Updating the Land Registration Act 2002
A Consultation Paper
Law Commission
Consultation Paper No 227

UPDATING THE LAND REGISTRATION ACT 2002
A Consultation Paper
THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Bean, Chairman, Professor Nick Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The acting Chief Executive is Matthew Jolley.

Topic of this consultation: Updating the Land Registration Act 2002: registration of title; priorities; indefeasibility; easements; adverse possession; charges; electronic conveyancing; and jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber).

Geographical scope: This consultation paper applies to the law of England and Wales.


Duration of the consultation: We invite responses from 31 March 2016 to 30 June 2016.

Comments may be sent:

By email to propertyandtrust@lawcommission.gsi.gov.uk

OR

By post to Jennifer Boddy, Law Commission, 1st Floor, Tower, Post Point 1.53, 52 Queen Anne’s Gate, London, SW1H 9AG.

Tel: 020 3334 6857 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

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# THE LAW COMMISSION

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## Glossary

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<td>Absolute title / Title Absolute</td>
<td>The best class of title which can be awarded by Land Registry. Registration with absolute title means that the estate is vested in the proprietor subject only to interests which are the subject of an entry in the register, overriding interests, and interests acquired under the Limitation Act 1980 (in other words, interests acquired through adverse possession) of which the proprietor had notice. See also possessory title and qualified title.</td>
</tr>
<tr>
<td>Adverse possession</td>
<td>Unauthorised physical control and occupation of land belonging to another coupled with the intention to exclude others from the land, which over time may entitle the person in possession to claim title to an estate in the land.</td>
</tr>
<tr>
<td>Agreed notice</td>
<td>A type of notice which is entered on 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.</td>
</tr>
<tr>
<td>Alienate / alienation</td>
<td>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.</td>
</tr>
<tr>
<td>Appurtenant</td>
<td>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.</td>
</tr>
<tr>
<td>Benefit</td>
<td>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 its enjoyment or enforcement is dependent on being the current owner of that estate.</td>
</tr>
<tr>
<td>Burden</td>
<td>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.</td>
</tr>
<tr>
<td>Caution against first registration</td>
<td>A caution against first registration may be lodged by a person who is entitled to an interest affecting an unregistered <strong>estate in land</strong>. 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 on the register.</td>
</tr>
<tr>
<td>Chancel repair liability</td>
<td>An owner of land subject to chancel repair liability is liable to pay for or contribute to repairs of the chancel of a church.</td>
</tr>
<tr>
<td>Chargee</td>
<td>A person with the benefit of a charge over a property. In registered land law 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.</td>
</tr>
<tr>
<td>Charging order</td>
<td>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.</td>
</tr>
<tr>
<td>Chief Land Registrar / registrar</td>
<td>The head of Land Registry, who is appointed by the Secretary of State to be both Chief Land Registrar and Chief Executive of Land Registry.</td>
</tr>
<tr>
<td>Copyhold</td>
<td>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.</td>
</tr>
<tr>
<td>Customary rights</td>
<td>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.</td>
</tr>
<tr>
<td>Day list</td>
<td>A record kept by Land Registry showing the date and time at which every pending application against a registered title is made, including applications for a priority search.</td>
</tr>
<tr>
<td>Demise</td>
<td>The grant of a <strong>leasehold estate</strong>. The term is also used to describe the area leased.</td>
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<tr>
<td>Term</td>
<td>Description</td>
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<tr>
<td>Disponee</td>
<td>A person to whom an interest or estate in land is granted or conveyed. For example, a buyer of a <strong>freehold</strong> or <strong>leasehold estate</strong>, a tenant under a lease, a <strong>chargee</strong>, or a person who is granted an <strong>easement</strong>. See also <strong>disponor</strong>.</td>
</tr>
<tr>
<td>Disponor</td>
<td>A person who grants or conveys an interest or estate in land to another. See also <strong>disponee</strong>.</td>
</tr>
<tr>
<td>Easement</td>
<td>A right to make some limited use of land belonging to someone else, or to receive something from that person’s land. Examples include rights of way or rights to light or support.</td>
</tr>
<tr>
<td>Electronic conveyancing / e-conveyancing</td>
<td>We use the term electronic conveyancing to describe a process of dealing with land whereby all or part of the disposition occurs online.</td>
</tr>
<tr>
<td>Estate contract</td>
<td>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 proprietary right in land.</td>
</tr>
<tr>
<td>Estate in land</td>
<td>A right to land that confers use or possession of the land for a period of time. In this publication we refer to the <strong>freehold estate</strong> (of potentially indefinite maximum duration) and the <strong>leasehold estate</strong> (which lasts for a fixed duration). Those who hold a freehold estate or long leasehold are colloquially known as owners of land.</td>
</tr>
<tr>
<td>Fee simple (absolute in possession)</td>
<td>Another name for a <strong>freehold</strong> estate. The term is now primarily associated with freehold estates in unregistered land.</td>
</tr>
<tr>
<td>Freehold</td>
<td>An <strong>estate in land</strong> of a potentially indefinite maximum duration. A freehold estate is one of the two legal <strong>estates in land</strong> which can be registered with its own title (the other being certain <strong>leasehold estates</strong>).</td>
</tr>
