust, which would include making dispositions of the land before the transfer has been registered.[101]

5.174 Some consultees[102] shared their views on the point of concurrency in their consultation responses. We are nevertheless unconvinced that there is a problem that needs to be solved.

## THE REGISTRATION GAP

5.175 In the Consultation Paper we also discussed, but did not propose reform, in relation to the registration gap.

5.176 We explained that much of the value of extending owner's powers to persons entitled to be registered as the proprietor is to address some of the problems arising from the registration gap: the time between completion and registration.[103]

5.177 However, owner's powers do not entirely solve the problems of the registration gap. Owner's powers enable a person who is entitled to be registered as the proprietor to enter into dispositions of the land during the registration gap; owner's powers do not encompass powers that are not powers of disposition. As we noted above, we do not consider that owner's powers enable a person entitled to be registered as the proprietor to have all the rights that accompany legal title, that is, the rights to use and enjoy land and to exercise certain functions under statute. The consequence of doing so would be to eliminate any significance from legal title passing on registration. Moreover, there could be unintended and unforeseen consequences: for example, extending legal rights of ownership could cause difficulties when the application for registration is found to be defective.[104]

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101 LRA 2002, s 7(2). See *Ruoff & Roper*, para 8.014.02 and Consultation Paper, paras 5.64 and 5.65.

102 Eg the Chancery Bar Association and Christopher Jessel.

103 Consultation Paper, paras 5.67 and 5.68.

104 Consultation Paper, para 5.82. To address uncertainty arising from the case law in relation to the powers of chargees, we recommend that the LRA 2002 should be amended to clarify that the owner's powers provisions in s 23(2) are confined to the power of disposition in respect of the registered charge itself, and do not confer a power to make a disposition of the property subject to the charge: see para 19.28 and following below.

5.178 Accordingly, owner's powers do not solve the problems of dealing with and managing estates in land during the registration gap. And problems do arise in practice. Most significantly, problems arise in relation to assignments of registered leases or the registered freehold reversion. Before an assignee of either the lease or the freehold reversion is registered, the assignment is only equitable, in accordance with section 27(1) of the LRA 2002. Therefore, the assignee tenant or landlord does not have the legal rights that go with the legal estate; the assignor retains the legal estate and the rights that go with it. The retention of the legal estate in the assignor has been held to limit the rights of the assignees to serve valid break notices and other types of statutory notices.[105]

5.179 As a part of our earlier project on land registration that culminated in the LRA 2002, we considered and dismissed two options for reform to ameliorate the registration gap in our 1998 Consultation Paper:

(1) changing the time at which legal title passes from the point of registration to the point of transfer, or to the point the application for registration is received by Land Registry: and

(2) taking away the registered proprietor's power to deal with the land once he or she has transferred the land.[106]

5.180 In the Consultation Paper, we explained that neither of these options are viable.[107]

(1) It is not an appropriate solution to vest legal title on completion because doing so would undermine the structure of land registration in the LRA 2002, which makes legal title contingent on registration. Furthermore, it is inappropriate for legal title to be vested in the disponee from the moment HM Land Registry receives the application for registration. Such a change would undermine the integrity of the register and could require purchasers to provide evidence of their applications in order to exercise powers as legal owner.

(2) Although the registered proprietor holds the land on trust for the disponee, and so is personally liable for any unauthorised dealing with the land, it is not apparent how this trust could be applied between the registered proprietor and third parties. Requiring third parties to ascertain the registered proprietor's power to deal with the land would undermine the conclusiveness of the register.

5.181 Moreover, these options do not account for what would happen if the application for registration was cancelled.

5.182 Accordingly, our view has been that the proposed legal solutions to the registration gap are inappropriate. Moreover, they might be unnecessary because practitioners have devised practical solutions to many of the problems. One, identified by the court in

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105 Consultation Paper, paras 5.69 to 5.72.

106 Law Com No 254, paras 11.29 and 12.80. See Consultation Paper, paras 5.75 and 5.76.

107 Consultation Paper, paras 5.77 to 5.84.

*Stodday Land Ltd v Pye*,[108] is that the seller can make the purchaser his or her agent so that the purchaser can serve notices and take other steps in the seller's name, pending registration.[109] Although we acknowledged that stakeholders experience practical problems with the registration gap, any legal solution might bring with it its own problems.

**Comments from consultees**

5.183 We therefore made no provisional proposals and asked no consultation questions on the issue of the registration gap.

5.184 Some consultees nevertheless commented on the registration gap. Several consultees disagreed with our statement that the problems occurring during the registration gap were operational (relating to the length of time that registration may take) rather than legal. They explained that the registration gap is caused by section 27(1), which provides that dispositions only take effect in equity until registered. They explained that the problems of the registration gap are exacerbated by operational issues.

5.185 Some consultees provided examples of problems in practice. In particular, some consultees identified problems caused in relation to landlord and tenant covenants.

5.186 The London Property Support Lawyers Group disagreed that transfer documents could be drafted in a way that could entirely prevent problems from arising during the registration gap. It explained that such drafting is not always possible and does not address specific issues in relation to leases, and provided examples of such cases.

5.187 The Berkeley Group also explained that it experiences practical problems with the registration gap, also with assignee landlords and new landlords. It noted that legislation designed to clarify and strengthen the law in relation to residential leases (for example, the Landlord and Tenant (Covenants) Act 1995) is often confusing in its operation due to a mismatch with the LRA 2002. The Berkeley Group argued for a solution that clarifies the law (including all related legislation) for the benefit of both landlords and tenants. Its preference is to make the assignment of a registered lease legal prior to registration as between the persons whose rights and liabilities are affected by the assignment (the second option we outlined in our 1998 Consultation Paper), or to extend section 29(4) of the LRA 2002 – which deems the grant of an unregistrable lease as registered at the time of the grant[110] – to registrable leases, such that a grant is assumed to be registered, and so legal, at the time of the grant, for the purposes of related legislation governing the identity of the landlord.

5.188 Nigel Madeley suggested that the registration gap causes difficulties in relation to covenants other than landlord and tenant covenants: he said that it prevents the operation of the rule that a successor in title takes the benefit of covenants so long as he or she has the legal estate, because the successor does not have the legal estate until registration.

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108 [2016] EWHC 2454 (Ch).

109 Above, at [41].

110 We discuss LRA 2002, s 29(4) in detail in Ch 9.

### Discussion

5.189 Consultees' comments have confirmed that the registration gap causes problems in practice. Difficulties arise in particular (but not only) in cases in which a lease or the reversion has been assigned, which is the context in which registration gap problems first came to light in *Brown & Root Technology Ltd v Sun Alliance & London Assurance*.[111]

5.190 Cases before the courts continue to demonstrate the problems created by the registration gap. In *Stodday Land Ltd v Pye*, the court determined that the notices to quit served by the assignee of the reversion[112] were invalid because only the legal owner could serve the notices: the assignee was not yet registered as the proprietor, and therefore only an equitable owner.[113] A similar result was reached in *Sackville UK Property Select II (GP) No 1 v Robertson Taylor Insurance Brokers Ltd*,[114] in relation to an assignment by the tenant: the court held that an assignee of a lease could not exercise a break option before being registered as the proprietor of the leasehold estate; the assignor was the registered proprietor and, as such, was the "tenant" who could serve the break notice within the terms of the lease. [115]

5.191 Problems during the registration gap may arise outside the leasehold context. Based on the decision at first instance, it appears that the case of *Baker v Craggs*[116] was an example of one. At the High Court, a purchaser of farm land found himself subject to an easement that was granted over his land by the sellers in the registration gap. The sellers granted the easement when they sold the remainder of their land (the barn) to another purchaser. The case was decided on a novel interpretation of overreaching, that saw the grant of the easement with the sale of the barn overreach the sale of the farm land, such that the farm land sale was subject to the easement which benefited the barn.[117]

5.192 On appeal, the Court of Appeal determined that overreaching had no role to play because an easement is not a legal estate in land, so the grant of an easement is not capable of being a disposition with overreaching effect.[118] Instead, the rules of priority in the LRA 2002 governed. As a consequence, the purchaser of the farm land was not subject to the easement granted in the sale of the barn: the first purchaser was in actual occupation of the farm land, so despite his disposition not being registered within the

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111 [2001] Ch 733, [2000] 2 WLR 566.

112 Under the Agricultural Holdings Act 1986, sch 3, case B.

113 [2016] EWHC 2454 (Ch). We disagree with the argument that owner's powers would confer on an owner anything other than powers of disposition, that is, the power to serve a notice to quit. This case therefore restricted the application of owner's powers to person entitled to be registered in line with *nemo dat*, following *Skelwith (Leisure) Ltd v Armstrong* [2015] EWHC 2830 (Ch), [2016] 2 WLR 144. We disagree with this view, as discussed throughout this chapter.

114 [2018] EWHC 122 (Ch).

115 Above at [33] to [38].

116 [2016] EWHC 3250 (Ch).

117 Commentators were very critical of the court's interpretation of overreaching: eg M Dixon, "The registration gap and overreaching" [2017] 1 *Conveyancer and Property Lawyer* 1.

118 Law of Property Act 1925, ss 1(1) and 2.

priority period, his interest nevertheless overrode the subsequent sale of the barn.[119] Although this case demonstrates that difficulties that can arise during the registration gap, it more clearly highlights the difficulties that can arise from mistakes in conveyancing: the sellers failed to reserve the easement on the sale of the farm land.

5.193 We acknowledge, as we did in the Consultation Paper, that we cannot solve the problems of the registration gap in this project. The only way to solve the registration gap is to close it. The only legal reform that can close the registration gap would be to reverse section 27(1) to provide that legal title passes on completion, not registration. This is not an option: legal title vesting on registration is the bedrock principle of registered land. Reversing it would be to undermine the entire scheme of the LRA 2002.

5.194 In our view, the only viable means of reducing, and ultimately closing, the registration gap is through electronic conveyancing. We make recommendations in Chapter 20 to facilitate the progress towards electronic conveyancing, where we confirm that simultaneous completion and registration should be the ultimate goal. By ensuring that the LRA 2002 facilitates the development of electronic conveyancing, we think we are taking the best approach that we can towards closing the registration gap in a manner that is consistent with the principles that underpin the LRA 2002.

[119] *Baker v Craggs* [2018] EWCA Civ 1126.

# Chapter 6: General and special rules of priority

## INTRODUCTION

6.1 In this chapter, we examine the priority rules in the LRA 2002. There are two: the basic priority rule in section 28 and the special priority rule in sections 29 and 30. The special priority rule in sections 29 and 30 only benefits registrable dispositions for valuable consideration. Our focus has been on whether the special priority rule should be extended to unregistrable interests that are noted in the register.

Terms used in this chapter

*Basic priority rule*: an interest created first in time takes priority over later created interests. Section 28 has the effect that the basic priority rule applies except in circumstances governed by the special priority rule.[1]

*Special priority rule*: the rule in section 29 (and also section 30) which benefits a registrable disposition by postponing to the disposition interests that are not protected in the register or are not overriding.

*Registrable dispositions*: dispositions which are required to be completed by registration under section 27.[2] They include transfers, the grants of certain kinds of leases, the grant of a legal charge, and the creation of some other interests, for example, certain easements, profits à prendre and rentcharges.

*Unregistrable interests*: interests which are not required to be registered pursuant to section 27, and which cannot take advantage of the special priority rule in section 29. They include interests only capable of existing in equity, including restrictive covenants and estate contracts. Among unregistrable interests, priority is determined by the basic priority rule; however, their priority against registrable dispositions can be protected by the entry of a notice.[3]

*Estate contracts*: an equitable interest in land, and so a type of *unregistrable interest*. A contract for the creation or transfer of an interest or estate in land. Examples include a contract for sale, an agreement for a lease, an option to purchase, and a right of pre-emption.

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1 *Megarry & Wade*, para 7-060; *Ruoff & Roper*, para 15.001.

2 LRA 2002, s 132(1).

3 Consultation Paper, para 6.9. To clarify, unregistrable interests cannot be substantively registered, but can be protected in the register by the entry of a notice. However, it is incorrect to say that they cannot be registered, because "registered" is defined as "entered in the register", and so includes the entry of a notice: LRA 2002, s 132(1). We discussed the difference between substantive registration and recording of interests in the Consultation Paper, paras 2.29 to 2.31.

6.2 Our consultation has led us to the conclusion that we should not recommend reform of the priority rules under the LRA 2002.

6.3 We provisionally proposed that the special priority rule should be extended to unregistrable interests, but we were mindful that not all unregistrable interests would be able to, or should benefit from, the special priority rule. We were also mindful that the priority of some unregistrable interests, namely home rights,[4] should not be affected by the extension of the special priority rule. We also sought the views of consultees as to the impact of our proposals, in order to prevent any increase in burden on parties or HM Land Registry.

6.4 Although consultees largely expressed support for introducing a new priority rule that would apply to unregistrable interests, they simultaneously expressed concern regarding the scope of any new priority rule. In particular, they worried about the application and effect of the rule in relation to interests that could not sensibly take advantage of it, and in consequence might suffer detriment under it. These interests include informally created interests, beneficial interests under a trust, interests arising by operation of law, and home rights. Significantly, consultees also did not suggest that there was a strong case for reform: they only gave limited evidence of instances of loss resulting from the existing priority rules.

6.5 We were aware in making our provisional proposal that we should proceed with caution. Consultees' concerns have underlined the need to be careful about making such significant reform of the rules governing priority. With the benefit of consultees' views, we have concluded against recommending reform. Without evidence of a need for reform, we think this is the wisest course.

6.6 Reform to enact a new priority rule would give rise to increased costs that we do not think are warranted, due to the limited evidence of problems in practice. We are also concerned that the new priority rule would add a level of complexity to an already complex aspect of the law of land registration, complexity which would be disproportionate to the benefit it would confer. Ultimately, we do not think that reform is justified.

6.7 Moreover, a wide range of exceptions would be necessary to take account of interests which it would not be desirable as a matter of policy to be allowed to take advantage of the special priority rule. These exceptions to the new priority rule would be so numerous that the rule would in essence be a rule about estate contracts and, in particular, about options to purchase (a form of estate contract).[5]

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4 Statutory rights granted to a spouse or civil partner to occupy the matrimonial or civil partnership home: Family Law Act 1996, s 30.

5 In *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52, [2015] AC 385, the Supreme Court suggested that a purchaser cannot create a property right in favour of a third party prior to completion of the purchase. This view is in tension with our view of the status of estate contracts as equitable interests in land. We do not consider this point further, but note that as a matter of the general law of property, it is outside the scope of our project.

6.8 In setting out the proposed priority rule in our Consultation Paper we had not envisaged a rule that would operate primarily to the benefit of any particular interest in land. As a matter of policy, it seems to us that a rule that primarily benefits one type of interest is different from a general rule. We fear that the new priority rule would disadvantage holders of other types of unregistrable interest, who are unable to benefit from the rule. It would also represent a fundamental divergence from the policy on which we consulted, which was intended to benefit a broad range of interests. It would be anomalous for the policy to operate only for the benefit of estate contracts, and moreover, in our view, there is no policy justification for putting those interests in a privileged position.

6.9 Doing so would also be anomalous within the scheme of the LRA 2002. Allowing estate contracts to be the sole type of equitable interest that could benefit from the special priority rule under section 29 would, in our view, effectively treat estate contracts as registrable dispositions under section 27. We do not believe that such special treatment is warranted.

6.10 Therefore, with the benefit of consultees' views, we do not recommend the introduction of a new priority rule.

## THE PRIORITY RULES UNDER THE LRA 2002

6.11 The priority rules under the LRA 2002 are provided in sections 28 to 30.

6.12 The basic rule of priority is found in section 28(1) of the LRA 2002:

> Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.

6.13 The basic rule is that the priority of any interest is unchanged by a later disposition. Although not express on its face, the effect of section 28(1) is that interests granted out of registered land have priority according to their date of creation, with earlier interests taking priority over later interests. As section 28(2) provides, "it makes no difference for the purposes of [the basic rule] whether the interest or disposition is registered":[6] first in time prevails.[7]

6.14 The basic rule is the starting presumption for priority under the LRA 2002. However, it is subject to an important exception: the special priority rule in section 29 of the LRA 2002. Section 29(1) provides that:

> If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

Section 30(1) makes similar provision in respect of dispositions of registered charges. Because of its broader application, we will focus on section 29 in this chapter.

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6 *Megarry & Wade*, para 7-060.

7 Law Com No 271, para 5.5.

6.15 The special priority rule offers a significant benefit for interests which fall within its scope, that is, registrable dispositions which are made for valuable consideration. On registration of a registrable disposition, section 29 gives the disposition priority over interests which would ordinarily have priority under the basic rule in section 28 if they are not protected at the time of registration.[8]

6.16 Unregistrable interests can be protected against registrable dispositions by entry of a notice in the register, which preserves the interest's priority on a registered disposition.[9] Grants of such interests are not, however, themselves "registrable dispositions" within the meaning of the LRA 2002, and so they cannot take advantage of the special priority rule.

6.17 We consider the operation of section 29 in more detail in Chapter 8 (in particular, what it means for an interest to be postponed on a registrable disposition).[10] Broadly speaking, the effect of registration of a disposition which falls within section 29(1) is that the disponee will take the property subject only to registered charges, interests which are the subject of a notice in the register,[11] and overriding interests. In particular, the disponee will not be affected by unregistered interests that are neither overriding interests nor excepted from the effect of registration.

## CONSIDERATIONS FOR REFORM

6.18 The special priority rule was not new in the LRA 2002. An equivalent provision, which gave protection to certain types of disposition for valuable consideration, existed under the LRA 1925.[12]

6.19 The special priority rule has been the subject of criticism since the 1970s. As a consequence, the Law Commission has examined it on a number of occasions.[13] We looked closely at it as part of our project leading to the LRA 2002. In our 1998 Consultation Paper, we identified a number of concerns about the law's treatment of priorities.

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8 For a more detailed discussion of the effect of s 29, and in particular, the effect of "postponement", see Ch 8.

9 LRA 2002, s 32. A restriction in the register may also reflect the existence of an unregistrable interest. A restriction regulates the circumstances in which a registrable disposition can be registered, but does not itself confer priority.

10 We also consider the requirement in s 29(1) for valuable consideration in more detail in Ch 7.

11 Including notices entered under ss 34 or 27, and notices entered to in respect of registrable dispositions under s 38 and para 7 of sch 2 to the LRA 2002.

12 LRA 1925, ss 20 and 23. See Consultation Paper, para 6.16.

13 See Transfer of Land – Land Registration (Fourth Paper) (1976) Law Commission Working Paper No 67, para 110; Third Report on Land Registration (1987) Law Com No 158, paras 4.97 and 4.98; Transfer of Land – Land Mortgages (1991) Law Com No 204, para 3.22.

(1) The law was uncertain, providing no clear definition of the rules regulating the priorities of overriding interests and unregistrable interests.[14]

(2) Unregistrable interests were given no security in relation to other, pre-existing unregistrable interests: entry in the register protected against registrable dispositions, but not other unregistrable interests, and there was no system of priority searches that applied on the creation of unregistrable interests.

(3) The law could lead to "anomalies". In particular, a pre-existing unregistrable interest could lose priority to a later unregistrable interest if that later interest ultimately became a registrable disposition (for example, an option which was exercised and so registered as a registrable disposition). An unregistrable interest could also effectively lose priority to a later created unregistrable interest if the former interest was not protected in the register but the latter was, and a registrable disposition effectively extinguished the former unprotected interest.[15]

6.20 In our 2001 Report, we did not proceed with wider reforms to the rules governing priorities. We anticipated that electronic conveyancing would resolve many of the concerns by effectively ensuring that the basic priority rule of first in time would prevail.[16]

6.21 Electronic conveyancing has not arrived in full form as quickly as we anticipated it would in 2001; therefore, we reconsidered the question of priority of unregistrable interests in the Consultation Paper for this project. In the Consultation Paper, we explained that many of the concerns we raised in the past remain concerns today. In particular, we noted that option agreements are frequently used to acquire development land, but that due to the priority rules option holders are vulnerable to pre-existing unregistrable interests about which they might have no means to discover.

6.22 Two examples make clear the risks that holders of unregistrable interests must contend with.[17] They are illustrated in figures 6 and 7.

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[14] Our 1998 Consultation Paper used the term "minor interests" rather than unregistrable interests, consistent with the language of the LRA 1925. This term is no longer used.

[15] Consultation Paper, para 6.19, citing Law Com No 254, para 7.27.

[16] Consultation Paper, para 6.23; Law Com No 271, para 5.3.

[17] For a fuller explanation and further examples, see paras 6.7 to 6.13 of the Consultation Paper.

Figure 6: example of the operation of sections 28 and 29

X is the owner of registered land. He grants a restrictive covenant not to develop the land to Y. Y does not protect her restrictive covenant by a notice in the register.

Several years later, X grants Z an option. Z protects his option in the register by way of a notice.

Due to section 28, Y's restrictive covenant has priority over Z's option. That is, Z's option is subject to the restrictive covenant not to develop. Z's option may be worth less than he thought, and he might have expended money in relation to it, for example, in obtaining planning permission. However, Z might have a right to withdraw from the sale and might have a contractual claim against X.

However, if X sells the land to A, and A registers the disposition, Y's restrictive covenant is postponed to A's estate under section 29, because the restrictive covenant is not protected in the register. In effect, Z's option will take priority over Y's restrictive covenant, because the restrictive covenant no longer binds the estate in A's hands, but the option does.

Figure 7: example of the operation of sections 28 and 29

X is the owner of registered land. He grants an option to Y. Y does not protect her option by a notice in the register.

Several years later, X contracts with Z to sell the land. Z protects his sale contract (which is an estate contract) in the register by way of a notice.

Due to section 28, Y's option has priority over Z's sales contract. If Y exercises her option and seeks specific performance against X, Y will be successful, and will not be bound by Z's sales contract. However, the existence of the option may constitute a breach of contract which would entitle Z to terminate the contract with X.

However, if before Y exercises her option, X completes the sale to Z and Z is registered as the new proprietor, then Z will take free of Y's option because of section 29.[18]

6.23 In the Consultation Paper, we suggested that it should be possible for those acquiring unregistrable interests in registered land to protect themselves against prior interests which do not appear in the register. To obtain this protection, the unregistrable interest would need to be the subject of a notice. We proposed that, if protected by a notice, the

[18] Example adapted from *Megarry & Wade*, para 7-063.

unregistrable interest would benefit from the same protection as is given to registrable dispositions by the special priority rule in section 29.[19]

6.24 The effect of this new priority rule would be that, in both examples in figures 6 and 7, Z would not be bound by X's prior interest, because X's interest was not protected in the register by way of a notice. When Z entered a notice, section 29 would therefore operate so that Z would obtain priority over X's interest in the land.

## CONSULTATION: A NEW PRIORITY RULE

6.25 To gauge whether reform is necessary, we asked consultees for any evidence of loss suffered under the current law as a result of the discovery of a prior interest with priority.[20]

6.26 We then provisionally proposed a new priority rule, under which an unregistrable interest noted in the register would benefit from section 29, and so only be subject to the interests set out section 29(2) of the LRA 2002.[21]

6.27 Picking up on our discussion in the Consultation Paper, we asked consultees a number of questions in relation to the scope of the extension of the special priority rule to unregistrable interests.

(1) We provisionally proposed that someone who could have benefited from the special priority rule by virtue of completing a registrable disposition by registration should not be able to take advantage of the new priority rule by instead protecting the interest by way of a notice. In particular, we provisionally proposed that someone taking an interest under a registrable disposition who fails to complete the disposition by registration, meaning the interest takes effect in equity only, should not be able to secure priority against prior unregistrable interests through the noting of that interest in the register. In the same vein, we provisionally proposed that a person who takes an interest under a disposition which would have been registrable if the parties had observed all proper formalities for its creation, but who failed to observe those formalities, should not be able to secure the priority of his or her equitable interest against prior interests through the noting of that interest in the register.[22] These proposals were designed to ensure that the new priority rule did not operate to undermine requirements of registration contained in the LRA 2002.

(2) To prevent unforeseen consequences for holders of home rights – a type of statutory right granted to a spouse or civil partner to occupy the matrimonial or partnership home[23] – we asked consultees whether home rights should be excluded from the effects of the new priority rule. The outcome would be that

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19 Consultation Paper, para 6.29.

20 Consultation Paper, para 6.59.

21 Consultation Paper, para 6.30.

22 Consultation Paper, paras 6.36 and 6.37.

23 Family Law Act 1996, s 30; see Consultation Paper, paras 6.43 to 6.48.

noting an unregistrable interest would not secure protection against pre-existing home rights, whether or not the home rights were noted in the register.[24]

(3) We also provisionally proposed that the priority of unregistrable interests which were created before the implementation of the new priority rule should remain unchanged. If consultees disagreed, we invited them to tell us what time period existing rights holders should have to note their interests in the register before they would become vulnerable to subsequent unregistrable interests which were noted in the register.[25]

6.28 To assess the costs of our proposal, we also asked consultees whether our proposals would lead to a material increase in the number of unregistrable interests being noted in the register, and therefore increase the burden on those involved in the granting of unregistrable interests and on HM Land Registry.[26]

6.29 We also asked three questions about the working of a new priority rule if it were implemented, in particular, in relation to the rectification and indemnity scheme[27] and the availability of official searches with priority.[28] Based on consultees' responses to our more general questions, we have decided not to recommend reform. Consequently, we do not need to consider these more detailed points.

## CONSULTATION RESPONSES

6.30 A total of 38 consultees responded to the various questions in this chapter. Consultees represented a broad cross-section of stakeholders, including academics, solicitors and professional or representative bodies. Many supported the new priority rule, but also expressed reservations about its application and impact. We outline their responses in more detail below.

### Evidence of problems in practice

6.31 In the Consultation Paper, we asked consultees for evidence of problems with the current law, specifically asking for evidence of situations in which the holder of an unregistrable interest has suffered loss as a result of the discovery of a prior interest with priority. Only ten consultees responded to this call for evidence. They gave limited evidence of specific instances of loss resulting from the existing priority rules. The examples they gave were largely based on hypothetical scenarios, rather than drawn from their own experiences.

6.32 The situations consultees identified as those in which loss could arise mirrored those discussed in our Consultation Paper. The Law Society and London Property Support Lawyers Group both suggested that the situation could arise on the grant of an option, which if bound by a prior unregistrable interest could cause the option holder to suffer

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24 Consultation Paper, para 6.49.

25 Consultation Paper, para 6.54.

26 Consultation Paper, para 6.63.

27 Consultation Paper, para 6.57.

28 Consultation Paper, paras 6.71 and 6.79.

losses. Dr Charles Harpum QC (Hon) suggested that problems could arise in relation to a second charge. He explained that if registration of a second charge is prevented by a restriction benefiting the first chargee (a common occurrence),[29] the second charge could only operate in equity, and so would be vulnerable to pre-existing unregistrable interests. Berwin Leighton Paisner LLP cited two reported cases about priority disputes between a bank's subrogated claim to an equitable charge (by way of subrogation to an unpaid vendor's lien) and a subsequently granted interest as examples of where the current law may create difficulties.[30]

6.33 Interestingly, the Berkeley Group (a large residential developer) stated that, despite the discussion in the Consultation Paper, its solicitors did not believe that the issue was a problem in practice.

**General views regarding the new priority rule**

6.34 Thirty consultees responded to our provisional proposal for a new priority rule for unregistrable interests. Of these, 19 agreed, five disagreed, and six expressed other views.

6.35 Consultees in favour of the new priority rule cited a range of benefits. The Bar Council said that the new priority rule would "promote certainty for those acquiring [unregistrable interests] in registered land without unfairness to the existing holders of such rights". Some consultees also suggested that the new priority rule would provide greater certainty and, in Berwin Leighton Paisner LLP's words, it "has the potential to solve many difficulties of competing interests at the time of a land transaction".

6.36 Several consultees suggested that the new rule would benefit parties who are currently unaware that their interest, noted in the register, does not benefit from the special priority rule under section 29 of the LRA 2002. The Law Society specifically commented that the present priority rule is a "trap for conveyancers and their clients". Howard Kennedy LLP echoed this point, noting that developers might not be aware of this priority issue.

6.37 Some of those in favour of the new priority rule, notwithstanding their support, expressed reservations. The London Property Support Lawyers Group feared our proposal might have "unexpected consequences". Several consultees suggested that the new priority rule would add complexity to an already complex area of law. For example, although the Society of Licensed Conveyancers agreed that the current protections for unregistrable interests are inadequate, it suggested that the new priority rule would erode the simplicity of conveyancing and the purpose of the register as a record of the legal title in an estate. Concerns were also raised by Amy Goymour, who thought that the new rule was a desirable change, but that its implementation raised various questions.[31]

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29 We note the frequent use of restrictions used to protect obligations within registered charges (by requiring the consent of the chargee in order for subsequent charge to be registered) in Ch 10.

30 *Halifax Plc v Omar* [2002] EWCA Civ 121, [2002] 2 P & CR 26; *Bank of Scotland Plc v Joseph* [2014] EWCA Civ 28, [2014] 1 P & CR 18. In each case, it was argued that the first in time rule was displaced by the conduct of the parties, and the provisions of the LRA 2002 respectively.

31 Some of which we raise below.

6.38 These concerns were shared by a number of the consultees who disagreed with our provisional proposal. Notably, Dr Harpum stated that the new rule would be a "fundamental change" to the existing priority rules, and the case that we made for reform in the Consultation Paper had failed to convince him that it was warranted. Similar sentiments were expressed by the Chancery Bar Association and Dr Lu Xu. In particular, Dr Xu was concerned that the Consultation Paper did not consider the full impact of such a significant change. Dr Xu feared the result could be a "race to the register" and sharp practice, the latter also being a concern of Nottingham Law School. Contrary to our provisional proposal, Dr Xu suggested that the distinction between registrable and unregistrable interests in the LRA 2002 is useful and principled.

6.39 HM Land Registry's response was in a similar vein. Although HM Land Registry chose to express its view as "other", it noted that the new rule would be a fundamental change to registered land principles. It warned that our provisional proposal might have unintended consequences. It also cautioned that it is not always meaningful to speak in terms of unregistered interests having priority over, or being subject to, one another because, from the perspective of the holders of those interests, the interests might not be mutually exclusive.

6.40 One impact of the new priority rule would be further to reduce the significance of the division between legal and equitable interests. Consultees were divided as to whether this impact militated for or against the proposal (and these views were not consistent across those who agreed versus those who disagreed). For example, the Chancery Bar Association, who disagreed with the proposal, emphasised the point that only interests capable of existing at law can benefit from the special priority rule in section 29. The Chancery Bar Association explained that land registration has not been concerned with the relative rights of owners of equitable interests, and, in the Association's view, it should not be. In contrast, Dr Xu, who also disagreed with the proposal, argued that the distinction between legal and equitable interests is "of little formal significance in land registration". This view was echoed by Amy Goymour. She did not express a view either for or against the proposal, but commented –

> there is no good reason that someone who acquires an interest which has historically only existed in equity (for example a restrictive covenant) should not avail of section 29 when he or she has done all he or she can to bring it on to the register.

6.41 Picking up on the distinction between legal and equitable interests, both Nigel Madeley and Cliff Campbell questioned the impetus for the new rule. Nigel Madeley explained that there will always be informal interests in land that deserve protection. As a result, in his view, the register of title should never be seen as "the whole story" of registered land. He considered that policy should not be driven by the "idea of minimal inspections", again citing the need for protection of informally created interests. Cliff Campbell argued that the register should not be used to record "the enormous miscellany of third party interests" which affect legal estates. Mr Campbell was opposed to the introduction of a new priority rule, particularly if it would primarily benefit developers, stating strongly:

> if the only real reason for doing this is a perceived but non-existent need for additional protection for developers' options then it ought best not be pursued.

6.42 Consultees also stated that the new priority rule would fundamentally change the nature of notices under the LRA 2002. Some consultees also queried how unregistrable interests would interact with overriding interests under the new priority rule. In particular, Dr Xu questioned how holders of unregistrable interests could sensibly be thought to be bound by overriding interests or be able to protect themselves against them through inspections of the land.

### Application of the new priority rule

6.43 We considered in the Consultation Paper that there may be a number of specific types of interest which would need to be excluded from the operation of the new priority rule. Consultees commented on the application (or otherwise) of the new priority rule to a variety of interests.

#### Estate contracts

6.44 We suggested in the Consultation Paper that estate contracts, and in particular, option agreements, could benefit from the new priority rule.[32] In response, consultees considered whether holders of option agreements in fact require more protection than they currently have. On one side, some consultees explained that a prospective purchaser might spend a considerable amount of money on the strength of an option agreement, which they considered to merit greater priority protection.[33] On the other side, consultees thought that the existing remedies available to option holders, based on breach of contract, provide an adequate remedy for any losses that they might suffer.[34]

#### Interests under registrable dispositions

6.45 We made two provisional proposals to exclude from the new priority rule interests under registrable dispositions that could take advantage of the special priority rule by registration, but did not. These interests are equitable either because the disposition creating them has not been completed by registration, or because the disposition did not comply with formality requirements under the general law.[35] Most consultees who responded on these points agreed.

6.46 Several consultees who agreed that these interests should be excluded from the new priority rule commented that the LRA 2002 should ensure that dispositions which must be completed by registration under section 27 should in fact be registered. They noted that allowing such interests to take advantage of the new priority rule could operate as a disincentive to registration. For example, Howard Kennedy LLP suggested that excluding such interests from the new priority rule would be necessary to prevent the benefits of registration from going to those who have not complied with the requirements for registration.

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32 Consultation Paper, paras 6.8, 6.14, and 6.26 to 6.28.

33 The Law Society and Berwin Leighton Paisner LLP.

34 Nigel Madeley and Cliff Campbell.

35 Consultation Paper, paras 6.36 and 6.37.

6.47 Others agreed with the need to exclude these interests on the basis of how registration interacts with restrictions. Restrictions prevent entries in the register in relation to a disposition, absent compliance with the terms of the restriction.[36] Some consultees suggested that excluding interests which could amount to registrable dispositions from the new priority rule would be necessary to ensure that restrictions are not circumvented.

6.48 Some consultees disagreed with these proposed exclusions. Several of these consultees identified a tension between the proposed exclusions and our suggestion that estate contracts could benefit from the new priority rule. The London Property Support Lawyers Group questioned the logic of extending the priority protection of the new rule to interests such as estate contracts which are not capable of being registered, but denying protection to interests which are capable of registration. The Chancery Bar Association commented that if an equitable charge could take advantage of the new priority rule, then a charge which could be legal on registration should also be able to do so. Other consultees, including Martin Wood and Christopher Jessel, explained that there are good reasons why someone might be temporarily unable to complete a registrable disposition by registration (for example, the presence of a restriction). In their view, such people should not be prevented from protecting the priority of their interest with a notice. Similarly, the Bar Council argued that the fact that equity steps in to protect those who inadvertently fail to follow the necessary formality requirements suggests that they are deserving of protection, and therefore they should also benefit from the new priority rule. Christopher Jessel also wondered whether the logic of our proposed exclusions runs contrary to that underlying the extension of owner's powers to persons entitled to be registered as the proprietor.

6.49 Dr Aruna Nair, who expressed other views, commented on the differences in our provisional policy's treatment of estate contracts compared to equitable interests arising under a registrable disposition, noting that it raises questions about the nature of the interest protected:

> Suppose X has an unregistered equitable interest in land. P then contracts to buy the land, and registers his estate contract; at this moment, X's priority is lost to P's estate contract. Then completion takes place and P fails to complete the disposition by registration. Does P's estate contract still exist, and bind X, or does X get his priority back, on the basis that P now has an interest under a disposition that would have been registrable if all proper formalities had been observed?
>
> It is possible to argue that P has two different equitable interests in this scenario – the estate contract, which exists until completion and is then terminated and replaced by a different equitable interest after completion but before registration – but this seems like a doubtful analysis of the current law.[37]

### Equitable charges

6.50 We suggested in the Consultation Paper that equitable charges were a good candidate for the protection offered by the new priority rule. However, we also proposed that

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[36] LRA 2002, ss 40 and 41.

[37] Amy Goymour made a similar point.

interests which are only equitable because they have not been registered should not be able to take advantage of the new priority rule.[38] In his response, Dr Harpum highlighted that many equitable charges are equitable only because they have not been registered. The reason for this situation is that restrictions are frequently entered by registered chargees, to prevent a second charge from being registered without the first chargee's consent, and so in the absence of consent the second charge operates in equity. These charges are vulnerable to pre-existing unregistrable interests, but under our provisional proposals they would be unable to benefit from the new priority rule.

### Informal interests, beneficial interests under a trust, and interests arising by operation of law

6.51 Consultees raised concerns regarding the application of a new priority rule to unregistrable interests which can arise informally or by operation of law. We explained in the Consultation Paper that most unregistrable interests must be created in writing in accordance with the Law of Property Act 1925;[39] however, we acknowledged that the requirement for writing does not apply to interests under resulting, implied and constructive trusts which, like an equity by estoppel, arise informally.[40] Moreover, the requirement of writing does not apply to rights that arise by operation of law, such as implied easements and easements by prescription. Some of these interests, including implied easements and equity by estoppel,[41] can be protected by a notice. However, by express provision in the LRA 2002, beneficial interests under a trust cannot be protected by a notice.[42]

6.52 The Chancery Bar Association considered that informally arising rights usually arise "in circumstances where protection by registration would not ordinarily be contemplated". In its view, their priority should therefore not be governed by the timing of registration. Dr Harpum agreed. He explained that such rights, for example, equity by estoppel, might be protected as overriding interests on the basis of actual occupation; however, if not, they are vulnerable to a registrable disposition for value. In Dr Harpum's view, this "vulnerability should not be increased" by the new priority rule. Similarly, Nottingham Law School commented that the likelihood that beneficiaries under a trust will be in actual occupation "save[s] the recommendations from very serious flaws". However, Nottingham Law School questioned whether "the justice of the situation should be determined by the accident of occupation". It suggested not, commenting that an interest under a trust would be prejudiced by our proposal but would be unable to benefit from it.

6.53 Dr Tola Amodu and Nottingham Law School both also commented that our proposal would need to consider the interaction of the new priority rule with the operation of overreaching. Nottingham Law School explained that it is not clear that the grant of an estate contract, even if benefiting from the new priority rule, could overreach beneficial interests; therefore, if adopted, the proposal would "throw up an undesirable tension

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38 Consultation Paper, paras 6.13, 6.25.

39 Law of Property Act 1925, ss 53 and 54.

40 Consultation Paper, para 6.41.

41 LRA 2002, ss 116 provides that, for the avoidance of doubt, proprietary estoppel and mere equities are interests capable of binding successors in title.

42 LRA 2002, s 33(a).

between priority gained through the notice and the provisions governing overreaching…".

### Home rights

6.54 We asked consultees whether home rights should be excluded from the effects of the new priority rule.[43] Consultees were divided on this point: of the 21 consultees who considered it, 11 thought that home rights should be excluded from operation of the new rule, and seven thought they should not be. Three consultees expressed other views.

6.55 Consultees who thought that home rights should be excluded from the effects of the new priority rule did so on the basis that home rights are a special category of right that merit special protection,[44] or because it is necessary to protect the rights of vulnerable individuals.[45] Some consultees suggested that if home rights were not excluded, the new priority rule could undermine the statutory scheme which aims to protect those rights.[46]

6.56 Consultees who disagreed that home rights should be excluded, or expressed other views, largely did so on the basis that this exclusion would make the new priority rule, and the scheme for priority generally, complicated.[47] Others pointed out that problems were caused by home rights binding purchasers of residential homes after an estate contract, with Professor Graham Battersby and Nigel Madeley pointing to a reported case as an example.[48]

### Unregistered interests created pre-reform

6.57 We provisionally proposed that the priority of unregistered interests created prior to any reform based on our proposal should remain unchanged.[49] Most consultees who responded on this point agreed. They suggested that such interests should be "in no worse position" than before any amendments;[50] and further that they should not be able to take advantage of the new regime.[51]

6.58 Some consultees raised concerns about allowing pre-existing interests to take advantage of the new priority rule. The Law Society pointed to the undue complexity that would be involved in phasing in old unregistrable interests into a new priority rule. HM Land Registry, which expressed other views, was also concerned that if a transitional provision were introduced to allow interests that pre-dated the reform to take advantage of the new priority rule, there would be a "race to note" these interests.

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43 Consultation Paper, para 6.49.

44 Mangala Muralia and Elizabeth Derrington.

45 Elizabeth Derrington and the Conveyancing Association.

46 Dr Tola Amodu and the Chancery Bar Association.

47 Berwin Leighton Paisner LLP, Martin Wood, the Property Litigation Association, and Dr Charles Harpum QC (Hon).

48 *Wroth v Tyler* [1974] Ch 30.

49 Consultation Paper, para 6.54.

50 The Society of Licensed Conveyancers.

51 Pinsent Masons LLP.

6.59 However, consultees also commented on the complexity of excluding interests created pre-reform. Martin Wood, who generally disagreed with the new priority rule, argued that the exclusion would result in "a mixed regime" (whereby different notices would have a different effect depending on the date of their entry), which would complicate the land registration system, rendering it more inaccessible. HM Land Registry also commented that excluding pre-reform unregistrable interests would result in a dual system. In its view, a dual system would cause complications and risk for HM Land Registry and the users of the land registration system.

6.60 HM Land Registry expressed its strong preference to avoid any system in which apparently similar notices have significantly different legal effects depending upon (presumably) the date that they are noted as having been entered in the register. Making a similar point, the Law Society questioned whether it would be clear from the register when the unregistered interest was created, in order to ascertain whether it benefited from the new priority rule.

**The costs of reform**

6.61 In the Consultation Paper, we asked consultees whether the new priority rule would result in a material increase to the number of interests noted in the register, and so an increase in the costs to those entering into transactions, or result in additional resource requirements for HM Land Registry.[52]

6.62 Most consultees agreed with our provisional view that it would not. But some key stakeholders, including the Law Society and the Society of Licensed Conveyancers, expressed the contrary view. These consultees suggested that we had underestimated the changes that would result in practice. In particular, they suggested that it could become common practice to protect contracts for sale by way of notice, which is uncommon under the current priority regime.[53] As a consequence, the work involved in conveyancing, including residential conveyancing, would increase.[54]

6.63 In particular, the Law Society explained that the new priority rule would encourage solicitors to protect unregistrable interests by way of a notice. Howard Kennedy LLP made a similar point, explaining that under the new priority rule, solicitors might be liable for claims in negligence if they failed to protect an estate contract with a notice.

6.64 HM Land Registry agreed that solicitors might be exposed to the risk of claims in negligence if they failed to apply for a notice. This possibility, together with the risk created by the new priority rule that an unregistrable interest could lose priority to a later-created unregistrable interest was, in HM Land Registry's view, "highly likely to lead to an increase in applications".

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52 Consultation Paper, para 6.63.

53 A point we made in the Consultation Paper, para 6.61.

54 Howard Kennedy LLP.

## DISCUSSION

6.65 In the light of consultees' responses, we have decided against recommending reform to introduce a new priority rule for the benefit of unregistrable interests. We explain our reasoning below.

### The fundamental nature of the proposed reform

6.66 In making our provisional proposal to introduce a new priority rule for unregistrable interests, we appreciated that the proposal would be a fundamental reform of the LRA 2002. In this sense, these proposals in the Consultation Paper were distinct from our other proposals, which have generally been directed at reforming the scope and application of existing rules. Despite the fundamental nature of the proposed reform of priorities, the new priority rule received significant support from consultees. In the light of consultees' support, we do not see the nature of the reform itself as a reason for not pursuing it.

6.67 However, to pursue a fundamental reform we would need to be confident of its benefits. Responses by consultees have persuaded us that concerns with the effect of the proposed new priority rule outweigh its benefits.

### The impact of reform

6.68 Consultees' responses suggested reform might not be necessary, and that the costs of reform would be significant.

6.69 Our provisional proposal was intended to remedy the loss that can arise under the existing priority rules, when an interest holder finds him or herself subject to a pre-existing unregistered interest. However, consultees provided limited evidence of difficulties caused in practice by the existing rules.

6.70 Moreover, some consultees indicated that there could be significant costs associated with a fundamental reform of the priority rules. In particular, HM Land Registry suggested that the introduction of the new priority rule could result in a "race" to note existing unregistrable interests, with both operational implications for HM Land Registry and the potential for unjust outcomes based on the timing of the entry of a notice. HM Land Registry expected that, over time, there would also be an increase in applications for notices (as well as official searches, if the reform enabled official searches to be made for the benefit of unregistrable interests), because conveyancers would be wary of claims of negligence if notices were not entered. This increase would have resource implications for HM Land Registry, as well as for the parties to transactions.

6.71 Although we think it would be possible to deal with some of these concerns through transitional provisions, doing so would inevitably add a further layer of complexity onto the new priority rule. Further, transitional provisions would not address concerns about the impact of the new priority rule on subsequent transactions. The new priority rule would demand a significant change in the way solicitors and conveyancers operate and advise their clients, in relation to both registrable dispositions and unregistrable interests. We do not think imposing this change is justifiable in the light of the lack of evidence of problems with the current law.

### The narrow application of the new priority rule

6.72 Consultees raised valid concerns about the application of the new priority rule in respect of a number of unregistrable interests. In making our provisional proposals in the Consultation Paper, we were aware that some exceptions to the new priority rule would be necessary. With the benefit of consultees' views, we appreciate the range of interests that would need to be excluded from the effects of the proposed new priority rule, particularly interests which arise informally or by operation of law, and home rights. We agree with consultees that the informal or automatic way in which these rights come into existence means that they are less likely to be recorded in the register than expressly granted rights. We think that it would be wrong as a matter of policy to enable interests that arise informally or by operation of law to be made vulnerable in favour of unregistrable interests that are created later in time. Doing so could have unintended and unjust consequences, and operate harshly in relation to rights that frequently arise in the context of the home.

6.73 With these exclusions, the list of unregistrable interests that could take advantage of, and be subject to the effects of, the new priority rule is reduced. The main interests we can identify as able to benefit from the rule would be estate contracts, and in particular, option agreements.[55]

6.74 We are not inclined to recommend a new priority rule that would apply so narrowly. Only a small group of interest holders – that is, mainly developers – could benefit from it. In substance, this policy would be very different from the one we proposed and consulted on. In our view, there is no strong policy reason for putting these interests in a privileged position. Indeed, it would arguably be unfair to benefit holders of estate contracts to the detriment of the wider group of unregistrable interest holders, who would be unable to take advantage of the rule. Contrary to our original policy vision for the new rule priority rule, the policy would make many unregistrable interests more vulnerable to other unregistrable interests, not less.

6.75 Creating a separate priority rule for a small class of interests would also introduce significant complexity into the priority scheme under the LRA 2002. HM Land Registry made this point, warning of complications and risks arising from the different legal effect of notices and interests arising before and after introduction of the new rule.[56] The same type of entry in the register – a notice – would operate differently depending on the interest protected and the time that the notice was entered.

6.76 These concerns have been important factors which weighed heavily in our decision not to proceed with recommending reform. In our view, the narrowness of the benefit of the reform, together with the complexity of the rule, make reform unjustifiable.

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55 Excluding mortgages that are equitable because of a failure to register the charge in compliance with s 27(2)(f). We note that consultees expressed mixed views on the application of the new priority rule to equitable charges and statutory charges (including charging orders).

56 This could be further complicated by the introduction of new notice procedures in accordance with our recommendations in Ch 9.

6.77 Consultees also raised further issues that, although insufficient in themselves to dissuade us from reform, would need to be addressed, and suggest that any scheme to implement a new priority rule would be complex.

6.78 First, applying the new priority rule to estate contracts but not to other types of unregistrable interest might be conceptually inconsistent. Some consultees disagreed that it was justifiable to treat estate contracts differently from interests which could have amounted to registrable dispositions, that is, interests which are only equitable because they were not registered in accordance with section 27, or failed to meet other requirements for the legal disposition of land under the Law of Property Act 1925. We accept that it could be seen as anomalous for one type of equitable interest to be capable of attracting the protection of the new priority rule, when other types could not be. That is particularly the case because an estate contract will provide the basis of a registered disposition.

6.79 Secondly, and relatedly, the effect of the new priority rule if applied to estate contracts would be that the benefit of the special priority rule in section 29 would operate to confer priority on a registrable disposition at an early stage of the conveyancing process. Currently, a disposition (for example, a transfer) takes priority over prior unprotected interests from the date of registration.[57] The new priority rule would enable a transfer to postpone pre-existing unprotected interests when the contract for the same is entered into and noted in the register. As Dr Nair questioned, it is not clear what the consequences are if the disposition is never registered. It is at least arguable that by allowing the contract for sale to benefit from priority protection by the entry of a notice, the disposition itself is benefiting from priority protection, absent registration. However, other consultees suggested that the priority given to a contract for sale protected by a notice should apply equally to the subsequent disposition.[58] Their comments are based on the decision in *A2 Dominion Homes Ltd v Prince Evans Solicitors*.[59]

6.80 Although we do not think that these issues are unsurmountable, they would need to be addressed before any reform could be proposed.

## CONCLUSION

6.81 We were aware in the Consultation Paper that recommending a new priority rule would constitute significant reform. We therefore appreciated the need to ensure that reform was justified. But consultees did not provide us with evidence of a strong case for reform. Moreover, although consultees generally supported our provisional policy, they also raised many issues that any recommendations for reform would have to address.

6.82 On balance, we do not think that the introduction of a new priority rule would be the right decision. We considered a possible solution to the issues raised by consultees – that is, that the new priority rule would only be applicable to a narrow range of interests,

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57 Which is the date on which the application was lodged with HM Land Registry: see LRA 2002, s 74(a); LRR 2003, r 15. The priority of a registrable disposition may also be protected by an official search with priority, which postpones entries in the register during the priority period in favour of the disposition in respect of which the search has been made: see Ch 8 for more detail.

58 The Law Society and Berwin Leighton Paisner LLP.

59 [2015] EWHC 2490 (Ch).

largely estate contracts. This solution would benefit a limited group of interest holders, to the disadvantage of other holders of unregistrable interests, including interests which are unlikely to be protected in the register and so are particularly vulnerable to losing priority to later interests. We do not think that this possible solution adequately addresses the concerns we originally raised in the Consultation Paper. It would introduce undue complexity into the scheme for priority under the LRA 2002. We do not think this complexity is justified.

6.83 Ultimately, our consultation has revealed that, by and large, the current priority rules work in practice. We therefore do not recommend general reform of the priority rules in the LRA 2002 for the benefit of unregistrable interests.

# Chapter 7: Valuable consideration

## INTRODUCTION

7.1 In this chapter we consider the concept of valuable consideration in the LRA 2002. We focus on the requirement for valuable consideration to engage the special priority rule in section 29.[1] Section 29(1) provides as follows:

> If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

7.2 It is only when a disposition is made for valuable consideration that it will attract the protection of the special priority rule in section 29. Similarly, the only type of transaction that may be protected by a priority search under section 72 of the LRA 2002 is a registrable disposition made for valuable consideration.[2]

7.3 The LRA 2002 contains a partial definition of the phrase "valuable consideration" in section 132(1):

> "valuable consideration" does not include marriage consideration or a nominal consideration in money.[3]

7.4 This provision is the only light that the LRA 2002 itself sheds on the meaning of the phrase. It does not assist in determining what constitutes consideration itself. It does not explain the difference between "valuable consideration" and "consideration". Section 132(1) does not define what is meant by "nominal consideration".

7.5 In Chapter 7 of the Consultation Paper, we discussed the ways in which the requirement for valuable consideration in section 29 is unclear and made suggestions for how it might be clarified.[4] We asked consultees whether the requirement of valuable consideration should be removed from section 29. If the requirement were to remain (which is what we provisionally proposed), we asked whether it should be clarified and, in particular, whether the exclusion of nominal consideration in money in section 132(1) should be retained. We discussed four specific forms of consideration – indemnity covenants, reverse premiums, the transfer of interests with negative value and peppercorns – and asked consultees whether they should qualify as valuable consideration within the meaning of section 29.

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1 We discuss the special priority rule in Ch 6: see paras 6.11 to 6.17 above.

2 LRR 2003, rr 131 and 147. See Ch 8, para 8.71 and following below.

3 The exclusion of marriage consideration represented a change between the LRA 1925 and the LRA 2002, but aside from this the definition remains the same as it was under the 1925 regime. See Law Com No 271, para 5.8 for an explanation of why marriage consideration was excluded under the LRA 2002.

4 Consultation Paper, paras 7.8 to 7.49.

7.6 Most consultees agreed that the requirement for valuable consideration should be retained. However, a majority of consultees also thought that the meaning of "valuable consideration" in section 29 should be clarified.

7.7 We agree with consultees that the requirement for valuable consideration should be retained in section 29 of the LRA 2002. However, we have ultimately decided that the general law should decide whether indemnity covenants, reverse premiums, interests with negative value and peppercorns should be able to constitute valuable consideration. We do not think that the LRA 2002 should make express provision for these forms of consideration. But in the light of consultees' responses, we recommend that nominal consideration in money should no longer be excluded from the partial definition of "valuable consideration" in section 132(1).

7.8 At the end of this chapter, we discuss whether, if the partial definition of "valuable consideration" is amended, the amended definition should apply to the whole of the LRA 2002. Having considered the responses from consultees, we have concluded that the amended definition should apply to the whole of the LRA 2002, but with the exception of section 86 (concerning bankruptcy).

## THE CONCEPTS OF "CONSIDERATION" AND "VALUE"

7.9 We begin by examining the concepts of "consideration" and "value" in the general law to see whether it sheds light upon the meaning of "valuable consideration" in the section 29 of the LRA 2002. These concepts play an important role in the law of contract and also in equity.[5] But as we explain below they function slightly differently in each context. The meaning of "valuable consideration" in section 29 may differ depending on whether the section draws more heavily upon the notion of consideration in contract or the notion of value in equity. It is possible that the phrase, when used in the LRA 2002, has a special meaning unique to land registration.

7.10 We ultimately conclude that the meaning of "valuable consideration" in section 29 is unclear. There is strong authority to the effect that anything that would constitute consideration within the law of contract can be valuable consideration under section 29.[6] But it is also arguable that only consideration that is actually paid will engage the section. It is also arguable that, even without the exclusion of nominal consideration in money by section 132(1), the payment of consideration of trivial value, whether in monetary or non-monetary form, would be insufficient to engage section 29.

### Consideration in the law of contract

7.11 In the law of contract, in order for an offer or a promise to be enforceable – that is, in order for a binding contract to come into existence, something of value (the consideration) must be given in exchange for the offer or promise. *Chitty on Contracts* explains the requirement of consideration as follows:

> The doctrine of consideration is based on the idea of reciprocity: that something of value in the eye of the law must be given for a promise in order to make it enforceable

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5 The distinction between legal and equitable rights is described in the Glossary and discussed in our Consultation Paper at para 2.25.

6 See the discussion of *Midland Bank Co Ltd v Green* [1981] AC 513 below.

as a contract. It follows that an informal gratuitous promise does not amount to a contract. A person or body to whom a promise of a gift is made from purely charitable or sentimental motives gives nothing for the promise; and the claims of such a promisee are regarded as less compelling than those of a person who has provided (or promised) some return for the promise.[7]

7.12 Although the law of contract requires consideration, it is not generally concerned about the adequacy of the consideration offered. Inadequate consideration can give rise to a binding contract. As Lord Somervell once commented, "a peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn".[8]

7.13 Nevertheless, a distinction can be drawn between inadequate consideration and nominal consideration. The authors of *Chitty on Contracts* describe inadequate consideration as consideration that "has substantial value even though it is manifestly less than that of the performance promised or rendered in return".[9] By contrast, they take "nominal consideration" to refer to consideration that does not have substantial value at all. They refer to the comment of Mr Justice Harman in *Westminster City Council v Duke of Westminster* that "any substantial value – that is a value more than, say £5 – passing at the time of a disposition will prevent that disposition being for a nominal consideration".[10]

7.14 However, a different interpretation of "nominal consideration" was given by Lord Wilberforce in *Midland Bank Trust Co Ltd v Green* ("*Midland Bank*"). Lord Wilberforce suggested that "nominal consideration" is a term of art describing a sum "which can be mentioned as consideration but is not necessarily paid".[11]

7.15 Although according to both the *Midland Bank* and the *Chitty* interpretations, "nominal consideration" is consideration *in name only*, there is a significant difference between the two interpretations. Very substantial consideration may be cited in a contract but the parties may not expect it actually to be paid; conversely, even where a contract cites some trivial consideration, the parties may still expect it to be paid.

7.16 We thus consider that the meaning of "nominal consideration" is ambiguous. It may mean consideration which is stated but not (intended to be) paid, or it may mean consideration of a trivial value.

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7 H G Beale (ed), *Chitty on Contracts* (32nd ed 2015) paras 4-001 to 4-002.

8 *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87, 114.

9 H G Beale (ed), *Chitty on Contracts* (32nd ed 2015) para 4-020.

10 *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136, 146. We discussed this case and the similar remarks of Judge Hopkin Morgan QC reported in *Johnsey Estates Ltd v Lewis & Manley (Engineering) Ltd* (1987) 54 P & CR 296 (CA), 299, in the Consultation Paper at paras 7.43 to 7.46.

11 *Midland Bank Co Ltd v Green* [1981] AC 513, 532. *Midland Bank* was a decision about the meaning of "valuable consideration" in the Land Charges Act 1925 and so its relevance for the law of contract may initially be unclear. But Lord Wilberforce held (531) that "valuable consideration" does not have a special meaning within the Land Charges Act 1925 but is a notion drawn from the general law.

### Equity and the bona fide purchaser for value without notice

7.17 The concept of giving value also plays an important role in equity. In equity, a purchaser of property will take the property free of beneficial (and other equitable) interests if he or she had no notice of the beneficial claims and gave *value* for the property.

7.18 In equity, as in contract law, a purchaser does not have to provide full or adequate value in order to take the property free of equitable interests. However, the equitable notion of value requires more than the contractual notion of consideration in two respects. First, a promise to perform some action or pay a particular sum is good consideration in contract. But in equity, for there to be a purchase for value, the promise must actually be performed or the sum of money actually paid.[12] Secondly, it has been suggested by Lord Neuberger (when he was a High Court judge) in *Nurdin & Peacock plc v DB Ramsden & Co Ltd* that, to a limited extent, equity can examine the adequacy of consideration. A contract may be enforceable because it provides for the payment of consideration that is of trivial value (something that none of the parties would genuinely consider to be of value). But equity "looks at the substance and not at the form" of a transaction; it looks to see whether value has genuinely been given. In particular, Lord Neuberger suggested that payment of "nominal consideration" does not make the purchaser "a 'purchaser for value'".[13]

### The requirement of valuable consideration in the LRA 2002, section 29

7.19 As we explained above, the LRA 2002 does not itself provide a comprehensive definition of valuable consideration for the purposes of section 29. Nor has the court provided an authoritative interpretation of the phrase "valuable consideration" as used in section 29 of the LRA 2002. However, in *Midland Bank*, the House of Lords considered the meaning of "valuable consideration" in the Land Charges Act 1925. Lord Wilberforce said that "valuable consideration" is "a term of art which precludes any inquiry as to adequacy. … It is an expression denoting an advantage conferred or detriment suffered".[14] This interpretation appears to treat the concept of valuable consideration as broadly equivalent to consideration in contract.

7.20 *Midland Bank* provides a powerful persuasive authority regarding the proper interpretation of "valuable consideration" in the LRA 2002: in the absence of provision to the contrary in the LRA 2002, there is no reason to suggest that the phrase should not be interpreted the same way in both pieces of legislation.

7.21 However, we do not believe that the definition of valuable consideration under section 29 is beyond doubt. In our view, the requirement of valuable consideration in section 29 does not perform the same function as the requirement of consideration for the enforceability of a contract. Enforceability is not usually in issue under the LRA 2002: the dispositions which are registered under section 29 will usually be made by deed, as this is a requirement for the creation of most legal interests in land.[15] A contract is

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12 *Snell's Equity* (33rd ed 2014) para 4-022; *Megarry & Wade, The Law of Real Property* (8th ed 2012) para 8-008; *Tourville v Naish* (1734) 3 P Wms 307; *Taylor Barnard v Tozer* [1984] 1 EGLR 21.

13 *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 EGLR 119, 123.

14 *Midland Bank Trust Co Ltd v Green* [1981] AC 513, 531.

15 Law of Property Act 1925, s 52.

enforceable without consideration if made by deed.[16] The issue addressed by section 29 is not enforceability, but whether the rights of third parties should be postponed.

7.22 The decision in *Midland Bank* notwithstanding, it appears to us to be arguable that the meaning of "valuable consideration" in section 29 draws on the equitable notion of value. The special priority rule in section 29 concerns situations in which a purchaser of land will take free of prior interests. Therefore, section 29 performs the same function as the equitable rule that determines whether a beneficial, or other equitable interest, is enforceable; both provide priority rules. If section 29 were to be interpreted according to equitable principles, it is unclear that it would protect transfers of land where the relevant consideration was not paid or not intended to be paid. It is not apparent, from the language of the LRA 2002, whether section 29 is intended to apply in such situations. Furthermore, it is unclear whether section 29 would protect a transaction where the consideration offered was trivial (for example, the payment of 1p or a peppercorn). Following *Nurdin & Peacock plc v DB Ramsden & Co Ltd*, it would need to be considered whether the transferee was genuinely giving value for the transfer. Consequently, we still consider that the meaning of "valuable consideration" in section 29 is unclear.

## OUR PROPOSALS FOR REFORM

7.23 Having set out our understanding of the relevant legal principles, we now consider the issues raised in our Consultation Paper and discussed by consultees. These issues can be organised in relation to five questions.

(1) Should the requirement of valuable consideration in section 29 be retained?

(2) If retained, should the requirement of valuable consideration in section 29 be clarified?

(3) If the requirement is to be clarified, should the LRA 2002 expressly provide that the following may constitute valuable consideration:

(a) indemnity covenants;

(b) reverse premiums;

(c) interests in land with negative value; and

(d) peppercorns?

(4) Should the exclusion of nominal consideration in money in the partial definition of "valuable consideration" in section 132(1) be retained?

(5) If the partial definition of "valuable consideration" in section 132(1) is amended, should the amended definition apply to the whole Act? In particular, should it apply to section 86(5)?

[16] *Pratt v Barker* (1828) 1 Sim 1.

7.24 Regarding these five issues, we make the following recommendations. We recommend retaining the requirement of valuable consideration and clarifying the requirement by deleting the reference to nominal consideration in money from section 132(1). We recommend that this amendment should apply to the whole of the LRA 2002 with the exception of section 86(5). We do not consider that any specific amendment should be made in relation to indemnity covenants, reverse premiums, land of negative value or peppercorns.

## ISSUE (1): SHOULD THE REQUIREMENT OF VALUABLE CONSIDERATION IN SECTION 29 BE RETAINED?

7.25 In Chapter 7 of our Consultation Paper we provisionally concluded that the requirement for valuable consideration in section 29 of the LRA 2002 should be retained, and we asked consultees if they agreed.[17]

7.26 Thirty-one consultees responded to the question. Twenty-eight consultees thought that the requirement should be retained.

7.27 Three consultees were unsure whether retention is justified, including the Law Society which raised a concern about priority searches.[18] Conveyancers may apply for priority searches even though the corresponding transfer is not for valuable consideration. Nevertheless, despite the priority search, if the transfer is not for valuable consideration, then the transfer will not be protected by section 29. We are not convinced that there are good reasons to introduce a specific exception to the requirement of valuable consideration in relation to priority searches. It seems to us that it would be self-defeating to retain the requirement of valuable consideration in section 29 but allow it to be circumvented merely through making an official search of the register.

7.28 Only one consultee – Christopher Jessel – suggested the outright abolition of the requirement of valuable consideration in section 29.[19] Mr Jessel said that, when the requirement was first imposed, titles were generally confidential, not deduced until after contracts were exchanged and often subject to complex family arrangements. This is no longer the case. Mr Jessel suggested that, in the context of registered land, the justification for the requirement has been lost and "priority should depend on the order of registration not whether consideration has been given".

7.29 We also received some alternative suggestions for reforming section 29. In particular, Michael Mark wrote that he had encountered several cases in which property had been transferred between family members or linked companies with no real consideration and with the intention of defeating unregistered interests in the relevant land. Mr Mark

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17 Consultation Paper, para 7.68.

18 The same concern was raised by the Chartered Institute of Legal Executives, although it expressly supported retaining the requirement of valuable consideration.

19 Christopher Jessel did, however, suggest making an exception for cases of inheritance as "it is arguable that a devisee should simply take whatever the testator had, and would therefore be subject to all rights which would have bound the testator". We note that the Society of Legal Scholars, who expressed other views in response to this provisional proposal, could not reach a consensus on whether the requirement for valuable consideration should be retained. The Law Society agreed that abolition of the requirement should be considered, although it thought on balance that it should be retained.

suggested that such cases could be avoided if section 29 required "consideration passing on a bona fide [or good faith] arm's length transaction for value". We are of the view, however, that Mr Mark's suggestion would introduce uncertainty into registered conveyancing. A purchaser of land may take steps to check whether the seller originally acquired the land for valuable consideration. It is difficult to see what steps a purchaser could realistically take to investigate whether the seller had acquired the land with the intention of defeating prior interests. Moreover, we think that it would be undesirable to introduce a requirement of good faith into section 29.[20]

7.30 Together with the majority of consultees, we think that the requirement of valuable consideration should be retained. A number of compelling reasons for retention were given by the consultees who supported our proposal.

7.31 As Nigel Madeley emphasised, it is a deeply-rooted principle of English law that the claims of someone who receives a gift are less compelling than the claims of someone who has provided consideration. This principle is applied in relation to both registered and unregistered land. We think that those who take the land as part of a commercial transaction should generally benefit from priority protection, while those who take as a gift should step into the shoes of the previous landowner.[21]

7.32 We also consider that interference with a person's property rights needs to be justified. This point was nicely expressed by Nottingham Law School in its consultation response, which argued that "the system of title registration is not set up to permit those who have not provided valuable consideration to destroy the interests of prior holders of interests in the land". As we explain in Chapter 8, in many cases, the effect of section 29 can be effectively to extinguish a person's interest in land. We do not think that such interference is justified where someone receives a gift of land. The recipient will not suffer the loss of any purchase money if the land turns out to be burdened by unregistered interests.

7.33 We moreover think that a recipient of a gift of land is less likely to have relied on the register of title than a purchaser. Dr Aruna Nair suggested in her consultation response that a purchaser of registered land is likely to examine the register in order to determine what he or she will be getting and how much should be paid. It is unfair for a person who has relied on the register to be bound by unregistered interests.[22] By contrast, someone who does not provide valuable consideration for a transfer is less likely to

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20 Our 1998 Consultation Paper discussed the requirement of good faith in the LRA 1925 ss 3(xxi) and 20(1). It explained how the requirement undermines the indefeasibility of title which the LRA 2002 sought to achieve. We are of the view that similar considerations militate against amending s 29 so that it focuses upon the parties' intentions: Law Com No 254, paras 3.39 to 3.42.

21 In our Consultation Paper, at paras 7.59 to 7.63, we discussed the possibility that s 29 might expressly exclude transfers by way of gift or inheritance, but explained why we do not believe that this approach would work.

22 The LRA 2002 makes an exception for overriding interests (listed in schs 1 and 3), but these interests should generally be apparent to a potential purchaser from an inspection of the land.

have relied on the register. Such a person certainly will not have relied on the register in order to determine what price should be paid for the land.[23]

7.34 Finally, we think the requirement for valuable consideration has a role to play in preventing fraudulent conveyances from benefiting from the special priority rule in section 29. We made this point in the Consultation Paper, citing the case of *Halifax plc v Curry Popeck*.[24] In that case, for the purpose of furthering a mortgage fraud, a property had been transferred from the joint names of a husband and wife into the husband's sole name for the purported consideration of £200,000. There was no evidence that this sum was ever paid. Nevertheless, the registration of the transfer did effect a change in legal ownership. It would therefore be difficult to argue that there was not really a "disposition" of a registered estate within the meaning of section 29. Mr Justice Norris held that "the transfer was part of a fraudulent enterprise in which the concept of consideration is entirely meaningless".[25] The requirement of valuable consideration in section 29 thus gave the court an avenue by which to consider whether the purported sale was really what it seemed to be. Moreover, it is arguable that, in cases falling short of fraud, the court may consider whether a sum cited as the consideration for a conveyance was genuinely intended by the parties to be the consideration for the sale. In this way, the requirement of valuable consideration in section 29 gives the court a useful tool for addressing cases of fraud and other dishonest dealings.[26]

## ISSUE (2): SHOULD THE REQUIREMENT OF VALUABLE CONSIDERATION IN SECTION 29 BE CLARIFIED?

7.35 In Chapter 7 of our Consultation Paper, we discussed ways in which the requirement of valuable consideration in section 29 may be unclear. We asked consultees whether the requirement could benefit from clarification.[27]

7.36 A majority of consultees – 24 out of the 31 consultees who responded, representing a wide range of stakeholders – agreed that clarification would be desirable. Those who provided detailed comments focussed upon the four specific forms of consideration discussed in our Consultation Paper and upon the exclusion of nominal consideration. Consultees' comments did not suggest that the requirement of valuable consideration is unclear beyond these particular issues.

7.37 Some consultees disagreed that clarification is required and urged caution. HM Land Registry suggested that "any reform in this area should be considered with great care". Similarly, the Society of Licensed Conveyancers commented that attempted clarification might create new problems, particularly as the use of terms such as "gift" and "bargain" would prompt litigation to settle their meaning.

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23 Dr Nair also pointed out that the requirement of valuable consideration, "can be justified in utilitarian terms, as a mechanism for producing efficiency in the property market by lowering information costs when parties are bargaining to acquire or transfer land". We agree.

24 [2008] EWHC 1692 (Ch); [2009] 1 P & CR DG3.

25 Above at [43].

26 Consultation Paper, para 7.49.

27 Consultation Paper, para 7.68.

7.38 Dr Charles Harpum QC (Hon) disagreed that the meaning of "valuable consideration" needed to be clarified, stating that *Midland Bank* already "gave the highest judicial guidance" as to its meaning. For the reasons set out in paragraphs 7.21 to 7.22 above, we disagree that the decision in *Midland Bank* puts the meaning of "valuable consideration" entirely beyond doubt.

7.39 For the reasons set out in the Consultation Paper and at the beginning of this chapter, we think that, in so far as possible, the requirement of valuable consideration in section 29 would benefit from some clarification. However, we consider that the clarification should be limited; we do not propose introducing a general definition of "valuable consideration".

7.40 In deciding on this approach, we are mindful of HM Land Registry's and the Society of Licensed Conveyancers' call for caution. Valuable consideration is not a concept that is unique to the LRA 2002. It is difficult to tell what effect amending the definition of "valuable consideration" in the LRA 2002 might have upon the construction of other statutes. Moreover, we did not consult on whether a complete definition of "valuable consideration" should be provided in the LRA 2002. It would be difficult to provide a statutory definition that is genuinely informative[28] while also being comprehensive and unambiguous.

7.41 As we explain below, we have decided that the LRA 2002 should not be amended to address specific forms of consideration. We intend to leave the definition of "valuable consideration" to the general law. However, we propose removing the reference to "nominal consideration in money" from section 132(1) as this particular provision in the LRA 2002 is causing confusion.

**ISSUE (3): SPECIFIC POINTS OF CLARIFICATION**

7.42 In Chapter 7 of our Consultation Paper, we asked consultees whether indemnity covenants, reverse premiums, interests in land of negative value, and peppercorns may constitute valuable consideration.[29] Our thinking was that the LRA 2002 might be amended to make specific provision for one or all of these examples.

7.43 In retrospect, we consider that there are good reasons why the LRA 2002 should *not* provide a list of specific things that may constitute valuable consideration. We would not, for example, want to provide that the payment of a reverse premium is *always* valuable consideration for the transfer of land. Consultees were in favour of retaining the requirement of valuable consideration in section 29. This retention has consequences. It is not clear that something would count as valuable consideration if it is not of value, or if it is not genuinely intended as consideration, or if it passes in the wrong direction, or (possibly) if it is not intended to be paid. It might be possible to amend the LRA 2002 to provide that the payment of a reverse premium *may* constitute valuable consideration. Such an amendment would not, however, appear to us to be a

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[28] For example, if the LRA 2002 provided, in line with *Midland Bank* that valuable consideration is "an advantage conferred or detriment suffered", it is unclear whether this definition would be informative. A question would arise about what constitutes "an advantage" or "a detriment".

[29] Consultation Paper, paras 7.70, 7.71 and 7.72.

clarification of the statute, as it would not make clear in what circumstances a reverse premium *would* be valuable consideration.

7.44 Consequently, although we discuss (1) indemnity covenants, (2) reverse premiums, (3) interests in land with negative value and (4) peppercorns below, we are not making any specific proposals for statutory reform in relation to them.

**(1) Indemnity covenants**

7.45 Where a tenant transfers a lease to a third party, the original tenant may remain liable for breaches of the terms of the lease. In these circumstances, it is common for the incoming tenant to promise to indemnify the original tenant for any future breach of the lease. This promise is called an indemnity covenant.

7.46 We did not make any proposals in relation to indemnity covenants in the Consultation Paper because we thought that it had been settled by the Court of Appeal that an indemnity covenant can constitute valuable consideration.[30] However, we invited consultees to tell us if they disagreed with our view. Only the City of Westminster and Holborn Law Society suggested that the LRA 2002 should make it explicit that an indemnity covenant can be valuable consideration. It did not suggest any reason to think that the analysis in the Consultation Paper[31] is incorrect and neither did any other consultees. Considering the Court of Appeal authority, we continue to think that reform to include indemnity covenants within the definition of valuable consideration in section 29 is unnecessary.

**(2) Reverse premiums**

7.47 A reverse premium is a payment from the person who transfers an interest in land to the person who receives the land. An example of when a reverse premium might be paid is given in figure 8 below.

Figure 8: a reverse premium

A is the registered proprietor of the freehold to some contaminated land. B agrees to take the land off A's hands, thereby taking on a statutory or a contractual obligation to clean up the land to the requisite environmental standards. B hopes to turn a profit once the land is cleaned. Nevertheless, B requires A to pay a reverse premium to offset some of the cost of the clean-up.

30 Consultation Paper, paras 7.22 to 7.26 and 7.67, citing *Johnsey Estates Ltd v Lewis & Manley (Engineering) Ltd* (1987) 54 P & CR 296 (CA).

31 Only three consultees addressed the issue and all agreed with our analysis. However, the City of Westminster and Holborn Law Society suggested that the LRA 2002 could make the point explicit. As we have explained in para 7.43 above, we do not think that such an amendment is desirable.

7.48 In our Consultation Paper, we suggested that in most cases where a reverse premium is paid, there is still some other consideration moving from a recipient of the land. For example, by taking the land, B relieves A of the obligation to clean it up.[32]

7.49 Eighteen out of the 24 consultees who considered the issue of reverse premiums said that they may constitute valuable consideration and that no clarification of the LRA 2002 is required. Six consultees, including Nigel Madeley and Burges Salmon LLP, suggested that the issue is not entirely clear. The Law Society pointed out that we did not commit ourselves in the Consultation Paper as to whether a reverse premium can constitute valuable consideration. Howard Kennedy LLP and the London Property Support Lawyers Group and Pinsent Masons LLP suggested that the LRA 2002 should make express provision for reverse premiums. They thought that a question mark could otherwise remain over whether a transaction involving a reverse premium is protected by section 29 if it is uncertain whether it also includes other valuable consideration.

7.50 As previously explained, we have concluded that the LRA 2002 should not include specific provision for any form of consideration. Regarding reverse premiums, we do not believe that the payment of a reverse premium will *always* constitute valuable consideration. We continue to think that it *may* do so. We do not think that an amendment of the LRA 2002 to provide that reverse premiums *may* constitute valuable consideration would constitute clarification.

7.51 We have not proposed making any change to the fundamental contractual principle that consideration must pass from the person who receives an offer or interest in land to the person who makes the offer or transfers the interest in land. A reverse premium is a payment of money. As such, it is clearly capable of constituting valuable consideration within a particular agreement. Yet it is easy to become confused about what a reverse premium may be consideration *for*. It cannot be consideration for the *receipt* of an interest in land. But it may be consideration for another person *taking* an interest in land. Where X transfers land to Y, it is not usually possible for Y to claim that he or she gives consideration for the transfer by accepting the land (or the goods or benefit). Value is only moving one way. But where the land confers a detriment on Y (perhaps because it carries onerous obligations), the payment of a reverse premium may be consideration for Y *taking* the land. Importantly, it only makes sense to think of the reverse premium as consideration for a transfer which imposes some detriment upon the recipient.

7.52 We think that the payment of a reverse premium is a strong indication that a transfer of land is supported by the transfer of valuable consideration. It is unclear why else any reverse premium should be paid. However, a blanket provision that applied the protection of section 29 to all cases involving the payment of a reverse premium would apply that protection in cases where the payment essentially amounts to a gift accompanying the transfer of land. This outcome would the undermine the rationale for retaining a requirement of valuable consideration in section 29. We therefore do not recommend amendment of the definition of valuable consideration in the LRA 2002 on this basis.

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[32] Consultation Paper, paras 7.15 to 7.18.

### (3) An interest in land with negative value

7.53 It was our view in the Consultation Paper that a disposition of an interest with negative value should be able to benefit from the priority protection in section 29. We gave the example of a transfer of contaminated land, where it would cost more to clean up the land to the appropriate environmental standards than the land (once clean) would be worth. We explained that a sale of land with negative value often involves the purchaser of the land taking on liabilities in connection with the land. In our view, taking on these liabilities is a detriment suffered that can clearly constitute valuable consideration. Moreover, a transfer or grant of a lease of land with negative value triggers compulsory first registration of land under section 4 of the LRA 2002.[33] We expressed the provisional view that where an interest has a negative value, a disposition of that interest is to be regarded as being made for valuable consideration for the purposes of section 29 of the LRA 2002.[34]

7.54 Twenty one of the 25 consultees who responded expressly agreed. Dr Lu Xu did not agree or disagree, but thought that it is unclear what amounts to negative value. Dr Xu wondered whether an estate burdened with "negative equity" (a larger mortgage loan than market value) would count as being of negative value. We do not think that such as estate has negative value. Ordinarily the value of the estate would be calculated without regard to the mortgage on the assumption that the mortgage would be discharged during a purchase. Moreover, if Dr Xu had in mind a case in which a purchaser is buying the estate subject to the mortgage, the land would still not be of negative value. In buying the land, the purchaser would not be incurring liability under the mortgage contract. The purchaser would merely be taking land which is liable to be repossessed by the mortgagee in case of default by the original owner.

7.55 Both the City of Westminster and Holborn Law Society and Nottingham Law School disagreed with our provisional view. They suggested that whether a transfer of land of negative value is for valuable consideration must depend upon whether enforceable duties were imposed on the recipient as part of the transfer. By contrast, Dr Harpum agreed with our provisional view but disagreed that any amendment of the LRA 2002 is required. Dr Harpum noted that "a conveyance of land which has negative value involves the incurrence of a detriment by the transferee", which may constitute consideration.

7.56 We agree with Dr Harpum that taking land of negative value (as opposed to land of nil value) must involve the recipient taking on some form of liability or other detriment. But the recipient is unlikely just to be taking on liabilities (which would be a form of gift by the recipient to the former owner). Even land of negative value usually has the potential to become valuable (once cleaned, developed, and so on). The land itself is likely to be both an immediate detriment and a potential future benefit to the recipient.

7.57 We have concluded that no amendment is required to the LRA 2002 to make it clear that land of negative value may constitute valuable consideration.

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[33] Consultation Paper, paras 7.27 to 7.31.

[34] Consultation Paper, para 7.71.

### (4) A peppercorn

7.58 We asked consultees whether a peppercorn could, by itself, qualify as valuable consideration and whether they had any experience of transactions in which a peppercorn was the only consideration.[35]

7.59 Twenty-two consultees answered this question. Ten said that peppercorns could amount to valuable consideration, although not all ten thought that the LRA 2002 should address this issue. Some consultees strongly disagreed. Dr Harpum noted that a peppercorn is a paradigm example of nominal consideration, in the *Midland Bank* sense of consideration that is cited but not paid. He was of the view that the LRA 2002 should continue to exclude nominal consideration. Nigel Madeley and Burges Salmon LLP pointed out that if a peppercorn qualifies as valuable consideration, it is difficult to see how anything could fail to be valuable.

7.60 Some consultees, including the Law Society and Michael Hall, said that, although a peppercorn is not valuable consideration, transfers for a peppercorn should be able to engage section 29 (despite the absence of valuable consideration). Dr Nair and the Society of Licensed Conveyancers suggested that, if a peppercorn consideration has been specified, this is an indication that the parties to a transfer of land are involved in a commercial transaction, not making a gift. Howard Kennedy LLP said that it has encountered leases of substations to utility companies where the only consideration given was a peppercorn.

7.61 We agree with Dr Nair and the Society of Licensed Conveyancers that transferring land for a peppercorn consideration is generally indicative of a commercial transaction and not of a gift. Furthermore, it may be convenient to specify consideration of a peppercorn where the true consideration for a transfer is difficult to describe (as may be the case where, for example, it relates to the development prospects of land which otherwise has little or negative value).

7.62 However, as explained above, we consider that it would be of limited value for the LRA 2002 to provide that a peppercorn *may* constitute valuable consideration without providing guidance as to the circumstances in which it will do so. Conversely, we do not think that the LRA 2002 should provide that consideration of a peppercorn will *always* constitute valuable consideration. Such a provision would deprive the court of any flexibility when dealing with cases in which a gift has been presented as a commercial bargain by including a peppercorn consideration.

7.63 Moreover, peppercorns are typically nominal consideration, in the *Midland Bank* sense of consideration that is not intended to be paid. It is rare for a peppercorn consideration actually to change hands. Furthermore, we do not believe that parties to transfers of land typically regard peppercorns as being items of genuine value. A peppercorn consideration is cited for formal reasons to make the relevant contract binding. We do not think that the LRA 2002 should expressly provide that a form of consideration which (1) is not generally intended to pass between the parties and (2) is not viewed by the parties as being of value, nonetheless always amounts to valuable consideration. We

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[35] Consultation Paper, para 7.72.

think that this would be inconsistent with retaining the requirement of valuable consideration in section 29. It would strip the requirement of most of its content.

7.64 We therefore consider that whether a peppercorn constitutes valuable consideration and so engages section 29 of the LRA 2002 is appropriately left to be determined by the general law according to the facts of the particular case.

### Further clarification

7.65 Finally, our Consultation Paper asked consultees whether there are any other types of bargain where it is unclear whether land is being transferred for valuable consideration.[36]

7.66 Eleven consultees responded to this question. The Chartered Institute of Legal Executives pointed out that it was aware of commercial transactions which specified non-monetary consideration of a red rose or a freshly baked lemon meringue pie. We consider that our discussion of peppercorns applies equally to such cases.

7.67 Consultees raised only one example which seems to us to require further discussion. Christopher Jessel and the National Trust mentioned transfers of land to charitable organisations. The National Trust argued that gifts of land to conservation organisations, who intend to hold such land indefinitely for the benefit of the public, should come within the protection afforded by section 29. It suggested that the public benefit that results from such transactions should be deemed to be consideration. We think the National Trust's comment raises a wider question of the extent to which (if at all) land should be treated differently because it is going to be held for the public benefit. As a matter of land registration law, we do not think that the application of section 29 (and therefore the priority of a property right) should be dependent on the identity of the transferee of land.

## ISSUE (4): SHOULD THE DEFINITION OF "VALUABLE CONSIDERATION" EXCLUDE NOMINAL CONSIDERATION?

7.68 The final point of clarification discussed in our consultation paper was the meaning of "nominal consideration".[37] We suggested that the exclusion of nominal consideration in money in section 132(1) of the LRA 2002 no longer serves a useful purpose. We suggested that the exclusion should be removed, and asked consultees whether they agreed.[38]

7.69 A clear majority of consultees (23 out of the 28 who responded) agreed with our provisional proposal, although they gave varying reasons. Howard Kennedy LLP pointed out that the meaning of "nominal consideration" is uncertain. Pinsent Masons LLP suggested that any monetary consideration, no matter how small, should constitute valuable consideration. The London Property Support Lawyers Group agreed on the basis that section 29 should protect commercial transactions which frequently provide for consideration of £1 or a peppercorn and where the consideration is often unpaid. The Law Society pointed out that "there may be many lawful transactions such as intra-

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36 Consultation Paper, para 7.73.

37 Consultation Paper, paras 7.38 to 7.49.

38 Consultation Paper, paras 7.47 and 7.69.

group transfers where a valuable consideration of thousands if not millions of pounds is specified in the document, but nothing changes hands because it is intra-group (although there may be changes to book entries)". It also raised a concern (particularly in relation to transfers within a group of companies) about how conveyancers can tell from looking at documents referring to substantial consideration that no consideration has in fact changed hands.

7.70 Four consultees disagreed with our provisional proposal, including the Bar Council. The Bar Council maintained that the exclusion of nominal consideration helps distinguish transactions in which "real value has changed hands" from transactions that are in essence gifts dressed up to look like commercial bargains.

7.71 It appears to us that the exclusion of nominal consideration in money in section 132(1) is causing confusion. As we have explained,[39] the phrase "nominal consideration" is ambiguous. It may mean consideration that is of merely trivial value or consideration that is stated but is not meant to be paid. There also appears to be no good reason why section 132(1) should exclude nominal consideration in money but not other forms of nominal consideration, such as a peppercorn.

7.72 We have sympathy for the Bar Council's view that the exclusion of nominal consideration might originally have served to ensure that only transactions for substantial value would obtain the protection of section 29. However, the notion of nominal consideration no longer serves this purpose. In our Consultation Paper, we discussed *Westminster City Council v Duke of Westminster* in which Mr Justice Harman said that any value more than £5 is more than nominal consideration.[40] If £5 is not nominal consideration, it is difficult to see why £1 or even a smaller sum of money should count as nominal consideration. The exclusion of nominal consideration does not by itself prevent what is in essence a gift from satisfying the conditions of section 29 through the payment of a trivial sum of money.

7.73 We have therefore concluded that the exclusion of a nominal consideration in money from the definition of valuable consideration in the LRA 2002 should be removed.

**Recommendation 11.**

7.74 We recommend that the definition of valuable consideration in section 132 of the LRA 2002 be amended so that "a nominal consideration in money" is no longer excluded from the definition of valuable consideration.

7.75 This recommendation is implemented by clause 41 of the draft Bill.

7.76 It should be noted, however, that our amendment of section 132(1) would not automatically have the consequences that the Law Society desires or those that the Bar Council fears. The removal of the exclusion of a nominal consideration in money from

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39 See paras 7.13 to 7.16 above.

40 *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136, discussed at para 7.45 of the Consultation Paper.

the definition of valuable consideration does not mean that a trivial sum, or alternatively consideration that is not intended to be paid, would automatically satisfy section 29. Section 29 still requires valuable consideration and the interpretation of valuable consideration remains a matter for the general law. If the court were to apply the decision in *Midland Bank*, then the adequacy of the sum paid would be irrelevant. Alternatively, if the equitable principles discussed in paragraphs 7.17 and 7.18 above were to be applied, then it appears that there could be some limited investigation into whether genuine value has been given. Additionally, it is not clear that section 29 would apply to a transfer where the relevant consideration is not actually paid.

## ISSUE (5): SHOULD SECTION 132(1) (AS AMENDED) APPLY TO THE WHOLE OF THE LRA 2002?

7.77 In our Consultation Paper, we asked consultees whether any amendment of the partial definition of "valuable consideration" in section 132(1) of the LRA 2002 should apply to other sections of the Act in addition to section 29. We asked specifically about section 30, section 86 and paragraph 5 of schedule 8, all of which refer to valuable consideration.[41] We will separate our discussion of section 86 (which concerns bankruptcy) from our discussion of the rest of the LRA 2002.

7.78 We also asked a question about whether the amendment should apply in relation to unregistrable interests that have been noted in the register.[42] This latter question related to a proposal we had made in Chapter 6 of the Consultation Paper that entry of a notice in the register should confer priority over other unregistrable interests. However, this issue has fallen away as we are not pursuing the Chapter 6 proposals.

### Valuable consideration in the rest of the LRA 2002

7.79 In addition to section 30, section 86 and paragraph 5 of schedule 8 (which we discussed in the Consultation Paper), we note that the phrase "valuable consideration" appears in sections 4, 7 and 80 of the LRA 2002. A summary of these provisions is set out below.

(1) Sections 4 and 80 describe the triggers for compulsory first registration, which include various kinds of transfer or grant "for valuable or other consideration, by way of gift or in pursuance of an order of any court".[43]

(2) Section 7 provides that, where the grant or creation of an interest in land becomes void due to a failure of first registration, "the grant or creation has effect as a contract for valuable consideration to grant or create the legal estate concerned".

(3) Section 30 concerns the effect of a registered disposition for valuable consideration of a registered charge. It largely replicates the wording of section 29.

(4) Section 86 concerns bankruptcy and is discussed separately below.

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41 Consultation Paper, paras 7.78 and 7.83.

42 Consultation Paper, para 7.75.

43 See also the discussion of our recommendation for new triggers for registering mines and minerals, some of which do and some of which do not require valuable consideration, in Ch 3, para 3.62 and following.

(5) Schedule 8 paragraph 5 concerns the right to an indemnity where the registrar rectifies mistakes in the register. It provides for that right to be limited where the person claiming the indemnity caused or contributed to the mistake through fraud of lack of proper care. This limitation does not affect purchasers of the relevant estate or interest for valuable consideration.

7.80 Almost all consultees who responded thought that (aside from section 86) any amended definition of "valuable consideration" should apply to the whole of the LRA 2002.[44] No consultees provided any examples that would indicate that "valuable consideration" should have a different meaning in section 29 than in section 30. Only one consultee thought that the amendment of section 132(1) should not apply to schedule 8 paragraph 5: Dr Tola Amodu suggested that purchasers who paid nominal consideration should not be able to claim an indemnity. But we think that there is no more reason to apply an exception for nominal consideration into paragraph 5(3) than there is to apply it to section 29. Finally, we are not aware of any reason why our amendment in respect of nominal consideration should not also apply to sections 4, 7 and 80.

7.81 No amendment of the LRA 2002 is required in order to ensure that the amended definition of "valuable consideration" applies generally to the LRA 2002. Section 132 contains general interpretation provisions. They apply to the whole of the Act unless the contrary is stated.

**Valuable consideration in section 86(5)**

7.82 Only one provision in the LRA 2002 referring to "valuable consideration" seems to require special treatment: section 86, which concerns bankruptcy.[45]

7.83 Thirteen consultees responded to the question whether any amendment of the definition of valuable consideration in section 132 of the LRA 2002 should apply to section 86(5) of the Act. There was considerable disagreement about whether section 86 presents a special case. The London Property Support Lawyers Group was concerned that amendment of section 132 could create a mismatch with the regime under the Insolvency Act 1986. Several consultees shared this concern. Others, such as Michael Hall, were satisfied that the amendment would not cause any mismatch as the relevant sections of the Insolvency Act 1986 do not place any restriction on what can qualify as valuable consideration.

7.84 We have decided that section 86 of the LRA 2002 should be given special treatment. To explain why, it is necessary briefly to consider the interplay between the LRA 2002 and insolvency law.

7.85 When an individual is made bankrupt, his or her property immediately vests in the official receiver by operation of law pursuant to section 306(2) of the Insolvency Act 1986. The 1986 Act also makes provision for preserving a person's assets between the presentation of a bankruptcy petition and the making of a bankruptcy order. Section 284 provides that any dispositions of property made by the person during this period are

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44 Eleven consultees directly addressed our question about s 30, of which nine were in favour of the amendment(s) applying to that section. Nineteen out of 22 consultees agreed that the amendment(s) should apply to sch 8, para 5, with two consultees expressing other views.

45 Consultation Paper, para 7.81.

void. But section 284(4) makes an exception for property which is transferred in good faith, for value and without notice that the bankruptcy petition has been presented. The meaning of "value" in section 284 is not defined by the 1986 Act.

7.86 Section 86 of the LRA 2002 provides for a restriction to be entered in the register to prevent a registered proprietor against whom a bankruptcy petition has been presented from disposing of his or her registered estate or charge. Subsection (5), however, provides that if a restriction is not entered, the title of the trustee in bankruptcy is void as against a person who takes a disposition of the bankrupt's property for valuable consideration, in good faith and without notice of the bankruptcy petition. There are clear parallels between the language of section 86(5) and section 284(4).

7.87 Although there are at present no apparent limits on what can constitute value for the purposes of section 284(4) of the 1986 Act, we are mindful of the fact that limits may come to be recognised or be introduced in future.[46] If so, those limits might conflict with the interpretation of "valuable consideration" in the LRA 2002. Conflicting interpretations could lead to unintended and undesirable consequences. We think that, as far as possible, the scheme in section 86 of the LRA 2002 should mirror the scheme in the Insolvency Act 1986. We therefore make the following recommendation.

**Recommendation 12.**

7.88 The reform we make to the definition of valuable consideration in the LRA 2002 should not apply to the requirement for valuable consideration in section 86 of the LRA 2002 (bankruptcy of the registered proprietor).

7.89 This recommendation is implemented by clause 42 of the draft Bill, which replaces the phrase "valuable consideration" in section 86 with the word "value" (the word used by the Insolvency Act 1986). This clause avoids the need for "valuable consideration" to have different meanings in different sections of the LRA 2002.

[46] In particular, we note that, by a quirk of drafting, the court's powers under ss 339(2) and 340(2) of the Insolvency Act 1986 to recover property transferred by a bankrupt at an undervalue do not apply to transfers made between the presentation of the bankruptcy petition and the making of the bankruptcy order. It is not implausible that the 1986 Act will in future be amended to address this lacuna in the court's powers.

# Chapter 8: Priorities under section 29: postponement of interests, and the protection of unregistrable leases

## INTRODUCTION

8.1 In the previous chapter, we considered one of the requirements in section 29 – that the disposition is made for valuable consideration. In this chapter, we consider the effect of section 29. We focus on two distinct issues.

8.2 We first consider the use of unilateral notices to protect the priority of an interest that has been postponed pursuant to section 29. We focus on former overriding interests (meaning interests which ceased to be overriding after 12 October 2013),[1] as it is specifically in relation to these interests that questions have arisen regarding the operation of section 29. With the support of most consultees, we recommend that applicants seeking to enter a unilateral notice in relation to a former overriding interest should be required to give reasons why the interest still binds the registered estate.

8.3 We next consider the priority of unregistrable leases in relation to an interest protected by a priority search pursuant to section 72. Although we clarify our interpretation of the law, we have concluded that reform of the LRA 2002 on this point is not necessary.

## THE PROTECTION OF POSTPONED INTERESTS BY NOTICE

8.4 We first consider the possibility of entering a unilateral notice to protect a former overriding interest, after the interest has been postponed to a registered disposition pursuant to section 29(1).

8.5 In the Consultation Paper, we entertained the possibility that this practice was the result of some uncertainty in the law about the precise meaning of "postpone" in section 29(1). We concluded, however, that it is clear what postpone means. We emphasise, both here and in the Consultation Paper,[2] that interests that have been postponed do not revive on a subsequent disposition which does not attract the protection of section 29.

8.6 We concluded that the entry of a unilateral notice to protect an interest that has already been postponed might be made for two reasons:

(1) because the beneficiary of the notice may be unaware that his or her interest has been postponed; and

1 By virtue of LRA 2002, s 117(1).

2 Consultation Paper, para 8.35.

(2) because the beneficiary of the former overriding interest can apply for a unilateral notice without evidence that the interest affects the registered estate, and HM Land Registry is unable to require evidence.[3]

The example at figure 9 illustrates this point.

Figure 9: application to enter a unilateral notice to protect a former overriding interest

A is the registered proprietor of an estate in land. X has the benefit of a manorial right (a type of former overriding interest) over the land, but X has not protected his interest by applying to enter a notice.

On 1 November 2013, A transfers the estate for valuable consideration to B. B registers the disposition on 1 December 2013.

On 5 January 2014, X applies to enter a unilateral notice to protect the manorial right. X must show that his or her interest is of a type that can be protected by a notice. The registrar cannot require X to prove that the interest continues to bind the estate, nor will the registrar determine whether the disposition from A to B was for valuable consideration.

The registrar therefore enters the unilateral notice to protect X's manorial right.

8.7 In this chapter, we recommend that where a person with the benefit of a former overriding interest applies to enter a unilateral notice and a registered disposition has taken place since the interest ceased to be overriding, he or she should be required to provide grounds as to why the interest still binds a registered estate.

8.8 Our recommendation seeks to align the practice in relation to the entry of unilateral notices with the law under section 29. By requiring those with the benefit of former overriding interests to provide grounds as to why their interest still binds a registered estate after a registered disposition, we hope to restrict applications for unilateral notices to cases in which the interest continues to bind the registered estate.

**The effect of "postponement" under section 29(1)**

8.9 When a registrable disposition is completed by registration, section 29(1) "has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration". This is referred to as the special priority rule.[4] In general terms, an interest that is not protected by a notice or is not protected by virtue of its overriding status will

[3] In Ch 9, we generally consider the issue that a beneficiary of a unilateral notice need not provide evidence of the interest in order to either apply for a unilateral notice or object to the registered proprietor's application to cancel the notice. We recommend that the beneficiary is required to provide evidence when objecting to an application to cancel: see Recommendation 14 at para 9.99 below.

[4] See Ch 6, paras 6.11 to 6.17, above.

lose priority to a disposition that is registered under section 29.[5] It stands in contrast to the basic priority rule in section 28. Where section 28 applies, the priority of interests is determined by the order in which they are created or acquired.

8.10 The term "postpone" was introduced in the LRA 2002, having not been used in the equivalent provisions in the LRA 1925.[6] However, the word was not intended to introduce any change in the law: in both the LRA 1925 and LRA 2002,[7] registration of a disposition is intended to give that disposition the benefit of the special priority rule, allowing the disposition to take priority over interests that are not protected.[8]

8.11 In the Consultation Paper, we explored whether there was some uncertainty about the meaning of "postpone".[9] Some commentators have suggested that the word "postpone" in section 29(1) leaves doubt about the operation of the special priority rule. In particular, they have questioned what postpone means in relation to a subsequent disposition that does not engage section 29, asking whether a postponed interest could "revive" against the interest acquired under such a disposition.[10]

8.12 In figures 10 and 11 we give two examples of situations in which a subsequent disposition does not engage section 29(1), where the argument that an interest has been revived may be raised.

Figure 10: Effect of postponement on a subsequent disposition that does not engage section 29

A is the registered proprietor of a freehold estate in land. A enters into a restrictive covenant with his neighbour, Z. The covenant is not noted on A's title.

A transfers the freehold for valuable consideration to B. B is registered as proprietor. Due to section 29, Z's covenant is postponed to B's estate, so B takes free of it.

B dies. The land is transferred by B's personal representatives to B's heir, C. The transfer does not fall within section 29, so the basic priority rule in section 28 applies.[11]

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5 LRA 2002, s 29(2).

6 LRA 1925, ss 20(1) and 23(1).

7 In fact, the principle that a registered disposition for valuable consideration takes free from unregistered or otherwise unprotected interests is as old as land registration itself: see Land Transfer Act 1875, s 30 and Land Registry Act 1862, s 30.

8 Law Com No 271, para 5.6. See also C Harpum and J Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002* (1st ed 2004) para 9.4; and I Clarke and J Farrand (eds), *Wolstenholme & Cherry's Annotated Land Registration Act 2002* (2003) para 3-301.

9 Consultation Paper, paras 8.7 to 8.23 and 8.34 to 8.35.

10 See *Ruoff & Roper*, para 42.003; M Dixon, "Priorities under the Land Registration Act 2002" (2009) 125 *Law Quarterly Review* 401, 405 to 407.

11 Consultation Paper, para 8.8.

Figure 11: Effect of postponement on the grant of a derivative interest that does not engage section 29

A is the registered proprietor of a freehold estate in land. A enters into a restrictive covenant with his neighbour, Z. The covenant is not noted on A's title.

A transfers the registered estate for valuable consideration to B. B is registered as proprietor. Due to section 29(1), Z's covenant is postponed to B's estate, so B takes free of it.

B then grants an equitable charge to C. The charge does not engage section 29, so the basic priority rule in section 28 applies.[12]

8.13 Some commentators have suggested that it is not entirely certain whether C in both cases takes his or her interest free from Z's interest.

8.14 Enabling Z's interest to be revived would undermine the protection section 29 is meant to provide (something the commentators have noted).[13] Although Z's restrictive covenant would not directly affect B's estate or interest (against which it has been postponed), it would do so indirectly by potentially affecting the interests that B subsequently grants. Therefore, B's ability to realise the full value of his or her interest might be compromised. As Nigel Madeley noted in his consultation response, by binding C, the restrictive covenant "would prejudice the value of the land in B's hands".

8.15 In our view, this interpretation cannot be correct. We think the answer is clear: in both cases, Z's interest has been postponed, and does not "revive" against C. C takes free of Z's restrictive covenant.

8.16 We explained our view in the Consultation Paper. Because we think that the law is clear on the effect of section 29(1), we did not ask any consultation questions in relation to this issue.[14]

8.17 It remains our view that the effect of postponement in section 29(1) is clear. "Postpone" means that the disponee will take free from the interest under the registrable disposition. As explained by Mr Justice Norris in *Halifax Plc v Curry Popek*, a registered disposition for valuable consideration "wipe[s] the title clean of any prior unprotected equitable interests".[15]

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12 Consultation Paper, para 8.16 and following.

13 *Ruoff & Roper*, para 42.003, n 11; M Dixon, "Priorities under the Land Registration Act 2002" (2009) 125 *Law Quarterly Review* 401, 406 to 407.

14 See Consultation Paper, paras 8.34 and 8.35. Some consultees shared their views on the term "postpone" and their interpretation of its effect in s 29(1), including Martin Wood, Howard Kennedy LLP, Nigel Madeley, Berwin Leighton Paisner LLP, and Dr Charles Harpum QC (Hon).

15 [2008] EWHC 1692 (Ch), 2008 152(37) SJLB 31 at [49].

8.18 The word "postpone" captures the idea that the interest is not necessarily destroyed; it may remain valid against interests other than that of (and those created by) the disponee. In his consultation response, Christopher Jessel provided examples of cases in which a postponed interest is not destroyed. The most common example is when the disposition that postpones the interest is the grant of a lease: the lessee will take free of the interest, but the interest will continue to affect the freehold reversion once the lease expires.[16] Because a leasehold estate is an estate that is time limited, the postponed interests will revive at the end of the term of the lease. This example is illustrated in figure 12.

Figure 12: Effect of postponement on the grant of a lease

A is the registered proprietor of a freehold estate in land. A enters into a restrictive covenant with his neighbour, Z. The covenant is not noted on A's title.

A grants a lease for ten years to B. B is registered as proprietor of the leasehold estate. Due to section 29(1), Z's covenant is postponed to B's estate, so B takes free of it.

A's freehold estate is still bound by Z's restrictive covenant. When B's lease determines, Z will be able to enforce his or her covenant against A.[17]

8.19 Dr Charles Harpum QC (Hon) explained in his consultation response that "postpone" was carefully chosen for this reason. He explained that, even if "postponement" does not usually indicate "postponed in perpetuity" outside the land registration context, it nevertheless accurately describes the effect of section 29(1).

8.20 In most cases, the practical effect of section 29(1) is that the postponed interest will be eliminated. The interest will not revive on a subsequent disposition of the disponee's interest, whether or not that subsequent disposition engages section 29.[18]

8.21 Despite some academic discussion, we disagree that there is any real question about what "postpone" means in section 29(1) of the LRA 2002. We intend that our discussion in the Consultation Paper and here will lay to rest any remaining doubts about the effect of section 29(1).

**The protection of postponed interests by unilateral notice**

8.22 Based on the operation of section 29(1), it follows that an interest which has been postponed to a disposition for valuable consideration should not be able to be the subject of a notice (other than in exceptional circumstances in which the interest is not postponed in perpetuity). However, stakeholders have expressed concern that unilateral notices are being used to protect interests which have been postponed. As

16 Christopher Jessel also provided an example involving franchises.

17 Example adapted from Christopher Jessel's consultation response. This example assumes that A does not dispose of his or her reversion during the course of the lease.

18 A point we explained in more detail in the Consultation Paper, paras 8.4 to 8.22.

explained above, we think that such entries arise because the beneficiary of the former overriding interest may not know that the interest has been postponed and is not required to provide evidence of the interest in order to enter a unilateral notice.

8.23 There are circumstances in which an interest will not have been postponed despite the fact that a registered disposition has taken place, because the disposition is not one to which section 29(1) applies. In particular, section 29(1) only applies if the registered disposition was made for valuable consideration.

### Valuable consideration

8.24 As we discussed in Chapter 7, "valuable consideration" is a term of art, the parameters of which are not entirely clear. Our recommendations in Chapter 7 seek to bring greater focus to those parameters. However, the requirement for valuable consideration is not one which lends itself to bright line rules, so some uncertainty will inevitably remain.

8.25 It is particularly difficult for someone who was not party to a transaction to discern if valuable consideration was given for it, even if the disposition is registered. HM Land Registry enters in the register the price paid as set out in the transfer,[19] but this information might not answer the question of whether there was valuable consideration: consideration that cannot be given a monetary value is not recorded, and sums set out in the transfer may not in fact have been paid. There is a risk that a court could find that there has been no valuable consideration, even if the transaction documents appear to indicate otherwise.

8.26 Accordingly, HM Land Registry does not scrutinise dispositions to ensure that the consideration given for the disposition is in fact valuable. We agree that it is not appropriate for HM Land Registry to make this determination in every case.[20]

8.27 The burden of proof to show that a disposition was made for valuable consideration should fall on the party seeking to rely on the special priority rule in section 29(1): the disponee. It would be impractical to expect that someone not party to the transaction could determine, or produce evidence, that the requirement for valuable consideration was, or was not, met. We do not think that a beneficiary of an interest which may have been postponed by a disposition is best situated to determine whether valuable consideration has been given for the disposition.

8.28 Thus, the beneficiary may take the view that it is better to protect the priority of his or her interest, even if it may have been postponed by a disposition under section 29(1).

### The use of notices

8.29 Even where an interest has been postponed under section 29(1), a further difficulty arises because it may still be possible to enter a notice in respect of the postponed interest. This is because an interest can be protected by a notice with little evidence.

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19 LRR 2003, r 8(2).

20 Consultation Paper, para 8.41.

8.30 A notice may be entered in the register to protect the priority of an interest affecting the registered estate or charge. A person entitled to the benefit of an interest affecting a registered estate or charge can apply either for an agreed notice or a unilateral notice.[21]

8.31 An agreed notice will only be entered if the registered proprietor consents to the entry, or if the beneficiary can satisfy the registrar that his or her claim is valid. Because an interest that has been postponed no longer "affects" the registered estate, it appears unlikely that an agreed notice will be entered in respect of one: it is unlikely that the registered proprietor will consent, and the beneficiary will be unable to prove that it affects the registered estate.[22]

8.32 However, as we explore in more detail in Chapter 9, a unilateral notice can be entered without the applicant providing evidence that the interest affects the registered estate. Based on the LRA 2002 as it stands, HM Land Registry cannot compel the applicant to provide this evidence. As we explore in Chapter 9, there are good reasons to have a procedure which allows a quick and flexible method of noting an interest in the register.[23] However, as a consequence, the beneficiary need only satisfy the registrar that the interest he or she seeks to note is of a sort that is capable of being protected by a notice.[24]

8.33 The LRA 2002 contains a provision meant to discourage abusive applications for notices (and other applications): applicants are under a duty only to apply for a notice with reasonable cause.[25]

### Interests generally

8.34 The lack of evidence required to enter a unilateral notice means that one could be entered in respect of an interest that has in fact been postponed under section 29. Stakeholders expressed their concerns in the context of former overriding interests, which are the focus of our discussion below. However, this issue is not confined to former overriding interests, but applies to any type of interest that can be postponed by a registrable disposition.[26]

8.35 Nevertheless, as we noted in the Consultation Paper,[27] there does not seem to be a concern about the use of unilateral notices to protect interests generally: difficulties appear to be confined in practice to unilateral notices that are entered in respect of former overriding interests. To ensure that wider reforms are unnecessary, we made a call for evidence, asking consultees to share with us evidence they had about

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21 LRA 2002, s 34(2).

22 LRA 2002, s 34(3).

23 See Ch 9, paras 9.25 to 9.27, below.

24 LRA 2002, ss 32(1), 33 and 34(1). We are making recommendations to reform the procedure for cancellation of a unilateral notice to address this issue more generally: see Ch 9.

25 LRA 2002, s 77.

26 Consultation Paper, paras 8.25 to 8.28.

27 Consultation Paper, para 8.47.

applications for unilateral notices where there has been an intervening disposition which engaged section 29.[28]

8.36 We did not receive evidence of problems in practice in response. Indeed, few consultees responded. Some who did, including the Chancery Bar Association and the Bar Council, merely noted that they had no evidence to share. Others, including Dr Harpum and the Chartered Institute of Legal Executives, suggested that they had heard of this issue arising, but did not have specific examples to give.

8.37 The only specific problem that consultees identified was in respect of chancel repair liability, a type of former overriding interest. We discuss this discrete issue at paragraph 8.64 and following below.

8.38 Some consultees nevertheless felt there was a problem that should be addressed. In response to our provisional proposals in respect of former overriding interests, the Society of Legal Scholars and Amy Goymour suggested that any proposal we make in this regard should be extended to include any type of interest that has been postponed by section 29. Similarly, Berwin Leighton Paisner LLP characterised the provisional proposal as an exception to the rule that an applicant for a unilateral notice only needs to describe the nature of the interest, suggesting that if the exception was allowed for former overriding interests, it should be allowed in other circumstances as well.

8.39 Because such interests can continue to be noted, Berwin Leighton Paisner LLP also suggested that a notice in respect of an interest that had been postponed, but could revive in the future (for example, on the expiry of a lease), should indicate this limitation on the title register. We think that in some situations this limitation will already be apparent: for example, where an interest has been postponed to a lease, but will bind the freehold, the notice should be entered only against the freehold title. Therefore, we have not pursued this issue further.

8.40 Given the lack of evidence of a problem, we do not recommend reform in relation to interests generally. Instead, we focus on former overriding interests.

**Former overriding interests**

8.41 Prior to consultation, stakeholders raised concerns with us about the use of unilateral notices to protect former overriding interests. We have therefore focussed on former overriding interests.

8.42 On 13 October 2013, a number of interests, including manorial rights and chancel repair liability, ceased to be overriding interests.[29] It was the policy of our 2001 Report that such interests should be protected in the register: they can be valuable, and so detract from the worth of the registered proprietor's estate. Moreover, those with the benefit of them tend to know that they have them.[30] In order to protect such interests against

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28 Consultation Paper, para 8.49.

29 By virtue of LRA 2002, s 117(1); Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 (SI 2003 No 2431).

30 Law Com No 271, para 8.40.

registered dispositions on or after 13 October 2013, a notice must be entered on the title of the registered estate.

8.43 As we explained in the Consultation Paper, it was presumed that the effect of the LRA 2002 was to prevent the beneficiary of a former overriding interest from entering a notice to protect that interest if the freehold estate had been transferred for valuable consideration after the cut-off date.[31]

8.44 However, because a unilateral notice can be entered without evidence that the interest affects the registered estate, such notices can still be entered. As HM Land Registry explains, its role in relation to unilateral interests is not to determine the validity of the interest, but only to determine whether it is an interest that is capable of being protected by notice.[32]

8.45 In the Consultation Paper, we agreed it was not appropriate for HM Land Registry to assess whether a registrable disposition for valuable consideration had postponed the interest. Moreover, given that HM Land Registry cannot require evidence that the interest affects the registered estate, we agreed with HM Land Registry that a unilateral notice can be entered in these circumstances.[33] But the consequence is illustrated by the example in figure 9 at paragraph 8.6 above: X is able to enter a unilateral notice to protect a manorial right that has been postponed by a registerable disposition.

8.46 We therefore explained that reform might be required to prevent a unilateral notice from being entered where a former overriding interest has been postponed, and the nature that the reform should take. We suggested that we cannot impose an absolute bar on the entry of notices to protect former overriding interests after a registered disposition of the registered estate, because if the disposition was not for valuable consideration, the former overriding interest could still affect the estate. We therefore proposed a filter procedure. We explained that we did not think the applicant for a unilateral notice should be required to prove that the interest still affects the title: the burden of proof that a disposition was made for valuable consideration, and so protected by section 29(1), falls on the party relying on that provision. Instead, we considered that the applicant should be asked to give reasons why he or she considered that the interest had not been postponed. The application for a unilateral notice would be cancelled unless the applicant provided reasons which were not groundless.[34]

### Consultation and discussion

8.47 We provisionally proposed that if a person applies for a unilateral notice to protect a former overriding interest, and the title indicates that there has been a registered disposition of the title since 12 October 2013, the applicant should be required to give

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31 Consultation Paper, para 8.27.

32 HM Land Registry, *Landnet* (October 2013) 38 p 11, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324701/Landnet-38.pdf at p11 (last visited 4 July 2018). HM Land Registry also explained that the registered proprietor can apply to cancel the unilateral notice; if the beneficiary of the notice objects to the cancellation the issue, including whether the interest affects the land, will be resolved by the Tribunal.

33 Consultation Paper, paras 8.27 to 8.32 and 8.36 to 8.41.

34 Consultation Paper, para 8.43 to 8.47.

reasons why the interest still binds the title. We proposed that the notice will only be entered if the reasons given are not groundless.[35]

8.48 Thirty consultees responded to our provisional proposal. The majority, 22, agreed. Two disagreed, and six expressed other views.

8.49 Some consultees who agreed did so without much further comment. Other consultees who agreed made similar points to the ones we made in the Consultation Paper. For example, Burges Salmon LLP agreed that the proposal may deter speculative applications, and the Conveyancing Association described the existing situation in which no evidence is required to enter a unilateral notice as "ripe for exploitation". Adrian Broomfield thought the proposal would help ensure that applications would only be made if they had a realistic prospect of success.

8.50 Some consultees commented on the need for balance: on one hand is the need for the unilateral notice procedure to be flexible and efficient for holders of interests, together with the need to ensure HM Land Registry is not required to take time to make difficult determinations of the law; on the other hand is the need to ensure that the register of title is not cluttered with notices of interests that do not affect the estate. Amy Goymour characterised this need for balance as a genuine dilemma. The Society of Legal Scholars thought that our proposal strikes the right balance. However, Cliff Campbell worried that our proposal would require HM Land Registry to act as arbiter in applications for unilateral notices.

8.51 Instead of the requirement that HM Land Registry assess the validity of each application on a "groundlessness" basis, the London Property Support Lawyers Group suggested that the applicant should be required to certify that the notice does not relate to an interest that has lost overriding status following a disposition for value made after 12 October 2013. Pinsent Masons LLP, however, thought that this solution would involve a reversal of the burden of proof on the point of valuable consideration, which we had rejected in the Consultation Paper.[36] It wondered if it would result in incorrect certificates being given.

8.52 HM Land Registry also commented on the need for a balanced approach. It agreed with our provisional proposal, but suggested that if taken forward, it would need to be implemented in a way that does not require the registrar to consider every application in detail to determine whether it falls into the category of a former overriding interest that may have been postponed to a registered disposition.

8.53 We have considered these points carefully in deciding to move forward with our proposal, and in drafting the relevant provision(s).[37] We discuss the registrar's role under our policy in more detail below.[38]

8.54 The City of London Law Society Land Law Committee expressed other views. Although it saw merit in our proposal, it wondered whether it reduces the utility of the flexible

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35 Consultation Paper, para 8.48.

36 Para 8.46.

37 See para 8.61 below.

38 See para 8.63 below.

unilateral notice procedure, highlighting concerns about confidentiality. We disagree that our proposal would hinder confidentiality, given that it is not focussed on contemporary expressly created interests, but rather former overriding interests with historic origins.

8.55 Two consultees disagreed with the provisional proposal: the Bar Council and Michael Hall. The Bar Council was "unconvinced" by the proposal. Despite our reasoning, its view was that our provisional proposal reverses the burden of proof on whether section 29 has operated or not. Moreover, the Bar Council questioned whether there was a real problem in practice; it suggested that if there is a problem, it will be a short-term one, and one that is adequately addressed by existing procedures, including the duty to act reasonably in section 77. Michael Hall disagreed based on his concerns about chancel repair liability, which we discuss below.

### Application of the policy

8.56 The City of London Law Society Land Law Committee questioned whether our proposal also applies in relation to section 30 of the LRA 2002. We clarify that it does not. Section 30 addresses priority in respect of a disposition of a registered charge; it does not address the issue of priority between the charge and other interests affecting the underlying registered estate. In our view, the question whether a former overriding interest has lost priority cannot arise in relation to a disposition of a registered charge, and our proposal applies only to an application for a unilateral notice against a registered estate. Former overriding interests affect the land, and so the underlying registered estate. They are not "adverse rights affecting the title to the … charge" within sections 30(1) and 132(3)(b) of the LRA 2002. If a registered estate is subject to both a former overriding interest and a charge, that will give rise to a question of priority, which will be determined under section 29, not section 30.[39]

8.57 We also note that our policy does not apply on first registration; it is simply not necessary to apply it to first registration. The filter procedure we propose is required only due to the possibility that section 29 has not operated to postpone the interest because the disposition was not made for valuable consideration. There is no requirement for valuable consideration on first registration; indeed, there is no requirement for a disposition at all, as first registration may be applied for voluntarily.[40] On first registration, whether a former overriding interest remains binding on an estate depends on section 11. According to section 11(4), and the various rules outlining the documents the registrar will consider, the registrar should be given all the evidence needed[41] to assess whether the notice should be entered in respect of a former overriding interest on first registration. Therefore, if a former overriding interest is missed on first registration, the holder of the interest should apply for alteration or rectification of the register, not seek to enter a notice at a later date.[42]

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39 See LRA 2002, s 29(2)(a)(i).

40 LRA 2002, s 3.

41 Including following the procedure for a caution entered in respect of such an interest: LRA 2002, s 16.

42 In order to further the policy decisions made in the 2001 Report that such interests should be protected in the register, we make a recommendation in Ch 13 that alteration or rectification should only be available if

Recommendation

8.58 The majority of consultees supported our provisional proposal. We continue to believe that it strikes the right balance. Holders of interests will continue to be able to enter unilateral notices quickly, and HM Land Registry's assessment of unilateral notices will remain minimal, including because they need to determine only whether the reason given for entry of the notice is not groundless. However, by requiring the holders of former overriding interests to give reasons why the interest still affects the registered estate, we hope that it will reduce baseless applications for unilateral notices.

8.59 We therefore proceed to make a recommendation in the same terms as our provisional policy.

**Recommendation 13.**

8.60 We recommend that where a person applies for a unilateral notice in respect of an interest which was formerly overriding until 12 October 2013, and the title indicates that there has been a registered disposition of the title since that date, the applicant should be required to give reasons why the interest still binds the title. The notice will only be entered if the reasons given are not groundless.

8.61 Clause 11 enacts this recommendation. It will insert a new section 34A into the LRA 2002. New section 34A requires the registrar to refuse the application for a unilateral notice if the applicant does not give reasons why the interest continues to affect the estate, or if, in the registrar's view, the reasons given are groundless. It however only does so if the application to enter a unilateral notice is in respect of a former overriding interest after there has been a registrable disposition of the affected estate, which is registered on or after the date of the sunset clause, 13 October 2013.

8.62 Section 34A provides the substantive basis within the LRA 2002 for the registrar to refuse to enter a notice. On that basis, HM Land Registry will be able to amend its forms, in particular, Form UN1 (the form to apply for a unilateral notice), to require the applicant to give reasons why the interest continues to affect the estate.[43]

8.63 We therefore anticipate that Form UN1 will be amended in the light of our recommendation. In the Consultation Paper we identified two possible ways that Form UN1 could be modified to achieve this goal.[44] Given HM Land Registry's concerns, we now believe that the most appropriate approach to achieve our policy is an amendment of Form UN1 that requires applicants to identify whether the interest is a former overriding interest, and whether there have been any registered dispositions of the land since 12 October 2013 (which an applicant will be able to identify by obtaining an official copy of the register), with a space for the applicant to give reasons why the interest still

the former overriding interest was not noted on first registration due to a mistake by the registrar: see Recommendation 30 at para 13.266 below.

43 The power to generally amend the forms, and to make different provision for different cases, is already provided in the LRA 2002: see s 128(1) and sch 10.

44 Para 8.44.

affects the registered estate. If no reasons are given, or the reasons given are groundless, the registrar will reject the application as substantially defective.[45] We believe clause 11 allows HM Land Registry to take this approach.[46]

### The discrete point of chancel repair liability

8.64 As our provisional proposal related to former overriding interests, it is perhaps unsurprising that a number of consultees raised the issue of uncertainty in the law in relation to chancel repair liability. Consultees, including Dr Harpum and Louis Farrington, explained that the law is unsettled on the point of whether chancel repair liability is an adverse property right affecting the title to an estate or some other type of liability. The suggestion is that, despite section 117 of the LRA 2002 eliminating the overriding status of chancel repair liability (among other former overriding interests) in 2013,[47] chancel repair liability may continue to be an overriding liability on property owners. As consultees noted, on this basis HM Land Registry continues to enter unilateral notices protecting chancel repair liability.

8.65 Consultees explained that the risk of chancel repair liability causes real concerns in practice. The Law Society explained that the practical result is that many purchasers continue to buy specific insurance to cover the risk. The Law Society therefore suggested that our provisional proposal should go further, offering that, in the case of chancel repair liability, the applicant should have to provide evidence that the liability affects the particular registered estate. The City of London Law Society Land Law Committee similarly wondered, under our new proposal, whether uncertainty over the law in relation to chancel repair liability may cause HM Land Registry to determine that an application for a notice is not groundless. Conversely, the respondent on behalf of Everyman Legal, an ex-ecclesiastical lawyer, commented that chancel repair liability was unlikely to be imposed in many cases going forward.

8.66 The character of chancel repair liability, and whether it should be abolished, falls outside the scope of this project.[48] The clear policy of section 117(1) of the LRA 2002 was that chancel repair liability should cease to be overriding, and so should not bind purchasers of registered land, unless it is protected in the register, so plain for all to see.

8.67 We acknowledge, however, that the legal status of chancel repair liability is unsettled, and uncertainty as to its status has cast doubt on whether the policy of the LRA 2002 has been achieved. To clarify its legal status, we have agreed to conduct a distinct project on chancel repair liability as part of our Thirteenth Programme of Law Reform.[49]

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45 Alternatively, the registrar may raise a requisition, asking the applicant to provide grounds.

46 Any amendment will consequentially need to be carried forward into any forms created for use in unilateral notice applications, as discussed in Ch 9.

47 See also the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 (SI 2003 No 2431).

48 A point we made in the Consultation Paper: para 1.19.

49 Thirteenth Programme of Law Reform (2017) Law Com No 377, paras 2.30 and 2.31.

## THE PRIORITY OF AN UNREGISTRABLE LEASE VERSUS A REGISTRABLE DISPOSITION DURING THE PRIORITY PERIOD

8.68 We next considered the interaction between the protection of unregistrable leases under section 29(4) and protection given to registrable dispositions by priority searches under section 72. As we explain below, we think the law is sufficiently clear that a recommendation for reform on this point is unnecessary.

### The issue

8.69 Subsection (4) of section 29 extends the protection conferred in subsection (1) to unregistrable leases. Section 29(4) provides:

> Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition, this section has the effect as if–
>
> (a) the grant involved such a disposition, and
>
> (b) the disposition were registered at the time of the grant.

Most commonly, section 29(4) will apply to leases of seven years or less, which are not registrable.[50]

8.70 As we discussed in the Consultation Paper, a recent case raised concerns about the effect of this section, particularly about the priority of unregistrable leases as against a registered charge protected by a priority search.

8.71 Section 72 of the LRA 2002 allows the priority of a registrable disposition to be protected between completion of the disposition and its registration. Once a disponee makes an application for an official search with priority (a "priority search"), the application is entered as a pending application on the day list. The disponee will have 30 days, the "priority period", within which to register the disposition. During the priority period, the practice of the registrar is not to enter adverse entries in the register. Any application to make an entry in the register will be postponed to the entry with the benefit of the priority search.[51]

8.72 We outline two situations below in which the interaction of the sections is complex. Although these issues are difficult, they are rare: there is only one case (discussed below) in which this issue has arisen, even though section 29(4) is not new to the LRA 2002, but replicated the law as it was in the LRA 1925.[52]

8.73 In the case of *Scott v Southern Pacific Mortgages Ltd* ("*Scott*"),[53] the High Court and Court of Appeal were concerned about the operation of section 29(4) in relation to

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50 LRA 2002, s 27(2)(b)(i). However, a tenant of a lease for between three and seven years can apply for a notice in respect of the lease: LRA 2002, s 33(b).

51 LRA 2002, s 72; LRR 2003, rr 131, 147 and 148.

52 LRA 1925, ss 19(2) and 22(2); see Consultation Paper, para 8.64.

53 [2010] EWHC 2991 (Ch); [2012] EWCA Civ 17, [2012] 1 WLR 1521. Lord Justice Etherton sitting in the Court of Appeal agreed with the conclusions on the second preliminary issue, essentially agreeing with the

mortgages protected by priority searches, in the context of a sale and lease back agreement. The courts found it undesirable for the tenant of an unregistrable lease, granted following completion of a purchase of the property, to be able to obtain priority through section 29(4) over the chargee. The chargee had advanced money to finance the purchase, and while the mortgage was not yet registered at the time the lease was granted it was protected by a priority search.

8.74 Although *Scott* considered situations in which the mortgage was granted as acquisition finance, we do not think this point is important. The significant facts are that the mortgage was protected by a priority search, and that it was executed before the unregistrable lease. We call this "the first scenario" and it is illustrated in figure 13.[54]

Figure 13: Unregistrable leases – the first scenario

A is purchasing a freehold estate in registered land. To finance the acquisition, A plans to execute a charge over the estate in favour of B. Several days prior to completion of the purchase and the mortgage, B applies for an official search with priority under section 72, which gives the two dispositions (to A and B) priority protection for 30 days.[55]

The purchase and mortgage are completed a few days later.

Five days after completion, but before the disposition and charge are registered, A grants a four-year lease to C.

A's estate and B's charge are both lodged during the 30-day priority period. Those applications are completed.

8.75 Judge Behrens, sitting as a High Court judge in the first instance decision in *Scott*, gave three reasons why section 29(4) did not operate to confer priority to the tenant over the mortgagee in that case. We consider that his reasoning applies generally to cases within the first scenario. Most of the reasoning in *Scott* is based on a consideration of owner's powers and therefore inapplicable to this issue.[56] However, as an alternative basis for his decision, Judge Behrens found that the lease could not prevail over the mortgage when the mortgagee had made a priority search under section 72 and had subsequently submitted its application for registration within the priority period conferred by the search.[57]

reasons given by the judge: see [2012] EWCA Civ 17, [2012] 1 WLR 1521 at [58]. By the time the case reached the Supreme Court, the second preliminary issue was no longer live: [2014] UKSC 52, [2015] AC 385 at [26].

54 See also Consultation Paper, paras 8.54 to 8.56.

55 See LRR 2003, r 151.

56 We discuss other aspects of the reasoning in Ch 5, paras 5.19 to 5.22 above.

57 [2010] EWHC 2991 (Ch) at [63].

8.76 We agree that this outcome is correct: when a mortgagee has made a priority search and submitted its application within the priority period, if the lease was created between the grant of the mortgage and its registration, the mortgage should take priority. Section 72 on its face provides protection by postponing to the interest protected "an entry made in the register during the priority period". Although section 72 is silent about a deemed entry under section 29(4), we think it is entirely logical and consistent with the LRA 2002 that section 72 provides protection against deemed entries under section 29(4). Our view is confirmed by what would happen if the lessee attempted to protect a lease of between three and seven years by notice: if the tenant applied for the notice during the priority period protecting a registrable charge, it would have been postponed to the registration of the charge.[58]

8.77 However, a similar scenario could arise outside the context of a purchase. In particular, it could arise when an unregistrable lease is created before the interest protected by the priority search. We call this "the second scenario" and it is illustrated in figure 14.[59]

Figure 14: Unregistrable leases – the second scenario

A is the registered proprietor of a freehold estate in land. To raise funds for renovations, A plans to grant a charge over the estate to B. Several days prior to the execution of the charge, B applies for an official search with priority under section 72, which gives B protection to register its charge for 30 days.

The next day, A grants a four-year lease to C.

Five days later, the charge is executed. B applies to register its charge, and it is registered within the 30-day priority period.

8.78 As we explained in the Consultation Paper, one interpretation of the interaction between section 29(4) and section 72 in a case within the second scenario is that where a lease is granted before the mortgage, but the mortgagee has already obtained an official search (and so has a priority period) the tenant of the lease loses priority to the subsequently granted mortgage. As we noted, this outcome would undermine the inclusion of unregistrable leases as a category of overriding interests in the LRA 2002. Therefore, in our view, it cannot be correct.[60]

8.79 We suggested that the answer to determining how sections 29(4) and 72 interact may depend on the time the unregistrable lease was created, and so whether the overriding interest provisions, in section 29(2) and schedule 3, apply. We suggested that the correct conclusion was that a lease granted before an interest under a registrable

58 Consultation Paper, paras 8.57 to 8.59. We discuss this point in more detail at paras 8.110 to 8.113 below.

59 Consultation Paper, paras 8.61 and 8.62.

60 Consultation Paper, paras 8.59 to 8.62.

disposition should take priority (the second scenario), but if granted after, as in *Scott*, it should not (the first scenario).

8.80 In order to assess whether any clarification of the law was necessary, we sought to gather evidence about whether section 29(4) causes problems in practice.[61]

**Consultation**

8.81 We invited consultees to provide us with evidence of whether section 29(4) has operated to give priority to an unregistrable lease over an interest protected by a priority search.[62]

Necessity for reform

8.82 Consultees did not provide us with evidence of problems in practice. Of the 15 consultees who responded, eight (many representing practitioners, including the Chancery Bar Association and the Law Society) said that they had no evidence to offer. The other consultees who answered also did not provide us with examples that have arisen in practice.