<tr>
<td>Grant</td>
<td>The express creation of an estate or interest in land, for example, a lease or an easement.</td>
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<td>Term</td>
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<tr>
<td>Home right</td>
<td>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).</td>
</tr>
<tr>
<td>Indemnity covenant</td>
<td>A promise by one person to undertake obligations held by another person, which includes a promise to re-imburse that other person in the event that the obligations are not complied with and the other person suffers loss as a result.</td>
</tr>
<tr>
<td>Keeper of the Registers of Scotland</td>
<td>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.</td>
</tr>
<tr>
<td>Lease / Leasehold estate</td>
<td>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).</td>
</tr>
<tr>
<td>Legal interest in land</td>
<td>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.</td>
</tr>
<tr>
<td>Licence</td>
<td>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.</td>
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<tr>
<td>LRA 1925</td>
<td>Land Registration Act 1925.</td>
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<td><strong>LRA 2002</strong></td>
<td>Land Registration Act 2002.</td>
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<tr>
<td><strong>LRR 1925</strong></td>
<td>Land Registration Rules 1925.</td>
</tr>
<tr>
<td><strong>Manorial rights</strong></td>
<td>Rights held by lords of former <em>copyhold</em> 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.</td>
</tr>
<tr>
<td><strong>Minor interests</strong></td>
<td>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.</td>
</tr>
<tr>
<td><strong>Nemo dat quod non habet</strong></td>
<td>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.</td>
</tr>
<tr>
<td><strong>Overreaching</strong></td>
<td>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.</td>
</tr>
<tr>
<td><strong>Overriding interest</strong></td>
<td>An interest which is binding on a first registered proprietor following first registration of an estate in land, or on a <em>disponee</em> following a registered disposition of a registered estate or charge, notwithstanding that the interest has not been noted on the register.</td>
</tr>
<tr>
<td><strong>Positive covenant</strong></td>
<td>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.</td>
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<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
<td>Possessory title</td>
<td>One of the classes of title with which a proprietor may be registered (see also absolute title and qualified title). Registration with possessory title has the same effect as registration with absolute title, except that it 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.</td>
</tr>
<tr>
<td>Prescription / Prescriptive acquisition</td>
<td>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.</td>
</tr>
<tr>
<td>Priority search</td>
<td>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.</td>
</tr>
<tr>
<td>Profit à prendre</td>
<td>The right to remove the products of natural growth from the burdened land; a common example is a right to cut turf or take game or fish.</td>
</tr>
<tr>
<td>Proprietary estoppel</td>
<td>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.</td>
</tr>
<tr>
<td>Qualified title</td>
<td>One of the classes of title with which a proprietor may be registered (see also absolute title and possessory title). Registration with qualified title has the same effect as registration with absolute title, except that it does not affect the enforcement of any estate, right or interest which appears from the register to be excepted from the effect of registration.</td>
</tr>
<tr>
<td>Registrable disposition</td>
<td>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.</td>
</tr>
<tr>
<td>Term</td>
<td>Definition</td>
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<tr>
<td>Registrar</td>
<td>See Chief Land Registrar.</td>
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<tr>
<td>Registration gap</td>
<td>The period between completion of a disposition and its registration. It is made up of two distinct periods: first, the gap between completion of the disposition and the application for registration being submitted to 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 Land Registry.</td>
</tr>
<tr>
<td>Requisition</td>
<td>An enquiry raised by 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 to respond may result in the application being rejected.</td>
</tr>
<tr>
<td>Restriction</td>
<td>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 on the register.</td>
</tr>
<tr>
<td>Restrictive covenant</td>
<td>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.</td>
</tr>
<tr>
<td>Reversion</td>
<td>The name given to the estate out of which a lease has been granted, for the duration of the lease.</td>
</tr>
<tr>
<td>Torrens system</td>
<td>A system of title registration first implemented in South Australia by Sir Robert Torrens.</td>
</tr>
<tr>
<td>Tribunal</td>
<td>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 Land Registry.</td>
</tr>
<tr>
<td>Trust of land</td>
<td>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.</td>
</tr>
<tr>
<td>Unilateral notice</td>
<td>A type of notice which is entered on 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.</td>
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PART 1
INTRODUCTION TO THE PROJECT AND TO LAND REGISTRATION
CHAPTER 1
INTRODUCTION

THE IMPORTANCE OF LAND REGISTRATION

1.1 The importance of clear and efficient law governing the ownership of land cannot be overstated. The days when title to land was always proved by the production of a bundle of deeds are long gone; today, most landowners in England and Wales have registered title to their land. That means that their ownership is recorded on a register kept by Land Registry. Entry on the register is all that is needed to prove title, and the law does not allow buyers of land (or lenders) to look behind the register at the deeds and other documents to establish their title. Furthermore, the law guarantees the correctness of the register.