8.83 Nigel Madeley wondered whether this issue might arise in other situations. He gave two examples: on a re-mortgage (in which the second mortgagee acquires by subrogation the priority of the first mortgagee); and in relation to overriding rights arising by prescription, such as easements, which could arise during the priority period.

8.84 On the basis that there was no evidence of problems arising in practice, some consultees wondered about the necessity for reform. HM Land Registry, the Society of Legal Scholars, and the City of Westminster and Holborn Law Society, suggested that clarification of the law was preferable. However, HM Land Registry only advocated clarification if there are problems in practice. Similarly, given the infrequency with which this issue has arisen before the courts, the Law Society questioned whether any changes to the law are necessary.

The first and second scenarios

8.85 Some consultees explained whether they agreed with us about what the outcomes should be in the first and second scenarios, generally focussing their comments on the second scenario. Most who expressly considered these points agreed with us that the lease should have priority in the second scenario; only the Law Society expressed the opposite view, while the London Property Lawyers Support Group did not express a definitive view either way.

8.86 The Society of Legal Scholars agreed with our interpretation in the second scenario: it stated that an unregistrable lease should take priority over a subsequently granted interest. It proposed that the "subordination" of the priority search rule to the rule protecting unregistrable leases should be made clear through an amendment of the LRA 2002.

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61 Consultation Paper, paras 8.63 and 8.64.

62 Consultation Paper, para 8.65.

8.87 The Bar Council expressed "cautious agreement" with our view in relation to the second scenario on the basis that unregistrable leases are often created informally. It is not possible for unregistrable leases to be protected by a priority search (or in many cases even a notice), and even so, it is not the sort of transaction in which parties could be expected to do so. The Bar Council noted that the mortgagee in this scenario will only experience difficulties if it needs to sell free of the tenancy, and the lease still exists when the borrower defaults. It explained that the mortgagee could avoid this problem with appropriate pre-contract enquiries, which in its view are not onerous in practice. The Bar Council also thought that a sale and leaseback case such as *Scott* is unlikely to arise again given recent regulation by the Financial Conduct Authority.[63]

8.88 Nigel Madeley appeared to make a similar point. He suggested that "legal logic supports the tenant's priority" in the second scenario because the mortgagee had an opportunity to protect itself by an inspection, in addition to being able to protect itself through loan covenants and calculation of the "loan to value" ratio.

8.89 Amy Goymour was also inclined to agree with our conclusions. Regarding the first scenario, she agreed that a lease granted during the priority period but after the registrable disposition should not take priority, because the mortgagee should not be disadvantaged simply because the lease is unregistrable. She also agreed that in the second scenario there is no reason for the mortgagee to take priority when the unregistrable lease is first in time. Ms Goymour specifically agreed that priority searches cannot guard against the creation of overriding interests that pre-date the right protected by the priority search. She wondered if these problems could be solved if section 29(4) only applied to leases of three years or less, noting that leases of between three and seven years can be protected by a notice in the register.

8.90 Dr Harpum explained that he did not know if this point causes problems in practice. With respect to the first scenario, when a lease is created after the mortgage but during the priority period, he made suggestions for how reform could be undertaken. In particular, he suggested that where the unregistrable lease is granted after entry into the mortgage and during the currency of the priority search, the lease could be taken to be granted on expiry of the priority search period.[64] His reasoning is similar to our own. Dr Harpum moreover appeared to agree with us about the outcome in the second scenario as he suggested that a lease granted before a mortgage would take priority.

8.91 The Law Society appeared to disagree with our conclusion about the law in the second scenario. It suggested that, when an unregistrable lease is granted before a later charge, so long as both occur during the priority period, the charge should take priority. We wonder if the Law Society was perhaps relying on the decision of the Court of

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63 Indeed, the Supreme Court said that, after s 19 of the Financial Services and Markets Act 2000 made sale and rent back transactions a regulated activity, they have become "very rare": *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52, [2015] AC 385 at [2] by Lord Collins.

64 Dr Harpum also made another suggestion: he suggested that the s 29(4) requirement that the lease is granted "out of a registered estate" could delay giving the lease priority until the reversion is registered. We do not pursue this suggestion.

Appeal in *Scott v Southern Pacific Mortgages Ltd*[65] for its reasoning. We address the reasoning in this case in more detail below.[66]

8.92 The London Property Support Lawyers Group[67] agreed with our analysis of the law in relation to the second scenario; however, it was concerned that it could cause problems in practice. It cited a statement from *Ruoff and Roper: Registered Conveyancing ("Ruoff & Roper")* that the priority protection provided by an official search does not protect a purchaser from an overriding interest that arises before the purchase is completed because the overriding interest is "instantly binding".[68] The Group described this statement as "undoubtedly" correct. However, it suggested that the law is problematic. It gave as an example a situation where before the mortgage is completed a lease is granted, which includes an option to buy the freehold. Fundamentally, the Group did not think an option should be capable of being an overriding interest on the basis of the beneficiary's actual occupation (which is an issue we consider in Chapter 11).[69] It further wondered whether a priority search should afford protection to the holder of the search against overriding interests, even those created before the registrable interest.

### Discussion

8.93 Consultees were unable to provide us with evidence of problems in practice, confirming our view in the Consultation Paper that any issues are indeed rare. We therefore agree that it is unnecessary for us to recommend reform to clarify the law.

8.94 Consultees largely agreed with our analysis of the law, and in particular, the interaction between the protection of unregistrable leases and the protection given by a priority search. Nevertheless, we clarify our interpretation of the law below in order to resolve any ambiguity that may exist.

8.95 We continue to believe that section 72 can be read to include protection against deemed entries in the register under section 29(4). Generally, we are satisfied with the conclusion reached on the interaction of section 72 and 29(4) by the High Court and Court of Appeal in *Scott*[70] with regard to what would happen in the first scenario. In particular, we are satisfied with the conclusion that section 29(4) would not operate to give priority to an unregistrable lease granted after completion of a registrable disposition but during the registration gap, so long as the disposition was protected by a priority search and registered within the priority period.

8.96 We are more concerned with the law in relation to the second scenario. Since the Consultation Paper, our thinking has developed. We more firmly believe that the second scenario is addressed by the provisions on overriding interests in section 29(1) and (2) and schedule 3, not by any deemed registration arising from section 29(4).

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65 [2012] EWCA Civ 17, [2012] 1 WLR 1521.

66 See para 8.102 and following below.

67 In its response to our call for evidence at para 8.49 of the Consultation Paper.

68 *Ruoff & Roper*, para 15.016.

69 See Ch 11, para 11.10 and following below.

70 [2010] EWHC 2991 (Ch) at [63]; [2012] EWCA Civ 17, [2012] 1 WLR 1521.

8.97 Section 29(4) deems an entry in the register to have been made for an unregistrable lease in order to give lessees the priority conferred by section 29(1) against pre-existing interests affecting title to the estate, unless those interests are protected under section 29(2). Section 29 is backward looking, clearing the title to benefit a new interest.

8.98 Section 29 is not forward looking: it does not expressly say anything about protection of an interest against subsequent dispositions. However, in so far as most interests, in order to take advantage of section 29, are entered in the register, they are protected from subsequent dispositions by section 29(1) and (2). Unregistrable leases are, by definition, not capable of registration. Section 29(4) deems unregistrable leases to be registered, but does not actually register them: they do not appear in the register of title. Therefore, their protection from subsequent interests does not come from section 29(4). Instead, unregistrable leases are protected from subsequent dispositions as overriding interests under schedule 3.[71]

8.99 In the second scenario, because the lease pre-dates the mortgage, section 29(4) is not relevant to determine the issue. The relevant protection is provided in subsections 29(1) and (2), which applies in the registration of the mortgage. Subsection 29(1) is subject to the significant exceptions in subsection (2), including overriding interests in schedule 3. As provided by section 29(1), an overriding interest is protected against a registrable disposition if it was "affecting the estate immediately before the disposition". Therefore, as between registrable dispositions and overriding interests, the basic rule of priority applies: first in time. Thus, a pre-existing unregistrable lease will override the disposition to the mortgagee.

8.100 Since section 29 does not sweep away overriding interests that pre-date the interest in the registrable disposition, it is our view that neither can section 72, which only extends the protection of section 29 for the duration of the priority period.

8.101 Our view that the priority period in section 72 does not give priority to a registered disposition over overriding interests that arise before the registered disposition in fact takes place is supported by *Ruoff and Roper*.[72]

8.102 We therefore think that the reasoning of the Court of Appeal in *Scott*[73] on this point could be problematic. Although we think its view on the interaction of sections 29(4) and 72 is generally correct, we think its view on the interaction between sections 29(4) and 72 and the provisions for overriding interests is misleading.

8.103 In the course of its judgment, the Court of Appeal said:

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71 LRA 2002, s 29(2)(a)(ii). The Society of Legal Scholars wondered whether unregistrable leases should be able to be protected by a priority search. We have not pursued this suggestion, because we do not think it fits within the current scheme for priority protection, in which only registrable dispositions can be protected by a priority search: see LRR 2003, r 131. We are also unconvinced that such protection is necessary, given, as the Society of Legal Scholars noted, that unregistrable leases are deemed to be registered when they are granted, and so there is no concern about a "registration gap" in relation to them.

72 *Ruoff & Roper* paras 15.016 and 30.013. The London Property Support Lawyers Group pointed us toward this quote.

73 [2012] EWCA Civ 17, [2012] 1 WLR 1521.

> The purpose and effect of LRA section 29(4) is simply to apply to such a lease the provisions of the LRA [2002] relating to priority as if it was a registrable disposition and was registered at the date of grant. That means … that the registration of subsequent transactions will take subject to the lease even though the lease is not registered, and whether or not it is protected by notice or is an overriding interest. Interests created earlier than the grant of the lease will, however, be binding on the tenant to the same extent, if any, as would any other earlier interest in relation to a disposition completed by registration, namely in those circumstances identified in section 29(2) and in cases where protection has been conferred by section 72.
>
> Mr Small's submission that section 72 is inapplicable to confer protection against a tenant under a lease of 7 years or less is plainly untenable. The express statutory assumptions in section 29(4) are that the grant of such a lease involves a registrable disposition (and so is not to be treated, for priority purposes, as an overriding interest within paragraph 1 of schedule 3) and the grant was registered at the time it was made. Section 72 must apply on the basis of the same assumptions.[74]

8.104 The Court of Appeal was, however, concerned with a case within the first scenario, in which the mortgage was completed before the lease was granted, and the lease was subsequently registered during the priority period. We agree that the priority period freezes the register until the end of that period, such that the lease is only deemed to be registered at that point. The overriding interest provisions do not apply because the lease is not first in time: a subsequently created interest cannot override the prior disposition.[75]

8.105 We do not know if the Court of Appeal meant for its statement about section 29(4) to apply to cases within the second scenario. However, we would not agree if this reasoning were applied to the second scenario, when the unregistrable lease pre-dates the mortgage. Nor do we consider that section 29(4) means that unregistrable leases are not overriding interests; in our view, that is not the logic or intention of section 29(4). The lease in *Scott* was not overriding because the lease was created after the charge. Unregistrable leases are clearly designated as overriding interests in paragraph 1 of both schedules 1 and 3. If short leases were not overriding interests, it is not clear how very short leases could be protected at all: although a notice can be entered in respect of a three- to seven-year lease to protect it from a subsequent disposition, a lease of less than three years can neither be registered nor protected by notice. It would be vulnerable to any registrable disposition.

8.106 Our conclusion accords with Dr Harpum's statement in his response: section 29(4) was drafted to replicate section 19(2) in the LRA 1925 and no change to the law was

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74 [2012] EWCA Civ 17, [2012] 1 WLR 1521 at [64].

75 Nor do we disagree with the Court's finding that a lease cannot be created by the purchaser before the purchase is completed, or between the purchase and the mortgage when the mortgage secures funds used to purchase the property: [2012] EWCA Civ 17, [2012] 1 WLR 1521 at [54] and [55]. This was the main point on which the Supreme Court made its decision: [2014] UKSC 52, [2015] AC 385. However, we note that the implication in the Supreme Court's judgement that, pre-completion, a purchaser cannot create a property right in favour of a third party is in tension with our view of the status of estate contracts as equitable interests in land. We do not consider this point further but note that, as a matter of the general law of property, it is outside the scope of our project.

proposed in our 1998 Consultation Paper in relation to the priority given to the grant of a lease which is an overriding interest.

8.107 Up until this point, we have considered the outcomes in the two scenarios simply as a matter of interpretation of the LRA 2002. We are also satisfied that the LRA 2002 comes to the right result in both scenarios as a matter of policy. Whether a registrable charge is bound by an overriding interest is determined based on whether the interest pre-exists the registrable disposition.[76] The mortgagee is able to discover whether an overriding interest exists before completion of the charge. Therefore, as noted by the Bar Council and Nigel Madeley,[77] mortgagees can protect themselves through due diligence. It is long standing principle that an inspection should be made prior to completion of a disposition. As we discuss in Chapter 11,[78] disponees, including purchasers and mortgagees, are entitled to inspect the land and make inquiries of occupiers to discover overriding interests. Parties to transactions should be aware of the risks if they decide not to do so. Even if, as some consultees suggest, inspections do not always take place in practice, the policy reasons for protecting a small class of interests as overriding remain.

### Conclusion

8.108 Consultees could not identify any problems in practice with the interaction between section 29 and section 72. *Scott* is the first and only case in which this problem has arisen. Our concern with the decision is not based on the outcome on the facts, but on how the decision might be applied on alternative facts, which were not considered by the court. Although we have some concern that the Court of Appeal's statements in *Scott* could cause some confusion if taken out of context, we do not consider that it would be appropriate to recommend an amendment of the legislation on such a speculative basis. Ultimately, we think that the LRA 2002 provides the answer in both the scenarios that we have considered. Our discussion of these issues should clarify any doubt that exists.

8.109 On this basis, we have concluded that reform of the legislation is unnecessary.

## NOTICES AND THE PRIORITY PERIOD

8.110 The London Property Support Lawyers Group made a discrete point about the use of notices during the priority period. The Group suggested that a priority search should provide priority protection against the entry of a notice to protect a former overriding interest whose overriding status would come to an end on completion of the disposition to which the search relates, if made within the priority period.

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[76] The conclusion that first in time governs assumes that the registrable disposition is protected by a priority search. If the registrable disposition (eg a charge) is not protected by a priority search, and is granted before the unregistrable lease, but not registered until after in our view of s 29(4), the lease would have priority. That is s 29 would have postponed the (then) equitable, unprotected, charge to give priority to the tenant. To avoid losing priority in this situation, registrable dispositions can be protected by a priority search.

[77] See paras 8.87 and 8.88 above.

[78] See Ch 11, paras 11.23 to 11.26 below.

8.111 We have accepted that it is possible to enter a unilateral notice in relation to an interest after a registrable disposition. Because the holder of the interest generally will not know if the disposition was made for valuable consideration, he or she cannot determine if the disposition benefited from the special priority rule in section 29(1).[79]

8.112 It follows that it must also be possible to apply for a unilateral notice during the currency of a priority search. However, in practice, the registrar will not make an adverse entry in the register during the priority period; if the disposition is registered within the priority period, the registrar would enter the unilateral notice after it. Whether a former overriding interest, or any other type of interest, continues to affect the disposition is a matter for section 29(1).

8.113 Recommendation 13, and our clause 11, appears to us to be wide enough for the registrar in this circumstance to exercise his or her discretion either to cancel the application for the unilateral notice or to send a requisition to require the applicant to provide grounds why the interest will still affect the registered estate once the disposition has been registered. The registrar's decision would depend on the precise circumstances. In any event, if the unilateral notice is entered in the register, the registered proprietor will be entitled, in the usual way, to apply to cancel it. If the holder of the interest objected to the cancellation, the dispute, and the issue of whether section 29(1) applied to postpone the former overriding interest to the disposition, will be a matter for the Tribunal to determine.

8.114 This discussion brings us to our next topic: the procedure to cancel a unilateral notice, which we consider and make recommendations to reform generally in Chapter 9.

[79] See paras 8.44 and 8.45 above.

# Chapter 9: Notices

## INTRODUCTION

9.1 In this chapter we consider notices, a form of entry in the register that is used to protect some third-party rights – interests held by someone other than the registered proprietor – under the LRA 2002.[1] Specifically, a notice is "an entry in the register in respect of the burden of an interest affecting a registered estate or charge".[2] It protects the priority of the interest on a registered disposition of the estate under section 29. It therefore ensures that the interest binds a purchaser or mortgagee of the estate. That said, a notice does not guarantee that the interest it protects is valid: it simply protects its priority against registered dispositions if it is.[3]

9.2 The LRA 2002 has a dual system of notices. A person with the benefit of an interest in land (whom we generally call the "beneficiary") can apply for one of two types of notice: an agreed notice or a unilateral notice. In the Consultation Paper we suggested that the underlying policy for having the two types of notice is sound; we provisionally concluded that both agreed and unilateral notices should be retained in the LRA 2002. We considered, however, that the procedure governing notices could be improved. In the light of consultation responses we have particularly focussed, and now make recommendations, on three issues.

(1) The procedure for cancelling a unilateral notice, and for objecting to that cancellation: we recommend an amendment of the procedure to cancel a unilateral notice, in order to require beneficiaries of unilateral notices to produce evidence of their claims earlier in the process. Although we have based our recommendations largely on our provisional proposals in the Consultation Paper, we have modified our procedure to address consultees' concerns. The draft Bill makes provision for a new procedure to object to an application to cancel a unilateral notice. To compare the current procedure with the procedure as it will be under our recommendation, please see the charts in Appendix 4 to this Report. This recommendation addresses an information asymmetry between the registered proprietor and the beneficiary of a notice, which can lead to the parties being referred to the Tribunal before the beneficiary is required to produce evidence of the right claimed.[4] By addressing this asymmetry, we consider that this recommendation responds to the criticism of unilateral notices made by the House of Commons Justice Committee's report on manorial rights.[5]

(2) Who may apply to cancel a unilateral notice: although we think that the law adequately provides for who is entitled to apply to cancel a unilateral notice, we

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1 Restrictions are the other: see Ch 10.

2 LRA 2002, s 32(1).

3 LRA 2002, s 32(3); see Consultation Paper, paras 9.2 to 9.4 and 9.9.

4 Consultation Paper, para 9.29.

5 Consultation Paper, paras 9.122 to 9.127.

take the opportunity in this Report to make our interpretation of the law clear. We do not think that amendment of the LRA 2002 is necessary on this point.

(3) The identification of beneficiaries of agreed notices: we recommend that beneficiaries of agreed notices should be identifiable, and their identities updated, on an entry of an agreed notice. We think this reform can be best achieved through amendment of the rules.

9.3 We discuss each of the above three issues in turn below.

## THE CURRENT LAW: THE DUAL SYSTEM OF AGREED AND UNILATERAL NOTICES

9.4 Under the LRA 2002, a beneficiary of an interest in land can apply for one of two types of notice: an agreed notice or a unilateral notice.[6]

9.5 In the Consultation paper, we considered the procedure for entry and removal of both agreed and unilateral notices in detail.[7] We do not repeat that discussion here, but provide a brief summary of the procedure.

### Agreed notices

9.6 An agreed notice can only be entered in specific circumstances: if the registered proprietor (or person entitled to be registered as proprietor) makes the application or consents to the application; or if the beneficiary satisfies the registrar of the validity of his or her claim.[8] An agreed notice can therefore be entered without the consent of the registered proprietor if the beneficiary of the interest can satisfy the registrar of the validity of the claim by producing sufficient evidence of his or her interest.[9]

9.7 When entered in the register, an agreed notice must give details of the interest protected. It will either extract the relevant part of the document that created the interest, or note that a copy of the document has been filed and is available for public inspection.[10]

9.8 Once entered, the registrar will only remove an agreed notice if provided with evidence sufficient to satisfy him or her that the interest has come to an end.[11]

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6 LRA 2002, s 34(2). There is also a third type, notices entered by the registrar absent any application from a party. "Registrar's notices", as they are often called, function like agreed notices once entered in the register: see LRA 2002, ss 37 and 38 and sch 2, para 3(2)(b); LRR 2003, rr 87 and 89; HM Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (April 2018) para 2.3.1.

7 Consultation Paper, paras 9.6 to 9.33.

8 LRA 2002, s 34(3).

9 See LRR 2003, r 81. Our discussion does not apply to home rights notice, a specific type of agreed notice addressed under rr 82 and 87A.

10 LRR 2003, r 84(3). HM Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (April 2018) para 2.3.2. We consider the information that appears in the entry of an agreed notice in more detail below: see para 9.118 and following.

11 LRR 2003, r 87.

### Unilateral notices

9.9 In contrast, the LRA 2002 does not set out any criteria for an application for a unilateral notice.[12] A beneficiary can apply for a unilateral notice without providing evidence of the validity of the interest to be protected by the notice, and without the agreement of the registered proprietor. All the registrar requires is that the interest is of a sort that can be protected by a notice.[13]

9.10 The entry for a unilateral notice contains less detail than an agreed notice. It will give "such details of the interest protected as the registrar considers appropriate", that is, the nature of the interest and the parties' names.[14] Unlike an agreed notice, a unilateral notice is required to name the beneficiary of the notice; the beneficiary's name and address are listed separately below the entry outlining the interest protected.[15]

9.11 Given that a unilateral notice can be a hostile act against the title of the registered proprietor, the scheme in the LRA 2002 provides a method for the registered proprietor to remove the unilateral notice, called cancellation. The cancellation process is the main safeguard to protect registered proprietors against unmeritorious unilateral notices. This process is outlined in figure 37 in Appendix 4.

9.12 After entering the unilateral notice in the register of title, the registrar must notify the registered proprietor of the entry.[16] The registered proprietor (or person entitled to be registered as proprietor) may then apply under section 36 of the LRA 2002 to cancel the unilateral notice.[17]

9.13 On receiving an application from the registered proprietor to cancel the notice, the registrar must notify the beneficiary of the unilateral notice of the application to cancel. The beneficiary is then given an opportunity to object, pursuant to section 36(2). If he or she does not object to the cancellation, then the registrar must cancel the notice.[18]

9.14 If the beneficiary objects to the cancellation of the unilateral notice, then the objection process in section 73 of the LRA 2002 is followed. This process is not specifically tailored to the unilateral notice context, but applies whenever a person objects to an application to the registrar.

9.15 To object, the beneficiary of the unilateral notice must provide a signed written statement stating the grounds for the objection. Significantly, however, he or she does not need to provide evidence in support of the objection; an objection to an application

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12 LRA 2002, s 34.

13 HM Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (April 2018) paras 2.3.3 and 2.7.2; *Ruoff & Roper*, para 42.006, citing LRR 2003, r 84(5) and the declaration in Form UN1 (panel 11), and para 48.01.

14 LRR 2003, r 84(5). See HM Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (April 2018) paras 2.3.3.

15 LRA 2002, s 35(2) and (3).

16 LRA 2002, s 35(1). See Consultation Paper, para 9.20.

17 See Consultation Paper, paras 9.21 to 9.24.

18 LRA 2002, s 36(3). See Consultation Paper, paras 9.20 to 9.22.

of any sort does not require the objector to produce evidence in support of the objection. The objector must only satisfy the registrar that the objection is not groundless.[19] This standard – groundlessness – is a "very low threshold".[20]

9.16 Unless the registrar is satisfied that the objection is groundless, he or she must give notice of the beneficiary's objection to the registered proprietor. The registrar then usually gives the parties up to six months to negotiate and reach an agreement. During that period the registered proprietor can withdraw the application to cancel the notice, the beneficiary can withdraw the objection, or the parties can reach an agreement. Alternatively, either party can commence court proceedings.[21] Absent any of these actions, the registrar must then refer the dispute to the Tribunal for resolution.[22]

9.17 A beneficiary will only be required to produce evidence of his or her claim if the registered proprietor disputes the claim and the matter is referred to the Tribunal.[23]

### Reasonable cause

9.18 In addition to the procedure for cancellation of a unilateral notice, the LRA 2002 provides one other notable safeguard to protect registered proprietors against the entry of unmeritorious unilateral notices. Section 77 is a general provision to prevent abusive applications. In particular, it makes a person who applies for a notice (among other things) without reasonable cause liable for damages for breach of statutory duty.[24]

## CONCERNS WITH THE UNILATERAL NOTICE PROCEDURE

9.19 In the Consultation Paper, we reported three concerns about the unilateral notice procedure that stakeholders had raised with us.

(1) The beneficiary need not show an entitlement to the right which purports to be protected.

(2) The registered proprietor is not given the opportunity to object before a unilateral notice is entered on his or her title, but is notified after the notice is entered.

(3) If the registered proprietor applies to cancel the unilateral notice, the objection procedure does not require the beneficiary of the unilateral notice to produce evidence in support of the claim.

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19 LRA 2002, s 73(5) and (6); LRR 2003, r 19(2).

20 *Silkstone v Tatnall* [2010] EWHC 1627 (Ch), [2010] 3 EGLR 25 (HC) at [17] by Floyd J.

21 If a party commences court proceedings, HM Land Registry will still refer the dispute to the Tribunal, but "it is likely that the Tribunal will adjourn the proceedings to await the outcome of the court proceedings": HM Land Registry, *Practice Guide 37: Objections and Disputes, A Guide to Land Registry Practice and Procedures* (January 2016) para 6.

22 LRA 2002, s 73(3) to (7).

23 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1169), rr 28 and 30.

24 We have been told anecdotally that it is difficult for a registered proprietor to prove the loss necessary to rely on this provision: Consultation Paper, paras 9.31 and 9.36.

Ultimately, at no point during the process to enter a unilateral notice and then to object to the cancellation of the unilateral notice must the beneficiary provide evidence of the validity of his or her interest. Evidence can be required to be produced only when the parties are engaged in litigation at the Tribunal. There is therefore an information asymmetry between the parties: registered proprietors can find themselves embroiled in proceedings in the Tribunal in order to challenge a unilateral notice which has been entered without their consent, and without the production of any evidence.[25]

9.20 As we detailed in the Consultation Paper, these issues were thrown into sharp relief by the report of the House of Commons Justice Committee on Manorial Rights. As we discussed in Chapter 8, manorial rights ceased to be overriding on 12 October 2013.[26] The change in their status resulted in a sharp increase in applications to note manorial rights up to the cut-off date, with 90,000 applications in the year leading up to October 2013.[27] Most often, manorial rights have been protected by unilateral notices. The Justice Committee criticised the use of unilateral notices to protect manorial rights. The Committee suggested that the use of unilateral notices skews the burden of proof away from the beneficiary and onto the registered proprietor, such that landowners shouldered the cost of disproving claims when in fact there was little evidence of the claims' validity. The concerns highlighted by the Committee were echoed in the views expressed to us by stakeholders. The Committee made several recommendations aimed at ameliorating these concerns.[28]

9.21 For the reasons we explained the Consultation Paper, we have not taken up any of the Committee's specific recommendations.[29] We have however taken the concerns of the Committee and of our stakeholders seriously in our review of notices.

9.22 In the Consultation Paper, we agreed that the unilateral notice procedure should be reformed to make it fairer. In particular, we agreed that reform to require the beneficiary of a unilateral notice to produce evidence earlier could prevent unmeritorious unilateral notice applications and could facilitate resolution of disputes at an earlier stage, preventing litigation before the Tribunal.[30] We think that this reform would address the general concerns of stakeholders about the unilateral notice procedure, as well as the specific concerns that have arisen in the context of manorial rights.

9.23 With the benefit of consultees' views, we recommend reform of this procedure. Our recommendations are a simpler version of our provisional proposals, and better reflect the proper role that the registrar plays in assessing evidence of a claim for a notice. We believe that our recommendations will address the concerns that lie at the heart of the Justice Committee's criticism of unilateral notices, whilst meeting the objectives we

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25 Consultation Paper, paras 9.35 to 9.39.

26 Due to LRA 2002, s 117.

27 Justice Committee, Manorial Rights (HC 657, January 2015) p 3.

28 Consultation Paper, paras 9.41 to 9.47 and 9.122 to 9.129.

29 Consultation Paper, paras 9.122 to 9.129.

30 Consultation Paper, paras 9.40 and 9.47 and following. We also note that we did not pursue reform that would confer on the Tribunal appellate jurisdiction to review the registrar's decisions: see Consultation Paper, paras 21.12 to 21.14.

identified in the Consultation Paper (listed in paragraph 9.25 below) that should govern reform of notices.

9.24 Additionally, we make recommendations in this Report to further the policy objective in the LRA 2002 that manorial rights and other former overriding interests should only bind purchasers if they are protected in the register.[31]

**Proposals for reform**

9.25 In the Consultation Paper, we outlined five objectives of any reform of the law governing the entry of notices:

(1) the notice, once entered, should be a secure means of protection for the beneficiary;

(2) it should be possible to enter a notice in the register without delay;

(3) the register should be as complete and accurate as possible, so that those acquiring land can see the interests to which the land is subject;

(4) registered proprietors should not have to incur undue costs, or suffer unnecessary anxiety, as a result of the entry of a notice by a third party on their title, and the law should not be designed in a way that creates unnecessary litigation; and

(5) there should be means by which those who choose to keep the details of their interest confidential can do so.[32]

9.26 With these five objectives in mind, we considered two options for reform: 1) a single-notice system; and 2) retention of the dual-notice system with amendments to the unilateral notice procedure to provide greater protection to registered proprietors.

9.27 We provisionally rejected a single-notice system, which would eliminate unilateral notices: all applications for a notice would need to be supported by evidence of the interest in order for a notice to be entered, or be consented to by the registered proprietor. In our view, there are two features of unilateral notices that serve important functions, and should be retained in the LRA 2002.

(1) Unilateral notices allow a beneficiary to enter a notice quickly because the beneficiary can apply before gathering all the evidence necessary to prove the existence of the right. They allow parties to take swift action to protect their interests.

(2) Because unilateral notices do not contain the detail of the interest on the face of the register, they can be used to protect interests when those interests contain confidential or commercially sensitive information.

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31 See Recommendations 13 and 30.

32 Consultation Paper, para 9.50. We discussed these objectives, and how they interact, at para 9.51 and following.

The second feature in particular ultimately led us to the view that the dual-notice system should be retained. We do not think that information about the detail of an interest should be able to be kept from a registered proprietor; however, we agreed that the LRA 2002 should retain a form of notice that can allow parties to keep sensitive and confidential details of transactions off the register. We noted that, although there is an exempt information document procedure which allows information provided to the registrar to be excluded from the public right of inspection, this procedure is not a failsafe means of keeping information confidential.[33]

9.28 We add that there are indications that Government policy is moving towards greater transparency of documents on the face of the register of title.[34] Nevertheless, stakeholders have expressed concern, both as part of this project and in relation to our 2001 Report, that there should be a way to keep confidential information off the register. We therefore proceeded in the Consultation Paper on that basis.

9.29 We explored two possibilities for reform of the dual-notice system, focussing on amendment of the unilateral notice procedure. The first, which we called option 2A, introduced a mechanism to require the beneficiary of the unilateral notice to provide evidence of the claim at the point of objecting to the registered proprietor's application to cancel the notice. The second, option 2B, amended the unilateral notice procedure so that the registered proprietor would receive notification of the application before the unilateral notice is entered. At this point, the registered proprietor could object. If he or she objected, the notice would not be entered, and the beneficiary would be required to produce evidence.[35]

9.30 We did not favour option 2B because of the delay the objection procedure could cause in the register: the application for the unilateral notice would sit on the day list during the objection process, "clogging up" the title to the estate. We therefore preferred a dual-notice system that followed option 2A. Most significantly, we proposed amendment of the unilateral notice procedure requiring the beneficiary of the notice to provide evidence of the claim at the stage that the registered proprietor applies to cancel the unilateral notice.

9.31 Additionally, we considered that the current terminology of agreed and unilateral notices can be confusing, and so we provisionally proposed that agreed and unilateral notices be re-named as full and summary notices, respectively.[36]

9.32 Rather than outline the procedure that we provisionally proposed in our Consultation Paper here,[37] we will only highlight the points on which the provisional scheme is different from the current law. The differences begin only at the stage that the registered proprietor applies to cancel the unilateral notice.

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33 Consultation Paper, paras 9.36 to 9.40, 9.53 to 9.81.

34 See Department for Communities and Local Government*, Improving the home buying and selling process: Call for evidence* (October 2017) para 18; HM Land Registry, *Business Strategy 2017-2022* (2017), pp 11 and 15.

35 Consultation Paper, paras 9.62 to 9.115. See LRA 2002, s 66(2); LRR 2003, r 136.

36 See Consultation Paper, paras 9.12, 9.92 and 9.93.

37 For more detail, see the Consultation Paper: paras 9.92 to 9.115 and figure 1.

Figure 15: Current scheme and our provisional proposals

| Current scheme | Provisional proposals |
|---|---|
| The beneficiary must object to the application to cancel within 15 business days (subject to the registrar's discretion to extend to 30 business days). The beneficiary must state the grounds of the objection.[38]<br><br>The registrar must be satisfied the objection is not groundless.<br><br>If the registrar is satisfied that the objection is groundless, the registrar will cancel the notice.[39] | The beneficiary must object to the application to cancel in two stages.<br><br>1. Within 15 business days, the beneficiary must make an initial response (subject to the registrar's discretion to extend to 30 business days). The beneficiary must state the grounds of the objection. The registrar must be satisfied the objection is not groundless.<br><br>2. Within a further 25 business days, the beneficiary must produce evidence of the claim.<br><br>If the registrar cannot determine the application on the basis of the evidence provided, the parties can negotiate.<br><br>If the registrar is satisfied of the validity of the interest claimed, the notice will remain in the register.<br><br>If the registrar is not satisfied of the validity of the interest claimed, the notice will be cancelled. |

### Consultation and discussion

9.33 Our provisional proposals provided details of the scheme as we had envisaged it. First, we provisionally proposed that the two forms of notice should remain. However, we proposed that the notices should be renamed: an agreed notice would be renamed a full notice and a unilateral notice a summary notice.[40] We then proposed amendment of the scheme for the procedure to object to an application to cancel a summary notice,

38 LRA 2002, ss 36(3) and 73(3); LRR 2003, rr 19 and 86.

39 LRA 2002, s 73(6). If the beneficiary of the notice is unhappy with this decision, he or she can apply for judicial review: see Law Com No 271, paras 16.14 and 16.24(2).

40 Consultation Paper, para 9.116.

as outlined in figure 15 at paragraph 9.32 above.[41] Finally, we proposed that the new procedure to object to the cancellation of a summary notice should apply to existing unilateral notices.[42]

9.34 Overall, most consultees agreed with our provisional proposals. Rather than focus on their responses to individual questions,[43] we discuss the points that consultees made thematically.

9.35 Consultees overwhelmingly supported retention of a two-notice system. However, our proposal to change the names of the types of notice received a mixed reception.

9.36 Most consultees agreed with our proposed reform of the unilateral notice procedure by requiring the beneficiary of a unilateral notice to provide evidence at the time of objecting to the registered proprietor's application to cancel. Consultees who disagreed or expressed concern with our proposal largely did so on three bases: the complexity of requiring the beneficiary to object in two stages; the time periods within which the beneficiary would have to object; and the role that HM Land Registry would play in assessing the beneficiary's claim.

9.37 The vast majority agreed that our proposed reforms of the unilateral notice procedure should apply to existing unilateral notices.

### General support for retention of a two-notice system

9.38 Consultees overwhelmingly supported retention of a two-notice system. In particular, consultees agreed that unilateral notices should remain a feature of the notice system within the LRA 2002. A number of law firms and practitioner associations[44] made the point that there should continue to be a form of notice which can be entered quickly in order to protect an interest and which enables parties to keep sensitive or confidential information off the register. Some consultees also noted that the provision to exempt certain information from the public right of inspection did not foreclose the possibility of eventual disclosure of the information; they therefore thought that such information should not be disclosed to the registrar at all.

9.39 HM Land Registry disagreed with our provisional proposals. It instead supported reform to move to a one-notice system, with only agreed notices being retained. In order to keep confidential information off the register, HM Land Registry suggested that evidence would not have to be provided on an application for an agreed notice where the registered proprietor agreed to the entry of the notice.

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41 Consultation Paper, paras 9.117 to 9.119.

42 Consultation Paper, para 9.121.

43 For more detail, see the analysis of responses. Twenty-five of 32 consultees agreed with para 9.116; 23 of 27 consultees agreed with para 9.117; 20 of 26 consultees agreed with para 9.118; 13 of 28 consultees agreed with para 9.119, with four consultees disagreeing and 11 expressing other views; and 22 of 27 consultees agreed with para 9.121.

44 The Property Litigation Association, the Bar Council, Howard Kennedy LLP, the London Property Support Lawyers Group, Taylor Wessing LLP, and Pinsent Masons LLP.

9.40 For the reasons given in the Consultation Paper, we disagree that a single-notice system is desirable. We disagree that a workable single-notice system could allow for confidentiality by allowing parties to dispense with providing evidence in cases of consent. In particular, we worry that commercial parties would choose this option by default, including in cases in which they would currently enter an agreed notice. The register would therefore provide less evidence than it does now.[45] Additionally, we wonder whether we would in effect be creating a two-notice system if we created two categories of a single notice, one entered with consent and the other not. We therefore agree with the majority of consultees that the two-notice system should be retained.

### Change of terminology

9.41 Not all consultees who responded expressly considered the part of our provisional proposal that suggested changing the name of agreed notices to full notices and unilateral notices to summary notices. Those who did respond directly on the issue were evenly divided on this proposal.

9.42 Supporting the proposed change in terminology, the Property Litigation Association and Elizabeth Derrington agreed that the current terminology is misleading. Elizabeth Derrington, the Independent Complaints Reviewer for HM Land Registry, stated that she has investigated a number of complaints in which the terminology of "agreed notice" (in cases when the registered proprietor did not consent to the notice) had caused confusion. Professor Warren Barr and Professor Debra Morris agreed that our proposed terminology would provide greater clarity.

9.43 However, several other consultees[46] argued that changing the terminology without substantive change to the procedure relating to both types of notice was unnecessary at best and at worst would cause confusion and uncertainty. Hogan Lovells International LLP, HM Land Registry, and the Chancery Bar Association argued that the existing terms were, at this point, well established and understood among the profession. Some consultees were concerned that our proposals would result in change too soon after the current scheme of notices had been introduced by the LRA 2002, which replaced the scheme contained in the LRA 1925 for the entry of notices and cautions.[47] Dr Charles Harpum QC (Hon) cautioned that a change in terminology would cause confusion and arguments about the interrelationship between the existing types of notice and the new types of notice. He suggested that transitional provisions would be necessary. He therefore argued that our proposal would not lead to clearer or simpler law.

9.44 Some consultees preferred the existing terms to our proposed terms. For example, the Chancery Bar Association argued that the current terms better capture the division between the notices as either consensual or hostile.[48] HM Land Registry suggested that our proposed terminology implied that one (a full notice) was superior to the other (a

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45 Consultation Paper, para 9.71.

46 Eg, Martin Wood and Everyman Legal.

47 See the Consultation Paper, para 9.2.

48 We rejected this characterisation in the Consultation Paper: see para 9.100 and following, in the context of whether notification of the notice should be given to the registered proprietor.

summary notice). On the basis that "summary" was insufficiently descriptive, Nigel Madeley instead suggested the terms "interim" and "final" or "binding".

9.45 The decision whether to recommend a change to the names of notices has been difficult. We think the arguments on each side are finely balanced. We continue to think that our proposed terms would modernise and simplify the law by describing notices in ways that better reflect their role and function. This modernisation would most clearly benefit members of the public, who are unfamiliar with the current terms.

9.46 However, we also accept consultees' concerns that changing the names of agreed and unilateral notices may cause confusion among the profession, who are already familiar with the existing terms in the LRA 2002.

9.47 Most significantly, we accept that it will cause confusion on the face of the register and within the legislation for the two different sets of names to exist concurrently. This problem would be most acute for unilateral notices, because they are identified as such in the register. Because we did not consider that existing unilateral notices should be re-named as summary notices, unilateral notices would remain in the register of title after the implementation of our reforms. The existence of two types of identical notice in the register – existing unilateral notices and summary notices – could also undermine the clarity of the register from the perspective of members of the public who search the register or when they see the register relating to their home. Additionally, the LRA 2002, the rules and HM Land Registry's forms would have to make parallel provisions for unilateral and summary notices, in particular, to cancel or remove them and to update the beneficiaries of them.[49] The requirement for two parallel schemes would detract from the clarity and simplicity our recommendations sought to provide.

9.48 HM Land Registry has also provided further information to us, after our consultation, about the cost of implementing this reform. It would necessitate a review and amendment of the rules made under the LRA 2002, the LRR 2003, including a review of relevant forms. It would also involve a review of internal and external guidance and systems. Although conceptually simple, HM Land Registry has provided data that our reform would incur cost[50] and, if prioritised, would involve the use of resource that might otherwise be employed elsewhere.

9.49 We consider that the principal benefit of our reform – providing an explanation of the different forms of notice that is more readily understood by the public – can be achieved without changing the names of the notices in the legislation or on the face of the register. Instead, we consider that this benefit can be obtained by looking at the information that is provided to the public about notices. We expect that HM Land Registry will review the guidance (including that on relevant forms) with a view to establishing whether greater clarity about the role of notices can be given to those making and affected by applications. We think, in the light of the concerns consultees raised about our

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49 See LRA 2002, s 35(3); LRR 2003, rr 85 and 88. Under our proposals, existing unilateral notices and summary notices would be treated the same within the LRA 2002.

50 Although some of these costs would be mitigated because rule changes will be required based on our reforms in any case.

provisional proposal, that providing greater clarity in customer-focussed information is a preferable means of carrying forward our recommendation.

### Caution about reform of the unilateral notice procedure

9.50 Although most consultees supported reform of the unilateral notice procedure, a few were wary of any reform of the system of notices. The Council of Mortgage Lenders was unconvinced that the notice procedure needs reform. In a general comment, Martin Wood warned against pursuing reform too readily. He argued that the scheme for protecting third-party interests should be kept stable, "otherwise we will end up with effectively three parallel systems operating for a substantive period of time: 1925, 2002, and revised 2002". He nevertheless agreed with our provisional proposal, on the basis that it is similar to the procedure in relation to a caution under the LRA 1925.

9.51 Similarly, although Dr Harpum was in favour of requiring evidence within the unilateral notice procedure, he was stronger in his support for other reforms. In particular, he supported reform aimed at increasing the deterrent effect of section 77 of the LRA 2002, and putting the jurisdiction of the court to remove notices from the register on a statutory footing, points we discuss at paragraphs 9.91 and 9.92 below.

9.52 Although we agree with the underlying point that we should proceed with reforms to the notice procedure with caution, we nevertheless believe that reform is warranted. However, we have taken consultees' views into account in developing the procedure from our provisional proposal. Moreover, we now suggest that the new procedure should apply to existing notices, and so will not require a parallel scheme to operate in respect of existing notices under the LRA 2002 and notices entered after our reforms are implemented.

### Requiring evidence during the unilateral notice procedure

9.53 Most consultees supported our proposal to amend the unilateral notice system to require the beneficiary to support his or her objection with evidence. They agreed for the reasons we outlined in the Consultation Paper: it would assist registered proprietors in determining whether to persist with their application to cancel the notice, so would ultimately reduce the number of disputes that end up at the Tribunal.

9.54 The London Property Support Lawyers Group and Pinsent Masons LLP supported our proposal on the basis that we also proceed with our proposals in Chapter 8 in respect of former overriding interests (which we are doing). Together the recommendations would allow the registered proprietor to obtain evidence of the beneficiary's claim at an early stage.[51]

9.55 However, the Berkeley Group and Taylor Wessing LLP were concerned that, in order to retain the ability to keep commercial information confidential, evidence provided to the registrar by the beneficiary of a unilateral notice in support of an objection to cancellation should remain confidential by being protected from public disclosure. As we explained in the Consultation Paper, there is a procedure to exempt information from

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[51] The London Property Support Lawyers Group was also concerned that our provisional proposals did not go far enough to protect against claims in respect of chancel repair liability. As we explained in Ch 8, the status of chancel repair liability is beyond the scope of this project: see paras 8.64 to 8.67 above.

public inspection, but this procedure is not failsafe.[52] Therefore, to keep sensitive or confidential details of an interest off the register, the registered proprietor would have to agree to the entry of the notice: this agreement could take the form of the registered proprietor consenting to an agreed notice or the registered proprietor not applying to cancel a unilateral notice.[53]

9.56 We acknowledge that the ability to keep documents related to a unilateral notice confidential will be constrained by the procedure requiring evidence at an earlier stage than is currently required. However, the purpose of reforming the unilateral notice procedure is to balance the interests of the beneficiary of a notice (to protect interests quickly and keep information confidential) against the interests of a registered proprietor (to have enough information to assess the claim of the beneficiary). We expect that most cases in which confidentiality is a concern are likely to be commercial transactions; these parties can make alternative arrangements (as suggested above) to avoid unnecessary disclosure of confidential information. We believe that requiring evidence following a registered proprietor's application to cancel a notice strikes the right balance between the interests of the parties.

### Evidence in support of an application

9.57 Most consultees agreed with our view in the Consultation Paper that beneficiaries should not be required to furnish evidence of their claim at the time of applying for a unilateral notice. Some consultees[54] agreed for the same reasons that justify a two-notice system: beneficiaries of interests should be able to apply for a form of notice quickly, particularly when they become aware of a possible disposition of the land.

9.58 However, other consultees suggested that our proposals should go further to protect registered proprietors. The Society of Licensed Conveyancers suggested that evidence should be provided at the stage of application, unless the registered proprietor agrees to the entry of the unilateral notice. Absent consent, the beneficiary of the interest applying for the notice should be required to disclose the evidence of his or her claim so the registered proprietor can make an informed decision about whether to object to the application.

9.59 Similarly, the Property Litigation Association, the Conveyancing Association, and the Chartered Institute of Legal Executives, who disagreed with our provisional proposal, argued that evidence should be required before the unilateral notice is entered in the register.[55] The Property Litigation Association and the Chartered Institute of Legal Executives argued that evidence should be required in order to prevent unilateral notices from being used spuriously or to extract ransom payments.

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52 LRA 2002, s 66(2); LRR 2003, r 136.

53 Consultation Paper, paras 9.77, 9.87, 9.100 and 9.114. Such agreement of the registered proprietor is commonly contained in the commercial agreement in which the interest is created.

54 Professor Warren Barr and Professor Debra Morris, Nigel Madeley, Everyman Legal, and Nationwide Building Society.

55 Cliff Campbell argued in favour of option 2B, which allows the registered proprietor time to object before the notice is entered in the register: we explained why we did not pursue this option in the Consultation Paper: paras 9.89 and 9.90.

9.60 Although we see the force of these arguments, we remain of the view that evidence should not be required at the time of application for a unilateral notice. As we explained in the Consultation Paper, requiring evidence at the time of application would effectively turn a unilateral notice into an agreed notice, rendering the system a one-notice system.[56]

### Complexity of the two-stage process

9.61 Consultees expressed mixed views as to whether the objection process should be a two-stage process as we had provisionally proposed, with the first stage requiring the beneficiary to show that his or her objection is not groundless, and the second step requiring the beneficiary to produce evidence in support of the validity of his or her claim.

9.62 Several consultees[57] agreed that the objection process should be in two stages. For example, Nationwide Building Society noted that it would be useful to be able to identify baseless unilateral notices at an early stage, which the initial stage would achieve.

9.63 Other consultees argued for a one-stage process. Dr Harpum, the Property Litigation Association,[58] and Everyman Legal suggested the two stages should be compressed into one, with the first stage abandoned. The one-stage process would consist of the beneficiary of the interest having to satisfy the registrar of the validity of his or her claim.

9.64 HM Land Registry's comments also reflect concern with the complexity of a two-stage objection process. Although it agreed that there are problems with the current system for lodging and objecting to unilateral notices, HM Land Registry worried that our proposal "is unnecessarily complex and working with it is likely to prove time-consuming and cumbersome for the parties". It worried that it would "create problems that are at least as great as those experienced" now.

9.65 In the light of consultees' comments, we have modified our proposal so that objecting would be a one-stage process: the beneficiary would not have to establish that his or her claim to the notice is not groundless as a separate, preliminary step. Although there is much to be said for providing a procedure in which groundless applications can be knocked out quickly and easily, on reflection, we do not think this would happen in sufficient numbers to justify the more complicated two-stage objection procedure.

9.66 We believe this modification simplifies the process considerably, and will reduce the time and expense for parties and HM Land Registry.

### Proposed timeframes

9.67 In the Consultation Paper, we suggested that the beneficiary should have 15 business days to provide an initial response (demonstrating that the entry of the notice is not "groundless") and 40 business days for the substantive response (providing evidence of the validity of his or her claim). Both periods were to run from the registered

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56 Consultation Paper, para 9.87.

57 Pinsent Masons LLP, Nationwide Building Society, Howard Kennedy LLP, and the London Property Support Lawyers Group.

58 On the basis that we did not agree with its suggestion that evidence should be provided at the application stage.

proprietor's application to cancel, thus amounting to 40 business days in total. Consultees variously submitted that our proposed time limits were either too short or too long.

9.68 Some thought the proposed time period for the initial objection to the cancellation was too short or that HM Land Registry should have greater power to extend the time period.[59] Consultees explained that the initial response period should be sufficient to ensure that the correct beneficiaries are identified and notified, and that beneficiaries have enough time to receive notification of the cancellation, take legal advice, and gather evidence.

9.69 Similarly, Christopher Jessel, Adrian Broomfield, and the National Trust suggested that the period for the second, more substantive, objection was too short, particularly in cases of manorial rights. Together with the Law Society, they argued that the registrar should have discretion to extend the time limits in appropriate cases, for example, cases in which historical research may be necessary.

9.70 Conversely, others stated the time periods we proposed were too long.[60] Consultees, including several law firms and representative bodies, argued that beneficiaries should be in a position to respond at both stages of the objection process quickly: in particular, beneficiaries with a genuine claim should have evidence to hand or should be able to gather it quickly. These consultees warned that that delay could create uncertainty in the register. Rather than a total of 40 business days, they instead variously suggested 30 days, 28 days and ten days as the right amount of time.[61]

9.71 HM Land Registry was also concerned that the proposed time limits were unnecessarily long. It thought that they did not appropriately balance the interests of the registered proprietor against those of the beneficiaries of notices. It also noted that if a beneficiary missed a deadline, it could simply apply to enter the notice again.[62]

9.72 As we explained above, we have modified our proposal so that it is a one-stage process. Doing so should alleviate some of consultees' concerns about the timescales we proposed. In particular, by eliminating the first step in the process, we address the concerns of some consultees who thought the period for the initial objection was too short.

9.73 With the benefit of consultees' views, we have also given further consideration to the timescale in our proposal. Only two consultees suggested that the overall time period of 40 business days was too short; conversely, several argued it was too long, thus

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59 Adrian Broomfield, and Christopher Jessel.

60 The London Property Support Lawyers Group, the Berkeley Group, Berwin Leighton Paisner LLP, the Chartered Institute of Legal Executives, the Property Litigation Association, Pinsent Masons LLP, Burges Salmon LLP, Nigel Madeley, and Dr Charles Harpum QC (Hon).

61 However, we note that some consultees (the Berkeley Group and Nigel Madeley) who thought the second time-period was too long appear to have misunderstood how the two periods worked together, thinking that they were cumulative.

62 The same is true under the existing law: if the beneficiary of a unilateral notice fails to object to a cancellation of the notice, he or she could apply for another unilateral notice. However, the date of entry of the notice (and so its protection against registered dispositions) would date from the second entry.

introducing uncertainty into the process. We therefore recommend that the beneficiary of the unilateral notice should be required to produce evidence of the validity of the interest claimed within 30 business days of the registered proprietor's application to cancel the notice. We have chosen this period as it is the maximum time a beneficiary has under the current law to object to an application for cancellation of a notice.

9.74 We also agree with consultees that the registrar should have discretion to extend the time period in appropriate cases. Under the current law, the registrar can extend the time for objecting to an application to cancel from 15 days to 30 days at the beneficiary's request, if the registrar deems it appropriate.[63] We agree that retaining discretion for the registrar to extend the period makes good sense. We therefore recommend that the registrar can extend the time period for objecting from 30 to 40 business days, in line with the maximum period in our original proposal.

### Evidence thresholds and the role of HM Land Registry in assessing validity

9.75 The most significant reform we proposed to the unilateral notice procedure was to change the threshold that an objection to an application to cancel a unilateral notice must meet. Currently, the beneficiary must only show that his or her objection is not "groundless". Under our proposals, the beneficiary would have to "satisfy the registrar of the validity of the interest claimed". On this point, a number of consultees expressed concern. Their concerns centred on the role of the registrar in assessing the validity of the claim, in particular that our proposal put HM Land Registry in an adjudicatory role of determining the issue between the beneficiary of the notice and the registered proprietor.

9.76 The most significant objection on this point came from the Land Registration Division of the Property Chamber (First-tier Tribunal) judges. They explained that although the agreed notice procedure in section 34(3)(c) provides that an agreed notice can be entered when the registrar is satisfied of the validity of the beneficiary's claim, in practice the registrar does not make this determination when the registered proprietor opposes the notice.[64] The judges argued that requiring the registrar to make a determination when a registered proprietor objects to a unilateral notice "runs counter to the principle that disputes … should be referred to the First-tier Tribunal", and moreover would be burdensome if the registrar's decision simply led to judicial review proceedings. The judges suggested that the registrar should be limited to assessing whether the objection to cancel the notice is not groundless: if not, the matter should be referred to the Tribunal.

9.77 Similarly, the Chancery Bar Association disagreed with our proposal to the degree that it required the beneficiary of the interest to satisfy the registrar that it was more likely that the interest existed than not. The Chancery Bar Association suggested that this role was not an appropriate one for the registrar to play. Cliff Campbell also perceived our proposal as putting the registrar in a judicial role; he emphasised that this was inappropriate, given that the only option for challenging a registrar's decision is through judicial review. Dr Harpum expressed concern that we were suggesting that the registrar would determine whether the interest exists on a balance of probabilities.

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63 See LRR 2003, r 86(5). See also Consultation Paper, para 9.105.

64 With the exception of notices under the Family Law Act 1996, s 30, to which opposition is irrelevant.

9.78 We understand why consultees thought that our proposal put the registrar in the position of determining the matter between the parties. On reflection, we realise that our comments on this point in the Consultation Paper may have been unclear. In some places what we wrote could suggest that we thought that the registrar could require the registered proprietor to provide evidence, against which to balance the beneficiary's evidence. In other places we suggested that the registrar could "determine" the application to cancel even if the beneficiary continued to object to it.

9.79 We clarify that our proposals were not intended to put the registrar in a judicial role. Under our proposal, the registrar's role is to determine applications on a technical or threshold level: the registrar must be "satisfied as to the validity of the claim".

9.80 Our proposal raises the threshold that the objector will have to meet for his or her objection to proceed. Currently, an objection to an application to cancel a unilateral notice is, like all other objections, only assessed on the basis that the objection is "not groundless". The court has said that this standard is a very low one.[65] However, there is no more guidance from the case law as to what groundless means. HM Land Registry explains in its guidance that groundless means that the objection "cannot possibly succeed, whether on the facts or the law".[66] The text *Ruoff and Roper* suggests that an objection will only be groundless "if, accepting as true what the objector claims, there is clearly nothing in substance or form wrong with the application [to cancel] such as to prevent it from being completed".[67]

9.81 Under our proposals, the objector will have to satisfy the registrar as to the validity of the claim. This bar is significantly higher than establishing that the objection is not groundless. Rather than simply providing a statement, for example that the claimed interest exists, we anticipate that the objector would need to provide evidence of the interest he or she was claiming, sufficient to establish on its face that the interest is valid. For example, if the beneficiary's interest arose from an express agreement, he or she will have to provide the registrar with a certified copy of the original instrument.[68]

9.82 Importantly, this threshold test is not a new one. It is the test currently required for the registrar to enter an agreed notice without the registered proprietor's consent, under section 34(3)(c) of the LRA 2002. We have adopted this test for unilateral notices because our recommendation seeks to ensure that the beneficiary of the notice provides the same type of evidence that is currently required of a beneficiary seeking to enter an agreed notice without consent.

9.83 Currently, if an application for an agreed notice is made without the registered proprietor's consent, the registrar will consider the evidence the beneficiary provides. If

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65 *Silkstone v Tatnall* [2010] EWHC 1627 (Ch), [2010] 3 EGLR 25 (HC) at [17] by Floyd J.

66 HM Land Registry, *Practice Guide 37: Objections and Disputes, A Guide to Land Registry Practice and Procedures* (January 2016) para 2.

67 *Ruoff & Roper*, para 48.001.

68 For examples of the type of evidence required to enter an agreed notice, see HM Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (April 2018) para 2.5.3.

it satisfies the registrar, the registrar will enter the notice. In most cases, it is only after entering the notice that the registrar will notify the registered proprietor.[69]

9.84 In the same way that the registrar considers evidence on an application for an agreed notice, we intend for the registrar to determine whether he or she is satisfied as to the validity of the beneficiary's claim for a unilateral notice solely on the basis of the evidence provided by the beneficiary. This function will be administrative, not judicial: we do not intend for the registrar to adjudicate between evidence provided by the beneficiary and by the registered proprietor. To ensure this is the case, we recommend that an amendment be made to the LRR 2003 to provide that the beneficiary (and only the beneficiary) must provide evidence to the registrar in order to satisfy the validity of his or her claim.[70]

9.85 Under our proposal, after the beneficiary satisfies the registrar of the validity of his or her claim, if the registered proprietor wishes his or her application to cancel the notice to proceed, the usual process for an objection would apply. The unilateral notice, having already been entered, would remain in the register. The parties could negotiate an agreement or be referred to the Tribunal.[71]

9.86 We take the Land Registration Division judges' point that in disputed notice cases the parties will end up in the Tribunal, as they do now both for disputed agreed notices and disputed unilateral notices. It is true that our proposal will not prevent cases in which there is a genuine dispute from reaching the Tribunal; we would not want it to do so. Nevertheless, our proposal offers improvement: it will ameliorate the disparity of information under the current procedure, preventing unnecessary disputes from reaching the stage of litigation at the Tribunal before the beneficiary of the notice has been required to produce any evidence of his or her interest. If a dispute is referred to the Tribunal, then the Tribunal will consider the substantive issues between the parties in exactly the same way as it does now. The Tribunal's jurisdiction is not affected in any way by the application of the threshold test by the registrar.

9.87 We also agree that, if the beneficiary failed to satisfy the registrar of the validity of his or her claim, and the beneficiary disagreed with this decision, the correct route to question the decision would be through judicial review. There is no right of appeal in the LRA 2002 against the registrar's decisions,[72] and we do not intend to change that.

9.88 Our recommendations also do not seek to change the nature of a unilateral notice that has gone through the new procedure. After the beneficiary satisfies both the registrar, and then the Tribunal of the validity of his or her claim, the notice will remain a unilateral notice: it will not become an agreed notice. On the face of the LRA 2002, the notice will

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69 HM Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (April 2018) para 2.3.2.

70 See para 9.103 below.

71 LRA 2002, s 73. We noted this in the Consultation Paper: see paras 9.114 and 9.115.

72 Law Com No 271, paras 16.14 and 16.24(2). There are two exceptions: a party may appeal against a decision of the registrar with respect to entry into or termination of a network access agreement: LRA 2002, sch 5, para 4(1); and a party may appeal a requirement by the registrar to produce a document for the purposes of proceedings before the registrar: LRA 2002, s 75(4).

remain vulnerable to applications to cancel. However, as we suggested in the Consultation Paper,[73] there are existing mechanisms to prevent repeated applications: an adverse costs order could be made against the applicant,[74] or he or she might be liable under section 77 for an unreasonable application. Moreover, the Tribunal can strike out proceedings and make an order restraining an applicant from making a repeat application.[75]

9.89 We think our clarification of our proposed scheme ameliorates consultees' concerns that HM Land Registry will be required to adjudicate disputes. By requiring the production of evidence earlier in the process, we consider that more cases will be resolved before reaching the Tribunal. If the beneficiary is not on the face of it entitled to the interest asserted, the notice will be removed, without having to involve the Tribunal. The requirement for evidence may moreover have a deterrent effect to those tempted to apply for a unilateral notice without first carrying out appropriate investigations. If the beneficiary in fact has evidence that shows on its fact that he or she is entitled to the interest, then the registered proprietor may be satisfied and not pursue the matter further to the Tribunal. The information may also provide the parties with evidence necessary for them to negotiate a solution to any dispute without the need for a reference to the Tribunal.

### Transitional provision

9.90 Twenty-seven consultees responded to our proposal that our proposed reforms to the unilateral notice procedure should apply to existing unilateral notices. Twenty-two consultees agreed, including the Property Litigation Association, the London Property Support Lawyers Group, Pinsent Masons LLP, and Dr Harpum. HM Land Registry, although reiterating its concerns with our provisional proposals for the new scheme, agreed that if the new scheme was implemented, it should apply to existing unilateral notices.

### Other suggestions

9.91 Dr Harpum drew our attention to the inherent jurisdiction of the High Court to order the removal of notices and restrictions from the register quickly, if they should not be there.[76] He explained that applications for such orders are not uncommon and usually secure the removal of a notice within a week. He suggested that this jurisdiction, which was not abolished by the LRA 2002, should be put on a statutory footing and extended to the county court. We do not agree that the High Court's inherent jurisdiction should be placed on statutory footing, as doing so could inadvertently make that jurisdiction less flexible than it is now. We do however think that Dr Harpum's idea to extend the jurisdiction to the county court merits consideration. The LRA 2002 does not generally make provision for the jurisdiction of any court; regarding disputes, the LRA 2002 confers jurisdiction on the First-tier Tribunal and the Upper Tribunal. Therefore, consideration of the jurisdiction of the county court would not be appropriately included

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73 Consultation Paper, para 9.113 n 94.

74 LRR 2003, r 202; Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1169), r 13.

75 Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1169), r 9.

76 Discussed in *Nugent v Nugent* [2013] EWHC 4095 (Ch), [2015] Ch 121 at [49].

within our review of the LRA 2002, so is outside the scope of the project. Although we are not able to take this suggestion forward in this project, we have forwarded this idea to the Ministry of Justice for consideration.

9.92 Dr Harpum also explained that section 77, which requires anyone applying for the entry of a notice or objecting to an application to act reasonably,[77] was meant to act as a real deterrent, but courts have not given it this effect. He noted that we alluded to this point in respect of former overriding interests in the Consultation Paper.[78] In his view, we did not go far enough. He suggested that we should consider re-wording section 77 to enhance it, perhaps by imposing a presumption that if an objection is not upheld by the Tribunal, it is presumed to have been made without reasonable cause. Although we share Dr Harpum's view that section 77 has not had a significant deterrent effect, we do not think his proposal is a satisfactory solution: the fact that someone has failed to establish his or her case on a balance of probabilities at the Tribunal does not mean that he or she should be taken to have acted unreasonably. More generally, on the basis that we did not consult on section 77, we do not think that we should recommend reform in relation to it.

9.93 Similarly, Berwin Leighton Paisner LLP suggested amendment of Form UN1 (the form to apply for a unilateral notice) to include an express warning about the liability for damages under section 77. Again we agree that this idea has merit, but in this case leave it to HM Land Registry to decide whether to pursue it.

**Recommendations**

9.94 With the broad support of consultees, we recommend reform of the procedure for cancellation of a unilateral notice. Although we are moving forward with the policy that we outlined in the Consultation Paper, our reforms are simpler than our provisional proposals.

9.95 Most obviously, we are not proceeding with our proposal to rename agreed and unilateral notices. As we explained at paragraphs 9.45 to 9.49 above we have concluded that changing the statute is not necessary to obtain the principal benefit of the reform, in the light of the countervailing concerns expressed by consultees. We expect that HM Land Registry will take forward its suggestion of reviewing its forms and guidance with a view to providing clarity for the members of the public about the nature of both agreed and unilateral notices. We think this review will ameliorate current uncertainty and confusion about the nature of the two types of notice in the LRA 2002.

9.96 The focus of our recommendations is on the system for objecting to an application to cancel a unilateral notice. We recommend that evidence be required during the objection procedure. However, given the points raised by consultees about the complexity of the procedure we proposed and the uncertainty cause by the length of the process, we have modified our recommendations. Instead of proposing a two-stage objection procedure, we recommend that the stages be collapsed into one. That is, when a registered proprietor applies to cancel a unilateral notice, if the beneficiary of the notice objects to the cancellation, he or she will be required to produce evidence to satisfy the registrar of the validity of the interest claimed within 30 business days. The

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77 Explained at Consultation Paper, paras 9.30 and 9.31.

78 Para 9.36.

registrar will have discretion to extend the period to 40 business days. We also recommend that this procedure apply to existing unilateral notices. Figure 38 in Appendix 4 illustrates how the new procedure would operate.

9.97 Our recommendations seek to ameliorate the asymmetry of information in the current scheme, by requiring the beneficiary of the unilateral notice to provide evidence of the validity of his or her claim before reaching the Tribunal. We think that our recommendation will promote the resolution of disputes before they reach the Tribunal by:

(1) discouraging applications for unilateral notices that are meritless;

(2) flushing out unilateral notices which have been entered without any evidential basis; and

(3) encouraging beneficiaries and registered proprietors to negotiate based on the evidence.

We believe that our recommendations address the points raised by consultees and ultimately strike the right balance between the interests of beneficiaries of notices and registered proprietors.

9.98 Our recommendations also ensure that the registrar's function will be limited to assessing the validity of the beneficiary's claim, on the basis of the evidence provided by the beneficiary. The registrar will not consider the validity of the claim on a balance of probabilities or have to weigh evidence from both parties. If the registrar is satisfied of the beneficiary's claim, the unilateral notice would remain in the register. Should the registered proprietor's dispute with the notice persist, the registrar will refer the parties to the Tribunal.

**Recommendation 14.**

9.99 We recommend that, if a registered proprietor applies to cancel a unilateral notice, the beneficiary of the unilateral notice will be required to respond within 30 business days (subject to an extension to a maximum of 40 business days at the discretion of the registrar). The response must produce evidence to satisfy the registrar of the validity of the beneficiary's claim.

(1) If the beneficiary does not produce evidence to satisfy the registrar of the validity of his or her claim, the registrar must cancel the unilateral notice.

(2) If the beneficiary does produce evidence to satisfy the registrar of the validity of his or her claim, the unilateral notice will remain in the register. If the registered proprietor continues to dispute the beneficiary's objection to the application to cancel, the registrar must, after allowing time for the parties to negotiate, refer the matter to be determined by the Tribunal.

**Recommendation 15.**

9.100 We recommend that our reform of the procedure for objections to cancel a unilateral notice should apply to unilateral notices that were entered in the register before the implementation of our reforms.

9.101 Clause 12 implements our recommendations. It amends section 36 of the LRA 2002, which governs applications to cancel a unilateral notice, by providing that the registrar must cancel the unilateral notice if the registrar is not satisfied as to the validity of the beneficiary's claim. The language tracks the language in section 34(3)(c), in relation to the standard required to enter an agreed notice without the registered proprietor's consent, to ensure that the provisions are interpreted to mean the same level of evidence is required.

9.102 Clause 12 will also insert a new section into the LRA 2002 to govern objections to applications to cancel unilateral notices, section 73A. Section 73A is similar to existing section 73. In particular, it provides that the right to object to an application to cancel a unilateral notice is subject to rules. It further requires that, if the notice has not been cancelled under the amended section 36, and the parties cannot dispose of the matter by agreement, the registrar must refer the matter to the Tribunal.

9.103 The change to the period during which the beneficiary must object – from 15 days to 30 days, with the discretionary extension changed from 30 days to 40 days – can be achieved by amendment of rule 86 of the LRR 2003. Consequential amendments to the rules will also be necessary. In particular, a new paragraph (2A) should be inserted into rule 19 of the LRR 2003 (which governs objections). We suggest the paragraph inserted should follow the wording of existing rule 81(c)(ii) (which governs applications for agreed notices) to provide that "In relation to an objection under section 73A, the statement must be accompanied by evidence to satisfy the registrar as to the validity of the objection". Various other amendments will be necessary to add a reference to section 73A where there is already a reference to section 73, and in particular to accommodate the reference to the new section 73A(5) for referrals to the Tribunal.

9.104 Some consequential amendments to the LRA 2002 are also necessary, which are included in the draft Bill in clause 13.

9.105 The effect of our recommendations is described in figure 16.[79]

[79] The entire scheme for application and cancellation of a unilateral notice under our recommendations is also illustrated in figure 38 of Appendix 4.

Figure 16: Current scheme and our recommendations

Our reforms amend the law after the point at which the registered proprietor applies to cancel a unilateral notice, and the beneficiary is notified of the application.

| Current scheme | Recommendations |
|---|---|
| The beneficiary must object to the application to cancel within 15 business days (subject to the registrar's discretion to extend to 30 business days). If he or she does not, the registrar must cancel the notice.[80] | The beneficiary must object to the application to cancel within 30 business days (subject to the registrar's discretion to extend to 40 business days). If he or she does not, the registrar must cancel the notice. |
| The beneficiary must object by delivering a written and signed statement stating the grounds of the objection.[81] | The beneficiary must object by delivering a written and signed statement stating the grounds of the objection and by producing evidence of the validity of the interest claimed. |
| The registrar must be satisfied the objection is not groundless.<br><br>If the registrar is satisfied that the objection is groundless, the registrar may determine the application to cancel (that is, cancel the notice).[82] | The registrar must be satisfied of the validity of the interest claimed.<br><br>If the registrar is not satisfied, on the face of the evidence provided, of the validity of the interest claimed, the registrar may determine the application to cancel (that is, cancel the notice).[83] |

At this point, the existing scheme and our reforms are again the same. Absent the registrar determining the application because of the beneficiary's failure to meet the required standard, the registrar may not determine the application to cancel unless the application is disposed of (for example, by agreement of the parties). The unilateral notice will remain in the register. If the parties continue to dispute, the registrar must refer the matter to the Tribunal.[84] If the Tribunal is satisfied of the beneficiary's claim, the matter will be determined and the unilateral notice will remain in the register.

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80 LRA 2002, s 36(3); LRR 2003, r 86.

81 LRA 2002, s 73(3); LRR 2003, r 19.

82 LRA 2002, s 73(6). If the beneficiary of the notice disputes the registrar's decision, he or she can apply for judicial review: see Law Com No 271, paras 16.14 and 16.24(2).

83 If the beneficiary of the notice disputes the registrar's decision, he or she can apply for judicial review: see above.

84 LRA 2002, s 73(5)(b) and (7).

## WHO MAY APPLY FOR CANCELLATION OF A UNILATERAL NOTICE

9.106 In addition to the registered proprietor, section 36 of the LRA 2002 provides that, "a person entitled to be registered as the proprietor" can also apply to cancel a unilateral notice.[85]

9.107 In the Consultation Paper, we noted that it is unclear from the current wording of section 36 whether other persons – specifically insolvency practitioners appointed in respect of an insolvent registered proprietor, and attorneys acting on behalf of a registered proprietor under a power of attorney – are entitled to apply for cancellation of a unilateral notice. In each case, we determined that the general law suggests that these persons should be able to apply to cancel a unilateral notice. Under the general law, insolvency practitioners are agents of the proprietor, or are otherwise able to execute documents in the name of the proprietor, or use the company seal of the proprietor. Similarly, under the general law, attorneys acting under a power of attorney are agents of the proprietor so are able to execute documents on his or her behalf.[86]

### Consultation

9.108 In the Consultation Paper, we provisionally proposed that it should be clarified that insolvency practitioners, appointed in respect of an insolvent registered proprietor, and attorneys acting under a power of attorney on behalf of a registered proprietor, should be able to apply to cancel a unilateral notice.[87] These proposals were designed to ensure that the LRA 2002 reflected the general law in this respect. Recognising that the issue of whether persons other than the registered proprietor may apply to cancel a unilateral notice could also arise in respect of other applications under the LRA 2002, we asked consultees whether there were other situations in which there are unnecessary limits on who can make an application.[88]

9.109 The vast majority of consultees who responded agreed with our provisional proposal to clarify the position: all 24 consultees who responded to our proposal in respect of insolvency practitioners agreed; and 24 of the 25 who responded to our proposal in respect of attorneys acting under a power of attorney agreed, with HM Land Registry expressing other views. Consultees agreeing included the Law Society, many law firms and practitioner groups, and Dr Harpum.

9.110 Generally, consultees agreed that insolvency practitioners should be able to apply to cancel a unilateral notice. Some consultees, including HM Land Registry, noted that the person should be required to provide appropriate evidence of his or her appointment in order to do so.

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85 Consultation Paper, para 9.131.

86 Pursuant to the Law of Property Act 1925, s 109(2) and the Insolvency Act 1986, ss 42(1), 44(1)(a); and the Powers of Attorney Act 1971, respectively. See the Consultation Paper, paras 9.133 to 9.138.

87 Consultation Paper, paras 9.141 and 9.142.

88 Consultation Paper, para 9.144.

9.111 Consultees also agreed that attorneys acting under a power of attorney should be able to apply to cancel a unilateral notice. Again some consultees suggested that the attorney should be required to lodge evidence of his or her appointment and the scope of his or her power. Dr Harpum, agreeing with the proposal, suggested that our proposal reflects the current law.

9.112 Fewer consultees responded to our general question about whether clarification in relation to other applications under the LRA 2002 was needed. Five of those consultees – the Law Society, the Property Litigation Association, the London Property Support Lawyers Group, Howard Kennedy LLP, and Pinsent Masons LLP – did not have any experience of other limitations. Other consultees made various suggestions, including in relation to joint proprietors, executors, personal representatives, beneficiaries under a trust, receivers appointed under mortgages, the appointment of trustees in cases where the surviving trustee is unwilling to act or incapable of acting, deputies under a Court of Protection Order, and attorneys acting on behalf of beneficiaries.

**Conclusion**

9.113 Based on the strong support for our provisional proposal in consultation responses, we continue to agree that insolvency practitioners and attorneys acting under a power of attorney should be able to apply to cancel a unilateral notice when they are acting or appointed on behalf of a registered proprietor.

9.114 The requirement that the person applying must provide the evidence of his or her power to do so is implicit in our proposal. We did not propose to change the law regarding who is in fact entitled to act on behalf of an insolvent person or as an agent under a power of attorney, or of the scope of those powers. It follows that an insolvency practitioner and an attorney acting under a power of attorney must show the basis on which he or she is applying to HM Land Registry in order to do so.

9.115 There was no consensus among consultees on the need for a recommendation in any other case, so it does not appear that clarification in those cases is needed.

9.116 On reflection, however, we do not consider that any amendment of the LRA is necessary to clarify the position. As we explained in the Consultation Paper and as Dr Harpum suggested, the general law already provides that such persons are able to act on behalf of the registered proprietor. We are concerned that making specific provision for these persons in the LRA 2002 may unintentionally cast doubt on the ability of other persons to make an application to cancel a unilateral notice. We consider that the question whether a person who is not the registered proprietor is entitled to do so, is properly seen as a question for the general law that governs the legal relationship between a person and the registered proprietor, and not a matter of land registration law.

9.117 However, further comfort about the effect of the law could be provided to users of the land registration system, without amendment of the LRA 2002. For example, we wonder whether HM Land Registry's guidance could be amended to reflect the ability of insolvency practitioners and attorneys acting under a power of attorney to apply to cancel a unilateral notice under section 36. In addition, or alternatively, the form to apply to cancel a unilateral notice, Form UN4, could be altered to include a box to complete

if acting as attorney or trustee in bankruptcy, and so forth (which would require an amendment of the rules). We leave these decisions in HM Land Registry's hands.

## IDENTIFICATION OF BENEFICIARIES OF AGREED NOTICES

9.118 In this last section of this chapter, we consider agreed notices. In particular, we focus on the information about a beneficiary of an agreed notice that appears in the entry in the register.

9.119 As we explained in paragraph 9.10 above, a unilateral notice appears in the register as a double entry: the first part notes the interest protected and that the entry is a unilateral notice; the second gives the name and address of the beneficiary of the notice. It is a specific requirement of section 35(2) of the LRA 2002 that the beneficiary of a unilateral notice be named. There is also provision in the LRR 2003 for a beneficiary of an interest protected by a unilateral notice to apply to replace the existing beneficiary, or to be added as an additional beneficiary, in the entry in the register.[89] The requirement to name a beneficiary ensures that the beneficiary can be notified if the registered proprietor applies to cancel the notice.[90] It is therefore a requirement unique to unilateral notices, which are vulnerable to cancellation.

9.120 In contrast, an agreed notice appears as a single entry, giving notice of the interest to which it relates. It may identify the beneficiary of the notice in its description of the interest protected. However, it does not necessarily, or invariably, do so, for the simple reason that an agreed notice is not vulnerable to cancellation by the registered proprietor in the same way as a unilateral notice.[91] There is no provision in the LRR 2003 to update the identity of the beneficiary of an agreed notice.

9.121 In the Consultation Paper, we explained our view that it might be useful for an agreed notice to also include the beneficiary's name and contact details: it would make the register more complete and transparent, and would assist a person reviewing the title to identify beneficiaries of rights to which the estate is subject. We suggested that how the beneficiary is identified could vary depending on the type of interest the notice protects. Interests which benefit an individual personally (for example, an estate contract) could identify that individual. Interests which benefit another estate (for example, an easement) could identify the proprietor of that registered estate, by its title number.[92]

9.122 We explained in the Consultation Paper that there could be difficulties in implementing this idea. First, it may be difficult to determine the beneficiary of a restrictive covenant, particularly in new housing developments. More importantly, we did not think that we could impose a requirement that beneficiaries of existing agreed notices must be identified. Therefore, any application to existing agreed notices would be voluntary. If

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89 LRR 2003, r 88.

90 HM Land Registry, *Practice Guide 19: Notices, Restrictions and Protection of Third Party Interests in the Register* (April 2018) para 2.3.3. See Consultation Paper, para 9.145.

91 HM Land Registry, *Practice Guide 19: Notices, Restrictions and Protection of Third Party Interests in the Register* (April 2018) para 2.3.2. See Consultation Paper, paras 9.146 and 9.147.

92 Consultation Paper, paras 9.148 and 9.149.

the scheme was voluntary, it would not be comprehensive. It therefore has the potential to be misleading.[93]

### The benefits of identifying beneficiaries

9.123 We sought the views of consultees as to whether beneficiaries of agreed notices should be able to be identified in the register, asking consultees to provide advantages and disadvantages of the scheme.[94]

9.124 Twenty-three consultees responded. Thirteen consultees (including HM Land Registry, the Law Society and the Chancery Bar Association) supported the idea of including in the register the identity of the beneficiary of the agreed notice, highlighting the advantages of the idea. Three of these consultees[95] stated that there were no disadvantages to such a scheme. Five consultees, including Dr Harpum, focussed on the disadvantages, generally suggesting that they did not favour the idea. Five other consultees discussed both the advantages and disadvantages, and did not offer a clear view.

9.125 Consultees who favoured identifying the beneficiary of an agreed notice, and keeping the identity of that beneficiary up to date, pointed to many advantages. Advantages included completeness of the register, in turn making investigations of title easier; transparency of ownership of interests in land, including by overseas entities; facilitating dealings and negotiations between beneficiaries of interests and registered proprietors; and keeping the register up to date, both by listing the current beneficiary and by making it easier to identify when an interest has been extinguished in order to clear obsolete notices from the register.

9.126 The Council of Mortgage Lenders suggested that, if the beneficiary's details were kept up to date, the position of the beneficiary would be more secure. It gave evidence of member lenders who, after purchase of a loan book, have been unable to have their interest recorded, as HM Land Registry will not amend the beneficiary of the agreed notice based on the current law. Cabot Credit Management Group reported the same difficulty. The Council of Mortgage Lenders noted that not being identified as the beneficiary in the register creates difficulties for the lender when it attempts to exercise the power of sale which it is entitled to do under the mortgage deed.

9.127 Cabot Credit Management Group emphasised that the original date of the agreed notice should not be amended when a beneficiary's identify is updated, so that the interest retains its priority. It was also in favour of applying this rule retrospectively, so the identity of beneficiaries could be added to existing agreed notices.

9.128 The National Trust agreed that the land with the benefit of the interest should also be noted, explaining that such a provision would be helpful in cases of restrictive covenants.

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93 Consultation Paper, paras 9.150 and 9.151.

94 Consultation Paper, para 9.153.

95 The Chancery Bar Association, the City of Westminster and Holborn Law Society, and the Chartered Institute of Legal Executives.

9.129 HM Land Registry was, on balance, in favour of the idea. However, it suggested that its obligations to give notification to beneficiaries should not be increased. It suggested in particular that if the registrar is satisfied an interest has come to an end, the registrar should not be obliged to serve notice on the beneficiary before cancelling the notice, in accordance with the current provisions.[96] HM Land Registry also warned that it will have to dedicate more resources in order to handle applications to update contact details of beneficiaries, and to make the necessary changes in its operation to allow it to update beneficiaries of agreed notices.

9.130 Other consultees were not in favour of identifying beneficiaries of agreed notices or their views were mixed. Professor Barr and Professor Morris jointly argued that it was unnecessary and could create anomalies between notices pre-dating and post-dating reforms. Martin Wood argued that reform would operate piecemeal because of the difficulties in applying it in practice.[97] The London Property Support Lawyers Group suggested that it would complicate the agreed notice procedure, blur the distinction between agreed and unilateral notices, and have cost implications for HM Land Registry and the parties. Berwin Leighton Paisner LLP and the London Property Support Lawyers Group suggested that unless the beneficiary's details were required to be updated, the scheme would not offer any more information than what is already available from the documentation lodged with HM Land Registry in support of the application for the agreed notice.

9.131 The Property Litigation Association and Christopher Jessel also highlighted that consideration must be given to the consequences of a beneficiary failing to update the register on assignment of the interest, suggesting as one consequence that the beneficiary could lose the benefit of the notice.

9.132 The Berkeley Group, not seeing an advantage to recording the beneficiary, did however see the advantage of cross-referring to the title number of the benefiting land.

9.133 We are of the view that the idea of recording the beneficiary's name and contact details as part of an agreed notice has sufficient support for us to make a recommendation to this effect. We clarify that, when the benefit of the interest is annexed to land, the title of the registered land should be referenced rather than the beneficiary's name.

**Should the scheme be mandatory or optional?**

9.134 The next question to consider is whether the identification of the beneficiary should be mandatory. We raised this issue with consultees, asking an open question in the Consultation Paper.[98]

9.135 Nineteen consultees responded. Eleven consultees were in favour of a mandatory requirement to identify the beneficiary of the interest or the benefiting land. Five thought any requirement should be optional. Three did not express a clear view one way or another.

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96 LRR 2003, r 87.

97 He cited as an example the discussion of housing estates in the Consultation Paper, paras 9.150 and 9.151.

98 Consultation Paper, para 9.154.

9.136 HM Land Registry and the Law Society were among those in favour of making the identification of beneficiaries of agreed notices mandatory. Cabot Credit Management Group was also in favour of it being mandatory: in its view, if it were voluntary, the problems in the current system would continue to arise. However, the Law Society, the Conveyancing Association and Michael Hall suggested that there should be provision to keep the beneficiary's identity off the register in specific cases.

9.137 Although most consultees suggested that it should be mandatory to identify the beneficiary of an agreed notice in the register, including updating the identity of the beneficiary if the interest has been assigned, we do not think we can make such a recommendation.

9.138 We agree that the policy will be of most use if it is widely adopted by beneficiaries, both of new notices and on assignment of interests protected by existing notices. However, we cannot identify any appropriate consequence of a failure to comply with a mandatory requirement, and we are disinclined to recommend a "toothless" obligation.

9.139 Although it would be possible to require a beneficiary to be identified on the entry of a notice, it is equally important for the policy that the identity of the beneficiary be kept up to date on assignment of the interest. We can only think of one possible consequence for failing to keep the identity of the beneficiary up to date: to provide that the notice has no effect on assignment of the interest if the beneficiary's identity is not updated in the register. However, in our view, that would be unfair and disproportionate. We do not think that it would be fair for a beneficiary of an interest to lose the benefit of the notice because of a failure to update the register. For example, it does not seem fair that, on an assignment of a short lease (of between three and seven years) which is protected by a notice in the register, the assignee should be required to update the notice on pain of loss of priority protection of the lease.

9.140 In our view, an appropriate and proportionate consequence would be that the beneficiary is not contactable by someone considering applying to cancel the notice, and does not receive notification (should the registrar give notification)[99] of an application to cancel the notice. However, these consequences are not sanctions that are imposed; the beneficiary is simply missing out on benefits of compliance. We think that beneficiaries will be sufficiently incentivised to take advantage of the policy, so there is no need to recommend that it is mandatory.

9.141 Given that our policy is voluntary, we think that it should apply retrospectively, so that the identity of beneficiaries of existing notices can also be identified on the notice if they wish. Of course, updating the beneficiary of an existing notice should not affect the priority of the interest.

**Recommendation**

9.142 We make two recommendations that beneficiaries of agreed notices should be able to be identified on the entry of the notice if they wish to be so identified. We believe that

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[99] The LRR 2003 does not currently require the registrar to notify a beneficiary of an agreed notice on an application to cancel: see r 87. However, in order to cancel an agreed notice, the applicant must satisfy the registrar that the interest has determined. Often, the beneficiary of the interest will be in the best position to provide such evidence.

identifying the beneficiaries of agreed notices will make the register more complete and transparent.

**Recommendation 16.**

9.143 We recommend that it should be possible for agreed notices to identify the beneficiary of that notice, or when relevant the title number of the benefiting land, in a similar way to the entries made in relation to a unilateral notice.

**Recommendation 17.**

9.144 We recommend that when the identity of the beneficiary has changed, or there are additional beneficiaries, the new beneficiary can apply to update the entry of the agreed notice so that it reflects the change of identity. Such an update to the identity of the beneficiary of the notice should not affect the interest's priority.

9.145 We emphasise that our recommendations are permissive: the beneficiary should only be identified on an application from that beneficiary.

9.146 We are of the view that the LRA 2002 does not need to be amended in order for our recommendations to be implemented. The changes necessary can be best achieved through rules. The existing rule-making powers in the LRA 2002[100] are sufficiently wide to enable the creation of rules that will achieve our recommendations.

9.147 We suggest that rules be drafted that put the registrar under a duty to enter a beneficiary of an agreed notice, or update the beneficiary of an agreed notice, on application from the beneficiary. We expect that the rule could be drafted similarly to existing rule 88 of the LRR 2003: it would require the registrar to enter a new or additional beneficiary of an agreed notice if the applicant provided evidence to satisfy the registrar of the applicant's title to the interest protected by the agreed notice.

[100] In particular, LRA 2002, ss 1(2) and 39, and sch 10, para 8.

# Chapter 10: Restrictions

## INTRODUCTION

10.1 In this chapter, we continue our consideration of the protection of third-party rights in the LRA 2002. In Chapters 8 and 9, we considered notices. In this chapter, we consider restrictions.

10.2 Some third-party rights cannot be protected by a notice. They can only be protected by a restriction.[1]

10.3 A notice protects the priority of an interest on a registered disposition. A restriction does not. Instead, a restriction regulates the circumstances in which a disposition of the registered estate or charge may be the subject of an entry in the register.[2] If a disposition falls within the ambit of the restriction, no entry may be made in the register in respect of that disposition unless the terms of the restriction are complied with. In other words, absent compliance with a restriction, the disposition cannot be registered.

10.4 Restrictions are a powerful means by which parties can protect their interests. Therefore, it may not come as a surprise that they also cause delays and disputes: we have been told that disputes about restrictions make up approximately 15 to 20% of the referrals made to the Tribunal.[3]

10.5 Stakeholders have raised concerns about the use of restrictions to protect two particular types of interest:

(1) contractual obligations; and

(2) interests derived under trusts, specifically charging orders over beneficial interests under a trust.

We therefore focussed on those two areas in our Consultation Paper, and we do so again here.

10.6 In the light of consultation responses, we agree with our provisional proposal that it should continue to be possible to protect contract obligations by a restriction. However, in the light of consultees' ongoing concerns, we recommend that the LRA 2002 should contain a new rule-making power. The power would allow the creation of rules that would provide that certain contractual obligations should not be able to be protected by a restriction or should not be able to be protected by certain forms of restriction.

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1 LRA 2002, s 33.

2 LRA 2002, s 40(1).

3 In the Consultation Paper, we reported that it was approximately 30%: see para 10.2. We now understand that over-estimated the position.

10.7 We also continue to agree with our provisional proposal that charging orders over beneficial interests under a trust should continue to be able to be the subject of a restriction, in Form K.[4] We recommend that the power to order the entry of a restriction in relation to a charging order over a beneficial interest should be expressly included with the powers of the court to order the entry of restrictions,[5] with the power making clear that the court can only order the entry of a Form K restriction in respect of such interests. Based on a procedural point made by HM Land Registry, we additionally recommend that the LRA 2002 should be amended to clarify that an application for a restriction in relation to a charging order over a beneficial interest, being an order of the court, does not need to be notified to the registered proprietor.

## THE CURRENT LAW

10.8 Under section 42 of the LRA 2002, if it is necessary or desirable to do so, the registrar may enter a restriction in one of three circumstances:

(1) to prevent invalidity or unlawfulness in relation to dispositions of a registered estate or charge,

(2) to secure that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached, and

(3) to protect a right or claim in relation to a registered estate or charge (that could not be the subject of a notice).[6]

10.9 It is clear from section 42(1) that the registrar has a discretion whether to enter a restriction; the subsection provides only that a restriction "may" be entered. In particular, it is implicit in the subsection that a restriction should not be entered where it is either unnecessary or undesirable to do so for any of the three reasons referred to.

10.10 The LRA 2002 also expressly confers on the court the power to order the registrar to enter a restriction if it considers it necessary or desirable to do so.[7] However, on the terms of the LRA 2002, it may only do so in order to protect a right or claim in relation to a registered estate or charge, which could not be protected by a notice.[8]

10.11 As we noted above, once entered, a restriction will regulate the circumstances in which a disposition can be registered.[9] Restrictions can take a number of forms. Standard

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4 The standard form of restriction that can be entered to protect a charging order over a beneficial interest under a trust. We explain Form K restrictions in more detail at para 10.93 and following below.

5 In LRA 2002, s 46.

6 The registrar is required to enter a restriction for the purpose of (2) – to secure interests are overreached – when he or she enters two or more persons as registered proprietor: s 44(1).

7 The jurisdiction of the Tribunal to order the registrar to enter (or remove) a restriction flows from the jurisdiction of the registrar itself: it will arise when an objection to the entry of a restriction is referred to the Tribunal, and is based on the Tribunal's jurisdiction to determine the "matter" referred: LRA 2002, ss 73(7) and 108(1)(a); Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 (SI 2013 No 1169) r 40; *Jayasignhe v Liyanage* [2010] EWHC 265 (Ch), [2010] 1 WLR 2106.

8 LRA 2002, s 46(1) and (2). See our Recommendation 19 below.

9 LRA 2002, s 40(1).

forms of restriction are outlined in the LRR 2003, although non-standard forms can also be entered. Usually, restrictions require one of the following:

(1) notice to a particular person;

(2) the consent of a particular person;

(3) a certificate by a particular person that the terms of a given document or statute are complied with; or

(4) an order of the court or the registrar.

10.12 Stakeholders have raised concerns about the use of restrictions, with most of those concerns relating to two issues: contractual arrangements, and derivative interests under a trust. We consider each point in turn.

## CONTRACTUAL ARRANGEMENTS

10.13 Stakeholders' concerns about restrictions largely centred on the use of restrictions to protect contractual arrangements, with focus on obligations in registered charges and registered leases.

10.14 As we explained in the Consultation Paper, the function of restrictions in the LRA 2002 is broader than solely the protection of property rights. Restrictions may also be used to protect contractual rights. In particular, section 42(1)(a) of the LRA 2002 allows the registrar to enter a restriction for the purpose of "preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge": "unlawfulness" extends to a disposition in breach of contract. We anticipated the use of restrictions to protect against dispositions that would be unlawful due to a breach of contract in our 2001 Report: there, we identified, as examples, the use of restrictions to prevent breaches of contract in relation to a right of pre-emption or an exclusion of the power to grant a lease under a charge, and to protect a positive covenant with a management company.[10]

10.15 The ability to protect a contractual obligation in the register was not new in the LRA 2002: it was also possible under the LRA 1925, under a related form of entry called an inhibition.[11]

10.16 However, HM Land Registry had reported to us that the use of restrictions to protect contractual obligations has increased since the LRA 2002 has come into force. HM Land Registry also reported difficulties with such restrictions; in particular, difficulties experienced by applicants seeking to comply with a restriction. HM Land Registry identified two situations where problems arise: restrictions protecting obligations in registered charges and restrictions protecting obligations in registered leases.[12]

10.17 As we explained in the Consultation Paper, a restriction to protect an obligation in a registered charge often has the effect of preventing the registered proprietor of the land from making any disposition of the land without the mortgagee's consent. We

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10 Law Com No 271, para 6.40. See Consultation Paper, paras 10.7 to 10.09.

11 See Law Com No 254, para 6.28 and following; Law Com No 271, para 6.40 and following.

12 Consultation Paper, para 10.10.

understand that such restrictions have become more prevalent since the LRA 2002, becoming a standard clause in most mortgages. Such a restriction can prevent a registered proprietor from obtaining finance from other sources, or prevent any further mortgage that the proprietor does grant from being registered. It can also delay registration of a sale of the land.[13]

10.18 Similarly, restrictions are also used to ensure compliance with the terms of a lease; for example, requiring the consent of a landlord or management company for any disposition of the lease. As we explained in the Consultation Paper, these restrictions might go beyond the terms of the lease and even the general law. For example, under the general law, an assignment made in breach of a covenant is effective, although there will be consequences for liability under the tenant covenants.[14] A restriction, however, prevents the person who was assigned the lease from obtaining legal title to it. Problems even arise for tenants who comply with the terms of the lease, if the landlord or management company delays in providing the consent required under the restriction.[15]

10.19 As we explained in the Consultation Paper, these concerns raise a broader question of policy: whether the use of restrictions for the purpose of preventing breach of contract is affording the beneficiaries of such restrictions a greater degree of control than is desirable or, in some instances, than is permitted by the general law. Against that policy question we weighed the practical benefits of this use of restrictions: restrictions provide a convenient device to ensure performance of obligations which are often related to the property interest and frequently benefit a person who also has a proprietary interest in the land. We were mindful that the use of restrictions to protect contractual arrangements has been a long-standing feature of the land registration system, and that reform of land registration could not change the continued use and validity of certain types of contractual obligations within the underlying contracts themselves. We provisionally suggested that the concerns did not outweigh the practical benefits of enabling restrictions to protect contractual arrangements.[16]

### Consultation

10.20 In the Consultation Paper, we did not propose reform, suggesting that contractual obligations should continue to be able to be protected by means of a restriction.[17] We asked consultees if they agreed with our provisional view. Additionally, we asked consultees whether there are particular types of contractual obligation which should not be able to be protected by a restriction.[18]

10.21 Consultees expressed strong agreement with our provisional view that contractual obligations should continue to be able to be protected by restriction: of the 29 consultees

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13 Consultation Paper, para 10.12 to 10.14.

14 Pursuant to the Landlord and Tenants (Covenants) Act 1995.

15 Consultation Paper, paras 10.15 to 10.18.

16 Consultation Paper, paras 10.11, 10.19 to 10.24 and 10.26 to 10.28.

17 Consultation Paper, para 10.25.

18 Consultation Paper, para 10.29.

who responded, 21 agreed, six expressed other views, and two disagreed. However, many consultees' agreement was qualified.

10.22 Fewer consultees responded to our question about whether particular types of contractual obligation should not be able to be protected by a restriction. Only 13 consultees responded and, of those, only some, largely practitioners or practitioner groups, identified specific contractual rights that they considered should not be able to be protected by a restriction.

10.23 Consultees' concerns and points raised in response to both questions were closely linked. Because of this overlap, we consider their responses to the two consultation questions together thematically.

### Purpose of the register

10.24 Several stakeholders had questioned the use of restrictions to protect contractual obligations, on the basis that it was not in keeping with the purpose of the register. Similarly, many consultees questioned whether it was correct as a matter of principle that contractual obligations should appear in the register of title at all. Most consultees also accepted that it was practically useful for them to do so, and so agreed with the proposal to continue this practice.[19]

10.25 A couple of consultees, however, did not accept that the practical benefit outweighs the principle-based objection to the use of restrictions to protect contractual obligations: they either disagreed or did not express clear agreement or disagreement with our proposal.

10.26 A number of consultees focussed on the (arguably unwarranted) control that restrictions allow the beneficiary to exert over dispositions of the land. HM Land Registry and the Chancery Bar Association both noted that restrictions provide holders of contractual rights with a stronger remedy than they have as a matter of contract law, suggesting that perhaps restrictions give their beneficiaries too much control over dispositions. The London Property Support Lawyers Group made this point in relation to the role of HM Land Registry, stating that it is arguable that "it is not the function of a land registration system to protect pure matters of contract (still less the role of HM Land Registry to police such matters)".

10.27 Amy Goymour and Nigel Madeley went further and suggested that restrictions functionally elevate contractual rights into property rights. Amy Goymour warned that doing so inevitably reduces the ease with which property can be conveyed, since it is in effect subject to more property rights. Similarly, in Nigel Madeley's view, this use of restrictions represents conceptual confusion between contract and property rights. He opined that this use infringes both the principle that new property interests in land cannot be created, and the "mirror principle" that the register provides an accurate statement of the property rights in relation to a piece of land.

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[19] Including Dr Nicholas Roberts, the Chancery Bar Association, and the London Property Support Lawyers Group.

10.28 Christopher Jessel was also concerned about the effect restrictions can have on an owner's ability to dispose of property freely. He argued that restrictions allow private agreements to restrain alienation of land, which he explained is contrary to a major principle in property law, initially established in Quia Emptores 1290.[20]

### Practical benefits and concerns: comments on specific types of contractual obligations

10.29 Four consultees agreed that restrictions should generally be able to be entered to protect contractual arrangements because of the practical benefits of such restrictions.[21] For example, Dr Nicholas Roberts explained that HM Land Registry had long since accepted that certain types of covenants can usefully be recorded in the register. The Bar Council argued that the practical benefits were obvious, but conceded that care is needed to strike the right balance and to ensure that the register is not cluttered with non-proprietary rights.[22]

10.30 In addition to the examples we highlighted in the Consultation Paper concerned with obligations in registered charges and in registered leases, consultees commented on other circumstances in which restrictions are used. We discuss the examples raised in the following paragraphs.

### Enforcement of positive covenants

10.31 Five consultees[23] explained that restrictions are useful, and even necessary, to protect positive covenants, which as a matter of the law do not run with freehold land. Dr Roberts said that restrictions "provide a useful way of plugging an acknowledged lacuna in the law"[24] and are therefore "indispensable".[25]

10.32 Two consultees[26] acknowledged that the inability in property law to enforce positive covenants against purchasers of land was a problem. However, they disagreed that it should be solved by restrictions, which they considered to be reform through the "back door" of land registration.

10.33 As noted by three consultees,[27] the Commission's recommendations in our report Making Land Work: Easements, Covenants and Profits à Prendre[28] will solve some of

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20 Among other things, Quia Emptores 1290 provided for owners of land to have free alienation of their land (in particular, the fee simple esate). It says (in the English translation) at s 1, "it shall be lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them; so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before". It also abolished subinfeudation, the creation of new feudal tenures.

21 Professors Warren Barr and Debra Morris, Dr Nicholas Roberts, the Chancery Bar Association, and the Bar Council.

22 Burges Salmon LLP made a similar point.

23 The London Property Support Lawyers Group, Dr Nicholas Roberts, the Property Litigation Association, Burges Salmon LLP, and the National Trust.

24 Dr Nicholas Roberts.

25 The Property Litigation Association.

26 Christopher Jessel and Nigel Madeley.

27 Professor Warren Barr and Professor Debra Morris, Burges Salmon LLP, and Dr Nicholas Roberts.

28 (2011) Law Com No 327.

the problems in relation to positive covenants. Nevertheless, as our proposed reforms to positive covenants would not be retrospective, this use of restrictions to protect existing covenants would necessarily continue.

### Obligations in registered leases

10.34 Consultees put forward differing views in relation to the use of restrictions to enforce obligations in leases.

10.35 Some consultees pointed to their practical use in the context of leases. The Berkeley Group explained that restrictions are necessary to overcome privity of estate limitations where managers or under-tenants are involved. The Law Society provided a specific example: it noted that the Homes and Community Agency's (which has now become Homes England) shared ownership lease includes a restriction requiring a certificate from the landlord before a disposition can be registered. The restriction protects the landlord's ability to dispose of the property to a person on a waiting list. In this case, a restriction is a useful mechanism to ensure that landlords can exercise the control over dispositions that is required of them by the Homes and Communities Agency (now Homes England).

10.36 However, the Law Society also noted that in practice restrictions to enforce obligations in leases cause delays in registration, particularly since the applicant has no ability to demonstrate compliance. HM Land Registry also said that restrictions requiring compliance with leasehold covenants cause "acute" problems. This comment reflects its view, explained in its practice guide, that "restrictions that require the consent or certificate of a specified landlord or managing agent often create serious problems for a range of parties when the landlord or agent changes – for the buyer of a leasehold title subject to the restriction, for the registered proprietor who wants to sell that property and for any former landlord or agent named in the restriction".[29]

10.37 Our consultation is not the only time the concern about restrictions on leasehold titles has been raised. For example, the Conveyancing Association's "White Paper" also comments on the delays to the registration process that arise from restrictions benefiting lease administrators. These delays flow from delays by lease administrators in providing the certificate of compliance in accordance with the terms of the restriction. It noted that the consequences can be requisitions[30] by HM Land Registry and even cancellation of the application for registration.[31]

10.38 A number of consultees expressed concern about the use of restrictions by landlords and management companies. Dr Roberts argued that some covenants with management companies or landlords are unnecessary or void by virtue of the Landlord and Tenant (Covenants) Act 1995. He described it as "objectionable for restrictions to be used to purport to bolster provisions which are self-evidently either a legal nullity or are downright misleading". Despite this, he noted that such restrictions were unlikely to

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29 HM Land Registry, *Practice Guide 19A: Restrictions and Leasehold Properties* (June 2015) para 1.

30 An enquiry or request for further evidence raised by HM Land Registry of an applicant for registration. LRR 2003, r 16 empowers the registrar to raise requisitions.

31 The Conveyancing Association*, Modernising the Home Moving Process: Conveyancing Association White Paper* (November 2016) pp 13 and 33.

be challenged because it is generally cheaper and easier for parties to comply with restrictions than to challenge them.

10.39 Michael Hall also expressed concern about the use of restrictions by landlords to extract fees for certificates of compliance. He was of the view that HM Land Registry should be more willing to reject restrictions that impose unnecessary requirements or are out of date. Similarly, the Society of Licensed Conveyancers said that HM Land Registry should be empowered to curb the excessive use of restrictions. It identified the use of restrictions by management companies as problematic, highlighting their use in protecting administration fees. The Society suggested that restrictions should be confined to conveyancing issues, such as serving notices and entering into deeds of covenant.

10.40 Echoing concerns regarding the excessive use of restrictions, Christopher Jessel did not support the use of restrictions for leasehold covenants. He noted that the landlord's remedy for a breach of a prohibition in a lease on assignment is forfeiture, but the assignment nevertheless transfers the legal estate; restrictions should not interfere with this outcome.

### Mortgages

10.41 Four consultees also offered differing views of the use of restrictions to protect the terms of mortgages.

10.42 The Council of Mortgage Lenders explained the practical benefit of restrictions that protect mortgage obligations. It observed that first charge lenders commonly enter restrictions to ensure that they are notified of, or consent to, any second charges. In its view, this mechanism provides lenders with "important protection", allowing them to assess whether the borrower is able to continue to meet his or her repayment obligations before consenting to a further charge.

10.43 Conversely, Christopher Jessel fundamentally disagreed with the use of restrictions to allow a chargee to prevent a landowner from granting further security or disposing of the land. He argued that the whole point of a mortgage is that it binds the land in the hands of purchasers; there is no good reason for the law to give a mortgagee power to prevent dispositions.

10.44 Both HM Land Registry and the Law Society identified that restrictions entered following registration of charges cause acute problems and delays in practice. The Law Society said that restrictions to protect charges prevents early completion in line with HM Land Registry policy.

### Overage

10.45 Several consultees discussed the use of restrictions to assist enforcement of overage agreements. Overage is a purely contractual arrangement that is used principally in commercial conveyancing agreements as a mechanism to secure additional payments to the seller following completion of the sale. It is commonly used when the parties anticipate that planning permission will be obtained after the sale, to increase the value of the land, or if the purchaser intends to develop the land into multiple plots or units. Overage may be structured as a "clawback" (payment of X% to the seller of the increase in the land's value if the purchaser obtains planning permission within Y years) or, more

commonly, as sales overage if sales of plots or units on a development exceed an agreed threshold (with the purchaser paying to the vendor X% of profits which exceed the threshold).

10.46 Nigel Madeley argued that protecting overage agreements is not a legitimate use of restrictions; he suggested that restrictions were originally intended to protect legal due process, not commercial interests.

10.47 However, other consultees emphasised the practical benefits that flowed from the use of restrictions to protect overage agreements. Although the Chancery Bar Association questioned the use of the land registration system to protect non-proprietary interests, it nevertheless accepted that restrictions are a useful mechanism to protect overage provisions. Burges Salmon LLP also agreed that restrictions are commonly and effectively used for overage agreements. The National Trust similarly explained conservation charities' reliance on restrictions to protect overage agreements: charities negotiate overage when they are selling donated land that does not have any conservation or heritage value, as a means of complying with their obligation to obtain the best value for the land. The Berkeley Group explained that there are alternative methods of protecting an overage agreement, absent a restriction, such as using charges and bonds. However, it said such other means could interfere with the conveyancing process or entail unnecessary expense.

### Contractual rights that should not be capable of protection by restriction

10.48 Some consultees considered whether certain (or any) contractual rights should not be capable of being protected by restriction.

10.49 Two consultees argued that no contractual obligations should be protectable by restriction. Christopher Jessel argued that restrictions to protect purely private rights should be eliminated on the basis that they fetter freedom of alienation. Similarly, Nigel Madeley argued that no contractual obligations should be capable of protection by restriction. Moreover, he expressed concern that any attempt to distinguish between different types of contractual obligations, to allow some to be protected but not others, would be illogical. As one possibility, he mooted whether restrictions should be limited to protecting contracts whose performance requires one of the parties to own or occupy the land. However, Mr Madeley was ultimately persuaded that only interests in land should appear in the register.

10.50 Conversely, four consultees[32] were of the view that there should be no exceptions or carve outs: all contractual arrangements should, in principle, be capable of protection by restriction. Some consultees based their view on the difficulties in distinguishing between different types of contractual agreement. For example, the Law Society agreed that the policy on restrictions should be coherent and consistent, but was uncertain that contractual obligations could easily be distinguished from each other. Similarly, Dr Charles Harpum QC (Hon) expressed his hope that no attempt would be made to bar the use of restrictions for particular types of contractual arrangement because doing so could lead to incoherence and confusion.

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[32] Howard Kennedy LLP, the Law Society, Dr Charles Harpum QC (Hon), and the Council of Mortgage Lenders.

10.51 In contrast, some consultees, in particular practitioners and practitioners' groups, identified particular types of contractual obligations that, in their view, should not be able to be protected by restriction.

10.52 A few suggested that unlawful or illegal contractual obligations should not be capable of protection. Burges Salmon LLP and the London Property Support Lawyers Group recommended that a restriction should not be allowed to protect an illegal contract. The London Property Support Lawyers Group particularly identified contracts that are illegal pursuant to consumer protection legislation. The Group argued that, for these types of contracts, consent to enter the restriction and the ability to go to court to challenge the restriction offer insufficient protection to consumers. In a similar vein, the Chartered Institute of Legal Executives expressed concern that the system leaves consumers vulnerable to exploitation.

10.53 Michael Hall suggested that contractual obligations that are impractical to perform should not be capable of protection by restriction; for instance, when a beneficiary company has ceased to function, has been placed in liquidation, or is imposing exorbitant charges. In his view, the registrar should exercise his or her discretion to modify or disapply a restriction if the restriction is unworkable or inappropriate.

10.54 The Bar Council suggested that a tenant's covenant not to assign or underlet without the landlord's consent (which is not to be unreasonably withheld or refused) should not be protectable by restriction. Such a restriction gives the landlord greater power than it has as a matter of law, because under the general law if a landlord's consent is unreasonably withheld or refused the tenant is free to assign or underlet without a court declaration.

10.55 Two consultees suggested that in some cases restrictions should only be able to be entered with the consent of both parties – the beneficiary of the restriction and the registered proprietor. The London Property Support Lawyers Group argued that a restriction should not be entered to prevent any breach of contract unless both parties to the contract consent to the restriction. More narrowly, the Property Litigation Association suggested that consent should be required in order to enter a restriction to prevent unlawful dealing with a lease.

### The form of protection available

10.56 Linked to the concern that restrictions give beneficiaries more power over dispositions than is warranted, some consultees suggested that limits should be placed on the extent of protection certain contractual arrangements attract.

10.57 The Chancery Bar Association suggested that the effect of a restriction to protect a purely contractual right should be limited to requiring either the beneficiary's consent to a disposition or a set number of days' notice to the beneficiary prior to registration of a disposition. The beneficiary would therefore be able to take proceedings for enforcement of its contractual right.

10.58 The Bar Council made a similar point. It explained that, in many cases, parties would be adequately protected by a restriction that afforded them a certain amount of notice before a disposition was registered; notice would allow them to take steps to ensure compliance with the contract or seek relief from the courts. The next steps would

therefore be determined by the general law, rather than by a veto power given to the beneficiary of the restriction. However, it also noted that there might be situations in which more demanding forms of restriction would be desirable.

10.59 A couple of consultees appeared to argue the opposite: for example, Taylor Wessing LLP argued that it is difficult in practice to persuade the registrar to enter a non-standard form of restriction, suggesting that customised restrictions should be able to be entered to ensure particular obligations are observed by the parties. Conversely, the Law Society argued in favour of standard forms of restriction: in its view, standard forms of restriction allow the purchaser to know what has to be done in order to comply with the restriction and to register the disposition with HM Land Registry.

10.60 Some consultees[33] suggested that delays are caused when the beneficiary of a restriction has changed, or fails to provide consent in a timely way. As HM Land Registry explains in its practice guide, difficulties can arise when a named landlord transfers its interest to a new landlord, and the restriction requires the landlord's consent. It explains that a new landlord cannot apply to alter or modify a restriction to substitute its own name;[34] however, an application can be made to cancel the restriction. To avoid these problems, HM Land Registry suggests using standard forms of restriction.[35] Some consultees thought that more should be done. For example, the Berkeley Group suggested that the form of restrictions should be amended to ensure that the current landlord could consent on behalf of the former landlord, in cases where the identity of the landlord had changed. Consultees also suggested that, when the beneficiary of a restriction fails to certify compliance with a restriction within a set time, a solicitor should be able to certify compliance instead.

### Discussion

10.61 Most consultees supported our suggestion in the Consultation Paper that contractual obligations should continue to be able to be protected by means of a restriction. However, consultees' support was considerably qualified: they identified significant concerns about the use of restrictions to protect certain types of contractual obligations. Many consultees expressed concern about the apparently limitless types of contractual arrangements that can be protected by way of a restriction.

10.62 Some consultees expressed concern in relation to the proper function of restrictions. We see the force of these arguments. We disagree, however, with the idea that protecting a contractual right by a restriction functionally elevates the right to a property right. Although a restriction might prevent the registration of a disposition, it does not enable the contractual obligation reflected in the restriction to run with the estate and bind a purchaser, which is the hallmark of an interest in land.[36] Nevertheless, as we

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33 Eg the London Property Support Lawyers Group.

34 A power to modify or disapply a restriction is provided to the registrar in LRA 2002, 41(2).

35 HM Land Registry, *Practice Guide 19A: Restrictions and Leasehold Properties* (June 2015) paras 2.2 and 4.1.

36 As classically explained by Lord Wilberforce in *National Provincial Bank v Ainsworth* [1965] AC 1175, 1247 to 1248, "before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, *capable in its nature of assumption by third parties*, and have some degree of permanence or stability" (emphasis added).

identified in the Consultation Paper, in some cases,[37] restrictions enable those with contractual rights to exercise a greater degree of control than is desirable or permitted by the general law. In particular, restrictions may delay or impede registration of dispositions of registered estates. We therefore agree that they can impose a restraint on the owner's ability to make dispositions of the land.

10.63 Numerous consultees also identified problems with the use of restrictions for particular types of contractual obligations, with a focus on obligations in registered leases and charges. However, many consultees also accepted that the protection of contractual obligations in the register serves useful purposes. Therefore, although consultees raised concerns with the use of restrictions in some of these cases, it appears that such restrictions continue to be useful.

10.64 No clear theme emerged from the responses in relation to what should not be able to be protected by a restriction or the form restrictions should take. Consultees expressed a variety of views as to what sorts of contractual rights should, or should not, be able to be protected by a restriction. Consultees also warned that it would be difficult to draw a bright line between contractual obligations which should or should not be able to be protected by a restriction in a way that is conceptually coherent and logical.

10.65 In the light of consultees' responses, we continue to have concerns about the use of restrictions to prevent breach of contract, whilst also acknowledging the practical advantages in being able to do so. In general, we continue to consider that the advantages of allowing restrictions to protect contractual obligations outweigh the risks. We acknowledge that there may be particular contractual obligations in respect of which the balance tips the other way. We do not, however, think that consultees have provided us with a clear answer as to whether we should prevent any particular type of contractual obligation from being able to be subject of a restriction, or whether we should prevent particular types of restriction from being entered in relation to contractual obligations.

10.66 We note that separately from our review of the LRA 2002, HM Land Registry is reviewing its policy around the use by landlords and management companies of restrictions to enforce covenants in leases, based on the existing discretion of the registrar to refuse to enter restrictions when it is not necessary or desirable to do so. Following a stakeholder event held in October 2017, it has worked with the Law Society and the Conveyancing Association, who have issued surveys on behalf of HM Land Registry to gather the views of their members.[38] HM Land Registry is considering next steps.

10.67 We think that the appropriate solution is to provide a power to make rules to determine how restrictions may be used to protect contractual obligations. This power will allow a

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37 Paras 10.10 and 10.11.

38 The discretion is contained in LRA 2002, s 42(1) and is examined at para 10.9 above. The Conveyancing Association, *Conveyancing Association launch Landlord / Management Company Restriction Survey with HM Land Registry* (January 2018), https://www.conveyancingassociation.org.uk/conveyancing-association-launch-landlord-management-company-restriction-survey-with-hm-land-registry/ (last visited 4 July 2018); The Law Society, *Have your say – Landlords / Management company restrictions*, https://www.lawsociety.org.uk/news/stories/have-your-say-landlord-management-company-restrictions/ (last visited 4 July 2018).

fuller investigation of the issue to determine how restrictions should be used, in order to curb the use of restrictions that is excessive or problematic.

10.68 In our view, the determination of which, if any, types of contractual obligation should not be able to be protected by restriction, or if the form of restriction should be limited based on the type of contractual obligation, is best set out by rules made under the LRA 2002. Creating a rule-making power will allow decisions about the use of restrictions to be informed by the operational concerns of HM Land Registry, and by wider Government objectives, matters on which the view of an independent Law Commission is less helpful.

10.69 In particular, enabling these determinations to be made by rules will allow the experience and expertise of the users of the land registration system, HM Land Registry, and the Rule Committee[39] to guide reform. It will allow lessons to be taken from HM Land Registry's current work, and will also allow for further, targeted consultation on any proposed limitations. We think that the Secretary of State and HM Land Registry (which is likely to conduct the consultation on behalf of the Secretary of State) are in the best position to conduct a targeted consultation regarding individual types of contractual obligation.

10.70 Moreover, it will also allow for flexibility and adaptability: it will be easier to modify rules than to amend the primary legislation, so any decisions can be revisited over time. For example, new rules could be implemented if sharp or problematic practices arise in the future in relation to particular types of obligation. Any rules made will be able to be subject to ongoing review such that they can be updated by the Secretary of State to reflect changing circumstances and practices.[40]

10.71 We further think the requirement for rules will ensure that changes will be subject to the proper level of scrutiny.

**Recommendation**

10.72 Consultees broadly supported the continued use of restrictions to protect contractual obligations. However, they expressed significant concerns with the use of restrictions in certain cases. We therefore make a recommendation to provide a power in the LRA 2002 to allow rules to be made which limit the types of contractual obligation that can be protected by restriction, or which limit the form of restriction available based on the type of contractual obligation. In each case, rules can only be made after public consultation.

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39 See LRA 2002, s 127.

40 Moreover, the standard forms of restrictions are currently prescribed in the rules: LRR 2003, sch 4.

**Recommendation 18.**

10.73 We recommend that the LRA 2002 should contain a power for the Secretary of State, after consultation, to make rules to determine:

(1) whether particular types of contractual obligation cannot be capable of protection by way of a restriction; and

(2) whether particular types of contractual obligation should only be capable of protection by way of a restriction that requires notice to be given to a beneficiary.

10.74 Clause 14 of our draft Bill enacts Recommendation 18. It inserts a new subsection (2A) into section 42 of the LRA 2002, which creates a power to make land registration rules to provide that restrictions cannot be used to protect against a breach of a contract or to protect certain contractual rights or claims, or that only certain types of restriction can be entered if the purpose of the restriction is to protect such rights. We understand that contractual obligations generally, if not invariably, are entered under section 42(1)(a); however, it seems to us possible that a restriction to protect a contractual right or claim could be entered under section 42(1)(c), in relation to protecting a right or claim in relation to a registered estate or charge.[41] The new provision to make rules therefore applies in respect of both.

10.75 Clause 14 further requires the Secretary of State to consult before making any such rules. In order to provide clarity about the interaction between the requirement for consultation and the role of the Rule Committee in providing advice and assistance to the Secretary of State, the clause specifies that consultation must take place before the Secretary of State obtains the advice and assistance of the Rule Committee under section 127.

### Guidance

10.76 Consultees' views on the justification for using of restrictions to protect contractual obligations varied. Accordingly, responses to our consultation did not provide the certainty necessary for us to make specific recommendations to amend the LRA 2002 in relation to the use of restrictions to protect against breaches of certain types of contractual obligations. Nevertheless, with the benefit of consultees' views, we think that we can offer some guidance to be taken into account before any rules are made under the new rule-making power.

#### Types of contractual obligations that can be protected by restriction

10.77 Consultees have expressed concerns with the use of restrictions to protect positive covenants, leasehold covenants, obligations owed towards mortgagees, and overage agreements. However, many consultees accepted that these restrictions were useful, or even indispensable. We therefore think that it could be unwise to impose a blanket

[41] LRA 2002, explanatory notes, para 86, explains that a right or claim under s 42(1)(c) need not be proprietary.

rule preventing the use of restrictions in any of these cases. If rules are one day proposed to do so, we think the issues that consultees have raised should be considered carefully.

10.78 In particular, some of the concerns about the use of restrictions in these cases seem to us to illustrate problems with the underlying law governing the agreements at issue. We reiterate the point, made in the Consultation Paper,[42] that concerns with the underlying law cannot properly be solved by amendment of the land registration scheme. We agree with consultees that the better solution is for the underlying law to be reformed. In relation to positive covenants, reform would be provided by the implementation of our report on Making Land Work: Easements, Covenants and Profits à Prendre.[43] The Government announced on 18 May 2016 that it intended to bring forward proposals in a draft Law of Property Bill to respond to the Commission's recommendations in that report.[44] Those recommendations will address many of the concerns with the current law that result in the entry of a restriction, by enabling positive land obligations to be registered and to run with the land. However, not every positive covenant will be a land obligation;[45] nor will our recommendations apply retrospectively. It may be that other mechanisms to protect positive covenants, including the use of restrictions, will therefore continue to be necessary.

10.79 We also do not think that consent to enter a restriction will provide an answer to the problems raised by the use of restrictions to protect contractual arrangements. As we explained in the Consultation Paper, the requirement for consent does not alleviate concerns that such agreements are not freely negotiated in the first place; nor does it address the delay that such restrictions can cause once they are entered.[46] Again, we think that more fundamental reform of the underlying law will instead be necessary.

10.80 We are intrigued by the suggestion that restrictions should not be used to protect unlawful or illegal contractual obligations. We agree that the land registration scheme should not be used to enforce compliance with unlawful contractual terms that would otherwise be void. However, the substantive question remains whether there is a valid, enforceable contract. We question, as a matter of principle, whether it is appropriate to charge HM Land Registry with the responsibility for determining whether a contract (or a term in a contract) is unenforceable or illegal; we moreover doubt, as a matter of practicality, that HM Land Registry would be able to identify all such terms. Our conclusion again points to the need for problems in the underlying law to be addressed.

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42 Consultation Paper, para 10.22.

43 (2011) Law Com No 327.

44 The announcement was first made in the Queen's Speech 2016: background briefing notes (May 2016) p 61, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524040/Queen_s_Speech_2016_background_notes_.pdf (last visited 4 July 2018), and has since been repeated in Fixing our Broken Housing Market (2017) Cm 9352, para 1.21 and A35; Department for Communities and Local Government, *Tackling Unfair Practices in the Leasehold Market: Summary of Consultation Responses and Government Response* (December 2017) para 36.

45 For example, a positive covenant will still have to "touch and concern" the benefiting land, which will not always be the case, eg, in relation to overage agreements: (2011) Law Com No 327, para 5.52; and we did not make recommendations about leasehold covenants: (2011) Law Com No 327, para 5.3.

46 Consultation Paper, paras 10.27 to 10.28.

10.81 We have considered whether a circle could be drawn around contractual obligations in which both parties have an existing proprietary right or formerly had a proprietary right in the registered estate, to allow such contractual obligations to be protectable by restriction. This approach is not dissimilar to one mooted by Nigel Madeley in relation to contracts relating to land (meaning that one of the parties must own or occupy land in order to perform the contract). Such a rule would enable overage agreements to be protected by restriction because the beneficiary would have formerly had an interest in the registered estate. This rule would also appear to exclude more purely contractual rights, for example, consumer contracts, which may unfairly be enforced by restrictions: the party potentially benefiting from any restriction would not have, nor ever would have had, any proprietary interest in the registered estate.

10.82 However, we were of the view in our project leading up to the LRA 2002 that restrictions should not be confined to those who have a proprietary interest in land.[47] Restrictions are therefore available to prevent the unlawfulness of a breach of contract, and also to protect limitations imposed by statute.[48] We have not been persuaded that this approach is wrong in principle.

10.83 More fundamentally, we question whether a clear conceptual line can be drawn that would address problematic uses of restrictions. A number of consultees suggested that it could not. For example, imposing a limit requiring the beneficiary of the restriction to have a property interest in the land would do nothing to prevent restrictions from being entered to protect a term in a lease, such as an obligation on the tenant to pay an administration fee, even though the use of restrictions in respect of such terms has been criticised. It may be that a single coherent rule cannot be based on land registration principles alone. Attempting to do so could unintentionally omit contractual rights that are usefully and uncontroversially protected by restrictions, or include contractual rights that should not be protected by a restriction.

10.84 It appears to us that, in some cases, decisions need to be made based on reasons of practically (for example, to allow restrictions to protect positive covenants). At the same time, decisions may need to take into account Government policy goals outside the land registration context (for example, the Law Society's example of shared ownership leases).

### The form restrictions should take in relation to certain types of contractual arrangements

10.85 We see merit in consultees' suggestions that some forms of contractual right should not entitle the holder to anything more than receiving notice that a sale has taken place. We think that giving the beneficiary the right to consent to, and thus veto, dispositions in some circumstances is inappropriate and moreover contributes to delay and potential unfairness on applicants. However, we do not think that requiring notice in advance of a disposition would be workable: as we explained in the Consultation Paper, if the notice

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47 Law Com No 254, para 6.58; Law Com No 271, para 6.40.

48 For example, a restriction can be entered based on a freezing injunction or a restraint order under the Proceeds of Crime Act 2002: see LRR 2003, r 93(h) and (l)(ii).

was not given, the restriction could not be complied with, and a disposition could never be registered, potentially sterilising the land.[49]

## DERIVATIVE INTERESTS UNDER TRUSTS

10.86 Stakeholders also raised concerns with us about the use of restrictions to protect beneficial interests under a trust of registered land, focussing on derivative interests under trusts.

10.87 As we explained in the Consultation Paper, the curtain principle dictates that beneficial interests should generally be kept off the register. Purchasers of land should not be concerned about beneficial interests because they are capable of being overreached, that is, transferred from the estate to the purchase money. The LRA 2002 provides a mechanism to ensure that beneficial interests are overreached on a registered disposition: pursuant to section 42(1)(b), when registered land is subject to a trust a restriction, known as a Form A restriction, can be entered in the register to the effect that no disposition by a sole registered proprietor under which capital money arises is to be registered without a court order.[50] In fact, when the registrar enters two or more persons in the register as the proprietor of an estate, barring particular exceptions, he or she must enter a Form A restriction to ensure that overreaching takes place.[51]

10.88 In most cases where there is a trust, a Form A restriction will be the only restriction that it is necessary or desirable to enter; it is all that is necessary to ensure overreaching occurs, while respecting the curtain principle by keeping beneficial interest off the register. In exceptional circumstances, a Form A restriction might be considered insufficient to protect a beneficiary's interest under a trust. Where that is the case, the beneficiary may also apply for another form of restriction, Form II, which requires notice of a disposition to the beneficiary.[52]

10.89 We explained our view in the Consultation Paper that the existing mechanisms are sufficient to protect beneficial interests under trusts, and moreover that because of the curtain principle, further protection would be inappropriate. We did not propose any reform on this basis, and did not ask a consultation question.[53] Nevertheless, some consultees suggested that forms of restriction should be amended to protect beneficial interests better, and further suggested amendments to the doctrine of overreaching.[54] We have not been persuaded to change our view: we continue to think that reform is unwarranted. Moreover, we have not considered reform of the doctrine of overreaching: as we explained in the Consultation Paper, overreaching is a doctrine which is not limited to registered land and thus is outside the scope of this project.[55]

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49 Consultation Paper, paras 10.38 and 10.39.

50 LRR 2003, r 93(a) and sch 4. Consultation Paper, paras 10.32 and 10.43.

51 LRA 2002, s 44(1). HM Land Registry, *Practice Guide 24: Private Trusts of Land* (April 2018) para 2.1.2.

52 Entered pursuant to s 42(1)(c); LRR 2003, sch 4.

53 Consultation Paper, para 10.47.

54 Professor Dermot Cahill and Dr John Gwilym Owen, and Amy Goymour.

55 Consultation Paper, para 1.20.

10.90 Our focus has instead been on derivative interests under trusts, the protection of which was raised as an issue by stakeholders. A derivative interest under a trust is an interest that is granted out of a beneficial interest under a trust.

Figure 17: Examples of derivative interests under a trust

(1) A and B are the trustees of a trust of land. The trust is held for the benefit of C and D. D grants a charge over her beneficial interest to E. E's interest is a derivative interest under a trust.

(2) A and B jointly own their home, and so are trustees of the estate for the benefit of themselves. B's beneficial interest is subject to a sub-trust for the benefit of C. C's interest is a derivative interest under a trust.

10.91 Because the registered estate is subject to a trust, a Form A restriction will appear in the register, to ensure that overreaching occurs. Typically, it will not be necessary to enter any additional restriction. Moreover, it will not be possible for the holder of the derivative interest to enter a restriction under the terms of section 42(1), which allows a restriction to be entered to prevent invalidity or unlawfulness or to protect a right or claim. In each case the invalidity or unlawfulness or right or claim must be in relation to the registered estate; these criteria will not be met if the interest is held over a beneficial interest in the registered estate, rather than the registered estate itself.[56]

10.92 Exceptionally, however, the LRA 2002 makes provision for the protection of a right that would not otherwise amount to a right in relation to a registered estate. It allows a charging order (an order of the court which imposes a charge on the property of the debtor for the purpose of securing a debt he or she owes as a result of a judgment or order of the court) over a beneficial interest under a trust to be protected by a restriction. In particular, section 42(4) of the LRA 2002 states that a person entitled to the benefit of a charging order relating to an interest under a trust shall be treated as having a right or claim in relation to the trust property (meaning the legal estate).[57] Such charging orders, and thus such restrictions, are common.

10.93 The standard form of restriction that can be entered to protect a charging order over a beneficial interest under a trust is a Form K restriction.[58] A Form K restriction provides that no disposition may be registered without a certificate by the applicant certifying that written notice of the disposition was given to the beneficiary of the charging order, the creditor.[59]

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56 Consultation Paper, paras 10.34 and 10.35.

57 Consultation Paper, para 10.36.

58 LRR 2003, r 93(k).

59 Consultation Paper, para 10.37. LRR 2003, s 93(k). See also sch 4, which outlines the standard forms of restriction.

10.94 In the Consultation Paper, we explained that stakeholders have criticised Form K restrictions, and the level of protection they offer. They have argued that Form K restrictions do not give the creditor an effective means of securing payment from the proceeds of a sale, because notice of the disposition can be given after the sale takes place.[60] Stakeholders and others had argued that the restriction should require the applicant to give notice to the creditor in advance of the disposition,[61] or require the applicant to obtain the consent of the creditor. However, we dismissed these suggestions. We were of the view that giving greater control to the creditor was unnecessary and undesirable. Requiring notification in advance of the disposition could sterilise title if a disposition takes place but the restriction had not been complied with. Further, unless the restriction clearly prescribed what would be required for compliance, disputes could arise over whether the terms of the restriction had in fact been complied with. Requiring consent could represent a "stranglehold" on the legal estate and circumvent overreaching. In providing notice to the creditor, Form K ensures the operation of overreaching, whilst enabling action by the creditor. In our view, it provides the right level of protection.[62]

10.95 We also provisionally took the view that reform was not needed such that holders of other derivative interests – those other than a charging order – under a trust could enter a restriction. Although it is anomalous that charging orders over beneficial interests can be protected by restriction, such orders are common and evidentially clear. Allowing other holders of derivative interests under trusts to apply for restrictions would undermine the curtain principle. It could also clutter the register, since any number of further derivative interests can be created.[63]

10.96 We did, however, provisionally propose reform in relation to the court's power to order the registrar to enter a restriction to protect a charging order over a beneficial interest under a trust. As we noted at paragraph 10.10 above, section 46 of the LRA 2002 gives the court power to order the entry of a restriction, but the circumstances in which a court can make such an order are more restrictive than those in which a registrar can do so under section 42. On the face of section 46, a court can only make an order to enter a restriction if it is necessary or desirable to do so for the purpose of protecting a right or claim in relation to a registered estate or charge.[64] There is no equivalent in section 46 to section 42(4), and therefore no equivalent provision to enable a restriction to be ordered in respect of charging orders over beneficial interests. Despite this apparent lacuna, such orders by the court are commonplace. To regularise the position, we provisionally recommended that this power be made explicit.[65]

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60 See *Megarry & Wade*, para 7-078 n 532.

61 See R Jackson (ed), *The White Book Service 2017, Civil Procedure*, vol 1 para 73.4.3.1. This was contemplated in our 2001 Report (see Law Com No 271, para 6.43 n 155) but in the Consultation Paper we stated that we were no longer convinced that such a requirement would be desirable: para 10.39.

62 Consultation Paper, paras 10.38 and 10.39.

63 Consultation Paper, para 10.40.

64 The equivalent to one of the three grounds on which a registrar can enter a restriction: s 42(1)(c).

65 Consultation Paper, para 10.48 to 10.52.

10.97 Further, when the court does make an order to enter a restriction in respect of a charging order over a beneficial interest, it does not always order a restriction in Form K. Given our reasoning that Form K is the only appropriate order in this circumstance,[66] and to prevent inconsistency in the protection given for charging orders, we also provisionally proposed that it be made clear that the form of restriction must be Form K.

**Consultation**

10.98 We had strong support for our provisional proposals in relation to derivative interests: all but four consultees agreed with both proposals. However, despite widespread agreement, a few consultees[67] repeated the concerns that the standard Form K restriction provides insufficient protection to creditors with a charging order over beneficial interests.

Whether Form K restrictions should be used for derivative interests

10.99 Most consultees agreed with our provisional proposal that Form K restrictions should continue to be available to protect charging orders over beneficial interests, but should not be more widely available to protect other types of derivative interest. Twenty-one consultees agreed, two disagreed, and one, HM Land Registry, expressed other views.

10.100 Among those consultees who agreed, some saw no reason for change[68] or viewed any potential reform as a "retrograde step" that would undermine the curtain principle.[69]

10.101 Christopher Jessel disagreed on the basis that charging orders over beneficial interests should not be able to be protected by a restriction, saying "it is hard to see why an applicant for registration … should be obliged to ensure that notice has been served on a creditor or a person who is a beneficiary but not on the title". In his view, it is sufficient for a single trust restriction to be entered in order to alert a purchaser that a trust exists; no further restriction to indicate the existence of a sub-trust is necessary.

10.102 The Chancery Bar Association also disagreed, arguing the opposite point: it argued that there is no justification for distinguishing between charging orders and other types of derivative interest, suggesting that other types of derivative interest should also be able to be protected by a restriction.

Requirement for a Form K restriction when ordered by the court

10.103 Most consultees also agreed with our provisional proposal to make express provision for the court to order the entry of a restriction to protect a charging order over a beneficial interest under a trust in Form K. Of 24 consultees who responded, 20 agreed, with only two disagreeing and two expressing other views. Most consultees simply indicated their agreement, some also noting that in practice this already happens. Only HM Land Registry offered substantive remarks on the point of providing the court with this express jurisdiction.

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66 Consultation Paper, para 10.38.

67 Including the Chancery Bar Association, Dr Charles Harpum QC (Hon), and the Bar Council.

68 The Property Litigation Association.

69 The Society of Licensed Conveyancers.

10.104 HM Land Registry broadly agreed with our proposal, but stated that provision would nevertheless be needed to clarify how HM Land Registry should deal with court orders that provide for the entry of restrictions in other forms, including non-standard forms. For example, it suggested that in relation to a charging order over a beneficial interest under a trust, it may be necessary to provide that any order made for a restriction other than in Form K should be treated by the registrar as if it were in that form, if the court has not expressly indicated that it has deliberately determined that a different form should be used.

### Concern about the level of protection Form K offers

10.105 A number of consultees focussed their responses to the proposals on the point of whether Form K provided sufficient protection.

10.106 Nigel Madeley agreed with our view that the creditor should not be entitled to any more protection than that provided by Form K. In his view, the creditor has lent unsecured (and perhaps charged a rate of interest to reflect that fact), so should not be entitled to greater protection than Form K provides. Similarly, the Law Society appeared to agree that a Form K restriction is all that is appropriate, as another form of restriction could give the creditor a right they were not entitled to under the trust, and could force purchasers of registered land to be concerned with the rights of beneficiaries under a trust, contrary to the curtain principle.

10.107 Other consultees argued that the protection offered by Form K was insufficient. For example, Dr Harpum strongly argued for reform of Form K on the basis that it provides insufficient protection to creditors, calling Form K "useless". Along with the Chancery Bar Association, he argued that the creditor should receive notice prior to the disposition, in order to take steps to ensure receipt of his or her share of the proceeds.

10.108 Likewise, the Bar Council argued that creditors should be able to protect their charging orders by a form of consent restriction. It stated that Form K, although sufficient to inform the creditor of overreaching, was insufficient to protect the creditor's interests. The Council explained that the parties have already been engaged in litigation, so the creditor might be concerned that the debtor will try to avoid paying the judgment debt. However, the Bar Council also agreed that a consent restriction might cause unfairness in cases where the creditor unreasonably refuses consent, particularly if the party wanting to sell the property could not afford to go to court to get an order permitting the sale.

## Discussion

10.109 Most consultees agreed that charges over beneficial interests should continue to be protectable by a restriction, but that other derivative interests under trusts should continue not to be. Most consultees also agreed that the law should make clear that a court may order the entry of a restriction to protect a charging order, but that such a restriction must be in Form K.

10.110 The most significant point raised by consultees related to the level of protection Form K provides creditors. Their points echo existing criticisms that Form K provides inadequate protection to judgment creditors, such that many applicants apply for a non-

standard form of restriction to protect their charges, suggesting that the LRR 2003 need to be improved in order to give effect to the Charging Orders Act 1979.[70]

10.111 We considered but dismissed this argument in the Consultation Paper, for the reasons given at paragraph 10.94 above. We remain of the view that Form K provides the only form of protection that is appropriate. Where beneficial interests affecting an estate in land are overreached on a sale, the holder of a charge over one of the beneficial interests will be entitled to no more than a share of the proceeds of sale to the value of the debt. The chargee is not entitled to prevent or hamper the sale. A Form A restriction should already appear in the register to ensure that overreaching takes place. The addition of a Form K restriction ensures that the chargee also receives notification that action should be taken to recoup the debt. We are unconvinced by arguments that Form K should provide more protection.

10.112 Following consultees' views, we remain of the view that the LRA 2002 should expressly provide that the court may order the registrar to enter a restriction to protect a charging order over an interest under a trust, provided the restriction is in Form K.

**Recommendation**

**Recommendation 19.**

10.113 We recommend that it should be made clear that a court may order the entry of a restriction to protect a charging order relating to an interest under a trust, but that such a restriction must be in Form K.

10.114 Clause 16 of our draft Bill enacts Recommendation 19. It inserts two new subsections into section 46, expressly granting the court an equivalent power in relation to charging orders relating to an interest under a trust that is given to the registrar, and mandate the form that order must be in.

10.115 Once amended, section 46 will expressly give the court the power to order a restriction to protect a charging order in relation to an interest under a trust. On the basis that section 46 grants the power, we do not think there is an objection in principle for that same provision to set conditions on the exercise of the power. We note that this provision only applies to the court's power under section 46; it does not undermine the court's inherent jurisdiction, for example, to issue injunctions.

10.116 HM Land Registry suggested that any reform should make clear how the registrar should deal with orders from the court for a restriction in another form. In further discussions with HM Land Registry, it has explained that it might be necessary, at least initially, for HM Land Registry to correspond with the court where the court has ordered a customised restriction to ensure it is not appropriate to enter a restriction in Form K.

[70] See for example Civil Procedure Rules, r 73.4 and the commentary in R Jackson (ed), *The White Book Service 2017*, Civil Procedure, vol 1 para 74.4.3.1.

**Notification on court-ordered restrictions**

10.117 HM Land Registry suggested that applications for Form K restrictions in respect of charging orders should be excluded from the requirement for the registrar to notify the registered proprietor under section 45 of the LRA 2002. It maintained that, because charging orders are court orders, it is unlikely that there would be a valid ground for objection and in practice few grounded objections are made. In cases in which an objection would be valid, an application could instead be made to remove the restriction from the register.

10.118 We think this suggestion is sensible. Moreover, it is consistent with section 45(3) of the LRA 2002, which provides that an application for the entry of a restriction is not notifiable if it is:

> an application for the entry of a restriction reflecting a limitation under an order of the court or registrar, or an undertaking given in place of such an order.

10.119 It is not clear from the wording of section 45(3) if a charging order over a beneficial interest is captured by "a limitation under an order". HM Land Registry suggest that whether an application for a restriction to protect a charging order is notifiable depends on the way the court drafts the order. We agree that it is not clear whether the notification requirement only applies if the charging order contains an obligation to enter a restriction, rather than an ability to enter a restriction. It might also be arguable that, based on the relationship between owner's powers and restrictions, the exemption from notification only applies to a "limitation" that is a limitation on the registered proprietor's powers of disposition, for example, a freezing order.

10.120 Although we did not consult on this issue, we think the point is sufficiently discrete that we can nevertheless make a recommendation. In doing so, we have taken into account that our recommendation is intended to clarify the scope of an existing exception in section 45. The recommendation will ensure that HM Land Registry need not give notice when an application for a restriction reflects a charging order over a beneficial interest under a trust.

**Recommendation 20.**

10.121 We recommend that it should be made clear that an application under section 43(1) of the LRA 2002 is not notifiable under section 45 of the LRA 2002 where that application is for the entry of a restriction to protect a charging order relating to an interest under a trust.

10.122 Clause 15 of our draft Bill enacts Recommendation 20.

# Chapter 11: Overriding interests

## INTRODUCTION

11.1 Overriding interests[1] are interests that are not protected in the register but are, as the name suggests, nevertheless binding on anyone who acquires an interest in the land. Schedule 1 to the LRA 2002 sets out the circumstances in which an interest will override on first registration, and schedule 3 sets out the circumstances in which an interest will override on a subsequent registered disposition.[2] For example, a proprietary interest belonging to a person in actual occupation of the land can be overriding under both schedules.

11.2 The LRA 2002 extensively reformed the law surrounding overriding interests by reducing the number of types of interest that are capable of overriding. The reform was guided by one main principle: an interest should only have overriding status if protection against buyers is needed, but if it is neither reasonable to expect nor sensible to require any entry in the register.[3]

11.3 We did not consider it necessary to embark on another fundamental review of overriding interests as part of this project.[4] We have instead focussed on three discrete issues about overriding interests raised by stakeholders. We have decided not to make recommendations for reform on any of the three issues.

11.4 First, we have considered whether estate contracts should continue to be capable of protection as overriding interests when the beneficiary of the estate contract is in actual occupation of the land. Together with the majority of consultees, we agree that an estate contract should continue to be able to be protected as an overriding interest in such circumstances.

11.5 Secondly, we have considered what is meant by the requirement that an interest must be "unregistered" in order to be overriding. We interpret the LRA 2002 such that the requirement is satisfied as long as the interest is not registered in the register of the burdened land. As a consequence, if the benefit of the interest alone has been registered, the interest is not precluded from being overriding.

11.6 Finally, we have considered subsection 29(3) of the LRA 2002, which provides that, once the priority of an interest is protected by a notice in the register, when that notice

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1 Or, as the LRA 2002 describes them, "interests which override".

2 LRA 2002, ss 11, 12, 29 and sch 1 and 3. As we noted in the Consultation Paper, the interests in sch 1 and 3 are similar but not identical, with sch 3 being more restrictive in what sorts of interest can override a registered disposition. See the Consultation Paper, paras 11.1 and 11.9.

3 Law Com No 271, paras 2.25 and 8.6. See also Law Com No 254, para 4.14.

4 Consultation Paper, paras 11.2 to 11.5. Christopher Jessel suggested that the categories of overriding interests should be increased, with particular reference to types of customary rights, statutory easements, and surface rights benefiting holders of mines and minerals rights. We consider that such an expansion of the category of overriding interests would be beyond the scope of our project, and contrary to the policy in the LRA 2002 to reduce the number of overriding interests.

is removed the interest can never again have overriding status for the purposes of section 29. Due to lack of consensus as well as insufficient evidence of any problems, we have decided against pursuing reform of section 29(3).

11.7 We discuss each of these three points in more detail below.

## INTERESTS CAPABLE OF OVERRIDING WHEN COUPLED WITH ACTUAL OCCUPATION

11.8 An overriding interest can be claimed on the basis of actual occupation, both on first registration (under paragraph 2 of schedule 1) and on subsequent registered dispositions (under paragraph 2 of schedule 3). That is, if a person who holds a proprietary right[5] is in actual occupation of the land, that right can be protected by virtue of his or her actual occupation, even if the occupation is not by virtue of the right.[6]

11.9 As we explained in our Consultation Paper, not all interests can be protected as overriding on the basis of actual occupation. Certain types of interests are excluded by statute.[7]

### Protection of estate contracts by actual occupation

11.10 Currently, an estate contract can be protected as an overriding interest if the beneficiary of the contract is in actual occupation.[8] In our Consultation Paper, we considered whether this protection should remain. We focussed our discussion on registered dispositions, rather than first registration.[9] An important consideration in our consultation has been whether the current law strikes the right balance between protecting purchasers from interests that are not reasonably discoverable on the one hand, and protecting beneficiaries of interests that cannot fairly be expected to be noted in the register on the other.[10]

#### Evaluation of the current law

11.11 It is uncontroversial that informally created interests should be able to be protected as overriding interests. Their informal nature means that there is no trigger for the beneficiary of the right to apply for an entry in the register. Indeed, the existence of the right might be determined only when a disposition of the land takes place and a priority dispute with the disponee arises. However, estate contracts are created expressly, in a

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5 Some types of right are excluded from being able to overriding on the basis of actual occupation: see eg LRA 2002, s 87 and Family Law Act 1996, s 31(10)(b). See the Consultation Paper, paras 11.11 and 11.12.

6 Consultation Paper, paras 11.8 to 11.10.

7 Consultation Paper, para 11.11. For a list of such interests, see *Ruoff & Roper*, para 10.023.

8 Decided by the Court of Appeal in *Ferrishurst Ltd v Wallcite Ltd* [1999] Ch 355. See the Consultation Paper, paras 11.14 to 11.16.

9 On the basis that there are more restrictions in para 2 of sch 3 compared to sch 1. As we discussed in the Consultation Paper, because first registration need not necessarily involve a disposition, the concept of making enquiries and inspecting the land is irrelevant: para 11.9.

10 Consultation Paper, paras 11.17 to 11.29.

signed written document. Accordingly, there is an argument that estate contracts should only be protected by a notice in the register.

11.12 However, the beneficiary of an estate contract may be a tenant of a short lease that is not registrable, and so may not receive legal advice in relation to the estate contract. Further, purchasers and mortgagees can protect themselves against overriding interests by carrying out enquiries of occupiers.[11] In our view, the balance tilted in favour of the current position.[12]

### Consultation and discussion

11.13 We were provisionally of the view in the Consultation Paper that estate contracts should continue to be able to be protected as overriding interests by actual occupation.[13]

11.14 Of the 28 consultees who responded on this point, 18 agreed with our provisional view that the law should remain unchanged.

11.15 The Law Society and the Chancery Bar Association were among those who agreed with our provisional proposal. Many who agreed did so because purchasers of land can, and should, make the appropriate enquiries to identify any potentially overriding interests. Howard Kennedy LLP and Nigel Madeley noted that this rule was important in residential conveyancing, and would usually benefit tenants "who might have options or rights to rectification".[14]

11.16 Two consultees expressed other views in response to our proposal. However, these consultees, HM Land Registry and Pinsent Masons LLP, supported the provisional proposal provided that we did not proceed with our proposals in Chapter 6 to allow unregistrable interests to take advantage of the priority provision in section 29. As we discussed in Chapter 6, we are not proceeding with reform of the priority rules and as such these consultees are supportive of this proposal.

11.17 Seven consultees disagreed, including Dr Charles Harpum QC (Hon) and some practitioner member groups such as the Conveyancing Association. Their disagreement was based on their view that it is reasonable to expect an estate contract to be protected in the register because it is an expressly created right.

### Protection of expressly created interests in the register

11.18 The seven consultees who disagreed argued that the class of overriding interests should be narrowed, in order for the register to be conclusive. In particular, they argued that because estate contracts must be created expressly, they should be required to be protected by a notice in the register rather than receiving protection as overriding interests. In their view, it is reasonable to expect those receiving the benefit of an

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11 Pursuant to LRA 2002, sch 3, para 2(b) and (c).

12 Consultation Paper, paras 11.28 to 11.29.

13 Consultation Paper, para 11.30.

14 Nigel Madeley. We disagree, however, that the ability to seek rectification should be construed as a proprietary interest: see para 13.20 and following below and Recommendation 22.

expressly created right, and (in their view) also often legal advice, to protect that right by a notice in the register.

11.19 Christopher Jessel, although disagreeing with our provisional proposal, noted that there are situations in which an expressly created interest might warrant overriding status. He had in mind situations in which property rights in land can be expressly created with no, or minimal, formality requirements.

11.20 In our 2001 Report, we explained that interests should only be able to be protected as an overriding interest where it is neither reasonable to expect nor sensible to require any entry in the register (or, in relation to unregistered land, to enter a caution against first registration). We acknowledged that the interests of those in actual occupation should continue to be protected as overriding, on the basis that persons in actual occupation are unlikely to appreciate the need to protect their interests in the register, believing that their occupation is sufficient protection. We acknowledged that expressly created interests should be required to be protected in the register. However, the scheme in the LRA 2002 is that expressly created rights continued to be protected as overriding interests by actual occupation; only on the introduction of electronic conveyancing would expressly created interests not be able to be overriding based on actual occupation.[15]

11.21 We continue to agree with the policy expressed in our 2001 Report that interests should only be able to be protected as an overriding interest where it was neither reasonable to expect nor sensible to require any entry in the register. Within that policy goal we have, however, developed a greater appreciation of the significance of legal advice in determining when it is reasonable to expect an entry in the register to be made. When people occupy land, they may not appreciate the need to take any steps to protect their interest. In our view, a person without the benefit of legal advice is all the more likely to assume that his or her occupation is the only protection that is needed. We therefore believe it is unreasonable to expect their interests to be registered.

11.22 We are unconvinced that those benefiting from an estate contract will necessarily be aware of the registration requirements; in particular, a short-term tenant with the benefit of an estate contract, due to the length of his or her lease, is unlikely to seek legal advice.

### Requirement to inspect the land and make enquiries

11.23 The London Property Support Lawyers Group, disagreeing with the proposal, also suggested that purchasers and mortgagees do not routinely make enquiries directly to occupiers in commercial transactions. When they do, such enquiries are made prior to completion and therefore not at the date of the disposition. The National Trust made a similar point, suggesting that the obligation on purchasers to discover overriding interests was too extensive. Burges Salmon LLP also suggested that it is impractical to inspect the property at the time of the disposition, the date when all the parties happen to have signed the documents.

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[15] Law Com No 271, para 8.16 and 8.53; Law Com No 254, para 5.6 and 5.61. See also Consultation Paper, para 11.20.

11.24 We are not, however, persuaded by these concerns. Purchasers and mortgagees, particularly those in commercial transactions, are likely to obtain legal advice. They are entitled to inspect the land. They should make enquiries of occupiers. A purchaser who makes enquiries will be informed if an estate contract exists, so will not be caught out by its existence. If a purchaser makes enquiries, but the estate contract is not disclosed, then it will not bind as an overriding interest. Parties to commercial transactions should be aware of the risks if they decide not to make enquiries of occupiers.

11.25 As regards the time at which enquiries are made, consultees raised a general point that purchasers and mortgagees cannot realistically make inquiries and inspect the property at the time of completion, as required by schedule 3, and so may be caught out by overriding interests generally. As we discuss in Chapter 8, due to the operation of section 29 and schedule 3, an overriding interest takes priority over a registered disposition (even if that disposition is protected by a priority search), so long as the overriding interest is created first in time. The time of the registered disposition is the relevant point.[16] Assessing whether there are interests that override at the time of the disposition is fundamental to both section 29 and schedule 3. Overturning it would be a radical departure; nor is it readily apparent to us what point in time could fairly replace it.

11.26 Moreover, we do not accept that inspection cannot be organised to take place at the time of the disposition. It is reasonable to expect purchasers and mortgagees to inspect the land when they buy or take an interest in it. Fundamentally, we do not think that rules created to protect the rights of those in occupation should be amended simply to reflect commercial practice in part of the property market.

### Conclusion

11.27 Given the majority support of consultees, we consider it best to maintain the protections currently available under the LRA 2002, to allow estate contracts to continue to be able to be overriding on the basis of actual occupation under paragraph 2. We therefore think the law should remain as it is. We think that the law strikes the right balance between the goal of requiring all interests which reasonably should be registered to be registered, and the need to protect purchasers and mortgagees from undiscoverable interests.

11.28 We acknowledge that some of those who have an estate contract may have had legal advice and may enter a notice in respect of their rights. There will still be an advantage to entering a notice in the register. The existence of this category of overriding interest acknowledges, however, that not all those in occupation will be aware of the registration requirements.

11.29 We also remain of the view that estate contracts, if protected by actual occupation, are discoverable. We do not think that it is overly burdensome for purchasers and mortgagees to conduct enquiries of occupiers to determine whether they have any interests that could be overriding. Moreover, that some consultees indicated that purchasers or mortgagees do not always conduct enquiries suggests to us that the existence of an overriding interest is considered an acceptable risk.

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[16] For a discussion of overriding interests and the priority period generally, see Ch 8, paras 8.9 and following and 8.69 and following, above. See also Law Com No 271, para 8.3.

11.30 We therefore make no recommendation for reform.

### Other overriding interests protected on the basis of actual occupation

11.31 In our consultation, we focussed on estate contracts, as the main example of a type of interest that is created expressly where the beneficiary is likely to be in actual occupation of the land.[17] However, we also explained that a transferee taking an interest under a registrable disposition whose application for registration was rejected for administrative reasons would similarly benefit from an overriding interest if he or she was in actual occupation.[18]

11.32 In its consultation response regarding Chapter 8, the London Property Support Lawyers Group questioned whether registrable dispositions should be able to be overriding on the basis of actual occupation under paragraph 2, focussing on registrable leases.

11.33 As we explained in the Consultation Paper, we can see the force of the argument that interests under registrable dispositions should be registered in order to be protected. Certainly, these interests are expected to be registered: they are registrable dispositions which, after all, do not operate at law absent registration. We nevertheless see paragraph 2 in this scenario as an important source of protection when registration has failed but when the tenant has taken possession of the land. We note that registration may fail for reasons outside the control of the tenant. It does not seem objectionable that actual occupation should provide protection in these circumstances for property rights the tenant may have in equity prior to registration. That is particularly since the tenant's occupation is easily discoverable through the usual inspection and enquiry process.

## THE MEANING OF "UNREGISTERED INTEREST"

### Evaluation of the law

11.34 For the purposes of schedules 1 and 3 to the LRA 2002,[19] in order for an interest to be an overriding interest it must also be an "unregistered interest": the schedules are indeed headed "Unregistered interests which override". Accordingly, once an interest appears in the register of title of an estate, it can no longer burden dispositions of that estate as an overriding interest.[20]

11.35 As we explained in the Consultation Paper, if an interest is noted only in the register of title of the benefiting estate, it is not clear whether the interest remains "unregistered" and so is capable of being overriding.[21] Below in figure 18 is an example of how these facts might arise in respect of an easement.

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17 Consultation Paper, para 11.23.

18 Consultation Paper, para 11.26.

19 The term "unregistered interest" is also used in relation to overriding interests in LRA 2002, ss 11(4)(b),12(4)(c), 37, 71 and 117.

20 Consultation Paper, para 11.31.

21 Consultation Paper, para 11.32.

Figure 18: The benefit of an easement is registered

An easement is granted at a time when both the benefiting and burdened titles are unregistered. Upon first registration of the benefiting land, the easement is noted on the title to the land. However, on the subsequent registration of the burdened land, no notice of the easement is entered on the title to the land (because the title deeds did not refer to the easement).

If the fact that the benefit of the easement is registered means that the easement is not an "unregistered interest" for the purposes of schedule 1 to the LRA 2002, then the easement will not operate as an overriding interest.

11.36 The relevance of the registration of the benefit of the interest (as opposed to the burden of the interest) is not apparent from the face of the LRA 2002. The LRA 2002 does not define "unregistered interest". However, it does define "registered" in section 132 to mean simply "entered in the register".[22]

11.37 In the Consultation Paper, we took the view that the registration of the benefit of the interest was not relevant to a determination of whether the interest is "unregistered".

11.38 We think this interpretation follows from the LRA 2002. Section 29 makes it clear that it is the title of the burdened land that is relevant; purchasers and mortgagees cannot be expected to search every neighbouring title to search for adverse interests. Additionally, not all interests that are overriding will have a benefiting title, and so uneven results would follow if registration of the benefit of an interest precluded it from being overriding.

11.39 Finally, there are good policy reasons for this view: a beneficiary of the interest should not be penalised for having registered the benefit of the interest on his or her title. Aside from the fairness, such a penalty would act as a disincentive to registration.

11.40 We therefore put forward to consultees our view that the term "unregistered" (and the converse, "registered"[23]) should relate to whether an interest appears in the register of the burdened title.[24]

**Consultation**

11.41 We provisionally proposed that the fact that the benefit of an interest has been registered should not preclude it from being an "unregistered interest" for the purposes of schedules 1 and 3.

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22 For more detail, see the Consultation Paper, paras 11.33 to 11.35.

23 Appearing in LRA 2002, s 132.

24 Consultation Paper, para 11.40.

11.42 Twenty-five consultees responded to this question, and all but one agreed,[25] including the Law Society, HM Land Registry, and Dr Harpum. Consultees cited the reasons we outlined in the Consultation Paper as their reasons for agreeing.

11.43 Christopher Jessel, who also agreed, added another point in favour of our interpretation. He explained that the way the benefit of an interest is registered may be different from the way the burden is registered. For example, on first registration of the benefiting land, the title might record that it includes the benefit of an easement for all vehicles for any residential purpose; on the subsequent registration of the burdened land, the easement could only be noted as being for the benefit of private vehicles for one dwelling. As Mr Jessel pointed out, "it may be unclear just what right has the benefit of registration".

11.44 Some consultees who agreed were of the view that our proposal reflects the law as it currently stands. Dr Harpum made this point, saying that "registration" in section 29 "must plainly be the registration of the burden of an interest against the burdened title". Martin Wood commented that if "unregistered" meant the register as a whole rather than the register of title of the burdened land, "the scheme simply doesn't work, and it would be inconceivable that a court would find otherwise". Conversely, the Law Society said that, although the definition of "registered" in section 132 makes no reference to the registration of the benefit of an interest, it also does not refer the registration of the burden.

**Conclusion**

11.45 Consultees overwhelmingly agreed with our interpretation of the law as put forward in our provisional proposal. However, we do not think that it is necessary to amend the LRA 2002. We think our interpretation is supported by the wording of the LRA 2002 as it is.

11.46 For the avoidance of doubt, we nevertheless wish to make our interpretation of "unregistered" in the context of overriding interests clear. In our view, the term "unregistered" refers to whether an interest appears in the register of the burdened title. Therefore, the fact that the benefit of an interest has been registered does not preclude that interest from being an "unregistered interest" (and so overriding) for the purposes of schedules 1 and 3 to the LRA 2002.

11.47 We agree with consultees that in assessing whether an interest is registered on first registration or on a registered disposition, the phrase "entered in the register" in section 132 must refer to the register entry in respect of the relevant burdened estate (that is, against the unique (numbered) title of the burdened estate), rather than the register of title as a whole. Similarly, "unregistered" must mean unregistered in the register of title for the relevant estate. As we explained in the Consultation Paper, this interpretation is the only sensible one, taking into account the scheme created by the LRA 2002.

11.48 We also have not been presented with any suggestion that the converse interpretation has been adopted or that the current wording is causing problems in practice. On that basis, we do not think that any clarifying amendment of the LRA 2002 is warranted.

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[25] Mangala Murali disagreed with our proposal.

## ONCE NOTED IN THE REGISTER, AN INTEREST CAN NEVER AGAIN OBTAIN OVERRIDING STATUS

11.49 According to section 29(3), an interest will not be an overriding interest if it "has been the subject of a notice in the register at any time since the coming into force of this section". Accordingly, once an overriding interest is noted in the register, it can never re-obtain its overriding status.[26] This rule could prove problematic if the notice protecting an interest were removed; the interest would then be vulnerable to a disposition of the registered estate for valuable consideration.[27]

11.50 We considered the arguments for and against retaining section 29(3) in the Consultation Paper.

11.51 As we explained in our 2001 Report, the policy behind section 29(3) was to reduce the number and impact of overriding interests.[28] However, as we acknowledged in the Consultation Paper, section 29(3) might create a disincentive to bringing interests on to the register. It might also result in a windfall for a purchaser who, believing that an interest is overriding because the holder is in actual occupation, finds that it is not because the interest was once the subject of a notice.[29]

11.52 On the other hand, in some situations section 29(3) would ensure that the expected outcome would in fact follow. For example, if a registered proprietor negotiates with the holder of an interest noted in the register for the notice to be cancelled, on the basis that the interest is an obstacle to a sale, it would be contrary to both parties' intentions for the interest to re-emerge as an overriding interest on the sale of the property. Moreover, without section 29(3), beneficiaries of notices would have less incentive to respond to an application to cancel the notice within the prescribed time period since their interests would continue to bind any disponee.[30]

### Consultation

11.53 We concluded in the Consultation Paper that the arguments for and against section 29(3) were evenly balanced. We therefore asked three open consultation questions, aimed at gathering evidence and determining whether section 29(3) should be retained.[31]

11.54 Twenty-one consultees responded on the point of whether section 29(3) should be retained. Demonstrating that the arguments for reform are indeed finely balanced, consultees were evenly split between those who thought section 29(3) should be retained and those who thought it should be repealed.

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26 Based on the above, in our view LRA 2002, s 29(3) is referring to the entry of notice against the title of the burdened estate.

27 Consultation Paper, paras 11.42 to 11.43.

28 Law Com No 271, para 8.95.

29 Consultation Paper, paras 11.46 to 11.50.

30 Consultation Paper, paras 11.51 and 11.52.

31 Consultation Paper, paras 11.54, 11.55 and 11.57.

11.55 Those in support of retention included the Law Society, the Chancery Bar Association and Dr Harpum. Many favouring retention were generally in favour of bringing overriding interests onto the register and encouraging interest holders to engage with the land registration scheme. They also echoed the points we made in the Consultation Paper. For example, the London Property Support Lawyers Group described section 29(3) as "an important provision" which "encourages overriding interests to be brought onto the register". It agreed that eliminating section 29(3) could result in a disincentive for beneficiaries of interests to respond to an application to cancel a notice. In their joint response, Professor Warren Barr and Professor Debra Morris said that section 29(3) should remain as an incentive to engage with the notice procedures. Burges Salmon LLP stated that section 29(3) promotes certainty. The Chancery Bar Association said that section 29(3) serves a useful purpose in preventing a beneficiary who had removed the notice, perhaps at the behest of the registered proprietor, "from subsequently seeking to assert the previously protected interest against a purchaser".

11.56 In the Consultation Paper we explained that if a notice of an interest was removed mistakenly by HM Land Registry, the register could be rectified and indemnity would be available.[32] A number of consultees made comments, or expressed concerns, in relation to mistake and indemnity. For example, Dr Harpum favoured retention, and did so in part because he believed that section 29(3), together with mistake and indemnity, achieved a just result. He explained that if a notice had been removed mistakenly by HM Land Registry, it was proper for HM Land Registry to have to pay an indemnity for its mistake, rather than being able to rely on the interest being protected as an overriding interest. He moreover explained that the interest re-emerging as an overriding interest might operate unfairly against a purchaser who had done its due diligence and concluded that the notice had been removed properly and for good reason.

11.57 Although believing that section 29(3) should be retained, Michael Hall stated that if the interest had been removed by mistake or through a fraudulent, a negligent or an improper application, an innocent beneficiary should be indemnified. Cliff Campbell, who argued in favour of repeal, expressed concern that a mistaken removal of an interest could have an unfair result.

11.58 HM Land Registry, in its consultation response, took the opposite view. It favoured the repeal of section 29(3), saying that the provision "increases unnecessarily the potential for indemnity claims based upon an historic entry having been made in the register".

11.59 Other consultees who thought that section 29(3) should be repealed argued that the provision was made in the theoretical pursuit of the mirror principle,[33] or represented "formalism for its own sake".[34] Both Everyman Legal and the City of Westminster and Holborn Law Society described it as a "trap". Nigel Madeley and Dr Aruna Nair made the point that, if the parties had agreed for the removal of the notice, they would also be sure to seek an express release from the right. Others thought the rule could operate

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32 Consultation Paper, para 11.44, citing our 2001 Report which made the same point: Law Com No 271, para 8.95.

33 Martin Wood.

34 Nigel Madeley. Cliff Campbell also described it as "fulfilling an ideal of the original Act rather than fulfilling any obvious practical purpose".

harshly:[35] some suggested that a purchaser should have to address, and potentially seek the release of, an interest of anyone in occupation apparent on inspection. If the notice is removed but the right continues to exist, it suggests that the beneficiary was not substantially or properly engaged in the removal of the notice. The Society of Legal Scholars stated that section 29(3) raises questions over the status of such rights and ultimately "causes more problems than it solves".

11.60 However, despite this last point, consultees could not in fact point to problems caused by section 29(3). In response to our consultation question in which we sought evidence of situations where section 29(3) has caused problems or been helpful in practice,[36] only six consultees responded. The majority who responded, including the Law Society and the Chancery Bar Association, responded only to say that they were unaware of any situations in practice in which section 29(3) was either a help or hindrance. Only Christopher Jessel and the Bar Council could provide any examples.

11.61 Christopher Jessel generally described the consequence that section 29(3) has on landed estates: on first registration, inspection of the title deeds may reveal reference to easements but no indication of the portion(s) of land over which they were granted. Although the rights may have become obsolete, HM Land Registry might enter them in the register of the perhaps dozens of titles to which they could relate. Once on title, the notices will not be removed as a safeguard due to section 29(3), so they may continue to clutter up titles.

11.62 The Bar Council provided an example of a case in which a notice had been poorly drafted and there was uncertainty about whether a particular interest was protected by the notice. Section 29(3) put the beneficiary in the position that he or she might be forced to defend the applicability of the notice to his or her interest in order to avoid the risk of losing any protection for the corresponding right.

### Conclusion

11.63 Responses from consultees did not provide us with any consensus as to whether reform is required. Given the variety of responses, we were unable to develop a clear view of the precise nature of problems with section 29(3) or identify steps which could be taken to alleviate any concerns. We were only given two examples of problems in practice, both showing that a cautious approach might be taken in the face of uncertainty about whether a notice applies to a particular title or protects the priority of a particular right. We are not persuaded that section 29(3) causes problems in practice sufficient to justify its repeal.

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35 Dr Aruna Nair and Cliff Campbell.

36 Consultation Paper, para 11.55.

# Chapter 12: Recording of lease variations

## INTRODUCTION

12.1 In this chapter, we focus on the voluntary recording of lease variations in the register.

In this chapter we refer to three types of transactions in relation to leases. We use the phrases set out below to describe them.

*Registrable lease variations*: variations of a lease that create a proprietary interest and which must either be completed by registration in order to have effect at law, or be protected in the register in order to preserve their priority.

*Non-dispositive lease variations*: variations that take effect at law and bind successors in title without needing to be registered. These variations do not give effect to a registrable disposition or create a new proprietary interest whose priority needs to be protected in the register. They bind successors in title to the landlord and tenant as covenants contained in "collateral agreements" to the lease.[1] They include amendments to the covenant to repair or to the frequency with which rent must be paid.

*Documents ancillary to a lease*: documents that do not vary the lease, but take effect under it. They include licences (for example, a permission to assign the lease) and rent review memoranda (a recording of a change to the level of rent payable).

12.2 The focus in this chapter is on non-dispositive lease variations and documents ancillary to a lease.

12.3 We considered registrable lease variations in the Consultation Paper, but we did not consult on reform in respect of them. Some lease variations create proprietary interests which either have to be completed by registration in order to have effect at law, or need to be protected in the register to preserve their priority. These variations need to be registered[2] in order to bind successors in title of the landlord or tenant.[3] In the Consultation Paper, we discussed the relationship between the LRA 2002 and the

1 Landlord and Tenant (Covenants) Act 1995, s 3. See also LRA 2002, ss 12(4)(a) and 29(2)(b).

2 Pursuant to LRA 2002, s 132(1), something is "registered" if it is "entered in the register". Consequently, when a notice is entered in the register, it is "registered".

3 The London Property Support Lawyers Group raised a concern about the protection of interests, protected by a notice in the register, when they are varied. Whether a variation amounts to the grant of a new interest is a matter for the general law of property, not the LRA 2002. Nevertheless, we note that HM Land Registry's practice guidance indicates that the registrar will not delete an earlier notice that protects the priority of an interest which has been varied and then protected by the entry of a new notice: *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (April 2018) para 2.8.1. It appears that the Group's concern is therefore addressed by HM Land Registry's practice.

transmission of the benefit and burden of landlord and tenant covenants under the common law and statutory rules and, in particular, under the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act"). We concluded that registration under the LRA 2002 is only required in relation to lease variations which involve the disposition of, or the grant of an interest out of, either the landlord's registered title or the registered lease itself. As we explained, these dispositions create interests in land which need to be registered or entered in the register to secure their priority, regardless of whether they are created within a landlord and tenant context.[4] Lease variations that involve a disposition or grant include those that amount to a surrender and re-grant of the lease, grants of an easement,[5] estate contracts,[6] and some restrictive covenants.[7] Therefore, the LRA 2002 already provides the mechanisms for the registration of registrable lease variations.

12.4 Accordingly, our consultation and provisional proposals for reform focussed on those categories of lease documents which are not required to be registered under the LRA 2002 in order to bind a successor in title to the landlord or tenant: those we have described as non-dispositive lease variations or documents ancillary to a lease.

12.5 We made a provisional proposal that the LRA 2002 should provide a clear mechanism for the voluntary recording of non-dispositive variations to a lease on the landlord's or the tenant's title, or both titles if both are registered. Consultees expressed support for this proposal. We therefore make a recommendation in similar terms. However, on further reflection, we think that amendment of the LRA 2002 is not necessary: we think that existing powers in the LRA 2002 already allow for rules to be made which will create a clear mechanism for the voluntary recording of lease variations.

12.6 We also invited the views of consultees as to whether documents ancillary to a lease should be able to be recorded in the register. Most consultees agreed with our view that there should not be provision to permit the recording of documents ancillary to a lease. Therefore, we do not recommend that express provision is made to allow recording of documents ancillary to a lease in the register.

12.7 In the last part of the Consultation Paper chapter, we took the opportunity to ask consultees about any problems with the 1995 Act, as part of the upcoming consultation on our Thirteenth Programme of Law Reform.[8] We considered consultees' responses to that question as part of our Thirteenth Programme consultation. We do not discuss them here except to note that consultees made clear that there are significant problems

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4 Consultation Paper, paras 12.20 to 12.31.

5 In Ch 16, we recommend that easements that benefit short (thus unregistrable) leases and are granted in the deed that grants the lease should not be required to be registered in order to operate at law: see Recommendation 37 at para 16.44 below.

6 Examples include an option to renew a lease, a landlord covenant to sell the reversion to the tenant, and a tenant covenant to offer to surrender the lease. However, if the beneficiary is in actual occupation (which is likely to be the case if the beneficiary is the tenant), the covenant may be protected as an overriding interest.

7 If a restrictive covenant relates to the property let, it cannot be the subject of a notice in the register. However, a landlord covenant not to use land separate from the land demised for a particular use will need to be noted on the landlord's title to the other property in order to bind successors.

8 Consultation Paper, paras 12.4 and 12.45 to 12.48.

caused by the current law in relation to commercial leasehold. However, a project on commercial leasehold was not included in our Thirteenth Programme for Law Reform, because the Department for Communities and Local Government could not offer support for the project because of other departmental priorities at the time. The project could be undertaken in the future should it be supported by the Government.[9]

## RECORDING OF NON-DISPOSITIVE LEASE VARIATIONS

12.8 Some lease variations do not amount to a registrable disposition, nor do they create an interest whose priority needs to be protected in the register. They therefore bind successors in title without being registered under the LRA 2002. Instead, these non-dispositive lease variations bind successors in title to the landlord and tenant as covenants contained in "collateral agreements" to the lease.[10] Such variations include an amendment of the covenant to repair or to the frequency with which rent must be paid.[11]

12.9 Although non-dispositive lease variations do not need to be registered,[12] we considered whether such variations should be permitted to be recorded in the register.

12.10 We explained in the Consultation Paper that there is a good argument for recording non-dispositive lease variations on a voluntary basis. Voluntary registration supports the mirror principle by enabling a more complete and accurate record of the lease to be recorded in the register. That said, since recording would be voluntary, the register would not be a complete record of the covenants contained in a lease; therefore, the purchaser would still need to make enquiries.[13]

12.11 A number of such variations are already noted in the register, perhaps because parties to leases see a benefit in having all the records relating to the lease in the register. Currently, HM Land Registry's practice allows for these variations to be noted in the register by two means:

(1) an application to alter the register to bring it up to date, by the effect of the variation being noted in the landlord's and tenant's individual registers;[14] and

(2) an application to enter a notice in the landlord's title in respect of a deed of variation of the lease.[15]

12.12 However, we explained that the current legal position in relation to registration of lease variations is confusing. It was our view that the LRA 2002 is not well equipped to deal

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9 The Thirteenth Programme of Law Reform (2017) Law Com No 377, para 4.11.

10 Landlord and Tenant (Covenants) Act 1995, s 3. See also LRA 2002, ss 12(4)(a) and 29(2)(b).

11 Consultation Paper, para 12.32.

12 For the reasons we gave in the Consultation Paper, we did not consider making non-dispositive variations compulsorily registrable: Consultation Paper, para 12.33.

13 Consultation Paper, paras 12.34 to 12.35.

14 Pursuant to LRA 2002, sch 4, para 5(b).

15 Pursuant to LRA 2002, s 32(1) and LRR 2003, r 84(4). See Consultation Paper, paras 12.35 and 12.38.

with entries in the register in respect of lease variations. We thought there was value in the LRA 2002 providing a clear mechanism for the voluntary recording of variations to leases on either or both of the landlord's or the tenant's title.[16]

### Consultation and discussion

12.13 We provisionally proposed that express provision should be made to permit the recording of a variation of a lease on either the landlord's registered title, or the tenant's registered title, or both.[17]

12.14 Of the 22 consultees who responded, 19 agreed with our provisional proposal including HM Land Registry, the Law Society, the Chancery Bar Association, and a number of academics. No consultees disagreed. Three expressed other views.

#### The benefits of voluntary registration

12.15 Consultees in favour of voluntary recording of lease variations noted that our proposal would clarify what is already existing practice.[18] It would ensure that such variations would have a clear basis[19] and would be entered in a consistent way.[20] It would promote a fuller picture of the leasehold title in the register while allowing parties flexibility to determine which variations warrant registration.[21]

12.16 Two consultees did not see voluntary registration as beneficial, however.

12.17 Nigel Madeley disagreed with our conclusion that voluntary registration of non-dispositive lease variations was beneficial. He argued that purchasers would not be spared from undertaking further enquiries, since the register might not reflect all variations. We note that because rights can be created informally, not all rights can be expected to be recorded in the register. Accordingly, a purchaser should make enquiries once alerted to the existence of the lease, if only because the tenant could have other rights that could be protected by virtue of his or her actual occupation. Nevertheless, additional information in the register is, in our view, generally beneficial. We therefore disagree that voluntary registration is not worthwhile, even though we acknowledge its limitations.[22]

12.18 Everyman Legal suggested that voluntary registration of lease variations would undermine the flexibility of the law in relation to leases, taking the view that short leases and informally created rights do not fit happily into the land registration scheme. We agree that flexibility in relation to leases is necessary, and therefore agree that

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16 Consultation Paper, para 12.36 to 12.39.

17 Consultation Paper, para 12.40.

18 Professor Warren Barr and Professor Debra Morris, and Dr Charles Harpum QC (Hon).

19 Dr Nicholas Roberts.

20 The London Property Support Lawyers Group and the National Trust.

21 The National Trust.

22 Consultation Paper, para 12.35.

compulsory registration is not worthwhile. But we do not think that this argument leads to the conclusion that voluntary recording is not beneficial.

### Compulsory registration

12.19 There was some disagreement amongst consultees as to whether our proposal should require compulsory registration of lease variations.

12.20 Some consultees emphasised that registration should be voluntary unless required in order to bind successors in title.[23] The Law Society supported our decision not to propose compulsory registration of all lease variations. In particular, it agreed with the general view that if a lease is not registrable, variations of that lease should not need to be registered either. Other consultees suggested that any provision allowing the voluntary registration of non-dispositive lease variations should make clear that registration is not necessary to bind successors in title for this class of variation.[24]

12.21 On the other hand, the Chartered Institute of Legal Executives and Christopher Jessel were in favour of compulsory registration of lease variations. In particular, Christopher Jessel argued that variations to a registered lease made by way of deed should be compulsorily registrable in order to prevent the original lease, which is lodged on registration, from giving an inaccurate, and perhaps wilfully misleading, statement of the terms of the lease. He explained that if the parties are using a deed, the extra cost of registration is negligible. On balance, he concluded that in a conflict between the policies of the 1995 Act, to enable covenants in leases to bind successors in title, and the LRA 2002, to require interests to be registered, the LRA 2002's policy of registration should be paramount.

12.22 We dismissed the possibility of making non-dispositive lease variations compulsorily registrable in the Consultation Paper. Mr Jessel's suggestion is narrower, only applying to variations by deed of registrable leases. Although we accept that the policy could be limited as he suggested, we think that doing so would introduce unnecessary complexity into an already complex area of law, as well as impose additional costs and reduce flexibility within the law relating to leases. We are also sympathetic to the idea that the lease lodged on registration might give an inaccurate view of the covenants after it has been varied. However, we do not think this reason is sufficient to require registration of variations that do not need to be registered to bind successors: successors in title, as the persons who will be bound by the covenants, can be expected to undertake due diligence in relation to the terms of the lease. Fundamentally, we disagree that the LRA 2002's purpose of a complete register is paramount to the purposes of the 1995 Act. We agree that a complete register is an important goal. However, we also think that requiring registration of variations made by deed risks running a coach and horses through the 1995 Act.

### The purpose of the register

12.23 Nigel Madeley challenged our proposal on the basis that covenants are contractual rights and thus not the proper subject matter of a record in the register of title. Mr Madeley based his argument on the dual nature of leases as both property and contract.

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[23] Burges Salmon LLP, the Law Society and the London Property Support Lawyers Group.

[24] Howard Kennedy LLP and the London Property Support Lawyers Group.

We explore the purpose of the register in more detail in relation to restrictions in Chapter 10. A purist approach to land registration might confine entries in the register exclusively to matters affecting title. However, the LRA 2002 does not take a purely principled approach: it represents a balance between principle and pragmatism. As we explain in Chapter 10, some contractual rights can be protected in the register by the entry of a restriction; we expect this use of restrictions to remain generally possible, although the ability to protect some contractual rights using a restriction may in the future be removed.[25] We think our policy represents the balanced approach already taken within the LRA 2002: not purely principled, but informed by experience in practice. Given that it is existing practice to record some lease variations that do not amount to registrable dispositions or grants of property rights in the register, and that there is a benefit in doing so, we see value in a clear mechanism providing how it should be done.

**Recommendation**

12.24 In the light of the strong support of consultees, we continue to believe that allowing for the voluntary recording of non-registrable lease variations in the register will be a positive step towards making the register more complete. It will clarify the basis for existing practice and, moreover, will promote transparency of the register.

12.25 In the Consultation Paper, we expressed the view that provisions in the LRA 2002 do not seem well equipped to deal with entries in the register in respect of non-dispositive lease variations. Our concern was based on our interpretation of the provisions of the LRA 2002 concerned with the entry of a notice in the register. We therefore suggested that the LRA 2002 itself should provide a clear mechanism to permit the noting of variations to leases.

12.26 We continue to be of the view that an express mechanism is required. However, we have come to the view that amendment of the LRA 2002 is not necessary. We think that an express mechanism can more appropriately be created within the rules, specifically the LRR 2003.

12.27 We have taken the view that it is not appropriate to amend the LRA 2002 because what we are proposing is voluntary and has no effect on substantive property rights. There will be no duty on a tenant or a landlord to apply to record a non-dispositive variation of a lease. The registrar will not be obliged to enter such a variation in the register. Variations of the covenants of the lease will continue to bind successors in title, in accordance with the 1995 Act, whether registered or not. What is instead wanted is a mechanism that properly reflects the nature of the record of a lease variation: an entry that is voluntarily made, and for information only.

12.28 Section 1(2) of the LRA 2002 contains a very broad rule-making power: it provides that "rules may make provision about how the register is kept", setting out specific examples. There is also a residual rule-making power under paragraph 8 of schedule 10 to the LRA 2002, allowing for rules to "make provision which it is expedient to make for the purposes of carrying this Act into effect". In our view, these rule-making powers are broad enough for rules to be made that create a mechanism under which information about lease variations may be included in the register.

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[25] See Ch 10, paras 10.72 to 10.85 above.

12.29 Various rules have already been made pursuant to the LRA 2002 that authorise the permissive entry of information additional to, or separate from, a registered disposition, notice or restriction. It appears to us that some of these rules have been made under the existing rule-making powers in section 1(2) and paragraph 8 of schedule 10.[26] Therefore, it is our view that the LRA 2002 already provides for the creation of rules which allow, but do not require, the registrar to make entries that record information.

12.30 Given our view that the LRA 2002 already provides sufficiently broad powers to make rules permitting the entry of information in the register, we are no longer concerned that the provisions in the Act regarding the entry of a notice do not enable the registrar to enter a notice to provide information in relation to a variation of a lease. We explained in the Consultation Paper that it is arguable that a variation is not "an adverse right"[27] and so might not "affect the estate" as required by section 34(1).[28] However, the LRA 2002 allows for additional information to be entered in the register, even if that information is not properly the subject of a notice. These powers, we think, are sufficient for the purpose of our recommendation.

**Recommendation 21.**

12.31 We recommend that the land registration rules should be amended to make express provision to permit the recording of a non-dispositive variation of a lease on either the landlord's registered title, or the tenant's registered title, or both.

12.32 Given that we think the express provision should be made in the rules, there is no clause in our draft Bill to implement this recommendation. Further, we do not provide any suggested wording to be considered for the rules that will implement our reforms. We think that the practical expertise called upon during the drafting of rules – of the Rule Committee, and, in particular, HM Land Registry – will be necessary in order to formulate the exact terms of the rules.

12.33 Nevertheless, we expect that the rules will reflect the current practice so that, where both the lease and the reversion are registered, voluntary recording of a non-dispositive lease variation will be made on both titles; if only one is registered, the lease variation will be recorded on that title.

## RECORDING OF DOCUMENTS ANCILLARY TO A LEASE

12.34 We have also considered whether documents ancillary to a lease should be able to be recorded in the register of title. Such documents are created pursuant to a lease but do not usually have the effect of varying the lease. They include licences (for example, a permission to assign the lease) and rent review memoranda (a recording of a change to the level of rent payable).

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26 See LRR 2003, rr 76 and 185.

27 LRA 2002, s 132(3)(b).

28 Consultation Paper, para 12.37.

12.35 As we explained in the Consultation Paper, the same argument for registration of non-dispositive lease variations arguably applies to documents ancillary to a lease: a person acquiring the lease or reversion would want to see documents ancillary to a lease, so recording them in the register would add to the register being a complete record of the state of title. However, these documents are commonplace. Their entry in the register would risk cluttering it; moreover, they would need to be removed on the expiry of the lease (or perhaps earlier, if they were personal to the tenant or landlord, or became otiose). Our view in the Consultation Paper was that the costs of recording documents ancillary to a lease outweighed the benefits.[29]

**Consultation and discussion**

12.36 We invited consultees to share with us their views as to whether express provision should be made to permit the recording of other documents which are ancillary to a lease in the register, whether the landlord's title, the tenant's, or both.[30]

12.37 Twenty consultees responded. Twelve were not in favour of an express provision to record ancillary documents, including HM Land Registry, the Law Society and Dr Charles Harpum QC (Hon).

12.38 Those who did favour express provision to record ancillary documents mentioned the value of the completeness of the register and transparency in relation to the terms of leases: if the rights or duties bind purchasers, then they should be reflected in the register of title.[31]

12.39 Christopher Jessel and Adrian Broomfield were in favour of recording of documents ancillary to the lease, but only if the document had the effect of varying the lease, such as a licence to alter.[32] However, we think that a document which amounts to a non-dispositive lease variation could be recorded voluntarily under Recommendation 21 above. Some other consultees, including the Law Society, made this point: a licence that amounts to a variation of a lease could be recorded in the register based on our provisional proposal in relation to non-dispositive lease variations. The question remains whether parties should be able to record ancillary documents that do not amount to a variation.

12.40 Christopher Jessel was of the view that recording should depend on the effect of the document, whether it was meant only to give rise to personal obligations or to bind successors in title. He argued that if a document is intended to bind successors then it should be compulsorily registrable. Registration would ensure that the current terms of the lease are available at any given time for public inspection. The implication of Mr Jessel's proposal is that failure to register would result in the variation not binding successors in title. In our view, this consequence would impair the functioning of the 1995 Act. As we explained at paragraph 12.22 above, we do not think that it is

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29 Consultation Paper, paras 12.41 to 12.43.

30 Consultation Paper, para 12.44.

31 Including Christopher Jessel, Dr Aruna Nair, Everyman Legal, and the Chartered Institute of Legal Executives.

32 We noted that such licences may vary the terms of the lease: Consultation Paper, para 12.42 n 49, citing *Topland Portfolio No. 1 v Smiths News Trading Ltd* [2014] EWCA Civ 18, [2014] All ER (D) 129 (Jan).

appropriate for us to make recommendations which undermine the policy of the 1995 Act.

12.41 Consultees who were not in favour of express provision being made for recording ancillary documents made three main arguments. First, any benefits of completeness of the register would be outweighed by the cluttering of the register, particularly on reversionary interests that are affected by multiple leases. Secondly, ancillary documents are often short-lived, informal, and speculative or conditional, and so not documents that would helpfully appear in the register of title.[33] Finally, consultees were also of the view that the administrative burden and the burden of time and costs on parties and HM Land Registry were not justified.[34] For example, Burges Salmon LLP explained that it would make closing leasehold titles on the termination of the lease more onerous.

12.42 HM Land Registry, which was not in favour, made all of these points. It stated, rather bluntly, that the register "is not a document repository and … should not become one". It explained that numerous documents may pass between the landlord and tenant during the course of the lease; recording them would increase the costs for parties and would increase the number of entries parties would need to consider in any proposed dealing with the land.

**Conclusion**

12.43 We expressed our view in the Consultation Paper that it was not worthwhile to record documents ancillary to the lease in the register. This view was shared by the majority of consultees who responded. We agree that any benefits of recording ancillary documents would be outweighed by the costs to the parties and HM Land Registry and the resulting clutter in the register. We therefore do not recommend that express provision is made to allow recording of documents ancillary to a lease in the register.

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[33] The National Trust, Professor Warren Barr and Debra Morris, Nigel Madeley, the London Property Support Lawyers Group, Dr Charles Harpum QC (Hon), Burges Salmon LLP, and Taylor Wessing LLP.

[34] Michael Hall, the City of Westminster and Holborn Law Society, the Law Society, Burges Salmon LLP, and Taylor Wessing LLP.

# Chapter 13: Alteration and rectification of the register

## INTRODUCTION

13.1 In Chapter 13 of the Consultation Paper we considered the provisions of the LRA 2002 which enable the alteration and rectification of the register. These provisions are contained within schedule 4 to the Act. The legal issues that arise in connection with schedule 4 can be complicated. As in the Consultation Paper,[1] we think these issues can be simplified by focussing upon a handful of examples. The first example is the AB scenario, in figure 19 below. We will introduce further scenarios as this chapter progresses.

Figure 19: the AB scenario

A is the sole registered proprietor of a freehold estate. A fraudster steals A's identity and forges a transfer of the estate to B, who becomes registered proprietor in place of A. Neither A nor B have any knowledge that anything is wrong and have been entirely conscientious throughout.

13.2 At common law, the transfer by the fraudster to B would have no effect. The fraudster did not own the estate and so could not transfer it to B. If the fraudster were to disappear with the purchase money, B would be left with nothing. The estate would still belong to A.

13.3 But the position is different in relation to registered land. Section 58(1) of the LRA 2002 contains what is known as the title promise. It states that–

> If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration.

This provision means that when B is registered as the proprietor of A's estate, B becomes the owner, irrespective of the fact that the fraudster had no right to transfer it.[2]

13.4 The title promise in section 58 gives potential purchasers of land confidence that the registered proprietor of an estate is indeed the legal owner. But the title promise is not

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1 Consultation Paper, para 13.7.

2 In the Consultation Paper, at paras 13.42 to 13.59, we discussed what we called "the *Malory* 1 argument" from *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216. In *Malory*, the Court of Appeal held that, in an AB scenario, s 58 confers only legal title to the estate on B, while beneficial title remains with A. The *Malory* 1 argument has since been disapproved by the Court of Appeal in *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602. Unless something happens to affect the conscience of B, there is no beneficial title to the estate. There is just the legal title. The effect of s 58 is that B becomes the sole owner of the estate.

absolute. The extent to which a registered proprietor's title to land may be challenged (or the extent to which a registered title may be subject to defeat) is known as the "indefeasibility" question.

13.5 In our 1998 Consultation Paper and 2001 Report,[3] we explained that the LRA 1925 embodied a principle of *qualified* indefeasibility. This principle was carried over into the LRA 2002. Under the LRA 2002, indefeasibility questions are answered by understanding the ways in which section 58 is subject to schedule 4, which enables the register to be altered and rectified.

13.6 Our focus in this chapter is on rectification. Rectification is a specific type of alteration. In the LRA 2002, "rectification" is the term used to describe an alteration of the register that both corrects a mistake and prejudicially affects the title of a registered proprietor.[4] A rectification of the register (or a decision by the registrar or court not to exercise the power to rectify it) triggers a right to an indemnity. Other alterations do not give rise to an indemnity. The link between rectification and indemnity makes this form of alteration of the register particularly significant.[5] Applications for alteration[6] of the register are often contested between two innocent parties, as in the AB scenario in figure 19. The outcome of the case would be that either A or B would get the property and the other would be left to claim an indemnity.

13.7 As we explained in the Consultation Paper, the legislation cannot and should not dictate the outcome in each case. However, the LRA 2002 should resolve any issues of principle about when rectification should generally be granted or refused. It should leave the registrar and the court with the flexibility to determine complex or unusual cases in a way that takes account of their idiosyncrasies.[7]

13.8 We begin this chapter by discussing, in Part 1, some key concepts and issues which are important for understanding the operation of schedule 4. First, we discuss what is meant by a "mistake" in the register. Secondly, we examine and criticise the decision of the Court of Appeal in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* ("*Malory*")[8] that the ability to seek rectification under schedule 4 constitutes a proprietary right. We set out our recommendation for amending the LRA 2002 in order to reverse this aspect of the decision in *Malory*.

13.9 We then split the remainder of the chapter into three further parts addressing the following issues.

13.10 In Part 2 of the chapter, we set out our recommendations for amending the general scheme in the LRA 2002 governing rectification, which is currently contained in

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3 Law Com No 254, para 8.23; Law Com No 271, para 10.13.

4 LRA 2002, sch 4, para 1; sch 8, para 11(2).

5 Consultation Paper, para 13.5.

6 An application is always made for "alteration" of the register, even where the alteration would be a rectification.

7 Consultation Paper, para 13.102.

8 *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216.

paragraphs 3 and 6 of schedule 4. In doing so, we explain how our recommended scheme has developed since we published our Consultation Paper.

13.11 In Part 3, we set out our recommendations for how the scheme for rectification in schedule 4 should be amended to address:

(1) cases in which a registered proprietor who has been registered by mistake (such as B) transfers or grants an interest affecting the relevant estate to a third party (C);

(2) cases in which the registrar mistakenly fails to register a derivative interest in land or mistakenly deletes it from the register; and

(3) cases of "multiple registration" in which the same parcel of land is mistakenly registered as part of two separate estates.

13.12 Finally, in Part 4 of the chapter we consider two problems that arise from the interaction between the scheme for rectification and indemnity in schedules 4 and 8 and sections 11 and 12 of the Act, which govern the effect of first registration. We make recommendations to ensure that a first registered proprietor or the holder of a former overriding interest will not be entitled to an indemnity in circumstances in which, as a matter of policy, we consider that an indemnity should not be payable.

## PART 1: THE MEANING OF "MISTAKE" AND THE DECISION IN *MALORY*

13.13 As mentioned above, in the first part of this chapter we discuss two preliminary issues that will be important for understanding the remainder of the chapter: the meaning of "mistake" and whether (as *Malory* decided) the ability to seek rectification constitutes a proprietary interest.

### The meaning of "mistake"

13.14 The LRA 2002, schedule 4, paragraph 2 provides that "the court may make an order for alteration of the register for the purpose of correcting a mistake".[9] Schedule 4 does not define what counts as a mistake. It has fallen to the court to provide an interpretation of the term.

13.15 The authors of *Ruoff and Roper: Registered Conveyancing* have given the following summary of what the court has decided regarding the meaning of "mistake".

> "Mistake" is not itself specifically defined in the 2002 Act, but it is suggested that there will be a mistake whenever the registrar (i) makes an entry in the register that he would not have made; (ii) makes an entry in the register that would not have been made in the form in which it was made; (iii) fails to make an entry in the register which he would

[9] Sch 4, para 5 makes equivalent provision for the registrar. Both the court and the registrar also have the power to alter the register in order to bring it up to date, or to give effect to any estate, right or interest excepted from the effect of registration (or, in the case of the registrar, to remove a superfluous entry). None of these changes would amount to rectification or give rise to an indemnity.

otherwise have made; or (iv) deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion.[10]

13.16 We consider that the account of "mistake" provided in *Ruoff and Roper* reflects the tenor of recent case law. The account has since been cited with approval by the Court of Appeal in *NRAM Ltd v Evans*.[11] The focus in this account is upon the time when the relevant entry is made in (or omitted from) the register. The transfer to B in figure 19 above is void at common law; it is of no effect and B's registration is a mistake. But the registration of a purchaser who has bought an estate under a *voidable* transfer is not a mistake if, at the time that the purchaser was registered, the transfer had not yet been avoided. An entry that was correctly made at the time cannot become a mistake because of later events.[12]

13.17 One consultee – Dr Simon Cooper – urged us to introduce a statutory definition of "mistake" into schedule 4. In our Consultation Paper we concluded that a statutory definition should not be introduced. We explained that we considered that the court should be left some flexibility in applying the concept to difficult cases.[13] We remain of this view.

13.18 Moreover, it is not clear to us what form a statutory definition could take if it is to be accurate, comprehensive and informative, and yet not give rise to undesirable consequences. For example, the summary of the meaning of "mistake" provided in *Ruoff and Roper*, while a helpful guide, would not provide a satisfactory statutory definition. The summary depends on a notion of what the registrar "would have done" if he or she had known the true or full facts. It does not address the issue of which facts are material and whether it matters if one of the relevant parties was under a duty (either under the current law or under land registration rules that may be issued in the future) to bring the facts to the registrar's attention. The authors of *Ruoff and Roper* take several pages fully to explain the meaning and application of "mistake".

13.19 Nevertheless, we do intend to take some steps to clarify the meaning of "mistake" within schedule 4. The reforms to schedule 4 recommended in this chapter address many of the issues Dr Cooper highlighted as points of concern under the current law. In Part 3 of this chapter, we set out our proposals regarding entries in the register which derive from earlier mistakes. For example, where a mistakenly registered proprietor of an estate transfers it to a third party, it is unclear whether the registration of the third party would count as a mistake. We intend to clarify this issue.[14] We also intend to clarify the circumstances in which the registrar and the court will be able to alter the register in

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10 *Ruoff & Roper*, para 46.009, interpreting *Baxter v Mannion* [2011] EWCA Civ 120, [2011] 1 WLR 1594 at [24] and [25]. See also the similar account given in *Megarry & Wade*, para 7-133.

11 *NRAM Ltd v Evans* [2017] EWCA Civ 1013, [2018] 1 WLR 639 at [51].

12 See *NRAM Ltd v Evans* [2017] EWCA Civ 1013, [2018] 1 WLR 639; *Antoine v Barclays Bank Plc* [2018] EWHC 395 (Ch), [2018] 4 WLR 67; K Lees, "*NRAM v Evans*: there are mistakes and mistakes…" [2018] *Conveyancer and Property Lawyer* 1.

13 Consultation Paper, paras 13.81 to 13.82.

14 See para 13.123 and following below.

order to give an interest in land the priority it would have had but for a mistake.[15] These changes should clarify the reach of "mistake" and the registrar's and the court's powers of rectification.

### *Malory* and the "right" to rectification

13.20 The second preliminary issue concerns the decision in *Malory*. We discussed *Malory* at length in our Consultation Paper.[16] *Malory* concerned an AB scenario: a property belonging to the claimant was transferred by fraud to the defendant. The claimant remained in possession of the land and applied (successfully) for rectification against the defendant.

13.21 In the Consultation Paper, we set out the details of what we called "the *Malory* 2 argument", which found favour with the Court of Appeal.[17] The court held that the claimant had a right to seek rectification and that this right constituted a proprietary interest affecting the land. As the claimant was in occupation of the land, its right to seek rectification constituted an overriding interest which bound the defendant.[18] Although *Malory* was a decision about the LRA 1925, this analysis of the right to seek rectification was endorsed by the Court of Appeal in *Swift 1st Ltd v Chief Land Registrar* ("*Swift*"),[19] which concerned the LRA 2002.

13.22 In the Consultation Paper, we suggested that treating the right to rectify as an overriding interest is deeply problematic.[20] Where the register is altered to give effect to an overriding interest no indemnity is paid.[21] The register is merely brought up to date to reflect an interest that was already binding on the registered proprietor. That is potentially disastrous for someone in the position of B in the AB scenario in figure 19 who may find, as an innocent victim of a third party's fraud, that title to the land is returned to A without an indemnity being payable. In *Swift*, the Court of Appeal held that an indemnity was available, but through a creative interpretation of a provision in the LRA 2002 which applies only where the disposition giving rise to the right to alter the register was forged.[22] If the disposition is void for some other reason, then no indemnity is available. Moreover, it has been argued by Dr Emma Lees that, if B has transferred the land to a third party (C), the analysis in *Malory* and *Swift* makes it doubtful whether C would be entitled to an indemnity. If the transfer from B to C was not forged then, if title were to be restored to A, it is unclear whether C would be able to claim an indemnity having acted "in good faith under a forged disposition".[23]

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15 See para 13.147 and following below.

16 Consultation Paper, paras 13.42 to 13.63.

17 Consultation Paper, paras 13.44 to 13.59.

18 *Malory* at [68] and [69].

19 *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602.

20 Consultation Paper, paras 13.60 to 13.63.

21 *Re Chowood's Registered Land* [1933] 1 Ch 574.

22 LRA 2002, sch 8, para 1(2)(b); *Swift* at [51].

23 E Lees, "Guaranteed Title: No Title, Guaranteed", in A Goymour, S Watterson and M Dixon (eds), *New Perspectives on Land Registration* (2018) p 113.

13.23 We provisionally proposed in our Consultation Paper that the ability of a person to seek alteration or rectification of the register should not be capable of being an overriding interest pursuant to paragraph 2 of schedule 3 to the LRA 2002.[24]

### Consultation

13.24 Our provisional proposal was supported by 21 consultees, including practitioners and their representatives, academics and HM Land Registry. One consultee (Michael Mark) disagreed without giving reasons, and seven expressed other views.

13.25 Some of the consultees who expressed other views, such as Martin Wood and Nigel Madeley, were concerned that we may be undermining the ability of former proprietors to obtain redress, even if they continue to live in the relevant properties. These concerns should be alleviated by our recommendation in Part 2 of this chapter[25] for new protections for former proprietors in possession. The concerns should also be alleviated by our clarification (discussed in Part 3[26]) of the ability to seek rectification against B's successors in title.

13.26 Many consultees who agreed reiterated our concerns with the *Malory* 2 argument in their responses. The Bar Council noted that "otherwise arbitrary results follow that are hard to justify as a matter of principle", while Dr Aruna Nair explained that "alteration and rectification claims should, as the Consultation Paper says, be resolved within the framework of schedule 4 only".

13.27 However, some consultees who agreed (and some who expressed other views) thought that our proposal did not go far enough. Dr Cooper and the Society of Legal Scholars suggested that our proposal was "only a piecemeal exclusion" that "does not comprehensively answer the underlying question of the reach of rectification as against third parties". Professor Warren Barr and Professor Debra Morris jointly suggested that the right to seek rectification is not a proprietary interest that could constitute an overriding interest. Dr Charles Harpum QC (Hon) said that the right to seek rectification is a statutory right governed by schedule 4 and not qualified by the provisions in the LRA 2002 regarding priority. Amy Goymour (who expressed other views) was concerned that merely specifying that the right to seek alteration cannot override would not affect the supposed proprietary status of such rights. In an AB scenario, if A acquires a (proprietary) right to seek alteration against B, it might then be argued that any alteration that follows flows out of A's persisting right to seek alteration and is not caused by the alteration itself. If so, B might still be deprived of an indemnity.

13.28 Additionally, since the publication of our Consultation Paper, the decision in *Malory* has been criticised by Professor Martin Dixon, who pointed out that there is no "right" to rectification. Rectification is a discretionary remedy for which anyone can apply.[27]

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24 Consultation Paper, para 13.87.

25 See para 13.54 and following below.

26 See para 13.123 and following below.

27 M Dixon, "Rectifying the Register under the LRA 2002: The *Malory* 2 Non-Problem", [2016] *Conveyancer and Property Lawyer* 5.

13.29 These arguments have convinced us that our provisional proposal did not go far enough. It was never intended that claims for alteration or rectification of the register should give rise to priority disputes, which are resolved under section 29 of the LRA 2002. It was always intended that such claims should be resolved under schedule 4 to the Act only. Our original proposal (that the ability to seek rectification should not be capable of being an overriding interest) would have ensured that, in the AB scenario, if A is in possession of the land, B is not bound by A's right to seek rectification and so is not deprived of an indemnity. However, if A is not in possession and if B has sold the land to a third party (C), our original proposal would not have prevented C from arguing that A's right to seek rectification has been postponed pursuant to section 29. If the ability to seek rectification is a proprietary right which is not overriding and not protected by a notice in the register, then it appears that it could be lost on a registered disposition for valuable consideration of the relevant estate.[28]

13.30 More fundamentally, we agree with Professor Dixon that the ability to seek rectification cannot coherently be construed as a proprietary right. In particular, there is no requirement under LRA 2002 that an applicant should have an interest in the relevant land, or even that they should have "standing" (in the sense that would be required to pursue a private law claim).[29] Anyone may apply for alteration of the register. There is consequently no sense that can be made of the suggestion in *Malory* that a right to seek alteration may be transferred from one person to another. The ability to seek rectification is not a private law right and it is not vested in any particular person.

### Recommendation

13.31 We are minded, therefore, to make a broader recommendation to reverse the effect of the *Malory* 2 argument than we made in our Consultation Paper. We think that our provisional proposal did not do enough to tackle the way in which the ability to seek rectification was fundamentally misconstrued in *Malory* and *Swift*. In proposing that the ability of a person to seek alteration or rectification of the register should not be capable of being an overriding interest, our intention was to solve the "problem" that arises if a proprietary interest exists. We now feel that our proposal dealt with the symptom, not the underlying disease. Moreover, it could be construed as giving credence to suggestions that the right is, in fact, proprietary. We think that the LRA 2002 should make clear that the ability to seek rectification under schedule 4 is not a proprietary right.

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28 This possibility is not merely academic. In *Bakrania v Lloyds Bank Plc* REF2014/0076/0077, 13 April 2017 at [26] and [29], the Tribunal suggested that the right to seek rectification may not only constitute an overriding interest but may also be overreached on a sale of the land, implicitly recognising that the right may be postponed under s 29 of the LRA 2002.

29 See the decision of Mr Adjudicator Cousins in *Burton v Walker*, REF/2007/1124, 14 May 2009, which was not disapproved by the Court of Appeal in a further decision relating to the same case (*Walker v Burton* [2013] EWCA Civ, [2014] P & CR 9); *Paton v Todd* [2012] EWHC 1248 (Ch), [2012] 2 EGLR 19 at [51]; and HM Land Registry's guidance in *Practice Guide 39: rectification and indemnity* (April 2018) para 2.1.

**Recommendation 22.**

13.32 We recommend that the LRA 2002 should explicitly confirm that the ability of a person to seek alteration or rectification of the register to correct a mistake should not be capable of being a property right.

13.33 Our recommendation is implemented by clause 21, which provides that the provisions of schedule 4 to the LRA 2002 do not confer on any person a right or interest affecting a registered estate or charge.

## PART 2: A REVISED SCHEME FOR RECTIFICATION

13.34 Having addressed the preliminary issues concerning the meaning of "mistake" and ability to seek alteration or rectification, we turn to consider the general scheme for alteration in schedule 4 to the LRA 2002.

13.35 Under the LRA 2002, the indefeasibility question concerns the degree to which the title promise in section 58 is subject to potential rectification under schedule 4. In our Consultation Paper, we discussed different approaches to indefeasibility[30] and set out some basic objectives which we think that the LRA 2002 should attempt to achieve.[31] In our view, the scheme for rectification should be as clear as possible, should be fact-sensitive (particularly to the importance of the land to the relevant parties), should promote finality, and (in so far as is consistent with the first three aims) should support the reliability of the register.

13.36 Based upon this discussion, our Consultation Paper then proposed a new scheme to govern rectification under schedule 4.

(1) So long as A remains in possession, A should be reinstated as proprietor unless it is unjust to rectify. There is no time limit by which A must seek rectification.

(2) A's successors in title who take over A's possession should be treated the same way as A.

(3) A's position (and that of his or her successors in title) should be unaffected by the passage of time since the mistake, as long as they remain in possession.

(4) If B (or B's successor in title) is the registered proprietor in possession, then in the ten-year period following the mistaken removal (or omission) of A from the register, B's title should be protected unless:

(a) it is unjust not to rectify; or

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30 Consultation Paper, paras 13.22 to 13.37.

31 Consultation Paper, paras 13.15 to 13.21.

(b) the proprietor in possession caused or contributed to the mistake by fraud or lack of proper care.

(5) If B (or B's successor in title) is the registered proprietor in possession, then ten years after the mistaken removal (or omission) of A's name, B's title should become indefeasible (in other words, it cannot be rectified) unless he or she caused or contributed to the mistake by fraud or lack of proper care. We refer to this ten-year period in our proposals as the "longstop".

(6) If neither A nor B (nor, where relevant, B's successor in title) is in possession, then for the initial ten-year period from the time of A's mistaken removal from the register, A's title should be restored unless there are exceptional circumstances.

(7) After the initial ten-year period, if neither A nor B (nor B's successor in title) is in possession, then the registered proprietor's title should become indefeasible unless he or she caused or contributed to the mistake by fraud or lack of proper care.

(8) Alteration of the register should continue to be available, in all situations, by consent of the parties.

(9) Where rectification of the register would be available but for the imposition of the ten-year longstop, entitlement to an indemnity is unaffected.[32]

13.37 As we discuss below, in the light of the consultation responses we have received, we recommend that our proposed scheme should be implemented. The scheme recognises and balances a variety of relevant factors, such as whether the land is occupied and how much time has passed since the mistake. Later in this chapter, we discuss various modifications of the scheme to enable it to deal with chains of interdependent mistakes, derivative interests, mistaken duplications in registration and issues arising on first registration.

13.38 Our draft Bill makes extensive changes to schedule 4. The provisions which implement our scheme for rectification (and the extensions to that scheme set out in Part 3 and Part 4 of this chapter) are longer and more detailed than the current provisions of schedule 4. We consider that the increase in length and intricacy is a price worth paying for a comprehensive scheme for rectification. Indeed, we believe that many of the difficulties in interpretation of schedule 4 stem from the fact that the legislation provides insufficient guidance on how claims for rectification should be determined. Our reforms ensure that schedule 4 delivers increased certainty, whilst retaining sufficient flexibility for the courts to respond to fact-sensitive issues.

13.39 Some of the new detail in schedule 4 reflects the fact that elements of our scheme for rectification are more prescriptive than the current law. There are new provisions for

[32] Consultation Paper, para 13.100. We have modified this quotation to take into account the point discussed below concerning the tests of exceptional circumstances and unjustness and the status of A and A's successors in title, and to make some small clarifications.

whether rectification should be granted or refused in cases in which the longstop has expired or where rectification is sought against a mortgagee.

13.40 However, the added length and detail also remedies the existing lacunae in schedule 4. The apparent simplicity of the current schedule is misleading. Our recommendation regarding derivative mistakes is necessary because schedule 4 does not make clear whether rectification is available, not just against B, but against B's successors in title. If B has sold the land to C, the provisions of schedule 4 do not make it clear whether the registration of C is a mistake. If rectification is available against C, schedule 4 does not make it clear whether and when it would stop being available against C's successors in title (D, E, F, and so on). Schedule 4 does not deal with these points as it was not apparent, at the time of the LRA 2002, whether C's registration should be classed as a mistake. Therefore the statute was not drafted to take account of the consequences of consecutive mistaken registrations. While there is case law regarding the availability of rectification against C (or C's successors in title), the leading case remains a first-instance decision of Deputy Adjudicator Michael Mark.[33] A different approach may yet be taken by the Court of Appeal or the Supreme Court. We believe that these are crucial matters which should be addressed within schedule 4 itself.

13.41 In order to explain how our scheme is implemented by our draft Bill, it will be necessary to look in more detail at the current provisions of schedule 4.

**The current scheme under schedule 4**

13.42 Paragraphs 2 and 5 of schedule 4 give the court and the registrar a power to alter the register for the purpose of correcting a mistake. Where that alteration would amount to rectification, this power must be exercised in accordance with the principles set out in paragraph 3 (in the case of the court) and paragraph 6 (in the case of the registrar). As these paragraphs are identical in all material respects, we will focus only on paragraph 3, which reads as follows.

> (1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.
>
> (2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—
>
> (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or
>
> (b) it would for any other reason be unjust for the alteration not to be made.
>
> (3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so.

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[33] *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] EWLandRA 2009_1459, [2011] EGLR 123. The approach taken in this case was given strong support by the Court of Appeal in *MacLeod v Gold Harp Properties Limited* [2014] EWCA Civ 1084, [2015] 1 WLR 1249, but *Gold Harp* did not directly concern the issue of whether rectification is available against C.

(4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land.

### The principles in paragraph 3

13.43 Paragraph 3 contains two presumptions which govern the rectification of the register.

13.44 First, there is a presumption under paragraph 3(3) that if the register can be rectified it should be rectified. This presumption reflects the general principle that mistakes in the register should be corrected. (It may also reflect a principle that a person who has been deprived of an interest in land through a mistake should be put back in the position he or she would have been in had the mistake not occurred.)

13.45 The general presumption in favour of rectification is subject to the specific presumption in paragraph 3(2) that rectification is not to be ordered against a proprietor in possession of the relevant land. This second presumption embodies a principle that a person's interest in land should be protected if he or she is in possession of the relevant land.

### "Exceptional circumstances" and "unjust for the alteration not to be made"

13.46 Neither the presumption in paragraph 3(2) nor the presumption in paragraph 3(3) is irrebuttable. There is no absolute right to rectification; the court and the registrar retain a discretion to decide whether rectification should take place. Where no relevant party is in possession of the land, the court or the registrar can nevertheless refuse rectification if there are exceptional circumstances which justify refusal. If rectification would prejudice a registered proprietor who is in possession of the land, the court or the registrar can nevertheless grant rectification if it would be unjust to refuse.

13.47 We have not made any recommendation to define "unjust" or "exceptional circumstances". We left it open in our Consultation Paper whether these two tests should be retained or rephrased.[34] Consultees did not suggest that they should be abandoned and we continue to use them in our draft Bill.

13.48 The meaning of "exceptional circumstances" was addressed by Mr Justice Morgan in *Paton v Todd*. He described an exceptional circumstance as:

> out of the ordinary course, or unusual or special, or uncommon; to be exceptional a circumstance need not be unique or unprecedented, or very rare but it cannot be one that is regularly, or routinely, or normally encountered.[35]

13.49 We consider that the requirement in paragraph 3(2)(b) to show that it would be unjust to refuse rectification imposes a more demanding test than the requirement in paragraph 3(3) to show that there are exceptional circumstances. We endorse the following account of the tests in paragraph 3(2) and (3) given by Professor Martin Dixon:

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34 Consultation Paper, para 13.99.

35 *Paton v Todd* [2012] EWHC 1248 (Ch), [2012] 2 EGLR 19 at [67]. See also *Antoine v Barclays Bank Plc* [2018] EWHC 395 (Ch), [2018] 4 WLR 67 at [132] to [136].

> In order to rectify against an innocent proprietor in possession, usually by taking something from them, it must be "unjust not to rectify": not exceptional, but positively unjust not to rectify. So it is a high hurdle in order to do something which would not otherwise be done. The "exceptional circumstance" provision is not only weaker, it operates conversely: it is a reason not to [do] something which would otherwise be done. The two concepts express different policies at different levels of intensity.[36]

13.50 In our view, schedule 4 should give more robust protection to those who are in possession of land than it gives to those who have lost an interest in land through a mistake in the register. The reason is straightforward. If the court or the registrar refuses to rectify the register, a disappointed applicant may seek an indemnity. But someone who is in possession of land is likely to be making use of the land, living on it or relying upon it. If the register is rectified so that they lose their interest in the land, they are more likely to suffer prejudice that cannot adequately be compensated by the payment of an indemnity.

### Our proposals for reform

13.51 Having set out the current scheme for rectification in schedule 4, we now turn to consider our proposals for reform.

13.52 It is helpful to return to the AB scenario which we sketched at the beginning of this chapter in figure 19. In this scenario, A's estate was transferred by a fraudster to B. Suppose that A has remained in possession. The current provisions of schedule 4 arguably pay too little regard to the fact of A's possession: they give A less protection than they would give to B if B were in possession. They also arguably give too little weight to the interests of finality as there is no time limit within which A must apply for the register to be altered.

13.53 We discuss our proposals for addressing each of these issues below. We then look at a third way in which the scheme in schedule 4 may be improved, namely by making express provision for claims for alteration against mortgagees.

### (1) Protection for former proprietors who are in possession

13.54 Schedule 4 to the LRA 2002 already provides some protection to A in the AB scenario if A has remained in possession. If A is still in possession, it is unlikely that B will also be in possession. If so, B will not be protected by the presumption against rectification in paragraph 3(2). By contrast, A will be able to rely on paragraph 3(3) and so A will be entitled to rectification unless there are exceptional circumstances.

13.55 However, we explained above that we think it is less demanding to establish that there are exceptional circumstances than it is to establish that it would be unjust not to rectify. We think that paragraph 3(3) confers less protection on A than paragraph 3(2) would

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[36] M Dixon, "Updating the Land Registration Act 2002: Title Guarantee, Rectification and Indeasibility" [2016] *Conveyancer and Property Lawyer* 6, 425. See also the similar remarks of Lord Justice Peter Gibson about the LRA 1925 in *Kingsalton Ltd v Thames Water Developments Ltd* [2001] EWCA Civ 20, [2002] 1 P & CR 15 at [40], with which we agree.

confer on B if B were in possession. We do not think that there is any good reason to treat A's possession as less worthy of protection than B's.

13.56 We proposed in our Consultation Paper that, where the proprietor of a registered estate has been removed or omitted from the register by mistake but has remained in possession of the land, the proprietor should be restored to the register unless it would be unjust.[37] We further proposed that this presumption in favour of rectification should also apply to "a successor in title to that proprietor" who is in possession. We proposed that the test for whether the former proprietor is in possession should be the same as that for whether the current registered proprietor is in possession (namely the test in section 131 of the LRA 2002). We proposed that the former proprietor's possession should not need to have been continuous.[38]

### Consultation

13.57 A majority of consultees agreed with all of our proposals. Twenty-seven out of the 30 consultees who considered the proposal to give a former proprietor in possession equal protection to a current proprietor in possession agreed. Twenty-four out of 28 consultees also agreed that the proposal should extend to the former proprietor's "successors in title". Twenty-five out of 29 consultees agreed that the test for possession in section 131 should apply and that possession need not be continuous.

13.58 The Society of Licensed Conveyancers, which supported our proposals, pointed out that protecting A while A remains in possession is consistent with the weight that schedule 4 gives to the fact of possession. We agree. Martin Wood and the Chancery Bar Association, who also supported our proposals, pointed out that it is particularly important to give specific protection to former proprietors in possession given our proposal to clarify that the ability to seek rectification is not an overriding interest.[39] Again, we agree.

13.59 HM Land Registry was in favour of our proposals, but suggested that a former proprietor should not automatically be restored to the register if they have been guilty of fraud. We propose that the court and the registrar should retain a discretion to refuse rectification where it would be unjust to grant it. This discretion should suffice to enable the court or the registrar to refuse rectification where a former proprietor has been guilty of fraud.

13.60 Our proposals were not expressly supported by Dr Harpum, who argued that the proposals did not change the current law, which already protects A. However, our proposals should in fact give A greater protection than under the current law. Under the current law, there is a presumption in favour of rectification unless there are exceptional circumstances which justify a refusal. Under our proposals, if A is in possession, there will be a presumption in favour of rectification unless it would be unjust to rectify. Where A or B is in possession, they will be given equal protection.

13.61 Amy Goymour suggested that schedule 4 should make clear whether, for the purposes of paragraph 3(2), a person is affected by the fraud or lack of proper care of a

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37 Consultation Paper, para 13.109. We inadvertently referred to the test of exceptional circumstances rather than the test of unjustness.

38 Consultation Paper, paras 13.110 and 13.114.

39 Consultation Paper, para 13.87, discussed at paras 13.20 to 13.33 above.

predecessor in title. For example, in the AB scenario, suppose that B was guilty of fraud or lack of proper care but B sells the estate to C, who is entirely innocent. Would C be protected against rectification under paragraph 3(2)? In our view, C would be protected. The current wording of paragraph 3(2) of schedule 4 focuses upon the registered proprietor who would be prejudiced by the proposed rectification, not upon the registered proprietor's predecessors in title. This reading of paragraph 3(2) was approved by Mr Justice Morgan in *Paton v Todd*.[40]

13.62 Only one consultee – Dr Nair – opposed our proposals. Dr Nair thought that the existing protection for A provided by the presumption in paragraph 3(3) in favour of rectification should be retained. We think that our proposals in relation to A may have been misunderstood. We do not propose to remove paragraph 3(3). Where neither A nor B is in possession, there should still be a presumption in favour of rectification unless there are exceptional circumstances. What we want is for A to have enhanced protection where he or she is still in possession.

13.63 Some consultees raised specific points about our proposals to protect A's "successors in title" and to extend section 131 so that it applies to A.

### Protecting successors in title

13.64 Regarding our proposal about successors in title, Christopher Jessel raised an important question about the meaning of "successor in title" to which we return below.

13.65 Other consultees suggested distinctions that could be drawn between different successors in title. The Property Litigation Association agreed with our suggestion on the basis that it would apply to executors or personal representatives of a deceased former proprietor's estate. As we explain below, our proposal is not quite as restricted as the Property Litigation Association suggests.

13.66 The Bar Council also agreed, but suggested we consider providing protection only to an involuntary transferee of the former proprietor. It pointed out that a person is only likely to agree to purchase the estate of the former proprietor if he or she fails to make proper enquiries which would have revealed that the former proprietor's title had been lost. But we do not think that our proposal should be limited in this manner. Both former and current proprietors should be given equal protections under paragraph 3. This entails protecting their successors in title in the same circumstances. The focus in both cases should be upon whether the successor in title contributed to the mistake in the register.

### Whether possession must be personal or continuous

13.67 Regarding our proposal about continuous or personal possession, the Property Litigation Association agreed that a former proprietor should count as being in possession if his or her tenants or agents are in possession. It pointed out that "a registered proprietor is permitted to deal with their property as they wish, which includes creating derivative interests from which they receive a rent". It continued that if the former proprietor has dealt with the property in this same way, "this arrangement should

[40] *Paton v Todd* [2012] EWHC 1248 (Ch), [2012] 2 EGLR 19 at [62].

not therefore prejudice their right to be restored to the register". We think this is a strong argument in favour of our proposal.

13.68 The National Trust also supported our proposal. It pointed out that large areas of the National Trust's inalienable land are occupied by its tenants and licensees. There are often significant periods between tenancies or licences during which the National Trust's inalienable land is unoccupied for a time and, if the land requires little management, the National Trust may perform only a few acts that would evidence occupation, such as the maintenance of boundaries.

13.69 Nigel Madeley asked whether the reference to "personal" possession in our proposal was meant to imply that a non-natural person could not be protected as a successor in title to a former proprietor in possession. We confirm that we did not intend to create this impression; we mean our proposal to apply to both natural and non-natural persons.

### Recommendation

13.70 Given the strong support from consultees, we recommend that our proposals in the Consultation Paper be implemented.

13.71 However, our proposal regarding successors in title first requires some clarification. Returning to the AB scenario, we referred in the Consultation Paper to A's "successors in title" and gave the examples of a transferee for value of A's freehold, A's personal representative or a beneficiary under A's will.[41] As Christopher Jessel pointed out in his consultation response, this was inaccurate. The effect of the mistake in the register is that B becomes the legal owner of A's freehold. A no longer has any title to the land. Consequently, A could not sell the freehold and, on A's death, it would not form part of his or her estate and could not pass to the beneficiaries under A's will or intestacy.

13.72 The people whom we mean to benefit from our proposal are those who, but for the occurrence of the mistake, would have been A's successors in title. The proposal will therefore catch those who would have taken title to A's freehold by operation of law, such as A's trustee in bankruptcy, the executor of A's will or the administrator of A's estate. More importantly, it may capture a beneficiary under A's will or intestacy provided that the beneficiary can show that the freehold would definitely have passed to him or her under the will or during the administration and that he or she would, by now, have been registered with title. In theory, our proposal would capture a purchaser who has exchanged contracts with A for the purchase of the freehold, paid the purchase price and moved into possession. But we recognise that this is unlikely to happen without the purchaser checking the register and discovering the fraud.

13.73 We therefore make the following recommendation.

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41 Consultation Paper, para 13.107.

**Recommendation 23.**

13.74 We recommend that where the proprietor of a registered estate has been removed or omitted from the register by mistake, the proprietor should be restored to the register if he or she is in possession of the land, unless it would be unjust to do so.

13.75 We recommend that a person who would have been the successor in title to that proprietor were it not for the mistake in the register should be restored to the register if he or she is in possession of the land, unless it would be unjust to do so.

13.76 We recommend that:

(1) The protection afforded to the proprietor of a registered estate who has been removed or omitted from the register by mistake should not be confined to when he or she is personally in possession, but should apply where a proprietor would be considered a proprietor in possession within section 131 of the LRA 2002.

(2) The protection afforded to the proprietor of a registered estate who has been removed or omitted from the register by mistake should not be confined to situations where his or her possession of the land has been continuous, as long as he or she is the proprietor in possession when schedule 4 is applied.

13.77 Our recommendation is implemented by clause 20. The clause also consolidates paragraphs 2 to 4 and 5 to 7 of schedule 4 into a single set of provisions governing both the court's and the registrar's power to alter the register.

13.78 Clause 20 creates three mutually-exclusive routes for considering whether rectification should be granted or refused depending on whether B is in possession (paragraph 3B), A is in possession (paragraph 3C), or neither is in possession (paragraph 3D). It should be noted that separating the provisions in this manner has changed the current law in two ways.

13.79 First, under the current law (paragraph 3(2)), if B is in possession, rectification cannot be granted against B unless it would be unjust not to grant it or unless B consents or contributed to the mistake by fraud or lack of proper care. But if rectification *can* be granted against B (perhaps because of B's lack of proper care), then the presumption in paragraph 3(3) applies and rectification must be granted unless there are exceptional circumstances. New paragraph 3B replicates this protection for B where B is in possession. However, if the protection does not apply, the general presumption in favour of rectification (now contained in paragraph 3D(2)) is not engaged. Paragraph 3D does not apply at all. Instead, the court or the registrar would have an unfettered discretion whether or not to grant rectification.

13.80 Secondly, under the current law, where neither A nor B is in possession, there is a general presumption in favour of rectification in paragraph 3(3) unless there are exceptional circumstances. This presumption is not subject to any exception for where A has contributed to the mistake through fraud or lack of proper care. However, the

equivalent provision in the new paragraph 3D(2) is subject to such an exception. Including this exception avoids an inconsistency that would otherwise arise between new paragraphs 3C (which applies where A is in possession) and 3D. Moreover, we think the court and the registrar *should* consider whether A contributed to the mistake through fraud or lack of proper care. However, although rectification is not automatic under new paragraph 3D where it is demonstrated that A caused or contributed to the mistake through fraud or lack of proper care, rectification may still be granted at the discretion of the court or the registrar.

13.81 Our recommendation regarding the nature and duration of possession is implemented by new sub-paragraphs 3C(5) and (6). These provisions replicate section 131 so that A will be entitled to the same presumptions regarding possession as would apply to B. The provision is needed because section 131 only applies to "proprietors" and A, having lost the estate, is not a proprietor.

13.82 Schedule 4 does not currently impose any requirement that a proprietor or former proprietor must have been in continuous possession, so no amendment is required to implement this part of our recommendation.

**(2) Finality: the ten-year longstop**

13.83 As mentioned above, we think that schedule 4 to the LRA 2002 currently pays too little regard to the need for finality. There is no time limit within which A must make an application for rectification. In consequence, B's title remains vulnerable to rectification indefinitely.

13.84 We addressed this issue in our Consultation Paper by proposing the introduction of a longstop. Our proposed longstop comprised three separate sub-proposals.

(1) Where B is in possession and the longstop has expired, we proposed that the register should not be rectified against B unless B's consents or B caused or contributed to the mistake through fraud or lack of proper care.[42]

(2) We proposed that the longstop should also apply in the same way even where B is not in possession of the land (although it would not apply where A has remained in possession).[43]

(3) We proposed that the appropriate period for the longstop should be ten years from the occurrence of the mistake.[44]

13.85 We explained that, under our proposal, the expiry of the longstop would not affect a party's entitlement to an indemnity.[45]

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42 Consultation Paper, para 13.120.

43 Consultation Paper, para 13.123.

44 Consultation Paper, para 13.126.

45 Consultation Paper, para 13.103.

### Consultation

13.86 Our proposals regarding the longstop generated a range of responses, with some consultees strongly agreeing and others strongly disagreeing. This is unsurprising, given that our proposals would introduce an entirely new principle into the land registration system.

(1) Thirty consultees responded to proposal (1) set out above. Twenty consultees agreed, three disagreed and seven expressed other views. (However, Christopher Jessel, who ticked the "other" box, expressly disagreed with the ten-year longstop.)

(2) Twenty-eight consultees responded to proposal (2). Fourteen consultees agreed, five disagreed and nine expressed other views.

(3) Twenty-nine consultees responded to our proposal (3). Fifteen consultees agreed, four disagreed and ten expressed other views.

13.87 A majority of the consultees who responded were in favour of each of our proposals. However, the consultees who disagreed or expressed other views tended to provide more detailed responses.

13.88 Some consultees raised points of clarification. The Bar Council and Dr Harpum, who both supported the imposition of a longstop, agreed on the basis that it should not apply where A has remained in possession. We confirm that the longstop should not apply where A is in possession, but only where B or no one is in possession. Christopher Jessel, who opposed the longstop, was concerned that the longstop should not apply where a claim for rectification is being litigated when the ten-year period expires. We confirm that the ten-year longstop should provide for a ten-year period in which to bring a claim or make an application for rectification; it should not start to apply while an application or claim is in the process of being determined.

13.89 Three consultees who opposed one or more of our proposals provided detailed grounds of opposition. First, Martin Wood complained that our Consultation Paper did not provide an argument for the virtues of finality. (Amy Goymour, who expressed other views, made the same point.) Martin Wood did not consider that the passage of time should be allowed to trump the interests of justice, a point on which HM Land Registry agreed. He wrote:

> One can picture the scene in court. "This is plainly a case where justice requires that the register be rectified. However, because more than ten years have passed since the mistake was made in the register, I am debarred from ordering rectification; an order I would have made without hesitation had less than ten years passed." Is this really desirable?

13.90 In the Consultation Paper, we justified the introduction of a longstop by reference to the importance of finality.[46] We continue to believe that finality should be one of the objectives of the rectification provisions in schedule 4. The continued availability of rectification for an indefinite period of time means that B's title is never fully secure.

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[46] Consultation Paper, paras 13.101 and 13.122.

Moreover, if B transfers the property to C, C's title is never fully secure. The prospect of an application by A or A's successors in title for alteration of the register will always be hanging over them. We do not, however, believe that the operation of the longstop is likely to force the registrar or the court to make unjust decisions, for the following reasons.

(1) Rectification will continue to be available after the longstop expires where the current proprietor substantially contributed to the mistake through fraud or lack of proper care.

(2) The longstop will not apply where A is still in possession of the land (and so would suffer prejudice if rectification were to be unavailable).

(3) The expiry of the longstop will not affect entitlement to an indemnity (which will be more likely to be an adequate remedy for A where A is not in possession of the land).

(4) In our view, after ten years, the specific interests of justice that may justify restoring A to the register should give way to the general public interest in providing finality of the register.

13.91 The second consultee to provide detailed grounds of opposition was HM Land Registry. HM Land Registry argued that our proposals were "a solution without a problem". HM Land Registry suggested that the longstop would not affect the outcome in many cases. However, the problem addressed by the longstop is not merely that claims for rectification can arise decades after the occurrence of the original mistake in the register. The problem is also the *threat* that such claims may arise. Moreover, later in this chapter, we make recommendations for cases in which B transfers the estate to a third party (C, who may then transfer it to D and so on).[47] An effect of these recommendations is that the registration of C (or D) would be a mistake. If it becomes clearer as a matter of law that rectification is available against C or D and their successors in title, there may be an increased number of claims to unwind chains of transactions. We therefore think that it important to provide some limit to the claims that may arise. Additionally, as we explain below, the longstop provides a solution to difficulties arising from multiple registration (a point doubted by HM Land Registry, whose concerns on that point we also address below).

13.92 HM Land Registry questioned how "final" the position will be and asked "what would amount to 'lack of proper care' for the purposes of the provision". We acknowledge that there is uncertainty as to the scope of "lack of proper care", which is a test contained in the existing legislation. However, we consider that the scope of the phrase should be left to be interpreted on a case-by-case basis. Our policy is not to achieve finality in all circumstances, but to balance finality with the need to ensure that those who caused or contributed to the mistake do not benefit from their fault.

13.93 Lastly, HM Land Registry questioned the compatibility of the longstop with the Human Rights Act 1998. We acknowledge that the longstop is likely to engage Article 1 of Protocol 1 to the European Convention on Human Rights. The title promise in section

[47] Paras 13.123 to 13.146 below.

58 has interfered with A's property rights by deeming B to be the new owner of A's freehold. The introduction of the longstop limits A's ability to obtain redress for this interference. However, we are confident that any interference will be justified; the interference achieves an objective which is in the public interest (finality of the register).[48] We consider that our recommendations pursue this objective in a proportionate manner. Exceptions have been included so that the longstop does not apply in cases of fraud and lack of proper care. Ten years is a significant period of time during which A may seek rectification. Lastly and importantly, the longstop does not affect A's entitlement to claim an indemnity.

13.94 Amy Goymour asked why we are introducing a longstop in relation to rectification claims but not in relation to indemnity claims. The answer is that we are mindful of the fact that the existence of the title promise in the LRA 2002 is in large part justified only because of the wide availability of an indemnity. Given that A loses his or her estate through the operation of section 58, we would be very cautious about restricting not only A's ability to secure its return, but also A's entitlement to an indemnity. In particular, one of the main reasons in favour of the longstop – namely that it would prejudice B to deprive him or her of the property after so much time -– has no bearing on the question of whether A should be entitled to an indemnity.

13.95 The third and final consultee to oppose (aspects of) the longstop for detailed reasons was the National Trust. It suggested that land held by a conservation organisation for conservation purposes should not be subject to the longstop. It argued that stewardship of land "for the public benefit, in particular for conservation purposes, is more important than certainty". Furthermore, it suggested that where (under its existing statutory powers) it has declared land to be inalienable –

> such land should automatically be classified as land held by a conservation organisation for conservation purposes and therefore a situation in which it would be "just" to rectify the register to reinstate the National Trust as registered proprietor.

13.96 We are not persuaded by the National Trust's suggestions. First, the need for finality benefits B and all those who rely in the register in dealing with B or B's successors in title. We do not see why B's protection should be weakened because the original registered proprietor was the National Trust. The harshness of depriving B of land which is in his or her possession is the same whether or not the land was originally owned by the National Trust. Secondly, we are concerned that exceptions to the longstop would weaken its effect. Admitting one exception could lead to calls for others to be made, for example, for other charitable land. Thirdly, the National Trust's suggested interpretation of "unjust" would, in effect, guarantee that, where land has been declared by them to be inalienable, it must always be returned regardless of when the dispute comes to light. This approach fails to pay due regard to the interests of justice, which may require the land to remain with B. As we explained in our Consultation Paper,[49] the law relating to indefeasibility should be fact-sensitive. Our longstop is designed to balance fact-

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[48] We note, for example, that enfranchisement legislation, which involves a forced sale of title to a leaseholder, and adverse possession, under which title is lost without compensation, have both been held compatible with Article 1 of Protocol 1: *James v United Kingdom* (A/98) (1986) EHRR 123; *JA Pye (Oxford) v United Kingdom* (44302/02) (2008) 46 EHRR 45, 23 BHRC 405, respectively.

[49] Consultation Paper, para 13.15.

sensitivity with finality. The National Trust's suggestion would remove from the court any ability to respond to the facts of individual cases, whether (for example) the dispute arose after one year or 20 years.

### The appropriate period for the longstop

13.97 A number of consultees commented upon the specific period we proposed for the longstop. The Society of Legal Scholars suggested that ten years may be too long where B has taken possession. By contrast, HM Land Registry suggested that the ten years is too short a period. Some consultees, including Nottingham Law School and the Bar Council, suggested a period of 12 years would be more appropriate by analogy with the period required to extinguish title to unregistered land.[50] Christopher Jessel suggested that we should make provision for extending the longstop where a former proprietor lacks capacity. Cliff Campbell suggested that the court should be given a discretion to extend the longstop in appropriate circumstances.

13.98 In the Consultation Paper we explained that we had suggested a period of ten years as this is consistent with the period of occupation required to make an adverse possession application under the LRA 2002, schedule 6.[51] We have not been given any substantial reason to think that our approach in the Consultation Paper was incorrect. We are not convinced that the longstop should be subject to extension, except to prevent a person who contributed to the mistake by fraud or lack of proper care from benefiting from it. In our view, after ten years, it is the interests of B and B's successors in title that become paramount, not the interests of A in recovering land of which he or she is not in possession. It should again be remembered that A will still be entitled to an indemnity.

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50 Limitation Act 1980, s 15.

51 Consultation Paper, paras 13.124 to 13.125.

Recommendation

**Recommendation 24.**

13.99 We recommend that the register should not be rectified in order to correct a mistake so as to prejudice the registered proprietor who is in possession of the land without that proprietor's consent, except where:

(1) The registered proprietor caused or contributed to the mistake by fraud or lack of proper care or;

(2) Less than ten years have passed since the original mistake and it would be unjust not to rectify the register.

13.100 We recommend that after ten years from the mistaken removal of the former registered proprietor from the register, the register should not be rectified to correct the mistake so as to prejudice the new registered proprietor even where the new proprietor is not in possession of the land. Exceptions should be provided only for where the former proprietor or his or her successors in title are in possession of the land, for where the new registered proprietor consents to the rectification, and for where the new registered proprietor caused or contributed to the mistake by fraud or lack of proper care.

13.101 These recommendations are implemented by clause 20 of our draft Bill. It inserts paragraph 3B(2)(c), and paragraph 3D(2)(a) and (3) into schedule 4. Pursuant to paragraphs 3B(3)(c) and 3D(4)(c), the default position is that the longstop starts to run when the mistake occurs. Paragraphs 3B(3)(a) and (b), and (3D)(4)(a) and (b) make special provision for specific cases (involving derivative mistakes and derivative interests) discussed later in this chapter.

13.102 The ten-year longstop does not apply where the former proprietor is in possession. Such cases are governed by new paragraph 3C,[52] which does not contain a longstop provision.

### (3) The position of mortgagees

13.103 The final element of our revised scheme for rectification concerns the treatment of mortgagees. The example in figure 20 illustrates the situation this element seeks to address.

Figure 20: the AB scenario, with B as a mortgagee

A is the registered proprietor of an estate. A fraudster has granted a mortgage over A's estate to B, and then disappeared with the money. A applies for rectification of the register.

[52] See paras 13.70 to 13.82 above.

13.104 We pointed out in the Consultation Paper that, under the current law, A's application will usually succeed.[53] There is a presumption in favour of rectification (under paragraph 3(3) of schedule 4). The presumption will apply unless B is in possession and is protected under paragraph 3(2) as a "proprietor of a registered estate". B, as mortgagee, is unlikely to be in possession. More importantly, B is not the proprietor of a "registered estate". The LRA 2002, section 132(1) defines a "registered estate" as "a legal estate the title to which is entered in the register, *other than a registered charge*" (emphasis added). B is therefore unable to rely upon paragraph 3(2). Nevertheless, B may oppose rectification under paragraph 3(3) on the basis that there are exceptional circumstances which justify a refusal. A may then be put to the expense and inconvenience of a contested hearing before the court or the Tribunal in order to obtain rectification.

13.105 We suggested in the Consultation Paper that this state of affairs is undesirable.[54] B's interest in A's property is financial. The essence of a mortgage is that it provides security for a debt. B should be indifferent as to whether the charge remains in the register, given that B will be indemnified if the charge is removed. We therefore proposed that a mortgagee who has been registered by mistake should not be able to oppose rectification of the register to correct that mistake.[55]

### Consultation

13.106 Eighteen consultees agreed with our proposal, seven disagreed and six expressed other views.

13.107 The Property Litigation Association, Nigel Madeley and the Society of Licensed Conveyancers, who all supported our proposal, agreed on the basis that a mortgagee's interest in an estate is financial. The Chancery Bar Association (who also agreed with our proposal) suggested, however, that "the interests of many registered freehold proprietors are purely financial in the sense that they can be adequately compensated by an indemnity following rectification". We acknowledge that for some freeholders the land is primarily an investment; for many, however, such as where the property is a home, the freehold represents much more than a financial investment.[56] By contrast, the purpose of a mortgage is to secure the payment of a sum of money. We therefore continue to think that there is a case for treating the interests of mortgagees differently from those of freeholders.

13.108 The Society of Legal Scholars and Dr Cooper, who agreed with our proposal, pointed out that not all mortgages secure the payment of a loan. Some instead support the

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53 Consultation Paper, para 13.93. We mistakenly referred to s 133 of the LRA 2002. We meant to refer to s 131 but, in retrospect, we consider that s 132(1) is the crucial provision.

54 Consultation Paper, paras 13.92 and 13.94.

55 Consultation Paper, para 13.95.

56 For further discussion of the special value that attaches to the home, see L Fox, *Conceptualising Home: Theories, Laws and Policies* (1st ed 2006).

performance of non-financial obligations.[57] We do not believe that this point necessitates any change to our proposal. Even where a mortgage secures the performance of a non-financial obligation, the interest of the mortgagee in the property (if not the interest in the performance of the obligation) is financial. We consider that the same response applies to the point raised by the Council of Mortgage Lenders (who opposed our proposal) that "mortgages confer other rights, such as the power of sale". A mortgagee's power of sale is an incident of its power to realise its security.

13.109 HM Land Registry and Dr Harpum (who both expressed other views) were supportive of our proposal but were concerned that it should remain possible for mortgagees to contest the allegation that there is a mistake in the register. As HM Land Registry explained:

> in cases of suspected fraud the chargee should be able to object until such time as, on the balance of probabilities, the fraud is proved and the registrar agrees that there is a mistake in the register.

13.110 We agree with this view. It was not our intention to prevent mortgagees from arguing that the register should not be rectified because there has been no mistake. As we explain below, the amendment of the LRA 2002 that we recommend will enable mortgagees to contest the existence of a mistake, but not to contest rectification once a mistake is proved.

13.111 Several consultees who disagreed were influenced by the possibility that a mortgagee's ability to obtain an indemnity may be limited as a result of our proposals in Chapter 14 of the Consultation Paper. These concerns should be alleviated by reason of our decision not to carry forward reforms that would limit the ability of mortgagees to claim an indemnity.[58]

13.112 Finally, Martin Wood opposed our proposal on the basis that rectification would normally be granted against a mortgagee under the current law in any case, but that the registrar and the court should retain a discretion whether to grant rectification. Nottingham Law School also opposed our proposal on this basis, arguing that the registrar and the court should be able to refuse rectification in the AB scenario if A has been guilty of fraud or has allowed fraud to take place through carelessness. We agree that the court or the registrar should be able to take A's fraud into account. However, we find it difficult to envisage circumstances in which the registration of B would qualify as a mistake if A brought it about through his or her fraud. Moreover, we are unconvinced that a mortgagee (who will be entitled to an indemnity) should be permitted to argue against rectification on the basis of A's carelessness alone.

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[57] A similar point was made by the City of London Law Society Land Law Committee and Nottingham Law School, who opposed our proposal.

[58] See Ch 14, paras 14.26 to 14.30 below.

Recommendation

**Recommendation 25.**

13.113 We recommend that a chargee who has been registered by mistake, or the chargee of a registered proprietor who has been registered by mistake, should not be able to oppose rectification of the register (once a mistake has been found by the registrar or a court) so as to correct that mistake by removing its charge.

13.114 This recommendation is implemented by clause 20 which will insert a new paragraph 3D(2) into schedule 4.

13.115 Where neither A nor B is in possession, paragraph 3D(2) provides that rectification should be granted unless there are exceptional circumstances (paragraph 3D(2)(c)). As explained above, if B is a mortgagee, B will not be the proprietor of a registered estate in possession of the land. An application for rectification against B will therefore always fall to be considered under paragraph 3D. The last line of paragraph 3D(2) disapplies the exceptional circumstances provision where the relevant alteration of the register would affect the proprietor of a registered charge. Importantly, paragraph 3D(2) does not alter the circumstances in which the court or the registrar has the power to alter the register (specifically, where there is mistake). Consequently, it does not prevent a mortgagee arguing that the power to alter the register has not arisen because there has been no mistake.

13.116 However, a mortgagee cannot rely upon the fraud and lack of care provision in paragraph 3D(2)(b) because the removal of a charge does not itself result in A "being or remaining registered" as proprietor.

## PART 3: EXTENDING OUR SCHEME – DERIVATIVE MISTAKES, DERIVATIVE INTERESTS AND MULTIPLE REGISTRATION

13.117 The third part of this chapter is concerned with ways in which our new scheme for rectification can be extended to address three problems which have arisen regarding the scope of the court's and registrar's powers of rectification.

13.118 In order to explain the nature of these three problems, it will be useful to consider a modification of the AB scenario involving a further transfer, illustrated in figure 21.

Figure 21: the ABC scenario (a derivative mistake)

A is the sole registered proprietor of a freehold estate. A fraudster steals A's identity and forges a transfer of the estate to B, who becomes registered proprietor in place of A. B then sells the estate to C, who becomes registered proprietor in place of B.

Alternatively, rather than selling the estate, B grants a registered mortgage over the land to C.

In both versions of the scenario, neither A, B, nor C had any knowledge about the fraud and they have all been entirely conscientious throughout.

13.119 The first problem we consider concerns the status of C's registration. In the AB scenario in figure 19, B is registered by mistake. Once B is registered, B is the legal owner of the estate with owner's powers to dispose of it. If B sells the estate to C, is the registration of C also a mistake and can A obtain rectification against C? If C's registration is a mistake, it must be so because it derives from (or depends on) B's earlier mistaken registration. We will therefore call this kind of mistake a "derivative mistake".

13.120 The second problem concerns derivative interests affecting an estate. A derivative interest is an interest in land granted out of a superior interest or estate. Examples include leases, mortgages, restrictive covenants, options and easements. If the registrar mistakenly fails to make an entry in respect of a derivative interest (or mistakenly removes the entry from the register), the derivative interest may cease to bind the superior estate. Alternatively, the derivative interest may lose priority to another derivative interest. Can the interest-holder apply to have it restored to the register and, if so, can the court or the registrar restore it with priority over the superior estate and other derivative interests?

13.121 The third problem concerns cases of multiple registration where, for example, the same land is mistakenly registered both as part of A's freehold estate and as part of B's neighbouring freehold estate. Should multiple registration be addressed by using the schedule 4 powers of rectification and, if so, what principles should apply?

13.122 We will address each of these problems in turn.

**(1) Derivative mistakes**

13.123 The first problem is that it is not clear, in the ABC scenario outlined in figure 21 above, whether the registration of C is a mistake. Therefore, it is not clear if rectification is available against C.

13.124 In the ABC scenario, A would want to have the register rectified so that he or she could recover the freehold from C. However, under the LRA 2002, A will only be entitled to rectification of the register if the registration of C was a mistake. In the AB scenario outlined in figure 19, there was no difficulty. There was something intrinsically wrong with the transfer of A's estate from the fraudster to B. But based on the terms of the LRA 2002 alone, it is not clear that the registration of C is a mistake. There was nothing

intrinsically wrong with the transfer (or mortgage) to C. At the point of sale, B was the registered proprietor of the estate, and is deemed to be vested with the title regardless of any flaw in the underlying transaction.[59] Sections 23 and 24 of the LRA 2002 expressly gave B, as registered proprietor, the power to transfer or mortgage the property. Moreover, on receipt of C's application for registration, we think that the registrar would be obliged to register C as the new proprietor.[60] Consequently, it is not the case that the registrar would have acted differently in relation to C's registration if he or she had known the true or full facts. There is thus an argument, based solely upon the provisions of the LRA 2002, that rectification should not be possible against C.[61]

13.125 We suggested in our Consultation Paper that, despite the argument set out above, the court has "found no difficulty in reasoning that rectification is available against C".[62] We did not ask a direct consultation question about this issue. However, our suggestion was questioned by Amy Goymour in her consultation response.[63] She noted that "whilst this is probably the tenor of the case law, there are, of course, cases pointing the other way, and which protect C's registered title". Moreover, both Amy Goymour and Nottingham Law School pointed out that, even if it is clear that rectification is available against C, there is not yet a consensus about the basis on which rectification is available. Nottingham Law School summarised its concerns by saying that "it seems premature to assert that the rights against C, or indeed later interest holders where case law support is weaker, is established firmly and is not potentially subject to challenge in litigation".

13.126 We think that the points raised by Amy Goymour and Nottingham Law School are persuasive. The principal authority on the availability of rectification against C is still a first-instance decision, namely the decision of Deputy Adjudicator Michael Mark in *Knights Construction (March) Limited v Roberto Mac Limited* ("*Knights Construction*").[64] This decision has since been cited with approval by the Court of Appeal in *MacLeod v Gold Harp Properties Limited* ("*Gold Harp*").[65] However, the decision in *Gold Harp* concerned the priority provisions of the LRA 2002. It did not directly consider the ABC scenario, where ownership of an interest in land is lost through the registration of a new proprietor.

13.127 As we will discuss *Gold Harp* in some detail later in this chapter, it is worth setting out the facts of the case. Mr Ralph was the registered freehold proprietor of a three-storey house. The roof space of the property was let on two registered long leases to Mr Byrne and Mr Briars (the claimants). Mr Ralph purported to forfeit the leases by re-entry for non-payment of ground rent and then successfully applied to HM Land Registry to close

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59 LRA 2002, s 58.

60 See our discussion of owner's powers in Ch 5, paras 5.77 to 5.84 above.

61 This argument found favour with the Court of Appeal in *Guy v Barclays Bank plc* [2008] EWCA Civ 452, [2008] 2 EGLR 74 at [23].

62 Consultation Paper, para 13.72.

63 Amy Goymour is a leading commentator on the law of rectification. See, in particular, her "Mistaken registrations of land: exploding the myth of 'title by registration'" (2013) 72 *Cambridge Law Journal* 617.

64 *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] EWLandRA 2009_1459, [2011] EGLR 123.

65 *MacLeod v Gold Harp Properties Limited* [2014] EWCA Civ 1084, [2015] 1 WLR 1249.

the claimants' leasehold titles. In fact, the forfeiture was unlawful and so the closure of the titles was a mistake. Mr Ralph then re-let the roof space on another registered long lease and the new lease was eventually assigned to Gold Harp Properties Limited, a company controlled by Mr Ralph. The claimants applied for alteration of the register to restore their leases. The Court of Appeal (confirming the decision at first instance) held that the claimants' leases should be reinstated in the register with priority over Gold Harp Properties Limited's lease.

13.128 In *Gold Harp*, Lord Justice Underhill said that previous case law had established that the power in schedule 4 to correct mistakes in the register "extends to correcting the consequences of such mistakes".[66] However, the cases cited by Lord Justice Underhill are not clear about the basis on which rectification may be obtained against C. A variety of different approaches have been taken.

13.129 In *Knights Construction*, Deputy Adjudicator Mark referred to the observations of Lord Neuberger in *Guy v Barclays Bank plc (No 2)* that there are two ways of arguing that rectification is available against C. The registration of C may be seen as "part and parcel of" the mistake involving B. Alternatively, even if the registration of C is not part of the mistake involving B, correcting the mistaken registration of B may involve removing C from the register.[67] But Deputy Adjudicator Mark did not decide which approach he preferred.[68]

13.130 In *Ajibade v Bank of Scotland plc*, Deputy Adjudicator Rhys held that the registration of C is not a mistake but rather the consequence of mistake. However, he held that the register can be rectified to correct the consequence of a mistake.[69]

13.131 By contrast, in *Odogwu v Vastguide Limited*, Sir Donald Rattee held that the power of the court under paragraph 2(1) of schedule 4 to correct a mistake is a power to correct "a mistake in the register". He suggested (although he did not expressly hold) that there is no power to correct the consequences of a mistake if the original mistake no longer appears in the register. But he accepted that the registration of C might itself be a mistake and not merely the consequence of a mistake.[70]

13.132 Given the uncertainty in the case law, we have concluded that it would be desirable for schedule 4 to the LRA 2002 to make clear on what basis rectification may be obtained against C.

13.133 Although our Consultation Paper did not ask consultees whether the status of C should be clarified, we expressed the view that rectification should be available against C. No consultee disagreed. No consultee said anything that would indicate that rectification should not be available against C.

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66 Above at [95].

67 *Guy v Barclays Bank plc (No 2)* [2010] EWCA Civ 1396, [2011] 1 WLR 681, at [35].

68 *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] EWLandRA 2009_1459, [2011] EGLR 123 at [130] to [131].

69 *Ajibade v Bank of Scotland plc* [2008] EWLandRA 2006_0163, at [12].

70 *Odogwu v Vastguide Limited* [2009] EWHC 3565 (Ch) at [56] to [59].

13.134 One consultee – Dr Harpum – thought that the status of C's registration does not need to be clarified. But Dr Harpum took this position on the basis (reflected in the discussion in our Consultation Paper) that C's registration would already be a mistake under the current law. While we now take the view that the legislation should be changed, we agree with Dr Harpum that rectification should be available on the basis that the registration of C was a mistake.

Recommendation

**Recommendation 26.**

13.135 We recommend that the LRA 2002 provides that where the registration of a registered proprietor is held to be a mistake, registration of any estates or charges granted by the registered proprietor, and any entry made in the register in respect of a derivative interest granted by the registered proprietor, should also be classed as a mistake.

13.136 We do not intend this recommendation to apply only to the registration of C in the ABC scenario outlined in figure 21 above. If, for example, C transfers the estate to D, and D transfers it to E, and E mortgages it to F, we want the registration of D, and of E, and of F (and so on) also to qualify as mistakes.

13.137 Our recommendation is implemented by clause 22, which inserts new paragraph 4B into schedule 4.

13.138 Paragraph 4B(1) applies where a mistaken entry is made in the register in relation to an estate, right or interest. If the estate, right or interest is transferred, or if a derivative interest is granted out of it, the registration of that transfer or grant will also be a mistake (paragraph 4B(5)(a) and (b)). Paragraph 4B(5)(c) and (d) ensure that the registration of further transfers or grants of derivative interests will also constitute mistakes.

13.139 However, expanding the reach of "mistake" in the manner provided for by paragraph 4B(1) and (5) has two consequences, each of which requires consideration. We describe these issues below and explain how they are addressed by our clause.

Split-rectification decisions

13.140 The first issue concerns the ABC scenario in which C is a mortgagee. Our amendment of schedule 4 makes clear that there are two mistakes in the register in this case: B's registration as proprietor and the registration of C's mortgage. When A applies for rectification, A will seek both the recovery of the estate and the removal of C's charge.

13.141 The court or the registrar might decide that rectification should not be granted against B. A will instead get an indemnity. However, this decision does not change the fact that the registration of B's title was a mistake. Accordingly, the decision does not change the fact that the registration of C's charge was also a mistake.

13.142 If the registration of C's charge was a mistake, then A (or, indeed, B or anyone else) can apply to have it removed from the register. There would be no reason why it should

be removed, given that there was nothing inherently wrong with the mortgage and that rectification is not being granted against B. But our proposed scheme for rectification contains both a general presumption that mistakes should be rectified and a provision which prevents mortgagees from arguing that there are exceptional circumstances that justify refusing rectification. The consequence would be that, perversely, C's charge would have to be removed from the register.

### The proliferation of mistakes in the register

13.143 The second issue concerns the potential proliferation of mistakes in the register. This issue could arise in in the example illustrated in figure 22 below.

Figure 22: the ABCDEF scenario

A is the sole registered proprietor of a freehold estate. A fraudster steals A's identity and forges a transfer of the estate to B, who becomes registered proprietor in place of A. B then sells the estate to C, who becomes registered proprietor in place of B.

A applies for rectification against C but is refused. Following the decision of the registrar or the court, C transfers the estate to D. D later transfers it to E, E to F, and so on.

13.144 Despite the decision to refuse rectification against C, the effect of new paragraph 4B(1) and (5) would be that the registration of C was still a mistake. Consequently (by operation of paragraph 4B(5)) the registration of D is a mistake, the registration of E is a mistake, and so on. Mistakes in relation to the property will now keep accruing in the register indefinitely.

### Resolving the two problems

13.145 To address both difficulties outlined above, clause 22 introduces an exception to the general rule in paragraph 4B(1) and (5). The exception is set out in paragraph 4B(2) to (4). It applies where the registrar or the court has considered the sequence of mistakes in the register and made a decision not to correct the original mistake or one of the mistakes which derived from it. Once this decision has been made, entries which derive from the mistake which is not being corrected will no longer count as mistakes.

13.146 For example, in the ABC scenario in figure 21, if rectification is refused against B, the registration of C will no longer count as a mistake. The registrar and the court will therefore not be able to grant rectification as against C. In our view this outcome is correct, as the only problem with the registration of C is the fact that it derives from the mistaken registration of B (and that mistake is being left in the register). In the scenario in figure 22, the court or the registrar has considered the mistaken registration of B (the original mistake) and C (the derivative mistake), but decided to leave C's title to the property undisturbed. The effect of paragraph 4B(2) to (4) would be that the registration of D, and E, and F, and so on, would not count as mistakes.

### (2) Derivative interests

13.147 The second problem that we would like our scheme for rectification to address concerns derivative interests in land. This problem is most easily illustrated by the scenario in figure 23.

Figure 23: the ABCD scenario

A is the sole registered proprietor of a freehold estate. A grants B a long lease of the estate, which B duly registers. Shortly afterwards, HM Land Registry mistakenly deletes the register entry for B's lease.

After the entry for B's lease has been removed, A sells the estate to C, who is registered as the new proprietor. C grants a long lease to D, which is also registered.[71]

13.148 The ABCD scenario is different in an important respect from the AB and ABC scenarios. In the AB and ABC scenarios, the occurrence of the mistake in the register means that A loses his or her freehold. In the ABCD scenario, the mistaken deletion of B's lease from the register does not mean that B loses his or her interest in land. B's lease is not destroyed or transferred to a third party. Rather, the result of the mistake is that B's lease becomes liable to be postponed under section 29 of the LRA 2002 on a transfer of the freehold for valuable consideration.[72] When the transfer to C takes place, B suffers prejudice not as a result of the title promise in section 58, but as a result of the priority promise in section 29.

13.149 The sale to C postpones B's lease to C's freehold. We explain in Chapter 8 that postponement is not the same thing as extinguishment.[73] The fact that B's lease has been postponed to C's freehold means that B cannot exercise any rights under the lease that conflict with C's rights as freeholder. However, where a lease is postponed to a freehold, the practical effect of postponement is likely to be the same as if the lease had been extinguished: B can no longer make use of the property. The only significant difference between the postponement and the extinguishment of B's lease is that, if the sale from A to C were later to be avoided (for example, on the grounds of misrepresentation), a postponed lease would again become binding on A whereas an extinguished lease would not.

#### The loss of priority to C's freehold

13.150 Focussing for the moment only on the registration of C in the ABCD scenario, we proposed in our Consultation Paper that "section 29 should be subject to schedule 4",

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71 This example is adapted from the facts of *Gold Harp*.

72 For more detail on the operation of the LRA 2002, s 29, see Chs 8 and 9.

73 Ch 8, paras 8.17 to 8.20 above.

so that B can apply to have his or her lease restored to the register so that it will bind C.[74]

13.151 We went on in our Consultation Paper to ask whether "the outcome of the application should be determined by the same principles that apply when the application for alteration or rectification relates to the title to the estate, including the operation of the longstop".[75] We will consider this further question (and the responses we received from consultees) separately in connection with our proposal for the modification of the longstop.[76]

13.152 Our proposal would mean that B could apply to have his or her lease re-registered so that it would be binding on C. Whether B's application would succeed would depend on the application of the principles in our general scheme for rectification, contained in clause 20 (paragraphs 3B to 3D) of the draft Bill.

13.153 However, we were not solely concerned in our Consultation Paper with the operation of section 29. We noted that a similar issue may arise in relation to section 11 of the LRA 2002, which provides for the effect of the first registration of a freehold estate. A applies for first registration of his or her freehold, and B files a caution against first registration to make the registrar aware of his or her lease. By mistake, the registrar overlooks the caution and registers A's freehold title unencumbered by B's lease. B is not in actual occupation. B's lease therefore ceases to bind A's estate pursuant to section 11(4). We proposed that, in addition to section 29, section 11 should be subject to schedule 4, and that B should be able to apply to have his or her lease registered against A's title.[77]

13.154 In our Consultation Paper, we also mentioned section 12, which makes provision for the first registration of leasehold estates,[78] but did not refer to section 30, which makes provision for the sale of registered charges. We see no reason why sections 12 and 30 should be treated differently to sections 11 and 29 given that the provisions are identical in all material respects. We take our proposal to apply to all of sections 11, 12, 29 and 30.

13.155 We made these proposals because we did not see a convincing case for giving the priority promise in sections 11, 12, 29 and 30 greater significance than the title promise in section 58. In the ABCD scenario, as in the AB scenario, there is a mistake in the register. In both scenarios, a registered proprietor suffers loss as a result of the mistake (whether through the loss of an estate or the loss of priority). The loss may be broadly equivalent in both cases. In the ABCD scenario, B may be living at the property and the lease may be a 90-year lease of similar value to a freehold. In both scenarios, a third party benefits from the mistake by becoming the registered owner of an (unburdened) estate. Moreover, in both scenarios the third party benefits because of a provision in

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74 Consultation Paper, para 13.169.

75 Consultation Paper, para 13.169.

76 See paras 13.182 to 13.197 below.

77 Consultation Paper, para 13.180.

78 Consultation Paper, para 13.154.

the LRA 2002 (which changes what the position might otherwise have been at common law).

### Consultation

13.156 Twenty-seven consultees responded to our proposal that section 29 should be subject to schedule 4, and 25 consultees responded to our proposal regarding section 11. All but three consultees agreed with the basic premise of our proposals that sections 11 and 29 should be subject to schedule 4 (although three of those consultees – Christopher Jessel, Martin Wood and the National Trust – disagreed with or expressed concerns about the longstop). The three consultees who did not agree (namely Nigel Madeley, Dr Harpum and Dr Cooper) all expressed other views rather than disagreement with our proposals.

13.157 Most of those who agreed with our proposal did so without further substantive comment. However, the Chancery Bar Association suggested that an amendment will be necessary to the indemnity provisions to ensure that the holder of a derivative interest is entitled to an indemnity. It had in mind a situation in which the registrar or court does not order rectification (so the registered proprietor takes free from the derivative interest) and the holder of the derivative interest is therefore prejudiced. We agree as a matter of policy that the holder of the derivative interest should be able to claim an indemnity in such a case, and this outcome is reflected in the examples provided in our Consultation Paper.[79] We consider, however, that the current legislation achieves this outcome.[80]

13.158 Dr Harpum, who expressed other views, agreed that it should be possible (in a situation akin to the ABCD scenario) for B to apply to have the register rectified so that his or her lease is re-registered against C's title. But his view (with which HM Land Registry agreed) was that the LRA 2002 already achieves this goal. We do not think that the LRA 2002 is clear on this issue. We note, however, that Dr Harpum did not disagree with us about when rectification should be available.