1.2 An effective land registration law is essential for everyone who owns land, whether as home owners, owners of businesses or investors. Most people who have come across land registration in their everyday lives have done so through buying and selling their own home. In addition to being aware of the idea of registration as proof of ownership, people may also have had explained to them by conveyancers entries on a register outlining rights that other people have over their land, or that they have over land owned by someone else. That may, for example, be a restrictive covenant designed to protect the residential character of a house by preventing business use, or a right of way (a type of easement) enabling access across a neighbour’s land. A home will often be the most expensive thing we buy and we may look to our home as a good financial investment as well as a place to live. Restrictive covenants and easements, as well as other property rights, may also have a significant financial value attached to them in addition to being of considerable amenity value. The means by which we own our homes and ensure that the property rights we have are enforceable is dependent on the effective operation of the land registration system.

1.3 Land registration has wider importance for business and the economy. A recent report from the World Bank suggests that the best economies are those with good regulations that allow efficient and transparent functioning of businesses and markets. As the World Bank comments:

A well-designed land administration system, by providing reliable information on the ownership of property, makes it possible for the property market to exist and to operate.


3 Above, p 1.
THE BACKGROUND TO OUR CURRENT WORK

1.4 Land registration in England and Wales is governed by the Land Registration Act 2002 (LRA 2002). This was not the first land registration statute to be enacted in this jurisdiction; it is the latest in a long series that began in 1862. It was a major reform of the law, which repealed and replaced its predecessor, the Land Registration Act 1925 (LRA 1925), and accomplished a great deal of modernisation. It was the result of a joint project carried out by the Law Commission and Land Registry; uniquely in the history of the Law Commission, the draft Bill annexed to our report, Land Registration for the Twenty-First Century (our 2001 Report), was introduced in Parliament the day before the Report was published.

1.5 This is a project to update the LRA 2002 in the light of the way it has worked so far. It has operated successfully for over 12 years now; but inevitably 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. Our review of the LRA 2002 in order to update the legislation is wide in its scope, but it is not fundamental in its nature. We have undertaken a detailed examination of a number of specific aspects of the LRA 2002 in order to propose reforms designed to operate within the existing legal framework provided by the Act. We have also been conscious of the need, as far as possible, to ensure that the provisional proposals we make stand the test of time and are fit for purpose not only now, but also for the future.

1.6 The landscape within which land registration operates has changed considerably since the LRA 2002 came into force. We have seen an increase in incidents of registered title fraud, the legal consequences of which have proved difficult to resolve, while technology has not developed in the way that was predicted at the time of the legislation. We have also witnessed the global economic crisis and a domestic recession, which impacted significantly on the property market. The market has since improved, but the effects of these events continue to be felt: they shape attitudes to mortgage-lending decisions and therefore to property transactions.

1.7 The recession was the cause of much personal hardship for individuals and families and for business. Inevitably, the impact on the property market was also felt by Land Registry and has had a continuing impact on its operational resources. As the Chief Land Registrar noted in the Forward to Land Registry’s Annual Report for 2008 to 2009:

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4 Land Registration for the Twenty-First Century (2001) Law Com No 271 (we refer to this report as “Law Com 271” or “our 2001 Report” throughout this Consultation Paper).

5 It was brought into force on 13 October 2003.


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 to the second quarter of 2008: p 40.

8 The recession led to a comprehensive review of the mortgage market: Financial Services Authority, Mortgage Market Review (October 2009).
the current slump … has seen our core business collapse by up to 75 per cent in volume. To put it bluntly, our workload and income have fallen off a cliff. It’s probably the most difficult period in our long history.9

The impact of the recession led to an Accelerated Transformation Programme, resulting in a significant reduction of Land Registry’s workforce and restructuring, including the closure of some offices.10

1.8 This project on land registration is part of our Twelfth Programme of Law Reform.11 We held a public consultation on our Twelfth Programme from July to October in 2013. As part of that consultation, we identified a number of possible law reform projects on which we requested views.12 Those possible projects included a review of the LRA 2002. We explained at that time that discussions with Land Registry suggested that there may be scope for a project on the Act and we highlighted, in particular, two areas for consideration.13 First, the effect of the guarantee of title and the impact of fraud upon that guarantee. We noted that cases “have demonstrated that the effect of the Act’s provisions is not clear, and that clarification is required”.14 Secondly, we raised the need to revise the provisions of the LRA 2002 on electronic conveyancing in the light of technical advances and our understanding of how electronic conveyancing has progressed in other jurisdictions. We therefore invited views on whether the Law Commission should take on a project.

1.9 In 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 Land Registry and by the Department for Business, Innovation and Skills, the Government department which sponsors Land Registry and is answerable for Land Registry in Parliament.15 The project was then approved along with the other work forming our Twelfth Programme of Law Reform by the Lord Chancellor, which we published in July 2014.