13.159 Similarly, Dr Cooper agreed in principle that sections 11 and 29 should be subject to schedule 4. He suggested that "to make a specific rule to that effect is not the best approach" as "it is an example of creating fragmented rules operating in isolation without reference to the principles pervading the Act". We have already discussed Dr Cooper's alternative suggestion, which was to introduce a statutory definition of "mistake" into schedule 4, and explained why we have not decided to adopt it. We do not believe that our preferred approach of introducing a specific provision into schedule 4 to govern losses of priority will lead to a fragmented set of rules in the schedule; we think it will contribute to a clearer and more comprehensive statutory scheme for rectification.

### The loss of priority to D's lease

13.160 Having considered rectification against C in the ABCD scenario above, there remains an issue about whether rectification should be available against D. Should B be able to

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79 Consultation Paper, paras 13.166 to 13.167.

80 The holder of the derivative interest will have suffered loss by reason of a mistake whose correction would involve rectification of the register, and would therefore be entitled to an indemnity under sch 8, para 1(1)(b) to the LRA 2002.

apply to have his or her lease re-registered so that it has priority over D's lease? Suppose that D's lease is longer than B's and is at a peppercorn rent. If the registrar or the court cannot give B's lease priority over D's, B may have little interest in rectification.

13.161 Paragraph 8 of schedule 4 to the LRA 2002 gives the registrar and the court a power to alter priorities when altering the register. Paragraph 8 provides:

> The powers under this Schedule to alter the register, so far as relating to rectification, extend to changing for the future the priority of any interest affecting the registered estate or charge concerned.

13.162 In the Consultation Paper,[81] we discussed the Court of Appeal's interpretation of paragraph 8 in *Gold Harp*. The Court of Appeal held that the provision empowers the court and the registrar, when re-registering a derivative interest that has been mistakenly removed from the register, to give that interest "the priority which it should have had but for the mistake".[82] In the ABCD scenario, paragraph 8 would thus enable the court or the registrar to rectify the register by re-registering B's lease and giving it priority over D's lease. The words "for the future" were interpreted to mean that the alteration of priorities would take effect from the date of the court's or the registrar's rectification decision.

13.163 *Gold Harp* has been said by legal commentators to allow for "retrospective" rectification. This term was used in the judgment itself and we also used it in the Consultation Paper. In retrospect, we now do not think that the rectification ordered in *Gold Harp* is best described as being "retrospective". *Gold Harp* allows rectification to be backward-looking, but not to have backward effect. When the court or the registrar restores B's lease to the register, they can look backwards and consider what priority B's lease would have had if it had not been mistakenly removed from the register. If B's lease had never been removed, C would have taken the freehold subject to B's lease and B's lease would have taken priority over D's lease. The court or the registrar can then ensure that, moving forward, B's lease regains the priority it would have had but for the mistake.

13.164 Nevertheless, the decision in *Gold Harp* does not allow rectification to be backdated. In the ABCD scenario, following rectification, it is not as if B's lease had never been removed from the register. Before the rectification decision, D's lease had priority over B's lease, a legal fact that does not change as a result of that decision. The effect is only that D's lease no longer has priority over B's lease. It would therefore not be open to B to sue D in trespass for occupying the property in the period before the rectification decision. Until the rectification decision, D was entitled to be in occupation.

13.165 We suggested in the Consultation Paper that we did not propose to reverse the decision in *Gold Harp*. We said that "in the case of competing derivative interests, rectification should operate retrospectively".[83] What we meant was that, as in *Gold Harp*, the court and the registrar should have the power to remedy the consequences

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81 Consultation Paper, paras 13.191 to 13.195.

82 *Gold Harp*, at [93].

83 Consultation Paper, paras 13.195 to 13.196.

of a mistake by altering the relative priority of derivative interests affecting an estate. We were not proposing that rectification should have backward effect.

13.166 We asked consultees whether they agreed. We also asked consultees to share any practical difficulties they had encountered as a result of the decision in *Gold Harp*.[84]

### Consultation

13.167 Fourteen consultees responded to our call for evidence of any difficulties that have arisen as a result of the decision in *Gold Harp*. Eight consultees, including the Bar Council and the Law Society, said that they had not encountered any problems.

13.168 Six consultees, including the London Property Support Lawyers Group, drew attention to the decision in *EMI Group Ltd v O&H Q1 Ltd*,[85] although they noted that it did not involve issues of priority between competing derivative interests. The case concerned a tenant who assigned a lease to the lease's guarantor, who then granted a sub-lease. The assignment to the guarantor was prohibited by the Landlord and Tenant (Covenants) Act 1995 and so was void. Consultees asked us to imagine that both the lease and the underlease had been registered, and further to imagine that the lease had then been assigned again. They said that an application to rectify the mistaken registration of the guarantor (due to the void assignment) would involve considerable complexity, possibly including the unpicking of the sub-lease and further assignment.

13.169 However, the *EMI* case (even as modified by consultees) is about a mistake affecting title rather than priority. We are asked to imagine that the guarantor was registered as the proprietor of a lease that, at law, did not belong to it. Our recommendations regarding derivative mistakes (set out earlier in this chapter)[86] would be relevant to such a case. We think that rectification should be available not only against the guarantor, but also against the sub-lessee or a further assignee of the lease. This may indeed mean that complex cases could arise involving many mistaken dispositions. We consider that our proposed scheme for rectification and longstop would make it more likely that a just outcome would be reached in such cases. But we do not think the *EMI* case sheds any light on what should be done in case involving competing derivative interests.

13.170 One further example of a potential difficulty was provided by Dr Harpum, who strongly opposed our endorsement of *Gold Harp*. Dr Harpum referred to a case described in his article "Can Rectification be Retrospective?".[87] The registered proprietor of an estate entered into a covenant with a third party not to dispose of the estate unless a particular condition was satisfied. A restriction was entered in the register to protect the covenant. HM Land Registry made a mistake in recording the restriction; it prevented transfers of the estate but did not prevent the estate from being charged. The registered proprietor charged the estate in breach of the covenant and the charge was registered. Dr Harpum asked whether, if rectification can be retrospective, the restriction could be altered

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84 Consultation Paper, paras 13.196 to 13.197.

85 *EMI Group Ltd v O&H Q1 Ltd* [2016] EWHC 529 (Ch), [2016] Ch 586.

86 Discussed in paras 13.123 to 13.146 above.

87 "Can Rectification be Retrospective?", in A Goymour, S Watterson and M Dixon (eds), *New Perspectives on Land Registration* (2018) pp 126 to 127.

retrospectively and, if so, whether the charge could then be invalidated as being granted in breach of a restriction.

13.171 We do not think that the example given by Dr Harpum is a problem generated by the decision in *Gold Harp*. The example does not engage paragraph 8 of schedule 4. The issue that arises is not whether the charge should or should not have priority over some other interest, but whether the charge was validly granted at all. Furthermore, as we have explained above, the Court of Appeal in *Gold Harp* did not suggest that rectification of the register could be backdated. It suggested that the effect of paragraph 8 is that rectification takes effect from the date that the register is rectified. If the same approach were to be taken to the rectification of restrictions then, on the assumption that the charge in Dr Harpum's example was valid when granted, it would remain valid after the restriction was rectified. Rectification would not change the fact that the charge was not granted in breach of a restriction.

13.172 Moving on to our proposal that rectification should continue to operate retrospectively in the sense identified in *Gold Harp*, 26 consultees agreed. Only two consultees disagreed and one of them (Martin Wood) disagreed only on the narrow basis that he wanted the court and the registrar to have a discretion to decide whether rectification should be retrospective.

13.173 Amy Goymour, who agreed with our proposal, said that it would be important to make clear what kind of retrospectivity is in question. She asked whether a person in the position of B (in the ABCD scenario) could, following rectification, sue D in trespass. Similarly, the Chancery Bar Association supported our proposal but wanted to know whether B would be able to sue D in relation to any damage caused to the property while D was the registered proprietor.

13.174 As we explained above, we think that these concerns are partly generated by the use of the word "retrospective". We do not intend that rectification should be backdated to the time of the mistake; rectification may be retrospective only in the sense that it may reverse a previous loss of priority. The reversal will take effect only from the date that the register is rectified. If D has caused damage before the register was rectified, B will not have a claim against D. B's remedy would be against the person who caused the original mistake in the register and (if that were to fail) it would be to claim an indemnity from HM Land Registry for the losses caused by the mistake.

13.175 The only consultee to provide detailed criticism of our proposal was Dr Harpum. He presented three grounds of opposition.

13.176 First, Dr Harpum argued that the judgment of Lord Justice Underhill in *Gold Harp* contained a mistake. Lord Justice Underhill cited our 1998 Consultation Paper, in which our policy was that B should be able to have his or her lease restored to the register with priority over D's lease. But our policy had changed by the time of our 2001 Report. Dr Harpum pointed out that the intention behind the LRA 2002 was that the court or the registrar should not be able to give B's lease priority over D's.[88]

[88] We discuss this change of policy in our Consultation Paper, paras 13.191 to 13.192.

13.177 We acknowledge that, despite what the Court of Appeal considered, the decision in *Gold Harp* is contrary to the intention in our 2001 Report. Nevertheless, we think that the Court of Appeal's interpretation of schedule 4 paragraph 8 is correct. The plain wording of paragraph 8 seems to allow for B's lease to be given priority over D's, even if the provision was not originally intended to have this effect. It is unclear to us what changes to the "priority of any interest affecting the registered estate" the court or the registrar could make under the provision if they are not changes intended to reverse a loss of priority resulting from a mistake in the register.

13.178 Secondly, Dr Harpum wrote that the decision in *Gold Harp* undermines the fundamental objective of the LRA 2002 that the register should be a "complete and accurate reflection of the state of the title of the land at any given time".

13.179 We do not agree that the operation of retrospective rectification undermines the LRA 2002 in the way that Dr Harpum suggested. The ability of the register to operate as a "complete and accurate reflection of the state of the title" is inherently limited by provision for alteration and rectification of the register. Schedule 4 draws a balance between the title and priority promises made in the LRA 2002 and the recognition that in some circumstances the register must be altered. That balance is provided by determining the extent to which the register is indefeasible.

13.180 Finally, Dr Harpum queried our reasons for endorsing the approach taken in *Gold Harp*.

13.181 In short, we consider that the outcome in *Gold Harp* was correct. We do not think we should recommend legislating to reverse the decision without good reason. Moreover, responses to our Consultation Paper indicate that the decision is not causing problems in practice. Furthermore, we agree with the policy outlined in *Gold Harp*: if it were to be reversed, we think this would lead to an unjustified disparity in the remedies available against C and D. Consultees (including Dr Harpum) have said that rectification should be available against C even though C was entirely innocent and may have relied on the register. We consider that rectification should likewise be available against D. Indeed, in the ABCD scenario, there may be little point in a power to re-register B's lease if there is no power to give it priority over D's lease. It has also been argued by Professor Roger Smith that there may be a breach of Article 1 of Protocol 1 to the European Convention of Human Rights if B is deprived of the enjoyment of his or her lease through a mistake by HM Land Registry and by operation of statute (specifically LRA 2002, section 29) if rectification is not available against D.[89]

### The principles that should govern rectification in priority disputes over derivative interests

13.182 We asked consultees whether the court's and the registrar's power to correct a mistake by altering the priority of derivative interests should be governed by our general scheme for rectification, set out earlier in this chapter.[90] The only issue commented upon by consultees was whether, and how, the ten-year longstop should apply in relation to derivative interests.

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89 R Smith, "Assessing Rectification and Indemnity", in A Goymour, S Watterson and M Dixon (eds), *New Perspectives on Land Registration* (2018) p 132.

90 Consultation Paper, paras 13.169 and 13.180.

13.183 Where HM Land Registry mistakenly fails to note a derivative interest in the register, or mistakenly removes the relevant entry from the register, the mistake may have no immediate impact on the rights of the interest-holder or the continuing existence of the interest. In the ABCD scenario in figure 23 above, the mistaken removal of B's lease from the register does not initially have any adverse impact on B. The lease continues to exist and to bind A. It is only when A sells the freehold to C that B's lease is adversely affected by the mistake in the register. It is only when the sale takes place and is registered that B's lease is postponed to C's freehold.

13.184 With this point in mind, we provisionally proposed that, in relation to derivative interests, the ten-year longstop should run from when "as a result of the mistake, the holder of the derivative interest lost priority".[91]

### Consultation

13.185 A majority of the consultees who responded (19 out of 28) agreed with our proposal. Six disagreed while two expressed other views.

13.186 Those who agreed generally did so without further substantive comment. Those who disagreed (including HM Land Registry and the National Trust) generally did so because they disagreed with the longstop, rather than with our analysis of how the longstop should apply in respect of derivative interests.

13.187 However, Christopher Jessel (who disagreed with the proposal) and Nigel Madeley (who expressed other views) both raised a concern with the operation of the longstop in relation to derivative interests.

13.188 Where a person loses title to land that he or she owns (for example, where A's freehold title is fraudulently transferred to B), the fact that the mistake has happened should be apparent: A will see, for example, that B is using land that A owned. In contrast, the loss of a derivative interest may not be apparent. Suppose that B has an easement over A's land or the benefit of a restrictive covenant binding A's land. If a notice of the easement or the restrictive covenant is mistakenly deleted from the register and A then sells the property to C, C may take free of the interest. But, as Nigel Madeley suggested:

> If B owns an easement, he may well be exercising it quite happily before and after the mistaken removal from the register … . A restrictive covenant isn't "exercised", but as long as C is not in breach of the covenant, B has no cause to be concerned.

13.189 In addition, Christopher Jessel suggested that the ability to claim an indemnity (which would remain unaffected by the longstop) may not be adequate compensation in respect of easements or covenants.

13.190 We acknowledge that these are legitimate concerns: the fact that (for example) an easement or restrictive covenant has been mistakenly removed from the register will not be apparent where the exercise of the right is unaffected. We consider that these concerns are partially alleviated by ensuring that the longstop does not start to operate until priority is lost, as that is the point in time from which the mistake is most likely to come to light. For example, if C becomes the registered proprietor of the land and B

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[91] Consultation Paper, para 13.170.

continues to exercise an easement that is not protected in the register, C might be expected to question B's use of the land. The mistake would then come to light.

13.191 The same may not be true in respect of restrictive covenants: the mistake may only come to light at the time of breach. We consider, however, that the objective of finality provided by the longstop is still persuasive. We do not consider that C, who has purchased land and relied on section 29, should have his or her use of the land made subject to a restrictive covenant that was mistakenly removed many years ago and that C had no means of discovering. Christopher Jessel and Nottingham Law School suggested that the longstop could operate from the time when the holder of the derivative interest ought to have become aware of the mistake. However, we consider that this alternative approach could be equally prejudicial to C. Without clear provision for finality, registered proprietors remain at risk of derivative interests being resurrected decades after priority had been lost. Such interests may be resurrected after a chain of transactions have taken place, each transaction having benefited from the operation of section 29.

Recommendation

**Recommendation 27.**

13.192 We recommend that sections 11 to 12 and 29 to 30 of the LRA 2002 should be subject to schedule 4. This means that where, through a mistake, a derivative interest has been omitted or removed from the register, the holder of the interest should be able to apply for alteration or rectification of the register to have the priority of the interest over the registered proprietor restored. The outcome of the application should be determined by the same principles that apply when the application for alteration or rectification relates to the title to the estate, including the operation of the longstop.

13.193 We recommend that where a derivative interest in land is mistakenly omitted or removed from the register and consequently loses priority to another derivative interest, the court and the registrar should have the power to restore the interest to the register with the priority it would have had if the mistake had not been made.

13.194 We recommend that where the application for alteration or rectification relates to a derivative interest, the ten-year longstop on alteration of the register should run from the time when, as a result of the mistake, the holder of the derivative interest lost priority, not from the time of the mistake.

13.195 Our recommendation is implemented by clause 25, which replaces paragraph 8 of schedule 4, and clause 20, which inserts new paragraphs 3B(3)(b) and 3D(4)(b) into schedule 4.

13.196 We think that the new paragraph 8 delimits the court's and the registrar's power more clearly than the previous provision; it is not an unconstrained power to alter priorities, but a specific power to reverse the consequences of a mistake. Furthermore, sub-paragraphs (3) to (4) of the new provision make clear how the power in paragraph 8(2) is to be exercised and what its consequences will be. Each alteration which the court or the registrar makes under paragraph 8(2) qualifies as the correction of a mistake,

engaging the indemnity provisions in paragraph 1 of schedule 8. Each alteration is subject to our general scheme for rectification in new paragraphs 3A to 3D, inserted by clause 20.

13.197 New paragraphs 3B(3)(b) and 3D(4)(b) delay the commencement of the ten-year longstop in cases in which, because of a mistake, a derivative interest loses priority to, or ceases to affect, an estate or another derivative interest.

**(3) Multiple registration**

13.198 The third extension to our scheme for rectification that we proposed to make in the Consultation Paper concerned cases of "double registration". We used this phrase to describe "the situation where the same plot of land is mistakenly registered concurrently under two separate freehold titles".[92] In this chapter, we will refer instead to "multiple registration": the underlying idea is the same, but the new name recognises that the same plot of land could in theory be registered within three or more titles.

13.199 In her consultation response, Amy Goymour raised a concern that boundary disputes[93] may be caught within the definition of multiple registration. If our discussion of multiple registration did apply to boundary disputes, Amy Goymour pointed out that this would mean that such disputes could give rise to an indemnity (which would be a change to the current law).

13.200 We think that the concern raised by Amy Goymour can be avoided by more clearly defining "multiple registration". We intend the phrase to apply where there is an error in the register. The phrase applies where the register is conferring inconsistent entitlements to the same piece of land on more than one registered proprietor. If a multiple registration confers inconsistent entitlements, it must involve more than the mere fact that the same plot of land is described in the register (or shown by title plans in the register) as falling within two separate registered freehold or leasehold estates.

13.201 There are situations in which the register describes or shows the same land as falling within two separate freehold or leasehold estates without there being an error in the register. One example is where the land forms part of a general boundary between the two estates. As we explain in Chapter 15, most boundaries in the register are general boundaries. A general boundary is one in which the location of the boundary is not guaranteed. Therefore, where the same physical parcel of land is described or shown as falling within two titles as part of a general boundary between them, there is no error in the register and the case is not one of multiple registration.

13.202 Another example of where the registration of the same plot of land within two registered titles is not indicative of an error is where one of the registered proprietors has possessory title. Under section 11(7) of the LRA 2002, a possessory title is subject to the adverse rights that subsisted or were capable of arising at the time of registration. Therefore, the possessory title may be subject to the title of the other registered freeholder.

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92 Consultation Paper, para 13.128.

93 We discuss boundary disputes in detail in Ch 15.

13.203 We have given a complete statutory definition of "multiple registration" in our draft Bill (clause 19, which inserts new paragraph 1A into schedule 4). The definition mentions possessory title but does not need to mention general boundaries. Paragraph 1A(1)(b) of the definition refers to land which is "comprised in two registered estates" and when land falls within the scope of the general boundaries rule, it is not genuinely comprised within two different estates.

13.204 Our discussion of multiple (in that case, double) registration in the Consultation Paper focussed on the decision in *Parshall v Hackney*.[94] Land registered within the title to No 29 Milner Street in Chelsea was additionally and mistakenly registered within the title to No 31 when No 31 was registered for the first time in 1980. The land was used by the owner of No 31 as a parking space. Through a subsequent error in 2000, the land was removed from the title to No 29, leaving No 31 as the sole registered proprietor of the disputed land. When the mistake came to light, the owners of No 29 applied for rectification of the register to have the land returned to them. The application succeeded even though the owner of No 31 was a proprietor in possession.

13.205 The owner of No 31 sought to prevent rectification on the basis that she had acquired the land through adverse possession. She argued that the adverse possession took place while the land was doubly registered within the titles of both No 29 and No 31. The adverse possession claim failed. The Court of Appeal held that, while the land was doubly registered, the owners of No 29 did not have a right to oust the owners of No 31 and take possession. Both owners had equal (although inconsistent) rights to the land. As the owners of No 29 did not have a claim for possession, time did not begin to run against them for the purposes of the Limitation Act 1980 and so the possession of the owner of No 31 did not count as being adverse.[95]

13.206 We agree with the Court of Appeal that cases of multiple registration are not to be resolved by the adverse possession provisions under schedule 6 to the LRA 2002. They should be resolved by the provisions governing the alteration of the register under schedule 4.

13.207 In the Consultation Paper, we provisionally proposed that this should be made clear in the text of the Act.[96]

13.208 We noted in the Consultation Paper that *Parshall v Hackney* has been criticised and agreed that the outcome appears unsatisfactory. The owners of No 31 lost land that had been within their title for 30 years to a neighbour who had not made use of the land for 30 years. We suggested that our proposed longstop would reverse the outcome in the case as the mistaken registration of the land within No 31 had happened considerably more than ten years prior to the application for rectification.

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94 *Parshall v Hackney* [2013] EWCA Civ 240, [2013] Ch 568.

95 *Parshall v Hackney* [2013] EWCA Civ 240, [2013] Ch 568 at [88] to [89]. The decision in *Parshall v Hackney* has since been followed and applied by Judge Elizabeth Cooke in *Rashid v Rashid* [2017] UKUT 0332 (TCC).

96 Consultation Paper, para 13.151(1).

13.209 We provisionally proposed that in a case of multiple registration, the registered proprietor who does not benefit from the longstop should have their title removed and should be entitled to an indemnity.[97] In a case with the same facts as *Parshall v Hackney*, once the longstop operated in favour of the owner of No 31 and the owners of No 29 lost the parking space, our proposal would ensure that the owners of No 29 would still be entitled to an indemnity.

### Consultation

13.210 Twenty-seven consultees responded to our two proposals. Twenty-one consultees agreed with both proposals, two disagreed with both and four expressed other views. Most consultees who agreed did so without adding any substantive comment.

13.211 Dr Cooper agreed that the current law is problematic because rectification "becomes effectively non-discretionary" in multiple registration cases, as "the system cannot countenance the retention of two conflicting titles in the register at the same time". As rectification is only available in relation to the mistaken part of the multiple registration, it will be granted against the mistakenly registered proprietor. In some cases, it would be fairer if the proprietor who had not been registered by mistake could be removed from the register. We agree entirely.

13.212 Some consultees (including Martin Wood, who disagreed, and Christopher Jessel and the National Trust, who expressed other views) took issue with our proposals because they disagreed with the introduction of the ten-year longstop. Martin Wood also suggested that it would be preferable to address cases of multiple registration through an application for adverse possession. We disagree. We think that the Court of Appeal in *Parshall v Hackney* was right that, in cases of multiple registration, one proprietor is not in adverse possession against the other proprietor because they both have equally good title to the land.

13.213 Martin Wood pointed out in his consultation response that there is no express power under schedule 4 for the court or the registrar to remove land from a title if it has not been registered by mistake. We think that Martin Wood has raised an important point which merits careful examination.

13.214 Consider a variation of the facts in *Parshall v Hackney* where the multiple registration was not removed in 2000 but had remained in the register up until the application by the owners of No 29 for rectification. At this point, there would have been two registered owners of the parking space. Suppose that the interests of justice strongly favoured leaving the parking space within the title to No 31, so the court was not minded to grant rectification against the owner of No 31. As Martin Wood suggested, the registration of the parking space within the title to No 31 was a mistake; the registrar and the court have the power to remove the parking space from that title for the purpose of correcting the mistake. But the registration of the parking space within the title to No 29 was not a mistake. Do the registrar and the court have the power to rectify the title to No 29?

13.215 We recognise that it is arguable that the court and the registrar do have the power to remove the parking space from the title to No 29. It could be argued that the presence

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[97] Consultation Paper, para 13.151(2).

of a multiple registration in the register is itself a mistake and that the registrar and the court have the power to correct that mistake by altering the title to No 29.

13.216 Conversely, however, it seems to us to be arguable that the registrar and the court lack this power. The multiple registration is comprised of two components: the mistaken registration of the parking space within No 31 and the correct registration of the parking space within No 29. It is not clear to us that addressing the multiple registration by removing its correctly-registered component and leaving its mistaken component in the register would count as *the correction* of a mistake. On one view, this would make the mistake worse by depriving the owners of No 29 of their land.

13.217 The court has not yet determined which of the two arguments sketched in the previous paragraph is correct. The scope of the registrar's and the court's power to address multiple registrations is consequently unclear. This uncertainty could present a problem. Even though the court has decided that the parking space should remain with the owner of No 31, it might feel compelled to grant rectification against that owner: notwithstanding the interests of justice, the only alternative would be to leave a serious error in the register.

13.218 To alleviate this concern, our draft Bill includes a provision which would clarify the powers of the registrar and the court to remove the parking space from the title to No 29.

13.219 HM Land Registry agreed that cases of multiple registration should be resolved through an application under schedule 4 and not schedule 6 to the LRA 2002. However, as discussed earlier in this chapter, it did not agree with the introduction of a ten-year longstop. We have already addressed its objections about the longstop. However, HM Land Registry also criticised the approach of the Court of Appeal in *Parshall v Hackney*. It pointed out that, but for the mistake in registration, the owner of No 31 would have had a claim to adverse possession against the owners of No 29, but that this factor was given no weight by the court in deciding whether to rectify the register. HM Land Registry pointed out that schedule 4 was designed to protect a proprietor in possession (such as the owner of No 31), but that the court nullified this protection by holding (without sufficient reason) that it would be unjust not to rectify the register. HM Land Registry pointed out that, although the ten-year longstop would have protected the owner of No 31, it would not assist a proprietor in possession where the ten-year longstop has not yet expired.

13.220 The issue raised by HM Land Registry is not specific to cases of multiple registration, but concerns the interpretation of when it is unjust not to rectify. We have already discussed (in paragraphs 13.49 and 13.50 above) what we consider to be the correct interpretation of the "unjust not to rectify" test.

Recommendation

**Recommendation 28.**

13.221 We recommend the following:

(1) Cases of multiple registration should be resolved through the application of our scheme for rectification. Therefore, in a case of multiple registration, a claim to adverse possession should not be possible.

(2) Where as a result of the operation of the longstop a multiple registration remains in the register, the party who does not benefit from the longstop should have their title amended to remove the multiple registration. The party whose title is amended in such circumstances should be entitled to an indemnity.

13.222 Our recommendation is implemented by clause 19 and by parts of clause 20, principally by the introduction of new paragraph 3E into schedule 4.

13.223 Clause 19 introduces a new paragraph 1A into schedule 4. Paragraph 1A incorporates a statutory definition of multiple registration. We also recommend amending the grounds set out in paragraph 2 on which the register can be altered. Clause 19 adds a new sub-paragraph (1A) to paragraph 2, which provides that the registrar's and the court's powers to alter the register include a power to remove a multiple registration by removing a registered title, or removing land from a registered title, which was not registered by mistake. We refer to this power as the power to alter "the correctly-registered title".

13.224 New sub-paragraph (1A) is neutral as to whether altering the correctly-registered title would nevertheless count as the correction of the mistake simply by virtue of the fact that it removes a multiple registration. If the registrar and the court already have the power to resolve multiple registrations in this way through their existing power to correct mistakes, then the effect of sub-paragraph (1A) is merely clarificatory. If the registrar and the court do not currently have the power to alter correctly-registered titles, then sub-paragraph (1A) gives them this power.

13.225 Where an application to remove a multiple registration would remove the mistakenly-registered proprietor from the register, the application is governed by our general scheme for rectification in paragraphs 3B and 3D, added by clause 20. (Paragraph 3C, which concerns former proprietors in possession, is inapplicable in a case of multiple registration.) Where the mistakenly-registered proprietor is in possession of the land, he or she will be protected under paragraph 3B (which provides that rectification may not be granted unless it would be unjust not to grant it and which applies the ten-year longstop).

13.226 If neither proprietor is in possession of the multiply-registered land, paragraph 3D applies. The mistakenly-registered proprietor should generally be removed from the register unless there are exceptional circumstances which justify not doing so. The ten-year longstop does not apply in such cases (see paragraph 3D(5)); the register contains

a fundamental mistake and the mistake should not become immune to correction after ten years.

13.227 Paragraph 3E (also introduced by clause 20) applies where the court or the registrar is considering whether to remove a multiple registration by altering or removing the correctly-registered title. Paragraph 3E provides the same protection to a correctly-registered proprietor in possession as paragraph 3B provides to a mistakenly-registered proprietor in possession. If the correctly-registered proprietor is not in possession, paragraph 3E makes no provision for how the registrar or the court should exercise the discretion to alter the register. The registrar or the court would consider whether multiple registration could and should be removed by granting rectification against the mistakenly-registered proprietor and the need to remove multiple registrations in one way or another.

13.228 Finally, clause 19 adds sub-paragraph (2A) into paragraph 11 of schedule 6, which prevents an application based on adverse possession from being made in cases of multiple registration.

## PART 4: RECTIFICATION AND FIRST REGISTRATION

13.229 Parts 2 and 3 of this chapter have set out the entirety of our new scheme for rectification. In the final part of this chapter, we address two ways in which the provisions of schedule 4 to the LRA 2002 could give rise to undesirable consequences in specific cases involving first registration. We consider whether an indemnity should be available to the proprietor of an estate if the register is rectified to give effect to an interest that ceased to affect the estate on first registration. We then consider whether it is possible to circumvent the LRA 2002's sunset provision, designed to ensure that various kinds of rights must be recorded in the register or risk being lost, by applying to rectify the register. In order to introduce our discussion of these issues, we start by examining the effect of first registration of title.

### The effect of first registration

13.230 First registration does not itself involve the disposition of an estate.[98] First registration may be voluntary: a proprietor may choose to bring his or her unregistered estate onto the register even though there has been no change in ownership. Moreover, even where first registration is compulsorily triggered by the disposition of an unregistered estate, the disposition is completed (and has legal effect) before first registration takes place.

13.231 Whether or not first registration has been triggered by the disposition of an unregistered estate, section 11(4) and (5) of the LRA 2002 provide that the first registration of a freehold estate has the following effect. (Section 12(4) and (5) makes similar provision for the first registration of a leasehold estate.)

> (4) The estate is vested in the proprietor subject only to the following interests affecting the estate at the time of registration —

[98] Contrast the registrable disposition of an estate that has already been registered, which does not take effect at law until the disposition is registered (LRA 2002, s 27).

(a) interests which are the subject of an entry in the register in relation to the estate,

(b) unregistered interests which fall within any of the paragraphs of Schedule 1, and

(c) interests acquired under the Limitation Act 1980 of which the proprietor has notice.

(5) If the proprietor is not entitled to the estate for his or her own benefit, or not entitled solely for his or her own benefit, then, as between the proprietor and the persons beneficially entitled to the estate, the estate is vested in the proprietor subject to such of their interests as he or she has notice of.

13.232 We suggested in our Consultation Paper that "first registration is not intended to affect priorities".[99] The same view was expressed by Dr Harpum and Janet Bignell QC in *Registered Land: Law and Practice under the Land Registration Act 2002*:

> As a general principle and, as a result of the LRA 2002, subject to an important exception, first registration does not affect priorities but merely reflects priorities that have already been determined. First registration may be voluntary so that there may have been no disposition to trigger registration. In any event, even where there is some disposition, that disposition precedes registration and any issue of competing priorities will be resolved at the time of that disposition. That resolution will depend upon the principles of unregistered conveyancing that necessarily apply to that disposition.[100]

13.233 Nevertheless, we recognised in the Consultation Paper that first registration may in fact affect priorities.[101] The wording of section 11(4) (specifically the phrase "subject only"), in our view, clearly indicates that, following first registration, an estate will no longer be affected by interests which do not fall within section 11(4)(a) to (c) or (5).[102] There is then at least a possibility that an interest may cease to bind an estate by reason of first registration. Indeed, if section 11(4) could not affect priorities, subsection (4)(b) (which makes provision for overriding interests) would be redundant. Subsection (5) (which ensures that section 11 does not lead to trust property being vested in a newly-registered trustee free from the interests of the beneficiaries) would be likewise redundant.

13.234 Furthermore, in some specific cases, first registration *was* intended to affect priorities. Dr Harpum and Janet Bignell mention an "important exception", namely section 11(4)(c). We discuss this provision in Chapter 17;[103] section 11(4)(c) was intended to

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99 Consultation Paper, para 13.172.

100 C Harpum and J Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002* (1st ed 2004) para 4.1. See also *Megarry & Wade*, para 7-133.

101 Consultation Paper, para 13.172.

102 The same view is taken by the authors of *Ruoff & Roper* (see paras 9.018, 10.003 and 36.002) and S Watterson and A Goymour, "A Tale of Three Promises: (2) The Priority Promise", in A Goymour, S Watterson and M Dixon (eds), *New Perspectives on Land Registration* (2018) p 319.

103 See Ch 17, paras 17.68 to 17.72 and 17.82 to 17.85 below.

allow a first registered proprietor to take free, in particular circumstances, of an interest acquired through adverse possession. Another example concerns overriding interests. Fewer interests qualify as overriding on first registration under the LRA 2002 than qualified as overriding under the LRA 1925. As discussed below, the LRA 2002 made provision for a number of interests to cease to be overriding on 13 October 2013. These changes were intended to ensure that such interests would be noted in the register during first registration or otherwise would cease to bind.

13.235 We nonetheless remain of the view that, outside a few specific exceptions (including adverse possession and former overriding interests), section 11 was not supposed to have an impact on priorities. The scheme for first registration in the LRR 2003 is designed to ensure that interests which bind an estate pre-registration will be entered in the register during first registration and so will continue to bind pursuant to section 11(4)(a). An applicant for first registration is under a duty to reveal interests in land which bind the estate.[104] Rule 35(1) of the LRR 2003 then requires the registrar "to enter a notice in the register of the burden of any interest which appears from his examination of the title to affect the registered estate". The effect of these provisions has been described as follows by Dr Stephen Watterson and Amy Goymour.

> The onus is properly on HM Land Registry to investigate, identify and appropriately protect any pre-existing interest … that affects the estate, to ensure that the interest's priority is, so far as possible, *transposed* and *preserved* on first registration.[105]

13.236 The LRA 2002 and the LRR 2003 do not, however, make detailed provision for what should happen when mistakes are made during the process of first registration. In the remainder of this chapter, we examine two different problems that may arise when something goes wrong. The first problem concerns the general issue of what should happen when an interest is missed off the register during first registration. As mentioned, we do not think that section 11 was intended generally to affect priorities. If the register is rectified, should the first registered proprietor then be entitled to an indemnity? The second problem concerns interests which ceased to override on 13 October 2013. We do think that section 11 was intended to affect priorities in these cases. Should rectification then be available? We make recommendations for reform designed to resolve these problems.

### A first registered proprietor's entitlement to an indemnity

13.237 In figure 24, we provide an illustration of first registration where something goes wrong.

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104 The disclosure should be made in form FR1, under rr 23(1) and 28(1) of the LRR 2003.

105 S Watterson and A Goymour, "A Tale of Three Promises: (2) The Priority Promise", in A Goymour, S Watterson and M Dixon (eds), *New Perspectives on Land Registration* (2018) p 325.

Figure 24: the AXB scenario

A is the proprietor of a freehold estate, which is unregistered land. X has the benefit of a restrictive covenant over the estate, which has been registered as a land charge. A sells the freehold to B triggering compulsory first registration. Because a land charge has been registered, B takes the freehold subject to X's restrictive covenant.[106]

B applies for first registration. Despite the registration of the land charge, it is overlooked and B is registered as proprietor without noting X's restrictive covenant in the register.

13.238 As X's restrictive covenant is not an overriding interest under schedule 1[107] or an interest acquired under the Limitation Act 1980, it will cease to affect B's estate following first registration as a result of section 11(4).

13.239 In the AXB scenario, the registrar has not properly investigated B's title in line with rule 35 of the LRR 2003. Yet even if the registrar had acted with all due diligence but the existence of the restrictive covenant did not come to light, it would remain the case that the registrar *would* have entered a notice in relation to X's restrictive covenant if the registrar had known of it. It appears, therefore, that the failure to register a notice of X's restrictive covenant was a mistake. X may then apply for the register to be altered in order to correct the mistake so that B's estate becomes subject to the restrictive covenant.

13.240 However, if the application succeeds, it appears that B may be entitled to an indemnity (assuming that B has not been guilty of fraud or lack of proper care). B was registered with title to the estate free from X's interest. B's unencumbered title is seemingly prejudiced if it is made subject to X's interest.

13.241 We suggested in the Consultation Paper that an indemnity would be a "windfall" for B.[108] B was bound by the restrictive covenant following the transfer from A. B has taken free of the restrictive covenant not because there was a disposition of the property but because of the mere fact of registration. As explained above, our view is that the aim of sections 11 and 12 of the LRA 2002 is not to enable a first registered proprietor to take free of interests that would otherwise have bound his or her land.

13.242 We therefore provisionally proposed that if a first registered proprietor was bound by an interest through the operation of priority rules in unregistered land, but obtains priority over the interest on first registration, an indemnity should not be available to him or her

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106 Law of Property Act 1925, s 198; Land Charges Act 1972, s 4(6).

107 In this case, X is not in actual occupation of the land, so cannot benefit from para 2 of sch 1 to the LRA 2002.

108 Consultation Paper, para 13.137.

if the register is rectified so that the interest once again becomes binding on B's estate.[109]

### Consultation

13.243 Our proposal was supported by 24 of the 28 consultees who responded on the issue. The majority of those consultees agreed without further comment, but a number specifically endorsed aspects of our reasoning in the Consultation Paper. The Property Litigation Association and the Society of Licensed Conveyancers agreed that an indemnity would be a windfall for the first registered proprietor, or B in the scenario in figure 24. Christopher Jessel emphasised that with voluntary first registration, there has been no transfer of the estate and "an owner should not be able to become free of an incumbrance simply by being registered".

13.244 Pinsent Masons LLP, who supported our proposal, suggested that it should be extended so that no indemnity is available if the relevant estate has been given as a gift by B to a third party. We agree and our draft Bill gives effect to this suggestion.

13.245 Three consultees disagreed with our proposal: Dr Harpum, Dr Cooper and the Society of Legal Scholars.

13.246 Dr Harpum suggested that the proposal is unnecessary as the LRA 2002 already accomplishes what we want to achieve. Dr Harpum wrote that, as B "was subject to the restrictive covenant when he or she purchased the freehold, he or she is not prejudicially affected by the alteration of the register which simply restores the position to what it was when he or she first acquired it". We do not, however, agree with Dr Harpum's interpretation of "prejudice". It is well established that a registered proprietor may be prejudiced if an entitlement conferred by the LRA 2002 is taken away. In the original AB scenario in figure 19, B only becomes the legal owner of A's estate following the fraudulent transfer because of the effect of section 58. But it is uncontroversial that B's title would be prejudiced if the estate were to be restored to A. Similarly, in the AXB scenario in figure 24, B's title is unencumbered by X's interest following registration. It seems to us that the court would be likely to find that altering the register so that X's interest once again binds B's estate would prejudicially affect B's title and that B then suffers the loss of an unencumbered estate.[110] We note that Dr Harpum does not disagree with us that, as a matter of policy, the first registered proprietor should not be entitled to an indemnity.

13.247 Dr Cooper and the Society of Legal Scholars disagreed with our proposal on a number of grounds. First, they pointed out that, as rectification is discretionary, X's application to alter the register might be refused so that B continues to enjoy the unencumbered estate. Indeed, the unavailability of an indemnity is sometimes used by the court as a ground for granting or refusing rectification. If rectification were to be refused, B would still receive a substantial windfall. Our proposal did not address this eventuality.

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109 Consultation Paper, para 13.181.

110 See para 13.174 of the Consultation Paper where we highlighted the same difficulty with another argument that could be advanced for denying B an entitlement to an indemnity under the current law.

13.248 As explained below, however, we have decided to implement our proposal by providing that B is not prejudicially affected by altering the register to give effect to X's restrictive covenant. As such, the alteration of the register would not be rectification. Where a mistake can be corrected by an alteration that does not amount to rectification, the alteration should generally take place.[111] Moreover, even if we had not taken this approach, we do not believe that B is likely to attract the court's or the registrar's sympathy; B is simply being made subject (once again) to an interest that was binding immediately before first registration.

13.249 Secondly, Dr Cooper and the Society of Legal Scholars suggested that an effect of our proposal would be to encourage the first registered proprietor to sell the property as soon as possible. The first registered proprietor would then be left to enjoy the full proceeds of the sale.

13.250 We do not think that our recommendation would have this effect for the following reasons.

(1) There would not be a strong incentive to sell in a case in which the first registered proprietor has acquired the property for his or her own sake (for example, as a home) and not as an investment.

(2) Even in investment cases, the first registered proprietor would remain personally bound by interests (such as options to purchase) which he or she had personally granted.

(3) As Dr Cooper and the Society of Legal Scholars recognised, where the first registered proprietor contributed to the mistake in the register through fraud or lack of proper care, HM Land Registry will be entitled to recover from him or her any indemnity paid to a successor in title.

(4) Following first registration, the beneficiary of the omitted interest can protect his or her position by applying for alteration of the register. This application will be entered on the day list when it is received by HM Land Registry, and will be actioned before any later application to register a sale of the property is completed.

13.251 Thirdly Dr Cooper and the Society of Legal Scholars pointed out that our proposal limits the effect of the priority promise in section 11. Additionally, Dr Cooper argued that "the land registration system currently protects those who rely on the register for the purpose of checking their own title after they have become registered". He suggested that our proposal undermines this protection.

13.252 We are not convinced by these criticisms. We believe that section 11 was only supposed to affect priorities in limited circumstances. In the AXB scenario, X's restrictive covenant has ceased to bind merely because something has gone wrong in the process of first registration. Moreover, while we agree with Dr Cooper that a first registered proprietor may examine the register to discover what interests his or her estate is subject to, the first registered proprietor does not rely on the register in the way that a subsequent purchaser of the estate would rely on the register. The first registered

[111] See LRR 2003, r 126.

proprietor has not relied on the register in order to discover what he or she is buying and how much should be paid. We do not think that the first registered proprietor's after-the-event reliance should be given the same level of protection.

Recommendation

**Recommendation 29.**

13.253 We recommend that where a first registered proprietor was bound by an interest through the operation of priority rules in unregistered land, but obtains priority over the interest on registration as a result of section 11, no indemnity should be payable on rectification of the register to include the interest at a time when the estate is still vested in the first registered proprietor.

13.254 Our recommendation is implemented by clause 24, which inserts a new paragraph 4D into schedule 4. Rather than making direct provision for when a first registered proprietor such as B will be entitled to an indemnity, the new paragraph provides that B's title is not prejudicially affected by being made subject once again to X's interest. We think that this is more in keeping with the intention behind section 11, which was not to confer a benefit upon B. As B's title is not prejudicially affected by the alteration, no indemnity is payable.

13.255 New paragraph 4D(2) extends the reach of the new provision to all of B's successors in title except for those who derive title under a registrable disposition for valuable consideration. Such persons are entitled to rely upon the priority promise in section 29.

13.256 Although the register should generally be altered to give effect to the interest that was binding pre-registration, alteration of the register is not guaranteed. If alteration is refused, the beneficiary of the interest who has lost out because of the mistake in the register should be entitled to an indemnity. New paragraph 4D(3) ensures that an indemnity will be available.

### Former overriding interests

13.257 Finally, we considered in the Consultation Paper a specific point that arises on first registration of title in relation to interests that ceased to be overriding on 13 October 2013.[112]

13.258 One of the purposes of the LRA 2002 was to reduce the number of overriding interests – interests that bind registered proprietors under section 29 even though they do not appear in the register. Under the LRA 2002's "sunset" provision, certain overriding interests (including manorial rights) lost that status on 13 October 2013.[113] After that

[112] Consultation Paper, paras 13.182 to 13.187.

[113] By virtue of LRA 2002, s 117(1); Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 (SI 2003 No 2431).

date, if a former overriding interest is not noted in the register, it will be lost on first registration or on a disposition for value of the affected estate.

13.259 As we discussed at the beginning of Part 4 of this chapter, unregistered former overriding interests are supposed to be lost on first registration or on a registered disposition; the purpose of the sunset provision was to bring them onto the register or ensure that they cease to bind.[114] These interests are one of a limited number of examples where section 11 was supposed to have an effect on priorities. But the availability of rectification under schedule 4 may undermine this goal. Consider the example set out below in figure 25.

Figure 25: the AX scenario

X has the benefit of a former overriding interest (for example, a chancel repair liability) affecting A's unregistered freehold estate. A is unaware of the chancel repair liability. X has not registered a caution against first registration. A applies for first registration (on or after 13 October 2013) and, because the registrar has not been informed about the existence of the chancel repair liability, it is not entered in the register. A becomes the registered proprietor of the freehold free from the liability.

13.260 It appears that if the registrar had known of the chancel repair liability, he or she would have been obliged to enter it in the register under rule 35 of the LRR 2003. Rule 35 obliges the registrar "to enter a notice in the register of the burden of any interest which appears from his examination of the title to affect the registered estate" and the chancel repair liability did affect A's unregistered estate. If the registrar would have acted differently if he or she had known the true and full facts, it is arguable that the omission of the chancel repair liability from the register was a mistake. If this argument is correct, X could apply for the register to be altered to give effect to the chancel repair liability. If the application failed, X would be entitled to an indemnity. The policy underlying the sunset clause is thereby undermined.

13.261 In the Consultation Paper, we provisionally proposed to prevent alteration or rectification of the register in respect of interests that ceased to be overriding on 13 October 2013 where they have been lost on first registration or a registered disposition taking place after that date. We proposed that there should be an exception where the interest has been lost because HM Land Registry failed to enter a notice that should have been entered under rule 35 or overlooked a caution against registration.[115]

### Consultation

13.262 Twenty-two consultees, including HM Land Registry, the Bar Council, the Law Society and Dr Harpum, agreed with our provisional proposal. Two disagreed and five

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114 See C Harpum and J Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002* (1st ed 2004) para 4.18.

115 Consultation Paper, para 13.188.

expressed other views. Those who agreed relied upon the reasoning set out in the Consultation Paper.

13.263 Martin Wood and Adrian Broomfield disagreed with the proposal. Adrian Broomfield pointed out that a party may be unaware that they have the benefit of a former overriding interest and so may take no steps to protect it. We do not think this point undermines our proposal given that the intention behind the sunset provision was that former overriding interests must be registered or risk being lost. Martin Wood said that rectification should be possible where there is a mistake. We agree that this should be the case where there is an error specifically by HM Land Registry so that the priority of the interest was lost even though the beneficiary of the former overriding interest took appropriate steps to protect his or her interest. (We make provision for this in the draft Bill.) We do not think that rectification should be available where the interest is not registered because the interest-holder has failed to take steps to protect it.

13.264 Some of those who expressed other views (Louis Farrington and Michael Hall) asked us to clarify the situation in respect of chancel repair liability. Chancel repair liability is an interest that ceased to be overriding on 13 October 2013, but ongoing doubts as to the nature of the liability have given rise to a concern that it may continue to be enforceable even if not registered. This issue raises matters beyond the land registration project, and is the subject of a proposed Thirteenth Programme project.[116]

13.265 Christopher Jessel, who expressed other views, suggested that our proposal should not apply on a voluntary first registration or where the first registered proprietor was or ought to have been aware of the existence of the right. We do not, however, agree with the basis of Christopher Jessel's suggestion, which would involve investigation of the first registered proprietor's knowledge and motives, rather than of the objective steps that had been taken by the interest-holder to protect his or her interest.

Recommendation

**Recommendation 30.**

13.266 We recommend that alteration or rectification of the register should not be possible in respect of an interest that ceased to be overriding on 13 October 2013, where first registration of the affected estate takes place on or after that date. An exception should be made, however, where on first registration HM Land Registry omitted a notice in relation to that interest that should have been entered under rule 35 of the LRR 2003, or overlooked a caution against first registration.

13.267 Our recommendation does not address transfers of registered estates for value. We think that section 29 of the LRA 2002 already does enough to ensure that former overriding interests will be lost on a registered disposition if not entered in the register. The loss of an unregistered interest would not be a mistake as the registrar has no duty to enter unregistered interests in the register in these circumstances even if they were

[116] Thirteenth Programme of Law Reform (2017) Law Com No 377, paras 2.30 to 2.31. See also Ch 2, paras 2.12 to 2.14 and Ch 8, paras 8.64 to 8.67 above.

brought to his or her attention. By contrast, such a duty does arise under rule 35 on first registration.

13.268 Our recommendation is implemented by clause 23, which inserts paragraph 4C into schedule 4.

13.269 New paragraph 4C provides that the register may not be altered using the powers in paragraph 2 so as to give effect to a former overriding interest that has been lost on first registration. It further provides (pursuant to paragraph 4C(3)) that the holder of such an interest will not be entitled to an indemnity. As it was not registered, the former overriding interest is supposed to be lost.

13.270 An exception is included, however, where the former overriding interest was not registered because of a breach of duty by HM Land Registry. On first registration, the registrar should enter a notice of relevant interests revealed in the title deeds, the cautions register, or the register of land charges, or that are otherwise brought to his or her attention. If the registrar fails to do this, he or she will, in our view, have breached the duty under rule 35 of the LRR 2003. The failure to enter a notice of the former overriding interest would be a mistake. In such circumstances, the holder of a former overriding interest should and would be able to have the register altered so that the first registered proprietor is again bound by the interest.

# Chapter 14: Indemnity

## INTRODUCTION

14.1 In this chapter we consider the indemnity scheme contained in the LRA 2002. In Chapter 13 we have seen that the register operates as a guarantee of title, but the guarantee is not absolute. The register can be changed, for example, when it is found to contain a mistake. The twin ideas that a registered title is guaranteed, but the register can be changed, are reconciled through entitlement to an indemnity. A person who loses land through an error in the register is, in certain circumstances, entitled to be compensated in money. The availability of an indemnity was described by Sir Theodore Ruoff as the "insurance principle". Provision of indemnity means that HM Land Registry stands as insurer of first resort for losses arising from registration. The provision of a state insurance for such losses is a fundamental principle of land registration: the state requires registration for legal title to be held, and therefore the state compensates those who suffer loss as a result of the operation of the register.[1]

14.2 Paragraph 1 of schedule 8 to the LRA 2002 sets out eight grounds on which an indemnity is payable:

> (1) A person is entitled to be indemnified if he suffers loss by reason of—
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> (a) rectification of the register,
>
> (b) a mistake whose correction would involve rectification of the register,
>
> (c) a mistake in an official search,
>
> (d) a mistake in an official copy,
>
> (e) a mistake in a document kept by the registrar which is not an original and is referred to in the register,
>
> (f) the loss or destruction of a document lodged at the registry for inspection or safe custody,
>
> (g) a mistake in the cautions register, or
>
> (h) failure by the registrar to perform his duty under section 50.
>
> (2) ……
>
> (3) No indemnity under sub-paragraph 1(b) is payable until a decision has been made about whether to alter the register for the purpose of correcting the

[1] In this respect, provision of an indemnity is considered to play a constitutional function: for discussion of this point, see N Hopkins, "Reforming the Indemnity Scheme", in A Goymour, S Watterson and M Dixon (eds), *New Perspectives on Land Registration* (2018) pp 210 to 212.

mistake; and the loss suffered by reason of the mistake is to be determined in the light of that decision.

14.3 In our Consultation Paper we reviewed the operation of the indemnity scheme, and addressed specific issues that had arisen with respect to limitation of actions and valuation. All of these grounds on which an indemnity is payable are relevant to our consideration of limitation and valuation of indemnity claims, which are covered at the end of this chapter. However, our review of the operation of the indemnity scheme was confined to two of these grounds: losses suffered by reason of

(1) a rectification of the register (schedule 8, paragraph 1(a)); and

(2) a mistake whose correction would involve rectification of the register (schedule 8, paragraph 1(b)).

14.4 These two grounds are two sides of the same coin and are the grounds on which an indemnity is claimed (amongst other situations) following a fraudulent transfer of title, such as in the AB and the ABC scenarios that we have discussed in Chapter 13. For convenience, we refer to these two grounds collectively in this Report as claims to indemnity arising from rectification of the register or from a rectification decision. Their operation can be illustrated by reference to the AB scenario in figure 26 below.

Figure 26: the AB scenario

A is the victim of registered title fraud. A's property is transferred by a third party to B (who is innocent of the fraud). B's registration is a "mistake" for the purposes of the LRA 2002, as B would not have been registered if HM Land Registry had known of the fraud.[2] When the fraud comes to light, then one of two outcomes is possible: either the register will be rectified to restore A's title, leaving B to claim an indemnity under schedule 8, paragraph 1(a); or B will retain the title and A will be left to claim an indemnity under schedule 8, paragraph 1(b).

14.5 As we have explained in paragraph 14.1 above, under the indemnity scheme contained in the LRA 2002, HM Land Registry stands as an insurer of first resort. In the above example, HM Land Registry's position as insurer means that if A's title is restored, then B can claim an indemnity directly against HM Land Registry. B does not have to attempt to recover his or her losses from the fraudster or from any other party who may be at fault; for example, a conveyancer who failed to undertake reasonable identity checks that would have uncovered the fraud. HM Land Registry, having paid the indemnity, is then given rights of recourse to enable it to seek to recover its losses against the party who is at fault. We emphasised in the Consultation Paper that the "basic principle" that HM Land Registry stands as an insurer of first resort is not called into question by our review of indemnity.[3]

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2 See our discussion of "mistake" in Ch 13, paras 13.14 to 13.19 above.

3 Consultation Paper, para 14.11.

14.6 It is important to note that our review is confined to the indemnity scheme contained in the LRA 2002. The scheme applies only in respect of titles that have been registered. The time of registration is the point at which the guarantee of title is invoked, and the risks of any fault in the transaction pass from the parties to HM Land Registry as insurer. Our review does not extend to considering the consequences of fraud where the fraud is detected before registration takes place. In such circumstances the losses lie with the parties. In our example above, if the fraud was discovered before B was registered, then the loss would lie with B as the victim of the fraud who has paid for land pursuant to a fraudulent transaction. In such a case, B may look to potential liability on the part of his or her conveyancer under the general law. The circumstances in which conveyancers (and other professionals) may be liable to B are contentious, and the subject of recent litigation.[4] The basis of liability in those cases, however, lies outside the LRA 2002.

14.7 Our review of the indemnity scheme was prompted by a question as to whether the scheme contained in the LRA 2002 remains appropriate for the context in which it is now being invoked and the factual situations in which claims are now being made.[5] The scheme was not reviewed as part of the work that led to the LRA 2002, and was not developed with registered title fraud in mind; fraud has now become the primary basis on which indemnity payments are made.[6] Additionally, indemnity schemes in a number of jurisdictions (including Scotland) have been reviewed and revised since the LRA 2002 was enacted.

14.8 One of the purposes of our review of the LRA 2002 was to investigate whether there were changes that could be made to the system that would promote a reduction of the incidence of registered title fraud. While it is right that HM Land Registry bears the risk of fraud, HM Land Registry is not best placed to detect and prevent fraudulent dispositions before they take place; it is dependent on checks undertaken by the parties' conveyancers. Further, the cost of registered title fraud is not just a matter of concern as between HM Land Registry and those involved in a particular transaction. Where HM Land Registry bears the cost through payment of an indemnity, the cost is ultimately borne by all of its customers through payment of fees. Any reform that could reduce the type of behaviour that allows preventable fraud to take place would therefore benefit all users of the registration system, not only the potential victims of fraud. As we explained in our Consultation Paper, while the vast majority of conveyancers act professionally, the fact that the risk lies with HM Land Registry means that conveyancers may not have an incentive to develop and then follow best practice.[7]

14.9 Further, the current regime of identity checks creates uncertainty for conveyancers as to what they need to do to ensure that they are considered to have acted reasonably.[8] That is because there is no single source of rules that tells conveyancers what steps they are required to take to verify identity. Instead, conveyancers must look to regulatory rules and guidance, which may differ according, for example, to whether the

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4 See *P&P Property Ltd v Owen and White & Catlin LLP* [2018] EWCA Civ 1082.

5 Consultation Paper, para 14.15.

6 See the Table provided in the Consultation Paper, para 14.34.

7 Consultation Paper, para 14.17.

8 Consultation Paper, paras 14.87 to 14.90.

conveyancer is a solicitor or a licensed conveyancer, and whether the conveyancer is acting on behalf of a lender in a residential conveyancing transaction.[9] Even where regulatory rules and guidance have been followed, there is no guarantee to the conveyancer that he or she will be held to have acted reasonably, should it transpire that the transaction was fraudulent. The Law Society and HM Land Registry's joint note on property and title fraud contains the warning that "Even where you have followed usual professional practice, a court may hold that the steps taken exposed someone to a foreseeable and avoidable risk and amounted to a breach of duty of care".[10]

14.10 At the time that we prepared our Consultation Paper, the Government had announced that it intended to consult on moving HM Land Registry operations into the private sector. We were aware that our review of the indemnity scheme was likely to be contentious as a result of that possible change. Practitioners were concerned, in particular, about any reform that they perceived as being intended to shift the costs of fraud from HM Land Registry to themselves in order to reduce the burden on HM Land Registry in the context of a privatisation. The publication of the Government's consultation paper[11] a week before the publication of our Consultation Paper heightened that concern and the potential impact of privatisation pervaded a number of the consultation responses we received on the issue of indemnity.

14.11 As a result of the sensitivities surrounding the topic, we did not propose a provisional policy in the Consultation Paper for reform of indemnity, save in relation to two technical issues (limitations and the valuation of claims). Instead, we asked a series of open questions around different options for reform. Consultees' responses have enabled us to develop a policy which we believe achieves our objective in reviewing the indemnity scheme of reducing the incidence of registered title fraud. At the same time, we think that our recommendations address the legitimate concerns of practitioners about the impact on them of reforms to the indemnity scheme. We consider that our recommendations will achieve two aims. First, they will ensure that identity checks that will need to be undertaken in respect of dealings with registered land are fit for purpose in enabling fraud to be identified. Secondly, they will give conveyancers certainty – not provided under the current law – that if they take specific steps to verify their clients' identity, then they will not be held liable to HM Land Registry if, notwithstanding, identify fraud has taken place.

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9 Most conveyancers will be subject to the Customer Due Diligence requirements in the Money Laundering Regulations (SI 2007 No 2157). Conveyancers acting on behalf of lenders in residential conveyancing transactions are also subject to the guidance contained in the Council of Mortgage Lenders' Handbook for England and Wales, complying with the guidance outlined for solicitors or licensed conveyancers, as appropriate. All solicitors who carry out work involving land registration applications are also subject to the Law Society's guidance. The Council for Licensed Conveyancers also provides guidance to those whom it has licensed. See Consultation Paper, para 14.88.

10 Joint Law Society and Land Registry note, Property and Title Fraud (2017) para 3.1, http://www.lawsociety.org.uk/policy-campaigns/articles/property-and-title-fraud-advice-note/ (last visited 4 July 2018).

11 Department for Business, Innovation and Skills, *Consultation on Moving Land Registry Operations into the Private Sector* (March 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510987/BIS-16-165-consultation-on-moving-land-registry-operations-to-the-private-sector.pdf (last visited 4 July 2018).

14.12 This chapter is structured as follows. First, we briefly consider two possible options for reform discussed in our Consultation Paper which, on the basis of consultation responses, we have decided not to pursue: first placing a cap on the indemnity that can be claimed; secondly limiting the circumstances in which mortgagees can claim indemnity. We then consider responses to other consultation questions relating to duties of care and identity checks, which provide the basis for our recommendations for reform.

14.13 In summary, we recommend the following.

(1) That a statutory duty of care be introduced that requires conveyancers and certain other professionals to take reasonable care to verify the identity of the parties on whose behalf they are acting.

(2) That the steps required to verify identity should be provided by HM Land Registry in directions following consultation.

(3) That the duty of care will supplement HM Land Registry's existing rights of recourse. As such, a breach of the statutory duty will not affect the ability of a person to claim an indemnity from HM Land Registry as insurer of first resort.[12]

14.14 Finally, we address the issues of limitation and the valuation of claims, and make recommendations for reform reflecting the provisional proposals contained in our Consultation Paper.

## PLACING A CAP ON THE INDEMNITY THAT CAN BE CLAIMED

14.15 The first option for reform that we considered in our Consultation Paper was the possibility of a cap being placed on the amount that could be recovered as an indemnity in claims arising from rectification of the register.[13] The cap would protect HM Land Registry from the risk of exceptional claims, but would not apply where the claim arises as a result of fault on the part of HM Land Registry (for example, where an entry in the register is accidentally deleted). We anticipated that parties involved in property transactions with a value above the level of the cap would look to private insurance to cover the risk. We explained, however, in the Consultation Paper that we were not convinced that a cap should be imposed. A cap would represent a significant change in the policy that HM Land Registry guarantees losses arising from registration. Further, however high the cap was set, there was a risk of it being lowered over time. Nevertheless, we invited views both as to whether there should be a cap and, if so, the level at which it should be set.[14]

14.16 The imposition of a cap was widely opposed by the 26 consultees who responded to this question. Opposition was reflected in the views of a wide range of consultees,

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12 However, the amount of indemnity payable can be reduced on the basis that the fraud was caused by the person's own lack of proper care, which may include the lack of proper care of the person's agent: see LRA 2002, sch 8, para 5(1)(b) and *Prestige Properties Ltd v Scottish Provident Institution* [2002] EWHC 330(Ch), [2003] Ch 1 at [35].

13 Consultation Paper, paras 14.53 to 14.60.

14 Consultation Paper, paras 14.59 to 14.61.

including those of HM Land Registry, Dr Charles Harpum QC (Hon), professional bodies and solicitors.

14.17 Opposition to the imposition of a cap reflected our own concerns at the significance of conceding, as a matter of policy, that losses would not be covered in full by the indemnity. Nationwide Building Society noted that –

> there would however be a concern that once a cap had been introduced, even if it was sufficiently high at the point of implementation, it would then be capable of being reduced in the future.

14.18 The Bar Council said that a cap "would breach the fundamental structure of the land registration system". Consultees, including the London Property Support Lawyers Group, also expressed concern that a cap would increase the costs and complexity of conveyancing.

14.19 The introduction of a cap was supported by two academics (Dr Lu Xu and Dr Simon Cooper[15]) and by the Society of Licensed Conveyancers. Dr Xu and the Society of Licensed Conveyancers both considered that a cap would provide an incentive for parties to protect against fraud. We are not, however, convinced that a cap would incentivise those best placed to detect fraud. The imposition of a cap would affect indemnity claimants and not (for example) conveyancers who undertake identity checks.

14.20 In view of the widespread opposition to the idea of a cap, it is unsurprising that few consultees considered the level at which any cap could be set. The responses did not reveal any consensus as to what would be an appropriate level.

14.21 In view of consultation responses, we have decided not to recommend the introduction of a cap on the level of indemnity that can be recovered. We remain of the view that the imposition of a cap would be an undesirable change in policy towards indemnity.

## LIMITING THE CIRCUMSTANCES IN WHICH MORTGAGEES CAN CLAIM INDEMNITY

14.22 Another option for reform that we considered in the Consultation Paper was to limit the circumstances in which mortgagees can claim an indemnity.[16] We suggested two ways of doing so.

14.23 The first (which we called option 4A) was to limit the ability of mortgagees to obtain an indemnity to situations in which a mortgage was granted on the basis of a mistake already contained in the register. This limitation would mean that if, in the example above, B was a mortgagee, and a mortgage had been fraudulently granted over A's land, then B would not be entitled to an indemnity. In contrast, if, following the fraudulent transfer to B, B granted a mortgage to C, then C would be able to claim an indemnity. C granted the mortgage on the basis of the mistake in the register (the registration of B). We explained that this option for reform would deny a mortgagee an indemnity in a

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15 Dr Cooper expressed his support tentatively, saying that it could be acceptable if the cap were set at the right level.

16 Consultation Paper, paras 14.102 to 14.123.

situation in which a mortgagee is currently entitled to one,[17] and in which a purchaser would remain entitled to an indemnity. It would therefore represent a policy decision to treat mortgagees differently. The possible rationale for doing do was considered to lie in the fact that in the AB case, where a mortgage is obtained by fraud (and so B is the mortgagee) the mortgagee is arguably best placed to uncover the identity fraud.

14.24 Secondly, we suggested that the entitlement of mortgagees to obtain an indemnity should be subject to compliance with a statutory duty to take reasonable care to verify the identity of the mortgagor (option 4B). We asked consultees for their views on both of these options for reform.

14.25 To help inform any policy decision made in respect of the ability of mortgagees to claim an indemnity, we also invited consultees to provide us with evidence as to the significance of the indemnity scheme to lending decisions, and of the potential repercussions of reforms that limited its availability. We included these calls for evidence as we were concerned that removing or limiting the operation of the indemnity scheme in respect of mortgagees might have wider repercussions for the operation of the property and broader financial services markets. To assess the risk of any such repercussions we wanted a better understanding of the significance of the indemnity scheme for lenders. Although we received a number of responses to the call for evidence, we did not receive specific evidence of the possible consequences of reform. In particular, we did not receive evidence from lenders on this question. As we have decided not to pursue these options for reform, we do not further discuss the responses to the call for evidence.

**Limiting indemnity to mortgages entered on the basis of mistakes in the register**

14.26 Our first option for reform in respect of mortgages, of limiting the availability of an indemnity to mortgages entered on the basis of mistakes in the register, derived some support, including from the Chancery Bar Association and HM Land Registry.

14.27 However, the Chancery Bar Association's support was predicated on the basis that it would support a general limitation of the indemnity scheme to transactions entered on the basis of mistakes in the register. We did not raise such a general limitation as an option for reform as we considered that it would be unacceptable, and we remain of that view. It would mean, for example, that where A's registered title is transferred to B by fraud, A and B being innocent of the fraud, either A or B must personally carry the loss. We do not consider that outcome acceptable. It would represent a radical alteration of the indemnity principle in the LRA 2002, and moreover was not supported by other consultees. The result would be that innocent parties in registered title fraud, including individual home owners, would be left to bear the costs of fraud. We do not think this outcome would be acceptable, and that conclusion is reflected in consultation responses. In our view, an indemnity should be available to A or B, whoever does not end up with the land. Indemnity must be available, first, to justify the operation of the title guarantee under section 58, and secondly, to ensure that the title guarantee is treated with proper seriousness.

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17 *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602.

14.28 Instead, our option for reform in respect of mortgagees was made expressly on the basis that, if adopted, the effect would be to treat mortgagees differently from (and less favourably than) other indemnity claimants.

14.29 Limiting the ability of mortgagees to claim an indemnity in this way was opposed by (amongst others) the Conveyancing Association, the London Property Support Lawyers Group, the Law Society, Burges Salmon LLP and Dr Cooper. Consultees were concerned that there was no justification for treating one type of claimant differently to others in respect of the indemnity scheme, and suggested that doing so could increase the costs of borrowing (as lenders would pass on additional costs to themselves to borrowers) and have an adverse impact on lending decisions. Dr Cooper highlighted the risks that limiting the indemnity "might harm a mortgagee which had acted with an entirely reasonable level of care" and that it would be undesirable for a mortgagee to find that its property rights had been "destroyed through the operation of a state-administered system without fault on the mortgagee's part". The Bar Council and Amy Goymour (both of whom expressed other views) highlighted that the reasoning in the Consultation Paper did not take into account the position of private or non-commercial lenders (such as mortgages funded within a family), in respect of whom the same arguments would not apply.

14.30 We think that a strong case would need to be made for treating mortgagees differently from other indemnity claimants. A convincing argument would need to be made for denying one type of party an indemnity in circumstances in which another party would clearly be entitled. Further, we remain concerned about the possible consequences of such a reform on lender behaviour and the overall cost of borrowing. In the light of consultation responses we are not persuaded that sufficient justification exists to limit the ability of mortgagees to claim an indemnity to situations in which a mortgage is granted on the basis of a mistake in the register.

**A specific statutory duty imposed on mortgagees**

14.31 In our second option for reform in respect of mortgagees, option 4B, we suggested that mortgagees could be placed under a statutory duty to take reasonable care to verify the identity of the mortgagor. A mortgagee would be entitled to an indemnity only if the statutory duty was complied with.

14.32 Consultees were fairly evenly divided on this point. Eight consultees agreed, including the City of Westminster and Holborn Law Society, the Society of Licensed Conveyancers, the Chartered Institute of Legal Executives and HM Land Registry; seven disagreed, including the Conveyancing Association, the London Property Support Lawyers Group, the Chancery Bar Association and the Bar Council. A number of those who disagreed referred to the existing provision in schedule 8, paragraph 5, which enables an indemnity to be reduced where a claimant to an indemnity is contributorily negligent. Some consultees (including the Bar Council) felt that the existing provision precluded the need for further reform. The Chancery Bar Association said that it favoured the idea (in the current legislation) of providing a partial indemnity where responsibility for the mistake is shared, and would not support disentitling a mortgagee from obtaining any remedy in the event of a breach of a new statutory duty. Dr Cooper felt that disputes over negligence would be "harder fought" if they became "a matter of eligibility [for an indemnity] rather than quantum".

14.33 Consultation responses therefore demonstrate some support for making the ability of mortgagees to claim an indemnity conditional on compliance with a statutory duty in respect of verifying the mortgagor's identity. However, we consider that this support needs to be placed in the context of concern expressed by consultees in relation to option 4A, as a matter of policy, of treating mortgagees differently to other indemnity claimants. We recommend below the introduction of a statutory duty of care in relation to identity checks, on conveyancers (and other legal professionals who verify identity) who make an application to HM Land Registry. This duty will apply to mortgagees who make applications to HM Land Registry themselves, and conveyancers acting for mortgagees. We consider that the provision of a universal statutory duty of care on conveyancing professionals in respect of identity checks is preferable to a measure directed specifically at mortgagees. For that reason, we have decided not to pursue a specific duty of care applicable only to mortgagees.

## DUTIES OF CARE

14.34 The second option for reform we considered in our Consultation Paper related to duties of care. We considered how duties of care could be used to reinforce HM Land Registry's existing rights of recourse in the LRA 2002.

### The relationship between HM Land Registry's rights of recourse and duties of care

14.35 As explained in paragraphs 14.1 and 14.5 above, HM Land Registry acts as an insurer of first resort. But having paid an indemnity, HM Land Registry has rights of recourse in the LRA 2002 to enable it to try and recover its losses against a party whose fault has caused the mistake in the register. In the Consultation Paper we considered the scope of the current rights of recourse and explained that they are not exhaustive.[18] In some circumstances the registrar is given a direct right of action against a defendant who caused or substantially contributed to the loss by fraud. In other circumstances, the registrar steps into the shoes of the recipient of an indemnity, or a person in whose favour the register has been rectified, in respect of a cause of action that recipient or person actually has, or would have had, but for payment of the indemnity or rectification of the register. Where the registrar steps into a person's shoes, the registrar will need to establish that all of the elements of the requisite cause of action were (or would have been) available against the defendant.

14.36 The operation of the rights of recourse can be illustrated by reference to the AB example discussed above in figure 26. We elaborate on this example in figure 27.

[18] Consultation Paper, paras 14.11 to 14.51. The rights of recourse are contained in the LRA 2002, sch 8, para 10. We set out the rights of recourse at para 14.110 below.

Figure 27: a negligent conveyancer in the AB scenario

Following the fraudulent transfer of title from A to B, the mistake in B's registration is discovered. The outcome on the facts is that B remains registered proprietor and the registrar indemnifies A for his or her loss. It then transpires that B's conveyancer had acted negligently. Under the rights of recourse, the registrar, having paid the indemnity, can bring a claim against B's conveyancer. However, for the claim to succeed, the registrar must establish that A would have succeeded in an action in negligence against the conveyancer. In order to do so, the registrar will need to establish, for example, that B's conveyancer owed a duty of care to A, who is not the conveyancer's client.

14.37 We noted in the Consultation Paper that the percentage of indemnity payments recovered under the rights of recourse varied between 1% and 20% over the preceding ten years. Not all indemnity payments made are recoverable; for example, payments that result from HM Land Registry's own errors. Nevertheless, it is indisputable that the percentage recovered is low.

14.38 Shortly before publication of the Consultation Paper, the High Court recognised that a solicitor could owe a duty of care to HM Land Registry,[19] though the scope of the duty remained unclear and the case appeared to be a weak authority.[20] The potential effect of the common law duty of care can be illustrated by reference to the above example in figure 27. We have seen that in order for HM Land Registry to have a right of recourse against B's conveyancer under the LRA 2002, it needs to demonstrate that A would have a cause of action against B's conveyancer if A's losses had not been recovered by an indemnity. In order to do so, HM Land Registry would need to establish that B's conveyancer owed a duty of care to A, who is not the conveyancer's client.[21] Under the common law, however, the question is whether B's conveyancer owed a duty of care directly to HM Land Registry, so that HM Land Registry has a direct cause of action against B's conveyancer.

**Options for reform of duties of care**

14.39 In our Consultation Paper we considered options for reform based on duties of care:

(1) enhancing the utility of the common law duty of care (option 2A);

(2) introducing a general statutory tort or duty of care (option 2B); and

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19 *Chief Land Registrar v Caffrey & Co* [2016] EWHC 161 (Ch), [2016] PNLR 23. See the Consultation Paper, para 14.65.

20 The solicitor did not appear and did not challenge allegations that negligent misrepresentations had been made. The judge noted, above at [59], that he was only "narrowly persuaded [to impose the duty] on the peculiar facts of the case". See the Consultation Paper, para 14.65.

21 Although it is possible that a solicitor may owe a duty of care to a party to the transaction who is not his or her client that is not usually the case. See the recent Court of Appeal decision in *P&P Property Ltd v Owen and White & Catlin LLP* [2018] EWCA Civ 1082, [62] to [82].

(3) introducing a specific statutory tort or duty of care in respect of identity (option 2C).

14.40 In relation to the common law duty of care, we invited views as to whether conveyancers should be required to make a declaration on HM Land Registry's forms to the effect that the conveyancer had taken sufficient steps to satisfy themselves that documents relating to an application were genuine. If it transpired that the document had been forged or fraudulently presented (to the conveyancer or to HM Land Registry), the conveyancer would not necessarily become liable for any consequent loss. It would mean, however, that liability would arise where it could be established that the conveyancer had not taken reasonable steps to ensure the validity of a document. The declaration would be a statement by the conveyancer which, if negligently made, could constitute a negligent misstatement. The significance of establishing a negligent misstatement is that HM Land Registry's losses are economic (the payment of an indemnity) and economic losses are recoverable in a claim for the tort of negligent misstatement.[22] We noted that some of HM Land Registry's forms already require particular statements to be made.[23]

14.41 In relation to statutory torts or duties of care, in the Consultation Paper we considered the developments that had taken place in Scotland. Following the recommendations of the Scottish Law Commission, a general duty of care has been introduced by section 111 of the Land Registration etc (Scotland) Act 2012. That Act places a duty on certain persons to "take reasonable care to ensure that the Keeper [the Scottish equivalent of the registrar] does not inadvertently make the register inaccurate…". The duty is imposed on a person granting a deed intended to be registered or making an application for registration, and his or her solicitor or legal advisor. Under the Scottish legislation, the duty of care plays two distinct roles. First, it provides the Keeper with a direct right of action against a person who acts in breach of the statutory duty. This right of action means that the Keeper can recover compensation for loss suffered as a consequence of the breach (subject to mitigation and remoteness). Secondly, the duty of care operates as a limitation on the availability of an indemnity. No indemnity is payable to a claimant for inaccuracies in the register attributable to a breach of the statutory duty of care by them or by their conveyancer. Our Consultation Paper invited views on whether a similar statutory tort should be introduced in England and Wales to supplement the existing rights of recourse. We also asked whether, if a statutory tort was introduced, if there are any categories of person who should be excluded from its scope, or whether it should be subject to any other exclusions or restrictions.[24]

14.42 As an alternative to a general statutory tort, we invited views on whether there should be a specific statutory tort imposing a duty of care in respect of verifying identity.[25] We noted that identity fraud was the most significant type of fraud in relation to registered title fraud, and so a targeted tort would focus on the specific problems arising in relation to the current law. We also explained in the Consultation Paper, however, that if the principle of a statutory tort is accepted, then there may be no good reason for confining

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22 See eg *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

23 Consultation Paper, paras 14.70 to 14.72.

24 Consultation Paper, paras 14.73 to 14.80.

25 Consultation Paper, paras 14.81 to 14.85.

its scope to identity checks. We expressed caution that a statutory tort confined to identity might be seen as signalling that a duty of care is not owed in other respects, when in fact a wider duty may still be owed under the common law.

**Enhancing the common law duty of care**

14.43 We received a mixed response from consultees, with ten supporting this option for reform, five opposed, and eight expressing other views.

14.44 Those supporting the proposal included HM Land Registry, the Chancery Bar Association, the Bar Council, Nationwide Building Society and the Conveyancing Association. The Conveyancing Association agreed with the proposal as regards the documents for registration within conveyancers' control, but not for documents being provided to them by third parties like a discharge of charge or unregistered title documents. Elizabeth Derrington, who also agreed with the proposal, considered that it was "appropriate" to build incentives to take appropriate care into the indemnity scheme, including requiring conveyancers to certify that they have taken sufficient steps to check that the documents relating to an application are genuine. Martin Wood considered that the proposal would "help to focus minds". Professor Warren Barr and Professor Debra Morris, and Dr Aruna Nair considered the proposal to be consistent with professional duties conveyancers owe to their clients.

14.45 Consultees who opposed this option for reform were exclusively transactional lawyers and their representative groups: three City firms of solicitors, the London Property Support Lawyers Group and the Chartered Institute of Legal Executives. We note that transactional lawyers would be most directly affected by this reform, but we also emphasise the fact that that they have the most significant insight into its likely impact, and to its effect on the conveyancing process. In part their concerns related to the wording of the consultation question and accompanying text, which referred to conveyancers taking "sufficient steps".[26] CMS Cameron McKenna LLP noted: "Without clarity about what are 'sufficient steps' … we would resist being required to make any declaration that they have been taken". The Chancery Bar Association (which supported the option for reform) based their support on an assumption that, despite the wording of the question, "reasonable care" is in fact what was intended. We agree that any new requirements imposed should be confined to those that are "reasonable" rather than those that are "sufficient".

14.46 Consultees who were opposed to conveyancers being required to make declarations were concerned that they would not know whether they had done "enough". As the London Property Support Lawyers Group explained, any additional measures introduced –

> should be specific and realistic … . Conveyancers would have no clear idea of what compliance with [the declaration] would entail and it would be a recipe for disputes and litigation.

14.47 Those opposed to the declaration were also concerned that conveyancers could be asked to make declarations in respect of matters that lie outside of their own control.

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[26] Consultation Paper, para 14.72.

14.48 Those who expressed other views did so for a variety of reasons, including uncertainty arising from the scope of the declaration (the Law Society, Everyman Legal, City of Westminster and Holborn Law Society and Dr Cooper), that solicitors are not likely to be culpable for failing to detect fraud (Michael Hall) and that any additional duties should be confined to verification of identity (Dr Cooper).

### Recommendation

14.49 Whilst there is support amongst consultees for HM Land Registry's forms to require declarations, there is a prevailing concern amongst those whose practice is most directly affected at being placed under duties which are uncertain in scope, and may ask them to make declarations in respect of matters that are beyond their responsibility or control. We consider these concerns to be well-founded. We think, however, that the concerns can be addressed by ensuring that any declarations that are required to be made on HM Land Registry's reforms are specific and targeted at ensuring that specified and reasonable steps have been taken in relation to particular matters.

14.50 We note, as we explained in paragraph 14.40 above that declarations are already required in some of HM Land Registry's forms. For example, Form FR1 (first registration) requires the applicant to tick a box either to declare that "The applicant knows of no other such rights" or to state "I / we have not fully examined the applicant's title". Form RX1 (application for a restriction) contains a declaration that "I am the applicant's conveyancer and I certify that I hold the relevant consent". A conveyancer who completes Form AP1 (application to change the register) when a party to the transaction is not represented, must either declare that sufficient steps have been taken to verify that party's identity or, where no such confirmation is made, enclose evidence of identity.

14.51 We also note that the Secretary of State already has broad powers to make rules in relation to the form and content of applications.[27] These existing statutory powers would therefore enable forms to be amended to require additional declarations to be made on an application.[28]

14.52 We consider that, in the light of developments in the common law duty of care, it is advisable for the Secretary of State to review the forms on which applications are made to HM Land Registry and consider whether additional declarations should be required. We consider that any declarations the Secretary of State requires to be made should relate to specified and reasonable steps being taken, to ensure that declarations do not impose onerous or uncertain burdens on applicants. Further, any additional declarations should be limited to matters that are within the control of the applicant.

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27 LRA 2002, s 14(a), 25(1), and sch 10, paras 6 to 8.

28 These forms are prescribed in LRR 2003, sch 1. In order to alter the substance of the forms (that is, the information within the panels) an amendment of the rules would be required. HM Land Registry has a separate power to publish forms (under LRA 2002, s 100(4)) and to make changes to the explanatory information within existing forms (under LRR 2003, r 207A), but those powers could not be used to require declarations to be made within existing forms prescribed under the LRR 2003.

## Statutory duties of care

14.53 In this part of the chapter we first summarise consultation responses in respect of the general and specific statutory duties of care. We then make our recommendation for reform based on our conclusions from consultation responses.

### A general statutory duty of care

14.54 Twenty consultees responded to this question. The introduction of a general statutory duty of care was supported by the Chancery Bar Association, HM Land Registry, the City of Westminster and Holborn Law Society, and Amy Goymour (an academic, who noted her support was "tentative" as she is insufficiently familiar with the potential impact of the statutory duty on conveyancers).

14.55 There was, however, significant opposition from the majority of consultees, including the Conveyancing Association, the London Property Support Lawyers Group, the Bar Council, the Law Society, the Chartered Institute of Legal Executives, the joint response of Professor Barr and Professor Morris, Dr Cooper, and Dr Nair.

14.56 Some of those who opposed the statutory duty did so as they supported other options for reform, which they considered to be preferable to the statutory duty. For example, in their joint response Professor Barr and Professor Morris considered that declarations from conveyancers (option 2A) "may be enough to change behaviour". The Bar Council expressed "serious reservations" about this option for reform, and considered that a narrower statutory duty in respect of identity checks (option 2C, discussed below) would be adequate in most cases. Others who opposed the general statutory duty considered that it would undermine the idea of a state indemnity scheme (Dr Cooper and Burges Salmon LLP).

14.57 The suggestion that the statutory duty would operate as a limitation on the availability of an indemnity, so that individuals whose conveyancers acted in breach of the duty would be denied an indemnity, provoked particular concern. The Bar Council expressed "deep reservations" about this aspect of the statutory duty. The Bar Council compared the "simple and risk-free" operation of the indemnity scheme from a claimant's perspective to the potential for "difficult and protracted litigation" that claimants might face if they were forced to try to recover from advisers. The London Property Support Lawyers Group "strongly" disagreed with denying an indemnity to the claimant and said that the "key principle" of HM Land Registry acting as insurer of first resort "should be retained whatever proposal is adopted". Dr Nair, who opposed the statutory duty, said:

> the common law duty of care, and rights of statutory recourse, should be a matter between HM Land Registry and the wrongdoing conveyancer; it should not affect the immediate availability of the indemnity in favour of the individual.

14.58 We agree with these concerns. We note that the statutory duty of care introduced in Scotland on which we based our discussion of a general statutory tort, goes further. As we have explained in paragraph 14.41 above under the Scottish legislation no indemnity is payable to claimants for inaccuracies in the register attributable to a breach of the statutory duty of care by them or their conveyancer. In our Consultation Paper we noted that the quantum of an indemnity can already be reduced to take into account a lack of

care on the part of the claimant.[29] We suggested that it would be consistent with this general provision for a statutory tort to operate as a limit on the availability of an indemnity. On reflection, we think the situations envisaged by the current law and under a statutory duty of care are different. In particular, the current provision, in contrast to a statutory duty, would not generally be seen as reflecting a requirement of professional due diligence. Further, we think that it would be unacceptable in the context of the English and Welsh indemnity scheme for a lack of proper care on the part of an individual's conveyancer, over which the individual has no knowledge or control, to result in the individual being left to bear the loss when the individual is an innocent victim of fraud.

14.59 It is perhaps unsurprising that conveyancers oppose the imposition of a statutory duty that would most directly impact upon them. We note, however, that opposition came from a wide range of stakeholders including those (such as academics) who would not be directly affected by the introduction of such a duty. Further, we consider the arguments made against the imposition of a general statutory duty of care to be convincing. In particular we note that consultation responses here (as in respect of enhancing the common law duty of care – option 2A above) expressed concern at the uncertain scope of the statutory duty. For example, Dr Nair said, "it would be too burdensome to impose a broader duty of this kind on all applicants". The London Property Support Lawyers Group suggested that the general duty "would be far too wide and go much further than is necessary to deal with the problems with the current law".

14.60 Consultation responses have convinced us that at the present stage the arguments are weighted against the introduction of a general statutory duty of care. Narrower and more targeted approaches are a preferable way of dealing with the problems in the current law. Targeted responses, such as those we have recommended above in respect of HM Land Registry's forms, and consider below in relation to identity checks, are more likely to be effective in preventing the incidence of registered title fraud than a generally expressed duty that creates uncertainty as to the steps that conveyancers are required to take. Moreover, we agree with consultees' concerns about the adoption of any reform that prevents those who incur loss as the result of a rectification decision from being able to claim an indemnity from HM Land Registry as an insurer of first resort.

14.61 The targeted reforms that we propose will be underpinned by the development of the common law duty of care by the courts, enhanced by any changes made to HM Land Registry's forms. If the experience of their operation suggests that our targeted reforms are not sufficient to reduce the incidence of registered title fraud, then we think that further consideration should be given to the introduction of wider statutory duties.

### A specific statutory duty of care in relation to identity

14.62 We asked for consultees' views on whether, as an alternative to a general statutory tort, there should be a specific statutory tort imposing a duty of care in respect of verifying identity.[30] Of the 20 consultees who responded to this question, five supported the introduction of a statutory duty of care confined to identity (the Bar Council, the Law Society, Nationwide Building Society, Dr Cooper and Martin Wood).

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29 LRA 2002, sch 8, para 5.

30 Consultation Paper, para 14.85.

14.63 Those opposed to any kind of statutory duty include the Conveyancing Association, the London Property Support Lawyers Group, the Chartered Institute of Legal Executives, CMS Cameron McKenna LLP and Burges Salmon LLP. Even these consultees were not, however, necessarily opposed to any intervention. Burges Salmon LLP and the London Property Support Lawyers Group both suggested that if the requirements for identity checks were rationalised (option 3A below), then liability could be attached to those who failed to comply with them. The London Property Support Lawyers Group suggested that an additional right of recourse could be added to the LRA 2002 to enable recovery against conveyancers who did not comply. As we explain below, we think that the same result is in fact achieved through our recommendation for a statutory duty of care in respect of identity checks, coupled with the provision of directions from HM Land Registry specifying the steps that must be taken in order to comply with the duty.

### Recommendation

14.64 Consultation responses to each of our individual questions relating to a statutory duty of care revealed a majority opposed to these options for reform. Notwithstanding, looking across responses to each question, approximately half of consultees supported the introduction of some form of statutory duty to take reasonable care, including key stakeholders. Across the answers to options 2A and 2B, the Bar Council, the Law Society, the Chancery Bar Association, HM Land Registry, the City of Westminster and Holborn Law Society, Nationwide Building Society, Dr Cooper, Amy Goymour and Martin Wood supported the introduction of a statutory duty of care. Further, some of those who opposed a statutory duty were not against the idea, in principle, of HM Land Registry being able to recover indemnity payments it had paid from conveyancers who did not comply with specific steps to verify identity. While those consultees considered that recovery of payments could be achieved without a statutory duty of care, we think that such a duty, appropriately confined in its scope and operation, provides the most effective means of doing so, in a manner consistent with HM Land Registry's existing rights of recourse. Further, we think that a statutory duty can provide much greater certainty to conveyancers than exists under the current law as to what is required of them in relation to identity checks.

14.65 We consider that the introduction of a statutory duty of care has the potential to be an effective means of reducing the incidence of registered title fraud. On the basis of consultees' responses, we believe that there is support for the introduction of a duty of care if two key concerns are addressed.

(1) First, for a statutory duty to be acceptable the scope of the duty must be certain for those who are subject to it.

(2) Secondly, breach of the statutory duty by a conveyancer should not prevent those who suffer loss as a result of the rectification decision from claiming an indemnity from HM Land Registry as insurer of first resort.

14.66 In order to address the first concern, we have concluded that the statutory duty of care should be confined to a duty in respect of verifying identity. Identity fraud is the most common form of registered title fraud. In the Consultation Paper we asked two questions designed to make identity checks a more effective means of detecting and preventing registered title fraud (options 3A and 3B). We consider the responses to those questions below. On the basis of those responses, however, we consider that a statutory duty in

respect of verifying identity will be sufficiently certain in scope if coupled with directions to conveyancers as regards the steps that must be taken to verify identity. Such a duty recognises that HM Land Registry relies on the checks that conveyancers take to confirm the identity of their clients. By confining the duty to compliance with directions, HM Land Registry will be responsible for identifying and outlining the steps that conveyancers must take and, importantly, HM Land Registry will not have a right of recourse against a conveyancer who complies with the duty if a fraudulent disposition is nevertheless registered. We consider that such a statutory duty, together with clearly prescribed steps for compliance with the duty in the form of directions, will give conveyancers a degree of certainty that is absent under the current law, which we believe they will welcome.

14.67 To address the second concern, we consider that a breach of the statutory duty of care should not prevent a claim to an indemnity. The effect of a breach of the duty will be to give HM Land Registry a direct cause of action against those in breach, so that HM Land Registry can attempt to recover indemnity payments made from those in breach. In this respect, the duty will act as an addition to (and in the same way as) existing rights of recourse. That does not, however, mean that a breach of the duty may not have an impact on the amount of the indemnity awarded. The existing indemnity scheme contained in the LRA 2002 is subject to a general principle of contributory negligence. Paragraph 5(2) of schedule 8 provides:

> Where any loss is suffered by a claimant partly as a result of his own lack of proper care, any indemnity payable to him is to be reduced to such extent as is fair having regard to his share in the responsibility for the loss.

14.68 We consider that the general principle of contributory negligence should apply to claims arising following a breach of statutory duty in the same way that it applies to any indemnity claim. It would be anomalous to carve out an exception that resulted in an indemnity claimant being placed in a favourable position where the claim arises following a breach of statutory duty. Further, we do not consider that the principle of contributory negligence will affect many claims to an indemnity arising following a breach of the statutory duty. That is because it is unlikely that the claimant or his or her solicitor will be the party who has acted in breach of the statutory duty; in practice, it is likely to be the fraudster's conveyancer.

14.69 Take, for example, an AB scenario: where title is fraudulently transferred to a purchaser (who is innocent of the fraud) following a breach of the proposed statutory duty by the solicitor acting for the vendor, a fraudster purporting to be the registered proprietor. If the register is rectified to return title to the registered proprietor, then the purchaser's claim to an indemnity would be unaffected as the purchaser's solicitor is not the party at fault. If the purchaser retains title and the previous registered proprietor is left to claim an indemnity, then again the indemnity will be unaffected; the solicitor at fault was not representing the previous registered proprietor, but a fraudster purporting to be the previous registered proprietor.

14.70 In order to be effective, we consider that the statutory duty of care in respect of identity must apply to two categories of person. It must apply to solicitors and conveyancers (and others acting in the course of their business or profession) who are involved in the preparation of deeds and documents that are used to make applications to HM Land

Registry. It also must apply to those assisting and advising in the preparation of those documents. As noted above, in the light of consultation responses we are not recommending a specific statutory duty on the part of mortgagees to verify the identity of mortgagors. In most cases, mortgagees will not apply for registration of a mortgage themselves, but the application will be made on their behalf by a conveyancer. The conveyancer will therefore be subject to the statutory duty of care to verify the mortgagor's identity. Where, however, the application is made by the mortgagee we consider that the mortgagee should be required to comply with the statutory duty of care and take reasonable steps to verify the mortgagor's identity.[31]

14.71 The application of the duty to conveyancers executing deeds intended to be registered is significant, as it ensures (for example) that on an ordinary conveyance of land, each conveyancer is under a duty to verify the identity of his or her clients. The purchaser's conveyancer (who makes the application to change the register) will be under a duty to verify the identity of the purchaser, while the vendor's solicitor, who prepares the deed of transfer for execution, will be under a duty to verify the identity of the vendor. The latter is particularly significant as generally in instances of fraud the property is not transferred directly to the fraudster as purchaser, and so would not be uncovered by verification of the purchaser's identity; instead, the land is transferred by a fraudster purporting to be the vendor. The prospect of discovering the fraud is therefore significantly enhanced by ensuring that the statutory duty applies to the vendor's solicitor.

14.72 The duty of care should be based on undertaking reasonable steps to verify identity. What constitutes reasonable steps will be provided in directions by HM Land Registry (as discussed below). As the duty is based on taking reasonable steps, HM Land Registry's directions will need to be confined to requiring only reasonable steps. As we explain below, those directions will be the subject of consultation.

[31] As we explained at para 14.9 above, these categories of person are already subject to various forms of regulatory rules and guidance.

**Recommendation 31.**

14.73 We recommend the introduction of a statutory duty of care in the following terms:

(1) A duty of care on the part of those who, in the course of a business or profession:

(a) make an application to the registrar;

(b) execute a deed or other document intended to be used in connection with an application for registration; or

(c) assist or advise in the same matters

to take reasonable care to verify the identity of the parties on whose behalf they are acting.

(2) The steps required to be taken to verify identity should be provided by HM Land Registry in directions.

(3) A breach of the statutory duty will not affect the ability of a party to claim an indemnity from HM Land Registry as a first resort. Instead, the breach of duty will enable HM Land Registry, having paid the indemnity, to recover sums paid from the conveyancer.

14.74 This recommendation will be implemented by clause 34 which inserts a new provision, paragraph 10A, into the existing rights of recourse conferred on HM Land Registry in schedule 8. The duty will apply only after HM Land Registry has set out reasonable steps that must be taken to verify identity (this aspect of the provision is considered below). A person providing a relevant service must then verify the identity of the person to whom he or she provides that service. A service is only a relevant service for these purposes, however, when it is undertaken in the course of a business or profession. A relevant service is explained in new paragraph 10A(2) as making an application to the registrar, preparing for execution a deed or document which the relevant person suspects or ought reasonably to suspect will be used to make an application to the registrar. The duty extends to those who assist or advise in connection with the same services. The duty does not apply, however, to those who merely advise about the content of a document: for example, a barrister from whom a solicitor takes advice on the drafting of a clause in a deed would not be subject to the duty, as he or she is not assisting or advising on the "execution" of the deed. The duty to verify the client's identity will lie with the solicitor, as is currently the case.

14.75 The person on whom the duty is imposed will be determined by directions. It is common for more than one member of staff within a firm of solicitors or conveyancers to be involved in preparing documents or giving advice on them. That does not mean, however, that each individual must verify their client's identity by taking steps in directions: the "person" in such a case is likely to be the firm. We would not expect

directions to require that every individual takes steps to verify identity, when it is reasonable for the steps taken by one individual to be relied upon by another.

14.76 The duty is incorporated into HM Land Registry's existing rights of recourse by an amendment of paragraph 10 of schedule 4. New sub-paragraph (aa), inserted by clause 34(2)(b), enables the registrar to recover an indemnity that it has paid from a person who caused or substantially contributed to the loss by not complying with directions issued under the new paragraph 10A.

## OPTIONS FOR REFORM RELATING TO IDENTITY CHECKS

14.77 The new statutory duty of care that we have recommended in respect of identity checks is dependent for its application on directions being published by HM Land Registry identifying the reasonable steps that must be taken to comply with the duty. In our Consultation Paper we suggested that if a duty of care in respect of identity was introduced, then compliance with the duty could be determined by reference to existing requirements for verifying identity issued by regulatory bodies, or by enhancing HM Land Registry's powers in respect of identity checks.[32]

14.78 In the Consultation Paper we discussed two options for reform designed to increase the effectiveness of identity checks. First, we considered rationalising current identity requirements (option 3A). We noted that the provision of different requirements by separate regulatory bodies creates uncertainty as to what is required and whether compliance with any particular set of guidance will constitute reasonable steps for the purposes of the common law duty of care. We also considered whether HM Land Registry's powers in respect of identity checks should be enhanced (option 3B). HM Land Registry already requires evidence of identity to be lodged, to verify the identity of parties who are not legally represented,[33] using its existing power to issue directions under section 100(4) of the LRA 2002.

14.79 We invited consultees to share their experience of any difficulties with current requirements in respect of verifying identity, and whether those requirements could usefully be rationalised.[34] We also invited views on whether HM Land Registry's powers in respect of identity checks should be enhanced to enable the registrar, through directions, to provide mandatory requirements in respect of identity verification, including provision for electronic verification of identity and sub-delegation.[35] In referring to electronic verification and powers of sub-delegation we envisaged, for example, that requirements mandated by HM Land Registry may include the use of existing credit reference agencies and of the Government's Verify system. In fact, at least in the context of electronic conveyancing, HM Land Registry may have broad powers in respect of mandating identity checks through the Network Access Agreement.[36]

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32 Consultation Paper, para 14.84.

33 Consultation Paper, paras 14.86 to 14.100.

34 Consultation Paper, para 14.91.

35 Consultation Paper, para 14.101.

36 The Network Access Agreement is the agreement under which a person who is not a member of HM Land Registry (for example, solicitors and conveyancers) can access online registration services, including electronic lodgement of applications. It is governed by the provisions in sch 5 to the LRA 2002.

### Consultation

14.80 We received general support from consultees for the idea of rationalising identity requirements, including from HM Land Registry, the London Property Support Lawyers Group and the Law Society.

14.81 No consultees appeared to be opposed to the idea of rationalising requirements. The London Property Support Lawyers Group emphasised, however, that rationalisation "should not be used as an opportunity to impose additional burdens and duties on conveyancers". The City of Westminster and Holborn Law Society questioned whether rationalisation "can be driven just by land registration", in view of anti-money laundering requirements and the imposition of specific requirements from some lenders. A number of consultees identified specific instances when current identification checks had proved problematic, including difficulties arising from paperless billing for utilities and so on; difficulties for older clients who no longer have acceptable forms of identification (such as a valid passport); and particular concerns conveyancers have in respect of acting for owners of unregistered land and for new clients who do not want a face-to-face meeting or do not have a financial track record.

14.82 A majority of consultees were supportive of HM Land Registry being given enhanced powers in respect of identity checks. These included the Conveyancing Association, Pinsent Masons LLP, the Chartered Institute of Legal Executives and the Law Society. Pinsent Masons LLP highlighted the need (as discussed in the Consultation Paper)[37] for any such powers to be accompanied by appropriate safeguards to ensure information is stored securely, and for any requirements laid by HM Land Registry to be subject to scrutiny before their introduction. The Chancery Bar Association could see no objection to giving such enhanced powers to HM Land Registry, but were uncertain whether identity checks would be effective in combatting fraud.

14.83 A small number of consultees were opposed to the idea of enhancing HM Land Registry's powers, including the City of Westminster and Holborn Law Society and the London Property Support Lawyers Group. Some of the concerns raised related to the risk of overly burdensome requirements being imposed, particularly if HM Land Registry were privatised. We consider that those concerns relating to privatisation should now be alleviated.

### Recommendation

14.84 We have recommended above the introduction of a statutory duty of care in respect of identity checks. Central to that recommendation is that it will provide greater certainty to conveyancers as to what is expected of them if the steps required to verify identity are provided by HM Land Registry through directions. Our recommendation in relation to the statutory duty of care has been informed by the general support of consultees to HM Land Registry being provided with enhanced powers to mandate requirements in respect of identity checks. The fact that the requirements are linked to a statutory duty to take "reasonable steps" to verify identity further ensures that the requirements imposed will not be overly burdensome.

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[37] Consultation Paper, para 14.98.

14.85 Further, in our Consultation Paper we suggested that any mandatory steps imposed by HM Land Registry should be subject to further scrutiny prior to their introduction. Therefore, HM Land Registry will be required to consult prior to the introduction of directions. This power to issue directions in relation to identity will be subject to a greater degree of scrutiny than HM Land Registry's existing power to issue directions under section 100(4) of the LRA 2002, in respect of which HM Land Registry need not consult.

14.86 We think that HM Land Registry is best placed to determine the reasonable steps that should be taken to ensure that the specific risks involved in registered title fraud are mitigated. We note, for example, that existing identity checks and due diligence requirements are not necessarily effective to prevent this type of fraud. That is because existing checks are generally directed at ensuring that a client is the person who he or she claims to be. In the context of registered title fraud, the key question is whether the client is the same person who is the registered proprietor of the estate in the land. That is, the question is not just if the client's name is actually Josephine Bloggs, but whether the client is the same Josephine Bloggs who is the registered proprietor of the estate. The use of directions ensures that the steps required to be taken can be changed over time; for example, in response to specific indicators of risk identified by HM Land Registry.

14.87 The new duty of care is based on a careful balance. By following directions, conveyancers have the certainty that HM Land Registry will not have a right of recourse against them if, despite compliance with directions, it transpires that their client was in fact engaged in identity fraud. It is therefore appropriate that HM Land Registry is able to specify the steps that must be taken to verify identity. But HM Land Registry's ability to do so is subject to the twin constraints that the steps required must be reasonable, and are subject to consultation.

14.88 We note that the steps specified in directions by HM Land Registry will not replace identity verification requirements that solicitors and conveyancers will be required to undertake for other purposes (such as anti-money laundering) or that may be determined by their professional bodies. Consultees supported the idea of existing identification requirements being rationalised. We leave that as a matter for consideration by professional bodies when setting requirements. We hope that when setting their own requirements, professional bodies pay due regard to steps required to be taken by HM Land Registry's directions.

**Recommendation 32.**

14.89 We recommend that HM Land Registry's powers in respect of identity checks should be enhanced to enable the registrar, through directions, to provide mandatory requirements in respect of identity verification, including provision for electronic verification of identification and sub-delegation.

14.90 We recommend that HM Land Registry should be required to consult prior to the introduction of mandatory requirements in respect of identity verification.

14.91 These recommendations will be implemented by new paragraph 10A inserted into schedule 8 by clause 34. This clause enables HM Land Registry to prepare and publish directions in connection with the duty of care introduced by the clause. The directions may require steps to be taken by electronic means or in electronic form and provide for different steps to be taken in respect of different applications or documents, and in respect of different classes of persons whose identity is being verified. The clause will therefore enable (for example) different steps to be specified for verifying the identity of a natural or legal person.

## LIMITATION PERIODS

14.92 We now turn to consider the limitation periods prescribed in the LRA 2002 for indemnity claims. In the Consultation Paper, we discussed a number of questions that have arisen in respect of the operation of limitation periods and the indemnity scheme. The issues concerned, on the one hand, the limitation periods applicable when an indemnity claim is made and, on the other hand, the limitation period applicable to HM Land Registry when exercising its rights of recourse.[38]

### The limitation period for indemnity claims

14.93 As we commented in the Consultation Paper, there is a lack of clarity in schedule 8 of the LRA 2002 regarding the commencement of the limitation period that applies to particular kinds of indemnity claims.[39] Paragraph 8 of schedule 8 provides that the same limitation period as applies to contractual debt claims (namely, six years) applies to claims for an indemnity.[40] It further provides that the cause of action for an indemnity "arises at the time when the claimant knows, or but for his own default might have known, of the existence of his claim". However, paragraph 1 of schedule 8 (which is set out in paragraph 14.2 above) allows for an indemnity to be claimed in a variety of different circumstances. As we explain below, in some of these circumstances, it is unclear when the claim for an indemnity comes into existence. It is therefore unclear when limitation begins to run.

14.94 The text of paragraph 1(1)(a) of schedule 8 – "a person is entitled to be indemnified for loss by reason of rectification" – suggests that a claim for an indemnity comes into existence when the register is rectified causing loss to the claimant.

14.95 But as we explained in the Consultation Paper,[41] it is much less clear when a claim for an indemnity arises under sub-paragraph 1(1)(b),"loss by reason of a mistake whose correction would involve rectification of the register".

(1) On the one hand, the claim under sub-paragraph 1(1)(b) may arise when a mistake is made in the register causing loss to the claimant. Limitation would then run from the date of the mistake.

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38 Consultation Paper, paras 14.125 to 14.146.

39 Consultation Paper, paras 14.127 to 14.132.

40 Limitation Act 1980, s 5.

41 Consultation Paper, paras 14.130 and 14.131.

(2) On the other hand, the effect of sub-paragraph 1(3) – that no indemnity is payable until an alteration decision has been made – may be that the claim does not crystallise until a decision is made whether to rectify the register. Alternatively, it may mean that the loss caused by a mistake in the register does not crystallise until this decision is made. In either case, limitation would then run from the date of the decision not to rectify the register.

### Consultation

14.96 In our Consultation Paper, we asked consultees whether they had encountered any difficulties in practice regarding the applicable limitation period for an indemnity claim under schedule 8.[42] We also made two provisional proposals to clarify the limitation periods in schedule 8.

(1) We provisionally proposed amending schedule 8 paragraph 8 so that it becomes clear that, in relation to claims under paragraph 1(1)(a) and (b), the six-year limitation period runs from the date of the decision to rectify or not to rectify the register.[43]

(2) We provisionally proposed that the provisions in paragraph 8 should remain unchanged in relation to claims under paragraph 1(1)(c) to (h), so that the limitation period will continue run from when the claimant knows, or but for his default might have known, of the claim.[44]

14.97 Nine consultees responded to our call for evidence about problems in practice caused by the limitation provisions in schedule 8. Most who replied stated that they had not encountered any difficulties. However, the Chancery Bar Association said that the existing provisions of schedule 8 "undoubtedly cause problems". It commented that it was aware that, in some indemnity cases, an issue has arisen about whether paragraph 1(3) has the effect of postponing the start of the limitation period for a claim under paragraph 1(1)(b). It noted that it is sometimes difficult to advise clients about whether they should issue a protective claim for an indemnity before it is known whether the register will be rectified.

14.98 Twenty-one consultees, including HM Land Registry and Dr Harpum, agreed with our provisional proposal that the limitation period for indemnity claims under paragraph 1(1)(a) and (b) should commence on the date of the rectification decision. The London Property Support Lawyers Group said that our proposal would "result in greater clarity and certainty".

14.99 Only Michael Hall and Nottingham Law School disagreed with our proposal. Nottingham Law School said that the Consultation Paper did not present a compelling case for reform. Mr Hall suggested that the current law is clear; the limitation period in relation to a claim under paragraph 1(1)(b) starts to run when the claimant knows or should

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42 Consultation Paper, para 14.133.

43 Consultation Paper, para 14.136.

44 Consultation Paper, para 14.138. This consultation question contained a typographical error, however, in that it referred to when a claimant "would" have known of a claim, not when he or she "might" have known of a claim (the word used in para 8). We did not mean to be proposing a change to the wording of para 8 of sch 8.

have known about the mistake in the register, not with the decision about rectification under paragraph 1(3). Dr Harpum, who supported our proposals, agreed with Mr Hall's interpretation of schedule 8. But he noted that the fact that limitation starts to run at the time of knowledge of the mistake "does not perhaps fit comfortably" with the fact that no indemnity is payable until a decision has been made about whether to alter the register. Dr Harpum continued that "it is slightly odd that a claim to indemnity could, in principle, be time barred even when it had not yet become payable".

14.100 Nineteen out of 22 consultees who responded agreed with our provisional proposal that no amendment of schedule 8 paragraph 8 was required in relation to claims under paragraph 1(1)(c) to (h). One consultee (Amy Goymour) said she "probably agreed". Only Nottingham Law School disagreed. However, as it did not support making any changes to the limitation provisions in schedule 8, this aspect of our provisional proposal in fact appears consistent with its general view.

14.101 The Law Society, which expressed other views, pointed out that it could be difficult to establish when a claimant first became aware of a mistake, which could be a long time after the mistake occurred. The Chancery Bar Association also argued that the phrase "or but for his own default might have known" may cause problems as it enables HM Land Registry to argue that the claimant should have done earlier searches which would have revealed the error. The Chancery Bar Association suggested that this interpretation would be wrong in principle as it should be HM Land Registry's responsibility, not the claimant's, to discover the error. Moreover, the Association thought that the court should have a discretion to extend the limitation period for indemnity claims.

### Recommendation

14.102 We propose to retain the current wording of paragraph 8(b) of schedule 8 to the LRA 2002 for indemnity claims arising under paragraph 1(c) to (h) of schedule 8. We are not minded to go further than the legislation currently states in the absence of evidence that the potential problems that the Chancery Bar Association described have arisen in practice.

14.103 We have only been provided with limited evidence that the limitation provisions in paragraph 8 of schedule 8 (in combination with paragraph 1) are causing problems in practice. Nevertheless, the Chancery Bar Association's response suggests that difficulties do arise and some litigants are left unsure about whether they need to issue protective claims.

14.104 Furthermore, we do not agree with Dr Harpum and Mr Hall that it is obvious that the limitation period for claims under paragraph 1(1)(b) commences when the claimant knows of the mistake in the register. We are unaware of any cases in which the court has considered when limitation commences in relation to paragraph 1(1)(b). But there is case law in another context that suggests that the commencement date might be interpreted as being when the court or the registrar makes a rectification decision pursuant to section 1(3). In *Chohan v Times Newspapers Ltd*, the Court of Appeal considered whether an order for costs, to be subject to taxation, became "enforceable" for the purposes of section 24 of the Limitation Act 1980 on the date when it was made or when the certificate of costs specifying the precise sum owed had been issued (which happened a year later). Lord Justice Aldous held that the judgment became enforceable

on the later date as "it would be odd if the Limitation Act 1980, when it used the word 'enforceable', covered a period when there were no practical steps that could be taken to enforce the order".[45] Similarly, it is not clear to us that a claim for an indemnity could be fully crystallised at a point when, because of the operation of paragraph 1(3), no indemnity is payable. Moreover, it is not clear to us whether the claimant could be said to have a complete cause of action at a time when it is uncertain whether he or she will obtain rectification of the register. At that point in time, it would be uncertain whether he or she will ultimately suffer any loss.

14.105 In view of the overwhelming support of consultees that, as a matter of policy, the limitation period should begin to run at the date the rectification decision is made, we think the LRA 2002 should be amended to ensure that that approach is taken.

**Recommendation 33.**

14.106 We recommend that

(1) for indemnity claims under paragraph 1(1)(a) of schedule 8, the limitation period should start to run from the date on which the register is rectified; and

(2) for indemnity claims under paragraph 1(1)(b), the limitation period should start to run from the date of the decision not to rectify the register.

14.107 We do not recommend making any change to when the limitation period begins to run in respect of claims under paragraph 1(1)(c) to (h).

14.108 Our recommendation is implemented by clause 36, which amends paragraph 8 of schedule 8.

14.109 Unlike the proposal in the Consultation Paper,[46] our clause does not refer to the date of the *decision* to pay an indemnity or to rectify the register. In relation to claims under paragraph 1(1)(a), the clause provides that limitation will start to run when the register is rectified. We made this change to take account of the fact that it is possible for there to be a delay between the court or the registrar deciding that the register should be rectified and the decision being put into effect. In relation to claims under paragraph 1(1)(b), limitation will start to run not at the date of the rectification decision but when an indemnity becomes "payable". We made this change to take account of the fact that a decision not to rectify the register may be subject to an appeal.

**The limitation period for HM Land Registry's statutory rights of recourse**

14.110 As mentioned in paragraphs 14.35 and 14.36 above, schedule 8 paragraph 10 confers rights of recourse on the registrar to recover indemnity payments from third parties. The provision reads as follows:

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45 *Chohan v Times Newspapers Ltd* [2001] EWCA Civ 964, [2001] 1 WLR 1859 at [28].

46 Consultation Paper, para 14.136.

(1) Where an indemnity under this Schedule is paid to a claimant in respect of any loss, the registrar is entitled (without prejudice to any other rights he may have)—

(a) to recover the amount paid from any person who caused or substantially contributed to the loss by his fraud, or

(b) for the purpose of recovering the amount paid, to enforce the rights of action referred to in sub-paragraph (2).

(2) Those rights of action are—

(a) any right of action (of whatever nature and however arising) which the claimant would have been entitled to enforce had the indemnity not been paid, and

(b) where the register has been rectified, any right of action (of whatever nature and however arising) which the person in whose favour the register has been rectified would have been entitled to enforce had it not been rectified.

14.111 We explained in the Consultation Paper that the LRA 2002 does not specify the limitation period applicable when the registrar exercises his or her rights of recourse. This lacuna does not, in our view, present any difficulty in relation to the registrar's rights of action under paragraph 10(1)(a). HM Land Registry treats the limitation period applicable to its direct right of action against perpetrators of fraud as six years from the date of the indemnity payment. We agree with this view.[47]

14.112 However, the limitation period applicable to the registrar's rights of recourse under paragraph 10(1)(b) and (2) does present a problem. The court has interpreted paragraph 10 as effecting a statutory subrogation in the sense that rights of action of the beneficiary of an indemnity or rectification are transferred to the registrar to the extent required for the registrar to be able to recover the indemnity payment.[48] The registrar thus steps into the shoes of either the indemnity claimant (paragraph 10(2)(a)) or the person in whose favour the register has been rectified (paragraph 10(2)(b)). We suggested in our Consultation Paper,[49] and we are still of the view, that the registrar will thus be subject to whatever limitation period applies to the claim which has been transferred by paragraph 10(1)(b). Time is therefore likely already to be running against the registrar before the relevant causes of action are transferred. It is in principle

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47 Consultation Paper, para 14.139. We think that the registrar's direct rights of recourse are caught by s 9 of the Limitation Act 1980, which provides for a six-year limitation period for actions "to recover any sum recoverable by virtue of any enactment".

48 See *Meek v Clarke* CA (unreported), 7 July 1982 (on the predecessor to sch 8 para 10 in s 83(10) of the LRA 1925); *Pinto v Lim* [2005] EWHC 630 (Ch) at [91]; *Chief Land Registrar v Caffrey & Co* [2016] EWHC 161 (Ch), [2016] PNLR 23 at [19]; *Patel v Freddy's Ltd* [2017] EWHC 73 (Ch) at [82].

49 Consultation Paper, para 14.141.

possible that the registrar's claim may be time barred before the registrar has any opportunity to enforce it.[50]

### Consultation

14.113 We provisionally proposed that paragraph 10 of schedule 8 should be amended so that, to exercise the paragraph 10(1)(b) rights of recourse, the registrar has the *longer* of either 1) the remaining limitation period applicable to the transferred claim or 2) 12 months from the date of the indemnity payment or rectification of the register.[51]

14.114 Our provisional proposal was broadly supported by 20 consultees. HM Land Registry regarded our proposal as "essential for both clarity and fairness". Only Nottingham Law School disagreed with the proposal, again, on the basis that the case for reform had not been persuasively made.

14.115 Some consultees suggested modifications to our proposal. Both the Chancery Bar Association and the Bar Council suggested that 12 months may be too short an extension period to give the registrar a fair opportunity to exercise the rights of recourse under paragraph 10(1)(b). They suggested imposing a two-year limitation period by analogy with contribution claims under the Civil Liability (Contribution) Act 1978. As HM Land Registry's view in its consultation response was that a one-year extension would be sufficient (although it is also open to a longer period), we have not adopted this suggestion.

14.116 The City of Westminster and Holborn Law Society agreed with our proposal, but subject to the caveat that the 12-month extension should not apply if the limitation period applicable to the claim transferred to the registrar has already expired before the transfer took place. We do not agree that this modification is appropriate. Part of the problem that we are intending to address is that the registrar may have become time-barred before he or she has an opportunity to exercise the rights of recourse under paragraph 10(1)(b). We cannot resolve this problem if we adopt the City of Westminster and Holborn Law Society's suggestion.

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50 Where the right to bring a claim is transferred from one person to another, it is settled law that the transferee can be in no better position than the transferor (*Lefevre v White* [1990] 1 Lloyd's Reports 569). We also referred in the Consultation Paper to the case of *Orakpo v Manson Investments* [1977] 1 WLR 347 in which it was held an insurer cannot claim through subrogation where the underlying claim of the claimant is time barred: see para 14.141.

51 Consultation Paper, para 14.146.

Recommendation

**Recommendation 34.**

14.117 We recommend that the registrar's rights of recourse under schedule 8, paragraph 10(2) ought to be subject to the following statutory limitation periods.

(1) In a case within schedule 8, paragraph 10(2)(a), HM Land Registry should have the longer of (i) the remaining limitation period applicable to any cause of action the indemnity claimant would have had if an indemnity had not been paid; or (ii) 12 months from the date the indemnity is paid.

(2) In a case within schedule 8, paragraph 10(2)(b), HM Land Registry should have the longer of (i) the remaining limitation period applicable to any cause of action the person in whose favour rectification has been made would have had if the rectification had not been made; or (ii) 12 months from the date the register is rectified.

14.118 Our recommendation is implemented by clause 36. This clause inserts a new sub-paragraph (2A) into paragraph 10. Sub-paragraph (2A) gives the registrar at least 12 months from the date on which the indemnity is paid or the rectification of the register takes effect to bring a claim under paragraph 1(1)(b).

## VALUATION OF INDEMNITY CASES

14.119 We conclude our consideration of indemnity with a discussion of the valuation of indemnity claims.[52] Paragraph 6 of schedule 8 imposes a cap on the valuation of the estate, charge or interest (all three of which, for ease of reference, we will refer to as "interests in land") for the purposes of an indemnity. The cap varies depending on whether a claim is made under paragraph 1(1)(a) (where the loss is due to rectification of the register) or under paragraph 1(1)(b) (where loss would have been resolved by rectification, but rectification is refused). Paragraph 6 provides as follows:

> Where an indemnity is payable in respect of the loss of an estate, interest or charge, the value of the estate, interest or charge for the purposes of the indemnity is to be regarded as not exceeding–
>
> (a) in a case of an indemnity under paragraph 1(1)(a), its value immediately before rectification of the register (but as if there were to be no rectification), and
>
> (b) in the case of an indemnity under paragraph 1(1)(b), its value at the time when the mistake which caused the loss was made.

14.120 Hence, sub-paragraphs (a) and (b) identify different times for valuing the interest in land. Sub-paragraph (a) refers to the value "immediately before rectification", while sub-

[52] Consultation Paper, paras 14.147 to 14.158.

paragraph (b) refers to the value at "the time when the mistake which caused the loss was made". In the Consultation Paper[53] we gave an example based on average house prices to illustrate how using different dates could have a significant impact on the level of indemnity payable. We reproduce this example in figure 28 below.

Figure 28: valuation of an indemnity claim

X is mistakenly entered as the registered proprietor of a house valued at the price of an average English house in January 2015: £285,000. Y, the "true" owner, discovers the mistake and applies to have the register rectified. The rectification decision takes place in January 2016. If rectification is granted X will be able to claim for the value of the estate in January 2016: £306,000. If rectification is not granted, the value of the estate will be capped at the January 2015 figure. Within a single year, the difference in value the claimant will recover could be as much as £21,000.

14.121 We have previously considered the appropriate date for valuation; indeed, the predecessor of schedule 8 paragraph 6 was introduced to implement one of our previous reports.[54] As we explained in the Consultation Paper, in the light of changing circumstances, we consider that the rationale underpinning the difference in valuation date now requires re-examination. Land values have been rising quickly. If interests in land are valued at the date of the mistake, applicants might be inadequately compensated for their loss. The payment of interest on the indemnity from the date of the mistake often falls far short of the increase in the value of the land.[55] We provisionally proposed to alter the date for valuing an indemnity for the loss of an interest in land under schedule 8 paragraph 1(1)(b). We proposed that the relevant interest in land should be valued as at the date of the decision not to rectify the register. However, we further proposed that the interest should be valued by reference to "the condition the land was in at the time of the mistake".[56] We wanted to ensure that, where there is a decision not to rectify, the applicant does not receive a windfall if the registered proprietor has improved or developed the land since the mistake was made.

14.122 As we were unsure whether it would be practicable for valuers to provide valuations of interests in land by reference to the past condition of the land, we also included a call for evidence for consultees to provide information about any valuation difficulties that may arise.[57]

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53 Consultation Paper, para 14.151

54 The Land Registration Act 1997, s 2 (which inserted a new s 83(8) into the LRA 1925) implemented the proposals in Transfer of Land: Land Registration (1995) Law Com No 235.

55 Consultation Paper, para 14.150.

56 Consultation Paper, para 14.159.

57 Consultation Paper, para 14.160.

### Consultation

14.123 Twenty-five consultees responded to our provisional proposal to alter the date of valuation. Nineteen consultees, including HM Land Registry, supported the proposal. Only three of the consultees who agreed provided detailed comments.

14.124 Dr Harpum said that the issue of the appropriate valuation date where rectification is refused was discussed extensively in preparing the 2001 Report. He explained that it was thought that, if an indemnity were to be refused, the applicant would still be reasonably compensated "because interest was payable on the sum of indemnity due from the time of the mistake, together with any consequential loss". The Bank of England base rate at the time was 4%.

14.125 The Bar Council agreed that the existing rule in schedule 8 paragraph 6 "does not fairly reflect the loss to the disappointed applicant". However, it was concerned that it may be unfair always to value the property in the condition it was in at the time of the mistake. In the Bar Council's view, an applicant may be "left undercompensated if he or she has spent money on improving the property in ignorance of the mistake". The Chancery Bar Association, which neither agreed nor disagreed with our proposal, made a similar point.

14.126 We do not think that the Bar Council's concern warrants any alteration to our proposal. Although schedule 8 paragraph 6 places a cap on the valuation of the relevant interest in land, it does not restrict the right of an applicant to recover for other losses caused by the mistake in the register. Under paragraph 1(1) of schedule 8, a person is entitled to be indemnified if "he suffers loss by reason of rectification of the register" or "a mistake whose correction would involve rectification of the register". This provision does not say that such a person is only entitled to an indemnity for the loss of an interest in land. Paragraph 6 thus does not prevent the applicant in the scenario sketched by the Bar Council from claiming a full indemnity in respect of his or her wasted expenditure in improving the property.

14.127 On a related point, Amy Goymour noted that the applicant might in addition have a claim against the current registered proprietor of the land for unjust enrichment. We think that the indemnity scheme should ensure that adequate compensation is paid. We do not think that the scheme provided by the LRA 2002 should rely on the availability of a separate cause of action, such as a restitution claim, in order for a claimant to receive adequate compensation.

14.128 In the Consultation Paper we noted that, in a number of cases, the court has taken the difference in the level of indemnity that will be available to the parties depending on whether or not rectification is granted as a reason to grant or to refuse rectification.[58] We commented that "it does not seem right as a matter of policy for the level of

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[58] We cited *Pinto v Lim* [2005] EWHC 630 Ch at [94], [102] and [103]; *Nouri v Marvi* [2005] EWHC 2996 (Ch), [2006] 1 EGLR 7 at [24] and [51]; and *Kingsalton v Thames Water Developments* [2001] EWCA Civ 20, [2002] 1 P & CR 15 at [27] and [30]. The approach taken in these cases has also now been given implicit support in relation to the LRA 2002 by the Court of Appeal in *MacLeod v Gold Harp Properties Ltd* [2014] EWCA Civ 1084, [2015] 1 WLR 1249 at [105].

indemnity payable to impact on the decision whether to rectify the register".[59] Amy Goymour agreed with our conclusion on this point.

14.129 The insurance principle is of fundamental importance to the land registration scheme in the LRA 2002. The availability of an adequate indemnity where mistakes occur supports the title promise in section 58. A person who suffers loss due to a mistake in the register and who has not been guilty of fraud or lack of proper care should be entitled either to rectification or to a full indemnity. By taking into account the different levels of indemnity that are available under schedule 8 paragraphs 1(1)(a) and 1(1)(b), the court is implicitly recognising that an indemnity under paragraph 1(1)(b) may be inadequate. Provision of inadequate compensation is anathema to the purpose of the indemnity scheme in schedule 8 whereby HM Land Registry acts as insurer for registered titles. Moreover, as we emphasise in Chapter 13 in our discussion of the scheme for rectification, mistakes should generally be rectified, but subject to the robust protections for those in possession of the land. The rectification scheme is undermined if the court or the registrar are also being swayed by the adequacy of the indemnity that will be provided if rectification is granted or refused.

14.130 Six consultees did not support our proposed amendment of paragraph 6 (of whom two disagreed and four expressed other views). Only one of those consultees opposed the substance of the amendment.

14.131 Christopher Jessel commented that paragraph 6 does not properly take into account the developmental potential of the land. For example, he explained that a person who purchased land with a view to development would be severely prejudiced if the register were to be rectified to note a restrictive covenant preventing the proposed development. However, we do not think that Mr Jessel has identified a significant problem with our proposed amendment. First, although schedule 8 specifies a date for the valuation of an interest in land, it does not state that the court or the registrar may not take into account the development potential that the land had at that date. Secondly, our proposal is limited to identifying the date at which the valuation is made. Given the current market climate, our proposal is more favourable to indemnity claimants than the current position.

14.132 The Chancery Bar Association agreed that paragraph 6 of schedule 8 is unsatisfactory, but felt that that there are problems with the provision that our proposal does not address. It suggested that the court should have discretion to choose an appropriate valuation date. We are not persuaded that it is either necessary or desirable for the court to have a discretion as to the valuation date. In our view, providing for such a discretion would be likely to lead to litigation over the choice of date.

14.133 The Law Society said that we are "seeking the best of both worlds" through our proposal. This is true. Where rectification is refused, we are suggesting the disappointed applicant's interest in land should be valued at the date of the refusal, but by reference to the condition of the land at the time of the mistake. The Law Society suggested that we should select either the date of the mistake or the date of the rectification decision, or provide that that indemnity applicants should receive the higher of the two values. It also suggested that it is "dangerous to start tinkering with core principles relating to the

[59] Consultation Paper, para 14.149.

assessment of damages". However, the Law Society provided no reason to think that our approach to valuation is unfeasible. Paragraph 6 of schedule 8 already "tinkers" with the assessment of damages (but, importantly, places no restriction on an applicant's recovery of consequential losses). Our recommended amendment merely ensures that it does so in a fairer manner, given variations in the property market.

14.134 Only Nottingham Law School opposed our specific proposal for reform. It said that a convincing case for reform had not been made out. It suggested that the difficulties we raised with schedule 8 paragraph 6 in the Consultation Paper had been "aggravated by the very unusual market conditions that have prevailed since the crisis in 2007 / 2008" and that these conditions were unlikely to last for much longer. Irrespective of whether Nottingham Law School is correct in its assessment of the current property market, we think that our reforms are still needed. For the reasons given in paragraphs 14.128 and 14.129 above, we think that the date for valuation of an interest in land on an application under paragraph 1(1)(b) should be as close as possible to the valuation date on an application under paragraph 1(1)(a). We think that as a matter of policy, the date of valuation should not be dependent on which party is to receive an indemnity. We accept that, as a result, in a falling market our provisional proposal would mean that the indemnity payable would be less than under the current law.[60]

**The call for evidence**

14.135 Twelve consultees responded to our call for evidence regarding difficulties in determining the current value of an interest in land on the supposition that the land had remained in the same condition it was in at the time of the mistake. No consultees suggested that it would be impossible in practice for such valuations to be carried out, although several consultees noted that it may be challenging.

14.136 The Conveyancing Association thought that, in the case of most residential properties, there would be little difficulty in establishing value based on comparable properties. However, in its view, establishing the condition of the property at the time of the mistake would be more problematic, and more so in the case of agricultural or commercial premises where fewer comparable properties will be available. The Law Society also pointed out that difficulties may arise where there is no record of the condition of the property at the time of the mistake.

14.137 We recognise that, in particular cases, there may be difficulties in discovering what condition a property was in at the time of the mistake. As the City of Westminster and Holborn Law Society said, these difficulties will be particularly acute where the condition of the land has changed substantially since the mistake. We do not think, however, that these difficulties should be overstated. The City of Westminster and Holborn Law Society noted that professional valuers will often have access to direct or comparable historic evidence on which to base a valuation. Similarly, Michael Hall noted that, where the land has undergone development, the nature and extent of the development will often be well known. In particular, residents, former residents and neighbours of property will often have a good idea of how its physical condition has changed over the years. Finally, the current law requires interests in land to be valued at the date of the

[60] Consultation Paper, para 14.156.

mistake and it has not been suggested to us that such valuations are proving to be impossible in practice.

**Recommendation**

**Recommendation 35.**

14.138 We recommend that where an indemnity is payable in respect of the loss of an estate, interest or charge following a decision not to rectify, the value of the estate, interest or charge should be regarded as not exceeding its value at the date of the rectification decision, but valued as if both the estate, interest or charge and the land had remained in the condition it was in at the time of the mistake.

14.139 Our recommendation is implemented by clause 35.

14.140 In its consultation response, the Chancery Bar Association argued that an amendment should avoid any ambiguity as to the relevant date for valuation. It pointed out that in the Consultation Paper we merely said that the "current" value of the land is to be assessed. This could be a reference to "the date of (a) the application to rectify, (b) the decision on rectification, (c) the claim for the indemnity or (d) the decision on the indemnity claim".

14.141 The clause ensures that no such ambiguity arises. The appropriate date is "the time when the indemnity becomes payable". For the avoidance of doubt, the clause includes a cross-reference to paragraph 1(3) of schedule 8. Paragraph 1(3) provides that an indemnity under paragraph 1(1)(b) is not payable "until a decision has been made about whether to alter the register for the purpose of correcting the mistake". The clause makes it clear that that the appropriate date for valuation is the date of the decision on rectification.