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14 Above.
15 Land Registry is a non-ministerial government department. It is also an Executive Agency of the Department for Business, Innovation and Skills.
1.10 In line with common practice, the Government agreed to make a financial contribution to the Law Commission towards the costs of the project. That contribution is being paid by 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 funding arrangements agreed for our law reform projects.

1.11 We announced the scope of the project in our Twelfth Programme of Law Reform as follows:

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 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.16

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

THE SCOPE OF OUR WORK

1.13 The terms of reference for our project are broadly stated as comprising a “wide-ranging review” of the LRA 2002. Following the announcement of the programme we met with a number of stakeholders to identify aspects of the legislation that are most in need of review. Those discussions, and the responses of stakeholders to our consultation on the programme, raised a large number of issues for us to consider. These issues revealed a range of different concerns with aspects of the legislation. In some instances, including the operation of the LRA 2002 in cases of registered title fraud, the legislation lacks clarity in a way that impacts adversely both on people involved in property transactions and on Land Registry in administering the scheme. In others, technology has not developed in the way that was anticipated at the time of the LRA 2002. In particular, it became apparent that electronic conveyancing, in the specific legal form anticipated by the Act, is not at the present time an achievable goal.

16 Twelfth Programme of Law Reform (2014) Law Com No 354, paras 2.15 to 2.16.
1.14 We have not taken forward all of the issues raised with us into our work. Some of the issues raised were outside the scope of our project, as they raised questions relating to the rights of owners of particular property rights, rather than the rules of land registration applicable to those rights.

1.15 Some other issues that were raised fall within the scope of a review of the LRA 2002, but we have not taken the issues forward for other reasons. In the context of a law reform project, we have had to bear in mind what can and cannot be achieved by reform of the LRA 2002. Hence, we have focused our attention on issues that the evidence we have received suggests are causing problems in practice and can appropriately be resolved by reform of the legislation. We have not taken forward issues where, on the basis of the evidence that we have received, the point appears unlikely to arise.

1.16 Some of the issues raised for us to consider concern questions of interpretation of the LRA 2002. We acknowledge that uncertainty can be the source of considerable practical difficulty, particularly where transactions, possibly involving long-term property relations, are conducted on the basis of assumptions as to how the legislation will be interpreted. We have taken forward a number of issues where the root of difficulties lies in doubts as to the intended operation of provisions of the LRA 2002. In these instances we have made provisional proposals that would clarify the legislation. However, we are also mindful that any change to the legislation is likely to give rise to an assumption of a change in the law. Attempts at clarification can therefore be counter-productive if they sow seeds of doubt affecting ongoing relations. We have not taken forward issues where the interpretation of a provision does not seem seriously to be in doubt or where practical difficulties appear unlikely to arise. We have also taken into account that in some instances legislation cannot deal with every possible eventuality and open-textured words and phrases can more usefully be left for interpretation and application by practitioners and, ultimately, the courts on a case-by-case basis.

1.17 In some instances, the issues raised by stakeholders have indicated that there may be underlying problems with the law that merit consideration in future work. Where that is the case, we have used this Consultation Paper as an opportunity to invite consultees’ views in advance of the Law Commission’s forthcoming consultation on our Thirteenth Programme of Law Reform. For example, we have taken this approach towards a number of matters relating to charges in Chapters 18 and 19.

1.18 We turn to explain some of the decisions made about the scope of our project that may be of particular interest.
Manorial rights and chancel repair liability

1.19 We were referred to a number of concerns with respect to manorial rights and liability for chancel repairs. Both of these rights are of ancient origin. Manorial rights comprise certain rights retained by lords of the manor in England and Wales when land became freehold in the early twentieth century. Liability for chancel repairs is an obligation to pay for repairs to the chancel of a church. The concerns relating to manorial rights were highlighted by the report of the House of Commons Justice Committee on Manorial Rights published in January 2015. Some of the issues raised with us in respect of these rights relate to how they are protected under the LRA 2002. We discuss these issues in Chapter 9. In respect of manorial rights, we agreed with the Government that we would examine, as part of our project on the LRA 2002, two of the recommendations made by the Justice Committee relating to the protection of the rights under the LRA 2002. However, other points referred to us and discussed by the Justice Committee concern the legal status of the rights. The nature of the rights is not a matter which is governed by the LRA 2002 and therefore cannot appropriately be addressed in a review of the Act.

Overreaching and the protection of beneficial interests

1.20 We were asked by stakeholders to consider a review of the doctrine of overreaching and to consider whether beneficial interests should be able to be entered on the register. 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. Overreaching is a general principle, which applies to personal property as well as land and to unregistered as well as registered land. It is governed primarily by provisions in the Law of Property Act 1925. We therefore concluded that its operation did not fall within our current review.

17 We considered chancel repair liability in Liability for Chancel Repairs (1985) Law Com No 152.
18 Justice Committee, Manorial Rights (HC 657, January 2015).
19 See paras 9.122 and following below.
20 Law of Property Act 1925, ss 2 and 27(2). We acknowledge that there is an alternative argument (developed by reference to the Land Registration Act 1925 (we refer to this Act as the "LRA 1925" throughout this Consultation Paper)) that registered land contains its own self-contained scheme of overreaching. However, this view has not garnered support and is noted by the author as being against the current authorities: N Jackson, "Overreaching in Registered Land Law" (2006) 69 Modern Law Review 214.
1.21 The inability to enter a beneficial interest on the register reflects one of the three basic principles of registered land (the “curtain principle”, which we explain in Chapter 2). The exclusion of beneficial interests reflects the expectation that overreaching will operate on a disposition. The type of property rights that can be entered on the register is clearly within the scope of an update of the LRA 2002. The treatment of beneficial interests under the Act, however, reflects an ongoing debate about the correct balance to strike between the rights of purchasers and mortgagees on the one hand, and beneficiaries on the other, particularly in the context of beneficial interests that people may own in their home. That debate raises broad questions of social policy that ultimately touch on the appropriate balance the law strikes between property as a “home” and as a financial investment for homeowners to realise.21 The treatment of beneficial interests in the LRA 2002 sits within a much wider matrix of considerations of how the law balances the desire of home owners to secure their interest in the home, with the interests of purchasers and of those (such as mortgage lenders) with a financial interest in the property. We did not consider that it would be appropriate to interfere with long-established assumptions by looking at how beneficial interests are dealt with by the LRA 2002 in isolation from the broader debates.

1.22 On 4 March 2016 the Government published a consultation on enhancing the transparency of beneficial ownership of foreign companies that purchase land or property in England and Wales.22 The proposals form part of a range of measures designed to combat money laundering.23 If taken forward, the proposals in the consultation would include the creation of a register of beneficial ownership of foreign companies that own land in England and Wales. It is important to note, however, that the proposals do not relate to the recording of beneficial ownership of that land on the land register. Therefore, these proposals do not affect the principles outlined above.

21 A comprehensive discussion is provided by L Fox, Conceptualising Home: Theories, Laws and Policies (2006).


23 Above, para 1.
Registration of local land charges on the register

1.23 The land register governed by the LRA 2002 is not the only register that contains information about land. We explain the scope of what is recorded on the register in Chapter 2. It is, in essence, a register of ownership of land and of some other property rights held in relation to land. Some information about land is held on what is known as the local land charges register, which is governed by the Local Land Charges Act 1975. Local land charges registers are currently administered by local authorities, but under the Infrastructure Act 2015, these registers will be replaced by a single local land charges register administered by Land Registry. The local land charges register contains information about planning permissions, compulsory purchase orders, and other public burdens that derive their validity from statute. It also contains information about some privately created rights that are not, in legal terms, property rights in land.

1.24 During consultation on the contents of our Twelfth Programme it was suggested to us that information currently recorded on local land charges registers could instead be recorded on the land register. We have not pursued this suggestion. Even though the local land charges register will in future be administered by Land Registry, its primary purpose is different from that of the land register. The land register guarantees title to land and records some other property rights in land in order to determine questions of priorities, which determine against whom rights can be enforced. The guarantee of title is reinforced by the provision of an indemnity scheme. We consider the guarantee of title and the operation of the indemnity scheme in Chapters 13 and 14.

1.25 The primary purpose of local land charges registers, on the other hand, is to publicise information about the matters which are contained within them. Matters which comprise local land charges will be binding on a person who acquires the land to which they relate notwithstanding their non-registration. Compensation may be payable under the Local Land Charges Act 1975 to such a person if the relevant local land charge has not been registered, but this compensation is not part of the indemnity scheme contained in the LRA 2002. In this way the local land charges register is not conclusive as to the existence (or non-existence) of a local land charge, and questions of priorities are not really applicable to local land charges as the interests recorded on the local land charges register do not necessarily compete or conflict with one another. The rules which govern the enforceability of local land charges are found in other legislation, which would not sit happily with the land registration regime, even when both registers are under the administrative control of Land Registry.


25 For example, a Light Obstruction Notice under the Rights of Light Act 1959. In our Report on Rights to Light (2014) Law Com No 356 we recommended a new procedure, the Notice of Proposed Obstruction, designed to manage negotiations about the enforcement of rights to light, which again would be registrable as a local land charge.

26 Local land charges are overriding interests under LRA 2002, sch 1, para 6 and sch 3, para 6. We explain the concept of overriding interests in Chapter 2: see para 2.61 and following below.
OUR RELATIONSHIP WITH LAND REGISTRY

1.26 As we have explained in paragraph 1.4 above, our 2001 Report that led to the LRA 2002 was the product of joint work between us and Land Registry. This project has not been conducted jointly and this Consultation Paper is a Law Commission update of the LRA 2002.

1.27 In undertaking our project, we have worked closely with Land Registry staff to understand 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. Many of our provisional proposals for reform in this Consultation Paper have been discussed with Land Registry, but the provisional proposals we are making have been reached independently by us.