14.142 For an indemnity under paragraph 1(1)(b), we recommend that the relevant interest in land is valued on the assumption that the interest and the land had remained in the same condition that they were in at the time of the mistake. However, HM Land Registry asked in its consultation response whether the "condition" of the land at the time of the mistake "includes the planning status of the land, or is it only the physical condition". This question is a significant one. Between the time of the mistake and the time of the rectification decision, there may be various physical changes to the relevant land. New buildings may be erected or old buildings demolished. Planning permission may be granted or revoked. Various interests may be granted over or in relation to the land, such as rights of way, restrictive covenants or options to purchase. Alternatively, the land may be let or sublet (and the tenants may or may not be afforded contractual or statutory protections), or relevant leases may be surrendered or forfeited.

14.143 Our reform has a narrow scope. The only change that we propose is intended to enable an indemnity claimant to take advantage of increases (or to suffer the detriment of decreases) in the property market between the date of the mistake and the date of the rectification decision.

14.144 The clause thus inserts a new sub-paragraph (2) into paragraph 6. The sub-paragraph provides that, on an application under paragraph 1(1)(b), the valuation of the relevant interest in land is to be carried out on the assumption that *both* the interest in land *and* the physical land itself was in the same condition as at the time of the mistake. It further provides that both the land and the interest in the land are to be taken to be subject to "the same estates, interests, rights and incidents" as at the time of the mistake. Any changes to the land or the interest in the land – whether a physical change to the land, the grant of planning permission, the grant of a right of way or restrictive covenant, or the grant or forfeiture of a lease – are to be disregarded.

# Chapter 15: General boundaries and boundary disputes

## INTRODUCTION

15.1 Boundary disputes between neighbours account for a considerable number of referrals to the Tribunal every year.[1] As we noted in the Consultation Paper, political and judicial concerns have been raised regarding the "disproportionately bitter, protracted and expensive" nature of these disputes.[2] We believe that clarification of the law may ease some of these difficulties.

15.2 Our focus in this chapter is on clarifying the distinction between "boundary disputes", meaning disputes that fall within the general boundaries rule, and "property disputes", meaning disputes that involve rectification of the register of title of an estate. Our aim in clarifying this distinction is to promote consistency in judicial and tribunal decisions and to provide guidance to landowners with potential claims.

15.3 In the Consultation Paper, we provisionally proposed the introduction of a non-exhaustive list of factors to guide the determination of whether a matter is a boundary dispute or a property dispute. Consultees largely agreed with our proposal. We now recommend the express provision of three factors within the LRA 2002 to guide the determination of whether an issue falls within a boundary or a property dispute. On reflection, we have decided against including in the list a fourth factor,[3] proposed in the Consultation Paper. We also recommend that a power be created in the LRA 2002 for further factors to be provided by, and contained within, land registration rules once they are recognised as indicators of the classification of disputes.

## THE GENERAL BOUNDARIES RULE

15.4 The concept of a "boundary" as understood in ordinary speech – a line typically marked by physical features dividing two neighbouring properties – does not adequately convey the meaning in law. As a legal concept, an exact boundary line is a line of no width that is imaginary or invisible.[4]

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1 Accounting for approximately 150 to 160 referrals in 2015 to 2016: Ministry of Justice, *Boundary Disputes: A Scoping Study* (January 2015) para 2.

2 Consultation Paper, para 15.1.

3 The manner in which the error in the boundaries shown on the title plan came about: see Consultation Paper, paras 15.34(4) and 15.35(4).

4 HM Land Registry, *Practice Guide 40: Supplement 3: HM Land Registry Plans: Boundaries* (June 2015) para 2.1.

15.5 When an estate is registered, it must be described in the property register. That is, the property register must contain a title plan, based on the Ordnance Survey map. On that title plan, the boundary of the estate will be indicated by red edging.[5]

15.6 The majority of boundaries as shown on HM Land Registry title plans are "general boundaries". General boundaries indicate approximate boundaries, the accuracy of which is not guaranteed. In contrast, a minority of titles show a "determined boundary", where the exact boundary has been established and is guaranteed by HM Land Registry.[6]

15.7 The general boundaries rule was originally introduced for registered land by the Land Transfer Act 1875.[7] Before then, the legal boundaries of registered land were required to be precisely recorded in the register. However, the precise legal boundary of an estate is frequently difficult to determine. Conveyances rarely identify the exact line of a boundary, and accordingly, extensive case law has developed around the question of how to establish the position of a legal boundary.[8] The requirement for exact boundaries in registered land therefore caused difficulties as well as disputes, often when there was no dispute on the ground between neighbours.[9] The general boundaries rule was introduced to ameliorate these issues. It was carried over from the Land Transfer Act 1875 into the rules made under the LRA 1925.[10]

15.8 Section 60 of the LRA 2002 is the current iteration of the general boundaries rule. Subsections (1) and (2) state:

> (1) The boundary of a registered estate as shown for the purposes of the register is a general boundary, unless shown as determined under this section.
>
> (2) A general boundary does not determine the exact line of the boundary.

15.9 Importantly, because of section 60, the guarantee of title in section 58 is not a guarantee of the boundary if the boundary has not been determined. Therefore, the general boundaries rule is a qualification of the title guarantee provided in section 58 of the LRA 2002: the extent of title in relation to an undetermined boundary is not guaranteed.

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5 LRR 2003, r 5(a). See HM Land Registry, *Practice Guide 77: Altering the Register by Removing Land from a Title Place* (September 2015) para 1.1. Two consultees, Tom Grillo FRICS and Martin Wood, made suggestions in their consultation responses about the scale of the plans used by HM Land Registry. We have not considered these points, as we consider it an operational matter not a matter of law. We have, however, drawn these matters to HM Land Registry's attention.

6 LRA 2002, s 60. If a boundary has been determined, the register will indicate this fact: see LRR 2003, r 120. Similarly, if the title plan only shows the general boundaries, an official copy of the plan will include the warning: "This title plan shows the general position of boundaries: it does not show the exact line of boundaries".

7 Land Transfer Act 1875, s 83(5).

8 HM Land Registry, *Practice Guide 40: Supplement 3: HM Land Registry Plans: Boundaries* (June 2015) paras 2.1, 3 and 4.

9 See Land Transfer Commission, *Land Transfer Commission on the Operation of the Land Registry Act* (1870) para 80.

10 In particular, Land Registration Rules 1925, r 278. See Consultation Paper, paras 15.6 and 15.7.

15.10 In this project, we have not considered wholesale reform of the general boundaries rule. We remain convinced that any move away from the general boundaries rule to exact boundaries would be unworkable. It would increase the costs of transactions (for example, the high cost of having to survey and determine a boundary before a disposition) and could provoke unnecessary disputes, perhaps making landowners feel that a move of the "paper boundary" would deprive them of land when in reality nothing had changed on the ground. Moreover, as we explained in the Consultation Paper, we have not considered the creation of a dispute resolution mechanism for boundary disputes, because such a mechanism is beyond the scope of the current project.[11]

15.11 Instead, we have identified legal issues, which contribute to the creation or perpetuation of boundary disputes between neighbours, that could be amended within the terms of the current project. Our focus has been on clarifying the distinction between boundary disputes and property disputes.

## THE CLASSIFICATION OF BOUNDARY DISPUTES

15.12 If a registered proprietor disagrees with a general boundary as indicated on a title plan, he or she may apply to alter the title plan pursuant to schedule 4.[12] The dispute will be categorised as either a "boundary dispute" or a "property dispute". This distinction is of the utmost significance to the parties: if the dispute is a boundary dispute, the party who loses out will not be indemnified; if the dispute is a property dispute, indemnity might be available to the party who loses out.

15.13 The distinction between boundary and property disputes is not express on the face of the LRA 2002. It is implicit. It flows from the effect of the general boundaries rule in section 60 in the context of the title guarantee in section 58.

15.14 If a dispute is a boundary dispute, removal of land from a title plan simply produces "another general boundary in a more accurate position than the current general boundary" (to borrow the words of Mr Justice Nugee).[13] The LRA 2002 does not guarantee the position of the boundary. Consequently, in a boundary dispute, an alteration of the register to reflect a more accurate general boundary is not prejudicial to the registered proprietor's title: he or she has not had anything taken away. Therefore, it does not amount to a rectification of the register, and no indemnity is available.[14]

15.15 Conversely, in a property dispute, if land is removed from a title plan, the land is being removed from the registered title. The registered proprietor in that case has lost a part of his or her estate that was guaranteed by HM Land Registry, and so alteration to

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11 Another form of resolution has been considered by the Ministry of Justice: see Ministry of Justice, *Boundary Disputes: A Scoping Study* (January 2015).

12 It may also be that a dispute could arise based on an application to determine the exact line of a boundary under LRA 2002, s 60 and LRR 2003, rr 118.

13 *Derbyshire County Council v Fallon* [2007] EWHC 1326 (Ch), [2007] 3 EGLR 44 at [26].

14 LRA 2002, sch 4, paras 1 and 2. HM Land Registry, *Practice Guide 77: Altering the Register by Removing Land from a Title Place* (September 2015) para 1.2; *Paton v Todd* [2012] EWHC 1248 (Ch), [2012] 2 EGLR 19 at [46].

correct the mistake is prejudicial to him or her. Therefore, indemnity might be available.[15]

15.16 As an aside, we note that there is one circumstance in which a case classified as a property dispute will not be resolved through the scheme for alteration and rectification. That is where the claim to the land arises though adverse possession and so is governed by schedule 6 to the LRA 2002. In some circumstances, which we explore in more detail in Chapter 17, a person who has been in adverse possession of land neighbouring his or her own land can be registered as proprietor of that land.[16] A transfer of title to land obtained through adverse possession does not give rise to an indemnity.[17]

15.17 The distinction between boundary and property disputes, although only implicit in the LRA 2002, is expressly adopted by the courts[18] and by HM Land Registry in its practice.[19]

15.18 Despite the significance of the distinction, there is a lack of certainty about how any given case will be classified. As we explained in the Consultation Paper, the case law has not provided clear guidance on how the distinction is drawn. Stakeholders had reported to us that landowners have difficulties predicting in advance of litigation whether a particular dispute would be found to be a "boundary dispute" or a "property dispute" by the courts or Tribunal.[20]

15.19 In its practice guide,[21] HM Land Registry offers some guidance about factors that might indicate that a matter is a property dispute.

(1) "The physical area of the land is significant relative to the land which is accepted as falling within the registered title".[22]

(2) "The land is somehow physically distinguishable from the other land in the registered title and of particular importance to the registered proprietor".[23]

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15 LRA 2002, schs 4 and 8. See Ch 13. See *Lee v Barrey* [1957] Ch 251; HM Land Registry, *Practice Guide 77: Altering the Register by Removing Land from a Title Place* (September 2015) para 1.2.

16 See Ch 17, paras 17.31 and 17.45 to 17.63, below.

17 LRA 2002, sch 6 para 9.

18 See eg *Derbyshire County Council v Fallon* [2007] EWHC 1326 (Ch), [2007] 3 EGLR 44; *Drake v Fripp* [2011] EWCA Civ 1279, [2012] 1 P& CR.

19 Consultation Paper, para 15.3. See HM Land Registry, *Practice Guide 77: Altering the Register by Removing Land from a Title Place* (September 2015) para 1.2.

20 Consultation Paper, para 15.3.

21 HM Land Registry, *Practice Guide 77: Altering the Register by Removing Land from a Title Place* (September 2015) para 1.2.

22 *Drake v Fripp* [2011] EWCA Civ 1279; *Knights Construction v Roberto Mac* [2011] 2 EGLR 123.

23 *Paton v Todd* [2012] EWHC 1248 (Ch), [2012] 2 EGLR 19; *Parshall v Hackney* [2013] EWCA Civ 240, [2013] Ch 568.

These factors are drawn from the case law and, as HM Land Registry suggests, are not present in cases which are classified as boundary disputes.

15.20 On the other hand, there is also a factor that points toward a matter being a boundary dispute: the determination of a dispute based on the common law presumptions about boundaries. Common law presumptions are used to determine the boundary between two parcels of land. One example is the hedge and ditch rule: if a hedge and a man-made ditch divides two properties, the boundary is presumed to run along the edge of the ditch that is furthest from the hedge.[24] These common law presumptions were previously incorporated into rule 278(2) of the LRR 1925, the predecessor to section 60 of the LRA.[25] Although they are no longer enshrined in the legislation or the rules, the presumptions remain relevant in the body of common law underlying the general boundaries rule. And, significantly for our purposes, when these presumptions can determine the matter, a case is likely to be considered a boundary dispute.

15.21 This guidance has not prevented uncertainty in relation to individual cases. In part, some uncertainty is inevitable, since the determination of whether a matter is a boundary dispute or a property dispute is "a question of fact and degree".[26] However, given the frequency of disputes about boundaries, we proposed in the Consultation Paper that codifying the factors which have featured frequently in cases would help to improve clarity in this area of the law.[27]

15.22 We also proposed an additional factor to be considered. We suggested that the manner in which the error in title plan came about could, in combination with other factors, help indicate whether the matter was a boundary dispute or a property dispute. For example, if the error was made by a landowner replacing a fence in the wrong spot, the matter is likely to be a boundary dispute; if HM Land Registry made an error in reflecting the boundary in the register, mistakenly adding an additional parcel of land in a registered title, the matter is likely to be a property dispute.[28]

## CONSULTATION AND DISCUSSION

15.23 In the Consultation Paper, we provisionally proposed that a non-exhaustive list of factors should be introduced to guide determinations of the distinction between boundary disputes and property disputes. We identified four possible factors:

(1) the relative size of the contested land in comparison to other land clearly within the remainder of the registered proprietor's title;

(2) the importance of the land to the registered proprietor;

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24 HM Land Registry, *Practice Guide 40: Supplement 3: HM Land Registry Plans: Boundaries* (June 2015) para 11.2. See also *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894, [1999] 2 All ER 897; *Parmar v Upton* [2015] EWCA Civ 795, [2015] 2 P & CR 18.

25 Law Com No 271, para 9.11; Consultation Paper, para 15.32.

26 *Drake v Fripp* [2011] EWCA Civ 1279 at [21]. See Consultation Paper, para 15.20.

27 Consultation Paper, paras 15.33 and 15.34.

28 Consultation Paper, para 15.34(4).

(3) the application of the common law presumptions; and

(4) the manner in which the error in the boundaries shown on the title plan came about.[29]

We also invited consultees to comment on the factors that should be considered when distinguishing boundary and property disputes.[30]

15.24 Twenty-five consultees responded to the proposal. Eleven responded to the additional question about the factors for consideration.

15.25 Most consultees were supportive of the introduction of a non-exhaustive list to aid the classification of disputes as either boundary or property disputes: 14 consultees agreed with the proposal, numbering among them a range of practitioners, practitioner bodies, and academics. Consultees who disagreed or expressed other views were largely academics, with the notable exceptions of HM Land Registry and the Law Society.

**General comments regarding the proposal**

Support for the proposal

15.26 Many respondents who agreed with our proposal did not offer further comment on its application. Those who did comment welcomed the proposal.

15.27 Elizabeth Derrington, the Independent Complaints Reviewer for HM Land Registry, noted that in her professional experience many boundary disputes are the result of parties' confusion about the effect of the general boundaries rule. She was joined by the London Property Support Lawyers Group, Pinsent Masons LLP and the Chancery Bar Association in stating that the provisional proposal would aid parties' understanding of the general boundaries rule, and provide clarity and consistency[31] in an area of law that is difficult to define and hard to predict.[32]

Reservations regarding the proposal

15.28 Whilst a majority of consultees supported the introduction of a non-exhaustive list of factors, several (both those in agreement or otherwise) expressed reservations. For the most part, these consultees doubted whether our proposal would provide greater clarity. Some consultees suggested that the proposals should go further, to reform the underlying general boundaries rule.

15.29 While not opposed to the proposal, Dr Charles Harpum QC (Hon) was sceptical of the assistance our proposal would provide. HM Land Registry was more critical of the proposal, explaining that a non-exhaustive list would be of little use in attempting to improve the regulation of already litigious cases, and risked further complicating a difficult area of law. HM Land Registry suggested that landowners are more interested in knowing where their boundary is, not whether they have a "property dispute or boundary dispute". Likewise, Martin Wood thought that the Law Commission's attention

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29 For further explanation of these factors see Consultation Paper, para 15.34.

30 Consultation Paper, paras 15.35 and 15.36.

31 London Property Support Lawyers Group and Pinsent Masons LLP.

32 Chancery Bar Association.

would be better focussed on the ambit of the general boundaries rule: he argued that the rule should be narrowly construed in order to give effect to the title guarantee given in section 58 of the LRA 2002. Similarly, Cliff Campbell did not think our proposal went far enough to address the fundamental problems with the current law.

15.30 As we indicated in the Consultation Paper, we are seeking to bring clarity where there is a dispute, or the potential for one. We did not propose to, and have not consulted on, reform of the general boundaries rule itself. Our proposals do not seek to change the meaning of that rule. However, in our view, by making the distinction between boundary and property disputes more apparent to parties, our proposal will in fact promote clarity about the scope of the general boundaries rule, because the two are related: a discrepancy about the boundary that would be resolved as a boundary dispute is an issue that falls within the general boundaries rule.

15.31 Amy Goymour suggested that a non-exhaustive list may provide Tribunal judges greater freedom to consider the consequences of their determinations, encouraging results-driven decision making. We do not agree with this analysis. Our policy aims to provide certainty to parties as to what may be considered as a relevant factor in any given case. The factors we propose are grounded in case law. We do not think that providing for these factors in statutory form will cause the Tribunal judges to take into account the consequences of their findings any more or less than is currently the case.

15.32 Conversely, in their joint response, Professors Warren Barr and Debra Morris were supportive of the introduction of a non-exhaustive list, but expressed concern with the difficulties in defining such a list and ensuring that it will be interpreted as non-exhaustive. Similarly, in disagreeing with the proposal, Christopher Jessel expressed the view that any list would be "liable to be construed as more or less exhaustive…". In his view, if a list were to be introduced, it should be given as extra-statutory guidance. We have considered how we can ensure that the factors we outline are considered as non-exhaustive, in particular in drafting the clause that will enact our recommendation, which we discuss in more detail below.

**Factors for consideration**

15.33 Most consultees in favour of the proposal were broadly supportive of including the four factors that we proposed, without providing additional comment. Only 11 consultees separately responded to our question about what type of factors should be considered when distinguishing boundary and property disputes, although other consultees addressed this issue in responding to the question of whether there should be a non-exhaustive list of factors. When consultees did comment, they focussed on their concerns on the four proposed factors. We discuss these concerns below.

Factor 1 – the relative size of the contested land

15.34 Although the Law Society supported the introduction of guidance, it did not support our proposal. In particular, it was critical of factor 1, the relative size of the contested land. The Law Society instead suggested that the distinction between a boundary and property dispute is fundamentally a question of the magnitude of the discrepancy between the boundary on the title plan and the respective contentions of the parties, on a linear measurement. In its view, the greater the discrepancy, the more likely it is that the dispute would be classified as a property dispute.

15.35 The factor we proposed – the relative size of the contested land compared to other land clearly within the remainder of the registered proprietor's title – flows from the case law, and replicates the guidance currently provided by HM Land Registry.[33] Like the Law Society's proposal, it is a comparative assessment of the scale of the land under dispute, although the focus is different. Our factor looks to the proportion of the contested land relative to the land within the registered title, while the Law Society is concerned with the distance of the new boundary from the existing one. In our view, the two may often point in the same direction. Nevertheless, we consider the relative size of the contested area to be a more accurate indication of the nature of the dispute. Moreover, we are unconvinced that we should depart from the analysis of the courts on this point.

### Factor 2 – the importance of the land to the registered proprietor

15.36 Some academic and practitioner consultees were concerned about how factor 2 – the importance of the land to the registered proprietor – would be assessed.[34] Most who considered this point suggested that this factor risked being viewed subjectively; on a subjective assessment, this factor would be irrelevant because "surely the land will always be important to the registered proprietor…" if it is the subject of a dispute.[35] Both Amy Goymour and Pinsent Masons LLP suggested that the assessment should be objective. To make clear that the assessment is objective, Pinsent Masons LLP suggested that the non-exhaustive list could include examples of objective importance, such as the objective value and utility of the land.

15.37 Similarly, various consultees suggested that the use of the disputed land by the parties should be considered. They suggested consideration of whether the land has been built on, the degree of possession and the current use and value of the land;[36] whether physical boundary markers would need to be moved;[37] the presence of buildings or other substantial structures;[38] and any impact on the amenity of adjoining property (for example, access to mines and minerals).[39] Dr Harpum expressed a similar idea, focussing on possession: he thought that whether a party is in possession of the disputed land should be a relevant factor in any decision, given the importance the LRA 2002 gives to possession.

15.38 Our proposal was intended to capture these points raised by consultees. We intended factor 2 to encompass the importance of land to the registered proprietor on an objective assessment, considering, as consultees suggested, the use of the land. In the light of

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33 See eg *Drake v Fripp* [2011] EWCA Civ 1279, [2012] 1 P & CR 4 at [20]; *Knights Construction v Roberto Mac* [2011] 2 EGLR 123.

34 The Law Society, London Property Support Lawyers Group, Amy Goymour, Pinsent Masons LLP, Everyman Legal, and Martin Wood.

35 Amy Goymour.

36 London Property Support Lawyers Group.

37 Michael Hall.

38 Chancery Bar Association.

39 Adrian Broomfield.

consultees' suggestions, we have clarified our policy in the recommendation we make, which we explain in more detail below.

### Factor 3 – the common law presumptions

15.39 We proposed that the common law presumptions should be included as a factor within the non-exhaustive list. Several consultees emphasised the need to include the factors previously incorporated into rule 278 of the Land Registration Rules 1925.[40] As acknowledged by both Dr Harpum and Cliff Campbell, we intended to capture the common law presumptions as reflected in the previous rule 278.

### Factor 4 – the manner in which the error came about

15.40 The Law Society did not support inclusion of factor 4, the manner in which an error in the title plan came about. It explained that this factor would often only be speculation, and expressed concern that it could be used to assign fault to a party, which could impact the determination of the dispute. Martin Wood also thought that this factor is irrelevant.

15.41 In the Consultation Paper, we explained that factor 4 should not have the same importance as the other factors, but rather should only be considered in combination with them. We identified this factor as one the Tribunal or court will generally consider, a point that Dr Harpum agreed with. We do not think that expressing the point in statute will allow an assessment of "fault" to creep into the determination. However, we agree with the Law Society that if the source of the error is not clear, speculation will not assist to determine the dispute.

15.42 On reflection, we think that factor 4 might not always be indicative of the type of dispute. As it would only generally be useful to consider in conjunction with the other factors, it is unlikely to be determinative by itself. We do not think it should be given the same treatment as the others in the legislation. Therefore, we accept that the legislation should not expressly require factor 4 to be considered in every case.

## Caveat about the general boundaries rule

15.43 The Law Society explained that there is a widely held misconception that HM Land Registry title plans accurately represent the boundary, despite the terms of the general boundaries rule.

15.44 HM Land Registry currently includes the following wording on official copies of title plans:

> This title plan shows the general position, not the exact line, of the boundaries. It may be subject to distortions in scale. Measurements scaled from this plan may not match measurements between the same points on the ground.

The Law Society suggested that this warning should be clearer. It proposed that HM Land Registry should include a statement on every title plan along the lines of:

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[40] HM Land Registry, Martin Wood, and the Law Society.

**Warning**: Land Registration Act 2002, section 60. Unless the contrary is stated on the property register, this plan does **not** accurately show the boundaries of the land comprised in this title.

15.45 We agree that the Law Society's suggested wording more clearly draws the registered proprietor's attention to what the general boundaries rule means for him or her, though we question whether the wording suggested by the Law Society would be understood by non-lawyers. We suggest to HM Land Registry that it should consider whether the standard wording on title plans (and official copies) should be amended so that it provides a clear explanation to lay people as to the nature of the boundaries shown.

**RECOMMENDATION**

15.46 We continue to believe that the introduction of a non-exhaustive list of factors, to be considered in determining whether a dispute is a boundary dispute or a property dispute, will help provide clarity and certainty to the law. It will allow parties more readily to assess the likelihood of the matter being determined to be a boundary or property dispute. As a consequence, we believe our proposal will discourage litigation of boundary disputes, and so reduce the number of claims brought before the Tribunal and the courts.

15.47 As we explained above, we have reconsidered the value of factor 4, the manner in which the error came about. We highlighted in the Consultation Paper that this factor is less significant than the others, and would need to be considered together with the other factors. Based on responses from consultees, we have decided to exclude it from our recommendation. We continue to think that it will often be useful to consider how the error came about in determining the nature of the dispute. However, we do not think that it should be required to be considered in every case; nor do we think it is likely to be determinative of any case.

15.48 Consultees were largely supportive of the other three factors that we proposed in the Consultation Paper. Although some consultees suggested additional considerations, in our view, those considerations are captured within the factors we proposed. We are moreover cautious about including factors that are not grounded in the case law.[41] We do, however, see the benefit in enabling other factors to be included, if the courts identify further factors. We have therefore worded our recommendation so that further factors can be added to the list of three that we propose, through the introduction of rules.

15.49 We have reflected on consultees' concerns that the assessment of the importance of the disputed land to the registered proprietor risked being determined on a subjective basis. Consultees emphasised that to operate satisfactorily this factor must be determined objectively, which was our intention in the proposal. We have worked to make this point clearer, both in our recommendation and in our clause to amend the LRA 2002. Our recommendation now speaks to the "value" of the land, rather than its importance. We also agree with consultees' views that possession and the use or amenity value of the land (for example, by being built on, or providing access to adjacent

[41] Factor 4 was implicit, but not explicit, within the case law, which was another reason we were more cautious about including it in our recommendation.

amenities) are relevant considerations. These factors all indicate the value of the land to the registered proprietor (or disputing party).

15.50 We explained in the Consultation Paper that we saw factor 2, the value of the land, as operating as a qualification to the consideration of the relative size of the disputed land. Therefore, where the disputed area is relatively small, if it is of great importance to the registered proprietor the case is more likely to be a property dispute.[42] We have made this point explicit in our recommendation, and in the clause to amend the LRA 2002.

15.51 Some consultees[43] expressed concern that we were introducing a new system for the classification of disputes. However, as emphasised in the Consultation Paper, this classification is implicit in the LRA 2002 (in the distinction between an alteration that does not prejudice the registered proprietor's title, and rectification of the title) and is explicit in the case law and HM Land Registry's practice guidance. Our recommendation therefore sits within the existing system of the classification of disputes to ensure greater consistency in decisions.

15.52 In the Consultation Paper, we suggested that the non-exhaustive list of factors would be contained in secondary legislation, to ensure that it could be updated.[44] Since these factors govern an assessment under schedules 4 and 8 – that is, whether the alteration of the title plan would prejudice the registered proprietor – we now believe that it is more appropriate for the factors to be contained in the LRA 2002. However, any additional factors that arise from the case law will be added to the list by (and so contained within) rules.

**Recommendation 36.**

15.53 We recommend the introduction of a non-exhaustive list of factors, to be included in the LRA 2002, to be considered to distinguish boundary and property disputes:

(1) The value of the disputed land as determined by an objective assessment of the facts;

(2) Subject to the assessment of the value of the land, the relative size of the disputed land in comparison to other land within the remainder of the registered proprietor's title; and

(3) Whether the common law presumptions about boundaries in land wholly determine the dispute.

15.54 We recommend that the LRA 2002 should grant a rule-making power to add further factors to be considered to distinguish boundary and property disputes.

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42 Consultation Paper, para 15.34.

43 HM Land Registry and Martin Wood.

44 See n 53 on p 341 of the Consultation Paper.

15.55 Clause 26 implements Recommendation 36. The determination of whether a matter is a boundary dispute or a property dispute is, under the LRA 2002, a determination of whether an alteration of the title plan would prejudicially affect the title of the registered proprietor. Therefore, clause 26 inserts these three criteria into schedule 4 in new paragraph 1B. Paragraph 1B of schedule 4 will require the registrar or court to have regard to the value of the land being removed from the register of title first, and secondly to the relative size of the land being removed. It will also provide that if the alteration is based solely on the application of the common law presumptions about boundaries, the title of the registered proprietor is generally not prejudicially affected by the alteration. These factors will assist the decision maker in determining whether the proposed alteration of the register would amount to rectification. However, they are not the only factors that the registrar or court can consider: as sub-paragraph 1B(4) makes clear, the registrar or court may have regard to any other factors considered appropriate. Moreover, paragraph 1B enables rules to make provision for additional factors to be considered.

# Chapter 16: Easements and profits à prendre benefiting short leases

## INTRODUCTION

16.1 In this chapter, we consider the way in which the LRA 2002 treats easements (and profits à prendre) which benefit short leases.

Terms used in the context of easements benefiting short leases

*Easements*: proprietary rights which enable the proprietor of an estate to make some limited use of someone else's land. Examples include rights of way and rights to light.

*Short leases*: leases which are granted for a term of seven years or less. Such leases generally do not have to be registered in order to operate at law.[1]

*Parol leases*: a category of short leases which are for three years or less for market rent with no additional premium.[2] As a matter of the general law of property, parol leases do not need to be made in writing in order to operate at law.[3]

*Profits à prendre*: proprietary rights which enable a person to take something from someone else's land. Examples include hunting rights and fishing rights.

16.2 The aim of our recommendations is to ensure the priority protection for easements is the same as the leases they benefit.[4] We seek to achieve our aim by aligning the registration requirements and overriding status of easements with the short leases that they benefit. We have taken a context-specific approach, with different outcomes depending on the type of lease and the timing of the easement's creation.

16.3 The effect of our recommendations is to increase the number of interests which bind purchasers and other disponees despite not being the subject of an entry in the register. As we acknowledged in the Consultation Paper, this outcome amounts to a small departure from the policy put forward in our 2001 Report that interests should be

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1 LRA 2002, s 27(2)(b)(i). Relevant social housing tenancies also do not need to be completed by registration: see LRA 2002, s 27(5A).

2 Market rent with no additional premium is referred to in the Law of Property Act 1925, s 54(2) as "the best rent which can be reasonably obtained without taking a fine".

3 Law of Property Act 1925, s 54(2).

4 There is a general argument that the registration requirements and priority of appurtenant rights should always mirror the interest they benefit. Our draft Bill does that in respect of the differences that were drawn to our attention and highlighted as causing problems.

brought onto the register.[5] We are sympathetic to the view, expressed by a small number of consultees, that any movement away from the policy that the register should provide a full and complete statement of title should be resisted. We continue to believe in the goal of a full and complete register of title and note that the Government shares this goal.[6]

16.4 Nevertheless, we think that limited departure from this principle is justified in the specific case of easements benefiting short leases. We consider that where tenants of short leases have the benefit of an easement, the registration requirements for that easement should not be more onerous than for the lease. As the LRA 2002 presently stands, the registration requirements for those interests differ. In our view, the need to protect tenants in this position outweighs the benefits of promoting registration in this instance. Nevertheless, our approach to overriding interests is consistent with that of the 2001 Report: an interest should only override if it is neither reasonable to expect nor sensible to require an entry in the register. In this case, we think it is necessary for such easements to be capable of overriding, in order to protect the rights of tenants of short leases.

16.5 Although we focussed upon easements in the Consultation Paper, we take the view that our policies in this chapter should equally apply to the similar rights known as profits à prendre. The rules concerning the creation and priority of profits à prendre and easements are the same. For convenience, reference to easements in this chapter should be taken to include profits à prendre.

16.6 This chapter is divided into three sections. In the first section, we explain the background law relating to the respective rules on the creation and priority of leases and easements. In the second section, we look at the registration requirements for easements benefiting short leases created by deed and the impact these requirements have on priority. We conclude that easements benefiting short leases created in the same deed as the lease should be exempt from the requirements of registration. Finally, we consider the priority protection for easements benefiting parol leases, and recommend that such easements, whether legal or equitable, should be capable of being overriding interests within paragraph 3 of schedule 3 to the LRA 2002.

## BACKGROUND LAW

16.7 There are various requirements as to form that must be met in order to create at law either a short lease or an easement. These requirements flow from an interaction of general property law and the registration requirements in the LRA 2002.

### Short leases

16.8 As a matter of general property law, leases are usually required to be made by deed in order to be legal.[7] Parol leases – a category of short lease – are an exception to this

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5 Consultation Paper, para 16.31.

6 Fixing our Broken Housing Market (2017) Cm 9352, paras 1.17 to 1.20 outlines the Government's goal of "comprehensive land registration", or the elimination of unregistered land, by 2030, and a register that better reflects "wider interests in land".

7 Law of Property Act 1925, s 52(1).

rule:[8] parol leases are not subject to any formality requirements under the general law, as outlined in the Law of Property Act 1925.[9]

16.9 In addition to the requirement of a deed, the LRA 2002 requires most leases to be completed by registration in order to operate at law.[10] Again, there are exceptions. Significantly, most leases for a term not exceeding seven years are excepted from the requirement of registration, and indeed cannot have their own registered titles.[11] We refer to these leases as "short leases".

16.10 The LRA 2002 provides two mechanisms to protect the priority of short leases. First, it is possible to protect leases for a term which exceeds three years by entering a notice in the register.[12] Secondly, the LRA 2002 confers overriding status on leases for a term of seven years or less, provided they are not otherwise required to be completed by registration.[13] Each mechanism provides the same priority protection: they are protected in the event of a disposition of the landlord's estate, and so will be binding on any person who acquires an interest in the registered land.[14]

16.11 A lease which fails to satisfy either the formality requirements of the general law or registration requirements of the LRA 2002 can only take effect in equity.[15] The priority of an equitable lease will only be protected if a notice is entered in the register or if the tenant is in actual occupation.[16]

### Easements

16.12 Easements can be created in three ways: by express grant or reservation, by implication or by prescription. The formality and registration requirements differ depending on the means of creation. As part of this project, we have only considered express and implied easements.[17]

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8 The other exceptions are particular social housing tenancies (flexible and assured tenancies) under the Law of Property Act 1925, s 52(2)(da) and (db).

9 Law of Property Act 1925, s 54(2).

10 LRA 2002, s 27(1) and (2)(b).

11 LRA 2002, s 27(2)(b)(i). A lease for a term not exceeding seven years may nonetheless be registrable if it falls within one of the other categories in s 27(2)(b).

12 LRA 2002, ss 32 and 33(b).

13 LRA 2002, schs 1 and 3, para 1.

14 LRA 2002, s 29(2)(a)(i) and (ii).

15 *Walsh v Lonsdale* (1882) 21 Ch D 9 (CA). There must be a specifically enforceable contract for an equitable easement to arise. Therefore, the contract formality requirements must be satisfied: see Law of Property Act (Miscellaneous Provisions) Act 1989, s 2.

16 LRA 2002, sch 3 para 2. Use of an easement over another person's land is unlikely to constitute actual occupation of that land: *Chaudhary v Yavuz* [2013] Ch 249. However, it is a question of fact and could conceivably occur where, for example, someone has an easement to store goods on another person's land: see Ben McFarlane, "Eastenders, Neighbours and Upstairs Downstairs: Chaudhary v Yavuz" [2013] *Conveyancer and Property Lawyer* 74.

17 Easements created by prescription always operate at law, regardless of formality or registration.

16.13 According to general property law, easements created by express grant or reservation must be made by deed to be legal.[18] Unlike with leases, there are no exceptions to this requirement. Some legal commentators have considered whether an easement benefiting a parol lease could take effect at law if it were not granted by deed.[19] However, since the Law of Property Act 1925 is silent on this point, we think the better view is that the requirement of a deed applies to all easements.[20] If an easement is not granted by deed, then it can only take effect in equity.[21]

16.14 According to the LRA 2002, the express grant or reservation of an easement over registered land[22] must be completed by registration in order to operate at law.[23] In the case of an easement, it will be "registered" by the entry of a notice in the register of title for the burdened land.[24]

16.15 In addition to express creation, easements may be implied into a conveyance. It is not settled whether the conveyance into which the easement is implied must be by way of a deed for the easement to take effect at law; this issue is discussed in further detail below.[25] Implied easements do not need to be completed by registration.[26]

16.16 Although profits à prendre are created by the same means, we recommended in our 2011 report, Making Land Work: Easements, Covenants and Profits à Prendre, that, for the future, it should only be possible to create them expressly or by statute.[27] This proposal does not impact on our recommendations below given that they primarily concern the express creation of easements and profits à prendre.

16.17 As with short leases, the priority of legal easements is protected by two mechanisms. First, an easement can be protected by a notice in the register. A notice will be entered when the express grant of an easement is completed by registration. It is also possible to apply to enter a notice in respect of an easement which is not required to be

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18 Law of Property Act 1925, s 52.

19 Eg *Woodfall: Landlord and Tenant* (looseleaf ed) para 14.010; J Gaunt, *Gale on Easements* (20th ed 2016) para 2.01; *Ruoff & Roper*, para 36.013.

20 Consultation Paper, para 16.17.

21 Provided there is either a specifically enforceable contract or proprietary estoppel: see J Gaunt, *Gale on Easements* (20th ed 2016) para 2.02. It is possible for an equitable easement to arise for reasons other than failure to satisfy formality requirements: See D G Barnsley, "Equitable easements—sixty years on" (1999) 115 LQR 89; Simon Pulleyn, "Equitable easements revisited" [2012] *Conveyancer and Property Lawyer* 387.

22 An easement over unregistered land is not required to be completed by registration, even if it benefits registered land: see HM Land Registry, *Practice* Guide 62: *easements* (March 2018) para 3.3; *Ruoff & Roper*, para 36.010. It is still possible to note the benefit of the easement in the register of title.

23 LRA 2002, s 27(2)(d). Note that easements deemed to be granted by virtue of the Law of Property Act 1925, s 62 are not required to be registered: s 27(7).

24 LRA 2002, sch 2 para 7(2)(a). If the benefiting estate is registered, the proprietor of the estate will also be entered in the register: LRA 2002, sch 2 para 7(2)(b). LRA 2002, s 132 provides that "'registered' means entered in the register", and thus can apply to notices.

25 See paras 16.53 to 16.55 below.

26 LRA 2002, s 27(2)(d) refers to *express* grant or reservation.

27 Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com 327, para 3.9.

registered to operate at law; for example, in relation to an implied easement.[28] In either case, the notice will protect the priority of the easement in the event of a registered disposition of the burdened estate.[29]

16.18 Secondly, a legal easement is capable of overriding a registered disposition. Given that all expressly created easements must be protected by notice to be legal,[30] only easements created by implication or prescription which are not otherwise protected by notice will be overriding. By paragraph 3 of schedule 3, a legal easement will override a registered disposition if it is either:

(1) within the actual knowledge of the person to whom the disposition is made;

(2) obvious on a reasonably careful inspection of the burdened land; or

(3) exercised in the period of one year ending with the day of the disposition.[31]

16.19 Equitable easements are not capable of being overriding interests within paragraph 3.[32] The only priority protection offered by the LRA 2002 in respect of equitable easements is the ability to enter a notice in the register.[33]

## THE REGISTRATION REQUIREMENTS OF EASEMENTS BENEFITING SHORT LEASES

16.20 The registration requirements for short leases and for easements benefiting them differ. This disparity creates uneven effects in terms of priority protection between the two; that is, in relation to whether the interest continues to bind following a registered disposition. In this section, we consider whether the requirements should be rationalised.

### Concerns with the current law

16.21 We consider first the current law that applies to short leases that are required to be made by deed in order to be legal, but are not registered estates; that is, leases which do not fall within the parol lease exception. Easements benefiting parol leases are the subject of detailed consideration and a discrete recommendation below at paragraph 16.46 and following.

16.22 The current law requires registration of all easements, but not of all of the short leases they may benefit. Tenants of short leases therefore may find that their lease is protected against registered dispositions, but an easement benefiting the lease is not. The effects

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28 LRA 2002, s 34(1).

29 LRA 2002, s 29(2)(a)(i).

30 LRA 2002, sch 2 para 7.

31 LRA 2002, sch 3 para 3. Note that all legal easements and profits à prendre are overriding on first registration: LRA 2002, sch 1, para 3.

32 LRA 2002, sch 3 para 3 only applies to legal easements. Equitable easements are not capable of protection under LRA 2002, sch 3 para 2; use of an easement over another person's land is unlikely to constitute actual occupation of that land: *Chaudhary v Yavuz* [2013] Ch 249.

33 LRA 2002, s 32.

of the different registration requirements are illustrated by the following example in figure 29.

Figure 29: grant of a short lease and an easement.

A owns two neighbouring plots of registered land. The first plot of land can only be accessed by crossing the second plot of land.

A grants to B by deed:

- a four-year lease over the first plot of land; and
- a right of way in the form of an easement over the second plot of land.

The transaction is not registered. B's lease will be legal without registration, but B's easement will only take effect in equity.

A sells both plots of land to C. The effect of this disposition in terms of B's interests is as follows:

- the priority of B's lease is protected,[34] and
- B's equitable easement is postponed to the disposition to C.[35]

C is bound by B's lease, but is not bound by B's easement. B will have no right to cross the second plot of land, and will therefore be unable to access the leased land.

16.23 The rationale behind the approach to overriding interests taken in the LRA 2002 is that an interest should have overriding status only if protection against buyers is needed, but it is neither reasonable to expect nor sensible to require any entry in the register.[36]

16.24 We took the view in the Consultation Paper[37] that it is neither reasonable to expect nor sensible to require the registration of easements benefiting short leases which are granted in the deed creating the lease. The short lease created by the deed is not required to be registered. It is counter-intuitive that a lesser right benefiting that lease should need to be registered. A tenant of a short lease is effectively required to register particular terms of an otherwise unregistrable lease. However, tenants of short leases are unlikely to take legal advice in relation to their lease, and so are unlikely to be aware that any easement granted in the lease must be registered.[38] The requirement of registration means that such tenants risk losing a valuable right in the event of a registered disposition. Accordingly, the need to register easements undermines the

34 LRA 2002, sch 3 para 1.

35 LRA 2002, s 29(1).

36 See Ch 11, para 11.2, above. See also Law Com No 271, paras 2.25 and 8.6; Law Com No 254, para 4.14.

37 Consultation Paper, paras 16.12, and 16.25 to 16.27.

38 Consultation Paper, para 16.12.

benefit of giving short leases the protection of overriding status. Moreover, as a number of stakeholders explained prior to consultation, the savings made in cost and effort by not requiring the registration of short leases is undermined by the need to register easements benefiting those leases. Additional time and cost will arise from the need to remove the notice of the easement when the lease comes to an end.

16.25 In contrast, we explained in the Consultation Paper that we did not think that easements granted after the creation of the lease should be exempt from the requirement of registration.[39] In this scenario, a separate deed will be used to grant the easement; therefore, legal advice in relation to registration is more likely to have been taken. Due to the fact the easement is created in a separate deed, the argument that it is not sensible to require the registration of certain terms of an otherwise unregistrable lease does not apply. Further, if the grant of the easement is located in a separate document, it may be harder for a purchaser to discover; the tenant's occupation will prompt a buyer to look at the terms of the lease, but the purchaser may not be alerted to the existence of a separate deed. As a result, we think that it is both reasonable to expect and sensible to require registration in these circumstances.

### Consultation and discussion

16.26 In order to rationalise the registration requirements between short leases and easements benefiting them, we provisionally proposed that an easement created in the deed granting a short lease should not be required to be completed by registration.[40] Such easements would therefore be legal, and able to override a registered disposition. For easements granted by a separate instrument, we provisionally proposed that the requirement of registration should continue to apply.[41]

16.27 In general, consultees supported both provisional proposals.

#### Easements granted by the deed creating the lease

16.28 Our provisional proposal to exempt easements granted within a lease from the requirement of registration attracted widespread support from a variety of consultees, including HM Land Registry, academics, solicitors and barristers. Many practitioners who responded expressed strong support for our proposal. The debate broadly revolved around two factors: protection for the tenant and the benefits of more extensive registration.

#### Protection for the tenant

16.29 Several consultees echoed our concern that tenants are insufficiently protected under the current law. The current law catches out unwitting tenants who may not appreciate that there are registration requirements for rights of way benefiting their unregistrable leases. Consultees agreed that short-term tenants often do not seek legal advice, and as a consequence do not register their easements.

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39 Consultation Paper, para 16.43.

40 Consultation Paper, para 16.32.

41 Consultation Paper, para 16.44(2).

16.30 The Law Society and Dr Charles Harpum QC (Hon) were among the small number of consultees who questioned the extent to which tenants of short leases need additional protection. These consultees pointed out that, in practice, it would not be in a landlord's interest to deny a tenant's easement set out in his or her short lease. Even if a landlord were to do so, the tenant could have a non-proprietary right against the landlord.[42]

16.31 We do not agree that the current law provides adequate protection to the tenant. First, it is unclear that personal rights adequately address the vulnerability of a tenant's easement against a third-party purchaser in all cases. Moreover, as a matter of policy, we believe priority issues affecting registered land should be settled by the land registration scheme, rather than the general law. The availability of remedies to a tenant does not detract from the merits of improving the legislative scheme. Our proposal aims to increase certainty for the parties involved, and thereby to reduce scope for dispute.

### Benefits of registration

16.32 Three consultees disagreed with our proposal, including Dr Harpum and the Conveyancing Association. These consultees considered that it represented a step back from the objective set out in our 2001 Report of creating a complete and accurate land register. We acknowledge that our proposal represents a departure, in narrowly defined circumstances, from the mirror principle. In our view, however, it is consistent with the approach taken in the 2001 Report to overriding interests.

16.33 In his consultation response, Dr Harpum emphasised the benefits of registration: purchasers can readily ascertain whether they are bound by an easement and tenants are better protected if their easement is registered. He considered that registration is not an onerous requirement and that, in contrast, overriding interests increase conveyancing costs by creating the need to enquire beyond the register. We do not disagree with Dr Harpum in principle, but we are not persuaded by his argument in relation to the specific interests under consideration; in particular, we think that registration does become onerous when the person required to register his or her interest is unlikely to be aware of the requirement.

16.34 As the London Property Support Lawyers Group argued convincingly, only easements which meet the conditions outlined in schedule 3 override,[43] and these conditions provide some protection for purchasers. That is, easements which can override will be discoverable. The LPSLG considered that a purchaser's due diligence "will not increase significantly as a result of this change".

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[42] For example, pursuant to a landlord's covenant for quiet enjoyment or the common law doctrine of non-derogation from grant: see *Woodfall: Landlord and Tenant* (looseleaf ed) paras 11.083 to 11.088 and 11.266 to 11.313.

[43] See para 16.18 above. The strength of this point is somewhat undermined by the fact that exercise of an easement in the previous year is enough to confer overriding status, even though the easement may not be apparent on inspection: LRA 2002, sch 3 para 3(2). We understand that this condition is intended to provide protection to certain types of easements which are in fact used regularly but will not be apparent on inspection, such as a drainage easement exercised through an underground pipe. Easements benefiting short leases are unlikely to have to rely on this condition, and in fact will usually be obvious on inspection of the land.

16.35 A number of practitioners suggested that there are disadvantages to registering easements benefiting short leases, namely clutter in the register. Several consultees, including the Law Society, indicated that the current registration requirement for easements leads to cluttered titles and increases conveyancing costs, often for "minimal" benefits. Evidence was provided that, even when legal advice is sought, these factors lead to inconsistent legal practice as to the registration of easements, with some practitioners taking the conscious decision not to register them.[44]

16.36 We are not convinced that the benefits of registration justify imposing the requirement of registration on easements benefiting short leases. Although the requirement of registration should result in a fuller picture of title in the register, that advantage is lost in so far as such easements are not in fact registered. It may also result in clutter and impose costs every time an easement needs to be added to or removed from the register, in circumstances in which the lease itself is not registrable. Moreover, we agree that purchasers of the landlord's estate should not be unduly prejudiced. Purchasers will usually be informed of the existence of a short lease and it should be discovered on an inspection of the land. If they are not obvious from an inspection of the land, easements granted in the short lease should be discoverable on inspection of the lease itself.

### Easements granted by a separate deed

16.37 The majority of consultees agreed with our proposal that the law should not be amended in relation to the registration requirements of easements benefiting short leases which are granted by a separate document to the one creating the lease. Consultees agreed that such easements should continue to have to be registered in order to operate at law. Professor Sarah Nield noted that there was "justification" for treating these easements differently. Many consultees agreed without further comment.

16.38 Dr Harpum and the Conveyancing Association agreed with this policy on the basis that they thought that all expressly created easements should be required to be completed by registration.

16.39 Four consultees disagreed with our proposal. These consultees took the view that any easement benefiting a short lease should be exempt from the requirement of registration. The Law Society considered that such easements should be capable of being overriding. It argued that it would promote "administrative convenience" and would "avoid cluttering the landlord's title", although it accepted that such easements were a "rarity". Two consultees[45] raised concerns that a tenant of a short lease who was granted an easement by deed outside the lease may not, in fact, have received legal advice.

16.40 We continue to be of the view that it is reasonable to expect registration in these circumstances. As the easement must have been created by deed in order to be legal, the parties are more likely to have received legal advice and, therefore, to be aware of registration requirements.

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[44] Evidence was provided by the Law Society and the City of London Law Society Land Law Committee.

[45] Christopher Jessel and the City of Westminster and Holborn Law Society.

16.41 However, as we indicated in the Consultation Paper,[46] we take a different view in relation to parol leases. As parol leases are not required to be created by deed, we think a different approach is needed. The approach we have taken, as we explain in more detail below,[47] is to allow easements benefiting a parol lease to be capable of overriding a registered disposition, regardless of whether they are created in the lease or separately from the lease.

**Recommendation**

16.42 We recommend that easements benefiting short leases granted in the same deed that creates the lease should be exempt from the requirements of registration. As a result, such easements will operate at law and, significantly, be capable of overriding registered dispositions.

16.43 This recommendation aligns the registration requirements that apply to easements created within a lease with those that apply to the lease itself. It removes a disparity in the registration requirements which was described by the City of London Law Society Land Law Committee as "inappropriate". Although we agree that registration provides more certain protection than overriding status, we nevertheless think that our proposal will enhance the protection of tenants without prejudicing purchasers and other disponees. We consider the proposal capable of reducing transaction costs, based on not only savings on registration fees, but also on reducing clutter in the register.

**Recommendation 37.**

16.44 We recommend that, where the grant of a lease is not a registrable disposition, easements and profits à prendre which benefit that lease and which are created by the deed granting the lease should not be required to be completed by registration in order to operate at law.

16.45 Clause 39 implements this recommendation. It will insert a new paragraph (c) into section 27(5A), alongside other dispositions which are exempt from the requirement of registration. It provides that section 27 does not apply to an easement which benefits, and is granted in the same document as, a term of years absolute which is not required to be completed by registration.[48] In order to avoid ambiguity as to whether an easement is created by, or is part of, a lease, clause 39 requires that the same deed grants the lease and easement.

## OVERRIDING INTEREST PROTECTION AND EASEMENTS BENEFITING PAROL LEASES

16.46 Recommendation 37 rationalises the registration requirements, allowing easements granted in the same deed as a lease to be capable of overriding. However, some easements benefiting a particular type of short lease, namely parol leases, may not be

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46 Consultation Paper, para 16.42.

47 See para 16.59 and following below.

48 Thus, it will be necessary to register an easement which benefits a lease falling within s 27(2)(b) or (c).

created by deed, and so may only be equitable. Currently, only legal easements can override a registered disposition. In this section, we consider whether these easements should also be capable of being an overriding interest.

### Current law

#### Express easements benefiting parol leases

16.47 As a matter of general property law, parol leases are not subject to any formality requirements.[49] However, legal easements which benefit them must be created by deed.[50] The consequences of this disparity are the same as the consequences of the uneven registration requirements in the LRA 2002 for short leases and easements benefiting them. With uneven formality requirements, there is a risk that these easements will not operate at law and therefore their priority will not be protected in the event of a registered disposition of the burdened estate.

16.48 If an easement does not operate at law, it can take effect in equity.[51] Under the current law, equitable easements are incapable of overriding first registration or a registered disposition.[52] The only form of protection available is the entry of a notice.[53] The priority of an equitable easement will be postponed unless protected by the entry of the notice in the register.

16.49 Once again, these different formality requirements have the potential to trip up the unwary, resulting in the inadvertent creation of equitable easements whose priority is not protected under the land registration regime. It is likely, and reasonable, that parties would not realise that an easement contained in the grant of a parol lease would need to be executed by deed. The prospect of this situation arising is increased by the fact that tenants of parol leases are less likely to seek legal advice in the course of the conveyance.[54]

16.50 We explained our view in the Consultation Paper that tenants who have inadvertently failed to comply with the necessary formalities for the creation of such easements should be offered some protection within the land registration regime.[55] We think that it is neither reasonable to expect nor sensible to require such a tenant to register or enter a notice in respect of their equitable easement. The argument that it is neither reasonable to expect nor sensible to require the registration of an easement which

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49 Law of Property Act 1925, s 54(2).

50 Law of Property Act 1925, s 52(1).

51 See para 16.13 n 21 above.

52 LRA 2002, sch 1, para 3, and sch 3, para 1. See para 16.19 above.

53 LRA 2002, ss 32 and 34.

54 Consultation Paper, paras 16.33 to 16.37. The policy behind exempting parol leases from the requirement of a deed is lack of legal advice see: S Bright, "Beware the informal lease: the (very) narrow scope of s 54(2) Law of Property Act 1925" [1998] *Conveyancer and Property Lawyer* 229, 233.

55 Consultation Paper, para 16.34.

benefits a short lease[56] applies even more strongly where the lease is created informally.

16.51 We also took the view in the Consultation Paper that this protection should be extended to easements benefiting parol leases which are granted *separately* to the grant of the lease.[57] Since a parol lease can be created without satisfying any formality requirements, the parties are unlikely to realise (quite reasonably) that the subsequent grant of an easement requires execution of a deed and registration. It is likely that the parties would not seek legal assistance for the grant of the easement given they are unlikely to have done so as regards the grant of the lease.

16.52 This differs from our view in respect of registration requirements for short leases created by deed.[58] We consider that it is reasonable to expect registration of a separate deed and that the parties would be likely to be legally advised due to the formal conveyancing process needed to create both the lease and the easement in the first place. We do not think the same distinction can be justified for parol leases; we think parties are more likely inadvertently to fail to satisfy the formality requirements whether the easement is granted within, or separately to, the parol lease. In either case, it is equally unreasonable to expect the tenant to register or enter a notice of his or her easement.

### Easements implied into parol leases

16.53 The law is unclear as to whether easements implied into the grant of a parol lease are legal or equitable. As we explained in the Consultation Paper, there are two schools of thought.[59]

16.54 One view is that implied easements still need to satisfy formality requirements, by being implied into a deed.[60] Thus, the status of an implied easement depends on how the conveyance into which it is implied is made. On this approach, an implied easement will only take effect at law if it is implied into a conveyance made by deed. Consequently, an easement implied into a parol lease could only ever be equitable.

16.55 Another view is that an implied easement–

> takes its character from the nature of the conveyance, so that an easement which is implied into the grant or reservation of a legal estate … is capable of existing as a legal easement.[61]

On this view, an easement implied into the grant of a parol lease will be legal and therefore capable of being an overriding interest. Although we adopted this view in our

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56 See para 16.24 above.

57 Consultation Paper, para 16.44.

58 See para 16.40 and 16.41 above; Consultation Paper para 16.43.

59 Consultation Paper, para 16.19 to 16.21.

60 See *R (Beresford) v Sunderland CC* [2003] UKHL 60, [2004] 1 AC 889 at [36]; K Gray and S F Gray, *Elements of Land Law* (5th ed 2009) para 5.2.20.

61 *Megarry & Wade*, para 28-002; see also *Wright v Macadam* [1949] 2 KB 744.

2008 consultation paper, Easements, Covenants and Profits à Prendre,[62] on reflection we think that the point is more equivocal.

16.56 Thus, there is a risk that such implied easements will not be legal. Consequently, they will be unable to override a registered disposition. Such an equitable easement will only take priority on a registered disposition if it is protected by a notice in the register. The entry of a notice appears to us unlikely, given that the tenant would first have to appreciate that an easement had been created by implication, and then appreciate that in order to protect the easement, a notice needed to be entered in the register.

16.57 In our view, this outcome undermines the utility of an easement arising by implication: to provide for the full extent of necessary benefits and burdens, which have not been expressly set out in the conveyance.[63]

**Consultation and discussion**

16.58 We provisionally proposed that easements benefiting parol leases should be capable of being overriding interests, regardless of whether such easements are legal or equitable. We asked for consultees views on our proposal in respect of easements contained in the grant of the lease[64] and easements granted separately to the lease.[65]

16.59 Our proposal for parol leases takes a different approach to our proposal for short leases created by deed. In Recommendation 37 above, we ensured that easements benefiting short leases could be overriding interests by changing the rules for creating legal easements; that is, by removing the requirement for registration, enabling such easements to operate at law. The same approach would be unsuitable for easements benefiting parol leases: it would be necessary to amend the formality rules under section 52 of the Law of Property Act 1925 to allow an easement that is not created by deed to operate at law, which we consider would be beyond the scope of our project.[66] Instead, our proposal directly amends the priority rules, allowing such easements to benefit from overriding interests protection without having to amend their status under the Law of Property Act 1925.

16.60 Our proposal would only protect an easement validly granted to a tenant of a parol lease; the easement would still have to meet the criteria of a valid easement[67] and satisfy relevant formality requirements. For example, there will be no easement which can fall within our policy if the oral grant of a parol lease purports to create one: the grant would not satisfy the formality requirements for either a legal easement[68] or an equitable easement based on a specifically enforceable contract.[69] Similarly, if the

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62 Easements, Covenants and Profits à Prendre (2008) Law Commission Consultation Paper No 186, para 4.62.

63 Consultation Paper, para 16.21.

64 Consultation Paper, para 16.32.

65 Consultation Paper, para 16.44(1).

66 Consultation Paper, para 16.39.

67 *Re Ellenborough Park* [1956] Ch 131.

68 Law of Property Act 1925, s 52(1).

69 Law of Property (Miscellaneous Provisions) Act 1989, s 2(1).

landlord merely intends to grant a licence, rather than an easement, that will not amount to a property right that can be protected as an overriding interest.

16.61 We asked consultees for their views in relation to our proposal. Although the majority of consultees agreed with us, we received a range of views from consultees who considered that our policy should apply more or less widely than we had suggested.

### All easements benefiting parol leases should override

16.62 The majority of consultees agreed with our proposal without additional comments. We had support from a range of consultees, including HM Land Registry, academics and practitioner organisations.

16.63 Most consultees were not troubled that our proposal represents a small step back from the policy in our 2001 Report that equitable easements should not be capable of overriding a registrable disposition. Dr Nicholas Roberts described this "limited re-admission of equitable easements to the canon of overriding interests" as an "acceptable price" to pay for the "sensible" policy of aligning the formality requirements for parol leases and easements which benefit them. Referring back to its response to the first consultation question in this chapter, the Law Society said that the policy would "be welcomed by landlords and tenants alike".

### Only easements contained in the grant of a parol lease should override

16.64 A few consultees disagreed that easements benefiting parol leases which are granted separately to the lease should also be protected. These consultees were solicitors who were concerned with the impact on purchasers' due diligence. Burges Salmon LLP thought that separately granted easements would prove "difficult to investigate". The London Property Support Lawyers Group thought that identifying easements not created as part of the "original occupational package" would increase the degree of due diligence needed on the part of purchasers.

16.65 We are not persuaded by these arguments. There are already a variety of interests that may be granted to tenants separately from the lease, and which will be likely to amount to an overriding interest on the basis that the tenant is in actual occupation of the land.[70] As we discuss in more detail in Chapter 11, the purchaser will therefore need to investigate whether the tenant has the benefit of any interests other than the lease. Due to the fact that purchasers and other disponees are already expected to undertake inspection of the property prior to completion, we do not consider that our proposal would materially increase the scope and resulting costs of the due diligence required.[71]

### Easements benefiting other types of short lease should override

16.66 Conversely, a few consultees who otherwise agreed with our proposal argued that it should go further, beyond easements benefiting parol leases. These consultees thought that equitable easements benefiting any short lease, including leases created by deed, should be capable of being overriding interests.

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70 LRA 2002, sch 3, para 2.

71 See Ch 11, paras 11.23 to 11.26 and 11.29, above.

16.67 Professor Nield considered that it was "incongruous" to require such easements to be noted in respect of leases which do not need to be registered. She thought that only allowing equitable easements benefiting parol leases to override was a "further twist for the unwary". We are not persuaded by this argument. The general principle of the LRA 2002 is that expressly created interests should be registered. In our view, departure from this principle is not justified when an easement is granted separately to a formally created lease. The parties are likely to receive legal advice in relation to a separate grant, so it is reasonable to expect and sensible to require registration.[72]

16.68 Christopher Jessel and the City of Westminster and Holborn Law Society were concerned with ensuring the protection of tenants of agricultural leases of between three and seven years, who are not included within our proposed policy. Their concern was that the formality requirements may not be satisfied in these cases due to the fact that conveyances may be executed by professionals who are not lawyers.[73] We do not think it is necessary to provide further protection to these tenants. Although they may not receive advice from a lawyer, we consider that the professionals designated by statute as able to execute the conveyance will be able to advise.

### Disagreed: no further easements should become overriding interests

16.69 The consultees who disagreed with our proposal to remove the registration requirement for legal easements granted in respect of short leases that require a deed also disagreed with this proposal for the same reasons. These consultees reiterated their view that our proposal represented a step back from a complete and certain register. Dr Harpum repeated his views that a landlord's successor in title is unlikely to refuse to allow a tenant to exercise a right of way and, moreover, that the courts may protect tenants in other ways. He also argued that expanding the number of overriding interests would increase conveyancing costs. As stated above, we remain unconvinced by this argument and believe that a case is made for the law to provide protection for tenants.

### Other comments

16.70 The London Property Support Lawyers Group queried whether our proposal would impact on rights, called code rights, found in the Electronic Communications Code, that are granted in leases which are not required to be registered. Since our consultation, the Electronic Communications Code was updated by schedule 1 to the Digital Economy Act 2017. It provides, among other things, that persons are bound by code rights regardless of whether they have been registered pursuant to any other enactment's registration requirements.[74] Our recommendations will therefore not interfere with the provisions of the Electronic Communications Code contained in schedule 1 to the Digital Economy Act 2017.

16.71 Amy Goymour, although agreeing with the substance of the proposal, was of the view that direct reform of the Law of Property Act 1925 would be better. As we explained at paragraph 16.59 above, amending the nature of property rights, or the requirements

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72 See para 16.25 above.

73 Legal Services Act 2007, sch 3 para 3(5) and (6): a Fellow of the Central Association of Agricultural Valuers or a Member or Fellow of the Royal Institution of Chartered Surveyors.

74 Communications Act 2003, sch 3A, para 14, inserted by Digital Economy Act 2017, sch 1, para 1.

imposed by the general law of property to create them, falls outside the scope of a project on land registration.

**Recommendation**

16.72 We recommend that easements, whether legal or equitable, benefiting parol leases should be capable of being overriding interests within paragraph 3 of schedules 1 and 3 to the LRA 2002. Consultation has confirmed our view that reform is needed to provide protection to tenants of parol leases and that such reform is justified.

16.73 We acknowledge that this policy goes against the decision taken in our 2001 Report that equitable easements should not be capable of overriding a registrable disposition.[75] Our view has changed in the light of our concern that the different formality requirements for the creation of parol leases and easements which benefit them have the potential to disadvantage tenants, resulting in the creation of equitable easements which are unlikely to be protected in the register.[76] We think that it is neither reasonable to expect nor sensible to require tenants to register such easements. Such easements are essentially created informally, being granted in or implied into an informally granted lease. The tenant is unlikely to appreciate the need to apply to protect the interest in the register. Moreover, a tenant in occupation of the land is unlikely to appreciate the need to take any steps to protect his or her interest. As we explained in Chapter 11, it is our view that a person without the benefit of legal advice is all the more likely to assume that his or her occupation is sufficient to protect any interests owned.[77]

16.74 Moreover, we do not think our proposal will result in easements being removed from the register. Stakeholders have relayed to us that easements benefiting very short leases are already not registered, despite the current requirement for registration. Therefore, our policy will not change existing practice substantially but rather align the law with it.

16.75 We are also unconvinced that making such easements capable of being overriding interests will increase conveyancing costs. Purchasers and mortgagees can, and should, protect themselves against overriding interests by carrying out enquiries of occupiers. Given that they should already undertake such inspections and, in particular, make enquiries of tenants in occupation of the land,[78] we cannot see that conveyancing costs will be increased.

16.76 Ultimately, we think our policy strikes the right balance between the need to protect the rights of tenants of short leases, and the need to ensure that overriding interests are discoverable by purchasers and mortgagees.

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75 Law Com No 271, para 8.65.

76 Consultation Paper, paras 16.34 and following.

77 See Ch 11, paras 11.20 to 11.22, above.

78 See Ch 11, paras 11.24 to 11.26, above.

**Recommendation 38.**

16.77 We recommend that all easements and profits à prendre benefiting leases which are not required to be created by deed by virtue of sections 52(2)(d) and 54(2) of the Law of Property Act 1925, including equitable easements, should be capable of being overriding interests.

16.78 Clause 40 implements this recommendation by amending schedules 1 and 3 to the LRA 2002. The amendment in relation to interests which override first registration is relatively simple: it will insert into schedule 1, paragraph 3, alongside a legal easement or profit, "an easement or profit which benefits a lease to which section 54(2) of the Law of Property Act 1925 applies".

16.79 The amendment to enable equitable easements to override a registered disposition under section 29 is more complex because legal easements are not overriding interests in all cases, pursuant to paragraph 3 of schedule 3. As a result, clause 40 takes a different approach to amendment. It will replace references to "legal easement or profit à prendre" with "qualifying easement or profit à prendre", which is defined as an easement or profit à prendre which is either legal or benefits a lease to which section 54(2) of the Law of Property Act 1925 applies.

16.80 Clause 40 will also apply to equitable easements which arise for reasons other than failure to satisfy the formality requirements.[79] We are satisfied that this application of the clause will not create any issues: such situations will be rare, and limited by the relative shortness of parol lease terms in any event.

16.81 However, clause 40 will not apply to equitable easements benefiting certain social housing tenancies. As with parol leases, certain social housing tenancies do not need to be created by deed, and do not need to be registered, in order to operate at law. However, easements (and other appurtenant interests) which benefit them do have to be created by deed, but do not have to be registered.[80] As a result, these easements also risk being equitable, thus not capable of overriding. Although the issue of misaligned formality requirements is the same as it is for parol leases, we concluded that we are not in a position to resolve any potential problem in this context, since we are unaware of any difficulties in practice.

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79 For example, an easement granted by the holder of an equitable interest.

80 Law of Property Act 1925, s 52(2)(da) to (db); LRA 2002, s 27(5A)(a) and (b).

# Chapter 17: Adverse possession

## INTRODUCTION

17.1 In this chapter, we consider the interaction between the land registration scheme in the LRA 2002 and the law governing adverse possession. Adverse possession is the process through which one person may claim legal title to land owned by another through possession of the land without permission of the landowner for a particular period of time.

17.2 In unregistered land, under the general law, entitlement to land is based on possession; the person with the strongest title to land is the person with the earliest claim to possession of that land. However, long-term possession of land can defeat earlier claims to possession by virtue of the Limitation Act 1980: adverse possession can operate to extinguish another person's pre-existing title, often called the superior title. In most cases, 12 years of adverse possession operates to extinguish a superior title,[1] leaving the adverse possessor with the strongest title.[2] The system of adverse possession in unregistered land is therefore based on obtaining title by possession.[3]

17.3 The effect of adverse possession in registered land is fundamentally different.[4] Under the LRA 2002, title is not acquired solely by adverse possession. The scheme for adverse possession in registered land, contained in schedule 6 to the LRA 2002, instead reflects a general principle that registration is the only means of acquiring title to registered land. Schedule 6 provides a procedure through which an adverse possessor may acquire title by registration on application to HM Land Registry. Ultimately, this procedure protects proprietors of registered land against claims to adverse possession.

17.4 In this project, we did not seek to revisit the policy underlying the scheme for adverse possession in the LRA 2002, nor to make any fundamental changes to that scheme. Although some consultees raised wider concerns with the operation of adverse possession, consultation responses as a whole did not in our view suggest that the procedure for adverse possession of registered land is not working, or that fundamental reform is desirable.[5] We therefore confined ourselves to considering specific aspects to the procedure in the LRA 2002 that have been the subject of concern.

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1 Limitation Act 1980, ss 15 and 17.

2 Subject to the possibility that an earlier title subsequently falls into possession. For example, where the adverse possession is against a leaseholder, at the end of the term of the lease the freehold falls into possession and the freeholder has 12 years in which to assert his or her title against the adverse possessor.

3 Consultation Paper, paras 17.4 to 17.13.

4 The definition of adverse possession is the same: LRA 2002, sch 6, para 11.

5 We disagree with consultees who suggested that the scheme for adverse possession in the LRA 2002 should be revisited for the reasons given in para 17.8 of the Consultation Paper. In addition, the Society of Legal Scholars raised a number of issues in relation to sch 6, but we have not been given evidence of problems in practice, and moreover some of the issues it raised concern property law in general, rather than land registration. We therefore do not consider them here.

17.5 Our review of adverse possession has focussed on two areas:

(1) particular aspects of the procedure governing adverse possession of registered land contained in schedule 6; and

(2) four specific points concerning the interaction between the general law governing adverse possession and the LRA 2002.

17.6 We begin this chapter by first briefly outlining the scheme for adverse possession in schedule 6 to the LRA 2002. We consider particular concerns raised about the procedure in schedule 6. We make a recommendation to prevent repeated applications for registration under schedule 6 by adverse possessors, unless the conditions for a second application are fulfilled. We also recommend that in boundary cases (those within paragraph 5 of schedule 6) the adverse possessor's reasonable belief that the property belonged to him or her must not have ended more than 12 months before the date of the application.

17.7 We next turn to the law governing adverse possession in unregistered land, considering points at which it interacts with the provisions in the LRA 2002. We make recommendations, on three discrete points, aimed at ensuring that the policy of the LRA 2002 is achieved when the Act interacts with the general law of adverse possession.

(1) We recommend that, in specific circumstances, a first registered proprietor who has been registered after his or her title was extinguished by adverse possession will be able to claim an indemnity if the register is altered in favour of the adverse possessor.

(2) We make recommendations to ensure that an adverse possessor in registered land can obtain registration only through the schedule 6 procedure, and to ensure that an adverse possessor in unregistered land cannot be registered as proprietor before the superior title has been extinguished.

(3) We also recommend that if possessory title to unregistered land is mistakenly registered, time can nevertheless continue to run under the Limitation Act 1980.

## THE SCHEME FOR ADVERSE POSSESSION IN THE LRA 2002

17.8 Schedule 6 to the LRA 2002 provides a bespoke scheme for adverse possession in relation to registered land, based on the principle of title by registration, rather than title by possession.[6]

17.9 Under the scheme in schedule 6, a person who has been in adverse possession of registered land for a minimum of ten years can apply to be registered as proprietor of the estate. The adverse possessor – the claimant – must make the application under paragraph 1 of schedule 6. When the application is made, the registrar must give notice of the application to the registered proprietor and other specified persons, pursuant to

[6] For more detail, see the Consultation Paper, para 17.9 and following.

paragraph 2. Those notified have 65 business days to respond; if they do not, the registrar will enter the claimant in the register as the registered proprietor.[7]

17.10 As for all types of application, the registered proprietor (or any other person) can also object, under section 73, to the claimant's application under paragraph 1. This objection will be on the basis that the requirements for an application under paragraph 1 have not been met, for example, that the claimant has not in fact been in adverse possession for at least ten years. As we explained in more detail in Chapters 8 and 9, an objection that is not groundless will be referred to the Tribunal for resolution.[8]

17.11 The scheme in schedule 6 also provides for a specific form of response, which can be made alone or in combination with an objection under section 73: a counter notice. To respond under the scheme in schedule 6, the registered proprietor (or other notified person) serves a counter notice to the application, requiring the claimant's application to be dealt with under paragraph 5 of schedule 6.[9]

17.12 Under paragraph 5, once a counter notice has been issued, the adverse possessor's application will be rejected unless he or she can satisfy one of three conditions:

(1) the claimant is entitled to the land through proprietary estoppel;

(2) the claimant is entitled to the land for a reason other than adverse possession or proprietary estoppel; or

(3) the land is adjacent to land owned by the claimant, who "for at least ten years of the period of adverse possession ending on the date of the application … reasonably believed that the land to which the application relates belonged to him [or her]".

As we explained in the Consultation Paper, only the third condition relates to a claim for adverse possession. The first two conditions address claims of entitlement to the land on bases other than adverse possession. The third is a specific provision to enable claims for adverse possession based on a mistaken belief about a boundary between neighbouring properties.[10]

17.13 If the claimant has established one of the three conditions, then the claimant is entitled to be entered in the register as the new proprietor of the estate despite the counter notice.[11] The adverse possessor thereby acquires title by registration.

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7 LRA 2002, sch 6, paras 3 and 4. The period is set by rules: LRR 2003, r 189.

8 LRA 2002, s 73.

9 LRA 2002, sch 6, para 3.

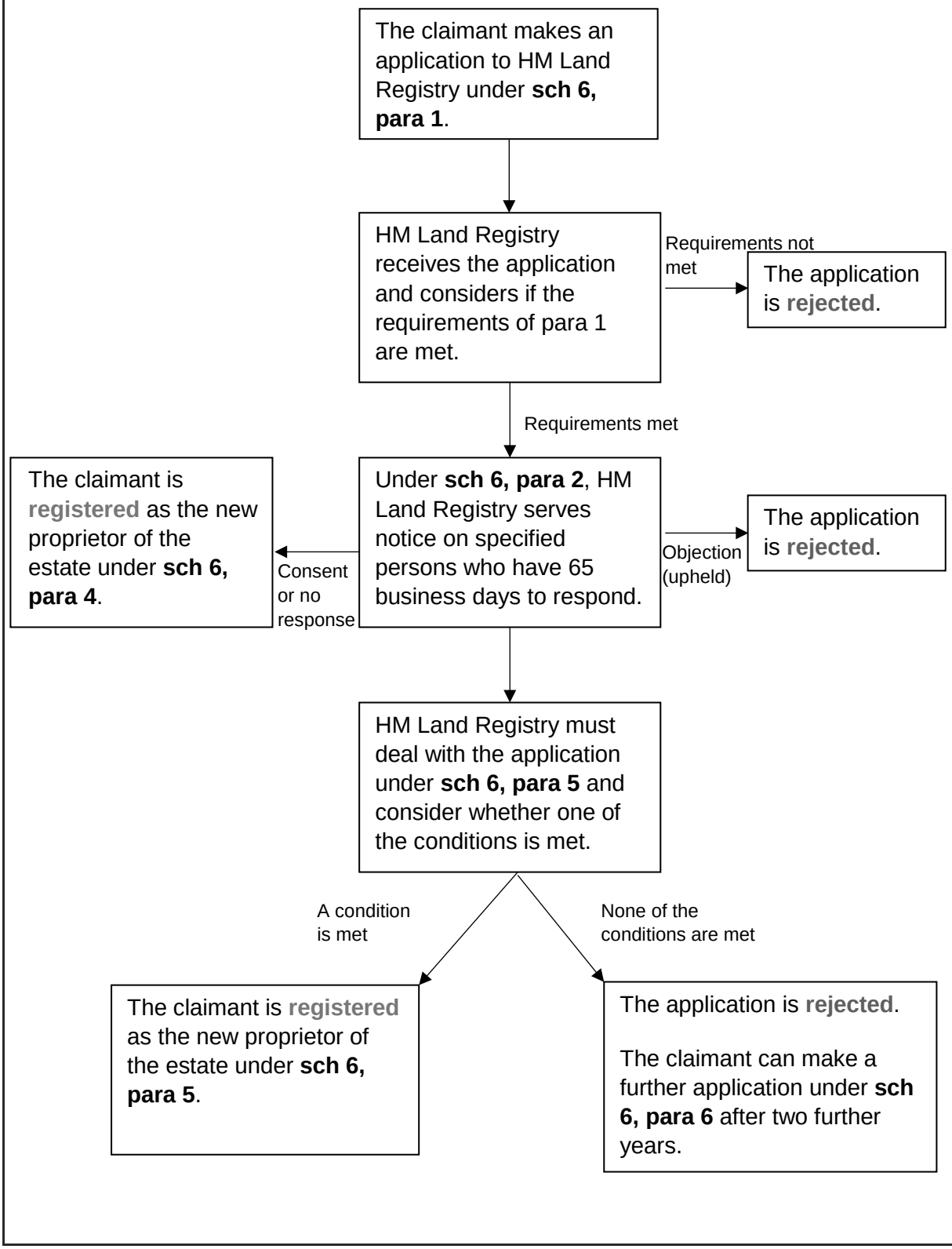
10 Consultation Paper, paras 17.14 to 17.15.

11 LRA 2002, sch 6, paras 4 and 5(1). If the registrar is satisfied that the claimant's evidence shows an arguable case for establishing one of the three conditions, the registrar will contact the registered proprietor to invite him or her to object to the application. If the registered proprietor raises an objection which is not groundless, the registrar will refer the matter to the Tribunal. The Tribunal will determine whether the claimant has met one of the conditions in para 5, and so should be registered as the proprietor: see HM Land Registry, *Practice Guide 4: Adverse Possession of Registered Land* (November 2017) para 7.

17.14 If the claimant does not establish one of the three conditions in paragraph 5, the registrar will reject the claimant's application for registration. The registered proprietor is then given two years to commence proceedings against the claimant for possession of the land. If the registered proprietor does not do so and the claimant remains in adverse possession, then, two years after making the application under paragraph 1, the adverse possessor may make a further application for registration under paragraph 6. On making the further application, the claimant "is entitled to be entered in the register as the new proprietor of the estate", in accordance with paragraph 7.

17.15 Figure 30 illustrates the application process under schedule 6.

Figure 30: the scheme for adverse possession of registered land under schedule 6 to the LRA 2002[12]




[12] The scheme set out in figure 30 has been slightly simplified for purposes of this Report. For example, a proprietor could object that the adverse possessor has satisfied a condition under para 5. Any objection would be dealt with under the LRA 2002, s 73 and the matter may be referred to the Tribunal.

### Repeat paragraph 1 applications

17.16 Schedule 6 does not specify whether a claimant, whose application for registration has been rejected, is able to make a second application under paragraph 1. We therefore made a provisional proposal in the Consultation Paper to clarify this position.

17.17 In the Consultation Paper we considered that the claimant should not be able to re-apply under paragraph 1, so long as the application was substantively rejected. By substantively rejected we meant that notice of the application was given to the registered proprietor, who served a counter notice, and the application was rejected under paragraph 5 because none of the three conditions were met.

17.18 Our proposal reflected existing HM Land Registry practice in relation to applications for adverse possession,[13] seeking to put this practice on clear statutory footing. It would ensure that schedule 6 on its face will prevent adverse possessors from circumventing the intention of the schedule to provide finality in cases of adverse possession. In particular, if a claimant could re-apply under paragraph 1, he or she could attempt to do so opportunistically where, for example, he or she knew that the registered proprietor would be unable to respond to HM Land Registry's notification because of an extended period of absence. As schedule 6 intends, the provisional proposal would ensure that once a claimant makes an application under paragraph 1, the registered proprietor has two years to commence possession proceedings to remove the claimant from possession of the land. It would prevent the claimant from re-applying unless the requirements for paragraph 6 were met, namely, that he or she remained in adverse possession for a further two years.[14]

17.19 As we explained in the Consultation Paper, our proposals were not intended to prevent claimants from re-applying under paragraph 1 if their first application was rejected because it did not meet the requirements of paragraph 1.[15] When HM Land Registry receives an application for registration under paragraph 1, the registrar will assess whether the procedural and substantive requirements have been fulfilled. For example, it will consider whether the appropriate fee has been paid and whether it is more likely than not that the claimant has completed ten years of adverse possession of the land. If the requirements for the application have not been met, the registrar will reject the application under paragraph 1. In such cases, the application would usually be rejected before notice was given to the registered proprietor. The application could also have been rejected based on an objection by the registered proprietor that the requirements under paragraph 1 – that the applicant had been in adverse possessor for at least ten years – had not been met, so therefore after notification to the registered proprietor.[16]

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13 Consultation Paper, paras 17.16 to 17.19. See HM Land Registry, *Practice Guide 4: Adverse Possession of Registered Land* (November 2017).

14 Consultation Paper, paras 17.20 to 17.22.

15 Consultation Paper, para 17.22.

16 And indeed after referral to the Tribunal for resolution of the dispute under s 73(7). See HM Land Registry, *Practice Guide 4: Adverse Possession of Registered Land* (November 2017) para 5.

### Consultation and discussion

17.20 In the Consultation Paper, we provisionally proposed that a claimant to title to land through adverse possession should be prevented from making a second application for registration under paragraph 1 when his or her application for registration has been rejected under paragraph 5. The claimant should only be able to apply again if the conditions in paragraph 6 – under which a second application is permitted – are fulfilled.[17]

17.21 Consultees largely supported our provisional proposal. Of the 22 consultees who responded, 17 agreed, representing a range of stakeholders, including academics, barristers and solicitors. Only one consultee disagreed,[18] and four expressed other views.

17.22 Most consultees agreed that, if notice of the application under paragraph 1 had been served on the registered proprietor, and the claim dealt with under paragraph 5, then the claimant should be prevented from re-applying unless and until the requirements for a further application under paragraph 6 have been established. As the Law Society explained, there would be "no good reason for renewing the application for registration". Elizabeth Derrington, the Independent Complaints Reviewer for HM Land Registry, stated that avoiding "repeated applications" could prevent "great distress" to individuals.

17.23 HM Land Registry, which expressed other views, agreed with the substance of our proposal but suggested that it represents the current law. It nevertheless agreed that the LRA 2002 should be clarified. We agree: although our proposal represents HM Land Registry's current practice, we do not think that schedule 6 to the LRA 2002, on its face, precludes the possibility of further, meritless, applications under paragraph 1. We therefore think it is necessary to amend the legislation.

17.24 Many consultees[19] emphasised that claimants whose applications had not been substantively rejected under paragraph 5 for failing to meet one of the three conditions should not be prevented from re-applying under paragraph 1. They argued that, in such cases, claimants should be able to correct their initial errors, or complete the required period of adverse possession, and re-submit their applications.

17.25 As noted above, we intended that our provisional proposal would only prevent re-applications when the application had been substantively rejected under paragraph 5. We also intended to prevent an application being made under paragraph 6 when the requirements for this further application had not (yet) been established. These qualifications of our proposal ensure that applications rejected for procedural reasons, or because the claimant has applied too early, could be resubmitted in accordance with paragraph 1. We have tried to make this point clear in our final recommendation. The clarification is reflected in the amendments we recommend be made to schedule 6 to the LRA 2002.

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17 Consultation Paper, para 17.24. We note that our provisional proposal incorrectly referred to the rejection being under para 6, rather than para 5.

18 Everyman Legal, whose dissatisfaction reflected disagreement with the policy underlying sch 6.

19 Including the Law Society, the Bar Council, the Property Litigation Association, and London Property Support Lawyers Group.

Recommendation

**Recommendation 39.**

17.26 We recommend that a claimant to title to registered land through adverse possession should be prevented from:

(1) making a further application for registration under schedule 6, paragraph 1 when his or her previous application has been rejected under schedule 6, paragraph 5; and

(2) making an application for registration under schedule 6, paragraph 6, unless the conditions in that paragraph under which a second application is currently permitted are satisfied.

17.27 Clause 31 enacts Recommendation 39. It will amend paragraph 1 of schedule 6 to prevent a claimant who made a previous application under paragraph 1 from making a repeat application based on the same ten-year period of adverse possession if the previous application was rejected under paragraph 5. It will also amend paragraph 6(1), by clarifying that an application can only be made under paragraph 6 if the person's application under paragraph 1 was rejected under paragraph 5.

17.28 As we explained in the Consultation Paper, our recommendation will have the effect that a claimant whose application was rejected under paragraph 5 because he or she failed to furnish sufficient evidence to establish one of the conditions in that paragraph would be barred from applying under paragraph 1 again. The registered proprietor would have been notified of the application and served a counter notice, and the application would have been dealt under paragraph 5. No further, meritless, applications will be possible until the conditions of paragraph 6 have been met. In order to have this effect, the provision will apply to applications made after commencement of the provision. Therefore, if an adverse possessor made a paragraph 1 application which was rejected under paragraph 5 prior to our reforms coming into force, any further paragraph 1 application for the same land would be prevented by our clause.

17.29 Our recommendation is intended to prevent repeated meritless applications under paragraph 1. However, it is possible that a claimant's repeat application could be barred even though it is not meritless, due to a failure to furnish the required evidence on the previous application. That is, the claimant's first application has been rejected under paragraph 5 because he or she failed to establish one of the three conditions on the evidence he or she submitted to HM Land Registry, when on the facts the condition was met. We think that this circumstance is unlikely to arise. A claimant would have to have furnished sufficient evidence to establish an arguable case that he or she had been in adverse possession for ten years, but fail to furnish sufficient evidence to establish an arguable case of one of the three grounds. Given that HM Land Registry provides a framework statement of truth for adverse possession claims, which directs the claimant

to set out the facts that support reliance on a condition in paragraph 5,[20] we think this risk is relatively low.

17.30 We think that any risk can be addressed by the provision of information to claimants about the implications of an unsatisfactory application being rejected. We therefore suggest that HM Land Registry consider whether a clearer warning should be given to claimants. HM Land Registry forms already provide a warning to applicants: "Failure to complete this form with proper care may result in a loss of protection under the Land Registration Act 2002 if, as a result, a mistake is made in the register". We wonder whether statutory Form ADV1, on which applications under schedule 6 are made, should on its face recommend that claimants seek legal advice before applying, due to the risk of being barred from re-applying.[21] Alternatively, a more prominent warning could be included in the relevant HM Land Registry practice guide. We leave it to HM Land Registry to determine the best approach.

**The three conditions in schedule 6, paragraph 5**

17.31 As we set out at paragraph 17.12 above, when an application is made under paragraph 1 of schedule 6, and a counter notice is given by the registered proprietor, the claimant is only entitled to be registered as the proprietor on the first application if he or she can establish one of three conditions.

(1) The first condition is that the claimant is entitled to the land through proprietary estoppel.[22]

(2) The second condition is that the claimant is entitled to the land for a reason other than adverse possession or proprietary estoppel.[23]

(3) The third condition is that the land is adjacent to land owned by the claimant, who "for at least ten years of the period of adverse possession ending on the date of the application … reasonably believed that the land to which the application relates belonged to him".[24]

17.32 Our review of these three conditions focusses on two things. First, we assess whether the first two conditions, which are situations in which the claimant is entitled to the land other than through adverse possession, should be removed from schedule 6. We then discuss a clarification in relation to the third condition. Ultimately, we only recommend reform in relation to the third condition.

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20 Form ST1 is a statement of truth in support of an application for registration of land based on adverse possession, and Form ST2 is for registration of a rentcharge based on adverse possession.

21 Consultation Paper, paras 17.22 and 17.23.

22 LRA 2002, sch 6, para 5(2).

23 LRA 2002, sch 6, para 5(3).

24 LRA 2002, sch 6, para 5(4). The exact boundary between the two properties must not have been determined pursuant to s 60, meaning that the general boundaries rule applies. We discuss the general boundaries rule in Ch 15.

### The first and second conditions: other claims to title to land

17.33 As we explained in the Consultation Paper, the first and second conditions in paragraph 5 of schedule 6 allow a person with a claim to land that is based on an entitlement other than adverse possession to apply to be registered as proprietor through the scheme for adverse possession. The first condition applies where the claimant is entitled to the land though proprietary estoppel, and the second where the claimant is entitled for some reason other than adverse possession or proprietary estoppel, for example, under a will or on intestacy.[25]

17.34 Schedule 6 is therefore performing a function which is in fact unrelated to adverse possession. It is funnelling claimants with entitlement to land towards HM Land Registry, and ultimately into the Tribunal, for comparatively cheaper resolution than more "costly court proceedings".[26] In the Consultation Paper, we accepted that this function could have practical benefits. In particular, the first condition provides the Tribunal with express statutory jurisdiction to determine the remedy to be awarded under proprietary estoppel, a jurisdiction it does not otherwise appear to have. This condition is relied upon in claims made under schedule 6.

17.35 We also noted that the second condition is successfully used by claimants who have completed 12 years of adverse possession in registered land before the coming into force of the LRA 2002. We suggested in the Consultation Paper that such claimants were not otherwise able to apply under the LRA 2002.[27] However, HM Land Registry has since explained that such claimants, who remain entitled to be registered under the LRA 2002[28] based on their entitlement under the LRA 1925, can make an application in Form AP1 (the application form to change the register); rule 13(1) of the LRR 2003 provides that applications should be made in that form if no other form is prescribed.[29]

17.36 Although practically useful, we explained in the Consultation Paper that the use of the scheme for adverse possession to determine the merits of claims to land other than through adverse possession seems conceptually unsatisfactory. We questioned whether it is appropriate for such claims to be made indirectly through the scheme for adverse possession. We therefore sought evidence from consultees about the use of these two conditions and asked whether they should be removed from schedule 6.[30]

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25 LRA 2002, sch 6, para 5(2) and (3), respectively. Consultation Paper, paras 17.14 and 17.25 to 17.28.

26 Law Com No 271, para 14.37.

27 Consultation Paper, paras 17.30 and 17.35.

28 Their entitlement under s 75 of the LRA 1925 is preserved by LRA 2002, sch 12, para 18.

29 In her consultation response, Amy Goymour suggests that an application to bring the register up to date could also be made, on the basis that the registered proprietor is a bare trustee for the adverse possessor based on the LRA 1925, s 75. However, in Ch 5 we disagree that a person is entitled to be registered as the proprietor based on the principle in *Saunders v Vautier* 41 ER 482, (1841) Cr & Ph 240: see para 5.113 above.

30 Consultation Paper, paras 17.29 to 17.32. We did not seek to remove the jurisdiction of the Tribunal in relation to proprietary estoppel claims: we discuss the Tribunal's jurisdiction in Ch 21.

### Consultation and discussion

17.37 We invited consultees to provide us with evidence about the use of the first two conditions in paragraph 5 of schedule 6, and asked for their views as to whether they should be removed from the schedule.[31]

17.38 Many of the 14 consultees who responded did not provide evidence of the use of the first and second conditions in paragraph 5. Only a few consultees gave examples of circumstances in which they believed the conditions could be or were used. These circumstances included cases where the transfer plan erroneously excluded some of the land transferred to the purchaser, and where a contract was entered into and the purchase price paid but the legal estate was never transferred.

17.39 The 20 consultees who responded to the question about whether the first and second conditions should be removed from schedule 6 were mixed in their responses. Some of the consultees who responded had no fixed view. Among those who did, consultees were nearly evenly split between those who favoured retention of the two conditions in schedule 6 and those who did not.

17.40 Consultees who thought that the two conditions should be removed expressed some of our conceptual discomfort with their inclusion within the scheme of adverse possession. Some (for example, the Law Society) noted that estoppel and other claims should be brought directly, and that the appropriate forum for such claims is the Chancery Division of the High Court. Some consultees also advocated for the ability of the Tribunal to transfer claims under schedule 6 to the court, or for the ability of multiple claims by one claimant to be heard together, whether by the Tribunal or the court. Some consultees who were unsure noted that the conditions' removal would help clarify the complex scheme for adverse possession in schedule 6.

17.41 Some consultees who favoured retention offered the view that the two conditions might be practically useful by providing a quicker and cheaper avenue for resolution of claims to land than court proceedings.

17.42 We remain of the view that the inclusion of the first and second conditions in paragraph 5 of schedule 6 is conceptually unsatisfactory. Ultimately, their presence means that whether Tribunal has jurisdiction in relation to some matters relies on "an element of fortuity"[32] that the claimant's claim to the land is coupled with ten years' possession.

17.43 Notwithstanding this conceptual concern, however, consultation responses have not brought to light problems arising from the inclusion of the first and second conditions in paragraph 5.

17.44 Much of the discussion in relation to the first and second conditions is fundamentally a question of the Tribunal's jurisdiction. In Chapter 21 of this Report we recommend that the Tribunal should be given an express statutory jurisdiction so that where a case is before it, the Tribunal can decide the remedy to award in satisfaction of an estoppel and the extent of beneficial interests. Given that we are recommending an expansion of the

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31 Consultation Paper, paras 17.33 and 17.34.

32 As described by Dr Charles Harpum QC (Hon) in his consultation response supporting retention of the two conditions.

Tribunal's jurisdiction, it does not appear to us desirable to remove part of the Tribunal's jurisdiction in schedule 6 to the LRA 2002, when there is no evidence of problems, simply for the sake of conceptual clarity. On that basis, we do not recommend reform.

### The third condition: reasonable belief

17.45 The third condition in paragraph 5 governs the situation where a person entered into possession of land neighbouring his or her own land, based on a reasonable but mistaken belief, held for ten years, that he or she was the owner of the land.[33] As we noted in our 2001 Report, such a case may arise where a boundary between two properties is uncertain, natural features of the land have led the proprietor to believe that the land is his or hers, or a misrepresentation about the physical extent of land has been made. The third condition is therefore about a class of property dispute between neighbours (which do not fall within the general boundaries rule).[34]

17.46 Relying as it does on reasonable but mistaken belief, for the third condition to result in an application, the claimant must at some point realise that he or she was mistaken. However, it is not clear from paragraph 5 how long the claimant has to make an application under paragraph 1 of the schedule, after ceasing to hold the belief that the land belongs to him or her.[35]

17.47 As we explained in the Consultation Paper, there are three interpretations as to how soon after realising that his or her belief is mistaken the claimant must apply for registration under schedule 6. The first interpretation is that the claimant must maintain the belief at the time of the application. This interpretation would deny the provision any use: claimants will not apply to be registered based on adverse possession if they do not realise that the land is not theirs. The meaning of the requirement therefore falls between two possible interpretations.[36]

(1) The reasonable belief must be held for ten years at any time prior to the application. This interpretation flows from the wording of the statute itself, and is supported by commentary and some case law.[37]

(2) The reasonable belief cannot end more than a short time before the date of the application. This interpretation is drawn from the Court of Appeal's guidance in *Zarb v Parry*,[38] and is also supported by commentary.[39]

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33 LRA 2002, sch 6, para 5(4).

34 Consultation Paper, paras 17.36 and 17.37.

35 Consultation Paper, paras 17.37 and 17.38.

36 Consultation Paper, paras 17.38 to 17.42.

37 See eg P Milne, "Mistaken belief and adverse possession – mistaken interpretation? *IAM Group plc v Chowdrey*" [2012] 4 *Conveyancer and Property Lawyer* 343, 344 to 345, citing *IAM Group v Chowdrey* [2012] EWCA Civ 505, [2012] 2 P &C R 13; *Megarry & Wade*, para 35-083. This was also implicitly suggested in Law Com No 271, paras 14.50 to 14.52.

38 *Zarb v Parry* [2011] EWCA Civ 1306, [2012] 1 WLR 1240 at [17].

39 See eg S Tozer and K Lees, "'Reasonable belief' in adverse possession" (2015) 1521 *Estates Gazette* 77. See also *Crew v London & Continental (Holdings) Limited* [2017] UKFTT 0047 (PC) at [30].

17.48 In the Consultation Paper, we favoured the latter interpretation. Schedule 6 was intended to bring finality to claims of adverse possession, and in particular, to resolve these types of boundary dispute. Once the person's reasonable belief comes to an end, ownership should be resolved quickly, and bringing finality to the question of ownership is in the interests of all parties. It would not be in keeping with the policy underlying schedule 6 to allow a claimant to sit indefinitely on a claim for adverse possession in relation to a boundary after becoming aware that he or she was not in fact the proprietor of the land.[40]

17.49 As we pointed out in the Consultation Paper, the difficulty with this interpretation is that it is unclear how long claimants should be given to make an application once they no longer reasonably believe the land is theirs. The period of time must be sufficient for claimants to seek to settle the matter with the adjoining landowner and then to prepare their claim if a settlement is not forthcoming. Given that paragraph 1(2)(a) of schedule 6 gives an adverse possessor whose possession is ended by eviction six months to make an application under schedule 6, we proposed that a six-month period would also be appropriate here.[41]

17.50 We acknowledged in the Consultation Paper that it may be difficult to determine the point at which a person's reasonable belief comes to an end. We took the view that this difficulty is already inherent in the third condition of paragraph 5, because it already requires the claimant to establish a reasonable but mistaken belief. Our suggestion is limited to ensuring that, once this belief comes to an end, the claimant acts in a timely way to resolve the ownership of the land.

### Consultation and discussion

17.51 Twenty-two consultees responded to our provisional proposal. The majority, 13 including the Law Society and the Chancery Bar Association, agreed with the proposal as a sensible solution, although some proposed a longer time limit. Six consultees, including HM Land Registry and Dr Charles Harpum QC (Hon) disagreed. Three expressed other views.

17.52 Consultees who agreed with our provisional proposal explained that it was in the interest of all parties for the dispute to be resolved promptly. They favoured the clarity our proposal would provide in remedying the uncertainty within the case law regarding the period of time within which the claimant has to apply.

17.53 Although some consultees expressly agreed with our proposed six-month period, others[42] argued that six months is too short, instead suggesting a 12-month period. They explained that a 12-month period would give claimants sufficient time to try to resolve the dispute and, should that fail, to recognise the need for action and seek legal advice. They also explained that a 12-month period would better accommodate the difficulty in identifying the date the reasonable belief came to an end.

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40 Consultation Paper, paras 17.43 and 17.44.

41 Consultation Paper, paras 17.45 and 17.46.

42 The Chancery Bar Association, the Bar Council, and Michael Hall.

17.54 Some of the consultees who disagreed did so because, in their view, our provisional proposal was a departure from the original intention behind paragraph 5, that is, that the reasonable belief could end at any point before the application so long as it had lasted for ten years. Some argued that our provisional proposal would encourage, rather than discourage, this type of boundary dispute. In particular, Dr Harpum strongly argued that the original provision was intended to allow the adverse possessor to rely on the facts "on the ground" until a dispute with a neighbour becomes unavoidable, since "no sane person wishes to initiate a boundary dispute". In his view, requiring the claimant to make an application within a set time period would prevent claimants from seeking to avoid a dispute. Dr Harpum also suggested that claimants would not be aware of any requirement to act promptly, and consequently would lose their entitlement to the land through no fault of their own.

17.55 We certainly do not intend to generate boundary disputes. However, we are unconvinced that our provisional proposal would have that effect. Our provisional proposal instead acknowledges that boundary disputes do arise and encourages parties to deal with them promptly when they do. As Lady Justice Arden noted in *Zarb v Parry*, "boundary disputes have a habit of reappearing until finally resolved".[43]

17.56 We explained in the Consultation Paper that, under the current provision, the onus rests on the claimant to establish that he or she held the reasonable belief. In our view, it is reasonable to expect the claimant to apply for registration promptly, because it is in his or her interest, as it is in the interest of all of the parties, for the situation to be resolved. A party should not become aware that his or her reasonable belief was mistaken and not be required to act.

17.57 Moreover, we think that it is likely that, in seeking to resolve the situation, the claimant will seek guidance, including legal advice. The scheme for adverse possession of registered land in schedule 6 already substantially circumscribes the ability of people simply to rely on the facts on the ground without engaging with the land registration regime. While the third condition in paragraph 5 of schedule 6 acknowledges that adverse possession has a legitimate role to play in registered land in respect of boundaries, we consider that it is consistent with the policy underlying the LRA 2002 not to adopt an expansive interpretation of the scope of the provision. In the scheme of title by registration reflected in schedule 6, the "facts on the ground" necessarily become less significant.

17.58 We are therefore not swayed by consultees who thought that any time limit was too restrictive. We remain convinced that claimants should be required to act promptly once they discover their mistake. We therefore agree with the Court of Appeal's guidance in *Zarb v Parry*,[44] and make a recommendation to provide certainty about the period of time that a claimant must act within.

17.59 We readily accept that claimants should be given sufficient time to attempt to resolve the issue before it develops into a legal dispute and to seek legal advice if it does. In the light of consultees' views on these points, we adopt in our recommendation

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43 [2011] EWCA Civ 1306, [2012] 1 WLR 1240 at [58].

44 In *Zarb v Parry* [2011] EWCA Civ 1306, [2012] 1 WLR 1240 at [17].

consultees' suggestion of a 12-month period, rather than the six-month period that we suggested in our provisional proposal.

17.60 A number of consultees made comments in relation to the requirement that the claimant's belief must be "reasonable". Some consultees expressed concern that we sought to change what would constitute a reasonable belief. We do not make any recommendation to change the meaning of "reasonable belief" in paragraph 5 of schedule 6. Other consultees, including HM Land Registry, highlighted the difficulty in determining when a reasonable belief exists, and when it did (or should) have ended. We think that the determination of whether a claimant had a reasonable belief, and when that belief came to an end, is a matter that is best determined by the Tribunal and the courts. We do not doubt that the Tribunal and the courts will sensibly interpret the requirement for reasonable belief based on the facts of each case. We do not think that we should prescribe what can or should constitute a reasonable belief.

Recommendation

**Recommendation 40.**

17.61 We recommend that where a claimant relies on the condition in schedule 6, paragraph 5(4), he or she must apply within 12 months of when his or her reasonable belief that the land belonged to him or her came to an end.

17.62 Clause 32 enacts Recommendation 40. It will amend paragraph 5(4) of schedule 6 to require the claimant to make his or her application within 12 months from the date that his or her reasonable belief came to an end. It will apply to applications made after the provision comes into force.

17.63 As a consequential amendment, clause 32 will also repeal paragraph 5(5) of schedule 6. Paragraph 5(5) applies to a claimant who is no longer in possession of the land because he or she has been evicted in the past six months, deeming the period of possession that the claimant must show as ending on the day before the date of eviction, rather than the date of the application. This provision is no longer needed because the same period of 12 months will apply to claimants, whether they have been evicted in advance of the application under paragraph 1 or not.

## THE RELATIONSHIP BETWEEN THE SCHEDULE 6 PROCEDURE AND THE GENERAL LAW OF ADVERSE POSSESSION

17.64 In the latter half of this chapter we turn to consider four particular aspects of the relationship between schedule 6 and the general law governing adverse possession. We make recommendations in respect of all but one of the issues.

### First registration of an extinguished title

17.65 The general law of adverse possession interacts with the LRA 2002 most closely in applications for first registration. The first point we consider is the situation in which title to land, which has been extinguished due to the operation of the principles of adverse

possession in unregistered land, is nevertheless brought onto the register by an application for first registration.

17.66 Under the general law governing unregistered land, an adverse possessor acquires a freehold title to the land from the time that he or she enters into adverse possession. The adverse possessor's title is weaker than the title held by the true, or paper, owner. However, after 12 years, the paper owner's superior title is extinguished by operation of the Limitation Act 1980.[45] From that moment, the adverse possessor's title becomes the strongest title to the land.[46]

17.67 As we explained in the Consultation Paper, it is possible that a paper owner (or his or her successor in title) whose title has been extinguished could in good faith apply for first registration of the land, relying on the title deeds.[47] The question arises as to whether, after first registration, the title of the paper owner (now the registered proprietor) would be bound by the adverse possessor's title.

17.68 Section 11(4) of the LRA 2002 provides that a proprietor on first registration is vested with the estate subject only to three categories of interest: (a) interests which are the subject of an entry in the register; (b) unregistered interests which override first registration by virtue of schedule 1; and (c) "interests acquired under the Limitation Act 1980 … of which the proprietor had notice". The latter two paragraphs, (4)(b) and (4)(c), are relevant to this scenario.

17.69 According to section 11(4)(b), if the registered proprietor's title was extinguished prior to first registration, and the adverse possessor was in actual occupation of the land at the time of registration, the adverse possessor's interest is protected as an overriding interest. The registered proprietor's title will be subject to the interest, and it is well established that alteration of the register to give effect to the overriding interest does not attract the payment of indemnity to the registered proprietor.[48] On the basis that the adverse possessor's occupation would have been obvious on an inspection of the land, this outcome is considered to be fair.

17.70 Similarly, based on section 11(4)(c), if the registered proprietor has notice of the adverse possessor's claim, then on first registration the registered proprietor will take the land subject to the interest. The adverse possessor could apply for alteration of the register under schedule 4, which would not give rise to a claim for an indemnity to the registered proprietor.[49] Again, this outcome is fair.

17.71 It is not, however, clear what happens if the registered proprietor had no notice of the adverse possessor's claim and the adverse possessor was not in actual occupation of the land (because he or she ceased to occupy the land after the paper owner's title was

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45 Limitation Act 1980, s 17.

46 Consultation Paper, para 17.49.

47 Consultation Paper, para 17.50. We considered, but dismissed, the possibility of allowing an adverse possessor to enter a caution against first registration: paras 17.52 to 17.55.

48 Consultation Paper, para 13.54. See eg *Re Chowood's Registered Land* [1933] Ch 574 and *Cooper v Ward* [2017] UKFTT 0474 (PC), REF/2016/0552.

49 Because it would be "excepted from the effect of registration" pursuant to LRA 2002, sch 4, para 2(1)(c).

extinguished). It appears from section 11(4) that the registered proprietor's title on first registration would not be subject to the superior estate of an adverse possessor, although the registered proprietor's title was extinguished as a matter of general property law.[50] It therefore appears that the adverse possessor would be unable to obtain alteration of the register.

17.72 According to our 2001 Report, this outcome was the intention behind the scheme in the LRA 2002.[51] However, as we explained in the Consultation Paper, the interpretation courts have subsequently given to "mistake" in schedules 4 and 8 to the LRA 2002 makes this outcome untenable. Courts have interpreted mistake to include a case in which the registrar would have done something differently had he or she known the true facts. In this situation, if the registrar was aware that the paper owner's title had been extinguished, he or she would have rejected the application for first registration. Therefore, the registration of the paper owner would be a mistake.[52] This analysis is significant, because if the register is altered to correct a mistake, and the alteration prejudicially affects the title of the registered proprietor, then the alteration is a "rectification" which triggers an entitlement to an indemnity.[53]

17.73 Whether altering the register to correct this mistake would be considered prejudicial to the title of the registered proprietor, or cause him or her loss, is not clear.[54] As we explained in the Consultation Paper, it could be argued that it is not the alteration of the register that prejudices the registered proprietor's title, but the operation of the principles of adverse possession. This same argument was successfully made under the Land Transfer Acts 1875 and 1897 in respect of fraud in *A-G v Odell*: when the register was rectified to restore a charge that was transferred by forgery, the court held that no indemnity was payable as the loss was caused by the forgery, not by the alteration of the register.[55] A provision was included in the LRA 1925 to reverse *A-G v Odell*, to ensure that in cases of fraud the registered proprietor can be indemnified.[56] The provision has been carried over into the LRA 2002, in paragraph 1(2)(b) of schedule 8.[57]

17.74 We explained in the Consultation Paper that whether the alteration would prejudicially affect the title of the registered proprietor was a difficult issue to resolve. We concluded, however, that where the register is rectified, an indemnity should be available. (And conversely, where a decision is made not to rectify the register, the adverse possessor would be entitled to an indemnity.) Therefore, in our view, the alteration would prejudicially affect the title of the registered proprietor. As we explained in the Consultation Paper, this conclusion is necessary to prevent a reintroduction of the *A-G*

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50 Consultation Paper, paras 17.56 to 17.58.

51 Law Com No 271, para 3.47.

52 Consultation Paper, paras 17.58 and 17.59.

53 We discuss the nature of rectification in Ch 13, para 13.6 above.

54 See LRA 2002, schs 4 and 8.

55 [1906] 2 Ch 47.

56 LRA 1925, s 83(4).

57 Consultation Paper, paras 17.58 to 17.60.

*v Odell* fallacy, and is based on the operation of the title promise in section 58 of the LRA 2002. Moreover, it is necessary to give effect to the policy decision, clear from the wording of section 11(4)(b), that the registered proprietor's title should only be subject to interests acquired under the Limitation Act 1980 if the registered proprietor has notice, or the interest is an overriding interest. Altering the register and denying the registered proprietor an indemnity would amount to the registered proprietor's title being subject to the adverse possessor's interest. This conclusion also flows from the decision in the LRA 2002 to end the protection of rights acquired under the Limitation Act 1980 as overriding interests, absent actual occupation of the rights holder.[58]

17.75 In short, the court's interpretation of mistake makes the original intention behind section 11(4) untenable, and at odds with the policy underlying the LRA 2002, including the title guarantee in section 58, leading to uncertainty.

17.76 We noted in the Consultation Paper that this issue has arisen in the past,[59] but has not, as far as we are aware, arisen under the LRA 2002. With the passage of time more rather than less land becomes registered, so the situation is increasingly unlikely to arise. Nevertheless, we considered the problem to be a real one, and not merely theoretical. The point is also important as it relates to the operation of the title guarantee contained in section 58. Therefore, we suggested that reform was warranted.[60]

### Consultation and discussion

17.77 We provisionally proposed that if a person has become the first registered proprietor of title to land after his or her title had in fact been extinguished by an adverse possessor, then an application for alteration of the registrar should be classed as a rectification if two conditions are met:[61] first, the registered proprietor did not have notice of the adverse possessor's claim; and secondly the adverse possessor was not in actual occupation of the land at the time of registration.

17.78 Twenty-three consultees responded, with 17 agreeing, four disagreeing and two expressing other views.

17.79 Many consultees agreed that our proposal, and our reasoning for it, were sensible and accorded with the interpretation of mistake given by the courts. Some, including the Law Society, however, noted that they had no evidence of this situation having occurred in practice.

17.80 A minority of consultees disagreed with the proposal.[62] Dr Harpum did so most strongly. His view, consistent with the original intention behind the LRA 2002, was that if the circumstances in section 11(4)(c) are not met, the registered proprietor's title is unimpeachable and not liable to rectification. He suggested that our proposal set out to defeat the protection offered by registration, and made section 11(4)(c) – which provides

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58 Consultation Paper, paras 17.60 and 17.61.

59 In *Re Chowood's Registered Land* [1933] Ch 574.

60 Consultation Paper, paras 17.51 and 17.61.

61 Consultation Paper, para 17.62.

62 Dr Charles Harpum QC (Hon), the Society of Legal Scholars, Everyman Legal, and Michael Mark.

that the title of a registered proprietor is subject to the adverse possessor's interest if the proprietor had notice of it – redundant.

17.81 HM Land Registry, expressing other views, suggested that although it agreed with the principle underlying our proposal, the current provisions of the LRA 2002 should be left to decide the outcome. The Society of Legal Scholars made a similar point.

17.82 We acknowledge that our policy in respect of section 11(4) represents a change from that put forward in our 2001 Report. Our change in policy is driven by the interpretation the courts have subsequently given the concept of mistake under the LRA 2002. We disagree with Dr Harpum's criticism that our proposal defeats the protection offered by registration: as we explain in more detail in Chapter 13, the title guarantee in section 58 is always subject to the scheme for alteration and rectification of the register.[63]

17.83 Our policy reflects the concept of mistake, as developed by the courts, and the statutory magic in section 58. First registration of a proprietor whose title has been extinguished is a mistake because, had the registrar known that the title had been extinguished, he or she would not have made the entry in the register. However, upon registration, section 58 vests title in the registered proprietor, subject only to the interests outlined in section 11(4). The fact that the registered proprietor's title in unregistered land was extinguished is not determinative of the issue once section 58 applies. Moreover, rectification in favour of the adverse possessor prejudicially affects the registered proprietor's title; he or she should therefore be entitled to apply for an indemnity.

17.84 We therefore disagree with Dr Harpum that our recommendation would make section 11(4)(c) redundant. Indeed, it seems to us that given the court's concept of mistake, the provision is currently redundant because it confers no benefit on the first registered proprietor. Section 11(4)(c) intends to put a first registered proprietor who does not have notice of a claim to adverse possession in a better position than one who has notice. The broad definition afforded to mistake means that registration of a person as first registered proprietor after his or her title has been extinguished by adverse possession is a mistake, and so the title is at risk of alteration. Where the first registered proprietor had notice of the adverse possessor, then he or she is bound by the adverse possessor's interest under section 11(4)(c), and an alteration of the register is not prejudicial to his or her title. Therefore, the first registered proprietor has not suffered loss from the alteration and is not entitled to an indemnity. If the same outcome is reached where the registered proprietor did not have notice of the adverse possession, then he or she has not derived any benefit from section 11(4)(c). The effect of our recommendation is to ensure that, if the registered proprietor did not have notice of the interest, then the registered proprietor will be able to claim an indemnity for his or her loss if the adverse possessor successfully applies for alteration of the register.

17.85 We acknowledge that as originally enacted section 11(4)(c) intended a different outcome; it intended that a first registered proprietor without notice of the adverse possession would take free from the claim. That original outcome has not been achieved because of the interpretation that has been given to mistake. Our recommendation ensures, however, that a first registered proprietor without notice is placed in a superior position to one with notice in a manner compatible with the

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63 See Ch 13, paras 13.4 and 13.5 above.

interpretation of mistake, by providing him or her with the ability to bring a claim for indemnity under schedule 8 to the LRA 2002.

17.86 Our policy proposal has implications for HM Land Registry's indemnity fund: once the paper owner has been registered, if the adverse possessor with true title to the land applies for rectification, one of them will be entitled to seek an indemnity, depending on who keeps the land. However, since the likelihood of this issue arising is slight and decreasing with time as more unregistered land is brought onto the register, we do not believe that there will be any significant increase in HM Land Registry's liability to indemnify parties. The provision will however ensure that section 58 operates as it is intended to operate, and moreover that the outcome for any parties affected is fair.

Recommendation

**Recommendation 41.**

17.87 We recommend that where a person becomes the first registered proprietor of title to land which has in fact been extinguished by an adverse possessor, where (i) the registered proprietor did not have notice of the adverse possessor's claim and (ii) the adverse possessor is not in actual occupation of the land at the time of registration, an alteration of the register should be classed as rectification.

17.88 Clause 33 enacts Recommendation 41. It amends paragraph 1 of schedule 8 to the LRA 2002. The amendment provides that a person suffers loss due to an alteration of the register to give effect to an interest acquired under the Limitation Act 1980 to which the registered proprietor's title is not subject under section 11(4), meaning an interest which on first registration is not protected as an overriding interest due to the adverse possessor's actual occupation and of which the registered proprietor had no notice. It therefore follows the same approach as the provision that reverses the *A-G v Odell* fallacy; by providing that a person suffers loss, the clause ensures that any alteration will be one with prejudicial effect. It ensures that the first registered proprietor is entitled to be indemnified if the register is rectified in favour of an adverse possessor. It does not define mistake, which is a matter we think is best left to the courts, as we explained in Chapter 13. It also does not apply to cases of adverse possession of registered land, which must be dealt with in accordance with schedule 6.

**Registration with possessory title by an adverse possessor**

17.89 Under the general law, from the moment of coming into possession of the land, an adverse possessor obtains a freehold title to the land which is subject only to the paper owner's superior freehold title. The question arises as to whether the adverse possessor can register his or her title.

17.90 On their face, there is nothing in the first registration provisions[64] precluding an adverse possessor from registering his or her freehold title prior to the expiry of the limitation period. The adverse possessor's title would be most likely to be registered with possessory title. Section 9(5) provides, in part, that a person may be registered with

[64] LRA 2002, ss 3 and 4.

possessory title if, in the registrar's opinion, "the person is in actual possession of the land". Possessory title is granted in cases of adverse possession and when the applicant cannot prove his or her title.[65] Registration with possessory title does not affect the enforcement of any adverse interest or estate which subsisted at the time of the registration, that is, the superior title of the paper owner.[66]

17.91 In the Consultation Paper, we expressed our provisional view that an adverse possessor should not be able to be registered with possessory title if the superior title has not been extinguished, whether the land is registered or unregistered.[67]

17.92 The policy argument in favour of our view in registered land is overwhelming. Possessory title is automatically upgraded to absolute title after 12 years, provided that the registered proprietor remains in possession.[68] Allowing an adverse possessor to apply for possessory title of registered land would allow the adverse possessor to circumvent the scheme in schedule 6 and its protections for registered proprietors.[69] However, whether, as a matter of law, an adverse possessor can apply for possessory title of registered land is not beyond doubt. The LRA 2002 is not definitive on this point. That said, the court in *Swan Housing Association Ltd v Gill*[70] implicitly closed this avenue off by its recognition that schedule 6 is intended to be the only route for an adverse possessor to acquire title to registered land.[71]

17.93 In relation to unregistered land, the law on this point more uncertain. Currently, HM Land Registry rejects applications for first registration by adverse possessors who have not been in possession for at least 12 years.[72] However, commentators are divided about whether this approach reflects the law.[73] Decisions of the Tribunal show that there is doubt about whether registration with possessory title before 12 years' adverse possession is possible.[74] Moreover, the policy arguments appear finely balanced. On one hand, allowing first registration of the adverse possessor with possessory title would not circumvent schedule 6, which only applies to registered land, and could reduce the risk of first registration of a paper owner's title which had in fact been extinguished through adverse possession. On the other, because the adverse possessor acquires an estate from the moment of taking up adverse possession, allowing registration with

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65 LRA 2002, explanatory notes, para 38.

66 LRA 2002, ss 11(7) and 12(8).

67 Consultation Paper, paras 17.63 to 17.69.

68 LRA 2002, ss 62(4) and (5) and 63.

69 Consultation Paper, para 17.67.

70 [2013] 1 WLR 1253.

71 However, LRA 2002, sch 12, para 18 provides a separate avenue for rights acquired by adverse possession under the LRA 1925.

72 HM Land Registry, *Practice Guide 5: Adverse Possession of (1) Unregistered and (2) Registered land where a right to be registered was acquired before 13 October 2003* (November 2017) paras 2 and 5.4.

73 Eg, compare *Megarry & Wade*, para 7-036 and *Ruoff & Roper*, para 6.002, n 2 with Jourdan and Radley-Gardner, *Adverse Possession* (2nd ed 2012) para 21-035.

74 See eg *Joslin v Hipgrave* [2015] UKFTT 0497 (PC), REF/2013/0942; *Akram v Stott* [2015] UKFTT 0312 (PC), REF/2013/1088 at [21].

possessory title based on this estate could result in abuse, by opportunistic entries. In the end, we thought it would be an undesirable complication for entitlement to possessory title to differ according to whether the application is in relation to registered land or first registration of unregistered land.[75]

### Consultation and discussion

17.94 We therefore made two provisional proposals. We proposed that an adverse possessor of unregistered land should not be able to apply for registration with possessory title until the paper owner's title has been extinguished under the Limitation Act 1980, and that an adverse possessor of registered land should not be able to apply for registration except through schedule 6.[76]

17.95 Most consultees agreed with us on both points. Eighteen of the 23 consultees who responded in respect of unregistered land agreed with our provisional proposal; and 19 of the 23 consultees who responded to our provisional proposal in respect of registered land agreed. Those in agreement with both proposals included HM Land Registry, the Law Society, and Dr Harpum.

17.96 Consultees who agreed mainly did so without much comment. They agreed with the need for clarification of the law and parity between the provisions for registered and unregistered land.

17.97 Some consultees who disagreed[77] (and one who agreed)[78] argued that relativity of title should be capable of being reflected by the registration of a possessory title (whether in relation to unregistered or registered land). In particular, in relation to unregistered land, possessory title would show that the adverse possessor's title is good against everyone except the paper owner, whose own title would remain superior until it was extinguished under the Limitation Act 1980. Christopher Jessel provided an example of a case in which the paper owner, the Crown in that case, had no interest in asserting its superior title. Christopher Jessel expressed his view that it was useful that the court allowed the adverse possessors to remain registered despite having only been in possession for five years.[79]

17.98 We disagree that the principle of relativity of title should be able to be reflected by the entry of possessory title. The automatic upgrade of a possessory title to an absolute one means that it is ill-equipped to reflect relativity of titles over time. Further, in the context of registered land, entry of a possessory title would enable adverse possessors to circumvent schedule 6.

17.99 Taking a different approach, the Society of Legal Scholars proposed that the estates of adverse possessors should instead be protected as overriding interests. Under the LRA 1925, rights acquired or in the course of being acquired by adverse possession were a

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75 Consultation Paper, paras 17.68 to 17.69.

76 Consultation Paper, paras 17.70 and 17.71.

77 Amy Goymour and Nigel Madeley.

78 Christopher Jessel.

79 Citing *Walker v Burton* [2013] EWCA Civ 1228.

separate category of overriding interests.[80] The category was removed in the LRA 2002 as part of a policy of reducing the number of overriding interests to make the register a more accurate mirror. We do not think as a matter of policy that it is desirable to reinstate claims to adverse possession as a category of overriding interest.

17.100 Some consultees, including Dr Harpum, expressed the view that the proposal in respect of registered land reflects the current law as implicit in the LRA 2002 and as expressed in *Swan Housing Association Ltd v Gill*.[81]

17.101 Although the statements made by the court in *Swan Housing Association Ltd v Gill* imply that an adverse possessor could not apply for possessory title, this statement was not necessary for the decision, which itself does not go so far. The case concerned the relationship between an application under schedule 6 of the LRA 2002 and proceedings by the landlord against the claimant for an anti-social behaviour injunction in respect of the claimant's use of the disputed land. The court held that, as a result of the LRA 2002, it could not determine whether title has been acquired by adverse possession; the acquisition of title to registered land requires an application to HM Land Registry. The court explained, more broadly, that "a person can only acquire an effective title by adverse possession if certain procedural requirements are fulfilled", implying that meeting the requirements in schedule 6 is the only means by which title can be acquired. But the application in that case had in fact been made under schedule 6. The court's decision does not, in its terms, prevent an adverse possessor from applying to HM Land Registry for possessory title outside of the schedule 6 procedure.

17.102 Therefore, we do not think that *Swan Housing Association Ltd v Gill* has put the matter beyond doubt, particular given that *Gill* was decided at first instance. We think it would be advantageous to make this point express in the LRA 2002.

Recommendations

**Recommendation 42.**

17.103 We recommend that an adverse possessor of unregistered land should not be able to apply for first registration with possessory title until the unregistered proprietor's superior title has been extinguished under the Limitation Act 1980.

**Recommendation 43.**

17.104 We recommend that an adverse possessor of registered land should not be able to apply for first registration of any legal estate acquired by adverse possession (since the coming into force of the LRA 2002) except through the procedure in schedule 6.

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80 LRA 1925, s 70(1)(f).

81 [2012] EWHC 3129 (QB), [2013] 1 WLR 1253.

17.105 Clause 29 enacts Recommendation 42. It will amend sections 3 and 4, the provisions in the LRA 2002 that govern when title may be first registered, to prevent an adverse possessor from making an application for registration unless the paper owner's superior title has been extinguished by the operation of the Limitation Act 1980.[82] It is unnecessary for clause 29 to amend the circumstances in which possessory title can be registered, that is, section 9(5). This provision remains unaltered. Once an adverse possessor has been in possession for 12 years, so he or she will be able to apply for first registration, the registrar will rely on section 9(5) to register the applicant with possessory title.[83]

17.106 In enacting Recommendation 42, clause 29 also enacts Recommendation 43. In registered land, section 96 bars the superior title from being extinguished under the Limitation Act 1980 (a provision that we discuss in detail in the next section of this chapter). Because the registered estate will never be extinguished, under clause 29 an adverse possessor will never be able to apply for registration of the land under sections 3 or 4.

**The running of time and possessory title**

17.107 We have recommended above that an adverse possessor in unregistered land should not be able to obtain registration until he or she has extinguished the superior title by 12 years of adverse possession. The next point we consider is what should happen if, contrary to this recommendation, an adverse possessor of unregistered land is nevertheless registered with possessory title before the superior title is extinguished. Given Recommendation 42, this registration would be considered a mistake, which could be altered.[84] But what is the consequence of the registration under the Limitation Act 1980; in particular, is the claimant's use of the land during the period he or she was mistakenly registered with possessory title a continuance of the period of adverse possession?

17.108 The law on this point is uncertain. There are two sources of the uncertainty:

(1) whether the possession is "adverse" for the purposes of the Limitation Act 1980; and

(2) whether time is stopped from running in the adverse possessor's favour under the Limitation Act 1980 as a result of section 96 of the LRA 2002.

17.109 First, in order for time to run under the Limitation Act 1980, the possession must be adverse. For possession to be adverse, it must be wrongful in the sense that it gives rise to another person's right to bring an action for recovery of the land. It is the paper

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[82] Or in the case of adverse possession of demesne land, where the Crown's right of action has been barred by expiry of the limitation period.

[83] By amending s 3, our amendments will address the concern, raised by the Society of Legal Scholars, that the basis in the LRA 2002 for denying registration to adverse possessors with less than 12 years' adverse possession was not strong as the statute is currently drafted, given that s 3(2) of the LRA 2002 currently appears to provide that such a person can apply to be registered as proprietor.

[84] See Ch 13 for a detailed discussion of mistake, alteration and rectification.

owner's right to bring an action for recovery that is time barred, and once barred, results in the extinguishment of the paper owner's title under the Limitation Act 1980.[85]

17.110 It is not clear whether possession by someone who has been registered with possessory title under section 9(5) (for a freehold estate) or section 10(6) (for a leasehold estate) is adverse for the purposes of the Limitation Act 1980. In our view, the question appears to be whether registration with possessory title bars the right of another person from bringing an action for recovery of the land against the adverse possessor.

17.111 The Court of Appeal in *Parshall v Hackney* considered that a registered proprietor's possession could not be adverse, albeit the court was considering absolute titles in the context of double registration.[86] However, this point has been specifically considered by the Tribunal. In *Moore v Buxton* Judge Owen Rhys suggested that proprietors registered with possessory title could not be in adverse possession.[87] Subsequently however, in *Sexton and Kember v Gill*, Judge Owen Rhys determined that registration with possessory title does not preclude the proprietors from continuing to be in adverse possession against the unregistered superior estate pursuant to the Limitation Act 1980.[88] We agree with this more recent conclusion.

17.112 In our view, sections 11(7) and 12(8) of the LRA 2002, which outline the effect of registration with possessory title (in freehold and leasehold estates, respectively), suggest that the newly registered proprietor's possession is still adverse to the paper owner's title. Consequently, time continues to run. They each provide that registration with possessory title –

> does not affect the enforcement of any estate, right or interest adverse to, or in derogation of, the proprietor's title subsisting at the time of registration or then capable of arising.

17.113 Secondly, for the limitation period to run, the provisions of the Limitation Act 1980 must apply. Section 96 of the LRA 2002 disapplies the limitation period, and extinguishment of title on the expiry of the limitation period, under the Limitation Act 1980 "in relation to an estate in land or rentcharge the title to which is registered".

17.114 Section 96 stops time from running under the Limitation Act 1980 against the paper owner when his or her superior title is registered. It is not without doubt, as demonstrated by the decisions of the Tribunal (and its predecessor, the Adjudicator), whether section 96 also stops time from running against the paper owner's superior title when it is the inferior title of the adverse possessor that is registered.[89] We think the

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85 Limitation Act 1980, ss 15 and 17, and sch 1, para 8.

86 [2013] EWCA Civ 240, [2013] Ch 240.

87 [2009] EWLandRA 2007_1216 at [24] to [28].

88 [2016] UKFTT 0023 (PC), REF/2013/0472/0473 at [19].

89 See *Moore v Buxton* [2009] EWLandRA 2007_1216 at [24] to [28]; and *Joslin v Hipgrave* [2015] UKFTT 0497 (PC), REF/2013/0942 at [21] to [24]; compare with *Sexton and Kember v Gill* [2016] UKFTT 0023 (PC), REF/2013/0472/0473 at [19]. See also *Akram v Stott* [2015] UKFTT 0312 (PC), REF/2013/1088 at [21].

better view, based on the wording of section 96, is that registration of the adverse possessor's title does not stop time from running.

17.115 It is our view that time should continue to run for the purposes of the Limitation Act 1980 in favour of an adverse possessor who is mistakenly registered with possessory title, when he or she should not have been registered by virtue of clause 29. As we explained in the Consultation Paper, the adverse possessor might be acting entirely in good faith,[90] so to stop time running would disadvantage adverse possessors who had sought to regularise their title by applying for registration.[91]

17.116 As we explained in the Consultation Paper, we do not think that this policy contradicts our policy that adverse possessors of unregistered land should not be able to apply for registration with possessory title until the paper owner's title has been extinguished under the Limitation Act 1980, contained in Recommendation 42. This policy addresses a mistaken belief that the Limitation Act 1980 has extinguished title. To promote consistency between these proposals, we proposed in the Consultation Paper that the period of adverse possession should continue to run only when the adverse possessor reasonably believes the paper title has been extinguished.[92]

### Consultation and discussion

17.117 We provisionally proposed that if an adverse possessor of unregistered land is registered with possessory title, based on a reasonable but incorrect belief that the prior title had been extinguished, the limitation period should continue to run while the possessory title is open.[93]

17.118 Nearly all the consultees who responded agreed with our proposal: of the 21 who responded, 19 agreed, showing support from a variety of stakeholders. They mainly agreed for the reasons we gave in the Consultation Paper, and supported reform as necessary to clarify an unsettled point of law.

17.119 A number of consultees who agreed, including HM Land Registry, expressed concern with the requirement that the adverse possessor must have a reasonable belief that the paper owner's title was extinguished. These consultees suggested that reasonable belief would be difficult to test. They moreover explained that imposing a requirement for a reasonable belief could lead to uncertainty and to disputes, undermining the clarity any reform would bring. To ameliorate this concern, Christopher Jessel proposed that the standard for reasonable belief should be objectively determined by what a "reasonable squatter in the position of the claimant would believe rather than the subjective belief of the actual squatter".[94]

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90 One example we gave in the Consultation Paper was in relation to land subject to a longer limitation period, such as Crown land: para 17.77.

91 Consultation Paper, paras 17.73 to 17.77.

92 Consultation Paper, para 17.78.

93 Consultation Paper, para 17.79.

94 He noted this would be in accordance with *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28, [2008] 1 AC 221.

17.120 Our intention in requiring the adverse possessor to have a reasonable belief was to prevent adverse possessors from knowingly, and perhaps shortly after entering into possession, applying for registration with possessory title. However, we have been persuaded by consultees that such a requirement would undermine the clarity our policy would otherwise bring. On reflection, we think that imposing a requirement of reasonable belief as a condition for a limitation period to run would essentially impose a requirement for good faith into the Limitation Act 1980 (albeit in limited circumstances), which we are reluctant to do. We have therefore amended our recommendation so that it no longer requires a reasonable belief that the paper owner's title has been extinguished. We think that the requirement that claimants provide evidence of 12 years of adverse possession on an application for registration with possessory title, as imposed by Recommendation 42 above, will be sufficient to prevent knowingly wrongful applications from being successful.