1.28 As with all of our work, we will seek to find consensus with all 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 is to devise recommendations for reform which balance the needs and requirements of all stakeholders, including property owners, practitioners, Land Registry and ultimately all taxpayers. Sometimes those interests will coincide; at other times they may diverge. We will make the recommendations that we feel, in 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.

GOVERNMENT CONSULTATION ON PRIVATISATION OF LAND REGISTRY OPERATIONS

1.29 The question of whether Land Registry operations should be moved into the private sector is not a matter that falls within the scope of our project. Our project is confined to updating the LRA 2002.

27 The indemnity scheme contained in the Land Registration Act 2002 (we refer to this Act as the “LRA 2002” throughout this Consultation Paper) is funded by fees paid to Land Registry, but in the event of a catastrophic loss the costs would ultimately be borne by taxpayers.
1.30 At the time our project was agreed as part of our Twelfth Programme of Law Reform, the Government had reported its conclusions on a proposal by the Department for Business, Innovation and Skills to create a new service delivery company to have responsibility for processes relating to land registration.28 The consultation had taken place between January and March 2014.29 As a result of the consultation, the Government concluded that further consideration of the proposal would be valuable. It announced that "at this time, no decision has been taken to change Land Registry’s model".30 The Government’s report explained, however, that it "continues to believe that there could be benefits in creating an arm’s length service delivery company to transform and modernise the way in which land registration is carried out in the UK, as well as to support new opportunities for the business to play a wider role in the property market".31

1.31 Following announcements in November 2015 and March 2016 that a consultation would take place on options to move Land Registry operations to the private sector,32 the Government published a consultation document on the issue on 24 March 2016.33 At the time of that publication, the provisional policy contained in our Consultation Paper, which represents the independent view of the Law Commission, had already been finalised. The Government’s previous announcements had, however, already placed particular focus on how Land Registry may operate in the future.

1.32 Our Consultation Paper raises a range of important issues. Many of these are technical, but others consider fundamental questions about what land registration does. We are aware that any potential changes to Land Registry may impact on consultees’ views on some of the issues included in our update of the LRA 2002. We are confident, however, that all of the issues that we discuss will remain significant in practice irrespective of any decision by the Government on the ownership of Land Registry. We will continue to engage with stakeholders to ensure that our final recommendations fully take into account any decision made by the Government in respect of Land Registry’s operations.

31 Above, part 2, para 10.
33 Department for Business, Innovation and Skills, Consultation on moving Land Registry operations to the private sector (March 2016).
THE STRUCTURE OF THIS CONSULTATION PAPER

1.33 This Consultation Paper is divided into ten parts. Part 1 explains our project and provides an introduction to land registration. Part 2 considers the registration of estates and dispositions of land, including a number of issues that arise when land is registered for the first time. Part 3 considers the land registration rules on priorities. These rules determine when and against whom a property right is enforceable. Part 4 addresses the question of indefeasibility; the circumstances in which the register can be changed and when such changes trigger an entitlement to an indemnity. Part 5 looks at specific matters relating to easements and Part 6 examines the provisions of the Act on adverse possession. Part 7 addresses some specific issues relating to mortgages or charges over registered land. Part 8 considers the development of electronic conveyancing. Part 9 looks at the jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber) (referred to in this Consultation Paper as the Tribunal), which adjudicates disputes relating to registered land. Finally, in Part 10 we gather together our provisional proposals for reform and other questions on which we invite the views of consultees.

ACKNOWLEDGEMENTS

1.34 We are grateful to all of those individuals and organisations who responded to our proposal for this project in our consultation for our Twelfth Programme of Law Reform. We would also like to express our thanks to all of those with whom we have met and corresponded in the preparation of this Consultation Paper. We extend our thanks, in particular, to the Association of Property Support Lawyers; Chancery Bar Association; City of London Law Society Land Law Committee; The Law Society Conveyancing and Land Law and Wills and Equity Committees; London Property Support Lawyers Group; Practical Law; Richard Calnan; Professor Martin Dixon; Amy Goymour; Charles Harpum; Dr Emma Lees; Professor Pamela O’Connor and Sian Skerratt-Williams.
CHAPTER 2
AN OUTLINE OF LAND REGISTRATION

INTRODUCTION

2.1 This chapter provides an introduction to the purpose and structure of land registration law. Although it is written with a view to assisting those who are not familiar with the very technical subject matter of this project, expert readers too may find it useful as an explanation of the way the Law Commission approaches land registration and the issues addressed in this Consultation Paper. Much of the explanation in subsequent chapters presupposes an understanding of the material in this one. We also refer readers to the Glossary for an explanation of some of the more general land law terms that are not set out in this chapter.

LAND, CONVEYANCING AND REGISTRATION

2.2 Land is a complex asset. Land can be a home, a source of income, a place of business, an access route to other land, security for a loan – the possibilities are many. Accordingly, buying land is not like buying other things. When a new bicycle, for example,\(^1\) is bought from a reputable shop for cash it is certain that no-one else owns it in whole or in part. Buying land bears some resemblance to the purchase of a car from a private seller, where there may be a worry that the car is in fact owned by someone else, or subject to a hire-purchase agreement. But it is more complex than that: the buyer of land may find that it is subject to a mortgage, or that a neighbour has a right of way or other easement over it, or even that a member of the owner’s family has an informal right to part-ownership of it, and so on.

2.3 The buyer of land has to be sure that he or she will buy it free of unwelcome or undisclosed interests.

2.4 We can give an example. C wants to buy land from B. B says he or she bought the land from A ten years ago. How can C be sure that B really did buy the land from A? And how can C be sure that the land is not subject to a mortgage or a lease that he or she has not been told about and that could be binding on C if C buys the land?

\(^1\) A bicycle is used as an example of a typical transaction involving property other than land by B McFarlane, *The Structure of Property Law* (2008).
2.5 Without a system of land registration, the answer is that C has to look at B’s documents of title: B’s deeds, as we say colloquially. B should be able to produce the conveyance to him or her from A. If it turns out that A was a trustee of the property, C will also have to check the trust deed so as to be sure that A had the power to transfer the land to B. Under the law that governs conveyances outside our system of land registration (known as unregistered land), C will have to investigate further back, because C must ensure that B can show a good root of title at least 15 years old; so C will have to check also the conveyance to A, at whatever date A bought the land. This can be a laborious process in a more complex case; and even though deeds will be produced for C’s inspection, C may not be sure that they were not forged. And it is always possible that deeds may have been lost or concealed, and so C can never be sure that he or she will not be bound by some interest in the land that he or she does not know about. The fact that there is nothing amongst the deeds to indicate that there is a lease or a right of way across the back garden does not mean that no such rights exist and if they do, C may still be bound by them. That is because in an unregistered conveyance some property rights that already exist in land will always bind C. Other types of rights will bind C unless C can show that he or she purchased the land in good faith without having notice of the rights. But notice in the context of unregistered land is a broad concept that includes not only rights that C actually knows about, but also those that C or his or her agent (for example, the conveyancer) ought to have known about if reasonable inquiries had been made.

2.6 This complexity and uncertainty are the product of an essentially private system of land transfer. Deeds are the responsibility of a property owner, who must keep them but can lose them or hide them, and their validity cannot be guaranteed. The civil law jurisdictions of continental Europe and elsewhere have a notarial system; the identity of the parties to a transaction and the validity of their documentation are checked by a notary, and the risk of forgery is therefore far lower than in England and Wales and the common law jurisdictions where conveyancing has traditionally been a private procedure.

2.7 Land registration ultimately aims to reduce or eliminate complexity and uncertainty in conveyancing.

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2 Law of Property Act 1969, s 23.

3 In unregistered land, legal rights always bind C. We explain why some rights are called legal rights at paras 2.24 to 2.25 below.

4 As a result of what is known as the doctrine of notice. For an account of the doctrine, see C Harpum, S Bridge and M Dixon, Megarry & Wade, The Law of Real Property (8th ed 2012) paras 8-005 to 8-024 (we refer to this text as “Megarry & Wade” throughout this Consultation Paper). The doctrine applies to equitable rights in unregistered land. We explain why some rights are called equitable rights at para 2.25 below.
There are many forms of land registration. Deeds registration is an early form. In England, the Middlesex and Yorkshire deeds registries were created in the eighteenth century. Deeds registration is quite simply a public collection of deeds, indexed to make them searchable; the essence of the system is that an unregistered deed will not be enforceable against a purchaser. So if in the above example a deeds registration system were in force, and B had mortgaged the property to D (a bank), and D had not registered its mortgage, that mortgage would have no validity against C. C would then be able to buy from B knowing that C did not have to be concerned with whether any mortgage was in existence. This would otherwise be a concern for a buyer, who needs to be sure that any mortgages have been redeemed. It would equally be a concern if C were about to lend on the security of the land, rather than to buy it; as a mortgagee C would need to know whether it had a first mortgage over the land, or whether the land was already charged with a prior loan.

But deeds registration does not guarantee the validity of the deeds; C must be satisfied that the transfer to B was valid, and indeed also the transfer to A. All that deeds registration does is to ensure that the purchaser knows that he or she will not be affected by any deed that is not on the register.

In other words, deeds registration regulates the priority of deeds; it determines which deeds will be enforceable against a buyer, or a mortgagee, of land – or, in more traditional terminology, which ones will bind a purchaser.

In this chapter we use the term “land registration” to include deeds registration, although in the rest of this Consultation Paper we use the term to refer only to title registration (explained at para 2.12 below) as is more usual.


That is a simplification of the position, which in practice was complicated by the puzzle of what should happen when a purchaser knew about a deed that was not registered; for the full story see above, pp 18-20.
2.11 The deeds registries in England have now been closed to new entries. A new system of managing priorities was introduced by the Land Charges Act 1925, namely the Land Charges Register. Whereas the deeds registries were regional in their scope, the Land Charges Act 1925 applied throughout England and Wales and provided a registration system for a limited range of rights in land (rather than a register of deeds), with the effect that rights that were registrable but had not been registered would not bind a purchaser even if the purchaser was aware of them. But it made no provision for the registration of ownership; it applied only to land the title to which had not yet been registered under the LRA 1925, the statute that governed registered land at the time.