17.121 Dr Harpum disagreed with our provisional proposal. Acknowledging that this point was difficult, he explained that ultimately he had difficulty conceiving "that a person can be in adverse possession of land of which he or she is the registered proprietor". In his view, this notion contradicts the logic of land registration, regardless of any principle of concurrent estates. We acknowledge the conceptual difficulty, but note that we are concerned with situations where the registration of possessory title itself was a mistake. We consider that it would be wrong to treat an adverse possessor who has attempted to regularise his or her possession less favourably than one who does not do so.

Recommendation

**Recommendation 44.**

17.122 We recommend that where an adverse possessor in unregistered land is incorrectly registered with possessory title when the prior title has not been extinguished, the period of adverse possession should continue to run while the possessor's title is open.

17.123 Clause 30 enacts Recommendation 44. It will insert a new section 96A into the LRA 2002 to clarify that registration of a person with possessory title when the paper owner's title was not extinguished does not prevent the limitation period under the Limitation Act 1980 from running.

17.124 Clause 30 therefore amends the LRA 2002 to clarify the uncertainty about whether the period of limitation under the Limitation Act 1980 is barred from running by virtue of section 96 of the LRA 2002, by providing that it can keep running when the adverse possessor is registered with possessory title. We do not think that any further amendment of the LRA 2002 is required to clarify that the possession is "adverse" for the purposes of the Limitation Act 1980. Existing sections 11(7) and 12(8) provide that registration with possessory title does not affect the enforcement of any adverse estate that existed at the time of registration. Together with these provisions, providing that the limitation period under the Limitation Act 1980 continues to run ensures that the paper owner will continue to have a right of action for recovery of the land against the adverse

possessor. That is, despite being mistakenly registered with possessory title, the adverse possessor's title remains adverse in relation to the title of the paper owner.[95]

17.125 This provision will apply in relation to proprietors registered with possessory title after commencement of clause 30 where the application for first registration was made after the commencement of clause 29.

**Adverse possession by a tenant**

17.126 In this final section of the chapter, we consider a discrete point about the common law presumption made in the context of a tenant's adverse possession of land owned by a third party (namely, a person other than the landlord). In particular, we consider how this presumption interacts with the scheme for adverse possession of registered land within schedule 6. As we explained in the Consultation Paper, although the continued use of this presumption is somewhat controversial, we have not considered its merits: doing so would extend beyond the scope of this project.[96]

17.127 In the context of adverse possession, a tenant's possession is not adverse to his or her landlord. Instead, a tenant's possession is considered to be possession by the landlord. [97] Consider the following example illustrated in figure 31.

Figure 31: adverse possession by a tenant of the adverse possessor

A is the paper owner of land. B takes adverse possession of that land for three years. B then leases the land to C, who remains in possession as B's tenant for twelve years.

17.128 In this example, B would have been "in possession" of the land for 15 years: three years of actual possession and 12 years vicariously in possession through C. There are a number of cases in which a landlord has vicariously relied on his or her tenant's adverse possession.[98]

17.129 The situation is different where the tenant is in adverse possession of land owned by a third party which is near to, but not part of, the demised or leased land. In this case, there is a presumption of fact made that the tenant is acting on behalf of his or her landlord. Unless the presumption is rebutted, the landlord will acquire freehold title to the third party's land, although the land will form part of and be subject to the terms of

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95 We agree with the finding in *Parshall v Hackney* [2013] EWCA Civ 240, [2013] Ch 240 that a person registered with absolute title cannot be in adverse possession of the land. Our conclusion is limited to the situation in which the adverse possessor has been registered with possessory title. It follows from ss 11(7) and 12(8) of the LRA 2002, which for possessory title exclude from the effect of registration protection against the enforcement of adverse estates, interests and rights which exist at the time of registration. See also *Rashid v Rashid* [2017] UKUT 0332 (TCC), UT/2006/0113.

96 Consultation Paper, para 17.81.

97 *Haigh v West* [1893] 2 QB 19, 31.

98 Eg *Haigh v West* [1893] 2 QB 19; see further in S Jourdan and O Radley-Gardner, *Adverse Possession* (2nd ed 2012) para 7-125, n 259.

the tenant's lease.[99] The presumption can be rebutted by proof that the tenant is acting on his or her own behalf, in which case the tenant will acquire freehold title to the third party's land.

Figure 32: adverse possession by a tenant of land not demised in the lease

A grants a long lease to B of a house with a small garden. B decides to extend the garden and build a shed, past the boundary line onto the back portion of the garden of the neighbour C. A is not aware of B's extension of the garden. B remains in adverse possession of the back portion of C's garden for ten years.

17.130 In the example in figure 32, the facts would suggest that B is not acting on his or her landlord's behalf, but on his or her own behalf.

17.131 In the Consultation Paper, we wondered whether the scheme outlined in schedule 6 allows the presumption to operate in relation to registered land. We explained our initial view that it does not appear to do so: paragraph 1 requires the person applying under schedule 6 to be the person who "has been in adverse possession", and the landlord has not personally been in adverse possession. We explained that HM Land Registry's practice of confirming with tenants that the encroachment was intended for the tenant's benefit allows the tenant to make an application under schedule 6 when the presumption is rebutted.[100] However, we also said that schedule 6 does not appear to allow landlords to make an application under schedule 6 based on their tenants' adverse possession in cases where the presumption has not been rebutted.[101]

17.132 We explained that the LRA 2002 was not intended to alter the operation of the presumption.[102] We therefore provisionally proposed that reform of the schedule 6 procedure was necessary to account for the presumption. As we discuss below, on further reflection we are now of the view that no reform is necessary: schedule 6 does in fact permit an application by the landlord based on the tenant's possession.

### Consultation and discussion

17.133 We provisionally proposed that if a tenant is in adverse possession of land not belonging to the landlord, and the presumption that the tenant is acting on behalf of the land is not rebutted, the landlord should be able to make an application under schedule 6, based on the tenant's adverse possession.[103]

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99 *Kingsmill v Millard* (1855) 11 Exch 313, 318 to 319. See also S Jourdan and O Radley-Gardner, *Adverse Possession* (2nd ed 2011) ch 25.

100 See HM Land Registry, *Practice Guide 4: Adverse Possession of Registered Land* (November 2017) para 11.2.

101 Consultation Paper, paras 17.82 to 17.85. A point made in E Lees, "Encroachment and Schedule 6 LRA 2002: unknotting the tangle" [2015] 2 *Conveyancer and Property Lawyer* 110.

102 See, eg *Dickenson v Longhurst* REF/2007/1276.

103 Consultation Paper, para 17.86.

17.134 Twenty-three consultees responded, with 21 agreeing, including HM Land Registry and the Law Society.

17.135 Some consultees focussed their responses on the merits of the presumption itself. They argued that the presumption is archaic so should be abolished in respect of registered land. In particular, Dr Harpum strongly disagreed with the proposal, stating his view that the reforms in the LRA 2002 were intended to remove this general land law presumption from the regime for registered land.

17.136 Although we recognise that some stakeholders take the view that the presumption is archaic, we do not think the operation of the presumption has been excluded from registered land by the LRA 2002. In our proposal, we simply sought to clarify that the existing presumption applies within the scheme outlined in schedule 6.

17.137 Most consultees agreed with this view. Without necessarily expressing support for the underlying presumption, these consultees said that schedule 6 should accommodate the operation of the presumption in registered land, in order for the register to reflect the existing relationship between landlords and tenants.

17.138 Christopher Jessel argued that the presumption in fact continues to operate within schedule 6, so no reform is necessary. He stated that "there seems to be nothing in the legislation to prevent a landlord from being in possession via the acts of his [or her] tenant", accordingly, the landlord would be able to apply under schedule 6. He nevertheless thought that it would be desirable for the position to be clear on the face of the legislation.

17.139 We have come to the view that schedule 6 in fact already allows for a landlord to make an application based on adverse possession by his or her tenant.

17.140 The LRA 2002 changes the consequences of adverse possession for registered land. It does not, however, change the meaning of adverse possession. Adverse possession in the LRA 2002 means the same as it does under the Limitation Act 1980: whether a period of limitation runs in a person's favour.[104] The LRA 2002, like the regime which applies in unregistered land, does not require a person personally to be in adverse possession in all cases. Therefore, if the presumption has not been rebutted, the landlord should be considered to be in possession of the land vicariously, based on the tenant's possession. We agree with Christopher Jessel that a landlord would be able to qualify as a person who has "been in adverse possession of the estate" in order to make an application under paragraph 1 of schedule 6. We therefore do not think that reform is necessary.

17.141 Moreover, we think that it would risk creating uncertainty if we made this point express on the face of the LRA 2002. In our view, schedule 6 relies on the general law and so allows for applications by a person in vicarious possession. If we made a landlord's vicarious possession through his or her tenant express in schedule 6, we would risk casting doubt on whether a person in another situation of vicarious possession was in fact in possession and so able to apply.

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[104] LRA 2002, sch 6, para 11(1) and (2). Para 11(3) makes a minor alteration to the meaning of adverse possession, which is not relevant here: see Law Com No 271, para 14.23.

17.142 As we think the presumption that a tenant is in adverse possession on behalf of his or her landlord is already able to operate under schedule 6, we do not make any recommendation for reform of the LRA 2002 on this point. However, we do suggest that HM Land Registry update its guidance to address the situation, so that it outlines the application process under schedule 6 for a landlord who is claiming the benefit of the presumption and applying for registration based on the adverse possession of his or her tenant.

# Chapter 18: Further advances

## INTRODUCTION

18.1 In this chapter, we consider the law relating to further advances made under an existing registered charge, and in particular, the principle of "tacking".

18.2 A "further advance" is the subsequent loan of additional money by a lender to a borrower where the original loan is secured by a charge.

18.3 Tacking allows a lender to add (or "tack") a further advance to his or her original secured loan with the effect that the further advance has the same priority as that loan. As a result, the further advance may take priority over a subsequent charge which would otherwise have priority over it. This is best illustrated by an example.

Figure 33: tacking in action

A raises money by taking out the following secured loans.

- A borrows £10,000 from B. The loan is secured by a charge over A's property in favour of B.
- Next, A borrows £5,000 from C. The loan is secured by a second charge over A's property, this time in favour of C.
- Finally, A borrows an additional £2,000 from B as a further advance under the existing charge in favour of B.

B's original loan of £10,000 takes priority over C's loan of £5,000 because it was made before C's loan.[1]

The priority of B's additional loan of £2,000 over C's loan depends on tacking – can B tack the additional loan to the original loan?

- If B's additional loan of £2,000 can be tacked to the original loan, it will have the same priority as the original loan and therefore take priority over C's loan.
- If B's additional loan cannot be tacked, C's loan will take priority because it was made before the additional loan to B.

18.4 We have limited our review to issues that stem from the LRA 2002. As we highlighted in the Consultation Paper, we have to balance the need to reform the law in relation to charges of registered land against the risk of interfering with the wider law of

[1] LRA 2002, s 28. The position is the same in unregistered land.

mortgages.[2] We indicated in the Consultation Paper that we were considering a project on the general law of mortgages as a part of the consultation on our Thirteenth Programme of Law Reform.[3] We ultimately decided not to include such a project. Our discussions with the Ministry of Justice and HM Treasury led us to believe that the Government was unlikely to give an undertaking that it had a serious intention to take forward reform in this area as is required under our Protocol.[4] Since the publication of our Consultation Paper, however, we have published our final report and draft Bill on goods mortgages, and we have considered tacking in that context.[5]

18.5 Due to our desire not to intrude into the wider law of mortgages, our review of the provisions which govern further advances within the LRA 2002 (the "tacking provisions", contained in section 49) has also been limited to ensure that we only address problems with registered land which are created by the LRA 2002. Although stakeholders have raised a variety of issues regarding the tacking provisions in the LRA 2002, some of these issues in fact stem from the general law of tacking rather than from the LRA 2002. These issues fall outside the scope of our project. Other issues fall within the land registration scheme but, in our view, cannot satisfactorily be reviewed in isolation from a wider reform of the law of mortgages. We have therefore limited our review to issues which can be resolved by a narrow solution applying only to registered land, without adversely impacting the general law of mortgages. Consultees agreed with our proposed approach.

18.6 We make one recommendation: that the tacking provisions should be extended to enable the tacking of further advances by beneficiaries of an express trust of a registered charge. This recommendation is aimed at facilitating the syndicated loan market in which lenders are beneficiaries under a trust of the registered charge, rather than the registered proprietors of the charge. These lenders will frequently make further advances directly to the borrower under the security of the charge.

## TACKING UNDER THE LRA 2002

### Section 49

18.7 The tacking provisions dealing with further advances made under registered charges are contained in section 49 of the LRA 2002.[6] Under section 49, a further advance made by the proprietor of a registered charge can take priority over a subsequent charge if one of the following four conditions is satisfied.

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2 Consultation Paper, paras 18.2 to 18.6.

3 Thirteenth Programme of Law Reform (2017) Law Com No 377.

4 Protocol between the Lord Chancellor (on behalf of the Government) and the Law Commission (2010) Law Com No 321, para 6(2).

5 From Bills of Sale to Goods Mortgages (2017) Law Com No 376, paras 6.28 to 6.35. On 14 May 2018, the Government announced that it will not bring forward the Law Commission's Good Mortgages Bill in the immediate future: HM Treasury, *Good Mortgages Bill: Response to Consultation* (May 2018).

6 The tacking provisions for unregistered land are contained in s 94 of the Law of Property Act 1925.

(1) The proprietor of the registered charge has not received notice from the subsequent chargee of the creation of the subsequent charge.[7]

(2) The advance was made in pursuance of an obligation and that obligation was, at the time of creation of the subsequent charge, entered in the register.[8]

(3) The parties to the prior charge agreed a maximum amount for which the charge is security and that agreement was, at the time of creation of the subsequent charge, entered in the register.[9]

(4) The subsequent chargee agreed that the further advance takes priority.[10]

18.8 In the Consultation Paper, we divided the discussion into five issues which stakeholders had raised with us in connection to the tacking provisions. These five issues are:

(1) loans which provide for drawdown in instalments;

(2) the inability of persons other than the registered proprietor to make further advances;

(3) the application of section 49(1) to any subsequent charge;

(4) further advances made pursuant to an obligation; and

(5) advances made up to a maximum amount under section 49(4).

18.9 However, one of those issues will not be discussed further in this Report. In relation to (3), in the Consultation Paper we only asked for evidence regarding a potential project on the general law of mortgages. As we explained above,[11] those responses were considered as part of our consultation on our Thirteenth Programme of Law Reform.

**Use in practice**

18.10 Before discussing the four issues in detail, it is first worth noting that the tacking provisions in the LRA 2002 do not appear to be much used. We noted in the Consultation Paper that we had received anecdotal evidence that lenders typically do not rely on the tacking provisions; instead they are more likely to use inter-creditor arrangements or deeds of priority, particularly for high-value commercial transactions. We wondered if reliance on section 49 may vary between primary and secondary tiers of the lending market.[12]

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7 LRA 2002, s 49(1) and (2).

8 LRA 2002, s 49(3).

9 LRA 2002, s 49(4).

10 LRA 2002, s 49(6).

11 See para 18.4 above.

12 Consultation Paper, para 18.14.

18.11 To better understand the circumstances in which section 49 is used, we asked consultees an open question about the circumstances in which and reasons why lenders rely on either section 49 or agreements between themselves.[13]

18.12 Eight consultees responded to this question, largely from practitioner associations and law firms with experience in the secured lending market. We also received various responses from consultees in their consideration of the Consultation Paper which, although not directed at the call for views, have helped shape our view of the reforms required.

18.13 Although we received a range of views, two strong themes emerged: first, that contractual arrangements are relied upon by the majority of lenders; but secondly, that the reasons for reliance on contractual arrangements is not necessarily inadequacies of the provisions in the LRA 2002.

18.14 The Law Society explained that the use of contractual arrangements is not due to perceived inadequacies of section 49 of the LRA 2002, but because the market prefers to regulate the terms of a specific transaction. Similarly, the Council of Mortgage Lenders and British Bankers' Association both stated that some lenders prefer to rely on deeds of priority because of the certainty they provide.

18.15 The London Property Support Lawyers Group and Burges Salmon LLP explained that inter-creditor arrangements often contain terms going beyond priority of charges. The provisions of section 49 are not the only driver for the agreement.

18.16 Berwin Leighton Paisner LLP expressed the opinion that "section 49 provides a long-standing and fair framework within which the great majority of mortgages operate, and which is well understood by practitioners". It identified that inter-creditor arrangements are typically used in syndicated loans and other high-value commercial transactions because the land is likely to be mortgaged to its fullest extent and the range of lenders is known at the outset.

18.17 However, consultees also stated that inter-creditor arrangements are used to overcome practical problems with section 49. For example, the London Property Support Lawyers Group identified that inter-creditor arrangements are used to overcome difficulties in the syndicated lending market and with obligations to make further advances. Similarly, Burges Salmon LLP stated that inter-creditor arrangements can be used to overcome problems with section 49, such as the fact that registration of the second charge does not itself amount to notice for the purposes of section 49.

## ISSUE 1 – LOANS WHICH PROVIDE FOR DRAWDOWN IN INSTALMENTS

### Current law

18.18 If a loan provides for payments to be made in instalments, does the payment of an instalment amount to a "further advance" for the purposes of section 49, or is the payment a part of the initial loan? If an instalment is the former, then it will only take priority over a subsequent charge in accordance with the tacking provisions of the LRA

[13] Consultation Paper, para 18.15.

2002.[14] If it is the latter, then an instalment will always take priority over a subsequent charge. This issue is best demonstrated using an example.

Figure 34: loan instalments

A takes a secured loan of £1,000,000 from B. The full amount of the loan is not advanced up front; instead the loan documentation provides that the loan is to be payable by B to A in £100,000 instalments over ten months. Five months into this process, A takes a further secured loan from C, which is drawn down immediately.

18.19 Despite some uncertainty, we reached the conclusion in the Consultation Paper that the five instalments of the loan by B made after the loan made by C would constitute "further advances".[15] Therefore, they could only gain priority over C's loan if they are protected in accordance with the tacking provisions.

18.20 No consultees disagreed with our analysis.

**Consultation**

18.21 We asked consultees whether the classification of instalments as "further advances" causes problems in practice, although with the caveat that submissions were unlikely to be taken forward as part of this project.

18.22 The eight consultees who answered this question were split into three categories: those who were of the view that the classification of loan instalments as further advances is causing problems in practice; those who felt that clarification would be beneficial (although without necessarily having practical experience of a problem); and those who did not see it as a problem in practice. Overall, however, more than half of consultees thought that there was a problem in practice or that clarification was desirable.

Problems in practice

18.23 The London Property Support Lawyers Group thought that classification of instalments as further advances causes problems in practice, and provided an example of where building development would be delayed or incomplete because the main financial backer is reluctant or unwilling to pay instalments which may rank in priority behind a subsequent charge. Howard Kennedy LLP endorsed this response, adding that the consequences of the classification of instalments as further advances can be "serious".

Clarification desirable

18.24 Several consultees thought that it would be desirable to clarify the law, even if there are not necessarily any problems in practice.

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[14] The instalment would take priority over a subsequent charge if the lender did not have notice of the subsequent charge at the time he or she paid the instalment, or if his or her obligation to pay that instalment was noted in the register at the time the subsequent charge was created.

[15] Consultation Paper, paras 18.18 to 18.20.

18.25 The Chartered Institute of Legal Executives did not consider it a "significant issue" but stated that it was nonetheless worth clarifying. In a similar vein, the City of Westminster and Holborn Law Society took no view on the existence of problems in practice, but thought that clarification would be desirable. Neither indicated how the law should be clarified.

18.26 Berwin Leighton Paisner LLP thought that instalments clearly amount to further advances. Nonetheless, it considered that it would be desirable if legislation could clarify more generally what types of arrangements are not to be regarded as "further advances". It specifically referred to the clarity given to some arrangements by *Urban Ventures Ltd v Thomas*,[16] noting that other arrangements would benefit from similar clarification.

18.27 Professor Sarah Nield put forward the view that the law should be clarified in order to exclude instalments from the concept of further advances, such that they therefore take priority over subsequent charges regardless of whether notice is given by the subsequent chargee under section 49(1) of the LRA 2002.

No problems in practice

18.28 In contrast to the above responses, the Law Society was of the view that categorising loan instalments as further advances does not cause significant problems in practice. It explained that "the position is well established by *Hopkinson v Rolt"*[17] (discussed at paragraph 18.80 below) and that there are insufficient grounds for amendment of the legislation.

**Conclusions**

18.29 Although consultees, on balance, favoured clarification of the meaning of further advances, we have decided not to make any recommendations in relation to this issue. Despite the support for clarification, we did not receive consensus as to what form that clarification should take. Notably, consultees' views differed as to whether clarification should provide that instalments constitute further advances, or that instalments are instead part of the initial loan.

18.30 Further, it appears that the difficulties that arise are not caused by the LRA 2002. As the Law Society's response indicated, the current position reflects a wider rule within the law of mortgages. This question goes to the heart of what constitutes a "further advance" and therefore has the potential to affect the law of tacking in relation to assets other than registered land.

18.31 We had concluded in the Consultation Paper that the definition of further advances in registered land probably fell within the wider law governing mortgages.[18] We remain of the view that any definition of "further advances" has implications beyond mortgages over registered land and therefore we do not make any recommendation in respect of this issue within this project.

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16 [2016] EWCA Civ 30, [2016] ICR 695.

17 (1861) 11 ER 829.

18 Consultation Paper, para 18.21.

## ISSUE 2 – FURTHER ADVANCES MAY ONLY BE MADE BY THE REGISTERED PROPRIETOR OF THE CHARGE

### Current law

18.32 The tacking provisions in the LRA 2002 only permit tacking by "the proprietor of a registered charge". This limitation had been drawn to our attention as problematic in the case of syndicated loans.

18.33 The essence of a syndicated loan is that a number of lenders join together (in a syndicate) to lend, usually large sums, to a borrower on security which is taken for the benefit of all of them. In the case of registered land, the security is a charge registered in the name of a single entity, typically called a "security agent", who acts as trustee for the syndicate. The security agent may or may not be a member of the syndicate.

18.34 Although the lenders within the syndicate may directly make further advances to the borrower, those advances will not be able to take priority under the tacking provisions;[19] such advances are, by definition, not made by "the proprietor of a registered charge". Only further advances made by the security agent, who is the registered proprietor of the charge, could be tacked.

18.35 This problem was not created by the LRA 2002: it was present in the equivalent provisions in the LRA 1925.[20] Nor is the problem confined to registered land; the equivalent provision for unregistered land limits tacking to further advances made by mortgagees.[21]

18.36 In the Consultation Paper, we were hesitant to propose reform because the issue arises beyond the context of registered land. However, we noted that the LRA 2002 devises a system which governs tacking in registered land, and that there is already one method of tacking that applies only to registered land.[22] Therefore, it would be possible to recommend a "narrow" solution only applying to the tacking provisions that apply to registered land, without interfering with tacking rules in relation to other assets. We therefore considered that whether tacking should be permitted by members of a syndicate who are not the registered proprietor was a question of policy that could be addressed in relation to the LRA 2002.[23]

### Consultation and discussion

18.37 We asked three related questions about extending the classes of person who may make a further advance capable of tacking under section 49:

(1) whether we should extend who is able to tack under section 49,

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19 Consultation Paper, para 18.23; unless made by a lender who is the security agent.

20 LRA 1925, s 30.

21 Law of Property Act 1925, s 94; the provision uses the language of "mortgagees" instead of "chargees".

22 Consultation Paper, para 18.25. See LRA 2002, s 49(4).

23 Consultation Paper, para 18.26.

(2) what the likely effect of this extension would be in practice, and

(3) to whom this extension should apply.[24]

18.38 As we indicated in the Consultation Paper,[25] we do not intend for any extension to change the requirement that the notice given by a subsequent chargee to prevent tacking must be given to the proprietor of the registered charge.[26] In our view, it is not reasonable to expect a subsequent chargee to give notice to anyone other than the proprietor of the prior registered charge. It would be up to the parties involved to ensure that the notice was disseminated to other lenders.

Question 1: should we extend who can rely on section 49?

18.39 First, we asked consultees whether it should be possible for persons other than a proprietor of a registered charge to make a further advance capable of tacking under section 49.[27]

18.40 Most consultees who responded agreed that the category of persons who can make further advances in accordance with section 49 should be expanded. Only two consultees did not agree with our suggested expansion. One of those responses was equivocal, seemingly in favour provided that the advances were made in accordance with the mortgage deeds (which is implicit in our discussion).

18.41 Several consultees, including the Law Society and the London Property Support Lawyers Group, highlighted that an expansion of the category of persons beyond the registered proprietor of the charge would be of practical benefit given the use of syndicated loans in commercial transactions.

18.42 Berwin Leighton Paisner LLP, who supported expansion, disagreed with our view that the LRA 1925 also limited tacking to the registered proprietor. It also disagreed with our view that the problem also exists for unregistered land. While we maintain our view of the law, we appreciate Berwin Leighton Paisner LLP's analysis. In fact, the case for our recommendation would be even stronger if the issue were confined to the LRA 2002.

Question 2: would this extension have an effect in practice?

18.43 Second, we asked consultees for evidence as to whether an extension to the persons able to make further advances under section 49 would be likely to have effect in practice, given the use of inter-creditor agreements in the commercial lending market.[28]

18.44 Although we received limited responses to our call for evidence, all consultees except one supported our initial conclusion that amendment would be beneficial.

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24 Consultation Paper, para 18.27, 18.28 and 18.31.

25 Consultation Paper, para 18.30.

26 LRA 2002, s 49(1) and (2).

27 Consultation Paper, para 18.27.

28 Consultation Paper, para 18.28.

18.45 The Law Society observed that extension of the class of persons beyond the registered proprietor–

> will only affect a very small number of lenders. However, the Society's view is that facilitation of syndicated loans by even a small number of sophisticated lenders is a worthwhile policy objective.

18.46 The London Property Support Lawyers Group noted that an amendment would be advantageous where parties do not put in place inter-creditor agreements, something which it sees occurring in practice.

Question 3: who should be able to rely on section 49?

18.47 Third, we asked consultees for their views as to which persons, other than the proprietor of a registered charge, should be able to make further advances capable of tacking under section 49.[29] Two consultees did not agree with our conclusion in the Consultation Paper that it would be necessary to define or limit the class of persons who should be able to make the further advances. The London Property Support Lawyers Group thought that the loan agreement should determine who is able to make further advances. Similarly, Michael Hall took the view that it is a matter to be determined by the borrower, as "the borrower should remain in control of who has security over his [or her] property".

18.48 We received three responses as to how to define the class of persons entitled to make a further advance.

18.49 The City of Westminster and Holborn Law Society stated that it would be preferable "where syndication arrangement for this are recorded in the register and limited to those so named". However, as we explained in the Consultation Paper, in practice only the security agent may appear in the register.[30] We do not think there is a workable way of recording the members of the syndicate in the register when they are not the registered proprietors. Further, we think that doing so would be tantamount to recording beneficial ownership of the syndicate, and would therefore operate against the curtain principle that beneficial interests are not recorded in the register.[31]

18.50 The Law Society proposed that the class should be restricted to beneficiaries of an express trust of the registered charge. It thought that it was "a clear and simple test" that would give the market "sufficient flexibility".

18.51 Berwin Leighton Paisner LLP proposed the following (potentially broader) definition:

> A person who is at that time either:
>
> (a) entitled to any part of the money or obligation secured by the mortgage; and / or

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29 Consultation Paper, para 18.31.

30 Consultation Paper, para 18.23.

31 We explain the curtain principle in the Consultation Paper, para 2.18. See also the Glossary.

(b) under an obligation to make the further advance in question.

18.52 In post-consultation discussion,[32] Berwin Leighton Paisner LLP explained that the Law Society's suggested definition, based on an express trust, would allow lenders in a syndicated loan to make further advances capable of tacking. As an example, it noted that a declaration of trust is contained, at clause 28.1.2, in the Loan Market Association's standard form for a syndicated property investment loan.

18.53 However, Berwin Leighton Paisner LLP believed that the Law Society's definition was too narrow: it would not capture possible situations outside the context of a syndicated loan. It explained that there are other arrangements in which the lender may not be the registered proprietor of the charge. One example it gave is where more than four lenders want to secure their loans by charge on the basis that their loans rank equally in priority. Section 34(2) of the Law of Property Act 1925 only permits the first four of them to be legal proprietors of the charge; only these lenders could be proprietors of the registered charge. The parties would expect that the first four lenders would hold the security on the behalf of all of the lenders, but they may not have declared an express trust.

18.54 To account for this arrangement, Berwin Leighton Paisner LLP suggested that we could modify the Law Society's suggestion to apply to the "beneficiary of an express *or implied* trust". It also reiterated its original suggestion (discussed above, at paragraph 18.51) as well as adding the alternative suggestion of "anyone on whose behalf (whether or not with others) the proprietor holds a registered charge".

18.55 There is merit in the definitions proposed by both the Law Society and Berwin Leighton Paisner LLP, but they vary as to the range of parties which they could capture.

**Recommendation**

18.56 The responses from consultees confirm that an extension of the class of persons able to rely on the tacking provisions would be beneficial in practice. We therefore recommend that it should be possible for persons other than the proprietor of a registered charge to make further advances on the security of that charge which rank in priority to a subsequent charge pursuant to the provisions of section 49 of the LRA 2002.

18.57 We did not receive a consensus of views as to whether the class of persons capable of making further advances on the security of the charge should be defined, or if so, how to define such a class.

18.58 In order to proceed to make a recommendation to extend the class of persons who can make further advances on the security of a registered charge, we must define the class of persons. This class cannot be overbroad such that it produces unfairness: for example, it must not be possible for a subsequent chargee (a third-ranking chargee) to "piggyback" off such provisions to displace the priority of a second-ranking charge;

[32] In post-consultation discussions, Norton Rose Fulbright similarly suggested that the terms of the mortgage would provide an adequate limit as to who is able to make further advances capable of tacking. We consider that this would be too broad for the reasons given at paras 18.60 and 18.61 below.

moreover, in a syndicated loan situation, it must not be possible for a former or existing member of the syndicate to tack non-syndicate lending, whenever made.

18.59 In defining this class of persons, we favour the Law Society's suggested definition of a "beneficiary of an express trust". As it states, it has the advantages of being simple, clear and flexible. Our preference for this definition was confirmed by Berwin Leighton Paisner LLP's explanation, in post-consultation discussion, that it would cover lenders who are members of a syndicate.[33]

18.60 We are grateful to Berwin Leighton Paisner LLP for their discussion with us in relation to this recommendation. We recognise its concerns that there are situations in which a lender may be neither a proprietor of the registered charge, nor a beneficiary under an express trust of that charge. We ultimately decided that we should not provide for these situations for two reasons. First, there is insufficient evidence from consultees that these situations cause problems in practice. In the light of the limited evidence, and given our overall cautious approach, we think that we should resolve only the specific problem that has been identified without going further.

18.61 Second, our amendments to section 49 will provide a clear method which will allow lenders who are not proprietors of the registered charge to make further advances capable of tacking. In the future, lenders will have the opportunity to create a structure and a security agreement for their lending which meet the criteria of the amended section 49 by using an express trust. We do not address the issue of priority between the distinct loans and advances made by members of the syndicate because this would be governed by the agreement between those members. Any statutory provision would only be a default provision in the absence of an agreement.

**Recommendation 45.**

18.62 We recommend that it should be possible for a beneficiary of an express trust of a registered charge to make further advances on the security of that charge which rank in priority to a subsequent charge pursuant to the provisions of section 49 of the LRA 2002.

18.63 Clause 17 will give effect to this recommendation.

18.64 Clause 17 will amend subsections 49(1), (3) and (4) to replace references in section 49 to "the proprietor of a registered charge" with "a relevant person in relation to a registered charge".[34] New subsection (5A) of section 49 defines "a relevant person" as either a proprietor of a registered charge or beneficiary of an express trust of a registered charge. The wording of subsection (5A) extends the classes of person able to make further advances capable of being tacked under section 49, while also ensuring

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33 Note that Berwin Leighton Paisner LLP's preference was for a wider definition applying beyond the context of syndicated loans.

34 No amendment is needed in respect of tacking by agreement under s 49(6). Under the current law, the subsequent chargee can already agree that further advances made by a person other than the registered proprietor take priority over a subsequent charge.

that the ability of the proprietor of the registered charge to tack is not ousted if he or she holds that charge on express trust. Whether a person is a "relevant person" will be determined at the time the further advance is made; a person who left the syndicate would be unable to rely on section 49.

18.65 Clause 17 will also insert a new subsection (5B) which will impose two conditions which must be satisfied if a lender is to be entitled to tack as a beneficiary of a trust of the charge. The first condition requires that, at the time the subsequent charge is created, there is an entry in the register indicating that persons other than the proprietor of the prior registered charge may make further advances secured by that charge. The second condition requires a person who lends as a beneficiary of a trust of a charge to have the agreement of all the other beneficiaries of that trust. In the context of a syndicated loan, a member of the syndicate who wishes to make a further advance will need the agreement of the other syndicate members.[35]

18.66 As we indicated in the Consultation Paper,[36] our recommendation will not change to whom notice must be given under section 49(1). Clause 17 will amend subsection (1) to state that notice must still be given to the proprietor of the registered charge.

18.67 This amendment will apply to charges which are registered on or after the day the amendment comes into force.

## ISSUE 4 – FURTHER ADVANCES MADE PURSUANT TO AN OBLIGATION

### Current law

18.68 Under section 49(3), a further advance made by a chargee in pursuance of an obligation takes priority over a subsequent charge if the obligation is the subject of an entry in the register at the time the subsequent charge is created.

18.69 As we explained in the Consultation Paper, for a chargee to rely on section 49(3), the obligation to make further advances must exist at the time the charge is granted and *still* exist at the time the further advance is made.[37]

18.70 The difficulty is that the grant of the subsequent charge prior to the further advance may release the first chargee from his or her obligation to make further advances. Often the obligation to make further advances is conditional on the borrower's compliance with the terms of the charge, which might prohibit the borrower from granting subsequent charges. Indeed, it has been argued that the grant of a subsequent charge always releases the first charge from an obligation to make further advances.[38] Thus, at the very point a chargee needs to rely on section 49(3) to assert priority over a subsequent charge, the grant of the subsequent charge may preclude reliance on section 49(3) by releasing the chargee's obligation to make a further advance.

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35 The syndication document itself may contain such an agreement.

36 Consultation Paper, para 18.30.

37 Consultation Paper, para 18.43.

38 See R Coleman, "Further advances under a secured loan: Land Registration Act 2002 s 49" [2014] *Conveyancer and Property Lawyer* 430, relying on the case of *West v Williams* (1899) 1 Ch 132.

### Consultation and discussion

18.71 In the Consultation Paper, we took the view that the issue appears to be a problem with tacking rules more widely and goes beyond registered land. For unregistered land, section 94(1)(c) of the Law of Property Act 1925 similarly permits tacking where the first mortgage imposes an obligation to make a further advance, even if the first mortgagee has notice of the subsequent mortgagee when making the further advance.[39] We noted that there is a range of possible solutions to this issue. We took the view that, although a "narrow" solution within the LRA 2002 would be possible, the right approach would be to consider the possible solutions in a general project about mortgages.[40]

18.72 As a result, we did not ask any specific questions about this issue. Nonetheless, five consultees provided informative comments on the issue.

18.73 All consultees who commented agreed that there are problems in practice with tacking where there is an obligation to make a further advance. Three consultees agreed that the requirement for the obligation to exist at the time the further advance is made is problematic.[41]

18.74 Two consultees raised a different problem, namely that obligations to make further advances are too often included in charges.

18.75 Michael Hall explained that there is a "common bad practice" by which lenders state in mortgage deeds that they are under an obligation to make further advances when, in fact, no such obligation exists. His view was that only "genuine obligations" should engage the tacking provisions. He suggested that lenders should have to make a statement as to the extent of the obligation and the manner in which it arose.

18.76 Burges Salmon LLP suggested that the prevalence of obligations to make further advances for commercial lenders is due to the use of standard HM Land Registry approved documents,[42] rather than consideration of how the obligation affects priority in each case.

18.77 No consultee disagreed with our view that the issue goes beyond registered land. In fact, Berwin Leighton Paisner LLP endorsed the view expressed in a previous Law Commission report[43] that the same problem exists under section 94 of the Law of Property Act 1925 for unregistered land. On the other hand, it suggested that we should nonetheless amend the LRA 2002 to resolve the issue for registered land only. It proposed that we amend section 49 either to clarify that subsection (3) applies even when the chargee has been released from his or her obligation, or to provide that the obligation is deemed to be continuing notwithstanding the borrower's breach.

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39 Our Goods Mortgages Bill also allows tacking where there is an obligation to make further advances, see From Bills of Sale to Goods Mortgages (2017) Law Com No 376, para 6.38.

40 Consultation Paper, paras 18.45 and 18.46.

41 The City of London Law Society Financial Law Committee, the London Property Support Lawyers Group, and Berwin Leighton Paisner LLP.

42 On this point, see HM Land Registry, *Practice Guide 30: Approval of mortgage documentation* (April 2018).

43 Transfer of Land – Land Mortgages (1991) Law Com No 204, para 9.4; also cited in the Consultation Paper, para 18.46 n 33.

### Conclusions

18.78 We are grateful for consultees' insight as to the operation of section 49(1) in practice. Nonetheless, we remain of the view that the issue would be best dealt with in a general project on mortgages, rather than adopting a narrow solution applying to registered land only. Therefore, we have not recommended reform relating to further advances pursuant to an obligation which would only apply to registered land.

## ISSUE 5 – ADVANCES UP TO A MAXIMUM AMOUNT UNDER SECTION 49(4)

### Current law

18.79 Under section 49(4) of the LRA 2002, tacking is possible if two conditions are met: first, the parties to the first charge have agreed a maximum amount for which the charge is security; and secondly at the time of creation of the subsequent charge the agreement (regarding the maximum amount) was entered in the register in accordance with the rules. This specific method of tacking was introduced by the LRA 2002 and is exclusive to registered land.

18.80 Section 49(4) has been criticised on the grounds that it is contrary to the principle set out in the nineteenth century House of Lords decision in *Hopkinson v Rolt*.[44] That decision held that once a first secured lender has notice of a second charge, then any further advances made by that first lender will rank after the second charge. The House of Lords considered that if the position were otherwise, then a first lender "would always be secure of his priority" which would act as "a perpetual curb…on the [borrower]'s right to encumber his equity of redemption".[45]

18.81 We reviewed these criticisms of section 49(4) in the Consultation Paper,[46] focussing on how lenders can use it to impede a borrower's ability to raise further finance elsewhere. We also explained that there is not unanimous agreement with the principle in *Hopkinson v Rolt* amongst secured lenders. We concluded that while this issue appears to relate to a provision of the LRA 2002, it is rooted in the principle set out in *Hopkinson v Rolt* which underpins the general law of tacking.[47]

### Consultation and discussion

18.82 We asked consultees two open questions to gather evidence about the use of section 49(4) and to inform any possible reform of the provision. In particular, we asked about the extent to which lenders rely on section 49(4) and whether the subsection is being used to prevent borrowers from obtaining further finance elsewhere.[48] Few consultees engaged with these questions. Six consultees responded to the first question and only four responded to the second question.

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44 (1861) 11 ER 829.

45 See full quote in the Consultation Paper, para 18.51.

46 Consultation Paper, paras 18.52 to 18.54.

47 Consultation Paper, para 18.55.

48 Consultation Paper, paras 18.58 and 18.59.

### Reliance on section 49(4) in general

18.83 Although we received a mixed response to this question, overall we were presented with limited evidence of lenders relying on section 49(4) to stipulate a maximum amount. Many consultees also expressed their views as to the desirability of section 49(4).

18.84 The Law Society was aware that a small proportion of lenders set a maximum amount in order to rely on section 49(4). In the Society's view:

> This is an undesirable "unintended consequence" of the drafting of section 49(4). The Society considers that there is no good reason for the inconsistency between registered and unregistered land and that there is no policy justification for the departure from the generally accepted effect of *Hopkinson v Rolt*.

18.85 Berwin Leighton Paisner LLP echoed this sentiment, emphasising that "it is not desirable to allow mortgage lenders to gain undue control over the borrower's land". In its view, *Hopkinson v Rolt* strikes the right balance between the parties.

18.86 On the other hand, the London Property Support Lawyers Group was not aware of reliance on section 49(4) by lenders, and believed that the provision may be perceived as being commercially unattractive.

18.87 This theme was explored by Dr Charles Harpum QC (Hon). He explained that section 49(4) of the LRA 2002 was the result of extensive consultation. Given the debates between primary and secondary lenders[49] at the time, he was not surprised that primary lenders do not support the provision today. Nevertheless, Dr Harpum expressed the view that the provision is helpful, highlighting that because it is permissive it is only used on the agreement of the parties.

18.88 The City of London Law Society Financial Law Committee, in its general comments on tacking, indirectly indicated support for section 49(4). In the Committee's view, *Hopkinson v Rolt*–

> cuts across the terms of the express agreement between the chargor and the first chargee. It is not necessary for the protection of the second chargee because the second chargee does not need to lend until it has reviewed the terms of the first charge.

18.89 The divergences of views we received in response to this question seems to be based on whether consultees agreed in principle with section 49(4)'s apparent departure from *Hopkinson v Rolt*.

### Use of section 49(4) to restrict the borrower's options for further finance.

18.90 Only four consultees responded to this question, none of whom provided evidence of reliance on section 49(4) to the detriment of borrowers. Despite the low number of responses, the consultees who did respond to this question, including the Law Society and the London Property Support Lawyers Group, represent a cross-section of

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[49] Primary lenders are those who lend in exchange for a first mortgage, and secondary lenders loan money in exchange for a subsequent mortgage.

practitioners. We therefore think that it is unlikely that borrowers are in fact suffering due to reliance on section 49(4).

### Conclusions

18.91 Consultee responses largely reflect the objections we expected in relation to section 49(4), based on the perceived inconsistency between the provision and *Hopkinson v Rolt*. However, consultees were not unanimously in favour of the position in *Hopkinson v Rolt* and we received no evidence of problems in practice. As we noted in the Consultation Paper,[50] this issue is not confined to the LRA 2002 given its basis in the policy underpinning tacking in equity. For this reason, we do not make any recommendation in relation to section 49(4) at this time.

[50] Consultation Paper, para 18.55.

# Chapter 19: Sub-charges

## INTRODUCTION

19.1 In this chapter, we consider four issues in relation to registered sub-charges. A sub-charge is a charge granted over money owed under a loan secured by an existing charge.

Terms used in the context of sub-charges

*The principal charge*: a charge over a registered estate in land in order to secure a loan.

*The principal chargee*: the lender in whose favour the principal charge is granted. In the context of a sub-charge, can also be referred to as the *sub-chargor*.

*The sub-charge*: a charge over the money owed to the principal chargee which is secured by the principal charge.

*The sub-chargee*: the lender in whose favour the sub-charge is granted.

*The disponee:* A person to whom an interest or estate in the charged land is granted or conveyed, in this context by the chargee (either principal chargee or sub-chargee). For example, a buyer of a freehold or leasehold estate, a tenant under a lease, a chargee, or a person granted an easement. Although the protections we are discussing in this chapter apply to disponees generally, for simplicity we refer to *purchasers.*

19.2 Sub-charges are best illustrated by an example.

Figure 35: example of a sub-charge

The proprietor of a registered estate borrows money from a lender. As security for the loan, the registered proprietor grants a legal charge (the principal charge) over a registered estate to the lender (the principal chargee).

The principal chargee then borrows money from a second lender. As security for the loan, the principal chargee grants a charge (the sub-charge) to the second lender (as sub-chargee) over the money owed to the lender under the principal charge (the principal chargee).

19.3 The nature of sub-charges and their relationship with charges over registered estates are explained in further detail below.[1]

19.4 In our Consultation Paper, we discussed three aspects of sub-charges:

(1) the protection of purchasers of the registered estate;

(2) the effect of section 53 of the LRA 2002 on the principal charge; and

(3) the discharge of the principal charge.

We discuss the issues relating to each of these aspects of sub-charges below.

19.5 We make two recommendations relating to (1) above, the protection of purchasers of the registered estate. First, we clarify that section 52 of the LRA 2002, rather than section 26, is the source of protection for such purchasers; and second, we clarify that the mere registration of a sub-charge does not amount to an "entry in the register" within the meaning of section 52(1). These reforms will ensure that a purchaser of a registered estate from a chargee can rely on the register.

19.6 However, we do not recommend reform in respect of the other two topics. We think that the effect of section 53 (issue (2) above), together with the case law, is sufficiently clear such that reform is unnecessary. Regarding issue (3), given the limited evidence of problems in practice and the lack of a workable solution, we are unable to recommend reform in respect of the discharge of the principal charge.

## BACKGROUND LAW

### Principal charges – charges over estates

19.7 Charges over land are used as security for debts (or other obligations). For example, a proprietor of a registered estate is able to secure a loan by granting a legal charge over his or her land to the lender (the principal chargee).[2]

19.8 In registered land, a charge is the only legal security interest that can be created.[3] Charges over registered estates will take effect "by way of legal mortgage"[4] which means that the principal chargee will have the same "protection, powers and remedies" under the general law as if a mortgage by demise had been granted in its favour.[5] For example, the principal chargee will have the right to foreclose or to take possession.

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1 See paras 19.11 to 19.15 below.

2 LRA 2002, s 23(1).

3 LRA 2002, s 23(1)(a) prevents a proprietor of a registered estate from creating a mortgage by demise, which operates by the grant of a lease by the borrower to the lender.

4 LRA 2002, s 23(1)(a) and Law of Property Act 1925, ss 85(1) and 86(1). Even if not expressed to be by way of legal mortgage (under LRA 2002, s 23(1)(b)), it will take effect by way of legal mortgages by virtue of LRA 2002, s 51.

5 Law of Property Act 1925, s 87(1).

19.9 Where a chargee exercises, or purports to exercise, its powers to dispose of the registered estate,[6] the LRA 2002 provides for the protection of purchasers of that estate. Such a purchaser is entitled to assume, for the purposes of the LRA 2002, that the chargee has a mortgagee's power to dispose of the registered estate unless there is an entry in the register reflecting a limitation on that power.[7]

19.10 The principal chargee's rights under the charge are themselves valuable. It has the right to be repaid the amount loaned (plus interest) and the power to enforce that loan by, for example, taking possession of or selling the registered proprietor's estate. For this reason, the principal chargee may want to deal with the charge, for example, by selling it or using it as security. These dealings are possible under section 23(2) of the LRA 2002.

**Sub-charges – charges over indebtedness secured by the principal charge**

19.11 The principal chargee can use its rights under the charge as security for a loan in the same way that the registered proprietor used his or her land as security: by granting a legal charge.

19.12 However, the method for creating the legal charge differs because the proprietor of a registered charge is unable to create a "legal sub-mortgage".[8] In addition to excluding the creation of sub-mortgages by conveyance (by transfer or sub-demise), the LRA 2002 also excludes the creation of sub-charges "by way of legal mortgage".[9] Nor do registered sub-charges take effect as charges "by way of legal mortgage".[10]

19.13 Instead, within the LRA 2002 a sub-charge can only be created by "charg[ing] at law with the payment of money indebtedness secured by the registered charge".[11] In other words, the principal chargee grants a charge over its right to be repaid under its loan to the registered proprietor in order to secure its loan from the sub-chargee. As section 23(2)(b) confers only a power to charge for payment of money, it seems that it is not possible to use a legal sub-charge to secure a non-monetary obligation.[12]

19.14 In registered land, a sub-chargee does not have the "protection, powers and remedies" of a sub-mortgagee by demise in relation to the principal charge because, in registered land, the sub-charge is not by way of legal mortgage.[13] For example, the sub-chargee will not have the right to take possession, or to foreclose the principal charge. Instead, the sub-chargee will have the remedies of a chargee under the general law, including

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6 Eg Law of Property Act 1925, ss 99 to 101.

7 LRA 2002, s 52. See also LRA 2002, s 26.

8 LRA 2002, s 23(2)(a).

9 LRA 2002, ss 23(2) and (3).

10 LRA 2002, s 51 applies to "registered estates", not "registered charges".

11 LRA 2002, s 23(2)(b). Thus, legal sub-charges can only be used to secure monetary obligations.

12 The same limitation existed under the LRA 1925: see Law Com No 271, para 7.11. One consultee did suggest reform of the LRA 2002 on this point. We did not proceed with this suggestion as the issue predates the LRA 2002 and we did not consult on it.

13 Law of Property Act 1925, s 87(1).

the statutory power of sale of the charged property under the Law of Property Act 1925.[14]

19.15 However, the position differs in respect of the sub-chargee's powers in relation to the *registered estate* (which is subject to the principal charge). The LRA 2002 provides that the sub-chargee has the same powers as the principal chargee in relation to the registered estate.[15] Therefore, the sub-chargee will have the same powers that the principal chargee has under the LPA 1925: the "protection, powers and remedies" of a mortgagee by demise. The effect of this on the principal chargee is discussed below.[16]

## THE PROTECTION OF PURCHASERS

19.16 The LRA 2002 protects purchasers by treating a registered proprietor's powers of disposition as free from any limitation except for those reflected in the register. If there is a limitation on the registered proprietor's powers of disposition which is not reflected in the register, a purchaser will nonetheless obtain good title. Thus, a purchaser only has to check the register to determine whether the registered proprietor is able to make the disposition. These provisions do not otherwise affect the lawfulness of the disposition. In the context of sub-charges, we next consider the source of protection for purchasers of the registered estate from chargees and which entries in the register limit that protection.

### The source of protection

Current law

19.17 There are two provisions in the LRA 2002 which provide protection to purchasers of registered estates and charges: section 26 and section 52.[17]

19.18 There are two key differences between the two provisions for the protection of purchasers: the powers of disposition and the classes of disponor.[18] Section 26 applies where owner's powers of disposition under section 23 are exercised by either a registered proprietor or a person "entitled to be registered as the proprietor".[19] Section 52 applies to the "powers of disposition conferred by law on the owner of a legal mortgage" exercised by registered chargees.

19.19 The power of disposition with which we are concerned is the power of a principal chargee to dispose of the property subject to the charge. The most common of these powers is the power of sale.[20] Under section 53 of the LRA 2002, sub-chargees also

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14 Law of Property Act 1925, s 101; by s 205(1)(xvi), the definition of "mortgage" includes "any charge or lien on any property for securing money".

15 LRA 2002, s 53. The sub-chargee also has the same powers as the person creating the sub-charge in relation to any intermediate charge.

16 See para 19.60 and following below.

17 Section 26 was considered in Ch 5.

18 There is also a third difference, but it is a minor one: protection under s 26 is also subject to limitations imposed by the LRA 2002. See further: Consultation Paper, para 19.14 n 16.

19 LRA 2002, s 24.

20 Law of Property Act 1925, s 101(1).

have the same powers as the principal chargee to dispose of the property subject to the principal charge.

19.20 The question arises: if either the chargee or sub-chargee were to exercise the power of sale of the charged property to sell the property to a purchaser, which provision would protect the purchaser? Arguably both section 26 and section 52 could apply to protect the purchaser. However, in the light of the differences between the two sections, we think the better view is that only section 52 applies.

19.21 It is clear that the purchaser would be protected under section 52, which treats a chargee or sub-chargee as having the "powers of disposition conferred by law on the owner of a legal mortgage". The power of sale is clearly a power of disposition conferred by law on the owner of a legal mortgage;[21] a purchaser from a person exercising that power would be protected.

19.22 The case law supports the view that the purchaser would also be protected under section 26, by classing powers to deal with the registered estate as owner's powers within section 23. In *Skelwith (Leisure) Ltd v Armstrong* ("*Skelwith*"),[22] the unregistered assignee of a registered charge purported to exercise the power of sale over the registered estate subject to the charge. The High Court held that owner's powers under section 23(2) includes "powers to deal with the charged property",[23] although a person "entitled to be registered" did not have such a power under section 23(2) due to the *nemo dat* rule; a rule that a person cannot give or convey more than he or she owns (a point we also considered in Chapter 5).[24] Nonetheless, it held that such a person was "entitled to receive and give a discharge for the mortgage money"[25] and therefore was able to exercise the power of sale under the Law of Property Act 1925.[26]

19.23 The significance of the source of owner's powers was not material to the outcome of the decision in *Skelwith*. As we explained above,[27] a key difference between section 26 and section 52 is that the former also protects disponees of persons entitled to be registered.[28] *Skelwith* nullified this difference by holding that a person entitled to be registered does not have the power of sale under section 23 due to the *nemo dat* rule.[29] Under the interpretation of the court in *Skelwith*, the protection under section 26 and section 52 is therefore the same.

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21 Law of Property Act 1925, s 101(1).

22 [2015] EWHC 2830 (Ch), [2016] 2 WLR 144.

23 Above at [48].

24 Above at [57] to [59]; following *Scott v Southern Pacific* [2014] UKSC 52. See Ch 5, para 5.20 above.

25 Law of Property Act 1925, s 106(1).

26 Above, s 101(1).

27 See para 19.18 above.

28 Hence Recommendations 9 and 10 only amend s 26 and not s 52.

29 [2015] EWHC 2830 (Ch), [2016] 2 WLR 144 at [59].

## Evaluation of the current law

19.24 Our view, as we explained in the Consultation Paper,[30] is that section 23(2) was not intended to include a chargee's powers of disposition over the property subject to the charge. Therefore, we disagree with the view expressed in *Skelwith* that owner's powers of disposition under section 23 include the power to dispose of the charged property. We acknowledge that our view differs from the commentary, which mostly,[31] but not entirely,[32] supports the view adopted in *Skelwith*. Nonetheless, we agree with the outcome of *Skelwith*: the equitable assignee of a legal charge has a power of sale; but we consider that this is by virtue of section 106 of the Law of Property Act 1925, not section 23 of the LRA 2002.

19.25 In our view, the LRA 2002 provides two parallel schemes protecting purchasers. Sections 23 to 26 are concerned with protecting purchasers where a registered proprietor, be it of an estate or charge, makes a disposition of that estate or charge. Similarly, sections 51 to 53 are concerned with protecting purchasers where a registered chargee or sub-chargee exercises a power to dispose of the property charged. We are confident that the LRA 2002 intended these two schemes to operate in parallel; if section 26 was intended to cover dispositions of the charged property by a chargee as well, then section 52 would be entirely superfluous.

19.26 We also think that the language of the relevant provisions is clear on this point: section 23(2) refers to "powers in relation to a registered charge consist of power to make a disposition… in relation to an interest of *that description*"; whereas section 52 concerns powers of disposition "in relation to the *property subject to the charge*". The latter, but not the former, concerns the power to dispose of the property subject to the charge. We think that an "interest of that description" in section 23 refers to the registered charge itself, rather than the charged property.

19.27 Further, although immaterial in the case of *Skelwith*, the difference between section 26 and section 52 will become relevant in the light of our understanding of and recommendations in relation to owner's powers. In *Skelwith*, the difference between sections 26 and 52 was eliminated by the application of the principle that a person cannot convey what he or she does not own. However, in Chapter 5, we recommend amendment of the LRA 2002 to clarify that owner's powers should not be limited by reason only of the fact that the person is not yet registered as the proprietor and so merely has equitable, rather than legal, title.[33] As a result, the reasoning in *Skelwith* would now have a material impact: a purchaser from a person who is entitled to be registered but is not yet registered and who is exercising the power of sale of the

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30 Consultation Paper, paras 19.8 to 19.14.

31 Eg *Megarry & Wade*, para 7-050 n 317, *Ruoff & Roper*, paras 28.001, 28.002, and 28.008, Emma Lees, "Powers of the beneficiary of a trust of a charge" [2016] *Conveyancer and Property Lawyer* 157. Berwin Leighton Paisner LLP also expressed this view in response to our consultation questions in Ch 5, suggesting that a transferee of a registered charge should be able to enforce its rights of disposition of the underlying estate as a chargee during the registration gap, that is without waiting for the transfer to be registered.

32 Compare S Watterson and A Goymour, "A Tale of Three Promises: (3) The Empowerment Promise", in A Goymour, S Watterson and M Dixon (eds), *New Perspectives on Land Registration: Contemporary Problems and Solutions* (2018) pp 384 and 385.

33 See Ch 5, paras 5.19 to 5.22, 5.44 to 5.54, 5.121 to 5.136, and 5.167 to 5.168.

charged property would be protected under section 26, even though he or she would not be protected under section 52. The narrower application of section 52 compared to section 26 would be undermined.

### Recommendations for reform

19.28 We think that the LRA 2002 should be clarified to ensure that section 23(2) only confers the powers to dispose of the charge itself, and does not confer any powers to dispose of the property subject to the charge. Consequently, a disponee of a person exercising such powers will be protected by section 52, rather than section 26.

19.29 Although we did not ask a consultation question directly on this issue, we are confident that the consultation responses we received in relation to other questions support this proposal.

19.30 Our consultation questions in Chapter 19 presupposed that *Skelwith* was wrong in holding that section 23(2) empowers a chargee to dispose of the charged property. With one exception (which we discuss below), consultees did not express disagreement with our interpretation of the case.

19.31 Berwin Leighton Paisner LLP was the only consultee who substantially commented on this point. It disagreed with our view. It argued that section 23(2)(a) "naturally" included the power of sale of the charged property and that our view that section 23(2) does not "permit enforcement by disposing of the land itself" was "somewhat troubling" for mortgagees. To clarify, our view that section 23 only concerns powers of disposition of the charge itself does not preclude a chargee from having powers to deal with the charged property under the general law.[34] Our view is simply that section 23 is not the *source* of these powers and consequently section 52, rather than section 26, is the source of protection for purchasers.

19.32 Since our consultation, it has also become clear to us that our other recommendations in this chapter would create problems if we do not also clarify the distinction between section 26 and section 52. Absent addressing this point, our recommendations could upset the symmetry between the parallel regimes in sections 23 to 26 and sections 51 to 53. Moreover, the effect of Recommendation 8 in respect of *nemo dat* would enable a person entitled to be registered as chargee to rely on section 23 as a source of its power of sale, rather than section 106 of the Law of Property Act 1925. We did not intend to change the law on this point.

19.33 We therefore make an express recommendation that the LRA 2002 should be clarified to make the scope of section 23(2) clear.

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[34] Eg Law of Property Act 1925, ss 99 to 101 (and s 106 in the case of an equitable chargee).

**Recommendation 46.**

19.34 We recommend that the LRA 2002 should be amended, to clarify that the owner's powers provisions in section 23(2) of the LRA 2002 are confined to the power of disposition in respect of the registered charge itself.

19.35 Clause 7 implements this recommendation. It will insert a new subsection (2A) into section 23 which clarifies that section 23(2)(a) does not confer a power to make a disposition of the property subject to the charge.

19.36 We do not anticipate that this amendment will affect chargees' powers of disposition; rather, it will ensure that those powers flow from the general law. The source of such powers for a principal chargee is either the terms of the charge document or under statute. The underlying statutory source is the Law of Property Act 1925. Since charges of registered estates either are, or are treated as being, charges by way of legal mortgage, registered chargees have "the same protection, powers and remedies" as a mortgagee by demise.[35] Thus, any registered chargee (including a sub-chargee)[36] will have the powers of disposition of a mortgagee under the Law of Property Act.[37]

### The protection conferred by section 52

Current law

19.37 Section 52 allows the disponee of a registered estate from a registered chargee[38] to assume that the chargee has the power to dispose of the registered estate unless there is an entry in the register to the contrary. It provides:

> (1) Subject to any entry in the register to the contrary, the proprietor of a registered charge is to be taken to have, in relation to the property subject to the charge, the powers of disposition conferred by law on the owner of a legal mortgage.
>
> (2) Subsection (1) has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of a disposition).

This provision ensures that a purchaser is able to rely on the register. However, as we explore below, it is not clear what sort of entry must be made in the register in order to limit the chargee's powers.

19.38 Where the principal chargee creates a sub-charge, the terms of the sub-charge may expressly limit the principal chargee's power to dispose of the registered estate. For example, the sub-charge could require the principal chargee to obtain the sub-

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35 Law of Property Act 1925, s 87.

36 LRA 2002, s 53.

37 Law of Property Act 1925, ss 99 to 101.

38 Either a principal chargee or sub-chargee.

chargee's consent to exercise the power, or even completely oust the principal chargee's power to dispose of the registered estate.

19.39 In principle, under section 52, a disponee from the principal chargee will not need to worry about any limitation contained in the sub-charge unless it is reflected by an entry in the register.[39] However, section 52 does not specify the form that an entry in the register needs to take.

19.40 It appears that the mere registration of a sub-charge could amount to an "entry in the register" for the purposes of section 52. As a result, a purchaser of the registered estate from the principal chargee may not get good title, even though there was no clear limitation on the face of the register. Therefore, in every case in which there is a registered sub-charge, a purchaser from the principal chargee is arguably required to investigate the terms of the sub-charge to determine whether there are any limitations on the principal chargee's powers of disposition.

19.41 It is contrary to the aims of registered land for a purchaser to have to look behind the register in every case in which there is a registered sub-charge, to confirm the powers of the principal chargee. In our view, the protection offered to purchasers by section 52 should be qualified only by entries in the register which expressly limit the principal chargee's powers to dispose of the property charged. The appropriate means of entering a limitation on a registered proprietor's powers is through a restriction. We therefore suggested in our Consultation Paper that only a restriction should amount to an entry which limits the powers of a chargee for the purpose of section 52.

### Consultation and discussion

#### Need for a restriction in the register

19.42 We provisionally proposed that, unless there is a restriction in the register, the powers of the principal chargee shall be taken to be free from any limitation contained in the sub-charge.[40]

19.43 All but one of the 19 consultees who responded agreed with our provisional proposal. Very few of the consultees who supported our provisional proposal provided any substantive comment. Among those who offered comments, Everyman Legal suggested it would help make the register clearer and Professor Warren Barr and Professor Debra Morris suggested that it would protect an innocent purchaser, a principle "on which the foundation of the LRA 2002 (and the LRA 1925) is built".

19.44 Professor Sarah Nield, although in favour of our proposal, expressed concern about which purchaser would take priority if both the principal chargee and the sub-chargee purported to sell the property. In our view, this problem would be addressed in practice by a priority search, which would protect the first transaction and prevent the second transaction from being completed (regardless of who sold the property first, be it the principal chargee or the sub-chargee). Moreover, we do not think this situation presents materially different risks from the general risk that a registered proprietor of the estate and a registered proprietor of the charge both purport to sell the property at similar

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39 S 52 is not subject to "limitations imposed by or under" the LRA 2002.

40 Consultation Paper, para 19.35.

times. In any event, our proposal seeks to clarify the need for a restriction: if a sub-chargee wishes to protect against such risk, it would be wise to enter a restriction in accordance with our proposal.

19.45 Berwin Leighton Paisner LLP disagreed with our proposal. In its view, sections 26 and 52 relate to cases where the disponor is subject to a limitation and do not apply to where "the disponor's interest is subject to an adverse substantively registered interest" such as a sub-charge. However, sections 26 and 52 do not address priority between registered interests, but provide that a purchaser still gets good title even though a disponor's power of disposition is subject to an unregistered limitation. In the context of sub-charges, we are referring to limitations on the principal chargee's powers of disposition which are *contained* in the terms of the sub-charge. For example, a term in the sub-charge may prevent the principal chargee from disposing of the charged property without the sub-chargee's consent.

19.46 Berwin Leighton Paisner LLP also noted that "it would not be right for the principal chargee to be able to flout the terms of the sub-charge and purport to deal with the principal charge as if it was unencumbered". To clarify, our proposal operates solely for the protection of purchasers; like section 26, section 52 does not affect the lawfulness of the disposition between the principal chargee and the sub-chargee.[41] It will not affect any personal remedy that the sub-chargee has against the principal chargee.

### Transitional provisions

19.47 We also asked consultees whether any transitional provisions were necessary in respect of our provisional proposal.[42] We identified two options for existing sub-charges: either the entry of the sub-charge in the register could remain sufficient to indicate a limitation on the principal chargee's power of disposition, or only the entry of a restriction would be sufficient to indicate a limitation for both existing and new sub-charges.

19.48 Half of the eight consultees who responded were not in favour of transitional provisions distinguishing new and existing sub-charges. For example, the Law Society stated that transitional provisions were not "necessary or desirable": there was no advantage "in perpetuating current uncertainties" and an existing sub-chargee could sufficiently protect itself by applying for a restriction.

19.49 Moreover, of the eight consultees who responded, only Howard Kennedy LLP clearly endorsed transitional provisions, saying they "probably are a good idea".

19.50 We agree with the majority view of consultees who expressly considered this point: we do not think it is necessary to treat existing sub-charges differently from new sub-charges. First, it would be confusing to provide that whether a registered sub-charge affects a purchaser depends on when that sub-charge was registered. Secondly, the entry of a restriction is the sensible way for a sub-chargee to protect its interests under the current law. We do not think that existing sub-chargees would suffer significant prejudice if they had to apply to enter a restriction.

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41 LRA 2002, s 52(2).

42 Consultation Paper, para 19.43.

Recommendation for reform

19.51 The broad support for our proposal has confirmed our view that, as a matter of policy, a limitation contained in a sub-charge on the principal chargee's power to dispose of the registered estate should only affect the validity of a purchaser's title if an appropriate restriction has been entered in the register.

19.52 To achieve this policy, however, we think our recommendation needs to be cast more widely than the specific situation we have discussed. The rationale behind our policy is that a purchaser should not be expected to examine the terms of a sub-charge to determine whether there are any limitations on the principal chargee's powers of disposition. However, there are other situations where a purchaser seeks to rely on the register but the terms of a charge may limit a chargee's powers of disposition. Two examples are set out below:

(1) A purchaser of a registered estate from a chargee, where the terms of a registered charge limit the registered chargee's power to dispose of the registered estate; and

(2) A purchaser of the registered estate from a sub-chargee, where the terms of a charge of that sub-charge ("a sub-sub-charge") limit the sub-chargee's power to dispose of the registered estate.

19.53 A purchaser in these circumstances should also be able to rely on the register, without having to examine the terms of the relevant charge. If we simply provided that a limitation contained in a *sub-charge* does not affect the validity of the title of a purchaser from the *principal chargee*, the implication would be that, in other circumstances, a purchaser *is* affected by limitations contained in registered charges, whether reflected by a restriction in the register or not.

19.54 Therefore, to implement our policy, we make a more general recommendation that the protection offered by section 52 to purchasers from a chargee should be qualified only by entries in the register that expressly limit that chargee's powers to dispose of the property charged.

**Recommendation 47.**

19.55 We recommend that the powers of a chargee shall be taken, under section 52 of the LRA 2002, to be free from any limitation contained in that charge, or any sub-charge, unless there is a restriction limiting the powers of that chargee in the register. A purchaser from a chargee will not be affected by a limitation that is not entered in the register, but this protection afforded to the purchaser would not affect the lawfulness of the disposition as between the chargee and the chargor or sub-chargee.

19.56 Clause 18 of our draft Bill implements this recommendation. It will omit "subject to any entry in the register to the contrary" from subsection (1), and instead insert a new subsection (1A) into section 52. Subsection (1A) provides that subsection (1) is subject to any limitation on powers of disposition reflected by a restriction in the register.

19.57 Subsection (2) of clause 18 clarifies that the amendment applies to charges whether created before or after the commencement of the provision.

19.58 The amendment made by clause 18 will eliminate any chance of success of the so-called registered instrument argument, that any entry in the register can amount to a limitation on the powers of disposition of the proprietor of the estate. By replacing the words "entry in the register to the contrary" in section 52 with a direct reference to a restriction, clause 18 will exclude this argument in relation to the powers of a chargee.

19.59 It is conceivable that a similar argument could be made in relation to owner's powers generally, to say that section 26 limits owner's powers in favour of a purchaser based on any entry in the register, for example, a notice protecting a lease. The registered instrument argument therefore muddies the waters between a limitation on an owner's powers of disposition and the priorities between competing estates or interests. We have not recommended an amendment of section 26 similar to the one that we recommend to section 52. Section 26 concerns owner's powers under the LRA 2002 with respect to the interest itself, whereas section 52 is concerned with the powers of a chargee under the general law to deal with the property subject to the charge. We think, in the light of this difference, that there is no basis for the registered instrument argument to be raised in relation to owner's powers generally. We therefore have not made any recommendation on this point in our discussion of owner's powers in Chapter 5.

## THE EFFECT OF SECTION 53: CONCURRENT OR EXCLUSIVE POWERS

### Current law

Section 53

19.60 Section 53 of the LRA 2002 confers powers on sub-chargees in relation to the property that is the subject of the principal charge: the registered estate. In particular, it confers on the sub-chargee the powers of a principal chargee in relation to the registered estate. Therefore, the sub-chargee has the "protection, powers and remedies" of a mortgagee by demise in relation to the registered estate.[43]

19.61 The terms of a sub-charge may confer or restrict the principal chargee's powers to dispose of the charged property. But in the absence of provision for the principal chargee's powers under the terms of the sub-charge, section 53 provides for a default position. However, it is unclear from the face of the statute what effect section 53 has on the principal chargee's powers: does it confer powers on the sub-chargee to the exclusion of the principal chargee, or do the sub-chargee and principal chargee hold the powers concurrently?

19.62 If section 53 confers power exclusively on the sub-chargee, the principal chargee will have no powers to dispose of the registered estate for the duration of the sub-charge. A purchaser of the registered estate from the principal chargee should be protected by section 52 in this situation. We noted in the Consultation Paper that section 52, unlike

[43] Law of Property Act 1925, s 87.

section 26, is not qualified by "limitations imposed by or under" the LRA 2002.[44] Thus, the effect of section 53 would not preclude protection under section 52. However, we were concerned that a purchaser would not be protected if mere registration of a sub-charge amounted to "an entry in the register to the contrary".[45]

19.63 However, as we explained in the Consultation Paper, the case law provides an answer to the ambiguity on the face of section 52 of the LRA 2002.

### Position under the LRA 1925

19.64 The Court of Appeal considered the equivalent provision of the LRA 1925[46] to section 53 of the LRA 2002 in *Credit & Mercantile plc v Marks* ("*Credit & Mercantile*").[47] In *Credit & Mercantile*, the principal chargee sought possession of the registered estate after the proprietor defaulted under the principal charge. The proprietor argued that the principal chargee was not entitled to possession because the chargee had, at the same time as entering into the charge, granted a sub-charge.

19.65 The Court of Appeal rejected any general proposition that the principal chargee's rights are transferred or suspended while the sub-charge exists.[48] Relying on the decision in a previous case,[49] it held that the mere existence of a sub-charge does not divest a principal chargee of its right to possession; the principal chargee has and retains its "separate estate and interest in land".[50] The powers of the principal chargee will therefore depend on the terms of the sub-charge.

19.66 We take the view that the court would interpret section 53 of the LRA 2002 in the same way.[51] As we explained in the Consultation Paper,[52] the rationale behind *Credit & Mercantile*[53] was that the principal chargee retains its interest and grants a new, separate interest to the sub-chargee. Although sub-charges are created by different

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44 LRA 2002, s 26(2)(b).

45 Consultation Paper, paras 19.15 and 19.16.

46 LRR 1925, r 163(2): "the proprietor of a sub-charge shall, subject to any entry to the contrary in the register, have the same powers of disposition, in relation to the land, as if he had been registered as proprietor of the principal chargee".

47 [2004] EWCA Civ 568, [2005] Ch 81.

48 [2004] EWCA Civ 568, [2005] Ch 81 at [38].

49 *Owen v Cornell* (1967) 203 *Estates Gazette* 29 (HC). The case involved a sub-mortgage by sub-demise over unregistered land, rather than a sub-charge by way of legal mortgage over registered land. The Court of Appeal in *Credit & Mercantile* considered that this difference was immaterial.

50 [2004] EWCA Civ 568, [2005] Ch 81 at [44].

51 Consultation Paper, paras 19.24 to 19.27.

52 Consultation Paper, para 19.25.

53 As well as in *Owen v Cornell* (1967) 203 *Estates Gazette* 29 (HC).

means under the LRA 2002,[54] it remains the case that creation of a sub-charge involves the creation of a new interest, rather than transfer of the principal chargee's interest.[55]

19.67 Although *Credit & Mercantile* only involved the power to take possession (rather than a power of disposition), we do not think the decision is limited to possession. The Court of Appeal placed emphasis on the differences between a transfer of the principal charge and the creation of a separate estate; the principal chargee would only lose its power to take possession if it transferred its charge. In our view, this interpretation applies equally to all rights created by the principal charge, including powers to dispose of the charged property. Nevertheless, particular powers of the principal chargee may be restricted by the terms of the sub-charge or other statutory provisions.[56]

**Consultation**

19.68 We provisionally proposed that section 53 of the LRA 2002 should be clarified to ensure that, subject to contrary agreement, it confers powers on the sub-chargee in addition to those held by the principal chargee.[57]

19.69 A majority of consultees agreed, including the Law Society, the Chancery Bar Association, the Bar Council and a number of practitioner groups and law firms. All but two consultees who agreed simply noted their agreement without providing further comment. Professor Nield added that the proposal was sensible, and Professor Barr and Professor Morris said that the proposal "would add useful clarity to the law".

19.70 HM Land Registry, expressing other views, broadly agreed with the provisional proposal. It suggested that any agreement about the powers under a sub-charge should only take effect if that agreement is registered in accordance with the rules. We have not pursued this point because Recommendation 47 in relation to restrictions at paragraph 19.55 above achieves the same result.

19.71 Berwin Leighton Paisner LLP disagreed with the provisional proposal because, in its view, clarification is not required. It compared the relationship between sub-chargee and principal chargee with the relationship between the principal chargee and proprietor of the registered estate. It explained that a sub-charge does not deprive the principal chargee from exercising its rights under the principal charge in the same way that a charge over a registered estate does not prevent the proprietor of that estate from continuing to use and enjoy the land.

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54 LRA 2002, s 23(2)(b).

55 In fact, the LRA 2002 abolishes the creation of sub-charges by transfer of the principal charge; see s 23(3)(a).

56 Eg Law of Property Act 1925, s 106(1) arguably only confers the power of sale under s 101 on the sub-chargee who is the only "person…entitled to receive and give discharge for the mortgage money". We take no view on this point.

57 Consultation Paper, para 19.34.

### Discussion

19.72 The majority of consultees supported our provisional proposal to clarify the effect of section 53. Consultees therefore supported our conclusion about the effect of section 53.

19.73 On reflection, however, we are inclined to agree with Berwin Leighton Paisner LLP that an amendment of section 53 of the LRA 2002 is not in fact necessary. As we explained in the Consultation Paper,[58] we think it is highly likely that the courts will interpret section 53 in line with *Credit & Mercantile*. Should there be any remaining uncertainty, we hope that our discussion in this Report will put it to rest.

19.74 Further, any possible problems with the protection of purchasers generated by section 53 are resolved by our other recommendations in this chapter.[59]

(1) Recommendation 46 clarifies that section 52 is the source of a chargee's powers. This prevents any argument that the purchaser is only protected by section 26, which is subject to section 53 as a "limitation imposed by or under" the LRA 2002.[60]

(2) Recommendation 47 clarifies that the mere registration of a sub-charge is not an "entry in the register to the contrary". Thus, a purchaser of the registered estate from the principal chargee will get good title unless there is a restriction in the register to the contrary.

19.75 Even if section 53 were interpreted to confer powers exclusively on the sub-chargee, our recommendations mean that a purchaser from the principal chargee would get good title unless there were a restriction in the register to the contrary. In the light of this outcome, we are of the view that section 53 is no longer capable of causing the problems for purchasers relying on the register that we had identified in the Consultation Paper.

19.76 We therefore do not make any recommendation on the lines of our proposal.

## DISCHARGE OF THE PRINCIPAL CHARGE

### Current law

19.77 As explained above,[61] sub-charges are means by which the principal chargee can use its rights under the principal charge as security for a loan from the sub-chargee. The discharge of the principal charge has the consequence of rendering the sub-chargee's security worthless.

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58 Consultation Paper, paras 19.24 to 19.27.

59 Consultation Paper, paras 19.15 to 19.17.

60 LRA 2002, s 26(2)(b).

61 See para 19.11 above.

19.78 As we explained in the Consultation Paper,[62] it seems that a sub-chargee is unable to prevent the principal chargee from discharging the principal charge in breach of the terms of the sub-charge. In particular, sub-chargees cannot rely on restrictions to prevent unlawful discharge of the principal charge. Restrictions prevent the entry of dispositions[63] and, for the purposes of a restriction, a discharge is not a disposition.[64]

**Consultation**

19.79 To gauge whether there is in fact a problem, we asked consultees for evidence of their experience of the discharge of a principal charge where there is a registered sub-charge. We also invited consultees' views as to whether there needs to be a mechanism built into the land registration system to allow sub-chargees to prevent discharge of the principal charge and, if so, how this should be achieved.[65]

19.80 We received a range of responses to this question. The majority of consultees were generally in favour of a mechanism being built into the LRA 2002 to allow sub-chargees to prevent discharge of the principal charge.

Evidence of problems in practice

19.81 Consultees did not generally provide evidence of problems in practice. The consultees in favour of a built-in mechanism recognised that this issue arises only exceptionally. For example, the Law Society, which favoured the introduction of a new mechanism, stated that it did not believe that there is a serious problem in practice.

19.82 Two other consultees did have some, albeit limited, experience of issue that had arisen. The London Property Support Lawyers Group said that on the few occasions in its experience on which the principal charge was discharged when there was a sub-charge, the note of the sub-charge remained in the register. As a result, the issue of the sub-charge needed to be resolved on a subsequent sale or re-mortgage.

19.83 Burges Salmon LLP had the opposite experience: it reported that HM Land Registry is unwilling to discharge a charge if there is a registered sub-charge unless the sub-chargee also provides a DS1 form (the HM Land Registry form for lenders to cancel entries) in relation to the sub-charge.

Suggested mechanisms

19.84 In spite of the lack of evidence provided of problems in practice, the majority of consultees were in favour of some mechanism to allow a sub-chargee to prevent the principal chargee from discharging the principal charge unlawfully. We received three suggestions as to how such a mechanism could work.

19.85 The London Property Support Lawyers Group, endorsed by Burges Salmon LLP, and the Chartered Institute of the Legal Executives, suggested that the sub-chargee should

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62 Consultation Paper, para 19.37.

63 LRA 2002, s 41(1).

64 HM Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (June 2018) para 3.1.1.

65 Consultation Paper, para 19.38.

be able to use a restriction[66] to prevent discharge of the principal charge. As we explained in the Consultation Paper,[67] however, we do not consider a restriction to be appropriate. Discharges are not "dispositions" for the purposes of a restriction and it would be anomalous to provide for this single instance of a restriction which did not fit within their wider use under the LRA 2002.

19.86 The Law Society suggested a change to the way registered charges are removed from the register. Under its proposal, in order to discharge the principal charge when there is an existing sub-charge, the proprietor of the registered estate (the borrower) would be required to satisfy the registrar that the sub-chargee had been served with an application to remove the charge. The registrar would only discharge the charge if the chargee does one of three things: consents to the discharge; fails to reply within a set period of time; or fails (within a set period of time) to satisfy the registrar that the charge should not be removed. The Law Society acknowledged that this process would place the onus on the registered proprietor of the estate, but considered the obligation to be proportionate.

19.87 We are not persuaded by this approach. In our view it is not proportionate for the onus to rest with the registered proprietor of the estate, who did not create and may not be aware of the sub-charge. Further, imposing the requirement on the borrower is inconsistent with HM Land Registry's digital solution for discharge of charges, in which lenders apply directly to the registrar to discharge a mortgage electronically.

19.88 The Bar Council supported a requirement that both the principal chargee and sub-chargee discharge the charge. As explained below, we understand that this approach is currently HM Land Registry's practice.

No need for a built-in mechanism

19.89 Two consultees did not think a mechanism should be introduced.

19.90 Berwin Leighton Paisner LLP argued that such a mechanism was unnecessary. Based on its interpretation of the law, the situation could not arise: "as the sub-chargee has a legal interest in the principal charge, it is not possible for the sub-chargor to release the principal charge unilaterally".

19.91 The City of Westminster and Holborn Law Society argued that the desire to protect a sub-chargee must be balanced against the expectation of the borrower that, upon paying off the registered proprietor of the charge, he or she "will get a discharge promptly", and in particular will not "need to persuade some sub-chargee to concur under agreements that have not involved the borrower". We think this point is compelling. Moreover, given that the sub-chargee knows that it is taking a sub-charge, it is aware of the risk from the beginning.

### Discussion

19.92 We are not making any recommendation in respect of this issue.

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66 The London Property Support Lawyers Group also suggested the entry of "a note stating that the sub-chargee's consent is required"; such a note is functionally the same as a restriction.

67 Consultation Paper, para 19.37.

19.93 Despite support for reform, we received little evidence of problems in practice in our call for evidence. We acknowledge that the concerns raised by consultees suggest that problems may (on rare occasions) arise in practice, even if the evidence presented to us is limited.

19.94 More significantly, however, there was no consensus on a suitable solution. In discussions with HM Land Registry, we learnt that it typically sends a requisition when receiving a DS1 Form (an application to discharge a charge) from a principal chargee if there is a sub-charge registered on title. This procedure already gives a level of protection to the sub-chargee. We had mixed evidence from consultees on the extent of this practice.[68]

19.95 Beyond this current practice, there does not appear to be a workable solution that adequately respects the rights of those who are not parties to the sub-charge. As the City of Westminster and Holborn Law Society suggest, there is a need for balance between protection of sub-chargees with the expectations of borrowers. As we explained in paragraph 19.85 above, we dismissed the use of restrictions in the Consultation Paper. Nor do we agree with the Law Society's suggestion which would force registered proprietors to deal with a sub-chargees with whom they have no relationship. The protection provided by HM Land Registry's practice of sending a requisition on receipt of a DS1 form where there is a registered sub-charge addresses some of the concerns discussed above without unfairly placing the onus on the registered proprietor of the estate.

[68] See paras 19.82 to 19.83 above.

# Chapter 20: Electronic conveyancing

## INTRODUCTION

20.1 In Chapter 20, our focus is on electronic conveyancing. Although there are various meanings of the term electronic conveyancing (or e-conveyancing), we use it to mean a process of dealing with land in which all or part of a registered disposition occurs online.

20.2 The LRA 2002 provides the framework for an ambitious model of electronic conveyancing. While significant steps towards the implementation of electronic conveyancing have been taken, a system which implements the model envisaged by the LRA 2002 has not been developed. The purpose of our review has not been to revisit whether electronic conveyancing should be enabled; the decision to do so was fundamental to the LRA 2002. Instead, the purpose of our review was to re-examine the legislative framework provided in the LRA 2002 to see how it can be adapted to facilitate and support the development of electronic conveyancing along more flexible means than envisaged in the Act.

20.3 We identified and considered three specific issues within the model for electronic conveyancing in the LRA 2002:

(1) the requirement for simultaneous completion and registration;

(2) the power to "switch on" electronic conveyancing and the power to "switch off" paper-based conveyancing; and

(3) the ability to overreach an interest under a trust if a single conveyancer has signed a deed on behalf of multiple trustees.

20.4 Consultees were largely supportive of our proposals in relation to each of the above three issues. There was less agreement in respect of (2), our proposal about the switch-on and switch-off powers. Consultees' concerns primarily flowed from the possibility of HM Land Registry being privatised. After our consultation, the Government announced that it will not go forward with privatisation.[1] We acknowledge the strength of consultees' concerns expressed at the time that the Government was considering moving HM Land Registry operations into the private sphere. We believe, however, that the outcome of the Government's consultation should alleviate those concerns.

20.5 We now make recommendations on each of the three issues that we discussed in our Consultation Paper. Our recommendations on (1) and (2) above, although based on our proposals, have evolved. They are narrower than our provisional proposals. There are two main reasons for this evolution.

(1) Consultees agreed with our proposal to separate the requirement for simultaneous completion and registration from the ability to make electronic

[1] Autumn Statement 2016 (November 2016) Cm 9362, para 1.66.

conveyancing mandatory. However, many supported keeping the ability to require completion and registration to occur simultaneously within the LRA 2002. We explained in our Consultation Paper that simultaneous completion and registration should remain the goal of electronic conveyancing.[2] In view of this goal, and in the light of consultation responses, we consider that the legislation should retain the possibility of a model of electronic conveyancing in which completion and registration occur simultaneously.

(2) Recent amendments to the LRR 2003[3] have overtaken the need for our recommendations to address the power to switch on electronic conveyancing. We therefore limit our recommendation to the power to switch off paper-based conveyancing, making electronic conveyancing mandatory.

## ELECTRONIC CONVEYANCING IN THE LRA 2002

20.6 The LRA 2002 provides the legal framework for electronic conveyancing. That framework is based on the model of electronic conveyancing that we envisioned in our 2001 Report. In this model, all aspects of a transaction, from the provision of information to the registration of dispositions, would occur electronically. The model would close the registration gap:[4] an interest would be registered at the same moment that it was created, with completion and registration occurring simultaneously. The registrar would be able to manage and coordinate transactions on an electronic network, minimising delays in conveyancing.[5]

20.7 The LRA 2002 does not implement this vision of electronic conveyancing directly. Rather, it contains rule-making powers, intended to allow the provision for electronic conveyancing to be based on technological developments.[6]

20.8 There are three important powers to enable electronic conveyancing in the LRA 2002.

(1) Section 92 (together with schedule 5) empowers the registrar to provide an electronic communications network for electronic conveyancing.

(2) Section 91 contains the power to switch on electronic conveyancing. Section 91 outlines the requirements that electronic documents must meet, and their effect once section 91 applies to them. Once the switch-on power is used, a dual system of conveyancing, both electronic and paper, will exist.

(3) In time, electronic conveyancing can be made mandatory by exercising the power in section 93 to switch off paper-based conveyancing. Section 93 reflects our

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2 Consultation Paper, para 20.16.

3 Land Registration (Amendment) Rules 2018 (SI 2018 No 70), in force from 6 April 2018.

4 For a more in-depth discussion of the registration gap, see Ch 5.

5 Law Com No 271, paras 2.48, 2.52, and 13.63 to 13.65.

6 Law Com No 271, para 13.68; Law Com No 254, paras 11.18 and 11.19.

vision in our 2001 Report for electronic conveyancing: it imports the requirement that completion of a disposition and its registration are simultaneous.[7]

20.9 In setting out the model for electronic conveyancing in 2001, we were optimistic that electronic conveyancing would develop in a relatively short timeframe, and expected that it would develop along the lines we had outlined in our 2001 Report.[8] However, as we explained in our Consultation Paper in the current project, the electronic conveyancing system envisioned in the LRA 2002 has not yet come into being.[9] That is not to say that progress has not been made.

20.10 Since the enactment of the LRA 2002, HM Land Registry has developed the technology in relation to registration services, digitising documents and services. This development continues.[10] More recently, since we published our Consultation Paper, HM Land Registry has made progress towards electronic conveyancing. It has made amendments to the LRR 2003 which provide for documents to be entirely electronic, including allowing execution of documents with digital signatures, once HM Land Registry has adequate arrangements in place for the type of disposition.[11]

20.11 HM Land Registry has affirmed that its digital transformation programme plays a key role in achieving its overall ambition to be the "world's leading land registry for speed, simplicity and an open approach to data".[12] The Government recently affirmed its commitment to support HM Land Registry's work "to facilitate a transition to digital registration and e-conveyancing".[13] As a separate development, digital signatures have also recently been used for the first time in the exchange of contracts for a residential sale and purchase.[14]

20.12 HM Land Registry's recent progress demonstrates that the delay in achieving electronic conveyancing is not entirely due to the legislative framework within the LRA 2002. Nevertheless, we remain of the view that there are certain aspects of the LRA 2002 which should be reconsidered to ensure that it can facilitate and support electronic conveyancing in the future.

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7 LRA 2002, s 93(2).

8 Law Com No 271, ch 13.

9 For more detail on the progress towards electronic conveyancing since the LRA 2002 was enacted, see Consultation Paper, paras 20.3 to 20.9.

10 See HM Land Registry, *HM Land Registry Network Services* (June 2014), https://www.gov.uk/guidance/hm-land-registry-network-services (last visited 4 July 2018).

11 HM Land Registry, *Proposals to amend the Land Registration Rules 2003: Government Response* (January 2018) para 1.2; LRR 2003, rr 54A to 54D, as amended by Land Registration (Amendment) Rules 2018 (SI 2018 No 70), r 11.

12 Fixing our Broken Housing Market (2017) Cm 9352, para 1.18.

13 Department for Communities and Local Government (now the Ministry for Housing, Communities and Local Government), *Improving the Home Buying and Selling Process: Call for Evidence* (October 2017) paras 18 to 19.

14 See Monidipa Fouzder, "E-conveyancing first as digital signature used to exchange contracts" (18 April 2017) *The Law Society Gazette* (online edition), https://www.lawgazette.co.uk/practice/e-conveyancing-first-as-digital-signature-used-to-exchange-contracts/5060677.article (last visited 4 July 2018).

## GENERAL CONCERNS ABOUT ELECTRONIC CONVEYANCING

20.13 Before discussing our recommendations, we respond to some general concerns about electronic conveyancing that were raised by consultees.

20.14 A small minority of consultees who responded to our Consultation Paper are opposed to electronic conveyancing. In part, their opposition is driven by concerns about fraud[15] and concerns that do-it-yourself ("DIY") conveyancers will not be able to continue to transfer interests in land without (paid) professional help.[16]

20.15 We have not sought to reconsider the aim of the LRA 2002 in enabling the development of electronic conveyancing. In this project, our aim is to ensure that the framework within the LRA 2002 facilitates the development of a system of conveyancing that can adapt and change with technology and the market. Transactions, and the provision of services generally, are moving towards digitisation. Given the value of estates and interests in land, we recognise that it is sensible to take a cautious approach to digitisation of conveyancing and land registration. However, we do not agree that conveyancing and land registration should be left behind entirely. The policy decision that the law should facilitate electronic conveyancing was central to the LRA 2002; although electronic conveyancing has not come as quickly as we initially anticipated, it remains a key goal of the LRA 2002 (and of HM Land Registry). Most consultees welcomed our proposals to facilitate its development.

20.16 We are, however, sympathetic to consultees' concerns about fraud. We have taken their concerns seriously, and made recommendations in Chapter 14 to reduce the risk of fraud in registered conveyancing.[17]

20.17 We also agree that DIY conveyancing should continue to be possible, including, as we mention below, after the power to switch off paper conveyancing has been exercised. After all, one of the purposes of a definitive register of title is to make conveyancing easier; thus, there is no reason to remove the ability for people to do their own conveyancing. Our 2001 Report explained that, with the introduction of an electronic network for registration, the registrar would be obliged to provide assistance to DIY conveyancers. The LRA 2002 does indeed impose such a duty on the registrar.[18] At the time of our 2001 Report we anticipated that a person who is undertaking his or her own conveyancing would attend a district land registry in person to register a disposition. The registrar would carry out the transaction in electronic form on that person's instructions.[19] It is likely that HM Land Registry will increasingly provide services to

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15 Nigel Madeley and Michael Hall. The Council for Licensed Conveyancers provided a counter-argument on the point of fraud, explaining that electronic conveyancing provides opportunities to mitigate existing risks in conveyancing.

16 Eg the responses by the London Property Support Lawyers Group, Martin Wood, and Professor Julian Farrand QC (Hon).

17 See Ch 14, Recommendations 31 and 32 at paras 14.73 and 14.89 to 14.90, above.

18 LRA 2002, sch 5, para 7.

19 Law Com No 271, para 13.73.

customers by telephone and online rather than in person. Nevertheless, we anticipate that it will continue to fulfil its duty to DIY conveyancers.[20]

## SIMULTANEOUS COMPLETION AND REGISTRATION

20.18 Our vision for electronic conveyancing, as we outlined in the 2001 Report, was based on simultaneous completion and registration, bringing an end to the registration gap. Simultaneous completion and registration was central to the model of electronic conveyancing envisaged by the LRA 2002.[21]

20.19 The requirement for simultaneous completion and registration appears in section 93 of the LRA 2002. Section 93 also contains the switch-off power which, once exercised, will make electronic conveyancing mandatory. The power in the LRA 2002 to make electronic conveyancing mandatory is therefore bound up with the requirement that completion and registration occur simultaneously: under the LRA 2002, electronic conveyancing cannot be mandatory without simultaneity.

20.20 We remain supportive of the goal of simultaneous completion and registration. However, it is a goal that is difficult to achieve. After reviewing the development of electronic conveyancing in England and Wales, and considering advanced systems in Scotland, New Zealand, Ontario (Canada) and Australia, we took the view in the Consultation Paper that it is not practicable to move directly from a paper-based system to a system of electronic conveyancing based on simultaneous completion and registration. We proposed that the focus of the LRA 2002 should not be on a particular model of electronic conveyancing. Our provisional view was that, for electronic conveyancing to become a reality, the legal framework should to amended to allow development to occur flexibly and incrementally.[22]

### Consultation and discussion

20.21 In our Consultation Paper, we provisionally proposed that the requirement for simultaneous completion and registration should be removed from the LRA 2002, so that electronic conveyancing could be made mandatory without also requiring simultaneity. As we explained, contrary to the model of electronic conveyancing envisaged in the 2001 Report, this proposal would have the effect that equitable interests could still be created between completion of the disposition and registration, replicating in electronic conveyancing the present position for paper-based conveyancing.[23] It would also mean that the registration gap continues to be a feature of registered land, even in the context of electronic conveyancing.

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20 See LRR 2003, r 216(9), amended by the Land Registration (Amendment) Rules 2018 (SI 2018 No 70); HM Land Registry, *Proposals to amend the Land Registration Rules 2003: Government Response* (January 2018) paras 4.81 to 4.84.

21 Law Com No 271, paras 2.45.

22 Consultation Paper, paras 20.16 to 20.24.

23 Consultation Paper, para 20.25.

20.22 Consultees overwhelmingly agreed with this provisional proposal: of the 24 who responded, 22 agreed. None disagreed, and only two, Dr Charles Harpum QC (Hon) and CMS Cameron McKenna LLP, expressed other views.

20.23 Consultees' only reservation with our policy was based on a belief that we intended to remove the requirement for simultaneity from the LRA 2002 entirely. The discussion in our Consultation Paper did not make clear whether our provisional proposal would remove the statutory requirement of simultaneous completion and registration contained in section 93, or would provide an additional but separate power to that contained in section 93.[24] Consultees have convinced us that the goal of simultaneity should remain within the LRA 2002. Therefore, we have adopted the latter approach, so that the aim of simultaneous completion and registration remains in the LRA 2002 and can be invoked once the technology allows.

### Support for a more flexible approach

20.24 Consultees generally agreed that the technology has not yet been developed in a form that is sufficiently cost-effective, widespread and integrated with other aspects of the conveyancing process to enable simultaneous completion and registration. They agreed that the goal of simultaneity is "currently unobtainable",[25] and linking the necessary technology with the power to make electronic conveyancing compulsory was, as Professor Warren Barr and Professor Debra Morris described, a "hostage to fortune".

20.25 Many consultees supported reform that would make the legal framework more flexible, agreeing that it is necessary for the development of electronic conveyancing.[26] Professor Sarah Nield suggested that stepping back from the requirement for simultaneity would "allow conveyancing practice to play a greater role in the development of e-conveyancing". Graff and Redfern Solicitors agreed that flexibility in the legislation "would provide impetus to e-conveyancing".

### Simultaneity as the ultimate goal

20.26 Dr Harpum supported the suspension of the requirement for simultaneous completion and registration, but only on a temporary basis. In his view, the requirement for simultaneity should be retained within the legislation as a long-term goal of electronic conveyancing. As he explained, the principles of electronic conveyancing based on simultaneous completion and registration inform the entire LRA 2002. If the ability to require completion and registration to be simultaneous is eliminated from the legislation, his view is that "it will never happen". The Law Society, although agreeing with our proposal, similarly stated that simultaneous completion and registration "should remain a long-term goal", suggesting that removing the requirement should only be temporary, in order for technology and practice to develop.

20.27 Conversely, other consultees expressed concerns with simultaneous completion and registration, which would need to be overcome before it could operate. The Chartered

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[24] See the Consultation Paper, paras 20.20, 20.22 to 20.25, and 20.28.

[25] Graff and Redfern Solicitors. See also the Law Society's comments.

[26] Professor Warren Barr and Professor Debra Morris, the Council of Mortgage Lenders, Graff & Redfern Solicitors, Professor Sarah Nield, and the Law Society.

Institute of Legal Executives suggested that the mortgage industry would have difficulty operating within the model of electronic conveyancing envisaged by the LRA 2002. HM Land Registry, which supported the provisional proposal, noted that simultaneous completion and registration would reduce its opportunity to assess applications for fraud. CMS Cameron McKenna LLP expressed concern that a model of simultaneity in which conveyancers themselves updated the register would pass risk from HM Land Registry to conveyancers.

### The registration gap

20.28 Simultaneous completion and registration would eliminate the registration gap.[27] Some consultees therefore commented that as a result of removing the power to require completion and registration to occur at the same time, the registration gap would remain a feature of the land registration regime in the future. CMS Cameron McKenna LLP was concerned that removing the requirement for simultaneity would permanently embed the registration gap within electronic conveyancing. The Law Society similarly commented that, without simultaneous completion and registration, the problems of the registration gap remain. However, it agreed that so long as there is a registration gap, it will be necessary to allow equitable rights to arise between completion and registration. The Society accepted that replicating the current situation for paper-based conveyancing in the system for electronic conveyancing (together with the ability to carry out priority searches), that is, allowing such equitable rights to arise during the gap, is "a practical way of proceeding".

### Recommendation

20.29 Section 91, the switch-on power, does not require simultaneity, or any particular model of electronic conveyancing. Therefore, the LRA 2002 currently allows for incremental development during the voluntary stage of electronic conveyancing. The recent amendments to the LRR 2003, in anticipation of electronic conveyancing being made available for some types of disposition, is good evidence of the flexibility of the scheme in the LRA 2002.

20.30 However, some of the benefits of electronic conveyancing might only be achievable once it becomes compulsory; for example, the benefits that can be obtained through chain management might fall away if any part of the chain is being conducted through a paper-based conveyance. Moreover, once electronic conveyancing has been adopted by the vast majority of users, it may become inefficient and expensive to operate a parallel paper system.[28]

20.31 Section 93 of the LRA 2002 only permits compulsory electronic conveyancing on a model in which there is simultaneity. This requirement has become a strait-jacket. Experience has shown that the goal of simultaneity will have to be reached in stages. Uncoupling completion and registration, to reflect the current position in paper conveyancing, provides an opportunity for the introduction of mandatory electronic conveyancing before digital platforms are able to provide satisfactorily for simultaneous

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27 A point we acknowledged in the Consultation Paper, para 20.23 to 20.24.

28 Law Com No 271, para 2.61.

completion and registration. We take the view that the legislation needs to be flexible, to enable the development of electronic conveyancing as models are developed.

20.32 Given the near-unanimous support our provisional proposal received, we now confirm that policy. Although we acknowledge consultees' concerns with the registration gap, we nevertheless think that our policy provides a sensible way forward for electronic conveyancing. We have, however, adapted our recommendation to ensure that a commitment to simultaneous completion and registration remains in the LRA 2002.

**Recommendation 48.**

20.33 We recommend that:

(1) there should be a power in the LRA 2002 to make electronic conveyancing mandatory without also requiring simultaneous completion and registration of dispositions;

(2) there should continue to be a power in the LRA 2002 to make electronic conveyancing mandatory that also requires simultaneous completion and registration; and

(3) in a system without simultaneous completion and registration, equitable interests should be capable of arising in the interim period between completion and registration.

20.34 Clause 27 enacts our recommendation by inserting a new section 92A into the LRA 2002.

20.35 As we explained above, consultees' responses have convinced us that in implementing our recommendation we should ensure that a commitment to simultaneous completion and registration remains in the LRA 2002. Therefore, our reform provides a separate power to make electronic conveyancing mandatory before simultaneity is feasible (or indeed if a model of electronic conveyancing develops which never allows for simultaneity), while leaving section 93 unaltered.[29] New section 92A provides an optional, interim scheme, under which electronic conveyancing can be made compulsory without requiring simultaneous completion and registration.

20.36 New section 92A is largely modelled on section 93: it applies to both dispositions of registered estates and charges, and to interests that are the subject of a notice in the register. Like section 93, section 92 requires the Secretary of State to consult before exercising his or her power to make electronic conveyancing compulsory.

20.37 However, section 92A also has some significant differences from section 93.

[29] Except for the amendments in the light of Recommendation 49, to provide HM Land Registry the power to timetable in respect of mandatory electronic conveyancing. See paras 20.75 to 20.77 below.

20.38 As section 92A will not require simultaneous completion and registration, the registration gap will continue to exist in the context of electronic conveyancing and equitable interests may continue to arise prior to registration. Therefore, in contrast to section 93,[30] section 92A does not exclude the operation of section 27. Instead, section 27(1) applies to dispositions to which section 92A applies. As a result, where electronic conveyancing takes place under section 92A the disposition will not "operate at law" until registration.[31]

20.39 Section 92A imposes a requirement for the disposition to be in electronic form.[32] Once electronic conveyancing is made mandatory under section 92A, if a disposition is not in electronic form, it will have no effect either at law or in equity. Section 93 imposes a similar requirement. The purpose of making electronic conveyancing mandatory would be impeded if a disposition in paper form could operate in equity.

20.40 However, unlike section 93, section 92A will not apply to contracts for a disposition. The application of section 93 to contracts for a disposition (in subsection 93(2)) was included as a necessary part of the model of electronic conveyancing anticipated in our 2001 Report to enable simultaneous completion and registration. It enables all the legal steps preliminary to a disposition to be required to be electronically communicated to the registrar, so that problems could be identified and remedied before the point at which the disposition would be simultaneously completed and registered.[33] It is therefore not necessary for section 92A to apply to contracts.

20.41 The consequence of not requiring a contract for a disposition to be in electronic form is that, under section 92A, a contract in paper form will continue to give rise to an equitable interest – an estate contract – which can be protected by a notice in the register or can be an overriding interest if coupled with actual occupation. Other equitable interests (for example, estoppel) will also continue to be able to arise absent registration. However, as in section 93, if the power to make conveyancing mandatory is exercised in respect of interests already protected by a notice in the register, including equitable interests, their assignment will be required to be in electronic form to have effect.

**POWERS TO IMPLEMENT ELECTRONIC CONVEYANCING**

20.42 The LRA 2002 provides the power to switch on electronic conveyancing (in section 91), and the power to switch off paper-based conveyancing (in section 93). In order to exercise either power, the Secretary of State must make rules that apply the section to the various types of disposition.[34]

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30 LRA 2002, s 93(4). Subsection (2) sets out the consequences of failure to register.

31 Moreover, s 27(2) will apply to dictate which dispositions are registrable, and s 27(1) will apply the registration requirements in sch 2.

32 However, other requirements can be imposed by rules: see new s 92A(2).

33 For example, by allowing details to be checked against the register at the contract stage by creation of a "mock" register. See LRA 2002, explanatory notes, para 153.

34 LRA 2002, ss 91(2) and 93(2). The Secretary of State is the person authorised, under s 128(1) of the LRA 2002, to make rules.

20.43 The switch-on and switch-off powers were drafted so that they could operate flexibly and incrementally.[35] That is, the Secretary of State can enact a new rule each time voluntary electronic conveyancing is available for a particular type of disposition, or when mandatory electronic conveyancing is required for a particular type of disposition. However, experience has shown that drafting and making rules each time a new interest is phased into the electronic conveyancing regime is time-consuming: the process for making rules requires Parliamentary scrutiny, and Parliament's time is a limited resource.[36] It was our view in the Consultation Paper that requiring rules to be made incrementally, and specifically, for each type of disposition would prevent the incremental implementation of electronic conveyancing.[37]

20.44 We provisionally proposed to separate out the exercise of the switch-on and switch-off powers from the ability to plan, or "timetable", the introduction of electronic conveyancing for particular types of interests. Under this model, the Secretary of State could enact a blanket rule applying to all (or a broad range of) dispositions. Once HM Land Registry had made sufficient provision for a particular type of disposition, the Chief Land Registrar could use a more informal mechanism to apply the rule to that specific type of disposition.

20.45 In our view, the exercise of the switch-on and switch-off powers is significant enough to require Parliamentary scrutiny, and so should remain with the Secretary of State. We proposed, however, that the detailed timetable for enabling and requiring particular types of transaction to be conveyed electronically did not need to be subject to Parliamentary scrutiny, and so could be set by the Chief Land Registrar. However, we proposed that the timetabling power should, like the switch-on and switch-off powers, only be able to be exercised after consultation with the relevant stakeholders.[38]

**Recent amendments to the LRR 2003**

20.46 Our consultation proceeded on the basis that amendment was necessary to both the switch-on power in section 91 and the switch-off power in section 93, to enable the timetabling model that we had proposed. Since our consultation, however, the LRR 2003 have been amended in a way that makes reform of section 91 otiose. In effect, the LRR 2003 have been amended in line with our provisional proposal, to allow HM Land Registry incrementally to introduce electronic conveyancing under section 91.

20.47 Within the LRR 2003, a rule has been made under section 91 to switch on electronic conveyancing for registrable dispositions of registered estates and charges. However,

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35 Law Com No 271, para 13.68 to 13.69; LRA 2002, explanatory notes, paras 146 and 153.

36 In the Consultation Paper, we noted that HM Land Registry had indicated that some of the existing rules took in excess of 60 weeks to be enacted: para 20.30.

37 Consultation Paper, paras 20.29 to 20.30.

38 Consultation Paper, paras 20.31 to 20.34.

section 91 will not apply to a disposition until HM Land Registry has adequate arrangements in place for the type of disposition.[39]

20.48 The amendments have introduced a general rule in rule 54A that switches on electronic conveyancing for all registrable dispositions of registered estates or charges under section 91(2).[40] A new rule 54B then provides the conditions that must be met in order for section 91 to apply in accordance with section 91(3)(d). One of those conditions is that the document effects a disposition of a kind specified in a notice issued by the registrar under new rule 54C.[41] Under rule 54C, the registrar will issue notices to specify particular documents in electronic form, meaning that section 91 will apply to them.

20.49 HM Land Registry explained this process when consulting on the amendments to the LRR 2003:

> As each new digital service is developed by Land Registry a notice will be published confirming the registrar is satisfied that adequate arrangements are or will be in place for dealing with the electronic transaction documents. This system of registrar's notices avoids the delays inherent in amending rules every time a new electronic service is introduced. It would not be practical to make new rules for each new service. The process of making rules by statutory instrument is long and unwieldy. Other electronic documents to cover other conveyancing transactions will be introduced incrementally, such as transfers for buying and selling. Each new service will be introduced after a period of user research and user testing.[42]

Since the LRR 2003 have been amended, HM Land Registry has published a notice to enable the electronic creation of mortgages as a part of a pilot programme involving a single provider.[43] Under it, two fully digital mortgages have been created and registered.[44]

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39 HM Land Registry, *Proposals to amend the Land Registration Rules 2003: Government Response* (January 2018) para 1.2; LRR 2003, rr 54A to 54D, as amended by Land Registration (Amendment) Rules 2018 (SI 2018 No 70), r 11.

40 The power to switch on electronic conveyancing has not been exercised in relation to dispositions of an interest which is the subject of a notice in the register (s 91(2)(b)) or dispositions which trigger the requirement for registration (s 91(2)(c)).

41 The ability of registrar to publicise arrangements for electronic conveyancing by notice is outlined in sch 2 to the LRR 2003.

42 HM Land Registry, *Consultation*: *Proposals to amend the Land Registration Rules 2003* (February 2017) para 36.

43 Notice 1 (under r 54C of the Land Registration Rules 2003): HM Land Registry Network Services – arrangements for the creation and registration of digital mortgages (6 April 2018).

44 As at 5 June 2018. One was created and registered before the amendments came into force, under the Land Registration (Electronic Conveyancing) Rules 2008 (now revoked). See HM Land Registry, "Digital mortgage signed by borrower and registered at HM Land Registry" (5 April 2018), https://www.gov.uk/government/news/digital-mortgage-signed-by-borrower-and-registered-at-hm-land-registry (last visited 4 July 2018).

20.50 This power to timetable is what we had envisaged in our provisional proposal with respect to section 91.[45] Accordingly, we do not need to make any amendment of section 91.

20.51 We nevertheless believe that reform of section 93 is necessary. Sections 91 and 93 are drafted differently. Taking together subsection (1)(b) and (3)(d), section 91 contains a specific power which enables conditions to be imposed within the rules which must be complied with in order for an electronic document to be one which HM Land Registry will accept as an electronic disposition. A condition under the amended LRR 2003 is that a notice from the registrar has been published that permits electronic conveyancing of the specific type of disposition. It is by these notices that HM Land Registry is exercising a timetabling power under section 91. Section 93 contains no power equivalent to that in section 91 to impose conditions in the rules. It simply provides that, once a disposition is of a sort specified in the rules, the section – and so mandatory electronic conveyancing – applies.

20.52 We therefore proceed by focussing on the switch-off power in section 93: it still requires amendment in order for HM Land Registry to set a timetable in respect of mandatory electronic conveyancing.

### Consultation and discussion

20.53 We provisionally proposed that the decision to enable electronic conveyancing and the subsequent decision to end paper-based conveyancing should remain vested in the Secretary of State. However, the power to set a timetable for the introduction of electronic conveyancing should be delegated to the Chief Land Registrar, who should be able to able to introduce it incrementally in relation to different types of disposition. The Chief Land Registrar would, like the Secretary of State, be required to consult before exercising his or her powers.

20.54 Twenty-six consultees responded. They were evenly split in their responses: half agreed and the other half either disagreed or were ambivalent.

#### Context of consultees' concerns

20.55 Much of the disagreement with our provisional proposal can be contextualised within wider concerns.

20.56 A few consultees disagreed that electronic conveyancing was a desirable aim, or questioned whether mandatory electronic conveyancing would ever be feasible or fair.[46] We noted their concerns above.[47] As we explained, we are not re-opening discussion of the fundamental policy of whether electronic conveyancing should be a goal within

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45 With the exception that there is no express requirement that HM Land Registry consult before introducing types of disposition into the electronic service. However, the new rules require the Secretary of State from time to time (and at intervals no longer than five years) to review the regulatory provision contained in the recent amendments to the LRR 2003, which includes the registrar's ability to issue notices bringing dispositions online: Land Registration (Amendment) Rules 2018 (SI 2018 No 70), r 7.

46 London Property Support Lawyers Group and Michael Hall. Martin Wood, in a general response to this chapter, noted concerns about the effect on electronic conveyancing on DIY conveyancing in general.

47 See paras 20.13 to 20.17 above.

the LRA 2002 as part of this project. Our recommendations have the more limited purpose of ensuring that the legislative framework operates to facilitate the existing aim.

20.57 Some consultees were of the view that the powers to enable and require electronic conveyancing should only be able to be exercised through primary legislation, in order to provide Parliament an opportunity for full discussion and debate.[48] The LRA 2002 already provides for the switch-on and switch-off powers to be exercised by secondary legislation. As we noted above, the secondary legislation process is too slow to enable incremental implementation in the context of electronic conveyancing. Revisiting the use of primary legislation to achieve electronic conveyancing is not, in our view, a feasible option; nor is it desirable as a matter of policy, as our goal is to facilitate the development of electronic conveyancing.

20.58 Three consultees were worried about the future of DIY conveyancing.[49] The concerns about DIY conveyancing arise particularly in the exercise of the switch-off power, when paper-based conveyancing is brought to an end. However, as we noted at paragraph 20.17 above, we fully expect that provision will continue to be made for DIY conveyancing by the registrar, and that specific provisions will be made for DIY conveyancers when the switch-off power is exercised. The registrar is required to assist those who wish to do their own conveyancing to do so by means of the land registry network, in accordance with paragraph 7 of schedule 5 of the LRA 2002.

20.59 Some consultees' responses to this question were coloured by their concerns about privatisation.[50] As it happened, during our consultation period, the Government was also consulting on options to move HM Land Registry's operations to the private sector.[51] With privatisation of HM Land Registry a real possibility, some consultees opposed vesting the timetabling power in the Chief Land Registrar. The Government has since determined not to proceed with privatisation of HM Land Registry, announcing its decision in the Autumn Statement 2016. Therefore, we consider that consultees' concerns in this respect should be alleviated.

### The power to timetable and Parliamentary scrutiny

20.60 The Chancery Bar Association disagreed that the timetabling power should be delegated to the Chief Land Registrar, without elaborating on the reason for its concern; in its view, such decisions should require secondary legislation. Other consultees did

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48 CMS Cameron McKenna LLP, London Property Support Lawyers Group, a confidential consultee, Pinsent Masons LLP, and Burges Salmon LLP.

49 London Property Support Lawyers Group, Michael Hall, and Martin Wood.

50 Eg the Law Society's agreement with our provisional proposal was conditional on HM Land Registry remaining in the public sector; should HM Land Registry be privatised, the power should remain with the Secretary of State. Professor Sarah Nield (who disagreed) and Everyman Legal (who marked "other") had similar concerns about the accountability of decisions in relation to electronic conveyancing should HM Land Registry be privatised.

51 Department for Business, Innovation and Skills, *Consultation on Moving Land Registry Operations to the Private Sector* (March 2016).

not share this view, and we have not found it persuasive in the light of our explanation in the Consultation Paper.[52]

20.61 Three consultees expressed general concerns with the switch-off power, noting that significant caution would be needed before its exercise.[53] We agree with these points, but do not see them as standing in opposition to our proposals: our proposal is such that this power remains vested in the Secretary of State, and will continue to require Parliamentary scrutiny and consultation with stakeholders.[54] Delegation to the Chief Land Registrar is confined to the detailed timetabling for switching off paper transactions, after the policy decision to move to mandatory electronic conveyancing has been made through secondary legislation and with Parliament's scrutiny.

20.62 In his response, Dr Harpum stated that the level of Parliamentary scrutiny required would need to be provided for in legislation. We clarify that we are not proposing any amendment to the level of scrutiny required for the Secretary of State to exercise the switch-on or switch-off powers, which is already contained in the LRA 2002.[55] We do not propose that the Chief Land Registrar's ability to set the timetable in respect of particular types of disposition should be subject to Parliamentary scrutiny. We propose to invest the Chief Land Registrar with the power to timetable because the requirement for Parliamentary scrutiny is likely to prevent electronic conveyancing from being implemented incrementally.

20.63 We are confident that sufficient Parliamentary scrutiny is provided at the point in time that the decision in principle to move to mandatory electronic conveyancing is made. The "micro" decision that will set the timetable for particular dispositions involves consideration of operational issues, which HM Land Registry is best placed to determine. The requirement of consultation with the appropriate stakeholders is designed as a safeguard to ensure that HM Land Registry does not seek to press ahead before the conveyancing sector is ready. We do not think that these issues – whether HM Land Registry and the conveyancing sector are ready for mandatory electronic conveyancing in the case of each individual type of disposition – are best answered by Parliament.

### Requirement for consultation

20.64 HM Land Registry's consultation practices reflect the importance it places on consultation with its stakeholders. However, HM Land Registry did not agree that the LRA 2002 should impose an explicit requirement on the Chief Land Registrar to consult before exercising the timetabling power. It raised a concern that the requirement to consult at two-stages – by the Secretary of State and then the Chief Land Registrar – could create an inflexible system.

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52 At paras 20.29 and 20.30.

53 The Law Society, the London Property Support Lawyers Group, and Burges Salmon LLP.

54 LRA 2002, ss 93(5) and 128(5).

55 LRA 2002, s 128. In particular, it was recognised that the exercise of s 93 is significant and so requires resolution of both Houses of Parliament: s 128(5).

20.65 On the other hand, many consultees expressed strong support for the requirement for consultation, both by the Secretary of State and the Chief Land Registrar.[56] For example, Pinsent Masons LLP argued that broad and active consultation across the property sector should be the "guiding principle" of any move towards electronic conveyancing. The Law Society was also strongly in favour of consultation, suggesting that the Law Commission could set out, at a high level, the scope of the consultation. The Council for Licensed Conveyancers suggested that both the Secretary of State and HM Land Registry should carry out full risk assessments before exercising their respective powers. Other consultees couched their support for vesting the timetabling power in the Chief Land Registrar on the basis that he or she would be required to consult stakeholders.

20.66 Highlighting the importance they placed on the requirement to consult, consultees noted that they expect that the Chief Land Registrar will not require mandatory electronic conveyancing for specific types of disposition through his or her timetabling powers before a sufficient majority of users are already using the service, and without providing advance notice to the conveyancing profession.[57]

20.67 We agree with these consultees that the requirement for consultation is a necessary safeguard to ensure that those who will use the system have their views heard in advance of any changes to implement mandatory electronic conveyancing. We do not think that the requirement to consult at both stages will make the scheme inflexible.

### Application to informally created rights

20.68 Professor Simon Gardner responded that in the Consultation Paper we were unclear about whether the Chief Land Registrar could exercise his or her powers to require dispositions that currently do not need to be completed by registration to be created electronically. His concern was focussed on informally created rights.

20.69 The switch-on and switch-off powers contained in the LRA 2002 can be exercised in relation to a disposition "of an interest which is the subject of a notice in the register",[58] as well as in relation to registrable dispositions.[59] Therefore, the current scheme already provides that, once an interest is protected by a notice in the register, rules can either allow or require assignment of that interest to be in electronic form.[60]

20.70 Under our proposal, the Secretary of State would first be required to make rules to switch off paper-based conveyancing for dispositions of interests noted in the register.

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56 Including the Law Society, the Council for Licensed Conveyancers, Adrian Broomfield, and Pinsent Masons LLP.

57 The Law Society and the Council for Licensed Conveyancers.

58 LRA 2002, ss 91(2)(b) and 93(1)(b).

59 LRA 2002, ss 91(2)(a) and (c) and 93(1)(a).

60 The power in s 91 to allow electronic conveyancing has already been exercised in relation to registrable dispositions of registered estates and charges; however, it has not been exercised in relation to dispositions of interests that are the subject of a notice in the register or dispositions triggering first registration: LRR 2003, r 54A.

Only then could the Chief Land Registrar exercise his or her timetabling power in respect of them.

20.71 The powers in sections 91 and 93 to allow and require electronic conveyancing can only be exercised to apply to the assignment of interests which are protected by a notice in the register.[61] With the exception of contracts to make a disposition, these powers do not apply to the creation of interests that are not themselves registrable.[62] In particular, they do not apply to informally created interests. Such interests will still be able to be created by the variety of methods that currently exist.[63]

### Larger concern with the requirement for rules in the LRA 2002

20.72 HM Land Registry wanted our provisional proposal to go further than it did. It suggested that powers under the LRA 2002 that are exercised by statutory instrument, including both the switch-on and switch-off powers, should be able to be made by direction or, failing that, by the use of the negative Parliamentary procedure.

20.73 Such amendments would constitute significant change to the scheme in the LRA 2002, and we did not consult on them. We have therefore concluded that we are not in a position to make a recommendation in relation to them.

### Recommendation

20.74 Although some influential consultees raised concerns with our provisional proposal, they were nevertheless a small minority. Further, we believe that many of the concerns of consultees are directed at wider issues that either are not the subject of our project, or have since been alleviated. We believe that there are good reasons to proceed with reform. Moreover, given that the Government has already moved forward to provide HM Land Registry with the power to timetable in respect of voluntary electronic conveyancing under section 91, we think it would assist the introduction of electronic conveyancing to amend section 93 along the same lines.

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61 As well as to registrable dispositions of registered estates and charges, and in s 91, dispositions of unregistered land triggering first registration: LRA 2002, ss 91(2) and 93(1).

62 LRA 2002, s 93(2).

63 Professor Martin Dixon has argued that, as a consequence of these provisions, there will be a boom in estoppel claims. In his view, there will be an increase in estoppel claims based on the argument that a failure to meet the requirements for an electronic disposition under the LRA 2002 can be cured by proprietary estoppel: see M Dixon, "Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability", in E Cooke (ed), *Modern Studies in Property Law, volume 3* (2005). See also M Dixon, "Confining and defining proprietary estoppel: the role of unconscionability" (2010) 30 *Legal Studies* 3.

**Recommendation 49.**

20.75 We recommend that:

(1) following the enactment of secondary legislation by the Secretary of State under section 93, and under the proposed new section 92A (inserted by clause 27) the setting of the timetable for ending paper-based conveyancing, in each case on a disposition by disposition basis, should be delegated to the Chief Land Registrar; and

(2) the Chief Land Registrar should be required to consult with stakeholders before exercising his or her powers in respect of mandating electronic conveyancing.

20.76 Clause 27 implements Recommendation 49. It does so by amending section 93, the existing power to make mandatory electronic conveyancing by simultaneous completion and registration. It is also implemented in our new section 92A (which implements Recommendation 48 above), which enables electronic conveyancing to be made mandatory without simultaneous completion and registration. Both provide that the Secretary of State may make rules which require dispositions to be in electronic form if the disposition is of a kind specified by a notice published by the registrar. Each section also requires the registrar to consult before publishing a notice.

20.77 We believe our amendments fit together well with the approach the LRR 2003 take in respect of section 91.

## OVERREACHING IN ELECTRONIC CONVEYANCING

20.78 The final point on electronic conveyancing we have considered is the interaction between electronic conveyancing and overreaching when execution of the disposition has been delegated to an agent or an attorney.

20.79 To allow conveyancers to authenticate dispositions electronically on behalf of clients, the LRA 2002 makes provision for a person to delegate his or her power to sign the disposition to an agent.[64] Section 91 deems a document to which the section applies[65] to comply with formality requirements imposed by the law, whether under the common law or statute. Subsection (5) deems a document to which section 91 applies to be a deed for the purpose of any enactment; therefore, the common law rule that an agent cannot execute a deed unless authorised to do so by deed is inapplicable. Subsection (6) regards a document executed by an agent as having been authenticated under the

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64 LRA 2002, s 91(3) and (4) make provision for electronic signatures to be accepted in place of manuscript signatures. The use of electronic signatures generally (but not within the LRA 2002) is currently being considered by the Law Commission in our project on the electronic execution of documents. A consultation paper on the topic will be published shortly. See https://www.lawcom.gov.uk/project/electronic-execution-of-documents/.

65 Meaning that a rule has been made bringing the type of disposition into the provision for electronic conveyancing and the formality requirements provided in s 91 and any in rules have been met: LRA 2002, s 91(1) to (4).

written authority of the principal. It therefore deems compliance with statutory requirements that some dispositions can only be made by an agent if he or she is authorised to do so in writing. Together, the provisions in section 91 deem an electronic signature of an agent to be sufficient for an electronic disposition of an interest in land.[66]

20.80 However, section 91 says nothing about the effect of overreaching in electronic dispositions under the LRA 2002.[67]

20.81 Put briefly, overreaching is the legal mechanism through which beneficial interests under a trust are removed from land and attach instead to the proceeds of sale or the mortgage money. For overreaching to take place, the interest must be capable of being overreached, and more to the point, the receipt for capital money must be given by at least two trustees (unless the trustee is a trust corporation).[68] The overreaching mechanism plays a vital (if sometimes controversial)[69] role in conveyancing, and electronic conveyancing is not viable without certainty that overreaching will take place.

20.82 Because the LRA 2002 is silent about whether overreaching can occur in an electronic disposition under section 91, whether a disposition has overreaching effect falls to be determined according to the underlying law governing delegation by trustees. The law depends on whether the trustees have delegated their power to an attorney under a power of attorney, or to an agent.

(1) Overreaching will not occur when a single attorney acts for two or more trustees. Trustees are permitted to delegate their functions to an attorney by deed pursuant to section 25 of the Trustee Act 1925. However, section 7 of the Trustee Delegation Act 1999 states that the overreaching requirements are not satisfied when a single attorney acts for two or more trustees.

(2) It is uncertain whether overreaching will occur when a single agent acts for two or more trustees. Pursuant to section 11 of the Trustee Act 2000, trustees can collectively delegate their functions to an agent. Nothing in this provision prohibits the delegation of the power to execute documents and give receipt for capital money. However, a purposive interpretation of section 7 of the Trustee Delegation Act 1999 suggests that overreaching will not occur in a transaction by a single agent: delegation to an agent does not require a deed, and so it is less formal and secure than delegation to an attorney. As an attorney who is appointed by deed cannot effect overreaching, an agent who need not be appointed by deed should not be able to do so either.

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66 See LRA 2002, explanatory notes, para 148; Law Com No 271, paras 13.20 to 13.21.

67 We note that there is an argument about whether overreaching can occur in registered land at all. The argument is that the LRA 2002 is supposed to provide a scheme for overreaching that is different from the scheme in the Law of Property Act 1925. We touch on this argument in Ch 5, paras 5.58 to 5.59 and 5.71 above.

68 Law of Property Act 1925, ss 2 and 27. See C Harpum, "Overreaching, trustees' powers and the reform of the 1925 legislation" (1990) 49(2) *Cambridge Law Journal* 277, 282.

69 As we noted in our Consultation Paper, at para 1.20 stakeholders asked us to consider a review of overreaching as part of this project. The doctrine does not, however, fall within the scope of our work as it is a general principle that also operates outside registered land: see Ch 2, para 2.15 above.

20.83 The risk that beneficial interests may not be overreached by an electronic conveyance executed by an agent or an attorney diminishes the value of the delegation powers in section 91.[70] Therefore, in our Consultation Paper, we suggested that this was a legal barrier to electronic conveyancing that should be removed. We explained our view that when multiple trustees delegate their powers to a single conveyancer, either as agent or attorney, to execute an electronic conveyance, that conveyance should be capable of overreaching beneficial interests.[71]

**Consultation and discussion**

20.84 We provisionally proposed that the law should be amended to ensure that overreaching can be effected by means of an electronic disposition where trustees have delegated their powers.

(1) We proposed that the matter in relation to agents should be clarified to eliminate doubt. The law should expressly provide that a beneficiary's interest in a trust of land can be overreached when trustees collectively delegate their power to a single conveyancer to sign an electronic conveyance and give a receipt for capital money.

(2) We also proposed that the law should be amended in relation to attorneys, in order to grant a single conveyancer acting as attorney for two or more trustees the power to sign an electronic conveyance and give a receipt for capital money. Doing so will eliminate the oddity of the more formal process of appointing an attorney offering less protection than appointing an agent.

Both aspects of our proposal were limited to delegations to a conveyancer.[72]

20.85 Twenty-four consultees responded to this question. Of those, 18 agreed, including the Law Society, HM Land Registry and the Chancery Bar Association. Four consultees disagreed and two expressed other views.

The doctrine of overreaching in electronic conveyancing.

20.86 Consultees expressed a range of opinions about how the doctrine of overreaching should develop in registered land.

20.87 Some consultees, including the City of Westminster and Holborn Law Society, agreed that overreaching should be modernised in order to facilitate electronic conveyancing, with appropriate protections.

20.88 Others disagreed with our proposals that would facilitate overreaching, wanting more robust protections for beneficiaries. Michael Hall disagreed that the signature of one conveyancer should enable overreaching, on the basis that it would undermine the protection gained by requiring two trustees. Nigel Madeley suggested that the law should insist that each trustee appoint his or her own agent or attorney. Professor Nield,

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70 Specifically, the deeming provisions in LRA 2002, s 91(5) and (6): see para 20.79 above.

71 Consultation Paper, paras 20.43 to 20.48.

72 Consultation Paper, para 20.47.

opposing change which would facilitate overreaching of overriding interests, instead proposed further protections for holders of beneficial interests, suggesting that the consent of beneficiaries in occupation should be required for overreaching to take place.[73]

20.89 We disagree that our provisional proposal undermines the protection afforded to beneficiaries by the rule requiring two trustees to give receipt for capital money in order for overreaching to take place.[74] Under our proposals, two or more trustees are required to delegate their powers to a single conveyancer in order for overreaching to take place. To delegate to an attorney, each trustee will have to do so by deed, either separately or jointly;[75] a deed is not used to delegate to an agent, but all the trustees must appoint the agent collectively.[76] Like the regular rule for capital money to be received by two trustees, our provisional proposal would similarly require the joint action of trustees in order to overreach the beneficiaries' interests on an electronic disposition. In that respect, the safeguard imposed by the need for two trustees to act in order to overreach beneficial interests remains intact.

20.90 The Conveyancing Association suggested that requiring trustees to sign electronically for themselves would better prevent fraud. We do not disagree. However, as we noted in the Consultation Paper,[77] it was originally envisaged that there would be a transitional period during which only professional conveyancers would be issued with electronic signatures.[78] This has not in fact transpired: under the Land Registration (Electronic Conveyancing) Rules 2008 (now revoked), only borrowers as individuals could electronically sign the mortgage deed. HM Land Registry expects to be providing borrowers and conveyancers with their own electronic signatures, to be used for electronic mortgages, in due course,[79] so as to allow for flexibility and choice. In its pilot mortgage initiative, the individual borrowers must sign.[80] It may therefore be that electronic signatures will be more widely available by the time our proposals take effect, a possibility the Law Society and the Chartered Institute of Legal Executives identified in their responses.[81] Nevertheless, we continue to believe that the delegation power is commercially useful, a point with which the Law Society agreed.

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73 Professor Nield noted that we had made this recommendation in an earlier project: see Transfer of Land – Overreaching: Beneficiaries in Occupation (1989) Law Com No 188, para 4.3.

74 Law of Property Act 1925, s 27.

75 Trustee Act 1925, s 25.

76 Moreover, settlors can exclude the operation of the delegation power in s 11 of the Trustee Act 2000 if they choose: Trustee Act 2000, s 26.

77 Consultation Paper, para 20.37.

78 See also Law Com No 271, para 13.20.

79 HM Land Registry*, Consultation: Proposals to amend the Land Registration Rules 2003* (February 2017) paras 21 and following; HM Land Registry, *Proposals to amend the Land Registration Rules 2003: Government Response* (January 2018) paras 4.16 and following.

80 HM Land Registry, "Digital mortgage signed by borrower and registered at HM Land Registry" (5 April 2018), https://www.gov.uk/government/news/digital-mortgage-signed-by-borrower-and-registered-at-hm-land-registry (last visited 4 July 2018).

81 Nigel Madeley did not think that this development would be positive, describing the use of electronic signatures by individuals as "rather scary".

### Whether amendment of the law is necessary

20.91 Three consultees, including Dr Harpum and the Law Society, seemed unconvinced that reform was required, on the basis that our proposals only seek to clarify the existing law. Despite their reservations about the current state of the law, they nevertheless agreed that the policy underlying our proposal is desirable.

20.92 We did generally describe our proposals as "confirmations" of the current law and we disagree with the view that reform is not required. We do not believe that the deeming provisions in section 91 satisfy the requirements for overreaching in the Law of Property Act 1925. In our view, the legislation governing trustee delegation applies. As we have explained, under section 7 of the Trustee Delegation Act 1999, the conditions for overreaching are not satisfied when a single attorney acts for two or more trustees. Further, it is uncertain whether an agent, to whom the trustees have collectively delegated the power to execute documents and give receipts for capital money under section 11 of the Trustee Act 2000, will be able to effect overreaching on a disposition. Applied purposively, section 7 of the Trustee Delegation Act 1999 would suggest that an agent cannot do so. Therefore, we think that the state of the law is unsatisfactory, and prevents conveyancers from being confident that dispositions that they execute will overreach beneficial interests. As we noted above in paragraph 20.81 the significance of overreaching to the conveyancing process is such that certainty as to its operation is essential for electronic conveyancing to be viable.

20.93 We therefore think that reform along the lines of our provisional proposal is necessary.

### Liability and evidence of delegation

20.94 Consultees representing practitioners expressed concern that delegation of electronic execution would have the effect of passing risk and liability onto conveyancers.[82]

20.95 The Chartered Institute of Legal Executives opined that conveyancers should only be able to sign electronically on behalf of clients if there are clear procedures and standardised documents for delegation. HM Land Registry agreed that delegation must be evidenced and recorded and must only be granted to a person regulated by a professional body.

20.96 We clarify that we do not envisage that trustees will delegate their powers of execution wholesale. Rather, we expect delegation to be in relation to a specific transaction only.

20.97 Moreover, through existing rule-making powers under the LRA 2002[83] or the registrar's power to issue notices in relation to electronic dispositions under the LRR 2003,[84] the Secretary of State or HM Land Registry (as the case may be) will be able to control who is able to execute electronic documents on behalf of others. Through these powers, the

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82 The Law Society, the Chartered Institute of Legal Executives, and CMS Cameron McKenna LLP.

83 LRA 2002, ss 91(3) and 92, and sch 5 para 5.

84 LRR 2003, rr 14 and 54C, and sch 2.

ability to overreach can be circumscribed to agents and attorneys who are considered suitable to engage in such dispositions.[85]

20.98 We agree that it is a good idea for trustees to provide evidence of the delegation of their authority for electronic execution consistently, so that it can be confirmed by HM Land Registry. We therefore include within our recommendation that HM Land Registry should require evidence of delegation in a standard format. This requirement would apply both to agents and attorneys and would ensure that HM Land Registry is satisfied of the scope of the delegation

20.99 To provide evidence of the delegation to an agent or attorney, HM Land Registry might require evidence of the trustees' signed authority. In this scenario, the trustees might not have their own electronic signatures, so any signatures that might be required from the trustees[86] could therefore be in manuscript form. Although a requirement for trustees' manuscript signatures may seem contrary to the goal of completely dematerialised conveyancing, the transition from paper-based conveyancing to electronic conveyancing might be incremental. The requirement for evidence of delegation will address HM Land Registry's concerns in relation to recording evidence of delegation. It will also enable conveyancers, and their clients, to complete transactions with confidence that the acts of an agent or attorney conveyancer can overreach equitable interests.

20.100 We clarify that our suggestion that HM Land Registry should require evidence of delegation in a standard format is not intended to amend the general law in relation to delegation (or indeed overreaching). It is merely intended to ensure that HM Land Registry receives sufficient evidence of delegation, in a consistent form, in order to register or note in the register an electronic disposition executed by an agent or attorney that can have overreaching effect.

20.101 In particular, by recommending that evidence of delegation be provided to HM Land Registry, it may appear that we have moved away from the thinking in our 2001 Report that led to section 91(6), in which an agent who has authenticated an electronic document is deemed to have written authority. The role of section 91(6) is however slightly different: it prevents a question from arising that a disposition failed to comply with other legislative provisions that require evidence of authority to an agent in written form. It does not, in our view, speak to the specific ability to delegate the power to overreach beneficial interests to a single conveyancer. It still has a role to play when a disposition is signed that does not have overreaching effect; for example, where there is a sole legal owner.

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85 For example, in order to limit it to conveyancers, it might be limited to agents or attorneys who are capable of entering into a network access agreement. Pursuant to the Land Registration (Network Access) Rules 2008 (as amended by the 2011 Rules), r 4(a) and sch 1 para 1: only a Government department or persons entitled to carry out "relevant reserved instrument activities" (defined in sch 2 of the Legal Services Act 2007) or those employing them are authorised to enter a full network access agreement.

86 For example, by requiring evidence of the statutory short form of power of attorney under s 25 of the Trustee Act 1925.

### Electronic signatures

20.102 The Law Society and the City of London Law Society Land Law Committee both suggested that we should consider whether the requirements for "virtual" execution should be outlined within the scheme for electronic conveyancing in the LRA 2002.

20.103 The LRA 2002 already provides, particularly in sections 91 and 92 and schedule 5, the framework necessary for electronic execution of dispositions. The specific requirements that electronic signatures must meet are not specified in the LRA 2002, but left to be addressed in rules. Electronic signatures must comply with HM Land Registry's requirements, as set out for each type of disposition.[87] We think that the requirements for electronic signatures should remain in the rules. A secure form of electronic execution is a matter within the expertise of HM Land Registry and the Government. Indeed, HM Land Registry recently outlined its current plans for electronic signatures, explaining that it will be operating as a trust service provider for advanced electronic signatures, relying on Verify for identity assurance, and intends to continue to monitor the market for new developments.[88]

### Application to equitable interests

20.104 Berwin Leighton Paisner LLP noted that overreaching applies not just to beneficial interests under a trust, but also to equitable interests such as liens and equitable mortgages. We agree with Berwin Leighton Paisner LLP that other equitable interests could therefore be overreached based on the electronic conveyancing delegation provisions under discussion. However, we are not aware that this would cause any particular concerns.

### Application to charitable trustees

20.105 Christopher Jessel expressed concern at the application of our proposal to charity trustees. He suggested that further safeguards may be required, particularly in the case of charity trustees who are natural persons rather than corporate bodies, and in cases where the beneficiaries of the charity are in occupation of the land.

20.106 Charity trustees can as a body delegate their powers of execution to two or more of their number, under section 333 of the Charities Act 2011.[89] This provision saves every trustee from having to execute a document. It applies equally to the certificate that charity trustees must supply in a disposition of registered land to satisfy a restriction in the register (entered to ensure that charity trustees comply with their obligations under the Charities Act 2011 before disposing of land).[90]

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87 LRR 2003, r 54B(b), inserted by Land Registration (Amendment) Rules 2018 (SI 2018 No 70).

88 HM Land Registry, Proposals to amend the Land Registration Rules 2003: Government Response (January 2018) paras 4.16 to 4.25.

89 By "charity trustees", we mean trustees of a charitable trust, and not the wider meaning of the term "charity trustees" in s 177 of the Charities Act 2011 which includes persons who are responsible for the control and management of a charity but who are not necessarily trustees as a matter of trust law.

90 Any uncertainty about the ability of charity trustees to use s 333 to delegate the giving of a certificate of compliance with Part 7 of the Charities Act 2011 would be removed by the implementation of our recommendations in Technical Issues in Charity Law (2017) Law Com No 375: see para 7.223 and clause 24 of the draft Bill.

20.107 Under the general law governing trustees, charity trustees can also jointly appoint an attorney to execute documents under section 25 of the Trustee Act 1925. Our proposal, which will disapply section 7 of the Trustee Delegation Act 1999, will affect charity trustees equally with other trustees. Given that charity trustees can generally delegate to attorneys like other trustees under the Trustee Act 1925, we disagree that additional safeguards are required in respect of charitable trustees in relation to electronic conveyancing.

20.108 We note that it may be possible for charity trustees to appoint agents under section 11 of the Trustee Act 2000. Section 11(3) specifically outlines the functions that a charity trustee can delegate. Charity trustees' power to delegate to agents under section 11 is limited: it applies only in respect of land held as an investment, and only to the creation or disposal of an interest in that land. These apparent limitations may make this option less attractive for charity trustees. As a result, charity trustees are more likely to delegate to an attorney.

20.109 We are of the view that our proposal should be generally applicable to all trustees, including charity trustees.

**Recommendation**

20.110 The majority of consultees supported reform along the lines we proposed in the Consultation Paper. We continue to believe that reform is necessary. We appreciate that some consultees have concerns about the operation of delegation and overreaching, including about liability and electronic signatures; in general, we think these matters are already adequately provided for under the scheme for electronic conveyancing in the LRA 2002. However, we make an additional recommendation that evidence of delegation be provided in the form required by HM Land Registry, in order to ensure that HM Land Registry is given the necessary evidence of delegation before altering the register.

20.111 We clarify that we are not recommending any amendment of the law in relation to delegation or overreaching. In particular, our reform does not seek to amend the rules surrounding what functions can be delegated by trustees, and how such functions must be delegated. These matters will continue to be governed by the various laws governing trustees. Similarly, our recommendations do not seek to amend the underlying law of overreaching, including by agents or attorneys, outside the context of electronic conveyancing under the LRA 2002.

20.112 We are also not amending section 91(5) of the LRA 2002. On reflection, our provisional proposal in the Consultation Paper was framed too broadly. We do not doubt that, due to section 91(5) of the LRA 2002, trustees can in fact collectively delegate to an agent the power to execute a disposition of land and receive capital money under section 11 of the Trustee Delegation Act 2000. Our amendments will only ensure that, in addition to trustees being able collectively to delegate power to execute a deed to an agent, the exercise of the delegated power will enable overreaching to occur.

20.113 The subject of our recommendation for reform is the ability of a single conveyancer, whether appointed as an agent or an attorney, to effect overreaching in a disposition to which section 91 applies. Our recommendations only apply to electronic dispositions to

which section 91 applies, and so to dispositions which meet the requirements that section 91, and any other relevant rules, impose.

**Recommendation 50.**

20.114 We recommend that in an electronic disposition to which section 91 of the LRA 2002 applies–

(1) a beneficiary's interest in a trust of land can be overreached when trustees collectively delegate their power to a single conveyancer to sign an electronic conveyance and give receipt for capital money;

(2) a beneficiary's interest in a trust of land can be overreached when two or more trustees, by power of attorney, grant to a single conveyancer the power to sign an electronic conveyance and give receipt for capital money; and

(3) evidence of the delegation to a single conveyancer, whether under section 11 of the Trustee Act 2000 or section 25 of the Trustee Act 1925, must be provided in the format required by HM Land Registry.

For overreaching to take place, it will remain necessary for the disposition that follows the delegation to be one with overreaching effect.

20.115 Clause 28 enacts Recommendation 50. It will insert a new subsection (9B) into section 91 of the LRA 2002. Section 91(9B) creates a statutory fiction that an electronic document that is signed by an agent or attorney acting for two (or more) trustees is in fact signed by those two (or more) trustees. This approach prevents any need to amend section 7 of the Trustee Delegation Act 1999: the statutory fiction in section 91(9B) makes section 7 of the Trustee Delegation Act 1999 inapplicable, since it deems the trustees themselves to be executing the document.

20.116 The requirement in our recommendation that the agent or attorney be a conveyancer is intended to safeguard the interests of beneficiaries.[91] Although this requirement remains within our recommendation, the new section 91(9B) refers broadly to electronic signatories, not conveyancers. As we noted above, subsection (1)(a) of section 91, taken with subsection (3)(d), enable rules to set out the conditions which must be met for a document to be one to which section 91 applies. It was our view that it was better to leave the restriction that our recommendation applies only to conveyancers to be enacted by rules or notices published by the registrar. By leaving the matter to be addressed together with the provisions for electronic conveyancing, we avoid creating a disconnect between any statutory definition of a "conveyancer" that we provide, and those who are determined by the Secretary of State or HM Land Registry to be entitled to engage in electronic conveyancing on behalf of others.[92] We therefore expect that

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91 Consultation Paper, para 20.45.

92 For example, a condition could be imposed that the signatory must have entered into a network access agreement. Pursuant to the relevant rules, currently only a Government department or persons entitled to

rules or a notice publicised by the registrar will ensure that only conveyancers are able to act as agents or attorneys for the purposes of being able to overreach beneficial interests under a trust, based on our recommendation.

20.117 Similarly, our draft Bill does not make any amendment of the LRA 2002 to require evidence of delegation to be provided in the format required by HM Land Registry. We think this requirement can best be achieved through rules made pursuant to the broad rule-making powers over electronic conveyancing already contained in the LRA 2002, under sections 91 and 92 and schedule 5, or by notices publicised by the registrar.

carry out "relevant reserved instrument activities" (as defined in sch 2 of the Legal Services Act 2007), or those employing them, are authorised to enter a full network access agreement, and thus make electronic dispositions: Land Registration (Network Access) Rules 2008 (as amended by the 2011 Rules), r 4(1) and sch 1 para 1.

# Chapter 21: Jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber)

## INTRODUCTION

21.1 In our final chapter, we turn to consider the jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber). For ease, we will refer to it as the "Tribunal".

21.2 In our Consultation Paper, we did not propose general reform of the Tribunal's jurisdiction.[1] Our consultation focussed on two specific aspects of the Tribunal's jurisdiction: its jurisdiction in respect of applications for a determined boundary under section 60 of the LRA 2002; and its jurisdiction to decide estoppel remedies and beneficial shares. With the support of the majority of consultees, we now recommend amendment of the LRA 2002 to expand the Tribunal's jurisdiction in both cases. Our reforms will allow the Tribunal to resolve the issues before it, without the need for additional proceedings to take place in the Tribunal (resulting from a fresh application for a determined boundary) or in court.

## THE TRIBUNAL'S JURISDICTION

21.3 The Tribunal has no inherent jurisdiction. It is a statutory body.[2] It therefore only has the jurisdiction expressly granted to it by Parliament.[3]

21.4 The Tribunal's jurisdiction is conferred by section 108 of the LRA 2002. The Tribunal's main function is to determine disputes arising out of an objection to an application to HM Land Registry. As provided in section 73(7) of the LRA 2002, the registrar must refer an objection to the Tribunal if it is not groundless and cannot be resolved by agreement.[4]

21.5 When an objection has been referred to the Tribunal, section 108(1)(a) confers on the Tribunal the jurisdiction to "determin[e] [the] matters referred to it". The nature of the jurisdiction therefore varies in each case, depending on the matter referred.[5] The courts

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1 Nor did we consider the Tribunal's jurisdiction to determine appeals of HM Land Registry's decisions to enter into and terminate network access agreements, pursuant to LRA 2002, s 108(1)(b) and sch 5, para 4. Although this jurisdiction has not yet been exercised, we are of the view that it could prove useful in the future, when electronic conveyancing has advanced. See the Consultation Paper, paras 21.12 to 21.14 and 21.30 to 21.34.

2 The Tribunal took over the functions of the Adjudicator to HM Land Registry (as well as other bodies) on 1 July 2013, pursuant to the Tribunals, Courts and Enforcement Act 2007 and the Transfer of Tribunal Functions Order 2013, art 4.

3 See *Murdoch v Amesbury* [2016] UKUT (TCC) at [57].

4 In addition, the Tribunal has jurisdiction to determine appeals in relation to network access agreements pursuant to s 108(1)(b), and to hear applications made directly to the Tribunal to make an order or to set aside a document, pursuant to s 108(2).

5 *Murdoch v Amesbury* [2016] UKUT 3 (TCC).

have concluded that, in order to determine the matter referred to it, the Tribunal has the jurisdiction to decide the underlying rights in dispute between the parties.[6] This point is illustrated in the example in figure 36.

Figure 36: example of the Tribunal's jurisdiction

A applies for the entry of a restriction over B's land, on the basis that A is the sole beneficiary of a resulting trust. B objects on the basis that A has no such interest. The objection is not groundless, and A and B cannot agree to resolve the dispute. The registrar refers the objection to the Tribunal. The Tribunal has the jurisdiction to determine–

(1) whether A is the beneficiary of a resulting trust (pursuant to section 43(1)); and (if so)

(2) whether the entry of a restriction is necessary or desirable to protect the resulting trust (pursuant to section 42(1)).[7]

## CRITICISMS OF THE CURRENT LAW

21.6 Two specific aspects of the Tribunal's jurisdiction have been the subject of criticism.

(1) There is currently uncertainty as to the extent of the Tribunal's jurisdiction in relation to determined boundary applications referred to it.

(2) The LRA 2002 does not confer on the Tribunal the power to grant equitable relief in relation to equities by estoppel except in the specific case of an application based on adverse possession under schedule 6. Additionally, while the Tribunal has the power to make findings as regards the existence of beneficial interests under a trust, it is not clear whether the Tribunal can quantify the extent of a beneficial interest.[8]

We discuss these points in more detail below. As we explain, in both cases, we are of the view that the Tribunal should be able fully to resolve the issues before it, to prevent the need for additional proceedings to take place. We therefore make recommendations to expand the Tribunal's jurisdiction in those cases.

21.7 Although a small number of stakeholders had raised the possibility of wider expansion of the Tribunal's jurisdiction, we did not undertake a broader review of the Tribunal's jurisdiction in our Consultation Paper. The specific questions that we focus on are areas

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6 *Silkstone v Tatnall* [2011] EWCA Civ 801, [2012] 1 WLR 400 at [48]; *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch), [2010] 1 WLR 2106; *Murdoch v Amesbury* [2016] UKUT 3 (TCC). For more detail, see Consultation Paper, paras 21.5 to 21.10.

7 Based on the facts and decision in *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch), [2010] 1 WLR 2106 at [16].

8 Consultation Paper, para 21.25.

in which the Tribunal's lack of express statutory jurisdiction in the LRA 2002 have been considered to be lacunas in the existing law. We do not consider that a review of the LRA 2002 is the appropriate vehicle for any broader reform of the Tribunal's jurisdiction to include the creation of appellate jurisdiction of the decisions of the registrar.[9]

21.8 Throughout our project, we have been aware of the possibility of other reforms to the Tribunal's jurisdiction. In particular, a working group of the Civil Justice Council has been looking at the different jurisdictions of the courts and tribunals to hear property disputes. Its project has involved considering flexible deployment of the judiciary "to ensure that all issues in dispute in property cases are dealt with in one forum".[10] Deployment responds to the problem where an action is brought, and in some circumstances has to be brought, in a forum which does not have jurisdiction to deal with all the issues raised: for example, if a matter is referred to the Tribunal by HM Land Registry, but the issues include matters that do not fall within the Tribunal's jurisdiction. Although the LRA 2002 makes provision for the matter to be referred by the Tribunal to the court,[11] doing so can cause duplication of proceedings, delay and expense. A pilot scheme operated by the Tribunal and Central London County Court has been underway, in which disputes referred to the court by the Tribunal are heard by Tribunal judges in order to use their expertise in land law matters. The goal of the Civil Justice Council working group therefore matches ours in this chapter.

21.9 Given the Civil Justice Council's work, at one stage it was unclear if we would need to take forward reform on the issues relating to the Tribunal's jurisdiction. However, it is now apparent that the specific jurisdiction issues in the LRA 2002 with which we are concerned will not be substantively dealt with by any other reforms. The deployment reforms will provide a way for such matters to be heard by a single judge (sitting as both a county court judge and a Tribunal judge) at a single hearing. However, they do not prevent parties before the Tribunal from needing to take additional proceedings in the county court when the Tribunal lacks jurisdiction. Moreover, the pilot scheme does not operate nationwide, only extending to cases brought in the central London County Court. Accordingly, we have proceeded to make recommendations.

## THE TRIBUNAL'S JURISDICTION TO DETERMINE BOUNDARIES

21.10 We explained the concept of general boundaries in Chapter 15. General boundaries are approximate boundaries, and their accuracy is not guaranteed.[12]

21.11 However, a boundary can be "determined". The registered proprietor of an estate can make an application to the registrar for the exact line of a boundary to be determined, under section 60(3) of the LRA 2002 and rule 118 of the LRR 2003. As with other

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9 Four consultees responded to questions in this chapter supporting broader reform, including the introduction of a jurisdiction for judicial review or appeal of HM Land Registry's decisions or suggestions for another mechanism for dispute resolution. We did not consider significant expansion of the Tribunal's existing jurisdiction, nor did we receive evidence that a fundamental re-examination was required: Consultation Paper, paras 21.12 to 21.14.

10 Civil Justice Council, *Interim Report of the Working Group on Property Disputes in the Courts and Tribunals* (May 2016) p 1, https://www.judiciary.gov.uk/wp-content/uploads/2011/03/final-interim-report-cjc-wg-property-disputes-in-the-courts-and-tribunals.pdf (last visited 4 July 2018).

11 LRA 2002, s 110(1).

12 LRA 2002, s 60(1) and (2). They are therefore an exception to the title guarantee in s 58. See Ch 15.

applications to the registrar, this application can be objected to under section 73, which in this case is most likely to be by an adjoining landowner. These objections, if they are not groundless and cannot be resolved by agreement, must be referred to the Tribunal.

21.12 The Tribunal makes decisions about boundaries in a number of contexts: in references relating to adverse possession, to first registration, or to alteration of the register. In those contexts, the Tribunal's jurisdiction to make decisions about the position of a general boundary is not in doubt. By contrast, the scope of the Tribunal's jurisdiction in relation to a determined boundary application has been called into question.

21.13 At the time we published the Consultation Paper, a recent case had taken a narrow interpretation of the Tribunal's jurisdiction in relation to determined boundaries, although the implications of the case were unclear. *Murdoch v Amesbury* was a decision of the Tribunal in a determined boundary application.[13] The Tribunal judge decided that the application should be rejected, because the plan did not meet HM Land Registry's requirement for scale. In order to discourage further litigation, the judge made a finding about where the exact line of the boundary was. On appeal to the Upper Tribunal, Judge Dight held that the matter referred to the Tribunal in that case was whether the plan was accurate. Once the Tribunal had decided that the application must fail because the plan was unsatisfactory, the Tribunal did not have the jurisdiction to determine where the boundary lay.[14] Judge Dight moreover considered that the procedure rules (rule 40 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 (the "Tribunal Procedure Rules"))[15] merely conferred a "binary" power to direct the registrar to give effect to the application, or to cancel it.[16]

21.14 After we published our Consultation Paper, the Upper Tribunal has revisited this issue twice, first in *Bean v Katz*[17] and more recently in *Lowe v William Davis Ltd*.[18]

21.15 In *Bean v Katz*, the Upper Tribunal interpreted the binding part of the decision in *Murdoch v Amesbury* narrowly, applying only where there was a successful objection to a determined boundary application based on the failure of the plan to meet HM Land Registry's technical requirements under rule 119(1)(a). Judge Cooke considered that the finding in *Murdoch v Amesbury* that applications under section 60(3) are solely concerned with accuracy of the applicant's plan, and not with matters of title, was not a binding part of the decision. The judge held that the "Tribunal has jurisdiction…where the objection is not to the quality of the plan but to what the plan says about the boundary".[19]

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13 *Murdoch v Amesbury* [2017] UKFTT 0021 (PC) at [50]

14 [2016] UKUT 3 (TCC) at [62] to [83].

15 SI 2013 No 1169.

16 [2016] UKUT 3 (TCC) at [72] to [74]. Judge Dight did not appear to consider the power under the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013, r 40(3)(a).

17 [2016] UKUT 168 (TCC).

18 [2018] UKUT 0206 (TCC).

19 [2016] UKUT 168 (TCC) at [20].

21.16 In contrast to the position in *Murdoch v Amesbury*, in *Bean v Katz* the plan was technically satisfactory. The point in issue was under rule 119(1)(b) – whether the line on the plan is in fact the boundary line. The Tribunal had decided that the plan was accurate, save for one small section, in respect of which the Tribunal decided that the boundary took a different route. The Upper Tribunal confirmed that the Tribunal had the jurisdiction to make that decision, by examining title to the land and then directing the registrar to give effect to the application as if the objection had not been made, save for the section of the boundary which took a different route; there, the Tribunal gave a direction to the registrar to note in the register where the boundary lay, pursuant to the Tribunal Procedure Rules.[20]

21.17 The Upper Tribunal once again considered the extent of the Tribunal's jurisdiction in determined boundary applications in *Lowe v William Davis Ltd*. Mr Justice Morgan characterised the decisions in *Murdoch v Amesbury* and *Bean v Katz* as "inconsistent", necessitating that he take his own view.[21] He favoured the approach in *Bean v Katz* over *Murdoch v Amesbury*. Mr Justice Morgan accepted that the procedure to determine the exact line of a boundary under section 60 is available in cases of dispute, whether or not there is a separate issue of the technical accuracy of the applicant's plan. The Tribunal's decision of whether to dispose of the matter if the plan is inaccurate, or to go on to determine the boundary, is a case management decision to be made by the Tribunal. Moreover, Mr Justice Morgan commented that the Tribunal has more than a binary power to give a direction to give effect to the application or to cancel it, but to include a direction to give effect to the application "in whole or in part" and to add a condition to it. However, if the application fails due to a technical inaccuracy of the plan, Justice Morgan acknowledged that the Tribunal's decision as to the boundary may not give rise to issue estoppel (a point he did not decide); he noted that in such a case, the Tribunal might decide to direct the parties to commence proceedings at court.[22]

21.18 We did not have the benefit of the Upper Tribunal's decisions in *Bean v Katz* and *Lowe v William Davis Ltd* at the time of our Consultation Paper. On the basis of the decision in *Murdoch v Amesbury*, our provisional view was that the law is unsatisfactory. It appeared that the Tribunal lacked sufficient jurisdiction in respect of determined boundary applications, and so was unable substantively to resolve disputes based on determined boundary applications, despite having all the evidence necessary to do so. We therefore provisionally proposed to confer an express statutory power on the Tribunal to determine where the boundary lies when a determined boundaries application under section 60 has been referred to it. This reform would reduce lengthy litigation between neighbours, as well as reduce costs to the parties and the courts.[23]

21.19 *Bean v Katz* and *Lowe v William Davis Ltd* have gone some way to clarify the Tribunal's jurisdiction when it has been referred a determined boundaries application. However, in our view, they have not entirely resolved the uncertainties arising from *Murdoch v Amesbury*. Following *Bean v Katz* and *Lowe v William Davis Ltd*, it is not without doubt

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20 Tribunal Procedure (Property Chamber) (First-tier Tribunal) Rules 2013 rr 40(2)(a) and (3)(a); [2016] UKUT 168 (TCC) at [26] and [27]. The appeal decision was that the application plan was entirely correct, so there was no need for a direction on appeal based on rr 40(3)(a).

21 [2018] UKUT 0206 (TCC) at [53].

22 [2018] UKUT 0206 (TCC) at [55]; see LRA 2002, s 110(1).

23 Consultation Paper, paras 21.15 to 21.24.

whether the Tribunal has jurisdiction to decide that the exact line of a boundary is substantially or wholly different from the one on the application plan. That point did not arise for decision in any of the three cases. While Mr Justice Morgan spoke generally about jurisdiction, his comments were directed at resolving the inconsistency between *Murdoch v Amesbury* and *Bean v Katz*.

21.20 Further, doubt remains as to the Tribunal's jurisdiction to determine the line of a boundary where the application fails based because of the technical inaccuracy of the plan.[24] It is not clear whether the Tribunal can direct the registrar to reflect an entirely different boundary than contended in the application; and if the Tribunal cannot, it is not clear whether an issue estoppel would arise in respect of the Tribunal's determination of where the boundary lies.

21.21 Additionally, all three cases are the decision of the Upper Tribunal. Given that three judges have taken different views for different reasons on the scope of the jurisdiction, the matter cannot be seen as resolved, and would be subject to review by the Court of Appeal.

21.22 Therefore, we have taken the view that the recent case law does not remove the need for us to consider whether the Tribunal's jurisdiction on an application for a determined boundary should be reformed, and in particular, made express in the LRA 2002.

**Consultation and discussion**

21.23 We provisionally proposed that the Tribunal should be given an express statutory power to determine where a boundary lies when an application under section 60(3) of the LRA 2002 is referred to it.

21.24 Twenty-three consultees responded to this proposal. All but one agreed with it. One consultee – Christopher Jessel – expressed other views, giving qualified support for the proposal.

The benefits of reform

21.25 Several consultees agreed that reform would bring benefits. They said that our proposal would provide quicker and more cost-effective resolution of boundary disputes,[25] preventing parties from being required to commence proceedings in more than one forum.[26] Michael Mark, a retired Tribunal judge, explained that hearings before the Tribunal rarely take more than a few days, representing a significant cost saving to parties, which he contrasted with county court proceedings which may have lengthy hearings. Pinsent Masons LLP stated that the proposal was "eminently sensible".

21.26 Michael Mark also agreed with the proposal on the basis that it was sensible. He provided a lengthy response based on his experience of sitting as a Tribunal judge. He linked our proposal to the standard principle of litigation that all related disputes should

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[24] That is, whether the Tribunal determines that the application fails based on LRR 2003, r 119(a), rather than (b).

[25] Professor Warren Barr and Professor Debra Morris, Adrian Broomfield, and the Property Litigation Association.

[26] Land Registration Division of the Property Chamber (First-tier Tribunal) Judges.

be determined in a single set of proceedings, and that a party cannot be permitted to raise issues in fresh proceedings that should have been raised in earlier proceedings. In his view the jurisdiction of the Tribunal, even when broadly interpreted, inhibits this principle. It had been further constrained by the decision in *Murdoch v Amesbury*, which in his words "would … give rise to multiple litigation".

21.27 Further, Michael Mark emphasised that, in principle, property disputes should be dealt with by a specialist property tribunal rather than by the county court. Cases before the Tribunal benefit from the judges' many years of property-related experience. The Property Litigation Association made a similar point. They noted that the Tribunal has the expertise, both in relation to the law and in assessing surveying evidence, necessary to determine the exact line of a boundary.

### The necessity for reform in the light of *Bean v Katz*

21.28 Three consultees specifically referred to the decision of *Bean v Katz*,[27] decided during the consultation period.[28] Consultees emphasised that the approach taken in the case, which distinguished the earlier case of *Murdoch v Amesbury*, should be settled definitively and they considered that our proposal would have that effect. The Land Registration Division of the Property Chamber (First-tier Tribunal) judges emphasised the benefit of the LRA 2002 conferring on the Tribunal an express power to make declarations, in preference to the Tribunal having to rely on emerging case law.

21.29 We agree that *Bean v Katz* does not entirely resolve the issues raised by *Murdoch v Amesbury*. First, the issue of the Tribunal's jurisdiction was not the subject of argument by the parties in *Bean v Katz*, at the Tribunal or on appeal. Moreover, *Bean v Katz* only distinguishes *Murdoch v Amesbury*, appearing to confine it to cases in which an objection has successfully been raised about the technical requirements of the applicant's plan.[29]

21.30 Since our consultation has closed, *Lowe v William Davis Ltd* has provided greater certainty; nevertheless, questions remain. It is not clear whether the Tribunal can direct the registrar to reflect a determined boundary that is wholly different from the boundary as described in the application under section 60; nor is it clear, if the plan is technically inaccurate and the Tribunal makes a finding as to where the boundary lies, whether an issue estoppel will arise to prevent further litigation between the parties.[30]

21.31 We agree with the Tribunal judges that the Tribunal's jurisdiction to decide the exact line of a boundary in a determined boundaries application should be express in the LRA 2002, to put the issue beyond question.

### Other suggestions for related reforms

21.32 The Law Society agreed with our proposal but was concerned that a risk of duplication of proceedings remained if the Tribunal did not have conferred upon it the jurisdiction

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27 [2016] UKUT 168 (TCC).

28 Chancery Bar Association, Dr Charles Harpum QC (Hon), and the Land Registration Division of the Property Chamber (First-tier Tribunal) Judges.

29 That is, under LRR 2003, r 119(1)(a), not r 119(1)(b).

30 [2018] UKUT 0206 (TCC) at [55].

to grant final injunctions and to assess and award damages (as in the county court) so that all aspects of a boundary dispute may be resolved. In our view, this suggestion represents a significant expansion of the Tribunal's jurisdiction, which goes further than is necessary to resolve the current difficulties with the Tribunal's jurisdiction in determined boundary applications.

21.33 Christopher Jessel cautiously agreed with the proposal, but only if all relevant parties were represented before the Tribunal.[31] He emphasised that there may be parties other than registered proprietors who should receive notice (for example the highway authority) or situations in which notice may be given but not received by the relevant registered proprietor. Similarly, Michael Mark noted that it is surprising there is no provision for notice to superior or inferior registered proprietors of an application for determination of a boundary. We understand that HM Land Registry's practice is to notify all owners of registered estates (including owners of inferior or superior estates) of the land subject to the application and of the adjoining land. Therefore, all relevant registered proprietors will be made aware of the application, and so are able to object to it.[32]

21.34 HM Land Registry was in agreement with the proposal. It made the additional suggestion that, if the Tribunal were to be granted an express statutory jurisdiction to determine boundaries, then any power should include the ability to direct the registrar as to how the decision should be reflected in the register. Any question about the implementation of the Tribunal's decision would therefore be avoided.

21.35 As we explained above,[33] the scope of the Tribunal's power to direct the registrar to make an entry in the register under rule 40 of the Tribunal Procedure Rules is unclear in relation to a determined boundaries cases. In particular, in cases where the Tribunal's determination does not accord with either the applicant's or objector's submission as to where the boundary is, a direction to reflect the Tribunal's determination in the register does not fit comfortably in the wording of rule 40. In discussion on this point, the Land Registration Division of the First-tier Tribunal (Property Chamber) judges agreed that it would be preferable for this power to be made express in the drafting of rule 40 of the Tribunal Procedure Rules. We take up this suggestion below.

**Recommendations for reform**

21.36 Consultees supported our proposed amendment of the LRA 2002 in relation to determined boundaries applications. They agreed that our proposal would facilitate quicker and more cost-effective resolution of boundary disputes, by preventing parties from needing to commence duplicate proceedings at court. Moreover, consultees agreed that the Tribunal has the necessary expertise to decide the exact line of a boundary in determined boundary applications.

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31 Christopher Jessel.

32 See LRR 2003, rr 119(1) and 120.

33 See para 21.13 and following above.

21.37 The cases of *Bean v Katz* and *Lowe v William Davis Ltd* have gone some way towards clarifying what the Tribunal may decide in considering a determined boundaries application. However, it has not entirely resolved the uncertainties in the law.

21.38 We therefore agree with consultees that the LRA 2002 should make it clear, beyond doubt, that the Tribunal may make a decision in a determined boundaries application about where the boundary lies. This jurisdiction should not just include a determination of where the boundary is not situated but, if the Tribunal has the relevant evidence before it, where precisely the boundary should be drawn.

**Recommendation 51.**

21.39 We recommend that the Land Registration Division of the First-tier Tribunal (Property Chamber) should be given an express statutory power to decide where a boundary lies when an application is referred to it under section 60(3) of the LRA 2002.

21.40 Clause 37 will give effect to this recommendation. It will insert a new section into the LRA 2002, section 108A, granting the Tribunal express jurisdiction to decide the exact line of the boundary where an application made pursuant to rules made under section 60 is referred to it; that is, a determined boundaries application. The function conferred under section 108A is in addition to those already granted to the Tribunal under section 108.

21.41 This amendment will apply to disputes referred to the Tribunal after the amendment comes into force.

21.42 We also recommend that, if the Tribunal is to have an express statutory jurisdiction to determine where a boundary lies, the Tribunal should direct the registrar as to how that decision should be reflected in the register. The Tribunal should not be limited to confirming the boundary as described in the application, or relying upon issue estoppel. This recommendation is based on HM Land Registry's submission and will ensure that the Tribunal's determination of the line of the boundary can be accurately reflected in the register.

**Recommendation 52.**

21.43 We recommend that in making a determination in accordance with Recommendation 51, the Land Registration Division of the First-tier Tribunal (Property Chamber) shall give a direction to the registrar as to where the determined boundary lies.

21.44 In our view, the best way to take forward Recommendation 52 is by reform of the Tribunal Procedure Rules.[34] Rule 40 already governs this point; it would be best for the provisions about directions from the Tribunal to the registrar to be contained in one

[34] LRA 2002, s 110(3) provides that Tribunal Procedure Rules may make provision about the functions of the Tribunal in consequence of a decision on a reference under s 73(7).

place. Therefore, we suggest that amendment of rule 40 could be made to include an express power (and requirement) to make a direction to the registrar as to where the determined boundary lies for the purpose of the register. We have not undertaken to draft a new rule 40, but will leave it to the Tribunals Procedure Committee to do so.[35]

## THE TRIBUNAL'S JURISDICTION TO DETERMINE AN EQUITY BY ESTOPPEL AND THE EXTENT OF A BENEFICIAL INTEREST

21.45 As we have explained above at paragraph 21.3, the Tribunal only has the jurisdiction conferred on it by the LRA 2002. It therefore has no inherent equitable jurisdiction. Under the LRA 2002, the Tribunal's jurisdiction to grant equitable relief is very narrow.[36]

21.46 The Tribunal has a general jurisdiction to determine the underlying rights of the parties in a dispute.[37] Under this general jurisdiction, the Tribunal may determine whether a party has an equity by estoppel. This question of whether a party has an equity by estoppel may arise, for example, when an application to enter a notice to protect the priority of an equity by estoppel is referred to the Tribunal. However, if the Tribunal does find that a party has an equity by estoppel, it does not have the jurisdiction to determine how that equity by estoppel is to be satisfied.[38] There is one, perhaps anomalous, exception: the Tribunal is expressly conferred the jurisdiction to make an order as to how an equity by estoppel should be satisfied in an application for registration based on adverse possession, by section 110(4).[39] The Tribunal is not given this jurisdiction in any other circumstance.

21.47 The Tribunal may also declare the existence of a beneficial interest in appropriate cases, again because the Tribunal has jurisdiction to determine the matter referred to it pursuant to section 108(1)(a). For example, the Tribunal may need to declare the existence of a beneficial interest in a dispute about an application to protect such an interest by a restriction.[40] However, it is not clear whether the Tribunal has the jurisdiction to go a step further and declare the extent of the beneficial interest.[41] In practice, the Tribunal, having all the evidence before it, often does go on to make a

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35 The Tribunals Procedure Committee is empowered to make Tribunal Procedure Rules pursuant to the Tribunals, Courts and Enforcement Act 2007, s 22(2).

36 See *Stapleford Frog Island (Rainham) Limited v Port of London Authority* [2016] UKFTT 0633 (PC) at [36].

37 LRA 2002, s 108(1)(a); *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch), [2010] 1 WLR 2106.

38 Consultation Paper, para 21.11.

39 We consulted on removing this power from sch 6, on the basis that a claim for proprietary estoppel is different in substance to a claim for adverse possession. We have not pursued reform on that basis, as we explain in Ch 17, paras 17.33 to 17.44, above.

40 *Jayasinghe v Liyanage* [2010] EWHC 265 (Ch), [2010] 1 WLR 2106. For an illustration see figure 36 above.

41 Consultation Paper, para 21.25. In *Jayasinghe v Liyanage*, the judge assumed that an application would need to be made to the court to determine the quantification of the applicant's alleged beneficial interest: see [2010] EWHC 265 (Ch), [2010] 1 WLR 2106 at [29]. See also *Whitehouse v Jervis* (2016) REF/2016/0498 at [125] to [126].

finding as to the parties' respective shares, often at the parties request, to prevent future litigation between the parties, and to assist the parties in future negotiations.[42]

21.48 If the Tribunal does not in fact have jurisdiction to declare the extent of the parties' beneficial interests, then any findings it makes have no legal effect; jurisdiction cannot be conferred by consent, and an issue estoppel will not arise to prevent re-litigation of the point.[43]

21.49 In our Consultation Paper, we explained that expansion of the Tribunal's jurisdiction to enable determination of these matters would reduce the need for extended litigation, saving the parties time and money. However, we noted that unlike the determination of a boundary pursuant to section 60 of the LRA 2002, instances of equitable relief are not intrinsically linked to land registration.[44] For example, the extent of a person's beneficial interest is not a matter that is recorded in the register. For this reason, we did not make a proposal in relation to this issue, but instead asked an open question.

### Consultation and discussion

21.50 We invited consultees to share their views with us as to whether the jurisdiction of the Tribunal should be expanded in the cases that come before it to determine –

(1) how an equity by estoppel should be satisfied, and

(2) the extent of a beneficial interest.[45]

21.51 Twenty-one consultees responded. Consultees were largely in favour of an expansion of the Tribunal's jurisdiction. Support was not as strong as it was in relation to boundaries: although most agreed, a few consultees disagreed, and several more expressed no firm view.

#### Resolving the dispute in one forum

21.52 Consultees highlighted that reform would enable determination of a matter in a single forum, providing more efficient resolution of disputes, with quicker and cheaper outcomes for all parties.[46] As the Law Society explained, "it is self-evidently better to have all related issues determined in a single hearing before the same forum". Similarly, the Property Litigation Association agreed that reform would prevent both the Tribunal and the court from needing to consider the same evidence. The City of Westminster and Holborn Law Society stated that it is "cumbersome" for these matters to go to a non-specialist court limited to judicial review.

21.53 HM Land Registry did not express itself to be in favour of the proposed expansion of jurisdiction, but acknowledged that such an expansion was aimed at keeping costs down for litigants. Usefully, it noted that it would be unlikely to increase significantly the

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42 See eg *Bouchba v Turner* [2017] UKFTT 0469 (PC) at [16] to [18]; *Ian Rand v Que Ha Tran* [2017] UKFTT 0888 (PC) at [1] and [13] to [14].

43 See *Inhenagwa v Onyeneho* [2017] EWHC 1971 (Ch), [2018] 1 P & CR 10.

44 Consultation Paper, paras 21.26 to 21.27.

45 Consultation Paper, para 21.28.

46 Property Litigation Association, Everyman Legal, the Law Society, and HM Land Registry.

Tribunal's running costs (which are funded by HM Land Registry) because the Tribunal is likely already to have heard the relevant evidence as part of the matter before it. Despite this, it argued that any resultant increase in running costs arising from an expansion of jurisdiction should be met by parties to the dispute.

### Expertise of the Tribunal

21.54 Consultees' views varied as to whether the Tribunal is the right forum, in terms of the expertise of the judges, to determine how an equity by estoppel should be satisfied and the extent of a beneficial interest.

### An appropriate forum in relation to equities by estoppel and beneficial interests

21.55 Several consultees, however, argued that the Tribunal has the necessary expertise to determine both how equities by estoppel should be satisfied and the extent of beneficial interests.

21.56 Some consultees emphasised that decisions about the extent of beneficial interests are effectively being made by the Tribunal already, although not able to form part of any determination. These views reflect the experiences recounted by Michael Mark in his submission. In his view, it is "plainly unsatisfactory that the Tribunal can determine the existence of a beneficial interest but not its extent".

21.57 Similarly, Dr Aruna Nair argued that the Tribunal effectively makes decisions in relation to such equitable rights and it would be reasonable to include such determinations within the Tribunal's jurisdiction.

21.58 The Chancery Bar Association argued that it was anomalous for the Tribunal to have jurisdiction to determine how an equity by estoppel should be satisfied in adverse possession cases, but not others. In support of the proposed expansion, it highlighted that Tribunal judges already have the power to sit as county court judges and vice versa.

21.59 The Land Registration Division of the Property Chamber (First-tier Tribunal) judges welcomed any expansion to the Tribunal's jurisdiction on these points. The judges affirmed their expertise and experience in the resolution of disputes involving land. They expressed their view that it is unhelpful to run into obstacles created by the narrow terms of the LRA 2002 when trying to fulfil their duties to the parties. They stated that express jurisdiction, placing these matters beyond doubt, would be a welcome reform.

### An appropriate forum for determination in relation to equity by estoppel only

21.60 Two consultees were not convinced that determining the extent of a beneficial interest falls within the Tribunal's expertise.

21.61 Dr Charles Harpum QC (Hon), who did not have strong views on the question, agreed that the Tribunal judges have specialist skills enabling them to deal with issues concerning estoppel. He was, however, "less convinced" that disputes concerning beneficial interests should be decided by the Tribunal.

21.62 Christopher Jessel agreed that equity by estoppel is a matter of land law suitable for the Tribunal. However, he thought that determination of the extent of a beneficial interest would be a matter for the Tribunal in limited circumstances only; more often, it is relevant in the context of inheritance or relationship breakdown.

21.63 We are not persuaded by arguments for distinguishing between the Tribunal's jurisdiction in relation to estoppel on the one hand and declaring beneficial shares on the other. First, Tribunal judges are often drawn from chancery practitioners, who have experience and knowledge of the relevant law. Secondly, consultees have told us, and the decisions of the Tribunal make clear,[47] that the Tribunal often does deal with the extent of the interest as part of its findings of fact. It has developed this practice because it has all the evidence before it to express such a view, and wishes to prevent future litigation between the parties over the issue in another forum.[48] In our view, declaring the extent of a beneficial interest is something that the Tribunal is competent to do in the cases that come before it.

21.64 We note that under our reforms, questions as to the extent of a beneficial interest would arise before the Tribunal only when a matter is referred to the Tribunal under section 73(7). The dispute must therefore be in relation to a land registration matter. Although a beneficial interest cannot be recorded in the register, it can be protected by a restriction.[49] Pursuant to section 108(1)(a), the Tribunal already has the jurisdiction to consider the existence of a beneficial interest in land. In exercising that power, the Tribunal usually hears all the evidence necessary to make a declaration of the extent of a beneficial interest. In the majority of cases, questions of beneficial ownership do not arise in relation to a land registration matter and will continue to be resolved by the courts. That includes cases of relationship breakdown and inheritance. However, we do not think that this point should exclude the Tribunal from declaring the extent of beneficial ownership in the minority of cases where the question does arise in relation to a land registration matter.

21.65 Moreover, if the Tribunal were to consider that an issue was beyond its expertise, it would be able to use its existing power to direct the parties to bring the matter before the court.[50]

21.66 We also accept that the extent of a beneficial interest, rather than its existence, is unlikely to be a matter directly relevant to the registration of land. However, we disagree that this is the only relevant point to consider in deciding whether the Tribunal should be able to make such findings. We think that the advantage for the parties, and for the Tribunal and court system as a whole, of preventing duplicate proceedings points towards giving this power to the Tribunal.

### Not an appropriate forum for either

21.67 Five consultees wondered whether the Tribunal is best placed to determine either how an equity by estoppel should be satisfied or to declare the extent of a beneficial interest. These consultees either disagreed with expanding the Tribunal's jurisdiction, or expressed no firm view either way.

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47 See eg *Bouchba v Turner* [2017] UKFTT 0469 (PC) at [16] to [18]; *Ian Rand v Que Ha Tran* [2017] UKFTT 0888 (PC) at [1] and [13] to [14].

48 *Ian Rand v Que Ha Tran* [2017] UKFTT 0888 (PC) at [1].

49 LRA 2002, s 42(1)(b).

50 LRA 2002, s 110(1).

21.68 In their joint response, Professor Warren Barr and Professor Debra Morris, while acknowledging that it is important to resolve issues as efficiently as possible, expressed the view that the Tribunal would not be the best forum for such issues. Nigel Madeley, who disagreed with our suggested expansion of the Tribunal's jurisdiction, argued that the two categories proposed were matters of equity "unconnected to land registration".

21.69 We disagree, for the reasons we gave at paragraphs 21.63 and 21.64, that the Tribunal lacks the expertise to determine the extent of a beneficial interest in land. We also disagree that the Tribunal lacks the expertise to determine how an equity by estoppel in relation to land should be satisfied. First, the Tribunal already has this jurisdiction in disputed applications for adverse possession.[51] Secondly, an equity by estoppel is an interest in land capable of binding successors in title,[52] which can be protected by a notice in the register.[53] It is therefore a land registration issue, of concern to the LRA 2002. Although how the equity is to be satisfied is not directly relevant to the land registration regime, any disposition or grant of property rights that result from its satisfaction will be. We are therefore convinced that the Tribunal does have sufficient expertise to determine how an equity by estoppel should be satisfied, and of the benefits of the Tribunal being able to make such a decision.

21.70 Without expressing a view one way or the other, the London Property Support Lawyers Group suggested that matters relating to estoppel remedies and beneficial shares may include detailed questions of trust law. Both the Group and Pinsent Masons LLP wondered whether such matters might be better determined by the Chancery division of the High Court. Dr Harpum suggested that the Commission discuss this point with the Chancery division judges.

21.71 The Bar Council, who disagreed with the expansion, added that it understood our arguments in favour of expansion of the jurisdiction but queried whether the Tribunal's jurisdiction has already been interpreted more widely than Parliament originally intended.

21.72 We discussed the issue with Sir Geoffrey Vos, Chancellor of the High Court. He considered that our policy was sensible and supported it, as did the Senior President of the Tribunals, Lord Justice Ryder. Sir Geoffrey Vos agrees that bifurcation of responsibility in the same subject areas between the courts and the tribunals is problematic, causing parties to have to participate in proceedings in both forums in order to have their disputes fully resolved. This problem extends beyond the scope of our project on land registration, but Sir Geoffrey Vos considers that a wider review of the interaction between courts and tribunals would be desirable, [54] and might be a suitable task for the Law Commission in due course.

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51 LRA 2002, s 110(4).

52 LRA 2002, s 116(a).

53 LRA 2002, s 32(1).

54 See further in the Speech by Sir Geoffrey Vos, Chancellor of the High Court: Professionalism in Property Conference 2018, https://www.judiciary.gov.uk/wp-content/uploads/2018/05/chc-speech-property-lecture-09052018.pdf (last visited 4 July 2018).

21.73 Nigel Madeley also made the point that it would be a convoluted procedure if appeal lay through the Upper Tribunal.

21.74 Tribunal decisions are appealable with permission to the Upper Tribunal.[55] Until recently, appeals against a decision of the Tribunal (specifically, the Land Registration Division of the Property Chamber) were heard by the Tax and Chancery Chamber of the Upper Tribunal.[56] We note that the Lands Chamber of the Upper Tribunal (which generally hears appeals from the Property Chamber)[57] may be better placed to hear appeals relating to equities by estoppel and beneficial interests: such appeals may raise points of general property rather than technical matters of land registration. Indeed, starting in May 2018, appeals from the Tribunal will be heard by the Lands Chamber.[58] We welcome this change.

### Wider reforms

21.75 Several consultees commented on the possibility of wider reforms of the Tribunal's jurisdiction.

21.76 The Land Registration Division of the Property Chamber (First-tier Tribunal) judges noted that any implementation of our proposals must be considered in the context of any wider reforms which may occur.

21.77 Others, including the Property Litigation Association, thought that our suggested reforms were better considered as part of wider reforms. The Chancery Bar Association noted that, if the Civil Justice Council's recommendations as expressed in its interim report were accepted, allowing specified types of property dispute to be transferred between the county court and the Tribunal, our reforms might be unnecessary.

21.78 As we explained at paragraphs 21.8 and 21.9 above, we understand that although the Civil Justice Council's practice may ameliorate the Tribunal's lack of jurisdiction in some cases, they will not resolve it. Further, it appears that any wider practical changes in these specific areas are unlikely in the short to medium term. We therefore think that we should proceed with making recommendations for reform.

21.79 The Law Society, supportive of the proposal, noted that any expansion of jurisdiction would necessitate a review of the rules and procedures of the Tribunal to bring the rules in line with the Civil Procedure Rules, in particular regarding the disclosure of documentary evidence. We note this concern but add that it falls outside the scope of this project.

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55 The right to appeal with permission of either the Tribunal or Upper Tribunal is provided by the Tribunals, Courts and Enforcement Act 2007, s 11.

56 First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010 No 2655) art 13(h).

57 Above, art 12.

58 First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2018 (SI 2018 No 509) art 2.

**Recommendation**

21.80 On the basis of consultees' views, we are confident that expanding the Tribunal's jurisdiction – in the limited circumstances we identified in the Consultation Paper – is the best way forward.

21.81 A majority of consultees agreed with expanding the Tribunal's jurisdiction to determine how an equity by estoppel is to be satisfied and the extent of a beneficial interest. As we explained above, we are of the view that the Tribunal has sufficient expertise to do both. It is significant that the Tribunal already has the power to determine how an equity by estoppel should be satisfied in adverse possession cases. In fact, in these cases, under section 110(4) the Tribunal is *required* to determine how an equity by estoppel is to be satisfied, not merely empowered to do so. It is also significant that the Tribunal already in practice does determine the extent of beneficial interests, even if its view cannot form part of its findings.

21.82 Ultimately, we are persuaded by the strength of consultee responses. Their responses reinforce our view in the Consultation Paper that giving the Tribunal the power to make these determinations would be in accordance with Judicature Act principles. It would ensure that the dispute could be completely and finally resolved in a single set of proceedings, and that the forum in which the proceedings are heard is able to grant all the remedies to which the parties might be entitled.[59] It would therefore save parties (and the courts) time, money and resources.

21.83 We emphasise that our reform does not give the Tribunal any original jurisdiction. The Tribunal will only be empowered to make these decisions in cases that are referred to it under section 73(7) pursuant to its current jurisdiction under section 108(1)(a): that is, disputes arising from an objection to an application to protect an interest in the register, whether by notice, restriction or caution.

21.84 Moreover, the powers we recommend the Tribunal has are permissive: the Tribunal can make these determinations if it is able to do so in any given case. If the point is complex or beyond its expertise, then the Tribunal will be able to use its existing power to direct the parties to commence proceedings at court.[60] We understand that, so long as the matter falls within the Tribunal's jurisdiction, the Tribunal does not in practice exercise this power. However, it will be open to it to do so, if it so wishes.

21.85 Accordingly, in our view, these reforms fall within the scope of our project – they relate to the extent of the jurisdiction of the Tribunal to resolve the disputes about land registration matters that come before it, jurisdiction for which is given by the LRA 2002.

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59 Supreme Court of Judicature Act 1873, s 24(7) (repealed). See the Senior Courts Act 1981, s 49.

60 LRA 2002, s 110(1).

**Recommendation 53.**

21.86 We recommend that the jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber) should be expanded to include an express statutory jurisdiction in cases that come before it to allow it:

(1) to determine how an equity by estoppel should be satisfied; and

(2) to declare the extent of a beneficial interest.

21.87 Clause 38 gives effect to Recommendation 53. It will insert three new subsections into section 110 of the LRA 2002. They empower the Tribunal in relation to matters arising from an objection to an application under section 73, and matters referred under new clause 73A(5), which will govern objections to unilateral notices specifically.

21.88 The new subsection 110(3B) inserted by clause 38 specifies that, in determining how an equity by estoppel is to be satisfied, the Tribunal may make any order that the High Court could make in the exercise of its equitable jurisdiction. Subsection 110(3B) is based on the Tribunal's existing power in respect of equities by estoppel in adverse possession cases, in section 110(4). It will ensure that the Tribunal can make any order necessary to do justice between the parties.

21.89 This amendment will apply to disputes referred to the Tribunal after the amendment comes into force.

21.90 Our reform does not address HM Land Registry's view that the funding of the Tribunal (provided by HM Land Registry)[61] should not cover the costs of the Tribunal determining how an equity by estoppel is to be satisfied or declaring the extent of a beneficial interest. Although we accept that these decisions might entail some additional cost at the Tribunal, we expect such costs to be minimal, given that the matter and most, if not all, of the necessary evidence is already before the Tribunal. The Tribunal judges agree with our view.

61 LRA 2002, s 108(5).

# Chapter 22: Recommendations

**Recommendation 1.**

22.1 We recommend the introduction of new compulsory triggers for registration of an estate in mines and minerals in the following instances:

(1) where mines and minerals are separated from a freehold estate, or a leasehold estate for a term exceeding seven years, following a transfer for valuable or other consideration, or by way of gift;

(2) where mines and minerals are separated from an unregistered legal estate following the grant of a lease for a term exceeding seven years for valuable or other consideration, or by way of gift;

(3) where an unregistered freehold estate in mines and minerals held apart from the surface, or a leasehold estate for a term exceeding seven years in mines and minerals held apart from the surface, is transferred for valuable consideration; and

(4) where a lease of a term exceeding seven years is granted out of an unregistered estate in mines and minerals held apart from the surface for valuable consideration.

**Paragraph 3.67**

**Recommendation 2.**

22.2 We recommend that surface owners should be notified of an application to register an estate in mines and minerals beneath their land, regardless of whether it is to be registered with qualified or absolute title.

**Paragraph 3.102**

**Recommendation 3.**

22.3 We recommend that the requirement of compulsory first registration should apply to the transfer of a discontinuous lease and to the grant of a discontinuous lease out of a qualifying estate.

**Paragraph 3.139**

**Recommendation 4.**

22.4 We recommend that it should be possible to enter a notice in respect of any discontinuous lease in the register of title of the landlord's estate.

**Paragraph 3.140**

**Recommendation 5.**

22.5 We recommend that the priority rules governing unregistered land should apply to dispositions arising after compulsory first registration has been triggered under section 4 of the LRA 2002, but before the application for first registration to HM Land Registry is made. However, section 14(3) of the Land Charges Act 1972 should continue to provide that it is neither possible nor necessary to protect under the Act a land charge that is created within the same instrument as a disposition of an unregistered estate that triggers first registration under the LRA 2002.

**Paragraph 4.66**

**Recommendation 6.**

22.6 We recommend that it should be clarified that, if registration is unsuccessful after a disposition triggers compulsory first registration under section 4 of the LRA 2002, the priority rules governing unregistered land should apply to interests created after the application for first registration was made.

**Paragraph 4.68**

**Recommendation 7.**

22.7 We recommend that it should be made clear that a person with a derivative interest under a trust may apply for a caution against first registration of the legal estate to which the trust relates.

**Paragraph 4.86**

**Recommendation 8.**

22.8 We recommend that the LRA 2002 should be clarified such that, in the case of a person entitled to be registered as the proprietor, owner's powers are not limited by reason only of the fact that the person is not yet registered as the proprietor and so merely has an equitable, rather than a legal, title.

**Paragraph 5.167**

**Recommendation 9.**

22.9 We recommend that the owner's powers provisions in the LRA 2002 should be clarified to ensure that any limitation on a trustee's powers of disposition, not reflected by an entry in the register, does not affect the validity of the title of the disponee.

**Paragraph 5.169**

**Recommendation 10.**

22.10 We recommend that the LRA 2002 should be clarified such that a person who is dealing with a person who is entitled to be registered, but is not yet registered as the proprietor, is bound by any limitations on that person's powers of disposition not reflected in the register.

**Paragraph 5.171**

**Recommendation 11.**

22.11 We recommend that the definition of valuable consideration in section 132 of the LRA 2002 be amended so that "a nominal consideration in money" is no longer excluded from the definition of valuable consideration.

**Paragraph 7.74**

**Recommendation 12.**

22.12 The reform we make to the definition of valuable consideration in the LRA 2002 should not apply to the requirement for valuable consideration in section 86 of the LRA 2002 (bankruptcy of the registered proprietor).

**Paragraph 7.88**

**Recommendation 13.**

22.13 We recommend that where a person applies for a unilateral notice in respect of an interest which was formerly overriding until 12 October 2013, and the title indicates that there has been a registered disposition of the title since that date, the applicant should be required to give reasons why the interest still binds the title. The notice will only be entered if the reasons given are not groundless.

**Paragraph 8.60**

**Recommendation 14.**

22.14 We recommend that, if a registered proprietor applies to cancel a unilateral notice, the beneficiary of the unilateral notice will be required to respond within 30 business days (subject to an extension to a maximum of 40 business days at the discretion of the registrar). The response must produce evidence to satisfy the registrar of the validity of the beneficiary's claim.

(1) If the beneficiary does not produce evidence to satisfy the registrar of the validity of his or her claim, the registrar must cancel the unilateral notice.

(2) If the beneficiary does produce evidence to satisfy the registrar of the validity of his or her claim, the unilateral notice will remain in the register. If the registered proprietor continues to dispute the beneficiary's objection to the application to cancel, the registrar must, after allowing time for the parties to negotiate, refer the matter to be determined by the Tribunal.

**Paragraph 9.99**

**Recommendation 15.**

22.15 We recommend that our reform of the procedure for objections to cancel a unilateral notice should apply to unilateral notices that were entered in the register before the implementation of our reforms.

**Paragraph 9.100**

**Recommendation 16.**

22.16 We recommend that it should be possible for agreed notices to identify the beneficiary of that notice, or when relevant the title number of the benefiting land, in a similar way to the entries made in relation to a unilateral notice.

**Paragraph 9.143**

**Recommendation 17.**

22.17 We recommend that when the identity of the beneficiary has changed, or there are additional beneficiaries, the new beneficiary can apply to update the entry of the agreed notice so that it reflects the change of identity. Such an update to the identity of the beneficiary of the notice should not affect the interest's priority.

**Paragraph 9.144**

**Recommendation 18.**

22.18 We recommend that the LRA 2002 should contain a power for the Secretary of State, after consultation, to make rules to determine:

(1) whether particular types of contractual obligation cannot be capable of protection by way of a restriction; and

(2) whether particular types of contractual obligation should only be capable of protection by way of a restriction that requires notice to be given to a beneficiary.

**Paragraph 10.73**

**Recommendation 19.**

22.19 We recommend that it should be made clear that a court may order the entry of a restriction to protect a charging order relating to an interest under a trust, but that such a restriction must be in Form K.

**Paragraph 10.113**

**Recommendation 20.**

22.20 We recommend that it should be made clear that an application under section 43(1) of the LRA 2002 is not notifiable under section 45 of the LRA 2002 where that application is for the entry of a restriction to protect a charging order relating to an interest under a trust.

**Paragraph 10.121**

**Recommendation 21.**

22.21 We recommend that the land registration rules should be amended to make express provision to permit the recording of a non-dispositive variation of a lease on either the landlord's registered title, or the tenant's registered title, or both.

**Paragraph 12.31**

**Recommendation 22.**

22.22 We recommend that the LRA 2002 should explicitly confirm that the ability of a person to seek alteration or rectification of the register to correct a mistake should not be capable of being a property right.

**Paragraph 13.32**

**Recommendation 23.**

22.23 We recommend that where the proprietor of a registered estate has been removed or omitted from the register by mistake, the proprietor should be restored to the register if he or she is in possession of the land, unless it would be unjust to do so.

22.24 We recommend that a person who would have been the successor in title to that proprietor were it not for the mistake in the register should be restored to the register if he or she is in possession of the land, unless it would be unjust to do so.

22.25 We recommend that:

(1) The protection afforded to the proprietor of a registered estate who has been removed or omitted from the register by mistake should not be confined to when he or she is personally in possession, but should apply where a proprietor would be considered a proprietor in possession within section 131 of the LRA 2002.

(2) The protection afforded to the proprietor of a registered estate who has been removed or omitted from the register by mistake should not be confined to situations where his or her possession of the land has been continuous, as long as he or she is the proprietor in possession when schedule 4 is applied.

**Paragraph 13.74**

**Recommendation 24.**

22.26 We recommend that the register should not be rectified in order to correct a mistake so as to prejudice the registered proprietor who is in possession of the land without that proprietor's consent, except where:

(1) The registered proprietor caused or contributed to the mistake by fraud or lack of proper care or;

(2) Less than ten years have passed since the original mistake and it would be unjust not to rectify the register.

22.27 We recommend that after ten years from the mistaken removal of the former registered proprietor from the register, the register should not be rectified to correct the mistake so as to prejudice the new registered proprietor even where the new proprietor is not in possession of the land. Exceptions should be provided only for where the former proprietor or his or her successors in title are in possession of the land, for where the new registered proprietor consents to the rectification, and for where the new registered proprietor caused or contributed to the mistake by fraud or lack of proper care.

**Paragraph 13.99**

**Recommendation 25.**

22.28 We recommend that a chargee who has been registered by mistake, or the chargee of a registered proprietor who has been registered by mistake, should not be able to oppose rectification of the register (once a mistake has been found by the registrar or a court) so as to correct that mistake by removing its charge.

**Paragraph 13.113**

**Recommendation 26.**

22.29 We recommend that the LRA 2002 provides that where the registration of a registered proprietor is held to be a mistake, registration of any estates or charges granted by the registered proprietor, and any entry made in the register in respect of a derivative interest granted by the registered proprietor, should also be classed as a mistake.

**Paragraph 13.135**

**Recommendation 27.**

22.30 We recommend that sections 11 to 12 and 29 to 30 of the LRA 2002 should be subject to schedule 4. This means that where, through a mistake, a derivative interest has been omitted or removed from the register, the holder of the interest should be able to apply for alteration or rectification of the register to have the priority of the interest over the registered proprietor restored. The outcome of the application should be determined by the same principles that apply when the application for alteration or rectification relates to the title to the estate, including the operation of the longstop.

22.31 We recommend that where a derivative interest in land is mistakenly omitted or removed from the register and consequently loses priority to another derivative interest, the court and the registrar should have the power to restore the interest to the register with the priority it would have had if the mistake had not been made.

22.32 We recommend that where the application for alteration or rectification relates to a derivative interest, the ten-year longstop on alteration of the register should run from the time when, as a result of the mistake, the holder of the derivative interest lost priority, not from the time of the mistake.

**Paragraph 13.192**

**Recommendation 28.**

22.33 We recommend the following:

(1) Cases of multiple registration should be resolved through the application of our scheme for rectification. Therefore, in a case of multiple registration, a claim to adverse possession should not be possible.

(2) Where as a result of the operation of the longstop a multiple registration remains in the register, the party who does not benefit from the longstop should have their title amended to remove the multiple registration. The party whose title is amended in such circumstances should be entitled to an indemnity.

**Paragraph 13.221**

**Recommendation 29.**

22.34 We recommend that where a first registered proprietor was bound by an interest through the operation of priority rules in unregistered land, but obtains priority over the interest on registration as a result of section 11, no indemnity should be payable on rectification of the register to include the interest at a time when the estate is still vested in the first registered proprietor.

**Paragraph 13.253**

**Recommendation 30.**

22.35 We recommend that alteration or rectification of the register should not be possible in respect of an interest that ceased to be overriding on 13 October 2013, where first registration of the affected estate takes place on or after that date. An exception should be made, however, where on first registration HM Land Registry omitted a notice in relation to that interest that should have been entered under rule 35 of the LRR 2003, or overlooked a caution against first registration.

**Paragraph 13.266**

**Recommendation 31.**

22.36 We recommend the introduction of a statutory duty of care in the following terms:

(1) A duty of care on the part of those who, in the course of a business or profession:

(a) make an application to the registrar;

(b) execute a deed or other document intended to be used in connection with an application for registration; or

(c) assist or advise in the same matters

to take reasonable care to verify the identity of the parties on whose behalf they are acting.

(2) The steps required to be taken to verify identity should be provided by HM Land Registry in directions.

(3) A breach of the statutory duty will not affect the ability of a party to claim an indemnity from HM Land Registry as a first resort. Instead, the breach of duty will enable HM Land Registry, having paid the indemnity, to recover sums paid from the conveyancer.

**Paragraph 14.73**

**Recommendation 32.**

22.37 We recommend that HM Land Registry's powers in respect of identity checks should be enhanced to enable the registrar, through directions, to provide mandatory requirements in respect of identity verification, including provision for electronic verification of identification and sub-delegation.

22.38 We recommend that HM Land Registry should be required to consult prior to the introduction of mandatory requirements in respect of identity verification.

**Paragraph 14.89**

**Recommendation 33.**

22.39 We recommend that

(1) for indemnity claims under paragraph 1(1)(a) of schedule 8, the limitation period should start to run from the date on which the register is rectified; and

(2) for indemnity claims under paragraph 1(1)(b), the limitation period should start to run from the date of the decision not to rectify the register.

**Paragraph 14.106**

**Recommendation 34.**

22.40 We recommend that the registrar's rights of recourse under schedule 8, paragraph 10(2) ought to be subject to the following statutory limitation periods.

(1) In a case within schedule 8, paragraph 10(2)(a), HM Land Registry should have the longer of (i) the remaining limitation period applicable to any cause of action the indemnity claimant would have had if an indemnity had not been paid; or (ii) 12 months from the date the indemnity is paid.

(2) In a case within schedule 8, paragraph 10(2)(b), HM Land Registry should have the longer of (i) the remaining limitation period applicable to any cause of action the person in whose favour rectification has been made would have had if the rectification had not been made; or (ii) 12 months from the date the register is rectified.

**Paragraph 14.117**

**Recommendation 35.**

22.41 We recommend that where an indemnity is payable in respect of the loss of an estate, interest or charge following a decision not to rectify, the value of the estate, interest or charge should be regarded as not exceeding its value at the date of the rectification decision, but valued as if both the estate, interest or charge and the land had remained in the condition it was in at the time of the mistake.

**Paragraph 14.138**

**Recommendation 36.**

22.42 We recommend the introduction of a non-exhaustive list of factors, to be included in the LRA 2002, to be considered to distinguish boundary and property disputes:

(1) The value of the disputed land as determined by an objective assessment of the facts;

(2) Subject to the assessment of the value of the land, the relative size of the disputed land in comparison to other land within the remainder of the registered proprietor's title; and

(3) Whether the common law presumptions about boundaries in land wholly determine the dispute.

22.43 We recommend that the LRA 2002 should grant a rule-making power to add further factors to be considered to distinguish boundary and property disputes.

**Paragraph 15.53**

**Recommendation 37.**

22.44 We recommend that, where the grant of a lease is not a registrable disposition, easements and profits à prendre which benefit that lease and which are created by the deed granting the lease should not be required to be completed by registration in order to operate at law.

**Paragraph 16.44**

**Recommendation 38.**

22.45 We recommend that all easements and profits à prendre benefiting leases which are not required to be created by deed by virtue of sections 52(2)(d) and 54(2) of the Law of Property Act 1925, including equitable easements, should be capable of being overriding interests.

**Paragraph 16.77**

**Recommendation 39.**

22.46 We recommend that a claimant to title to registered land through adverse possession should be prevented from:

(1) making a further application for registration under schedule 6, paragraph 1 when his or her previous application has been rejected under schedule 6, paragraph 5; and

(2) making an application for registration under schedule 6, paragraph 6, unless the conditions in that paragraph under which a second application is currently permitted are satisfied.

**Paragraph 17.26**

**Recommendation 40.**

22.47 We recommend that where a claimant relies on the condition in schedule 6, paragraph 5(4), he or she must apply within 12 months of when his or her reasonable belief that the land belonged to him or her came to an end.

**Paragraph 17.61**

**Recommendation 41.**

22.48 We recommend that where a person becomes the first registered proprietor of title to land which has in fact been extinguished by an adverse possessor, where (i) the registered proprietor did not have notice of the adverse possessor's claim and (ii) the adverse possessor is not in actual occupation of the land at the time of registration, an alteration of the register should be classed as rectification.

**Paragraph 17.87**

**Recommendation 42.**

22.49 We recommend that an adverse possessor of unregistered land should not be able to apply for first registration with possessory title until the unregistered proprietor's superior title has been extinguished under the Limitation Act 1980.

**Paragraph 17.103**

**Recommendation 43.**

22.50 We recommend that an adverse possessor of registered land should not be able to apply for first registration of any legal estate acquired by adverse possession (since the coming into force of the LRA 2002) except through the procedure in schedule 6.

**Paragraph 17.104**

**Recommendation 44.**

22.51 We recommend that where an adverse possessor in unregistered land is incorrectly registered with possessory title when the prior title has not been extinguished, the period of adverse possession should continue to run while the possessor's title is open.

**Paragraph 17.122**

**Recommendation 45.**

22.52 We recommend that it should be possible for a beneficiary of an express trust of a registered charge to make further advances on the security of that charge which rank in priority to a subsequent charge pursuant to the provisions of section 49 of the LRA 2002.

**Paragraph 18.62**

**Recommendation 46.**

22.53 We recommend that the LRA 2002 should be amended, to clarify that the owner's powers provisions in section 23(2) of the LRA 2002 are confined to the power of disposition in respect of the registered charge itself.

**Paragraph 19.34**

**Recommendation 47.**

22.54 We recommend that the powers of a chargee shall be taken, under section 52 of the LRA 2002, to be free from any limitation contained in that charge, or any sub-charge, unless there is a restriction limiting the powers of that chargee in the register. A purchaser from a chargee will not be affected by a limitation that is not entered in the register, but this protection afforded to the purchaser would not affect the lawfulness of the disposition as between the chargee and the chargor or sub-chargee.

**Paragraph 19.55**

**Recommendation 48.**

22.55 We recommend that:

(1) there should be a power in the LRA 2002 to make electronic conveyancing mandatory without also requiring simultaneous completion and registration of dispositions;

(2) there should continue to be a power in the LRA 2002 to make electronic conveyancing mandatory that also requires simultaneous completion and registration; and

(3) in a system without simultaneous completion and registration, equitable interests should be capable of arising in the interim period between completion and registration.

**Paragraph 20.33**

**Recommendation 49.**

22.56 We recommend that:

(1) following the enactment of secondary legislation by the Secretary of State under section 93, and under the proposed new section 92A (inserted by clause 27) the setting of the timetable for ending paper-based conveyancing, in each case on a disposition by disposition basis, should be delegated to the Chief Land Registrar; and

(2) the Chief Land Registrar should be required to consult with stakeholders before exercising his or her powers in respect of mandating electronic conveyancing.

**Paragraph 20.75**

**Recommendation 50.**

22.57 We recommend that in an electronic disposition to which section 91 of the LRA 2002 applies–

(1) a beneficiary's interest in a trust of land can be overreached when trustees collectively delegate their power to a single conveyancer to sign an electronic conveyance and give receipt for capital money;

(2) a beneficiary's interest in a trust of land can be overreached when two or more trustees, by power of attorney, grant to a single conveyancer the power to sign an electronic conveyance and give receipt for capital money; and

(3) evidence of the delegation to a single conveyancer, whether under section 11 of the Trustee Act 2000 or section 25 of the Trustee Act 1925, must be provided in the format required by HM Land Registry.

For overreaching to take place, it will remain necessary for the disposition that follows the delegation to be one with overreaching effect.

**Paragraph 20.114**

**Recommendation 51.**

22.58 We recommend that the Land Registration Division of the First-tier Tribunal (Property Chamber) should be given an express statutory power to decide where a boundary lies when an application is referred to it under section 60(3) of the LRA 2002.

**Paragraph 21.39**

**Recommendation 52.**

22.59 We recommend that in making a determination in accordance with Recommendation 51, the Land Registration Division of the First-tier Tribunal (Property Chamber) shall give a direction to the registrar as to where the determined boundary lies.

**Paragraph 21.43**

**Recommendation 53.**

22.60 We recommend that the jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber) should be expanded to include an express statutory jurisdiction in cases that come before it to allow it:

(1) to determine how an equity by estoppel should be satisfied; and

(2) to declare the extent of a beneficial interest.

**Paragraph 21.86**

# Appendix 1: Draft Land Registration (Amendment) Bill

# Land Registration (Amendment) Bill

CONTENTS

A

# B I L L

TO

Amend the Land Registration Act 2002; and for connected purposes

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

*Registration of title*

**1 Estates in mines and minerals: requirement to register**

(1) Section 4 of the Land Registration Act 2002 is amended in accordance with subsections (2) to (6).

(2) In subsection (1)—

(a) after paragraph (ba) (as inserted by section 3) insert—

"(bb) the transfer for valuable consideration of a qualifying mines and minerals estate;

(bc) the transfer for valuable or other consideration, or by way of gift, of part of a qualifying estate where, as a result of the transfer, the estate vested in the transferee is—

(i) a freehold estate in mines and minerals held apart from the surface, or

(ii) a leasehold estate in mines and minerals held apart from the surface for a term of years absolute of more than seven years from the date of the transfer;";

(b) after paragraph (f) insert—

"(fa) the grant out of a qualifying mines and minerals estate of an estate in land—

(i) for a term of years absolute of more than seven years from the date of the grant, and

(ii) for valuable consideration;

(fb) the grant out of a qualifying estate of an estate in mines and minerals which is—

(i) an estate in land,

(ii) for a term of years absolute of more than seven years from the date of the grant, and

(iii) for valuable or other consideration, or by way of gift,

where, as a result of the grant, the estate in mines and minerals will be held apart from the surface;".

(3) After subsection (2) insert—

"(2A) Also for those purposes, a qualifying mines and minerals estate is an unregistered legal estate in land which is—

(a) a freehold estate in mines and minerals held apart from the surface, or

(b) a leasehold estate in mines and minerals held apart from the surface for a term which, at the time of the transfer or grant, has more than seven years to run."

(4) In subsection (6), for "and (c)" substitute ", (bc), (c) and (fb)".

(5) In subsection (7), for "and (c)" substitute ", (bc), (c) and (fb)".

(6) In subsection (9), after "land"" insert "(apart from in paragraphs (fa) and (fb) of subsection (1) and subsection (2A))".

(7) In section 80 of that Act (compulsory registration of grants out of demesne land), for subsection (3) substitute—

"(3) In the case of a grant of an estate in mines and minerals held apart from the surface, subsection (1) applies only to a grant for valuable or other consideration or by way of gift."

(8) In section 118(1) of that Act (power to reduce qualifying term), for paragraph (b) substitute—

"(b) section 4(1)(bc)(ii), (c)(i), (fa)(i), (fb)(ii), (2)(b) and (2A)(b),".

(9) In Schedule 3 to that Act (unregistered interests which override registered dispositions)—

(a) in paragraph 8—

(i) the existing text becomes sub-paragraph (1);

(ii) after that sub-paragraph insert—

"(2) Sub-paragraph (1) does not apply to a right once it is transferred by a transfer which gives rise to a requirement to register by virtue of section 4(1)(bb).";

(b) in paragraph 9—

(i) the existing text becomes sub-paragraph (1);

(ii) after that sub-paragraph insert—

"(2) Sub-paragraph (1) does not apply to a right once it is transferred by a transfer which gives rise to a requirement to register by virtue of section 4(1)(bb)."

**2 Estates in mines and minerals: coal**

(1) The Land Registration Act 2002 is amended as follows.

(2) In section 4 (when title must be registered)—

(a) after subsection (5A) insert—

"(5B) Paragraphs (bb), (fa) and (fb) of subsection (1) do not apply to the transfer or grant of an estate in mines and minerals which consists of, or includes, coal or a coal mine by—

(a) the Coal Authority, or

(b) any person who derives title under or by virtue of a transfer or grant from the Coal Authority.

(5C) Paragraph (bc) of subsection (1) does not apply to a transfer where the estate in mines and minerals vested in the transferee consists of, or includes, coal or a coal mine where the transfer is by—

(a) the Coal Authority, or

(b) any person who derives title under or by virtue of a transfer or grant from the Coal Authority.";

(b) in subsection (9), before the definition of "land" insert—

""coal" and "coal mine" have the same meaning as in the Coal Industry Act 1994 (see section 65(1) of that Act);".

(3) In section 33 (excluded interests), after subsection (2) (as inserted by section 3) insert—

"(3) Subsection (1)(e) does not apply to an interest in any coal or coal mine which is acquired by a transfer or grant to which the requirement of registration applies."

(4) In Schedule 1 (unregistered interests which override first registration), in paragraph 7—

(a) the existing text becomes sub-paragraph (1);

(b) after that sub-paragraph insert—

"(2) Sub-paragraph (1) does not apply to—

(a) an interest once it is transferred by a transfer which gives rise to a requirement to register by virtue of section 4(1)(bb) or (bc), or

(b) an interest which is granted out of an interest mentioned in sub-paragraph (1) by a grant which gives rise to a requirement to register by virtue of section 4(1)(fa) or (fb)."

(5) In Schedule 3 (unregistered interests which override registered dispositions), in paragraph 7—

(a) the existing text becomes sub-paragraph (1);

(b) after that sub-paragraph insert—

"(2) Sub-paragraph (1) does not apply to—

(a) an interest once it is transferred by a transfer which gives rise to a requirement to register by virtue of section 4(1)(bb) or (bc), or

(b) an interest which is granted out of an interest mentioned in sub-paragraph (1) by a grant which gives rise to a requirement to register by virtue of section 4(1)(fa) or (fb)."

**3 Discontinuous leases: requirement to register**

(1) The Land Registration Act 2002 is amended in accordance with subsections (2) to (5).

(2) In section 4 (when title must be registered), in subsection (1)—

(a) after paragraph (b) insert—

"(ba) the transfer of an unregistered legal estate in land which is a leasehold estate where the right to possession under the lease is discontinuous;";

(b) after paragraph (d) insert—

"(da) the grant out of a qualifying estate of an estate in land for a term of years absolute under which the right to possession is discontinuous;".

(3) In section 33 (excluded interests)—

(a) the existing text becomes subsection (1);

(b) after that subsection insert—

"(2) Subsection (1)(b) does not apply to a leasehold estate in land if the right to possession under the lease is discontinuous."

(4) In Schedule 1 (unregistered interests which override first registration), in paragraph 1, after "(d)," insert "(da),".

(5) In Schedule 3 (unregistered interests which override registered dispositions), in paragraph 1, in paragraph (a), after "(d)," insert "(da),".

(6) The amendments made by subsections (4) and (5) apply to a lease granted before the day on which the amendments come into force only if the lease is transferred on or after that day.

(7) In relation to a lease to which the amendments made by subsections (4) and (5) apply, the lease is not by virtue of paragraph 12 of Schedule 12 to the Land Registration Act 2002 an interest to be taken to be included in paragraph 1 of each of Schedules 1 and 3 to that Act.

**4 Sections 1 and 3: consequential amendments**

(1) The Land Registration Act 2002 is amended as follows.

(2) In section 4 (when title must be registered)—

(a) in subsection (3), for "subsection (1)(a)" substitute "paragraphs (a), (ba), (bb) and (bc) of subsection (1)";

(b) in subsection (4), for "Subsection (1)(a) does" substitute "Paragraphs (a), (ba), (bb) and (bc) of subsection (1) do";

(c) in subsection (5), for "Subsection (1)(c) does" substitute "Paragraphs (c), (da), (fa) and (fb) of subsection (1) do".

(3) In section 7 (effect of non-compliance with section 6), in subsection (2)(a), after "or (b)" insert "to (bc)".

**5 Relationship between Land Charges Act 1972 and Land Registration Act 2002**

(1) In section 74 of the Land Registration Act 2002 (effective date of registration)—

(a) the existing text becomes subsection (1);

(b) after that subsection insert—

"(2) Where an entry has effect as mentioned in subsection (1), section 4 of the Land Charges Act 1972 (effect of land charges and protection of purchasers) ceases to have effect in relation to the legal estate which is the subject of the entry from the time of the making of the application."

(2) In section 17(1) of the Land Charges Act 1972 (interpretation), in the definition of "registered land", at the end insert ", ignoring section 74 of that Act and any rules made under that Act which provide for registration to have effect from a time before an entry is made in the register".

**6 Right to lodge caution: interests under trusts**

In section 15 of the Land Registration Act 2002 (right to lodge), after subsection (2) insert—

"(2A) For the purposes of subsection (1)(b), an interest affecting a qualifying estate includes an interest affecting a beneficial interest in a qualifying estate."

*Dispositions of registered land*

**7 Registered charge: scope of owner's powers**

In section 23 of the Land Registration Act 2002 (owner's powers)—

(a) in subsection (2), at the beginning of paragraph (a) insert "subject to subsection (2A),";

(b) after that subsection insert—

"(2A) Subsection (2)(a) does not confer power to make a disposition in relation to the property subject to the registered charge."

**8 Effect of exercise of owner's powers by person entitled to be registered**

(1) Section 24 of the Land Registration Act 2002 (right to exercise owner's powers) is amended in accordance with subsections (2) and (3).

(2) The existing text becomes subsection (1).

(3) After that subsection insert—

"(2) An exercise of owner's powers by a person falling within subsection (1)(b) is not prevented from operating at law merely because the person is not the registered proprietor of the registered estate or charge in relation to which the powers are exercised."

(4) The amendments made by this section have effect only in relation to an exercise of owner's powers on or after the day this section comes into force.

**9 Limitations on owner's powers: trustees**

In section 26 of the Land Registration Act 2002 (protection of disponees), after

subsection (1) insert—

"(1A) In the case of a person falling within section 24(1)(a), the reference in subsection (1) to a person's right to exercise owner's powers being free from any limitation affecting the validity of a disposition includes—

(a) any limitation arising as a result of section 6(6) or (8) or section 8(2) of the Trusts of Land and Appointment of Trustees Act 1996 (limitation on exercise of general powers of trustees), and

(b) in so far as section 6 of that Act does not apply to a trust of land, any limitation arising from the provisions of the disposition creating that trust of land."

**10 Limitations on owner's powers: persons entitled to be registered**

(1) Section 26 of the Land Registration Act 2002 (protection of disponees) is amended in accordance with subsections (2) and (3).

(2) In subsection (1), for "subsection (2)" substitute "subsections (2) and (2A)".

(3) After subsection (2) insert—

"(2A) In the case of a person falling within section 24(1)(b), subsection (1) does not apply to a limitation—

(a) affecting the validity of a disposition by that person or by an intermediate person, and

(b) which is of a kind which could be reflected by an entry in the register.

(2B) In subsection (2A)(a), an "intermediate person" means a person who, at any time since the registered proprietor of the registered estate or charge was registered as such, fell within section 24(1)(b) in relation to the registered estate or charge."

(4) The amendments made by this section have effect—

(a) whenever the entitlement to be registered as proprietor arose, but

(b) only in relation to an exercise of owner's powers on or after the day this section comes into force.

*Notices and restrictions*

**11 Refusal to enter unilateral notice**

(1) The Land Registration Act 2002 is amended in accordance with subsections (2) and (3).

(2) After section 34 insert—

**"34A Refusal to enter unilateral notice: former overriding interests**

(1) This section applies to an application for a unilateral notice under section 34(2)(b) in respect of a former overriding interest where there has been a relevant disposition of the registered estate claimed to be affected by that interest.

(2) No notice may be entered in the register if—

(a) the application does not contain reasons why, despite the relevant disposition, the interest affects the registered estate, or

(b) the registrar is satisfied that the reasons given are groundless.

(3) For the purposes of subsection (1) each of the following is a "former overriding interest"—

(a) a franchise;

(b) a manorial right;

(c) a right to rent which was reserved to the Crown on the granting of any freehold estate (whether or not the right is still vested in the Crown);

(d) a non-statutory right in respect of an embankment or sea or river wall;

(e) a right to payment in lieu of tithe;

(f) a right in respect of the repair of a church chancel.

(4) In this section, a "relevant disposition" means a registrable disposition in respect of which the relevant registration requirements are met on or after 13 October 2013."

(3) In the heading of section 35 for "notices" substitute "notices: procedure".

**12 Objection to cancellation of unilateral notice**

(1) The Land Registration Act 2002 is amended as follows.

(2) In section 36 (cancellation of unilateral notices), for subsection (3) substitute—

"(3) The registrar must cancel the notice if—

(a) the right to object to the application is not exercised before the end of such period as rules may provide, or

(b) the registrar is not satisfied as to the validity of the beneficiary's claim."

(3) In section 73 (objections)—

(a) for subsection (1) substitute—

"(1) This section applies in relation to an application to the registrar other than an application under section 36.

(1A) Subject to subsection (2), anyone may object to an application to which this section applies.";

(b) omit subsection (3).

(4) After section 73 insert—

**"73A Objections: applications under section 36**

(1) This section applies in relation to an application to the registrar under section 36.

(2) The person shown in the register as the beneficiary of the notice to which the application relates, or such other person as rules may provide, may object to such an application.

(3) The right to object under this section is subject to rules.

(4) Where an objection is made under this section, the registrar—

(a) must give notice of the objection to the applicant, and

(b) unless the registrar cancels the notice by virtue of section 36(3)(b), may not determine the application until the objection has been disposed of.

(5) If it is not possible to dispose by agreement of an objection under this section, the registrar must refer the matter to the First-tier Tribunal.

(6) Rules may make provision about references under subsection (5)."

**13 Section 12: consequential amendments**

(1) The Land Registration Act 2002 is amended as follows.

(2) In section 36 (cancellation of unilateral notices), after subsection (3) insert—

"(3A) The reference in subsection (3) to the right to object is to the right under section 73A."

(3) In section 77 (duty to act reasonably), in subsection (1)(c), after "registrar" insert "under section 73 or 73A".

(4) In section 108 (jurisdiction), in subsection (1)(a), after "section 73(7)" insert "or section 73A(5)".

(5) In section 110 (functions in relation to disputes), in subsections (1) and (3), after "section 73(7)" insert "or section 73A(5)".

(6) In section 132 (general interpretation), in subsection (3), at the beginning of paragraph (c) insert "apart from in sections 36 and 77,".

**14 Restrictions to protect contractual rights**

(1) Section 42 of the Land Registration Act 2002 (power of registrar to enter restriction in the register) is amended as follows.

(2) After subsection (2) insert—

"(2A) The power under subsection (1) is subject to rules which may make provision—

(a) that no restriction may be entered under subsection (1)(a) for the purpose of preventing invalidity or unlawfulness arising as a result of a breach of a contractual obligation of a kind specified in the rules;

(b) that no restriction may be entered under subsection (1)(c) for the purpose of protecting a contractual right or claim of a kind specified in the rules;

(c) specifying the form a restriction must take if it is entered for the purpose of—

(i) preventing invalidity or unlawfulness arising as a result of a breach of a contractual obligation of a kind specified in the rules, or

(ii) protecting a contractual right or claim of a kind specified in the rules.

(2B) In subsection (2A), a "contractual obligation" and a "contractual right or claim" include an obligation or a right or claim (as the case may be) arising under a covenant."

(3) After subsection (4) insert—

"(4A) Before making rules under this section the Secretary of State must consult such persons as the Secretary of State considers appropriate.

(4B) The consultation required by subsection (4A) must be carried out before the Secretary of State obtains the advice and assistance of the Rule Committee under section 127."

**15 Notification of application for a restriction: interests under trusts**

In section 45 of the Land Registration Act 2002 (notifiable applications), in subsection (3)—

(a) omit the "or" following paragraph (b);

(b) at the end of paragraph (c) insert ", or

(d) an application for the entry of a restriction reflecting that a person is entitled to the benefit of a charging order relating to an interest under a trust."

**16 Court ordered restrictions to protect interests under trusts**

In section 46 of the Land Registration Act 2002 (power of court to order entry of restriction in the register), after subsection (5) insert—

"(6) For the purposes of subsection (1), a person entitled to the benefit of a charging order relating to an interest under a trust is to be treated as having a right or claim in relation to the trust property.

(7) If rules under section 43(2)(d) provide for a standard form of restriction to be entered in the register for the purpose of protecting a right or claim falling within subsection (6), an order made under this section for that purpose must require the registrar to enter a restriction in that form."

*Charges*

**17 Priority of further advances**

(1) Section 49 of the Land Registration Act 2002 (tacking and further advances) is amended in accordance with subsections (2) to (5).

(2) In subsection (1)—

(a) for "The proprietor of" substitute "A relevant person in relation to";

(b) for "he" substitute "the proprietor of the registered charge".

(3) In subsection (3) for "The proprietor of" substitute "A relevant person in relation to".

(4) In subsection (4) for "The proprietor of" substitute "A relevant person in relation to".

(5) After subsection (5) insert—

"(5A) Each of the following is a relevant person in relation to a registered charge—

(a) the proprietor of the charge;

(b) a beneficiary under an express trust of the registered charge.

(5B) A person falling within subsection (5A)(b) may make a further advance on the security of the charge ranking in priority to a subsequent charge only if—

(a) at the time of the creation of the subsequent charge there was an entry in the register, made in accordance with rules, which indicated that persons other than the proprietor of the registered charge may make such further advances, and

(b) the person has the agreement of every other beneficiary under the express trust of the registered charge."

(6) The amendments made by this section have effect only in relation to charges which are registered on or after the day this section comes into force.

**18 Powers of proprietor of registered charge**

(1) Section 52 of the Land Registration Act 2002 (protection of disponees) is amended as follows—

(a) in subsection (1), for "Subject to any entry in the register to the contrary, the" substitute "The";

(b) after that subsection insert—

"(1A) Subsection (1) is subject to any limitation on the powers of disposition of the proprietor which is reflected by a restriction in the register."

(2) The amendments made by subsection (1) apply to a registered charge whether created before or after the commencement of this section.

*Alteration of the register*

**19 Multiple registration**

(1) The Land Registration Act 2002 is amended as follows.

(2) In Schedule 4 (alteration of the register)—

(a) after paragraph 1 insert—

*"Multiple registration*

1A (1) For the purposes of this Schedule, the register contains a multiple registration if—

(a) more than one person is registered as proprietor of the same registered estate or charge (otherwise than as joint tenants), or

(b) the same land is comprised in two registered estates and neither of the exceptions in sub-paragraph (2) applies.

(2) The exceptions are—

(a) that one of the registered estates is a leasehold estate which has been granted out of the other registered estate or the registered estates have otherwise been derived from the same estate (whether freehold or leasehold), or

(b) that the proprietor of one of the registered estates is registered with possessory title and the estate of the other proprietor can be enforced against that title as described in section 11(7) or 12(8).";

(b) in paragraph 2 (power to alter the register), after sub-paragraph (1) insert—

"(1A) If the register contains a multiple registration, the power in sub-paragraph (1) includes power to remove the multiple registration by—

(a) removing a registered title from the register, or

(b) removing land from a registered title,

even if the registration of the title, or the inclusion of the land in the registered title, was not a mistake."

(3) In paragraph 11 of Schedule 6 (meaning of "adverse possession"), after sub-paragraph (2) insert—

"(2A) A person is not in adverse possession of an estate in land for the purposes of this Schedule at any time when—

(a) the register contains a multiple registration (within the meaning of paragraph 1A of Schedule 4) of which the land concerned is part, and

(b) the person is registered as proprietor of an estate which includes the land concerned."

(4) In paragraph 1 of Schedule 8 (entitlement to indemnity), in sub-paragraph (2), after paragraph (a) insert—

"(aa) any person who suffers loss by reason of an alteration of the register made by virtue of paragraph 2(1A) of Schedule 4 is to be regarded as having suffered loss by reason of rectification of the register,".

**20 Power to alter the register**

(1) Schedule 4 to the Land Registration Act 2002 (alteration of the register) is amended in accordance with subsections (2) to (7).

(2) In paragraph 2 (power to alter the register)—

(a) in sub-paragraph (1) for the words from "court" to "alteration of" substitute "registrar may alter, or the court may make an order for the alteration of,";

(b) after sub-paragraph (1A) (as inserted by section 19) insert—

"(1B) The registrar may also exercise the power in sub-paragraph (1) for the purpose of removing a superfluous entry.

(1C) The power conferred on the registrar by sub-paragraph (1) is exercisable without an order of the court.";

(c) after sub-paragraph 2 insert—

"(3) In paragraphs 3A to 3E, a reference to the power of the court to alter the register is a reference to the power of the court to make an order for alteration of the register."

(3) In the italic heading before paragraph 2 for "pursuant to a court order" substitute "of the register by the registrar or the court".

(4) For paragraph 3 (exercise by court of power to rectify the register) substitute—

*"Exercise of power under paragraph 2: general*

3A (1) Paragraphs 3B to 3E contain provision about whether or not the registrar or the court should exercise the power conferred by paragraph 2—

(a) on an application to alter the register, or

(b) in any proceedings.

(2) Paragraphs 3B to 3D apply to the power to alter the register under paragraph 2, so far as relating to rectification.

*Exercise of power under paragraph 2(1)(a): registered proprietor in possession*

3B (1) This paragraph applies to the extent that an alteration of the register to correct a mistake would prejudicially affect the title of the proprietor of a registered estate in land where the land concerned is in the proprietor's possession.

(2) No alteration or order may be made under paragraph 2 unless—

(a) the registered proprietor consents to the alteration,

(b) the registered proprietor by fraud or lack of proper care caused or substantially contributed to the mistake, or

(c) the application to alter the register was made, or the proceedings were commenced, before the end of the period of 10 years beginning with the relevant date and it would be unjust for the alteration not to be made.

(3) In sub-paragraph (2)(c), the "relevant date" is—

(a) in a case where the mistake to which the application or proceedings relate is a mistake only by reason of paragraph 4B, the date on which the entry was made in the register in relation to the original estate, right or interest within the meaning of that paragraph;

(b) in a case where the mistake to which the application or proceedings relate resulted in—

(i) an interest ceasing to affect a registered estate by virtue of section 11(4) or 12(4), or

(ii) an interest being postponed to a registered estate or charge by virtue of section 29 or 30,

the date on which the interest ceased to affect, or was postponed to, the registered estate or charge;

(c) in any other case, the date of the mistake.

(4) In this paragraph the reference to the title of the proprietor of a registered estate in land includes the proprietor's title to any registered estate which subsists for the benefit of the estate in land.

*Exercise of power under paragraph 2(1)(a): former registered proprietor (or successor) in possession*

3C (1) This paragraph applies to the power under paragraph 2 to alter the register to correct a mistake where—

(a) the mistake concerns the removal from the register of the title of a person who was the proprietor of a registered estate in land, and

(b) that person ("the former proprietor"), or a relevant person, is in possession of the land.

(2) The registrar or the court must exercise the power to alter the register unless—

(a) the former proprietor or (if the former proprietor is not in possession of the land) the relevant person consents to the register not being altered,

(b) the former proprietor or the relevant person by fraud or lack of proper care caused or substantially contributed to the mistake, or

(c) it would be unjust for the alteration to be made.

(3) In this paragraph the reference to the title of the former proprietor of a registered estate in land includes the former proprietor's title to any registered estate which subsists for the benefit of the estate in land.

(4) In this paragraph a "relevant person", in relation to a registered estate in land, is a person who, but for the mistake, would have been a successor in title of the former proprietor to that estate.

(5) For the purposes of this paragraph, land is in the possession of a person if it is physically in that person's possession.

(6) In the case of the following relationships, land which is (or is treated as being) in the possession of the second-mentioned person is to be treated for the purposes of sub-paragraph (5) as in the possession of the first-mentioned person—

(a) landlord and tenant;

(b) licensor and licensee;

(c) trustee and beneficiary.

*Exercise of power under paragraph 2(1)(a): other cases*

3D (1) This paragraph applies to the power to alter the register to correct a mistake if neither paragraph 3B nor 3C applies.

(2) The registrar or the court must exercise the power to alter the register unless—

(a) sub-paragraph (3) applies,

(b) the alteration would result in a person being, or remaining, registered as proprietor where that person by fraud or lack of

proper care caused or substantially contributed to the mistake, or

(c) there are exceptional circumstances which justify the registrar or the court not exercising the power to alter the register.

But paragraph (c) does not apply where the alteration affects the title of the proprietor of a registered charge.

(3) The registrar or the court may not exercise the power to alter the register if the application was made, or the proceedings were commenced, after the end of the period of 10 years beginning with the relevant date unless the registered proprietor whose title would be prejudicially affected—

(a) consents to the alteration, or

(b) by fraud or lack of proper care caused or substantially contributed to the mistake.

(4) In sub-paragraph (3), the "relevant date" is—

(a) in a case where the mistake to which the application or proceedings relate is a mistake only by reason of paragraph 4B, the date on which the entry was made in relation to the original estate, right or interest within the meaning of that paragraph;

(b) in a case where the mistake to which the application or proceedings relate resulted in—

(i) an interest ceasing to affect a registered estate by virtue of section 11(4) or 12(4), or

(ii) an interest being postponed to a registered estate or charge by virtue of section 29 or 30,

the date on which the interest ceased to affect, or was postponed to, the registered estate or charge;

(c) in any other case, the date of the mistake.

(5) Sub-paragraph (3) does not apply where the alteration involves removing a multiple registration.

*Exercise of power to remove a multiple registration (other than to correct a mistake)*

3E (1) This paragraph applies to the power to alter the register under paragraph 2 so far as the alteration—

(a) involves the removal of a multiple registration by virtue of paragraph 2(1A), and

(b) does not involve the removal of an entry in the register which has been made by mistake.

(2) To the extent that the alteration would prejudicially affect the title of the proprietor of a registered estate in land where the land concerned is in the proprietor's possession, no alteration or order may be made under paragraph 2 unless—

(a) the registered proprietor consents to the alteration,

(b) the registered proprietor by fraud or lack of proper care caused the register to contain or substantially contributed to the register containing the multiple registration, or

(c) the application to alter the register was made, or the proceedings were commenced, before the end of the period of 10 years beginning with the date on which the register first contained the multiple registration and it would be unjust for the alteration not to be made.

(3) In this paragraph the reference to the title of the proprietor of a registered estate in land includes the proprietor's title to any registered estate which subsists for the benefit of the estate in land."

(5) In paragraph 4 (power to make rules)—

(a) in paragraph (a), after "rectification" insert "or removing a multiple registration";

(b) after paragraph (c), insert—

"(d) make provision about how the registrar is to alter the register in exercise of the power conferred on the registrar by paragraph 2;

(e) make provision about applications to the registrar for alteration, including provision requiring the making of such applications;

(f) make provision about procedure in relation to an exercise by the registrar of that power, whether on application or otherwise."

(6) Before paragraph 4 insert—

*"Rules about exercising the power under paragraph 2".*

(7) Omit paragraphs 5 to 7.

(8) After the commencement of this section any provision of the Land Registration Rules 2003 (S.I. 2003/1417) made pursuant to the power conferred by paragraph 7 of Schedule 4 to the Land Registration Act 2002 have effect as if made under paragraph 4 of that Schedule.

**21 Alteration of the register: effect of existence of power of registrar and court**

In Schedule 4 to the Land Registration Act 2002 (alteration of the register), after paragraph 4 insert—

*"Effect of power to alter the register*

4A (1) The existence of a power under this Schedule to alter the register does not, for the purposes of this Act, confer on any person a right or interest affecting a registered estate or charge.

(2) This paragraph is to be treated as always having had effect."

**22 Effect of mistake on subsequent entries**

(1) In Schedule 4 to the Land Registration Act 2002 (alteration of the register) after paragraph 4A (as inserted by section 21) insert—

*"Effect of mistake on subsequent entries*

4B (1) Subject to sub-paragraph (2), if—

(a) by mistake, an entry is made in the register in relation to an estate, right or interest ("the original estate, right or interest"),

(b) an entry is made in the register pursuant to a relevant event ("the subsequent entry"), and

(c) the subsequent entry could not have been made if the entry in relation to the original estate, right or interest had not been made,

the subsequent entry is to be taken to be a mistake for the purposes of paragraphs 1 and 2 of this Schedule and paragraph 1 of Schedule 8.

(2) A subsequent entry is not to be taken to be a mistake by virtue of sub-paragraph (1) if the conditions in sub-paragraphs (3) and (4) are met.

(3) The condition in this sub-paragraph is that a rectification decision has been made about or in connection with—

(a) the mistake in relation to the original estate, right or interest, and

(b) every other mistake in relation to any entry in the register—

(i) made since the entry in relation to the original estate, right or interest, and

(ii) without which the subsequent entry could not have been made.

(4) The condition in this sub-paragraph is that in relation to at least one of the mistakes mentioned in sub-paragraph (3), the rectification decision was a decision not to alter the register.

(5) For the purposes of this paragraph a "relevant event" is—

(a) a transfer of the original estate, right or interest;

(b) a grant of an estate, right or interest out of the original estate, right or interest;

(c) a grant of an estate, right or interest out of the estate, right or interest first mentioned in paragraph (b) or out of an estate, right or interest granted out of that estate, right or interest and so on;

(d) a transfer of an estate, right or interest granted as mentioned in paragraph (b) or (c).

(6) For the purposes of this paragraph a "rectification decision" is a decision under paragraph 2 whether to alter, or make an order for alteration of, the register for the purpose of correcting a mistake.

(7) The reference in sub-paragraph (1)(a) to a mistake in relation to an entry in the register does not include an entry in the register which would not be a mistake if it were not for the operation of sub-paragraph (1)."

(2) In Schedule 8 to the Land Registration Act 2002 (indemnities), in paragraph 11 (interpretation), after sub-paragraph (1) insert—

"(1A) See also paragraph 4B of Schedule 4 (which provides for certain entries in the register to be taken to be mistakes for the purposes of paragraph 1 of this Schedule)."

**23 Alteration of the register: former overriding interests**

(1) Schedule 4 to the Land Registration Act 2002 (alteration of the register) is amended as follows.

(2) After paragraph 4B (as inserted by section 22) insert—

*"Alteration and former overriding interests*

4C (1) Sub-paragraphs (2) and (3) apply if—

(a) an unregistered freehold or leasehold estate is affected by a former overriding interest,

(b) a person is registered as proprietor of the estate under Chapter 1 of Part 2 (first registration of title), and

(c) as a result of section 11(4) or 12(4) the estate vested in the proprietor is no longer affected by the former overriding interest.

(2) The registrar or the court may (subject to paragraphs 3A to 3D) exercise the power under paragraph 2 to alter the register so that the estate is affected by the former overriding interest only if the reason the estate vested in the proprietor was not subject to the former overriding interest is that—

(a) the registrar failed to fulfil a duty imposed by or under this Act, and

(b) as a result of that failure, no notice in respect of the former overriding interest was included in the register for the purposes of section 11(4)(a) or 12(4)(b) (as the case may be).

(3) If the registrar or the court may not, as a result of sub-paragraph (2), exercise the power under paragraph 2 the person claiming to be entitled to the benefit of the former overriding interest is not entitled to an indemnity under paragraph 1(1)(b) of Schedule 8.

(4) For the purposes of this paragraph each of the following is a "former overriding interest"—

(a) a franchise;

(b) a manorial right;

(c) a right to rent which was reserved to the Crown on the granting of any freehold estate (whether or not the right is still vested in the Crown);

(d) a non-statutory right in respect of an embankment or sea or river wall;

(e) a right to payment in lieu of tithe;

(f) a right in respect of the repair of a church chancel.

(5) See also paragraph 4D if the registrar or the court may exercise the power under paragraph 2 to alter the register so that the estate is affected by the former overriding interest."

**24 Alteration of the register: effect on first registered proprietor**

(1) Schedule 4 to the Land Registration Act 2002 (alteration of the register) is amended as follows.

(2) After paragraph 4C (as inserted by section 23) insert—

*"Alteration and first registered proprietors*

4D (1) Sub-paragraphs (2) and (3) apply if—

(a) an unregistered freehold or leasehold estate is affected by an interest,

(b) a person ("the first registered proprietor") is registered as proprietor of the estate under Chapter 1 of Part 2 (first registration of title), and

(c) as a result of section 11(4) or 12(4) the estate vested in the first registered proprietor is no longer affected by the interest.

(2) If the registrar or the court exercises the power under paragraph 2 to alter the register so that the estate is affected by the interest, that alteration does not for the purposes of this Schedule or Schedule 8 prejudicially affect the title of—

(a) the first registered proprietor, or

(b) a successor in title of the first registered proprietor, other than a person who derives title under a registrable disposition for valuable consideration or a person who derives title from such a person.

(3) If the registrar or the court decides not to exercise the power under paragraph 2 to alter the register, so that the estate remains unaffected by the interest, the effect of sub-paragraph (2) is to be ignored in determining whether a person is entitled to be indemnified under paragraph 1(1)(b) of Schedule 8."

**25 Alteration of the register: priority of derivative interests**

In Schedule 4 to the Land Registration Act 2002 (alteration of the register) for paragraph 8, and the italic heading before it, substitute—

*"Alteration and priority of interests*

8 (1) Sub-paragraph (2) applies where, as a result of a mistake—

(a) an interest ceases to affect an estate by virtue of section 11(4) or 12(4), or

(b) an interest is postponed to a registered estate or charge by virtue of section 29 or 30.

(2) An exercise by the registrar or the court of the power to correct the mistake mentioned in sub-paragraph (1) includes power to make such alterations to the register as are necessary so that—

(a) the interest will affect the registered estate, and

(b) the interest will have the priority, in relation to any other interest affecting the registered estate or charge concerned, it would have had, had the mistake not been made.

(3) For the purposes of this Schedule and Schedule 8 an alteration of the register made pursuant to sub-paragraph (2) is the correction of a mistake.

(4) Where on an application to alter the register, or in any proceedings, the power of the registrar or the court to make any of the alterations to which the application or proceedings relate arises by virtue of sub-paragraph (2), paragraphs 3B to 3D apply in respect of each of those alterations as if—

(a) in paragraph 3B(1), the reference to "to correct a mistake" were a reference to "made by virtue of paragraph 8(2)";

(b) in the opening words of paragraph 3C(1) and in paragraph 3D(1), the reference to "to correct a mistake" were a reference to "arising by virtue of paragraph 8(2)";

(c) all other references to "the mistake" were a reference to "the mistake mentioned in paragraph 8(1)"."

**26 Mistakes relating to a boundary**

(1) In Schedule 4 to the Land Registration Act 2002 (alteration of the register), after paragraph 1A (as inserted by section 19) insert—

*"Mistake relating to a boundary*

1B (1) Sub-paragraphs (2) to (4) apply when the registrar or the court is deciding for the purposes of this Schedule or Schedule 8 whether an alteration of the register in relation to a boundary which has not been determined under section 60 would prejudicially affect the title of a registered proprietor.

(2) The registrar and the court must have regard—

(a) first to the value (financial and otherwise) of the area which would be removed from the description of the land in the register of that proprietor's title, both in relation to the land remaining and independently of that land, and

(b) then to the size of the area which would be removed relative to the size of the area remaining.

(3) If an alteration would be based solely on the application of common law presumptions about boundaries of land, the alteration would not prejudicially affect the title of a registered proprietor unless the particular circumstances of the case indicate otherwise.

(4) The registrar and the court may have regard to any other factor which the registrar or the court (as the case may be) considers appropriate.

(5) Rules may make provision about additional factors to which the registrar and the court must have regard for the purposes mentioned in sub-paragraph (1)."

(2) In Schedule 8 to the Land Registration Act 2002 (indemnities), in paragraph 11 (interpretation), after sub-paragraph (2) insert—

"(3) See also paragraph 1B of Schedule 4 (which is about decisions of the registrar and the court for the purposes of this Schedule as to whether an alteration of the register in relation to a boundary prejudicially affects the title of a registered proprietor)."

*Electronic conveyancing*

**27 Electronic dispositions**

(1) The Land Registration Act 2002 is amended as follows.

(2) After section 92 insert—

**"92A Power to require electronic dispositions**

(1) Rules may provide that this section applies to a disposition of—

(a) a registered estate or charge, or

(b) an interest which is the subject of a notice in the register,

which is of a description specified, for the purposes of this section, in a notice published by the registrar.

(2) Rules may make further provision about notices published by the registrar under this section.

(3) A disposition to which this section applies only has effect if it is made by means of a document in electronic form.

(4) Before making rules under this section the Secretary of State must consult such persons as the Secretary of State considers appropriate.

(5) Before publishing a notice under this section the registrar must consult such persons as the registrar considers appropriate.

(6) In this section, "disposition", in relation to a registered charge, includes postponement."

(3) In section 93 (power to require simultaneous registration)—

(a) for subsection (1) substitute—

"(1) Rules may provide that this section applies to a disposition of—

(a) a registered estate or charge, or

(b) an interest which is the subject of a notice in the register,

which is of a description specified, for the purposes of this section, in a notice published by the registrar.

(1A) Rules may make further provision about notices published by the registrar under this section.";

(b) after subsection (5) insert—

"(5A) Before publishing a notice under this section the registrar must consult such persons as the registrar considers appropriate."

(4) In section 128 (rules, regulations and orders), in subsection (5), after "section" insert "92A or".

(5) In section 132 (general interpretation), in subsection (1), in the definition of "land registration rules", after "under section" insert "92A or".

**28 Overreaching and electronic dispositions**

In section 91 of the Land Registration Act 2002 (electronic dispositions:

formalities), after subsection (9A) insert—

"(9B) If a document is entered into by a person (an "electronic signatory") on behalf of two or more trustees (whether the electronic signatory is acting as agent or attorney and howsoever appointed)—

(a) subsection (3)(b) is taken to be satisfied as regards entry into the document on behalf of such trustees if the document has the electronic signature of the electronic signatory,

(b) for the purposes of subsection (4)(b), the document is to be regarded as signed (and, if relevant, sealed) by each trustee on whose behalf the electronic signatory acts (even though the document only has the electronic signature of the electronic signatory), and

(c) for the purposes of subsection (5), the deed is to be regarded as having been executed by each trustee on whose behalf the electronic signatory acts."

*Adverse possession*

**29 Prevention of registration of title of person in adverse possession**

(1) The Land Registration Act 2002 is amended as follows.

(2) In section 3 (voluntary registration of an unregistered legal estate), after subsection (4) insert—

"(4ZA) A person may not make an application—

(a) under subsection (2)(a), in respect of an estate which is vested in the person by virtue of the person's possession of land, or

(b) under subsection (2)(b), in respect of an estate which is vested in another person by virtue of that other person's possession of land,

unless the condition in subsection (4ZB) is met.

(4ZB) The condition is that—

(a) every other freehold estate in the land has been extinguished under section 17 of the Limitation Act 1980 (extinction of title on expiry of time limit),

(b) the only other freehold estate in the land is any freehold estate of the landlord which may remain after the enlargement of a term into a fee simple under section 153 of the Law of Property Act 1925, or

(c) if the land is demesne land, the period of time within which an action can be brought to recover the land has expired (see section 15 of the Limitation Act 1980 as modified by paragraphs 10 and 11 of Schedule 1 to that Act)."

(3) In section 4 (compulsory registration of an unregistered legal estate)—

(a) in subsection (2), after "qualifying estate is" insert ", subject to subsection (2B),";

(b) after subsection (2A) (as inserted by section 1) insert—

"(2B) The estate vested in a person by virtue of the person's possession of land is not a qualifying estate in land for the purposes of subsection (1) unless—

(a) every other freehold estate in the land has been extinguished under section 17 of the Limitation Act 1980 (extinction of title on expiry of time limit),

(b) the only other freehold estate in the land is any freehold estate of the landlord which may remain after the enlargement of a term into a fee simple under section 153 of the Law of Property Act 1925, or

(c) if the land is demesne land, the period of time within which an action can be brought to recover the land has expired (see section 15 of the Limitation Act 1980 as modified by paragraphs 10 and 11 of Schedule 1 to that Act)."

**30 Running of period of limitation: adverse possessor mistakenly registered**

After section 96 of the Land Registration Act 2002 insert—

**"96A Limitation period: adverse possessor mistakenly registered**

(1) Subsection (2) applies at any time when a person is registered with possessory title as proprietor of an estate in land in circumstances where, by virtue of section 3(4ZA) or 4(2B), the application for registration should not have been made.

(2) The fact that the person is registered as proprietor of an estate in land does not prevent a period of limitation under section 15 of the Limitation Act 1980 (time limits in relation to the recovery of land) running against any person (whether it would be prevented by section 96 or otherwise)."

**31 Prevention of repeat applications for registration**

(1) Schedule 6 to the Land Registration Act 2002 (registration of adverse possessor) is amended as follows.

(2) In paragraph 1(3)—

(a) omit the "or" following sub-paragraph (a);

(b) at the end of sub-paragraph (b) insert ", or

(c) the person has made a previous application under this paragraph in respect of the land which—

(i) was based on any part of the same ten year period of adverse possession, and

(ii) was dealt with under paragraph 5 and rejected."

(3) In paragraph 6(1), after "paragraph 1 is" insert "dealt with under paragraph 5 and".

**32 Timing of application for registration**

(1) Paragraph 5 of Schedule 6 to the Land Registration Act 2002 (conditions for entitlement to registration) is amended as follows.

(2) In sub-paragraph (4)—

(a) in paragraph (c) omit "ending on the date of the application";

(b) omit the "and" following that paragraph;

(c) after that paragraph insert—

"(ca) the application was made within the period of 12 months beginning with the date on which the reasonable belief mentioned in paragraph (c) came to an end, and".

(3) Omit sub-paragraph (5).

**33 Indemnity where extinguished title is registered**

(1) Paragraph 1 of Schedule 8 to the Land Registration Act 2002 (entitlement to indemnity) is amended as follows.

(2) In sub-paragraph (2)—

(a) omit the "and" following paragraph (a);

(b) at the end of paragraph (b) insert ", and

(c) any person who suffers loss by reason of—

(i) an alteration of the register falling within sub-paragraph (2A), or

(ii) a decision not to alter the register if, were the alteration to be made, it would be an alteration falling within sub-paragraph (2A),

is to be regarded as having suffered loss by reason of rectification of the register."

(3) After sub-paragraph (2) insert—

"(2A) An alteration falls within this sub-paragraph if it is to give effect to an interest acquired under the Limitation Act 1980 other than—

(a) an interest which, at the time of registration of the registered estate concerned, fell within Schedule 1, or

(b) an interest of which, at the time of the registration of the registered estate concerned, the proprietor had notice."

*Indemnities*

**34 Duty to verify identity**

(1) Schedule 8 to the Land Registration Act 2002 (indemnities) is amended as follows.

(2) In paragraph 10 (recovery of indemnity by registrar), in sub-paragraph (1)—

(a) omit the "or" following paragraph (a);

(b) after paragraph (a) insert—

"(aa) to recover the amount paid from any person who caused or substantially contributed to the loss by not complying with directions issued under paragraph 10A, or".

(3) After paragraph 10 insert—

*"Duty to verify identity*

10A (1) The registrar may prepare and publish directions setting out such reasonable steps that a person (a "relevant person") must take to verify the identity of a person to whom the relevant person provides, or on whose behalf the relevant person carries out, a relevant service.

(2) Each of the following is a "relevant service" when carried out in the course of a business or profession—

(a) making an application to the registrar;

(b) preparing for execution a deed or other document which the relevant person suspects or ought reasonably to suspect will be used to make an application to the registrar;

(c) advising about or assisting with—

(i) an application to the registrar, or

(ii) the execution of a deed or other document which the relevant person suspects or ought reasonably to suspect will be used to make an application to the registrar.

(3) Directions under sub-paragraph (1) may—

(a) require steps to be taken by electronic means or in electronic form;

(b) provide for different steps to be taken in respect of different applications or documents;

(c) provide for different steps to be taken in respect of different classes of person whose identity is being verified.

(4) The registrar may prepare and publish such forms as the registrar considers necessary or desirable in connection with directions under this paragraph.

(5) Before preparing directions under this paragraph the registrar must consult such persons as the registrar considers appropriate."

**35 Valuation of estate etc for purposes of indemnity payment**

In Schedule 8 to the Land Registration Act 2002 (indemnities), in paragraph 6—

(a) the existing text becomes sub-paragraph (1);

(b) in paragraph (b) of that sub-paragraph for "value" to the end substitute "value at the time when the indemnity becomes payable (see paragraph 1(3)), but calculated on the assumptions in sub-paragraph (2).";

(c) after that sub-paragraph insert—

"(2) The assumptions are that—

(a) the estate, interest or charge is the same in all respects and is subject to (and has the benefit of) the same estates, interests, rights and incidents as at the time when the mistake which caused the loss was made, and

(b) the land to which the estate, interest or charge relates is in the same state and is subject to (and has the

benefit of) the same estates, interests, rights and incidents as at that time."

**36 Indemnity claims: time limits**

(1) Schedule 8 to the Land Registration Act 2002 (indemnities) is amended as follows.

(2) In paragraph 8(b), for "arises" substitute "accrues—

(i) in the case of an indemnity under paragraph 1(1)(a), when the rectification of the register takes effect,

(ii) in the case of an indemnity under paragraph 1(1)(b), when the indemnity becomes payable (see paragraph 1(3)), and

(iii) in any other case,".

(3) In paragraph 10, after sub-paragraph (2) insert—

"(2A) If the period during which the registrar can enforce a right of action has come to an end, the registrar may nevertheless enforce the right for the purposes of this paragraph if the action is brought by the end of the period of 12 months from the date on which the indemnity is paid or the rectification of the register takes effect (as the case may be)."

*Adjudication of disputes*

**37 Jurisdiction: determination of boundaries**

After section 108 of the Land Registration Act 2002 insert—

**"108A Jurisdiction: determination of boundaries pursuant to section 60**

(1) Subsection (2) applies where—

(a) there is an application, made in accordance with rules under section 60, to determine the exact line of the boundary of a registered estate, and

(b) the matter is referred to the First-tier Tribunal under section 73(7).

(2) In addition to the functions mentioned in section 108(1)(a), the First-tier Tribunal may decide the exact line of the boundary and, in particular, may decide that the exact line of the boundary is different to that claimed in the application or in the objection to that application."

**38 Tribunal's dispute functions: beneficial interests and equity by estoppel**

In section 110 of the Land Registration Act 2002 (Tribunal's functions in relation to disputes), after subsection (3) insert—

"(3A) In proceedings on a reference under section 73(7) or 73A(5), if the First-tier Tribunal determines there is a beneficial interest in registered land, or in a qualifying estate, the First-tier Tribunal may make a declaration as to the extent of that beneficial interest.

(3B) In proceedings on a reference under section 73(7) or 73A(5), if the First-tier Tribunal determines a person has an equity by estoppel in relation to registered land, or in relation to a qualifying estate, the First-tier Tribunal—

(a) may determine how that equity is to be satisfied, and

(b) for that purpose, may make any order that the High Court could make in the exercise of its equitable jurisdiction.

(3C) For the purposes of this section a "qualifying estate" is an unregistered legal estate which is an interest of any of the following kinds—

(a) an estate in land,

(b) a rentcharge,

(c) a franchise, and

(d) a profit a prendre in gross."

*Miscellaneous*

**39 Exclusion of certain rights from registration requirement**

(1) In section 27 of the Land Registration Act 2002 (dispositions required to be registered), in subsection (5A)—

(a) omit the "or" at the end of paragraph (a);

(b) after paragraph (b) insert ", or

(c) the express grant of an interest falling within section 1(2)(a) of the Law of Property Act 1925 where—

(i) the grant is by a deed which also grants a term of years absolute which is not required by this section to be completed by registration, and

(ii) the interest is created for the benefit of the leasehold estate in land created by the grant."

**40 Certain interests to be overriding**

(1) In Schedule 1 to the Land Registration Act 2002 (unregistered interests which override first registration), at the end of paragraph 3 insert "and an easement or profit a prendre which benefits a lease to which section 54(2) of the Law of Property Act 1925 applies".

(2) In Schedule 3 to the Land Registration Act 2002 (unregistered interests which override registered dispositions)—

(a) in paragraph 3(1), for "legal" substitute "qualifying";

(b) after paragraph 3(1) insert—

"(1A) In sub-paragraph (1), a "qualifying easement or profit a prendre" is a legal easement or profit a prendre, or an easement or profit a prendre which benefits a lease to which section 54(2) of the Law of Property Act 1925 applies."

**41 Meaning of valuable consideration**

In section 132 of the Land Registration Act 2002 (general interpretation), in subsection (1), in the definition of "valuable consideration", omit "or a nominal consideration in money".

**42 Bankruptcy: position of disponee**

In section 86 of the Land Registration Act 2002 (bankruptcy), in subsection (5)(a), for "valuable consideration" substitute "value".

*Final provisions*

**43 Extent, commencement and short title**

(1) This Act extends to England and Wales only.

(2) Sections 1 to 42 come into force on such day as the Secretary of State may by regulations made by statutory instrument appoint.

(3) Regulations under subsection (2) may—

(a) appoint different days for different purposes;

(b) make consequential, transitional or saving provision.

(4) This section comes into force on the day on which this Act is passed.

(5) This Act may be cited as the Land Registration (Amendment) Act 2018.

# Appendix 2: Explanatory notes on the draft Land Registration (Amendment) Bill

## WHAT THESE NOTES DO

2.1 These explanatory notes relate to the draft Land Registration (Amendment) Bill ("the Bill"), which gives effect to the recommendations made by the Law Commission in its report, Updating the Land Registration Act 2002, published on 24 July 2018.[1] They have been produced by the Law Commission in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2.2 These explanatory notes explain what each part of the Bill will mean in practice, provide background information on the development of policy, and provide additional information on how the Bill will affect existing legislation in this area, in particular the Land Registration Act 2002 (the "LRA 2002").

2.3 These explanatory notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

## OVERVIEW OF THE DRAFT BILL

2.4 The Bill gives effect to the Law Commission's recommendations to reform various technical issues in land registration law. It does so nearly exclusively by amending the LRA 2002. It also makes an amendment to the Land Charges Act 1972.

2.5 If enacted, the Bill would (among other things) do the following:

(1) expand the triggers for compulsory first registration of unregistered estates in land;

(2) clarify that, after compulsory first registration is triggered, the priority rules of unregistered land govern the priority of interests created –

(a) before an application for registration is made, and

(b) after an application for registration is made where that application is subsequently cancelled;

(3) clarify the scope of owner's powers;

(4) amend the procedure to object to an application to cancel a unilateral notice;

(5) allow rules to be made to limit the use of restrictions to protect a contractual right or obligation;

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1 Law Com No 380.

(6) expand the category of lenders who can make further advances with priority over subsequently registered charges ("tacking");

(7) amend the provisions relating to alteration and rectification of the register, in particular to –

(a) require cases of multiple registration to be resolved through the scheme for alteration and rectification of the register,

(b) place a ten-year limit on the period of time in which a mistake on the register can be rectified, except in specific circumstances, and

(c) ensure that the register can be altered to restore the priority of a derivative interest;

(8) provide a new power to make electronic conveyancing mandatory, without requiring completion and registration to be simultaneous;

(9) provide the registrar with the power to set the timetable for the introduction of mandatory electronic conveyancing;

(10) clarify the rules governing applications for registration based on adverse possession;

(11) allow directions to be issued by the registrar that specify the reasonable steps that conveyancers must take in verifying the identity of clients, and impose a duty of care owed to HM Land Registry in relation to those directions;

(12) clarify certain powers of the First-tier Tribunal in relation to matters referred to it by the registrar; and

(13) rationalise the priority protection of short leases and of the easements and profits à prendre that benefit them.

## POLICY BACKGROUND

2.6 This project was commenced as part of the Law Commission's Twelfth Programme of Law Reform. The Programme explained that the project would comprise a wide-ranging review of the LRA 2002, with a view to amendment where elements of the Act could be improved in the light of experience with its operation. Stakeholders had revealed a range of often highly technical issues that have important commercial and other implications for HM Land Registry and its stakeholders.

2.7 While the Law Commission acts independently, this project was supported by HM Land Registry and the Department for Business, Energy and Industrial Strategy,[2] the Government department which sponsors HM Land Registry.

[2] Formerly the Department for Business, Innovation and Skills.

2.8 Further information on the policy and background to the Law Commission's recommendations is provided in its final report and the consultation paper which preceded it.[3]

## LEGAL BACKGROUND

2.9 The current land registration system is the result of legal development over many years. The most recent piece of legislation, the LRA 2002, was a major reform of the law: it repealed and replaced its predecessor, the Land Registration Act 1925, and achieved a great deal of modernisation. The LRA 2002 was the result of a joint project carried out by the Law Commission and HM Land Registry, Land Registration in the Twenty-First Century.[4] The LRA 2002 came into force on 13 October 2003.

## TERRITORIAL EXTENT AND APPLICATION

2.10 The Bill extends to England and Wales only.

## COMMENTARY ON PROVISIONS OF THE BILL

2.11 The Bill contains 43 clauses.

### Registration of title

Clause 1 and Clause 2: Estates in mines and minerals: requirement to register and Estates in mines and minerals: coal

2.12 Section 4 of the LRA 2002 outlines the circumstances in which an unregistered estate in land is required to be registered. Clause 1 amends section 4 by adding to the existing list of dispositions which trigger compulsory first registration. It adds four triggers relating to estates in mines and minerals, which apply where:

(1) an estate in mines and minerals is separated from the surface land by a transfer (sub-paragraph (1)(bc));

(2) an estate in mines and minerals is separated from the surface land by grant of a lease (sub-paragraph (1)(fb));

(3) an estate in mines and minerals held apart of the surface is transferred for valuable consideration (sub-paragraph (1)(bb)); or

(4) a leasehold estate in mines and minerals is granted out of an estate in mines and minerals held apart from the surface for valuable consideration (sub-paragraph (1)(fa)).

2.13 Compulsory registration will only be triggered for leasehold estates if the remaining term exceeds seven years.

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3 Updating the Land Registration Act 2002 (2018) Law Com No 380; Updating the Land Registration Act 2002: A Consultation Paper (2016) Law Commission Consultation Paper No 227.

4 Land Registration for the Twenty-First Century (2001) Law Com 271.

2.14 For the purposes of section 4 of the LRA 2002, the new subsection (2A) defines an estate in mines and minerals held apart from the surface as a "qualifying mines and minerals estate". In contrast to the definition of a "qualifying estate", this definition does not refer to "the time of…creation" because it has no application to the trigger in section 4(1)(g).

2.15 Clause 1(7) will also amend section 80 to require first registration of the grant of an estate in mines and minerals held apart from the surface out of demesne land.

2.16 Dispositions of estates in mines and minerals by other means, such as by assent or pursuant to a court order, will not trigger the requirement for first registration in section 4. The grant or transfer of an interest other than a freehold or leasehold estate in land (for example, a franchise or a profit à prendre in gross) will also not trigger the requirement for first registration.

2.17 Clause 1(9) will amend schedule 3 to provide that existing estates in mines and minerals that fall within paragraph 8 or 9 of schedule 3 will cease to be overriding if compulsory registration of the estate is triggered.

2.18 The clause does not amend schedule 1 because paragraphs 8 and 9 of that schedule only apply if the estate subject to the overriding interest is already registered. Similarly, the amendment refers to the trigger in section 4(1)(bb) of the LRA 2002 only because paragraph 8 and 9 can only apply to an existing leasehold estate in mines and minerals which is already held apart from the surface.

2.19 Clause 2 makes special provision for coal. Estates in mines and minerals which consist of or include coal will not be subject to compulsory first registration under section 4 of the LRA 2002 if the estate is derived from the Coal Authority. Estates in coal which are not derived from the Coal Authority (namely, those which were retained under section 5 of the Coal Act 1938) will be subject to compulsory registration if they otherwise fall within the new triggers for compulsory first registration in clause 1.

2.20 Clause 2 amends section 33 to provide that a notice may be entered in respect of an interest in coal or a coal mine that is required to be registered. It also amends schedules 1 and 3 to ensure that an estate in mines and minerals that includes coal ceases to be an overriding interest once compulsory first registration is triggered.

2.21 Clause 1 also makes consequential amendments to the LRA 2002 in relation to the new triggers for compulsory first registration of mines and minerals.

Clause 3: Discontinuous leases: requirement to register

2.22 Clause 3 amends section 4 by adding two further triggers for compulsory first registration:

(1) the transfer of a leasehold estate where the right to possession is discontinuous; and

(2) the grant of a leasehold estate where the right to possession is discontinuous.

2.23 Once the requirement for first registration has been triggered, the discontinuous lease will cease to be an overriding interest (by virtue of sub-paragraphs (4) and (5)).

2.24 These provisions will apply to existing discontinuous leases. Pursuant to sub-paragraphs (6) and (7), existing discontinuous leases, including those granted before the LRA 2002 came into force, will retain their overriding status unless and until they are transferred after the amendments made by clause 3 come into force. If they are transferred after the commencement of clause 3, they will be subject to compulsory first registration.

2.25 Clause 3 also amends section 33 to provide that a notice may be entered in respect of an existing discontinuous lease which is not subject to compulsory first registration, regardless of its length.

### Clause 4: Sections 1 and 3: consequential amendments

2.26 Clause 4 makes consequential amendments to the LRA 2002 in order to include relevant references to the new triggers for compulsory registration introduced by clauses 1 and 3.

### Clause 5: Relationship between Land Charges Act 1972 and Land Registration Act 2002

2.27 Pursuant to section 4 of the Land Charges Act 1972, a land charge is required to be entered in the land charges register for certain types of interest granted in relation to unregistered land, in order to protect them on a disposition of the land. Section 14 of the Land Charges Act 1972 excludes that Act from applying to registered land.

2.28 Section 74 of the LRA 2002 governs the effective date an entry is made in the register, deeming that the entry has effect from the time the application is made. For the purposes of the LRA 2002, land becomes "registered" from the date of the making of the application: see section 132(1).

2.29 Clause 5 inserts a new subsection into section 74(2), which disapplies section 4 of the Land Charges Act 1972 from the date that the land becomes "registered". Therefore, it disapplies the effect of the entry of a land charge under the Land Charges Act 1972 so that the interest is not void against a purchaser if a land charge is not entered. Instead, when an application for registration under the LRA 2002 is successful, section 74 will apply so that the priority rules under the LRA 2002 will apply from the date the application for registration is made.

2.30 Clause 5 also amends the definition of "registered land" in section 17(1) of the Land Charges Act 1972. The amendment provides that land is not registered for the purposes of the Land Charges Act 1972 until registration under the LRA 2002 is completed. Accordingly, it will be possible to register a land charge in relation to the land until the application for registration under the LRA 2002 is successful.

### Clause 6: Right to lodge caution: interests under trusts

2.31 Under sections 15 to 22 of the LRA 2002, a person who claims to be entitled to an interest in unregistered land (other than the freehold or a lease with more than seven years unexpired) can lodge a caution against first registration at HM Land Registry. Such a cautioner is entitled to be given notice of any application for first registration of the land, and to object to the application. That enables the cautioner to ensure that when the land is registered, the title includes whatever entry is appropriate to protect his or her interest.

2.32 A person who claims a beneficial interest in unregistered land under a trust of land or a strict settlement can apply for a caution against first registration: see section 15(1)(b). Clause 6 inserts a new subsection 15(2A), which makes it clear that an application for a caution can also be made by a person who claims a right against such a beneficial interest (a derivative interest), not directly under the trust or settlement.

2.33 For example, subsection (2A) would apply to a charge created by a beneficiary over his or her beneficial interest under the trust; or to an express sub-trust of such an interest; or to a claim that a beneficial interest in land has become subject to a constructive trust. It will also ensure that, in circumstances where it is doubtful whether a particular interest arises directly under the trust or is derivative, the person claiming that interest can nevertheless apply to lodge a caution.

2.34 On receiving notice of an application for first registration, a person with a derivative interest will be better able to ensure that the purchase money is dealt with correctly if the land is being sold. Alternatively, if the trust or settlement continues in existence because (for example) the registration is voluntary, or is triggered by the appointment of a new trustee, the cautioner will be able to ensure that the appropriate restriction is entered on the register to protect the beneficial interest from which his or her rights are derived.

2.35 By section 16(3) of the Act, a caution against first registration has no effect on the validity or priority of the cautioner's interest. Lodging a caution in respect of a derivative interest therefore does not affect the need to give notice of the dealing which created that interest to the trustees of the trust under the Law of Property Act 1925, section 137.

**Dispositions of registered land**

Clause 7: Registered charges: scope of owner's powers

2.36 Section 23(2)(a) of the LRA 2002 provides that owner's powers in relation to a registered charge include the power to make a disposition of any kind permitted by the general law in relation to such an interest, other than a legal sub-mortgage.

2.37 Clause 7 inserts new section 23(2A), providing that subsection (2)(a) does not include dispositions of the charged property by the chargee. This subsection reverses the reasoning on this issue in *Skelwith (Leisure) Ltd v Armstrong* [2015] EWHC 2830 (Ch), [2016] Ch 345 at paragraphs 42 to 49. The result is that section 23(2) applies to dealings by the chargee with the charge itself, by transferring it, declaring a trust of it, or creating a charge of the mortgage debt (a sub-charge).

2.38 The chargee's powers to deal with the charged property derive from the general law, as well as the terms of the charge itself. Sections 101(1)(i), 99(2) and 100(2) of the Law of Property Act 1925, respectively, govern powers of sale, leasing and accepting surrenders of leases. Sections 51 and 53 of the LRA 2002 ensure that these powers can be exercised by a registered chargee and by a registered sub-chargee.

2.39 The exclusion of section 23(2)(a) in relation to the chargee's powers of disposition over the charged property means a purchaser of the property from a chargee will be protected by section 52, rather than section 26. The difference between these provisions is that section 26 protects a purchaser from a "person entitled to be registered as proprietor" (see section 24(1)(b) (as amended)), whereas section 52 does

not. The rules of the general law as to entitlement to exercise powers of disposition over charged property are unaffected. In particular, section 106(1) of the Law of Property Act 1925 allows "any person … entitled to receive and give a discharge for the mortgage money" to exercise the statutory power of sale.

### Clause 8: Effect of exercise of owner's powers by person entitled to be registered

2.40 Section 24(1)(b) of the LRA 2002 (as amended) enables "a person entitled to be registered as the proprietor" of registered land to exercise owner's powers to make dispositions of the land, in accordance with section 23. The new section 24(2), inserted by clause 8, provides that a disposition by such a person can transfer or create a legal, as opposed to a merely equitable, interest.

2.41 For example, on completion of a sale of registered land, the purchaser becomes "entitled to be registered as the proprietor". The purchaser's interest is equitable, not legal, until he or she is registered. Nevertheless, before the transfer is registered, the purchaser might make a further transfer (for example, by way of sub-sale), or grant a mortgage or a lease; the new section 24(2) enables those dispositions to have effect at law.

2.42 The requirement for registration applies to such dispositions in the ordinary way, under section 27 of and Schedule 2 to the Act. Such a sub-sale, transfer or mortgage, or a lease for more than seven years, will have effect in equity when it is executed. It will be required to be registered, but when registered it will have effect at law. However, the grant of a lease for seven years or less by a person "entitled to be registered as the proprietor", will have effect at law when it is granted (if it is not within any of the categories of registrable short lease in section 27(2)(b)(ii) to (v) of the Act).

### Clause 9: Limitations on owner's powers: trustees

2.43 Section 26 of the LRA 2002 provides that, in favour of a disponee, owner's powers to make dispositions of registered land are to be taken to be free from any limitation affecting the validity of a disposition, unless the limitation is either reflected by an entry in the register, or imposed by or under the 2002 Act itself.

2.44 Clause 9 inserts a new section 26(1A) in the 2002 Act, which confirms that, where trustees of land are registered as proprietors, section 26 applies to the following limitations on their powers arising from certain provisions of the Trusts of Land and Appointment of Trustees Act 1996 (the "1996 Act") or under the terms of their trust:

(1) limitations arising from section 6(6) of the 1996 Act, which prohibits the exercise of trustees' wide statutory powers in contravention of, or of an order made under, any other enactment or any rule of law or equity (for example, by section 27(2) of the Law of Property Act 1925, capital money arising on a disposition by trustees of land must be paid to (or as directed by) at least two trustees, unless a sole trustee is a trust corporation);

(2) limitations arising from section 6(8) of the 1996 Act, which prohibits the use of trustees' powers under section 6(1) of that Act in such a way as to circumvent any restriction, limitation or condition imposed on any power conferred on them by any other enactment;

(3) any requirement under the terms of the trust and section 8(2) of the 1996 Act that any consent is to be obtained to the exercise of any power conferred by section 6 or section 7 of that Act; and

(4) terms of a trust of land that exclude any of the powers conferred by section 6 or section 7 of the 1996 Act and impose any limitation on the trustees' powers.

2.45 Any of the above limitations will not affect the title of a disponee unless the limitation is reflected by an entry in the register, in the form of a restriction.

2.46 Clause 9 applies to the exercise of owner's powers by trustees, of existing as well as future trusts of land, after the amendment comes into force.

Clause 10: Limitations on owner's powers: persons entitled to be registered

2.47 Section 26 of the LRA 2002 provides that the title of a person to whom a disposition is made cannot be invalidated by a limitation on the owner's powers of the person making the disposition, unless the limitation is reflected by an entry in the register, or arises under the LRA 2002 itself.

2.48 Clause 10 inserts new subsections 26(2A) and (2B), which disapply that protection in relation to limitations on the owner's powers of any person who is not registered as the proprietor but can exercise those powers as a person entitled to be registered (section 24(1)(b) (as amended)). Any limitations on the owner's powers of such a person will not be entered on or discoverable from the register. The effect of section 26(2A) and (2B) is that anyone dealing with a person entitled to be registered will be bound by –

(1) any limitations on that person's powers of disposition, and

(2) any limitations on powers of any other person who has also dealt with the land, as a person entitled to be registered, since the current proprietor made the disposition (or the first of a chain of dispositions) leading to the instant transaction.

2.49 The operation of these provisions can be illustrated by an example.

Example 1: limitation on the powers of a person entitled to be registered

A, the registered proprietor of land, sells and transfers the land to B. The transfer declares that B is to hold the land on trust for X and may not dispose of the land without X's consent.

Before being registered, B re-sells the land to C (in breach of trust).

C, before being registered, raises part of the price on a mortgage to D.

2.50 Without the addition of new subsection (2A), the effect of section 26(1) and (2) would appear to be that the titles of C and D cannot be questioned (so are not subject to requirement that X must consent to the transfers). However, subsection (2A) stops

section 26(1) from applying to the requirement to obtain X's consent. As a result, C does not take the land free of the limitation on B's powers of disposition. The result is the same in relation to the mortgage by C to D: because B is an "intermediate person", as defined in section 26(2B), B is subject to a limitation on his owner's powers. It is therefore in C's interest, and in D's, to investigate B's title and any limitations on his or her powers.

2.51 The amendments made by clause 10 do not apply to any limitation on the owner's powers of a person who is actually registered as proprietor, A in example 1. If A was subject to a requirement to obtain a further person's consent (Y's consent) to a disposition, that would not affect B, C or D unless it was reflected by an entry in the register.

**Notices and restrictions**

Clause 11: Refusal to enter unilateral notice

2.52 On 13 October 2013, six classes of interests in land ("former overriding interests") ceased to be "interests which override registered dispositions" under schedule 3 to the LRA 2002 (as a result of section 117(1) of the Act). Since that date, if a registrable disposition of the land for valuable consideration is completed by registration, and a former overriding interest is not protected by a notice on the registered title to the affected land, the former overriding interest will be postponed, by section 29(1) of the LRA 2002, to the interest under the disposition. A postponed interest will not be enforceable against the person to whom the disposition was made, or against that person's successors in title.

2.53 However, even if there has been a registered disposition of the land affected on or after 13 October 2013 (a "relevant disposition" within new section 34A(4)), a person who claims to be entitled to a former overriding interest can still apply to have a notice entered on the register in respect of that interest.

2.54 Clause 11 will insert a new section 34A into the LRA 2002. When an application to enter a unilateral notice to protect a former overriding interest is made, section 34A has the effect of requiring the applicant to give reasons why the former overriding interest is still binding on the registered estate despite the registration of a disposition since 13 October 2013. The following are possible reasons.

(1) The disposition was not expressed to be made for valuable consideration but (for instance) appointed new trustees of a trust of the registered estate, so that section 29 did not postpone the applicant's interest.

(2) The disposition was a lease or charge of the registered estate for valuable consideration, so that the applicant's interest was postponed to the interest granted, but the registered estate itself remained bound.

(3) The disposition which appeared from the register of title to have been made for valuable consideration was actually gratuitous, and did not postpone the applicant's interest.

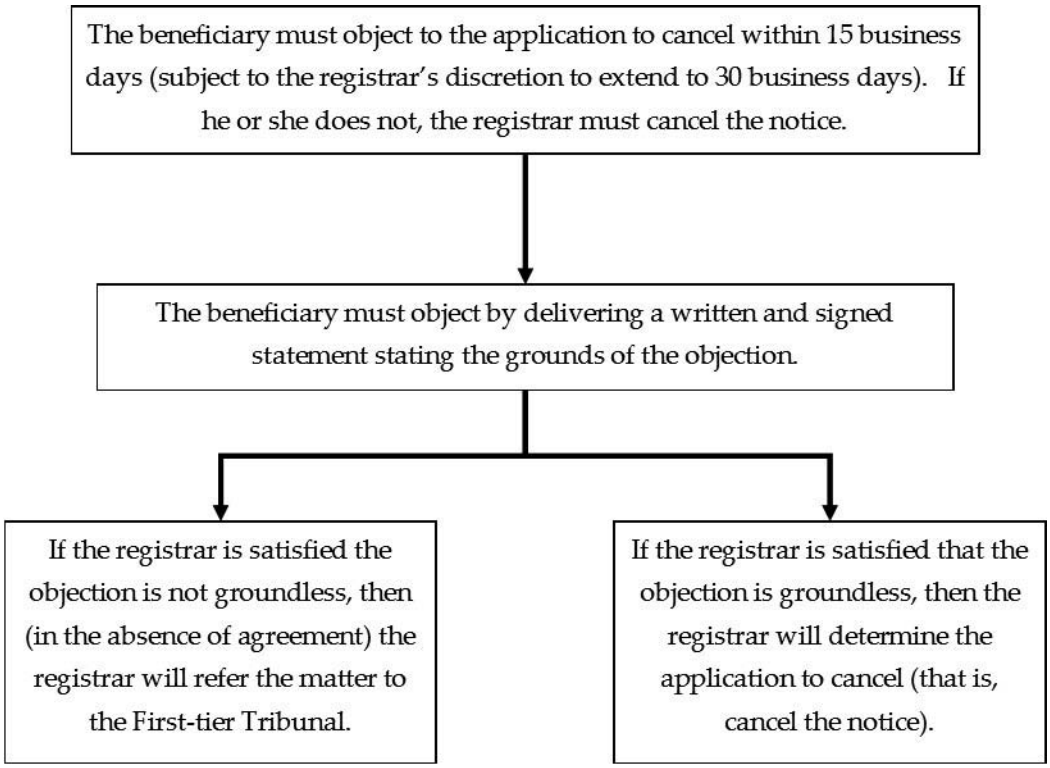
2.55 The applicant does not have to prove that the reasons given are correct. The registrar will not enter the unilateral notice if no reasons are given, or if the registrar is satisfied

that the reasons given are groundless. This criterion is modelled on section 73(6) of the Act. If reasons are given and they are not "groundless", the notice will be entered in the register. If the registered proprietor of the land disputes the entry of the notice, he or she will then be entitled to apply to have it cancelled, under section 36 of the Act.

Clause 12: Objection to cancellation of unilateral notice

2.56 A person with the benefit of an interest (the "beneficiary") may apply for the entry of a notice to protect the priority of his or her interest. A unilateral notice can be entered without evidence of the validity of the interest to be protected, and without the agreement of the registered proprietor of the land affected (section 34 of the Act). After entering the notice on the register, the registrar must notify the proprietor of the entry (section 35), who may then apply to cancel the notice (section 36(1), and Land Registration Rules 2003 ("LRR 2003"), rule 86). The registrar must notify the beneficiary of the application. If the beneficiary objects to the application to cancel, and the objection cannot be disposed of by agreement between the beneficiary and the proprietor, the registrar must refer the matter to the First-tier Tribunal (section 73, and LRR 2003, rule 19).

Table 1: the current objection procedure




2.57 Clause 12 amends section 36. It provides for a new procedure to be followed in order for a beneficiary to object to an application to cancel a unilateral notice, once he or she receives notification from the registrar of the application to cancel. Under the new procedure, the registrar must cancel the notice if the beneficiary does not exercise the right to object within the prescribed time period, or the registrar is not satisfied as to the validity of the interest protected by the notice.

2.58 Clause 12 contains rule-making powers. We anticipate that land registration rules (as defined in section 132(1) of the Act) will be made to provide for the beneficiary to have

30 working days (capable of extension to 40 working days at the registrar's discretion) to respond, and to require the beneficiary to provide the registrar with evidence in support of the claimed right to register the notice.

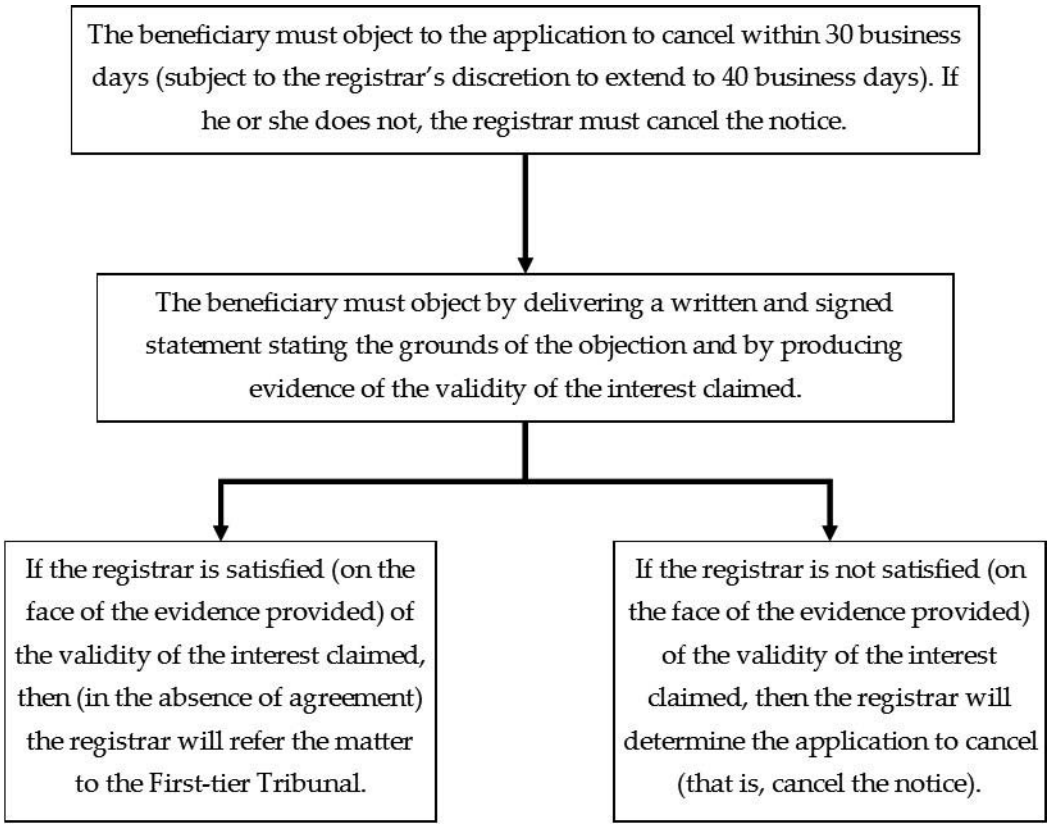
2.59 According to section 36(3), as substituted by clause 12(2), the notice will be cancelled if the beneficiary does not respond within the time allowed, or if the evidence produced by the beneficiary does not satisfy the registrar as to the validity of the beneficiary's claim. The test of whether the registrar is "satisfied as to the validity of the … claim" is the same as that under section 34(3)(c) of the Act for the entry of an agreed notice without the consent of the registered proprietor. This standard is significantly higher than "not groundless" in section 73(6) of the Act (which governs objections generally). But it is enough for the beneficiary to produce evidence which on its face supports the claim. The registrar's function is to make an administrative assessment of (not a judicial decision on) the adequacy of the beneficiary's evidence.

2.60 Clause 12(3) disapplies the general dispute resolution provision in section 73 of the Act in relation to an application to cancel a unilateral notice. Section 73A, inserted by clause 12(4), provides for the beneficiary to be entitled to object to such an application, and for the matter to be referred to the First-tier Tribunal if –

(1) the beneficiary's evidence is sufficient to satisfy the registrar as to the validity of the beneficiary's claim, but

(2) the proprietor and the beneficiary still cannot agree whether the notice should be retained or cancelled.

Table 2: the amended objection procedure



Clause 13: Section 12: consequential amendments

2.61 Clause 13 makes consequential amendments in relation to the new objection provision under clause 12.

Clause 14: Restrictions to protect contractual rights

2.62 Section 42(1) of the LRA 2002 authorises restrictions to be entered in the register for the purposes, under paragraph (a), of "preventing invalidity or unlawfulness" in relation to dispositions of registered land, and under paragraph (c) of "protecting a right or claim" in relation to registered land. These provisions include, respectively, invalidity or unlawfulness arising from a breach of contract, and contractual rights or claims.

2.63 Clause 14 inserts new subsection (2A) into section 42. Subsection (2A) enables rules to be made to prohibit the entry of restrictions, or to require the use of a particular form of restriction, in respect of breaches of specified kinds of contractual obligations, or to protect specified kinds of contractual rights or claims.

2.64 Such rules can apply to particular obligations, rights or claims under a contract, rather than to the whole of it. For example, without regulating the use of restrictions to protect any other obligations in a lease, it would be possible for rules to –

(1) prohibit the entry of any restriction in respect of a tenant's obligation to pay the landlord's costs of consenting to an assignment, or

(2) require the use of a standard form of restriction in relation to service charge provisions.

2.65 A contractual obligation, right or claim includes an obligation, right or claim arising under a covenant: subsection (2B). Rules under subsection (2A) can therefore apply to obligations, rights and claims which are binding on the successors in title of the original parties to a lease only by privity of estate, where there is no privity of contract between those successors.

2.66 Rules under section 42(2A) will be land registration rules, as defined by section 132(1) of the Act. They will therefore be made by the Secretary of State with the advice and assistance of the Rule Committee (section 127(1)), and subject to the negative resolution procedure (section 128(4)(a)). They will also be subject to a special requirement that the Secretary of State is to consult appropriate persons before referring a proposal to the Rule Committee, pursuant to new section 42(4A) and (4B).

Clause 15: Notification of application for a restriction: interests under trusts

2.67 Section 43(1) of the LRA 2002 authorises an application for a restriction to be made by or with the consent of the registered proprietor of the title affected (or a person entitled to be registered as proprietor), or by anyone else with a "sufficient interest" in the entry of the restriction. Such an application is "notifiable", which means, by section 45(1), that the registrar must give the registered proprietor notice of it, and of the right to object to it, unless it falls within one of the categories specified in section 45(3).

2.68 A person with the benefit of a charging order over a beneficial interest in registered land held under a trust of land has a "sufficient interest" to apply for the entry of a restriction in standard Form K: LRR 2003, rule 93(k). Clause 15 inserts a new paragraph (d) in

section 45(3), excepting an application for a restriction to protect such an order from the requirement of notification under section 45(1). Therefore, if an application under section 43(1) is made for the entry of such a restriction, new section 45(3)(d) will apply, and the registrar will not have to give notice to the registered proprietor under section 45(1).

Clause 16: Court ordered restrictions to protect interests under trusts

2.69 Section 42(1)(c) of the LRA 2002 authorises the registrar to enter a restriction in the register for the purpose of protecting a right or claim in relation to a registered estate or charge. By section 42(4), a person who has the benefit of a charging order over an interest under a trust is treated for the purpose of subsection (1) as having a right or claim in relation to the trust property. A restriction can therefore be entered under subsection (1)(c) to protect a charging order over an interest under a trust of land.

2.70 Section 46(1) gives the court an analogous power to that of the registrar under section 42(1)(c), to make an order requiring the registrar to enter a restriction to protect a right or claim in relation to a registered estate or charge. However, there is no provision in section 46 equivalent to section 42(4), treating a charging order over an interest under a trust of registered land as a right or claim in relation to the land, which would enable the court to require the entry of a restriction to protect the charging order.

2.71 Clause 16 inserts a new subsection 46(6), in similar terms to section 42(4), with the effect that a charging order over an interest under a trust of registered land is treated as a right or claim in relation to the land, which can be protected by an order under section 46(1) for a restriction to be entered.

2.72 Clause 16 also makes provision for the terms of such a restriction. It inserts a new subsection 46(7), to the effect that if the land registration rules specify a standard form of restriction for protecting a charging order over an interest under a trust, any order under section 46(1) and (6) must require the registrar to enter a restriction in the form so specified. By LRA 2002, section 43(2)(d), and LRR 2003, rule 91(1) and schedule 4, the form specified is Form K. The relevant terms of that form are that no disposition is to be registered without a certificate that written notice of the disposition has been given to the person who has the benefit of the charging order.

**Charges**

Clause 17: Priority of further advances

2.73 Section 49 of the Act enables a lender who is registered as proprietor of a charge to make further advances on the security of that charge, with priority over a subsequent charge. This is referred to as “tacking”.

2.74 Clause 17 extends the ability to tack to include beneficiaries of an express trust of the charge who are not registered as proprietors of it. Each will fall within the new definition of “a relevant person” who is entitled to tack.

2.75 The new provisions will apply principally to syndicated loan arrangements. In a syndicated loan arrangement, a number of lenders have joined together to lend on the security of a charge registered in the name of one (or more) but not all of them, or in the name of a third party, designated as (for example) the “security trustee”.

2.76 Section 49 permits tacking of further advances without the consent of the subsequent lender in three situations, namely where:

(1) the proprietor of the prior charge has not received notice of the subsequent charge from its proprietor;

(2) the advance is made pursuant to an obligation on the lender, and the obligation is entered in the register when the subsequent charge is created; or

(3) the parties to the prior charge have agreed a maximum amount to be secured, and the agreement is entered in the register when the subsequent charge is created.

2.77 Clause 17 makes each of these forms of tacking available to a "relevant person".

2.78 However, clause 17 imposes two conditions which must be satisfied if a lender is to be entitled to tack as a beneficiary of a trust of the charge.

(1) There must be an entry in the register, when the subsequent charge is created, indicating that persons other than the proprietor of the prior registered charge may make further advances secured by that charge. That entry will alert a prospective second chargee to the possibility that there has been such lending. The second chargee will then be able to make appropriate enquiries as to the total amount secured, and the amount of any future advances which any of the prior lenders are obliged or permitted to make.

(2) A person who lends as a beneficiary of a trust of a charge must have the agreement of all the other beneficiaries of that trust. For example, in the case of a syndicated loan, all the other members of the syndicate. That condition will automatically be satisfied in relation to advances which the syndication agreement requires or permits. The express consent of all the syndicate members will be required in relation to advances not contemplated by the agreement. The effect will be that further advances by a beneficiary of a trust of a charge cannot adversely affect the other beneficiaries' security against their will.

2.79 The extension of the ability to tack further advances will make no practical difference to the ordinary situation in which the registered proprietor of a charge is the only lender and the only person beneficially interested in the security.

2.80 The new provisions will not apply to existing syndication (or similar) arrangements: the amendments to section 49 will apply only to charges registered after the amendments come into force. In relation to such charges, the amendments will create a facility for tacking further advances by beneficiaries of a trust of a charge. The parties to new syndication (or similar) arrangements will have the choice whether to take advantage of that facility.

### Clause 18: Powers of proprietor of registered charge

2.81 Section 52 of the LRA 2002 provides that the proprietor of a registered charge is to be taken to have, in relation to the mortgaged property, the powers of disposition conferred by law on the owner of a legal mortgage. This provision is made for the purpose of

preventing the title of a disponee being questioned. The relevant powers of disposition are the power of sale conferred by section 101(1)(i) of the Law of Property Act 1925 and the powers of leasing and accepting surrenders of leases under sections 99(2) and 100(2) (respectively) of that Act.

2.82 Clause 18 inserts the new section 52(1A), which confirms that the mortgagee's powers of disposition are subject only to limitations which are reflected by a restriction in the register. The effect is that if the registered charge or a registered sub-charge (or any other instrument) imposes a limitation on the mortgagee's power of sale or leasing, the title of a purchaser or lessee from the mortgagee will not be affected merely because the limitation is contained in an instrument which has been registered. The person entitled to the benefit of such a limitation will have to apply for an appropriate restriction.

2.83 Section 52(1A) will apply to the exercise of a mortgagee's powers of disposition under existing charges after the amendment comes into force. If there is a limitation on the powers of the mortgagee under such a security, the person entitled to the benefit of that limitation will be entitled to apply under section 43(1)(c) of the Act for an appropriate restriction. That restriction will then operate in relation to any subsequent disposition of the charged property by the mortgagee.

**Alteration of the register**

Clause 19: Multiple registration

2.84 This clause introduces new provisions concerning multiple registration into the LRA 2002.

2.85 An example of multiple registration is provided below.

Example 2: multiple registration

X is the registered proprietor of the freehold to a detached townhouse at No 1 Green Street. The freehold includes a parcel of land between No 1 and the neighbouring townhouse at No 2. The parcel of land is used as parking space. It is significant space, large enough to park two cars.

Y is the proprietor of the freehold to No 2 Green Street, which used to be unregistered land. Y applied for first registration of No 2. During the process of first registration, the registrar mistakenly included X's parking space within the title to No 2.

As a result, X's parking space is registered within the title of both No 1 and No 2.

2.86 Where there is a multiple registration, there is a mistake on the register. The register is conferring inconsistent rights to land on the two registered proprietors. In example 2, however, the multiple registration came about because of a mistake in relation to only one of the two registered estates. The inclusion of the parking space within Y's estate was a mistake; its inclusion within X's estate was not a mistake.

2.87 Paragraphs 2 and 5 of schedule 4 to the LRA 2002 give the registrar and the court the power to alter the register for the purpose of correcting a mistake. This power enables the registrar and the court to remove the parking space from Y's title.

2.88 If, however, the registrar or the court concludes that Y should keep the parking space, the multiple registration can only be resolved by removing the parking space from X's title. It is unclear whether removing the parking space from X's title would qualify as "correcting a mistake" under paragraphs 2 and 5 of schedule 4. Altering the register to remove the parking space from X's title removes the multiple registration from the register. But the alteration does so by leaving the mistaken element of that multiple registration on the register. The alteration completes the mistake in that it makes Y the sole registered owner of the parking space. And it removes the parking space from X's title even though X was not registered as the proprietor of the parking space by mistake; the mistake was the registration of the parking space within the registered title relating to No 2 Green Street, not its continued registration within No 1.

2.89 Clause 19 amends schedule 4 in order to clarify the registrar's and the court's powers to deal with multiple registrations.

2.90 Clause 19 provides a definition of "multiple registration" in new paragraph 1A. Multiple registration occurs if more than one person is registered as proprietor of the same estate or land, except where they are co-owners, their estates derive from one another or a common source, or one of them is registered with possessory title. In these cases, the rights of each registered proprietor do not conflict.

2.91 In example 2, there has been a multiple registration within the meaning of paragraph 1A(1)(b): the same land is comprised within two registered estates, and none of the exceptions in paragraph 1A(2) apply.

2.92 Where the same land is included within the title plans to two registered estates, the register will nevertheless not contain a multiple registration if the land falls within the scope of the general boundaries rule in section 60 of the LRA 2002. Unless a boundary has been determined, the register does not guarantee the exact position of the boundaries shown on the title plan. Thus, the register may not guarantee that land lying adjacent to a boundary (as shown on the title plan) in fact falls within the relevant estate, rather than within the neighbouring estate. A multiple registration occurs where the same land is "comprised in" two registered estates, meaning that the register is (contradictorily) guaranteeing that the land falls within both estates.

2.93 In example 2, the parcel of land is likely to be too significant (both in value and in extent) to fall within the scope of the general boundaries rule; thus, it is an example of multiple registration.

2.94 Clause 19 also adds a new sub-paragraph (1A) to paragraph 2 of schedule 4 which clarifies that the registrar's and the court's power to address multiple registrations by removing an entry that was not registered by mistake. (Clause 20 contains guidance for how the court and the registrar should exercise the power to remove a multiple registration by altering the register where the alteration falls within sub-paragraph (1A).)

2.95 New sub-paragraph (1A) of paragraph 2 makes clear that, in example 2, the power to alter the register includes the power to remove the multiple registration by removing the parking space from X's title.

2.96 Under paragraph 1 of schedule 8 to the LRA 2002, a person who suffers loss due to the rectification of the register is entitled to an indemnity. Rectification is an alteration of the register which prejudicially affects the title of a registered proprietor and which involves the correction of a mistake. Clause 19(4) modifies paragraph 1 of schedule 8 so that a person (such as X in example 2) who suffers loss due to the removal of a multiple registration from the register will also be entitled to an indemnity.

2.97 Clause 19(3) modifies schedule 6 to the LRA 2002 to ensure that disputes over multiple registration of land must be resolved by an application under schedule 4 for alteration of the register, and not by an application based on adverse possession under schedule 6.

### Clause 20: Power to alter the register

2.98 Under paragraphs 2 and 5 of schedule 4, the court and the registrar respectively may alter the register for the purpose of:

(1) correcting a mistake;

(2) bringing the register up to date;

(3) giving effect to an estate, right or interest excepted from the effect of registration; or

(4) (in the case of the registrar) removing a superfluous entry.

2.99 Paragraphs 3 and 6 of schedule 4 make provision for how the registrar and the court should exercise the power to alter the register where the alteration would amount to rectification. Rectification is an alteration of the register which prejudicially affects the title of a registered proprietor and which involves the correction of a mistake. Paragraphs 4 and 7 enable land registration rules to be made to govern the way in which the registrar and the court should exercise the power to alter the register where the alteration does not amount to rectification.

2.100 Clause 20 consolidates existing paragraphs 2 to 7 into a single set of provisions governing the power of both the registrar and the court to alter the register. That power is defined in an amended paragraph 2. Paragraphs 3A to 3E contain detailed rules for how the registrar and the court should exercise the power to alter the register in paragraph 2.

(1) Paragraph 3A makes general provision regarding the application of paragraphs 3B to 3E.

(2) Paragraph 3B to 3D contains principles which apply when the proposed alteration amounts to rectification.

(3) Paragraph 3E contains principles which apply where the proposed alteration is for the purpose of removing a multiple registration by removing a title from the register, or removing land from a title, which was not registered by mistake.

### The scheme in paragraphs 3A to 3E

2.101 The substantive rules for how the registrar and the court should exercise the power to alter the register are set out in paragraphs 3B to 3E.

2.102 A proposed alteration to the register should only engage one of paragraphs 3B to 3E. Which paragraph is relevant depends on the circumstances of the case and, in particular, on who is in possession of the relevant land.

2.103 These explanatory notes address cases which involve multiple registration separately. They start by focussing on standard cases of rectification which do not involve multiple registration. The reason for the separate treatment is that paragraph 3E applies only to cases of multiple registration and the application of paragraph 3D differs depending on whether or not an alteration to correct a mistake would also remove a multiple registration.

2.104 Two technical concepts will be used in examining paragraphs 3B to 3E:

(1) *Relevant person*: Paragraph 3C(4) defines a "relevant person" as a person who, but for the mistake, would have succeeded to the former registered proprietor's title to the land. The "but for" test used in paragraph 3C(4) is a familiar causal test. The provision does not merely apply to transfers which would have taken place by operation of law or transfers (caught by section 27(5) of the LRA 2002) which would not have needed to be completed by registration to operate at law. It applies more broadly than that.

> Suppose that the former proprietor has died intestate since the occurrence of the mistake. It would be open, for example, for the former proprietor's spouse to argue that he or she was the only person who could have inherited the deceased's estate under the intestacy rules, that the deceased had left no debts and that all administration expenses had been covered. The spouse could thus argue that, but for the mistake, the administrator of the deceased former proprietor's estate would have applied to be registered as the proprietor of the deceased's land and would have transferred that land to the spouse, who would also have applied to be registered. The spouse can thus argue that he or she is a "relevant person".

(2) *The longstop*: The "longstop" is a period of ten years, after which the grounds on which the register may be rectified become narrower (see paragraphs 3B(2)(c) and (3), 3D(3) and (4) and 3E(2)(c)). After the longstop has expired, the register may only be rectified if the registered proprietor consents or in cases of fraud or lack of proper care. The longstop begins to run on the date of the mistake in the register, except in cases which engage paragraph 4B or paragraph 8, which are examined below in relation to clauses 22 and 25.

Rectification (where there is no multiple registration)

2.105 An example of a mistaken registration which does not involve multiple registration is provided below.

Example 3: mistaken registration

A is the registered proprietor of the freehold to Spring Cottage. A fraudster impersonates A and sells Spring Cottage to B. B successfully applies to be registered as the new freehold proprietor of the property. B's registration as the new proprietor is a mistake. A applies for alteration of the register to have the title to Spring Cottage restored to him or her.

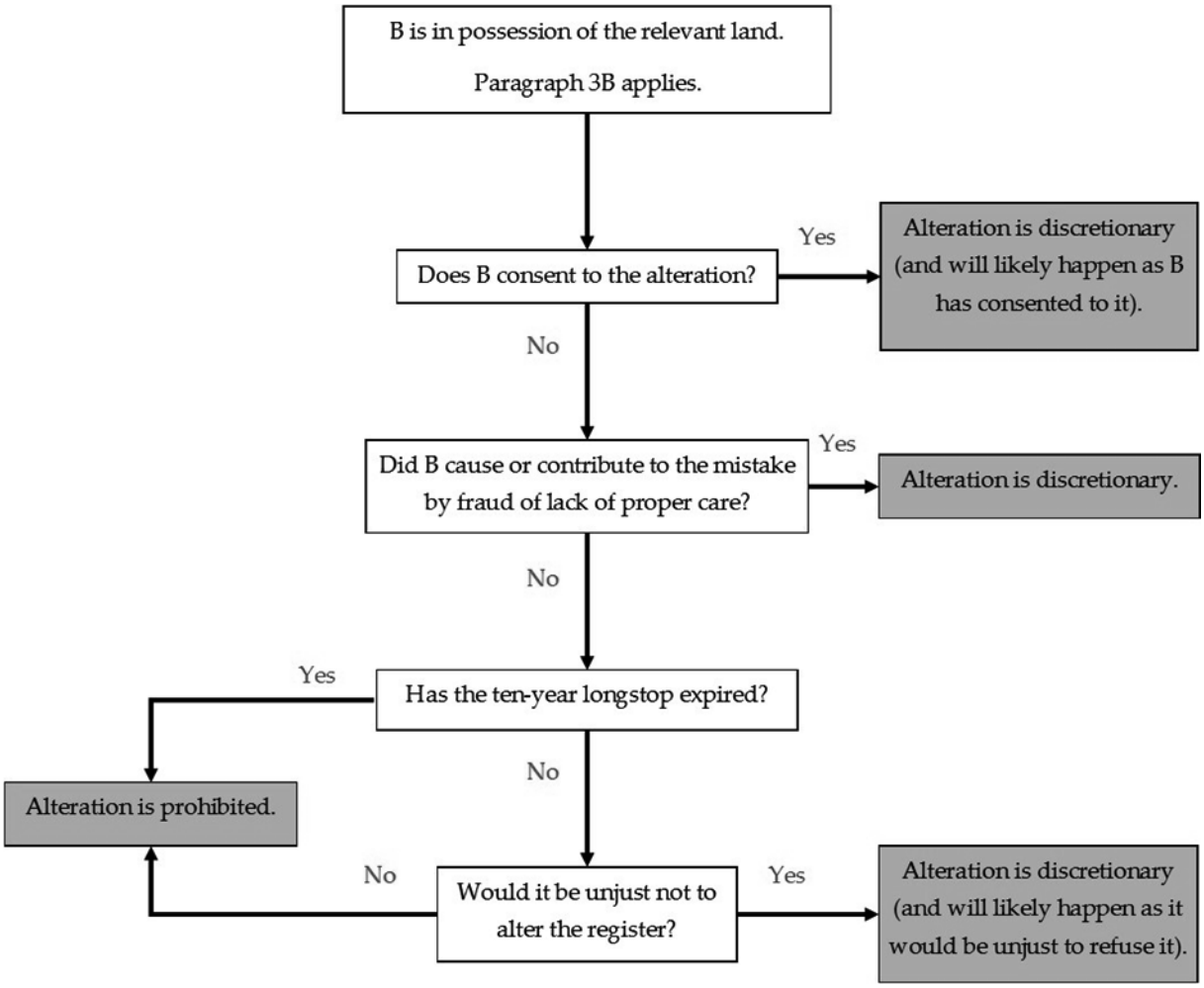
2.106 The alteration sought by A would amount to rectification of the register. A's application would be decided either in accordance with paragraph 3B, or 3C, or 3D depending on who is in possession of Spring Cottage: the registered proprietor (B); the former registered proprietor (A) or a "relevant person"; or neither of them.

| | | |
|---|---|---|
| The registered proprietor (B) is in possession of the land. | → | Proceed under **paragraph 3B**. |
| The former registered proprietor or a "relevant person" (A) is in possession of the land. | → | Proceed under **paragraph 3C**. |
| Neither the registered proprietor (B), nor the former registered proprietor or a "relevant person" (A), is in possession of the land. | → | Proceed under **paragraph 3D**. |

2.107 Tables 3 to 5 below illustrate how paragraph 3B, 3C or 3D (where relevant) would apply to example 3. Paragraphs 3B to 3D can be taken to be posing a series of questions. Depending on how the questions are answered, rectification may be mandatory or prohibited, or the registrar or the court may have an unfettered discretion about whether rectification should take place.

Paragraph 3B

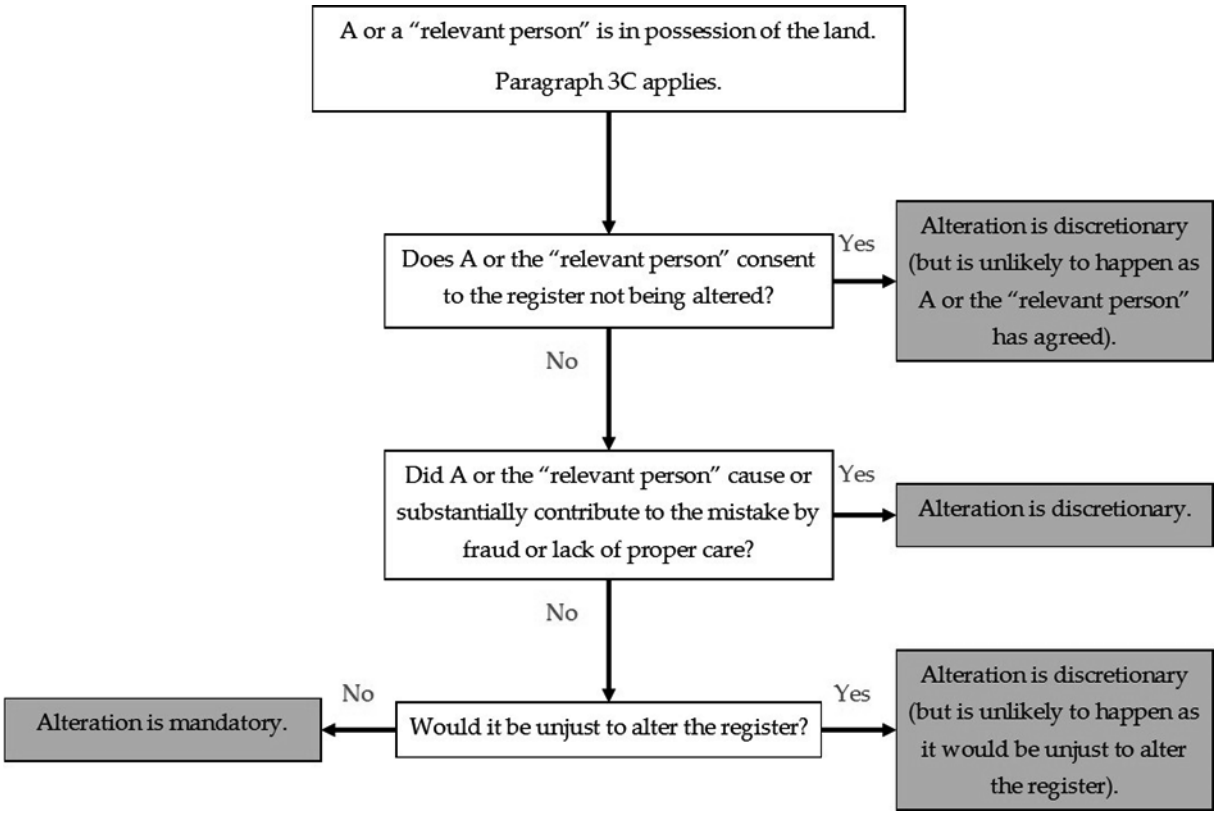
Table 3: paragraph 3B – the registered proprietor (B) in possession.




2.108 Paragraph 3B should be read in the light of section 131 of the LRA 2002, which provides that B would qualify as being "in possession" of Spring Cottage if B's tenant, mortgagee, licensee or beneficiary under a trust is in possession.

Paragraph 3C

Table 4: paragraph 3C – the former registered proprietor or a "relevant person" (A) in possession

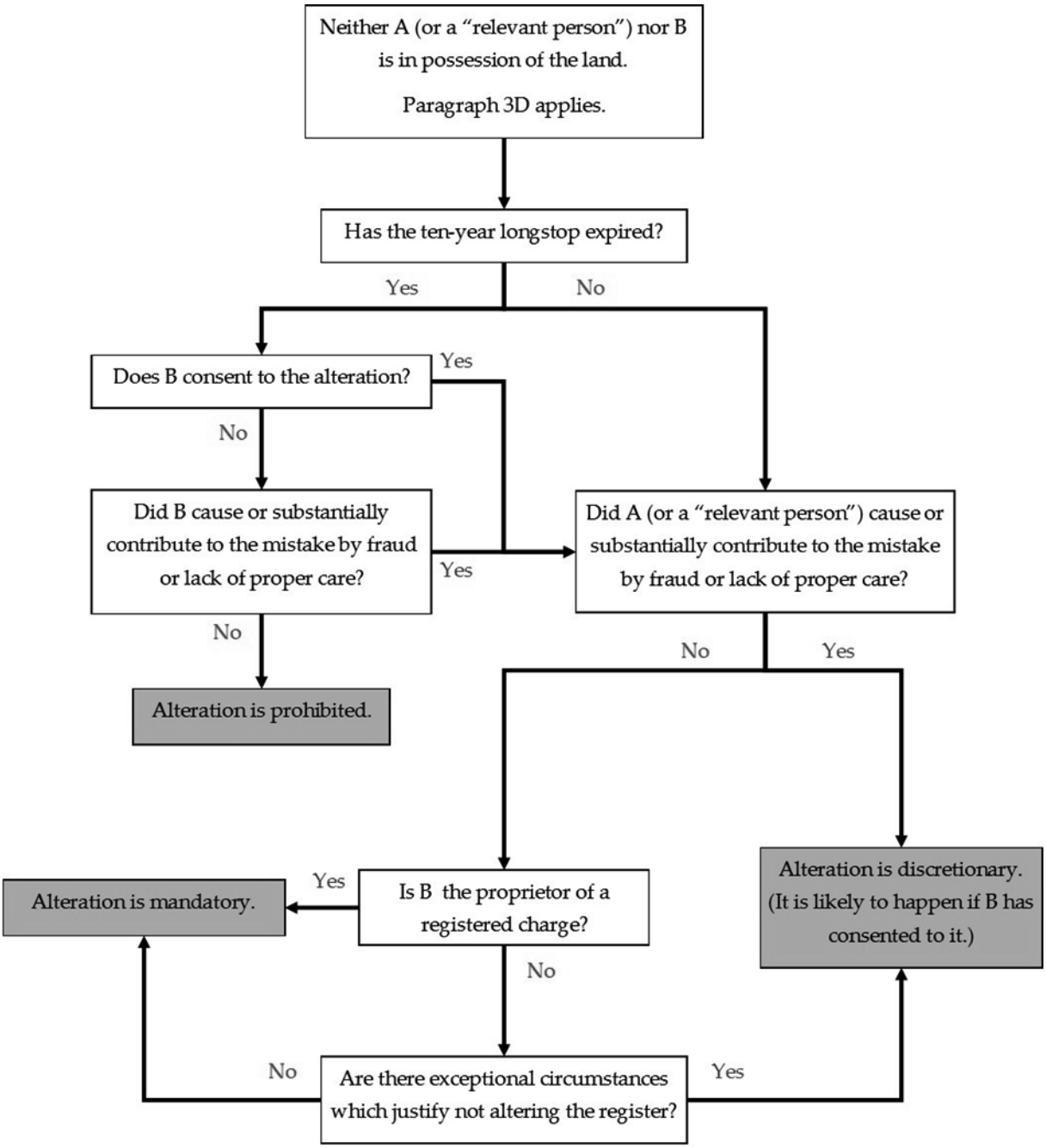



2.109 Section 131 of the LRA 2002 only applies in relation to a "proprietor of a registered estate". It does not apply to a former registered proprietor, for example, A who has lost title to Spring Cottage. New paragraph 3C(5) and (6) provide that A will count as being in possession of the cottage if A's tenant, licensee or beneficiary is in possession.

2.110 New paragraph 3C does not impose a longstop on the former registered proprietor or a relevant person. For example, if A is in possession of Spring Cottage, there is no set period within which A must apply for rectification if the application is to succeed.

Paragraph 3D

Table 5: paragraph 3D – neither the registered proprietor (B), nor the former registered proprietor or a "relevant person" (A), in possession.




2.111 Paragraph 3D employs a different test to that employed by paragraphs 3B and 3C.

(1) Paragraphs 3B and 3C apply a test of unjustness – tables 3 and 4 ask whether it would be unjust (not) to rectify the register.

(2) Paragraph 3D applies a test of exceptional circumstances – table 5 asks whether there are exceptional circumstances which justify not altering the register.

2.112 The test of unjustness presents a higher hurdle than the test of exceptional circumstances: it is more difficult to show that it would be unjust not to rectify the register

than it is to show that there are exceptional circumstances which justify not rectifying the register. The use of these two different tests means that paragraphs 3B and 3C give greater protection to proprietors and former proprietors in possession than paragraph 3D gives to persons seeking rectification who are not in possession.

2.113 Paragraph 3D makes special provision for proprietors of registered charges; they are not able to rely on the exceptional circumstances provision in paragraph 3D(2)(c). There is no equivalent provision in paragraphs 3B and 3C because a chargee will never be "the registered proprietor of a registered estate" in possession of the relevant land. A charge is not a "registered estate" (see LRA 2002, section 132(1)).

### Discretion under paragraphs 3B to 3D

2.114 Where the registrar or the court has a discretion whether to rectify the register, the discretion is nevertheless likely to be exercised in accordance with the principles contained in paragraphs 3B to 3D. These are:

(1) that the discretion should generally be exercised in favour of a party who is in possession of the relevant land;

(2) that, where possible, mistakes on the register should be corrected;

(3) that regard should be given to how much time has passed since the occurrence of the mistake, particularly if the ten-year longstop has expired; and

(4) that regard should be given to whether one or more of the parties caused or contributed to the mistake by fraud or lack of proper care.

### Rectification to remove a multiple registration

2.115 The scheme in paragraphs 3A to 3E may also be engaged by an application to alter the register for the purpose of removing a multiple registration. The explanatory notes to clause 19 gave an example of multiple registration (example 2) which is reprinted below.

> Example 2: multiple registration (reprinted)
>
> X is the registered proprietor of the freehold to a detached townhouse at No 1 Green Street. The freehold includes a parcel of land between No 1 and the neighbouring townhouse at No 2. The parcel of land is used as parking space. It is significant space, large enough to park two cars.
>
> Y is the proprietor of the freehold to No 2 Green Street, which used to be unregistered land. Y applied for first registration of No 2. During the process of first registration, the registrar mistakenly included X's parking space within the title to No 2.
>
> As a result, X's parking space is registered within the title of both No 1 and No 2.

2.116 There has been a multiple registration within the meaning of new paragraph 1A(1)(b) of schedule 4 (inserted by Clause 19). The same land is comprised within two registered

estates, and none of the exceptions in paragraph 1A(2) apply. X and Y are now both registered with absolute title, and the parcel of land is too significant (both in value and in extent) to form a general boundary between No 1 and No 2.

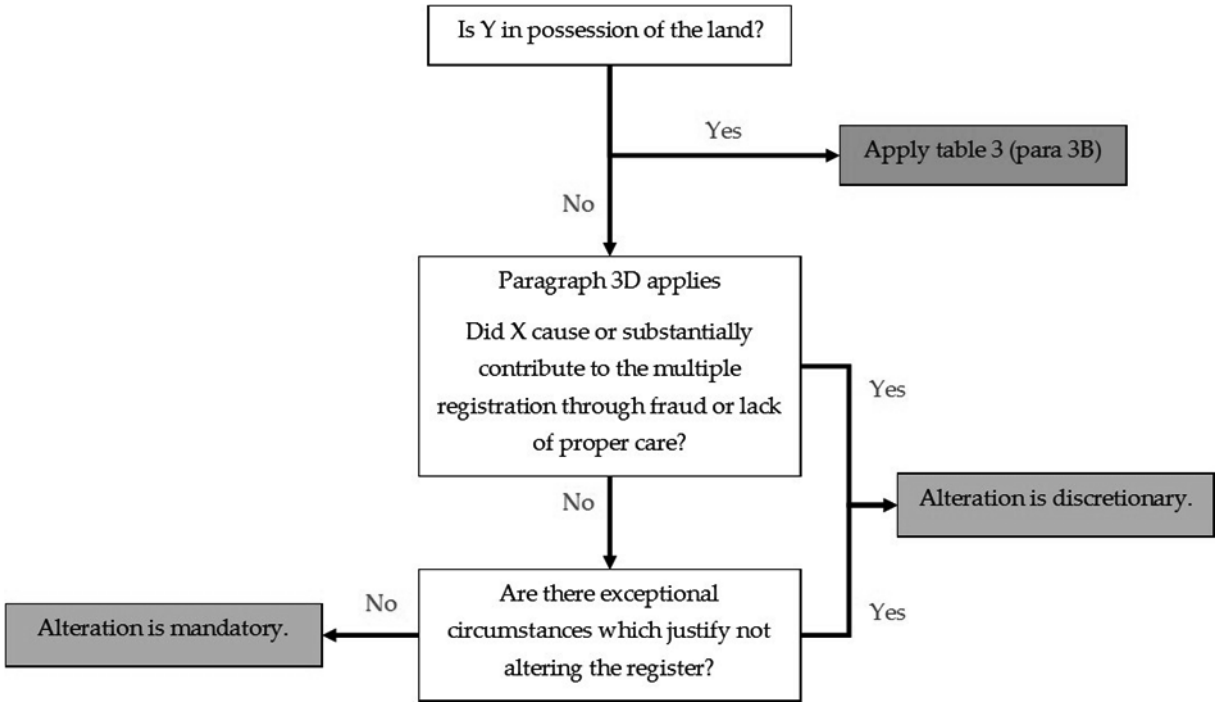
2.117 Different provisions apply depending on whether the registrar or the court is considering whether to remove the multiple registration by removing the parking space from Y's title or by removing it from X's title. The registrar and the court can remove the parking space from Y's title by exercising the power to correct a mistake in accordance with paragraphs 3A to 3D. If, however, the registrar or the court is considering whether to remove the parking space from X's title, paragraph 3E will apply. Paragraph 3E applies whenever the registrar or the court is altering the register to remove a multiple registration by removing a title, or removing land from a title, which was not registered by mistake.

(1) Removing a multiple registration by correcting a mistake

2.118 If X is applying to alter the register to remove the parking space from Y's title, this alteration would correct a mistake in Y's registered title. Depending on whether or not Y is in possession of the parking space, either paragraph 3B or paragraph 3D will apply. Paragraph 3C will not apply; X is not a former registered proprietor of the parking space but is one of two concurrently-registered proprietors.

2.119 Table 6 illustrates how paragraph 3D would apply in relation to X's application (where Y is not in possession of the parking space). Where Y is in possession of the parking space, paragraph 3B applies exactly as set out in table 3 above.

Table 6: paragraphs 3B and 3D – alteration to remove a multiple registration by correcting a mistake




2.120 The difference between table 5 and table 6 (which both concern paragraph 3D) is that the ten-year longstop in paragraph 3D does not apply where the relevant alteration would remove a multiple registration. If Y is not in possession of the parking space then,

given that X is also a registered proprietor of the parking space, Y is no more entitled to take advantage of the passage of time since the multiple registration than X. (However, if Y is in possession, then Y may be protected as a proprietor in possession by the longstop in paragraph 3B.)

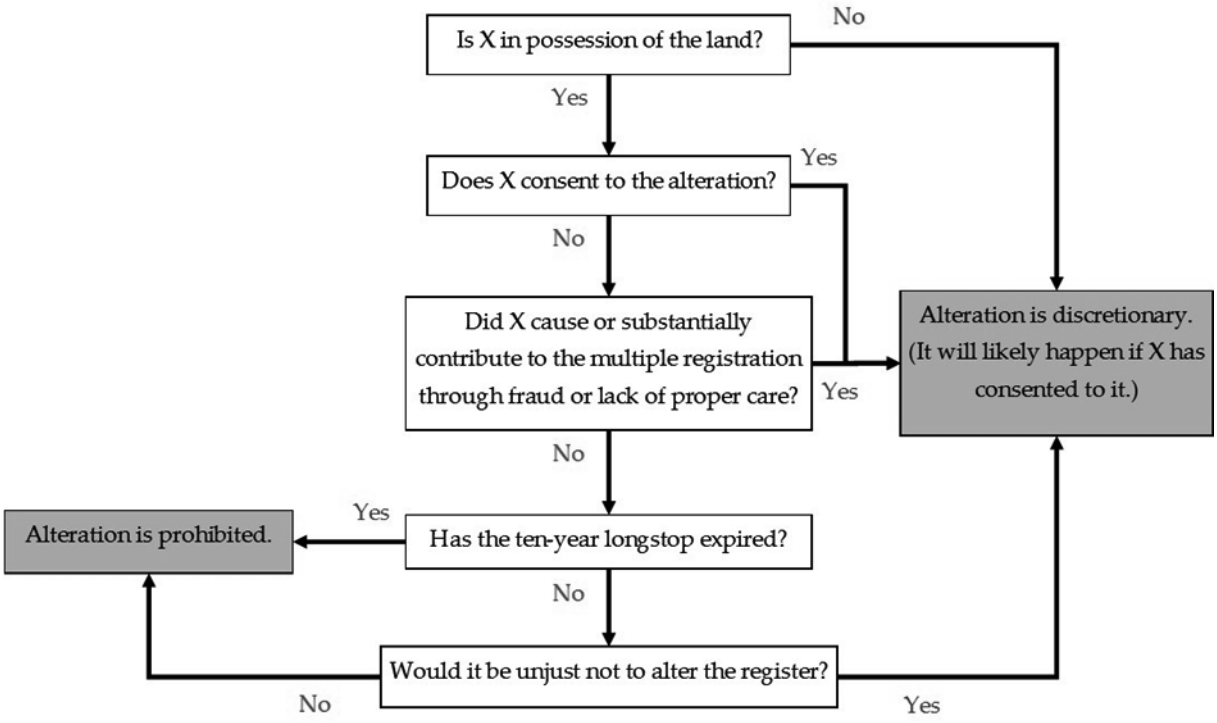
(2) Removing a multiple registration by altering a title which does not contain a mistake

2.121 Clause 19 inserts a new sub-paragraph (2A) into paragraph 2 of schedule 4 which makes clear that the registrar and the court can remove a multiple registration by removing a title from the register or removing land from a registered title even though the registration of the relevant title did not involve a mistake.

2.122 It is thus possible for Y to apply to have the parking space removed from X's title even though the parking space had been correctly registered within A's title.

2.123 Y's application would be governed by paragraph 3E, as illustrated by table 7.

Table 7: paragraph 3E – removing a multiple registration by altering a title which does not contain a mistake




2.124 If X is in possession of the parking space, the effect of paragraph 3E is that X is given the same protection as would apply to Y (under paragraph 3B) if Y were in possession.

2.125 If X is not in possession of the parking space, then the registrar and the court have an unfettered discretion whether to accede to Y's application and remove the parking space from X's title.

(1) Where X has not consented to Y's application, it is likely that (in the same proceedings) X will be seeking to have the parking space removed from Y's title. The registrar and the court will not have to exercise their discretion to remove the parking space from X's title if they have decided, after applying the principles in

paragraphs 3B or 3D, that they can and should remove the parking space from Y's title.

(2) However, a multiple registration is a serious error which should not be left on the register. The parking space should either be removed from X's title or from Y's title. If the registrar or the court decides that the register cannot or should not be rectified against Y, the parking space will have to be removed from X's title.

(3) If the application of paragraphs 3B to 3E leaves the registrar and the court with an unfettered discretion to alter either X's or Y's title, a solution will need to be found by considering all the circumstances of the case and balancing the interests of the parties.

### Clause 21: Alteration of the register: effect of existence of power of the registrar and the court

2.126 Schedule 4 to the LRA 2002 enables the registrar and the court to alter the register for the purpose of correcting a mistake (among other purposes). A correction which adversely affects the title of a registered proprietor is termed "rectification" (schedule 4, paragraph 1), and can give rise to a claim for an indemnity from the registrar (under schedule 8).

2.127 Clause 21 inserts a new paragraph 4A in schedule 4. Paragraph 4A reverses the decisions in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216 and *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602 that the ability to claim rectification of the register is a proprietary interest. By new paragraph 4A(1), a claim for rectification is not a "right or interest" of the claimant affecting the registered title.

2.128 All rectification claims will therefore be determined exclusively in accordance with the rules in schedule 4 of the LRA 2002. This includes claims which have arisen before paragraph 4A comes into force: by paragraph 4A(2), the amendment to the LRA 2002 is retrospective.

### Clause 22: Effect of mistake on derivative interests

2.129 Under schedule 4 to the LRA 2002, the registrar and the court have the power to alter the register for the purpose of correcting a mistake. The term "mistake" is not defined in schedule 4. In *NRAM Ltd v Evans* [2017] EWCA Civ 1013, [2018] 1 WLR 639 at [48] to [52], the Court of Appeal endorsed the view that there is a mistake if the registrar makes, fails to make, or alters an entry in the register or removes an entry from the register but would not have done so if he or she had known the true or full facts.

2.130 Clause 22 inserts a new paragraph 4B into schedule 4. Paragraph 4B makes provision for cases in which a mistaken entry is made in the register and then, as a consequence of that mistaken entry, further entries are made in the register. Paragraph 4B clarifies whether those further entries will also qualify as mistakes.

2.131 New paragraph 4B only applies where an entry is made on the register in respect of an estate, right or interest ("the original estate, right or interest") by mistake. Sub-paragraph (7) means the entry in relation to the original estate, right or interest must be a mistake according to the general meaning of "mistake" used by schedule 4 and interpreted by

*NRAM Ltd v Evans*. If the entry on the register is not a mistake in its own right (so it would be a mistake even if paragraph 4B did not exist), paragraph 4B will not be engaged.

2.132 The effect of paragraph 4B is to clarify that (subject to an exception set out in sub-paragraphs (2) to (4), discussed below) if there is a mistake in relation to an estate, right or interest, then the registration of every subsequent dealing with that estate, right or interest which depends on the earlier mistake will itself constitute a mistake. An illustration is provided in example 4 below.

Example 4: a sequence of dependent mistakes

A was the registered proprietor of a freehold estate. A fraudster impersonated A and sold the estate to B, who was registered as the new freehold proprietor.

B had no knowledge of the fraud. B later sold the freehold estate to C.

C then sold the freehold to D. D granted a long lease out the estate to E. E sold the leasehold estate to F. F granted an easement over the leasehold land to a neighbour, G.

All of these transactions were duly registered.

2.133 Paragraph 4B would apply to example 4 as follows.

(1) The registration of B was a mistake according to the understanding of "mistake" adopted by the general law. The registrar would not have registered B if the registrar had known that the seller of the estate was not really A.

(2) Paragraph 4B(1) then provides that every entry in the register made due to a "relevant event" which could not have been made if it were not for mistaken registration of B is also a mistake.

(3) Although there was nothing inherently wrong with the transfer of the freehold from B to C, that transfer could not have taken place and been completed by registration if it had not been for the mistaken registration of B. A transfer of the freehold estate (the original estate, right or interest) is a "relevant event" under paragraph 4B(5)(a). Consequently, the registration of C as freehold proprietor was a mistake.

(4) Similarly, the registration of D was a mistake because the transfer to D was a "relevant event" which could not have been made had it not been for the initial mistaken registration of B.

(5) The grant of a long lease by D to E was a "relevant event" under paragraph 4B(5)(b) as it was the grant of an estate out of the freehold (the original estate, right or interest). The grant could not have taken place had it not been for the

original mistaken registration of B. Consequently, the registration of E was a mistake.

(6) The transfer of an estate granted out of the original estate, right or interest is a "relevant event" under paragraph 4B(5)(d). The registration of F was therefore a mistake as well.

(7) The grant of an easement binding the leasehold land was the grant of an interest out of an estate granted out of the original estate, right or interest. It was a "relevant event" under paragraph 4B(5)(c). The registration of G's easement was consequently also a mistake.

### The exception in paragraph 4B(2) to (4)

2.134 The operation of paragraph 4B sub-paragraphs (1) and (5) is subject to the exception set out in sub-paragraphs (2) to (4). This exception ensures that mistakes do not continue to accrue on the register indefinitely once the registrar or the court has made a (comprehensive) rectification decision. A rectification decision is defined in sub-paragraph (6); it is a decision whether to alter the register for the purpose of correcting a mistake.

2.135 The exception has two limbs set out in sub-paragraphs (3) and (4). A subsequent entry which is made following a mistake will not itself qualify as a mistake if both limbs of the exception are met.

(1) The first limb is satisfied if the registrar or the court makes a rectification decision "about or in connection with" every mistake in the chain which links the "subsequent entry" being considered to the initial mistake (in relation to the original estate, right or interest). The words "in connection with" are used because some of the relevant mistakes may no longer appear in the register.

In example 4, B and C were registered by mistake but neither now appear on the register. However, in deciding whether to rectify the mistaken registration of D, for example, the registrar or the court would have to consider how D came to be registered and so would make a decision "in connection with" the mistaken registration of B and C.

(2) The second limb requires that registrar or the court has decided not to rectify one of the mistakes in the chain leading back to the initial mistake. The effect of a decision not to rectify a mistake in the chain is that entries further down in the chain will no longer count as mistakes.

### An illustration of the exception in paragraph 4B(2) to (4)

2.136 The operation of paragraph 4B(2) to (4) is illustrated by example 5 below.

Example 5: a decision not to rectify one of a sequence of dependent mistakes

A was the registered proprietor of a freehold estate. A fraudster impersonated A and sold the estate to B, who was registered as the new freehold proprietor. B had no knowledge of the fraud. B granted a long lease to C, which is registered. C mortgaged the leasehold to D, who was also registered

A applied for alteration of the register seeking the restoration of his or her freehold (the removal of B from the register) and the removal of C's lease and, consequently, of D's charge.

The registrar or the court decides that the freehold estate should not be restored to A.

2.137 In example 5, if no rectification decision had been made, the registration of C's lease and D's charge would have qualified as mistakes (under new paragraph 4B(1) and (5)(b) and (c)).

2.138 However, once a rectification decision is made not to alter the register in order to correct the mistaken registration of B, the registration of C's lease no longer counts as a mistake. At this point:

(1) A rectification decision has been made about "the mistake in relation the original estate, right or interest" (the registration of B). Paragraph 4B(3)(a) is satisfied.

(2) As there were no mistaken entries between the registration of B and the registration of C, paragraph 4B(3)(b) must also be satisfied (every intervening mistake has been considered).

(3) One of the rectification decisions (in fact, the only one that has been made) was a negative decision not to rectify the register against B. Therefore paragraph 4B(4) is satisfied.

2.139 Likewise, following the decision not to rectify the register against B, the registration of D's charge will no longer qualify as a mistake for the same reasons as applied to C's lease.

2.140 If B now decides to sell the freehold (or if C or D now decide to sell the leasehold or the charge), the registration of the sale will not constitute a mistake. The decision not rectify the register against B has wiped the slate clean so far as the consequences of B's mistaken registration are concerned.

Difficult cases

2.141 The operation of paragraph 4B(2) to (4) is further illustrated by examples 6 and 7 below, which describe difficult cases in which the effect of paragraph 4B might initially be unclear.

Example 6: multiple frauds

A was the registered proprietor of a freehold estate. A fraudster impersonated A and sold the estate to B, who was registered as the new freehold proprietor. A applies for alteration of the register seeking the restoration of his or her freehold. The registrar or the court decides not to alter the register.

Another fraudster subsequently impersonates B and sells the estate to C, who is registered as the new freehold proprietor.

B applies to have the register altered so that C will be removed from the register and the freehold will be restored to B.

2.142 Although there was a sequence of dependent mistakes in example 6, paragraph 4B is not relevant to whether the registration of C was a mistake. The effect of paragraph 4B is to turn innocent entries on the register into mistakes where they depend upon a prior mistake. This provision is not needed in relation to the registration of C, which qualifies as a mistake for independent reasons unconnected to the previous mistake involving B.

Example 7: the discovery of a further, pre-existing mistake

B was the registered proprietor of a freehold estate. A fraudster impersonated B and sold the estate to C, who was registered as the new freehold proprietor. C had no knowledge of the fraud. C granted a registered long lease out of the estate to D.

B applied for alteration of the register to recover his or her freehold and remove D's lease. The registrar or the court decided not to restore the freehold to B and consequently decided that the registration of D's lease no longer qualifies as a mistake.

After the decision, A issues an application for alteration. It turns out that A was the original owner of the freehold and the freehold had been transferred to B by mistake. As B's registration was a mistake, A claims that the registration of C and the registration of D were also mistakes. A seeks the restoration of his or her freehold and the removal of D's lease.

2.143 As the registration of B was a mistake, the effect of paragraph 4B(1) and (5) would be that the registration of C and the registration of D were also mistakes, unless the exception in paragraph 4B(2) to (4) applies. But it may be unclear whether C and D can take advantage of the exception, given the previous decision by the registrar or the court in the proceedings brought by B.

2.144 In fact, the exception does <u>not</u> apply and new paragraph 4B(2) to (4) does not prevent A from seeking to recover the freehold from C and D. A's application will rely upon the

mistaken registration of B (which led to the subsequent registrations of C and D). It is the mistake involving B that will be "the mistake in relation to the original estate, right or interest" within the meaning of paragraph 4B(3)(a). The registrar and the court have not made a rectification decision about or in connection with this mistake. Consequently, the first limb of the exception (the paragraph 4B(3) limb) is not met and the registrations of C and D still count as mistakes. What makes example 7 complicated is that this fact was not known at the time that the registrar or the court determined B's application for alteration.

### Clauses 23 and 24: Alteration of the register: former overriding interests and effect on first registered proprietor

2.145 Clauses 23 and 24 make provision for alteration of the register and indemnity in cases in which an estate ceases to be bound by an interest on first registration.

2.146 Sections 11(4) and 12(4) of the LRA 2002 provide that, on first registration of a freehold or leasehold estate, "the estate is vested in the proprietor subject only to the following interests affecting the estate at the time of registration":

(1) interests which are the subject of an entry in the register in relation to the estate;

(2) unregistered interests which fall within any of the paragraphs of schedule 1;

(3) interests acquired under the Limitation Act 1980 of which the proprietor has notice; and

(4) (in the case of leasehold estates) implied and express covenants, obligations and liabilities incident to the estate.

2.147 Interests which fall within schedule 1 are overriding and will continue to bind an estate on first registration, regardless of whether they are noted on the register. Other interests need to be noted on the register if they are to continue to bind. The LRR 2003 contain rules designed to ensure that interests which bind an estate will be brought to the registrar's attention during the process of first registration. Rule 35(1) then requires the registrar to "enter a notice in the register of the burden of any interest which appears from his examination of the title to affect the registered estate".

2.148 However, if something goes wrong during first registration – if a relevant interest is not brought to the registrar's attention or if the registrar makes an error – the estate may be vested in the newly-registered proprietor free of an interest that had been binding pre-registration. The beneficiary of the interest might then apply under paragraph 2 of schedule 4 for the register to be altered (so that the interest will again be binding on the estate) on the basis that the omission of the interest from the register was a mistake. If the application succeeds, the first registered proprietor may then be entitled to an indemnity under paragraph 1(1)(a) of schedule 8 ("a person is entitled to be indemnified by the registrar if he suffers loss by reason of … rectification of the register"). If the application fails, the beneficiary of the interest that has been lost may be entitled to an indemnity under paragraph 1(1)(b) of schedule 8 ("a person is entitled to be indemnified by the registrar if he suffers loss by reason of … a mistake whose correction would involve rectification of the register").

2.149 Clause 24 inserts a new paragraph 4D into schedule 4. Paragraph 4D applies where an interest ceases to affect an estate as a result of section 11(4) or 12(4). If the registrar or the court alters the register so that the interest once again affects the estate, paragraph 4D(2) provides that the alteration does not prejudice the title of the first registered proprietor. The effect of this provision is that the alteration does not amount to rectification of the register. As the register is being altered but not rectified, the first registered proprietor is not entitled to an indemnity under paragraph 1(1)(a) of schedule 8.

2.150 Sub-paragraph (2)(b) extends the application of new paragraph 4D(2) to the first registered proprietor's successors in title, except for those who derive title under a registrable disposition for valuable consideration. Such a disposition would attract the protection of the priority provision in section 29 of the LRA 2002.

2.151 Sub-paragraph (3) ensures that paragraph 4D does not cause any unintended prejudice to the beneficiary of an interest that has ceased to bind on first registration. Where alteration of the register is refused, the effect of sub-paragraph (2) is to be ignored in deciding whether an indemnity is payable. This means that the beneficiary of the interest can claim to have suffered loss as the result of a mistake the correction of which would have involved rectification and so may still be entitled to an indemnity under paragraph 1(1)(b) of schedule 8.

2.152 Clause 23 makes special provision for "former overriding interests". On 13 October 2013, six interests in land (originally listed in schedule 1, paragraphs 10 to 14 and 16) ceased to be overriding interests, as a result of section 117(1) of the Act.[5] Following 13 October 2013, if a former overriding interest is not brought to the registrar's attention and entered on the register during first registration, it will cease to bind the estate when registration is completed.

2.153 Clause 23 inserts a new paragraph 4C into schedule 4 to the LRA 2002. If a former overriding interest ceases to bind an estate on first registration due to section 11(4) or 12(4), paragraph 4C(2) prevents the registrar and the court from altering the register so that the former overriding interest will once again affect the estate. Paragraph 4C(3) prevents the beneficiary of the former overriding interest from being entitled to an indemnity.

2.154 But paragraph 4C does not apply if the former overriding interest ceased to affect an estate under section 11(4) or 12(4) because of the registrar's failure to fulfil a duty imposed by or under the LRA 2002 (in particular, a duty imposed under the LRR 2003).

2.155 For example:

(1) If the beneficiary of a former overriding interest did not take any steps to protect the interest (such as by applying for a caution against first registration), and as a consequence, the interest does not get entered on the register during first registration, then the beneficiary of the interest will not be able to have the register altered and will not be entitled to an indemnity.

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[5] See also the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 (SI 2003 No 2431).

(2) If the beneficiary of a former overriding interest entered a caution against first registration which was mistakenly overlooked by the registrar, the beneficiary of the interest will be entitled to alteration or an indemnity. Moreover, paragraph 4C(5) makes clear that, if alteration is granted, paragraph 4D will apply and the first registered proprietor will not be entitled to an indemnity.

### Clause 25: Alteration of the register: priority of derivative interests

2.156 Clause 25 replaces paragraph 8 of schedule 4 to the LRA 2002 with a new and more-detailed provision concerning mistakes and losses of priority.

Example 8: loss of priority consequent upon a mistake

A is the sole registered proprietor of a freehold estate. A grants B a long lease of the estate, which B duly registers. Shortly afterwards, the registrar mistakenly deletes the register entry for B's lease.

B is not in possession of the estate. After the entry for B's lease has been removed, A sells the estate to C, who is registered as the new proprietor. C grants a long lease to D, which is also registered.

2.157 In example 8, B's lease does not cease to exist when it is removed from the register. However, when A sells the freehold to C, B's lease is postponed to C's freehold title under section 29 of the LRA 2002. B's lease is not protected by registration and is not an overriding interest under schedule 3. The fact that B's lease is postponed to C's freehold means that B cannot exercise any rights as lessee that are adverse to C's rights as freeholder. As C's freehold has priority over B's lease, D's lease (which is carved out of C's freehold) also has priority.

2.158 As B's lease was removed from the register by mistake, B may apply to have the register altered to correct this mistake.

2.159 Paragraph 8 of schedule 4 makes clear that, in correcting a mistake of this kind, the registrar and the court can make changes to the priority of B's lease. Paragraph 8 currently provides that the registrar's and the court's powers to rectify the register "extend to changing for the future the priority of any interest affecting the registered estate or charge concerned". However, paragraph 8 does not currently define the precise extent of these powers, how they are to be exercised and their implications for entitlement to an indemnity.

2.160 The new paragraph 8 inserted by clause 25 applies where, due to a mistake, an interest ceases to affect an estate on first registration or is postponed on a registrable disposition for value. In practice, it is likely to apply where (as in example 8) the registrar mistakenly fails to record an interest on the register or mistakenly removes a notice or other entry for an interest from the register. Sub-paragraph (2) makes clear that the power of the registrar and the court to alter priorities is a power to give the relevant interest the priority it would have had if a mistake had not taken place.

2.161 By providing that alterations under sub-paragraph (2) are "the correction of a mistake", sub-paragraph (3) of new paragraph 8 clarifies when an indemnity will be payable. If an alteration corrects a mistake then, if it also prejudices the title of a registered proprietor, it qualifies as rectification. Both rectification of the register and a refusal to correct a mistake by rectifying the register trigger a right to an indemnity under paragraph 1 of schedule 8.

2.162 Sub-paragraph (4) of paragraph 8 provides that paragraphs 3B to 3D (inserted into schedule 4 by clause 20) apply to alterations made under sub-paragraph (2). Where, as a result of a mistake, an interest in land ceases to affect or is postponed to an estate, paragraphs 3B(3)(b) and 3D(4)(b) provide that the ten-year longstop (discussed in the explanatory notes to clause 20) will not begin to run until, as a result of the mistake, the relevant interest lost priority.

2.163 New paragraph 8 would apply to example 8 as follows.

(1) Paragraph 8(2) gives the registrar and the court the power (under sub-paragraph 2(a)) to re-register B's lease so that it binds C's freehold and (under sub-paragraph 2(b)) to give B's lease priority over D's lease.

(2) If B's lease were to be restored to the register so that it has priority over C's freehold and D's lease, both C and D would be entitled to an indemnity. If the court or the registrar were to refuse to restore B's lease with priority, B would be entitled to an indemnity.

(3) The ten-year longstop would not begin to run when B's lease was deleted from the register but would begin to run when A sold the freehold to C.

### Clause 26: Mistakes relating to a boundary

2.164 Clause 26 contains provisions about the factors which must be treated as relevant in determining whether the removal of any land from the description in the property register and title plan "would prejudicially affect" the registered proprietor for the purpose of the alteration and indemnity provisions of schedules 4 and 8 to the LRA 2002.

2.165 The land in a registered title is identified in the property register and by means of a plan, based on the Ordnance Survey (LRR 2003, rule 5). The boundary of the land is shown by red edging on the plan, and there may also be a verbal description of the boundary or of significant boundary features. Unless the register shows that the exact line of the boundary has been determined, the registered boundary is a "general boundary", which does not determine the exact line (LRA 2002 section 60). Where the "general boundaries" rule applies, the "title guarantee" in the section 58 of the LRA 2002 is not engaged.

2.166 If there is a dispute as to the position of a general boundary (called a "boundary dispute"), the decision of the Tribunal or the court, and any consequential alteration of the title plan and any verbal description of the land, clarifies but does not alter the boundary line. Even if such a decision is adverse to the registered proprietor's contentions, it does not remove any land from the registered title. The alteration of the register therefore does not prejudicially affect the proprietor's title; it does not amount

to rectification as defined by paragraph 1 of schedule 4 to the LRA 2002, and does not give rise to any right to an indemnity under paragraph 1(1)(a) or (b) of schedule 8.

2.167 By contrast, a dispute as to the extent of the land in the registered title which does not fall within the scope of the general boundaries rule (called a "property dispute"), may lead to an alteration of the boundary or description of the registered estate, or both, which removes from the title land to which the guarantee in section 58 applied. Such a removal will often "prejudicially affect" the proprietor of that title and give rise to an indemnity claim. The possible availability of an indemnity is the main practical consequence of classifying a claim as a property dispute rather than a boundary dispute.

2.168 Clause 26 inserts a new paragraph 1B in schedule 4 to the LRA 2002. New paragraph 1B contains a non-exhaustive list of factors, derived from case-law, to which the registrar and the court must have regard when deciding whether an alteration of the register relating to a boundary would prejudicially affect the title of the registered proprietor for the purposes of schedule 4 (alteration) and schedule 8 (indemnity).

(1) The first factor is the value of the area of land which would cease to fall within the title plan and any verbal description of the registered estate, assessed objectively in relation both to that land as a separate unit and in relation to the rest of land in the title. "Value" includes financial value and other forms of value, such as amenity value. It will consider, for example, the use of the land (such as whether the land is built on or provides access to adjacent amenities) and any possession of the land.

(2) The next factor is the size of the land removed relative to the land remaining. Because this factor is second to value, even if the area is small, if it has significant value, removing it from the description of the estate of the registered proprietor may prejudicially affect his or her title.

(3) An alteration based entirely on common-law presumptions about boundaries is taken not to prejudice a proprietor's title unless there are particular circumstances indicating otherwise. For example, if the alteration is determined solely based on the presumption that where two properties are separated by a highway, the boundary is the mid-line of the highway, the alteration would not prejudicially affect the registered proprietor's title.

2.169 The registrar and the court may also have regard to any other appropriate factor. For instance, it may in some cases be relevant to consider how an error in the title plan came to be made.

2.170 New sub-paragraph 1B(5) grants a power to make land registration rules adding further factors to the list (but not to remove factors from it).

**Electronic conveyancing**

Clause 27: Electronic dispositions

2.171 Section 93 of the LRA 2002 enables the Secretary of State to introduce, by statutory instrument, a system of mandatory electronic conveyancing, by which specified kinds of disposition must be made by a document in electronic form. That document will only

take effect if it is electronically communicated to the registrar and the "relevant registration requirements" (under schedule 2 or as provided by rules) are met. Under section 93, completion and registration of a disposition must be simultaneous. Section 93 applies to a disposition of a registered estate or charge, to a disposition of an interest which is the subject of a notice in the register, and to a contract to make any such disposition.

### Alternative system of mandatory electronic conveyancing

2.172 Clause 27 provides for an alternative system of mandatory electronic conveyancing, without the requirement of simultaneous completion and registration. It inserts a new section 92A into the LRA 2002, under which the Secretary of State will introduce the system in principle, by making rules specifying dispositions, or a range of dispositions, which will only have effect if made electronically. The registrar will then have a "timetabling" power to bring the system into operation incrementally, by publishing notices specifying descriptions of dispositions to which section 92A is to apply. A disposition specified in a notice under section 92A will only have effect it is made by a document in electronic form.

2.173 The rules and notices can relate to any disposition of a registered estate or charge, including a postponement of a charge (section 92A(1)(6)), and to a disposition of an interest which is the subject of a notice in the register.

2.174 New section 92A is different from section 93 in two significant ways.

(1) Section 92A does not require an electronic disposition to be communicated to the registrar, or the registration requirements to be satisfied, in order for it to have effect. It also does not exclude the effect of section 27(1) of the Act. Unlike section 93, section 92A does not require registration to be simultaneous with completion. There will therefore still be a "registration gap", between completion and registration, during which an electronic disposition under section 92A has effect in equity but not at law. During the registration gap, other equitable interests can arise, and priorities will be regulated by sections 28 to 30 and the priority notice procedure in section 72.

(2) Section 92A does not apply to the contract to make a disposition. Therefore, although section 92A can be used to require a disposition to be completed by an electronic document, it cannot prevent the contract to make the disposition from being in paper form.

2.175 New section 92A requires consultation at two stages. Before the Secretary of State may make rules under section 92A, and before the registrar may publish a notice under the section, they each must consult such persons as they respectively consider appropriate.

2.176 By virtue of clause 27(4) and (5), rules under section 92A will be subject to the affirmative resolution procedure. They will not be not land registration rules, so will not have to be considered by the Rule Committee.

### Timetabling power under section 93

2.177 Clause 27 also amends section 93(1). It inserts the "timetabling" provisions (equivalent to those in section 92A) into section 93. Therefore, the Secretary of State may make

rules by which electronic conveyancing with simultaneous completion and registration is mandatory in principle. Then, the registrar, after consulting such persons as are considered appropriate, may apply the system incrementally to dispositions of a description specified in notices published under section 93.

Clause 28: Overreaching and electronic dispositions

2.178 Section 91 of the LRA 2002 sets out the conditions which an electronic document must satisfy in order to comply with the requirements of the general law that a transaction must be made in writing or by deed.

2.179 Section 91 makes no provision for "overreaching". Overreaching frees land from the interests of beneficiaries under a trust of land, and transfers them to the price received for the land in a disposition. Dispositions by trustees of land "overreach" the interests of the beneficiaries if the proceeds of sale are paid to (or applied by the direction of) at least two trustees or a trust corporation (Law of Property Act 1925, sections 2 and 27).

2.180 Clause 28 inserts new subsection 91(9B) to make provision for overreaching in electronic conveyancing. If two or more trustees of land appoint the same person (an "electronic signatory") as their agent or attorney to enter into an electronic document disposing of trust land, and the document has the electronic signature of the electronic signatory, the document –

(1) is taken to have the electronic signature of each of the trustees who appointed the electronic signatory (section 91(3)(b) and (9B)(a)),

(2) is to be regarded as signed by each of those trustees who is an individual, and sealed by each of them that is a corporation (section 91(4)(b) and (9B)(b)), and

(3) is to be regarded, for the purposes of any enactment, as having been executed as a deed by each of those trustees (section 91(5) and (9B)(c)).

2.181 Accordingly, overreaching will not be prevented merely because a document is electronically signed by one electronic signatory on behalf of two or more trustees. If an electronic document satisfies the other conditions in section 91(3), and complies with the other requirements of the general law for overreaching beneficial interests, overreaching will occur.

**Adverse possession**

Clause 29: Prevention of registration of title of person in adverse possession

2.182 A person with a freehold estate in land is able to apply for first registration by virtue of section 3(1)(a) of the LRA 2002. Under sections 9(5), on first registration of unregistered land, the registrar may register a proprietor with possessory title if –

(1) the person is in actual possession of the land or in receipt of the rents and profits of the land, by virtue of the estate, and

(2) there is no other class of title which he or she may be registered with.

These provisions allow a person whose title is based on adverse possession of unregistered land to be registered as proprietor of it.

2.183 Clause 29 amends the provisions in the LRA 2002 governing voluntary registration of unregistered land (section 3) and compulsory registration of unregistered land (section 4) to provide that a person may not, and is not under an obligation to, make an application for registration if –

(1) his or her estate is based on adverse possession, and

(2) the title of the superior freehold estate(s) in the land has not yet been extinguished under the Limitation Act 1980.

2.184 Clause 29 only refers to every other *freehold* estate because, if time has begun to run against a freeholder, it follows that the freehold is either not subject to a lease, or the leasehold estate has been extinguished under the Limitation Act 1980.

2.185 The amendment will apply to demesne land, which is subject to a longer limitation period (Limitation Act 1980, section 15(7)). It will also apply if there is a separate freehold estate in the land which continued to exist following enlargement of a lease under section 153 of the Law of Property Act 1925 (if such a freehold is not determined by that section).

2.186 For example, if a person has been in adverse possession of unregistered land for ten years, that person will not be able to make an application for voluntary first registration, because of new subsection (4ZA) of section 3. The limitation period under section 15 of the Limitation Act 1980 has not expired: the owner of the original estate continues to have a right of action against the adverse possessor, and his or her title has not yet been extinguished under section 17 of that Act. Similarly, if the adverse possessor transferred, leased or mortgaged the estate, section 4 would not apply to require the estate to be registered.

2.187 A person who has been in adverse possession of registered land will also be barred from applying for, or being required to apply for, first registration. The title of the registered estate will not have been extinguished under the Limitation Act 1980, because section 96 of the LRA 2002 stops the limitation period under the Limitation Act 1980 from running against registered land.

Clause 30: Running of period of limitation: adverse possessor mistakenly registered

2.188 Section 96 of the LRA 2002 stops the limitation period under the Limitation Act 1980 from running against any person (other than a chargee) in relation to registered land. Schedule 6 to the LRA 2002 instead governs the acquisition of title of registered land by adverse possession.

2.189 Clause 30 will amend the LRA 2002 by inserting a new section 96A into the Act. New section 96A limits the application of section 96 so that is does not apply where an adverse possessor is registered with possessory title of land when the superior estate in land has not been extinguished under the Limitation Act 1980, although he or she should not have been registered pursuant to clause 30.

2.190 New section 96A works together with existing section 11(7) of the LRA 2002, which provides that registration with possessory title does not affect the enforcement of any adverse estate that existed at the time of registration. Together they have the effect that

registration with possessory title does not stop the adverse possessor's possession from being adverse to the title of the superior estate.

2.191 Therefore, time will continue to run under the limitation period in section 15 of the Limitation Act 1980, despite the mistaken first registration of the adverse possessor.

### Clause 31: Prevention of repeat applications for registration

2.192 Schedule 6 to the LRA 2002 governs the acquisition of title to registered land through adverse possession. Under paragraph 1 of schedule 6, a person may apply to the registrar to be registered as the proprietor of a registered estate if he or she has been in adverse possession of the estate for at least ten years.

2.193 Unless the applicant can establish one of three grounds outlined in paragraph 5, the application under paragraph 1 will be rejected. However, if the applicant remains in adverse possession of the registered estate for another two years, he or she can re-apply for registration under paragraph 6.

2.194 Clause 31 will amend paragraph 1 by inserting a new sub-paragraph 1(3)(c), which will prevent repeat applications under paragraph 1. An applicant will be barred from re-applying for registration under paragraph 1 if his or her previous application was rejected because it did not meet one of the three conditions for registration under paragraph 5 of schedule 6. It will bar a subsequent application if –

(1) it is based on any part of the same ten-year period of adverse possession, and

(2) if it concerns land which was included in a previous application.

It will not prevent an application in respect of land which has not been the subject of an application, even if it also contains in the application land which had been the subject of a previous application.

2.195 The applicant will only be able to re-apply for registration under paragraph 6 of schedule 6. Clause 31 will amend paragraph 6 to clarify that an applicant can only make an application under paragraph 6 if his or her previous application under paragraph 1 was rejected based on paragraph 5.

### Clause 32: Timing of application for registration

2.196 Paragraph 5 of schedule 6 to the LRA 2002 outlines three conditions on which an applicant under paragraph 1 is entitled to be registered as proprietor of a registered estate based on adverse possession. The third condition (in sub-paragraph 5(4)) relates to land which is adjacent to land belonging to the applicant, where the boundary is governed by the general boundaries rule in section 60. In order to satisfy this condition, the applicant must have reasonably believed that the land belonged to him or her for at least ten years of the period of adverse possession.

2.197 Clause 32 will amend paragraph 5 by inserting a new sub-paragraph (4)(ca). Sub-paragraph 5(4)(ca) will require the applicant to make an application under paragraph 1 within 12 months of losing his or her reasonable belief that he or she owned the land.

2.198 Clause 32 will also repeal sub-paragraph 5(5). An applicant who is no longer in possession of the land because he or she has been evicted in the past six months is entitled to apply for registration under paragraph 1(2). Paragraph 5(5) deems the period of possession that the applicant must show under paragraph 5(4) as ending on the day before the date of eviction. This sub-paragraph is no longer needed because the same period of 12 months will apply to all applicants, including those who have been evicted prior to making an application under paragraph 1.

Clause 33: Indemnity where extinguished title is registered

2.199 Clause 33 amends paragraph 1 of schedule 8 to the LRA 2002 in order to make provision for the payment of indemnity in cases in which a person is first registered with title to land that had been extinguished through adverse possession.

2.200 An example of a case which would engage the amended paragraph 1 is provided below.

Example 9: first registration of a title extinguished under the Limitation Act 1980.

A was the unregistered freehold proprietor of a parcel of land. B went into adverse possession of the land and remained in adverse possession for 12 years. At the expiry of 12 years, A's title to the land was extinguished by operation of section 17 of the Limitation Act 1980. At that point, B was the sole freehold proprietor of the land.

One year after the extinguishment of title, A applied for first registration of his or her (former) freehold. The application was successful and A was registered as the sole freehold proprietor of the land.

There are three versions of this scenario.

Version 1: A was unaware and had no notice of the fact that his or her title had been extinguished by B's adverse possession. Moreover, when A applied for first registration, B was no longer in possession of the land.

Version 2: A was unaware and had no notice of the fact that his or her title had been extinguished by B's adverse possession. However, when A applied for first registration, B was still in possession of the land.

Version 3: A had notice of the fact that his or her title had been extinguished by B's adverse possession but nonetheless applied for first registration.

B applies for alteration of the register so that he or she will be registered as the freehold proprietor of the land in place of A.

2.201 Section 11(4) of the LRA 2002 sets out the effect of first registration of a freehold estate. (Section 12(4) makes equivalent provision for first registration of a leasehold estate.) Section 11 subsections (4)(b) and (c) provide that first registration vests a freehold in the newly registered proprietor subject to –

(1) interests affecting the estate at the time of registration which fall within schedule 1 (overriding interests), and

(2) interests which were acquired under the Limitation Act 1980 and of which the newly registered proprietor has notice.

2.202 The effect of section 11 is illustrated by the versions of example 9 above.

(1) In version 1, the freehold estate in land which is vested in A is not subject to B's interest in the land; B's interest does not fall within schedule 1 and A did not have notice of it.

(2) In version 2, A's freehold is subject to B's interest following first registration. B has an overriding interest under paragraph 2 of schedule 1 as he or she was in actual occupation of the land.

(3) In version 3, A's freehold is subject to B's interest following first registration. A had notice of B's interest and so was registered with the freehold subject to that interest by virtue of section 11(4)(c).

2.203 Following first registration, the adverse possessor might apply to alter the register in order to reflect his or her estate. If the alteration is made, the first registered proprietor will only be entitled to an indemnity –

(1) if the alteration corrects a mistake;

(2) if the alteration prejudicially affects the first registered proprietor's title, and

(3) if the alteration causes the first registered proprietor loss.

(See paragraphs 1(1)(a) and 11(2) of schedule 8.)

2.204 It is not clear, however, whether an alteration to the register to reflect an adverse possessor's estate does prejudicially affect the title of the first registered proprietor. Moreover, if the first registered proprietor's title is removed from the register, it is unclear whether the loss to the registered proprietor is caused by the alteration of the register or by the fact that the registered proprietor's title was previously extinguished through adverse possession. (See *A-G v Odell* [1906] 2 Ch 47 where a parallel issue was considered, namely whether loss had been caused by an alteration to the register to correct an earlier fraudulent transaction.)

2.205 In relation to example 9, the uncertainty (identified above) concerning the first registered proprietor's (A's) entitlement to an indemnity arises only in version 1. In versions 2 and 3 of example 9, A would not be entitled to an indemnity. A's freehold title is registered subject to B's freehold acquired through adverse possession. Consequently, registering B in place of A as the freehold proprietor would not prejudice A's title.

2.206 Clause 33 inserts a new sub-paragraph (c) into paragraph 1(2) of schedule 8. Sub-paragraph (2)(c)(i) makes clear that, if the register is altered so that the first registered proprietor loses his or her title, then he or she suffers loss by reason of rectification of the register. The first registered proprietor is therefore entitled to an indemnity under paragraph 1(1)(a) of schedule 8. The new sub-paragraph (2)(c)(ii) makes equivalent

provision for the adverse possessor in a case in which alteration of the register is refused.

2.207 New paragraph 1(2)(c) only applies in relation to alterations falling within a new sub-paragraph (2A), which clause 33 also inserts into paragraph 1 of schedule 8. Sub-paragraph (2A) applies to alterations of the register which give effect to interests acquired under the Limitation Act 1980 if:

(1) the interest was not an overriding interest (under schedule 1) at the time of first registration; and

(2) the first registered proprietor did not have notice of the interest at the time of first registration.

2.208 The wording of sub-paragraph (2A) mirrors the wording of section 11(4)(b) and (c) (and also section 12(4)(c) and (d)). Sub-paragraph (2A) only applies where, by operation of section 11 or 12, the first registered proprietor was not bound by the adverse possessor's interest on first registration.

2.209 The effect of clause 33 is illustrated by the versions of example 9 above.

(1) In version 1, if B were to obtain alteration of the register, the alteration would fall within sub-paragraph (2A). Consequently, sub-paragraph (2)(c) makes clear that A would be entitled an indemnity. If the register were not to be altered, B would be entitled to an indemnity.

(2) In version 2, if the register were to be altered, A would not be entitled to an indemnity. The alteration would not fall within sub-paragraph (2A). The alteration would give effect to an overriding interest under schedule 1 which was already binding on A.

(3) In version 3, if the register were to be altered, A would not be entitled to an indemnity. The alteration would not fall within sub-paragraph (2A). The alteration would give effect to an interest that was already binding on A under section 11(4)(c) of the LRA 2002.

**Indemnities**

Clause 34: Duty to verify indemnity

2.210 Schedule 8 to the LRA 2002 specifies the circumstances in which a person will be entitled to an indemnity from the registrar if he or she suffers loss, and makes provision for the calculation and payment of such indemnities.

2.211 Under paragraph 10(1)(a) of schedule 8 to the LRA 2002, the registrar may recover indemnity payments that have been made under that schedule "from any person who caused or substantially contributed to the loss by his fraud".

2.212 Clause 34 amends paragraph 10 by adding new sub-paragraph (1)(aa), to enable the registrar to recover (all or some of) an indemnity payment from a third party who caused or contributed to the loss by failing to comply with directions issued under new paragraph 10A. Clause 34 also inserts paragraph 10A into schedule 8 which, as

explained below, gives the registrar the power to issue directions concerning identity checks. Until such directions are issued, the registrar will not be able to recover indemnity payments using the power in paragraph 10(1)(aa).

2.213 The power to issue directions under the new paragraph 10A is closely defined.

(1) Under paragraph 10A(1), the directions must specifically concern identity checks where one person is providing conveyancing services to another. The directions must concern reasonable steps that a person must take to verify identity. Such directions cannot require steps which it would be unreasonably onerous to take.

(2) Under paragraph 10A(2), the directions may only apply to those who provide conveyancing services while acting in the course of a business or profession.

(a) The conveyancing services in question are set out in paragraph 10A(2)(a) and (b), and concern the making of applications to the registrar and the preparation for execution of documents used in applications.

(b) Under paragraph 10A(2)(c), the provision also applies to those who assist or advise in connection with the services mentioned in paragraph 10A(2)(a) and (b).

(3) Paragraph 10A does not apply, however, to those who merely advise about the content of a document. For example, a barrister from whom a solicitor takes advice on the drafting of a clause in a deed would not be subject to the duty, as the barrister is not assisting or advising on the "execution" of the deed.

(4) Paragraph 10A(3) makes clear that the directions need not be uniform: they may lay down different requirements for different circumstances (for example, by requiring different steps to be taken for corporate persons, for overseas persons, or for persons for whom the conveyancer regularly acts) and may, in particular, require identity checks to be carried out electronically.

(5) The registrar is required to carry out a consultation before issuing the new directions, under sub-paragraph (5).

### Clause 35: Valuation of estate etc for purposes of indemnity payment

2.214 Paragraph 6 of schedule 8 to the LRA 2002 concerns the valuation of indemnities paid for the loss of interests in land (estates, interests and charges). Where an indemnity is paid (under paragraph 1(1)(b) of schedule 8) for the loss of an interest in land caused by a mistake on the register, paragraph 6(b) states that the value of interest "is to be regarded as not exceeding … its value at the time when the mistake which caused the loss was made".

2.215 Clause 35 amends paragraph 6 to change the date for determining the maximum value of an interest in land under sub-paragraph (b). The value of the interest is to be regarded as not exceeding its value at the "time when the indemnity becomes payable". Under paragraph 1(3) of schedule 8, an indemnity does not become payable for loss due to a mistake on the register until the registrar makes a decision about whether to rectify the mistake. The valuation date will be the date of this rectification decision.

2.216 Clause 35 also inserts a new sub-paragraph (2) into paragraph 6. It makes provision for cases in which there have been changes affecting the interest or changes to the physical land between the time of the mistake and the time indemnity becomes payable. The lost interest in land is to be valued based on two assumptions:

(1) that both the interest and the physical land itself are the same in all respects as they were at the time of the mistake; and

(2) that the land and the interest in the land are subject to "the same estates, interests, rights and incidents" as at the time of the mistake.

2.217 The phrase "the same estates, interests, rights and incidents" is a catch-all provision intended to apply to any factor (aside from the condition of the property market) which may have an impact on the value of land. In particular, the word "incidents" has been adopted from two sources, in which the word had a broad application.

(1) "Incidents" is used in section 19(3) of the Acquisition of Land Act 1981, to describe all of the private and public law rights attaching to a parcel of land.

(2) It is also used in sections 137(2) and 193(2) of the Inheritance Tax Act 1984, having been adopted from section 12(3) of the War Damage Act 1943. Section 12(3) of that War Damage Act 1943 was interpreted in *Re Johnston's Application* [1950] Ch 524, 533 and 534, in which Mr Justice Harman held that an "incident" of a proprietary interest was "any factor connected with the proprietary interests which immediately before the war damage would have affected the value of each of them in the market".

2.218 The valuation of the lost interest in land should disregard all changes to the land or the interest since the mistake, whether a physical change to the land, the grant of planning permission, the grant of a right of way or restrictive covenant, or the grant or forfeiture of a lease.

### Clause 36: Indemnity claims: time limits

2.219 Clause 36 amends paragraphs 8 and 10 of schedule 8 to the LRA 2002 to make further provision for the limitation period applicable to claims for an indemnity and applicable to the registrar's rights of recourse following the payment of an indemnity.

### Limitation period: claims for an indemnity

2.220 Paragraph 8(a) of schedule 8 provides that that the registrar's liability to pay an indemnity under schedule 8 (paragraph 1) is a "simple contract debt" for the purposes of the Limitation Act 1980. Section 5 of the Limitation Act 1980 provides that the limitation period for simple contract claims is six years. Paragraph 8(b) of schedule 8 to the LRA 2002 states that a claim for an indemnity "arises at the time when the claimant knows, or but for his own default might have known, of the existence of his claim".

2.221 Clause 36 makes provision for when a claim for an indemnity accrues under paragraph 1(1)(a) (claim for loss by reason of rectification of the register) and paragraph 1(1)(b) (claim for loss by reason of a mistake whose correction would involve rectification of the register). It does not apply to claims under paragraph 1(1)(c) to (h) where the cause of

action will still accrue when the claimant knows, or but for his own default might have known, of the existence of his claim.

(1) Under new paragraph 8(b)(i), a claim for an indemnity under paragraph 1(1)(a) accrues when the rectification of the register takes effect. This date may be later than the date of the decision by the registrar or the court that the register is to be rectified. For example, an order by the court for the registrar to rectify the register may be stayed pending an appeal. The six-year limitation period for claiming an indemnity will not begin to run until the order is given effect (either due to the stay being lifted or once the appeal is dismissed).

(2) Under new paragraph 8(b)(ii), a claim for an indemnity under paragraph 1(1)(b) accrues when the indemnity becomes "payable". Under paragraph 1(3) of schedule 8, an indemnity does not become payable for loss due to a mistake on the register until the registrar makes a decision about whether to rectify the mistake.

Limitation period: registrar's rights of recourse

2.222 Paragraph 10(1)(a) of schedule 8 to the LRA 2002 gives the registrar the power to recover indemnity payments from any person who caused or substantially contributed to his or her loss by fraud. There is no express limitation period in the LRA 2002, but section 9 of the Limitation Act 1980 specifies a six-year limitation period for actions to recover any sum recoverable by virtue of any enactment.

2.223 Paragraph 10(1)(b) and (2) also enables the registrar to recover an indemnity payment by enforcing rights of action which the recipient of the indemnity or the beneficiary of rectification would have had if the indemnity had not been paid or rectification had not taken place. There is no express limitation period in the LRA 2002. However, the provision brings about a statutory subrogation, so he registrar would be subject to whatever limitation period applied to the rights of action which the registrar is seeking to enforce.

2.224 Clause 36 adds a new sub-paragraph (2A) to paragraph 10 of schedule 8. Sub-paragraph (2A) makes provision for cases where the limitation period applicable to a claim which the registrar can enforce has already expired or will expire less than a year after it becomes enforceable by the registrar. In such cases, the registrar has a year in which to exercise the rights of recourse under paragraph 10(1)(b).

2.225 If the relevant limitation period has more than a year left to run when the corresponding claim becomes enforceable by the registrar, sub-paragraph (2A) makes no difference to the applicable limitation period.

2.226 An example of the operation of new sub-paragraph (2A) is provided below.

Example 10: the limitation period applicable to the registrar's rights of recourse

A is the registered freehold proprietor of an estate. A fraudster impersonates A and offers A's estate for sale to B. B instructs a firm of solicitors S in relation to the conveyance. Through negligence and breach of contract, S fails adequately to investigate the circumstances of the sale and the fraudster's identity. The sale by the fraudster is completed and B is registered as the new owner of the estate. A discovers the sale and applies for the register to be altered. The registrar decides to alter the register so that A once again becomes the registered proprietor. This alteration constitutes rectification.

B has a claim against S for breach of contract and in negligence. The claim accrues in January 2010. The limitation period for bringing the claim would expire in January 2016.

However, rather than suing S, B claims (and receives) an indemnity from the registrar.

If the registrar exercises the rights of recourse under paragraph 10(1)(b) of schedule 8, the following table shows when the applicable limitation period would expire depending on when the indemnity is paid.

| | | |
|---|---|---|
| The registrar pays B an indemnity in March 2013 | → | The limitation period expires in January 2016 (there is no change in the limitation period). |
| The registrar pays B an indemnity in November 2015. | → | The limitation period expires in November 2016 (the limitation period is extended up to a year from the date of payment). |
| The registrar pays B an indemnity in August 2016. | → | The limitation period expires in August 2017 (even though limitation had previously expired in January 2016). |

**Adjudication of disputes**

Clause 37: Jurisdiction: determination of boundaries

2.227 By section 60 of the LRA 2002, the boundary of a registered estate, as shown on the title plan, is a "general boundary". A general boundary does not fix (or guarantee) the exact line of the boundary. However, the exact line of a boundary can be determined on an application to the registrar.

2.228 Rules 117 to 121 of the LRR 2003 (made under section 60(3)), regulate the procedure on an application for a determined boundary. Rule 119(1) directs the registrar to give notice of the application to the owners of the land adjoining the boundary in question. If one of those owners objects to the application, and the objection cannot be disposed of by agreement, the registrar must refer the matter to the First-tier Tribunal under section 73(7) of the Act.

2.229 Clause 37 inserts new section 108A in the Act. It confers jurisdiction on the First-tier Tribunal on a reference made in relation to an application under section 60. It provides that the First-tier Tribunal can determine the exact line of the boundary, even if it or part of it is neither where the applicant claims, nor where the neighbour who objected claims. This jurisdiction does not apply to any issues as to the line of a boundary which arise in any other proceedings before the First-tier Tribunal.

Clause 38: Tribunal's dispute functions: beneficial interests and equity by estoppel

2.230 Sections 108 and 110 of the LRA 2002 govern the jurisdiction of the First-tier Tribunal.

2.231 When an objection to an application to the registrar is referred to the First-tier Tribunal under section 73(7) or new section 73A(5), the Tribunal's jurisdiction is limited to determining the matter referred (see section 108(1)(a)). Section 110 governs the First-tier Tribunal's functions in relation to determining matters referred to it.

2.232 Such a determination may not resolve the whole of the dispute between the parties to the reference. For example, if the applicant claims to have a beneficial interest in registered land, and applies for the entry in the register of a restriction in standard Form A, the application will succeed if the First-tier Tribunal decides that such an interest exists. It is not, however, necessary for the First-tier Tribunal to decide what the extent of that interest is.

2.233 Clause 38 inserts new subsections (3A), (3B) and (3C) in section 110 of the LRA 2002. Subsections (3A) and (3B) confer specific functions on the First-tier Tribunal.

(1) Subsection (3A) gives the First-tier Tribunal jurisdiction to determine the extent of a beneficial interest which it holds to exist.

(2) Subsection (3B) applies if the Tribunal decides that a party is entitled to an "equity by estoppel" (an interest arising informally where, typically, the claiming party suffers a detriment through relying on a representation by the landowner that the claimant has or will obtain some interest in the land). In such a case subsection (3B) enables the Tribunal to determine what (if any) interest in the land, or other compensation, the claimant should receive, and for that purpose to exercise any powers of the High Court.

2.234 The function of the First-tier Tribunal under section 110(3A) and (3B) is discretionary. It does not affect the Tribunal's duty under section 110(4), in relation to cases of adverse possession. Under section 110(4), the First-tier Tribunal must determine how an equity by estoppel is to be satisfied in a case where an applicant under paragraph 1 of schedule 6 establishes an equity which makes it unconscionable for the registered proprietor to dispossess him, but it is not appropriate for the applicant him- or herself to be registered as proprietor.

2.235 The powers conferred by section 110(3A) and (3B) can be exercised on applications relating to "registered land" or to a "qualifying estate".

(1) "Registered land" is defined by section 132(1) of the LRA 2002 as a "registered estate or charge".

(2) A "qualifying estate" is defined by new subsection (3C), in the same terms as section 3(1) of the Act, which specifies the unregistered interests which can be registered.

2.236 The amendments made by clause 38 do not confer on the First-tier Tribunal jurisdiction to determine matters that it is not already able to determine. It instead extends the Tribunal's functions in certain cases. It therefore will not expand the number of cases that the First-tier Tribunal has jurisdiction to hear.

**Miscellaneous**

Clause 39: Exclusion of certain rights from registration requirement

2.237 Section 27 of the LRA 2002 requires certain disposition out of registered land to be completed by registration in order to operate at law.

2.238 Clause 39 will amend section 27 to exempt the grant of an easement or a profit à prendre that benefits a leasehold estate in land from the requirement of registration in section 27(2)(d) of the LRA 2002 where:

(1) the same deed grants the easement or profit, and the leasehold estate in land it benefits, and

(2) the grant of that leasehold estate in land is not required by section 27(2)(b) of the LRA 2002 to be completed by registration.

2.239 As a result, both the leasehold estate in land and the easement or profit à prendre benefiting it will operate at law without registration of the grant.

Clause 40: Certain interests to be overriding

2.240 A lease for a term of three years or less, and at market rent with no additional premium ("parol lease") is not subject to any formality requirements by virtue of section 54(2) of the Law of Property Act 1925. However, pursuant to section 52 of that Act, an easement benefiting a parol lease must be created by deed and completed by registration in order to operate at law. If an easement does not satisfy these requirement, it will only take effect in equity (if at all).

2.241 Clause 40 expands the categories of interests set out in in schedules 1 and 3 to the Act which override, to include equitable easements and profits à prendre that benefit parol leases. This aligns the priority protection of parol leases with easements and profits à prendre that benefit parol leases.

2.242 For example, suppose a landlord has granted a parol lease of a house, and thereafter grants a right of way to the tenant over adjoining land which benefits that lease. So long as that right is otherwise capable of amounting to an easement, it will also override a disposition affecting the burdened land on first registration, or on a registered disposition if the conditions (as to discoverability) set out in paragraph 3 of schedule 3 to the Act are otherwise met.

Clauses 41 and 42: Meaning of valuable consideration; Bankruptcy: position of disponee

2.243 Clause 41 removes the exclusion of "a nominal consideration in money" from the partial definition of "valuable consideration" in section 132(1) of the Act. The effect of the amendment is that the LRA 2002 treats nominal consideration in money in the same way as other forms of nominal consideration, such as a peppercorn. There will no longer be an absolute rule that a nominal sum of money cannot constitute valuable consideration; whether a nominal sum does in fact constitute valuable consideration in relation to a particular contract will be determined by the general law, rather than by the LRA 2002.

2.244 The interpretation provision in section 132 of the LRA 2002 applies generally to the whole Act (and therefore, according to section 11 of the Interpretation Act 1978, the rules made under the Act). The amendment made by clause 41 will therefore affect the meaning of "valuable consideration" in the following provisions (among others):

(1) the special priority rule for registered estates in section 29;

(2) the equivalent special priority rule for registered charges in section 30;

(3) the limitation of indemnity in paragraph 5(3) of schedule 8 in cases of fraud or lack of proper care; and

(4) the rules as to priority searches in rules 131 and 147 to 154 of the LRR 2003.

2.245 Section 86(5)(a) of the LRA 2002 also refers to "valuable consideration" while making provision for cases of bankruptcy. However, clause 42 makes particular provision for cases of bankruptcy.

2.246 When an individual is made bankrupt, any disposition of his or her property whilst the bankruptcy proceedings are pending are void by operation of section 284 of the Insolvency Act 1986. However, this provision does not apply against a person who receives any property before the bankruptcy order is made, in good faith, "for value" and without notice of the bankruptcy proceedings. Section 86(5) of the LRA 2002 was modelled on section 284(4) of the Insolvency Act 1986; the provisions were intended to apply in the same circumstances. But section 86(5) of the LRA 2002 currently refers to "valuable consideration" rather than "value".

2.247 There is a risk that "value" (in the Insolvency Act 1986) and "valuable consideration" (in the LRA 2002) might be interpreted to have different meanings. The risk may become

greater given the amendment to the definition of “valuable consideration” in section 132 of the LRA 2002 made by clause 41. In order to prevent any inconsistencies arising between the protection offered by the LRA 2002 and the Insolvency Act 1986, clause 42 replaces the reference to “valuable consideration” in section 86(5) with a reference to “value”. The language used by the two Acts will consequently match and the changes to section 132 made by clause 41 will have no effect on the interpretation of section 86.

# Appendix 3: Consultees and consultation events

**LIST OF CONSULTEES**

**Representative bodies and groups**[6]

Bar Council

British Bankers' Association

British Property Federation

Building Societies Association

British Council of Shopping Centres

Chancery Bar Association

Chartered Institute of Legal Executives

The City of London Law Society Land Law Committee / The City of London Law Society Financial Law Committee

The City of Westminster and Holborn Law Society

Conveyancing Association

Council for Licensed Conveyancers

Council of Mortgage Lenders

Investment Property Forum

Land Registration Division of the Property Chamber (First-tier Tribunal) judges

HM Land Registry

The Law Society

London Property Support Lawyers Group

- submitted on behalf of the following members (some of which submitted separate responses): Allen & Overy LLP, Ashurst LLP, Berwin Leighton Paisner LLP, Clifford Chance LLP, Clyde & Co LLP, CMS Cameron McKenna LLP, Dechert LLP, Dentons UKMEA LLP, Eversheds LLP, Fieldfisher LLP, Freshfields Bruckhaus Deringer LLP, Herbert Smith Freehills LLP, Hogan Lovells International LLP,

6 Representative bodies and groups are referred to by their names at the time their consultation responses were received.

Macfarlanes LLP, Mishcon de Reya LLP, Nabarro LLP, Norton Rose Fulbright LLP, and Shoosmiths LLP

- endorsed in full, without further written comment by the following members of the Association of Property Support Lawyers: Bircham Dyson Bell LLP, Cripps LLP, DWF LLP, Greenwoods Solicitors LLP, Hewitsons LLP, Lewis Silkin LLP, Olswang LLP, Stephenson Harwood LLP, and Watson Farley & Williams LLP

- endorsed in part, in the context of a separate consultation response by Pinsent Masons LLP, Howard Kennedy LLP and the City of London Law Society Land Law Committee / the City of London Law Society Financial Law Committee.

National Trust

Property Litigation Association

Public and Commercial Services Union

Society of Legal Scholars, Property & Trusts Law Section (referred to in this Report as Society of Legal Scholars)

- drafted following discussion with members by Dr Aruna Nair, Amy Goymour, Professor Martin Dixon, Dr Simon Cooper, and Professor Peter Sparkes (some of whom submitted separate responses)

Society of Licensed Conveyancers

**Firms and other organisations**[7]

Berkeley Group

Berwin Leighton Paisner LLP

Brentwood Borough Council

Burges Salmon LLP

Cabot Credit Management Group

CMS Cameron McKenna LLP

Confidential consultee

Dentons UKMEA LLP

Everyman Legal

Graff & Redfern Solicitors

[7] Firms and other organisations are referred to by their names at the time their consultation responses were received.

Hogan Lovells International LLP

Howard Kennedy LLP

Nationwide Building Society

Nottingham Law School

Pinsent Masons LLP

Taylor Wessing LLP

**Individuals**

Dr Tola Amodu, UEA Law School, University of East Anglia

Professor Warren Barr and Professor Debra Morris, Liverpool Law School, School of Law and Social Justice, University of Liverpool

Professor Graham Battersby, Emeritus Professor, University of Sheffield School of Law

Robert Brialey, a retired solicitor

Adrian Broomfield, a solicitor employed by the Church Commissioners for England responding in his personal capacity

Professor Dermot Cahill and Dr John Gwilym Owen, Bangor Law School

Cliff Campbell, an employee of HM Land Registry responding in his personal capacity

Confidential consultee, a member of the public

Confidential consultee, a member of the public

Confidential consultee, a member of the public

Ian Cook, a solicitor responding in his personal capacity

Dr Simon Cooper, School of Law, Oxford Brookes University

Elizabeth Derrington, the Independent Complaints Reviewer for HM Land Registry

Mark Fairweather, a solicitor responding in his personal capacity

Professor Julian Farrand QC (Hon), a legal commentator and former Law Commissioner

Louis Farrington, a Housing Officer responding in his personal capacity

Professor Simon Gardner, Lincoln College, Oxford University.

Amy Goymour, Downing College, University of Cambridge

Tom Grillo FRICS, a Chartered Surveyor

Michael Hall, a solicitor responding in his personal capacity

Dr Charles Harpum QC (Hon), a barrister and former Law Commissioner

Christopher Jessel, a retired solicitor

Nigel Madeley, a professional support lawyer responding in his personal capacity

Michael Mark, a retired Deputy Adjudicator to the Land Registry, First-tier and Upper Tribunal judge

Mangala Murali, a member of the public

Dr Aruna Nair, Dickson Poon School of Law, King's College London

Professor Sarah Nield, Southampton Law School

Glenn Pearce, a member of the public

Oliver Price, a solicitor responding in his personal capacity

Dr Nicholas Roberts, School of Law, University of Reading

Martin Wood, a former HM Land Registry employee responding in his personal capacity

Richard and Janet Woodward, members of the public

Dr Lu Xu, Lancaster University Law School

**CONSULTATION EVENTS**

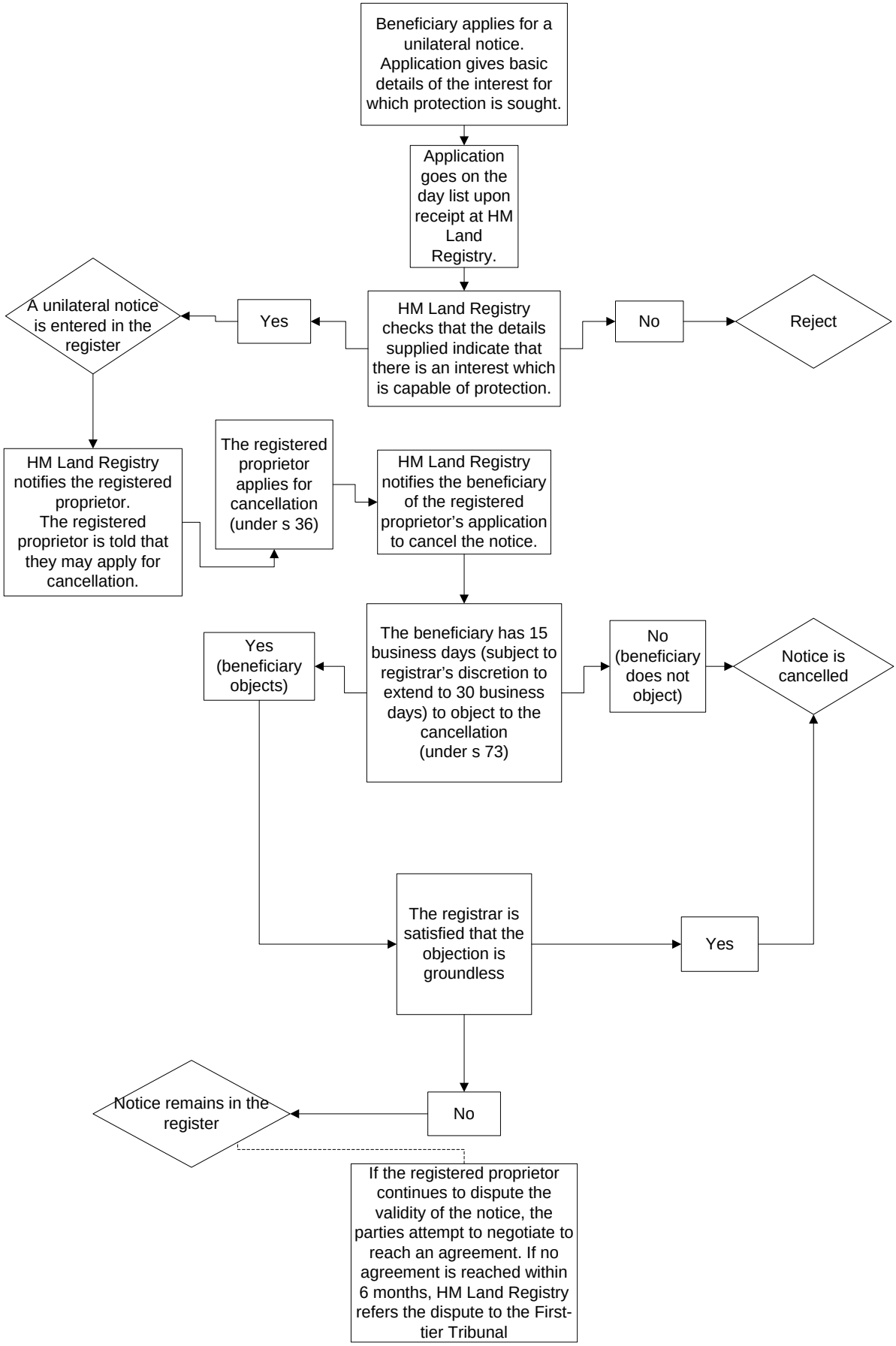
Members of the Law Commission team attended nearly 20 consultation events and meetings, both during and after the consultation period including:

- The Modern Studies in Property Law Biennial Conference, at Queen's University Belfast, on 5 to 7 April 2016.
- A meeting with the Law Society, at the Law Society's offices, on 28 April 2016.
- A meeting with the Association of Property Support Lawyers, at Charles Russell Speechlys LLP, on 18 May 2016.
- An event hosted by the Commercial Real Estate Legal Association, at Dentons UKMEA LLP in London, on 8 June 2016.
- An event organised by the Commercial Real Estate Legal Association held at Northumbria University in Newcastle, on 13 June 2017.
- A meeting of the Law Society's Conveyancing and Land Law Committee, at the Law Society's Chancery Lane offices, on 14 June 2016.
- An event organised by the Law Society Office in Wales, in Cardiff, on 15 June 2016.

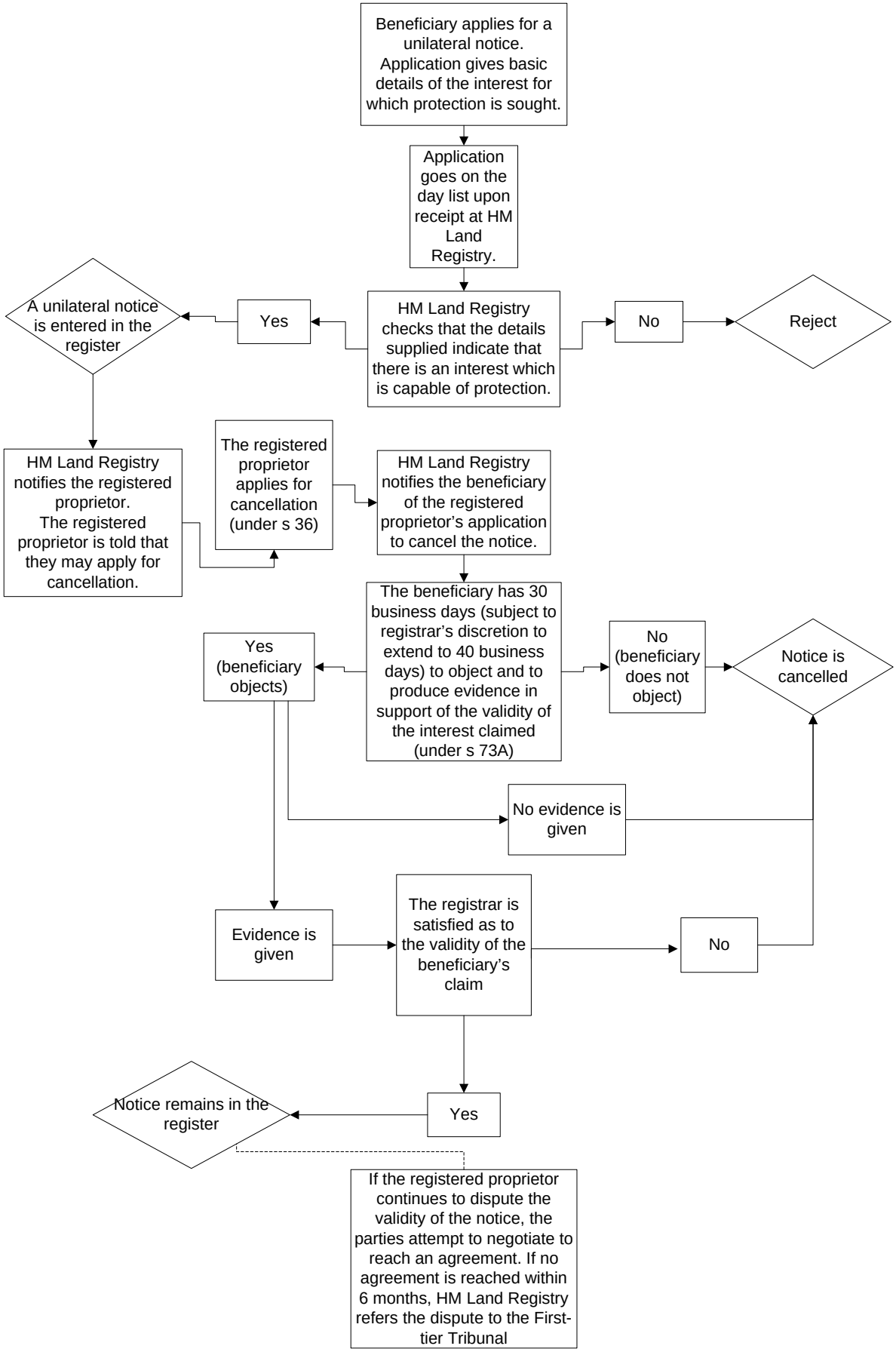
- An event organised by the Commercial Real Estate Legal Association Bristol, at Burges Salmon LLP in Bristol, on 15 June 2016.
- A meeting with the City of London Law Society Land Law Committee at Hogan Lovells International LLP, on 13 July 2016.
- A meeting with the Berkeley Group and its legal advisers, on 22 June 2016.
- A meeting with the Council of Mortgage Lenders, at their offices, on 23 June 2016.
- An event organised by the Commercial Real Estate Legal Association Nottingham, at Shakespeare Martineau LLP in Nottingham, on 24 June 2016.
- An event organised by the Commercial Real Estate Legal Association Birmingham, at Squire Patton Boggs LLP in Birmingham, on 30 June 2016.
- An event organised by the Commercial Real Estate Legal Association Cambridge, at Mills & Reeve LLP in Cambridge, on 1 July 2016.
- An event organised by the Commercial Real Estate Legal Association Guildford, at Charles Russell Speechys LLP in Guildford, on 5 July 2016.
- Two events organised by the Commercial Real Estate Legal Association Manchester and Leeds, both held at Eversheds LLP in Manchester and Leeds, on 8 July 2016.
- Royal Institution of Chartered Surveyors conferences, in Bournemouth, Cambridge, Leeds and London, between 22 September 2016 and 8 December 2016.
- The Society of Legal Scholar's Annual Conference, in September 2016.
- The eConveyancing and Title Registration International Conference hosted by the National University of Ireland, Galway, in April 2017.

# Appendix 4: Objecting to an application to cancel a unilateral notice

## FIGURE 37: THE SCHEME UNDER THE CURRENT LAW



## FIGURE 38: THE SCHEME UNDER RECOMMENDATION 14



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