2.12 Title registration, which is now the most widespread form of land registration, takes things one step further. It aims to facilitate conveyancing by eliminating the need to check the underlying deeds. What is seen on the register is what the purchaser gets. The register is supposed to set out the details of ownership and of any other rights in the land in tabular form rather than requiring the purchaser to investigate the history of the ownership of the land by examining the deeds. In order to do this, and truly to eliminate the need for the purchaser to investigate title through the deeds, title registration must go one step further than deeds registration. As well as regulating the priority of interests in land, it must also guarantee the truth of what it says about ownership. As well as saying something negative (“there are no unregistered interests in this land” – which, as we shall see, it says with some qualification) it must also say something positive: “the registered proprietor owns the land and can transfer it to you”.

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8 Since repealed and replaced by the Land Charges Act 1972.
10 Land charges registration persists today for land whose title is still unregistered: around 14% of land in England and Wales by area: Land Registry, *Annual Report and Accounts 2014/15* (July 2015) p 9. When such land is sold or mortgaged the purchaser must examine the deeds to ensure that a valid title is being offered, but the enforceability of third party rights in the land are, for the most part, governed by registration on the Land Charges Register. That register is held and managed by Land Registry but on its own terms and not as part of the register of title. Every sale of unregistered land as described here will be the last, because the purchaser’s title will have to be registered: LRA 2002, s 4.
Accordingly, if the register shows B as the freehold owner of land, C can take that at face value, knowing that registration makes B the owner of the land. If there are no adverse interests (easements, mortgages, restrictive covenants and so on) shown on the register, then C can buy with confidence knowing that he or she will get an unencumbered freehold. And if the register does not indicate that there are any limitations on B’s powers to transfer the land to C, C need not be troubled about B’s ability to sell; even if B is a trustee and the trust deed says that he or she cannot sell the land without a specified person’s consent, if that requirement is not shown on the register it has no effect on C.

The account just given is a simplification, but it sets out the basic intention and effect of title registration. In particular, we have not mentioned in this account an important category of interests known as "overriding interests". This is the name given to property rights which do not appear on the register but are enforceable against any purchaser.

**THREE BASIC PRINCIPLES**

Title registration exists in a number of different forms throughout the world. Each system has its own particular rules. While the same policy questions have often arisen in different jurisdictions, they will not necessarily be answered the same way. Each system of land registration is guided by what works best for the particular jurisdiction in which it applies.

There are, however, three basic principles that underpin systems of title registration. These principles were identified in a seminal work by Theodore Ruoff on a comparison of the English system with Torrens systems. Torrens is the eponymous name given to the system of registration introduced by Sir Robert Torrens in South Australia in 1858 and subsequently followed by a number of countries.

The first principle is the “mirror principle”, the idea that the register provides an accurate and complete reflection of property rights in relation to a piece of land. We will see at paragraph 2.55 and following below that the idea of a complete register sometimes gives way to countervailing policy choices, such as the need to protect some property rights as overriding interests.

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13 For a discussion of freehold estates, see para 2.23 below.
14 This is known as the register’s “positive warranty”; its basis is s 58 of the LRA 2002. We discuss it further at para 2.46 and following below.
15 This is known as the register’s “negative warranty”: see para 2.55 and following below. Its basis is the LRA 2002, s 29. However, it is subject to exceptions; the aspiration for the register to be a complete depiction of the title is not completely achieved in reality. See the discussion of overriding interests at para 2.61 and following below.
16 LRA 2002, s 26; we say more about the powers of a registered proprietor in Chapter 5.
17 We explain overriding interests at para 2.61 and following below.
19 We discuss the Torrens systems of registration further at para 13.23 and following below.
2.18 The second principle is the “curtain principle”. This principle says that a curtain is drawn across the register against any trusts. Hence, as we will see at paragraph 2.32 and following below the register does not record beneficial ownership of land.

2.19 The third principle is the “insurance principle”. We have noted and explore further below, at paragraph 2.46 and following below, that the register operates as a guarantee of title. People dealing with land need to be able to rely on what the register says because they are unable to look behind the register to the deeds. The insurance principle means that if the register is shown to be incorrect, those who suffer loss as a result are compensated.

2.20 In the sections that follow we first set out some basic concepts in land law and registration. We then outline some key aspects of the current legislation, the LRA 2002. We explain what is registrable and the way that registration affects the priority of interests. After that, we discuss the register’s guarantee of title, certainly the most difficult issue addressed in this Consultation Paper. We then consider the priority rules contained in the LRA 2002. These preliminary explanations pave the way for the chapters that follow.

SOME BASIC CONCEPTS

2.21 Land law in England and Wales, and the registration of land, is founded on a number of central concepts, many of which have their origins in the feudal system established at the time of William the Conqueror. The terminology and the connections between these concepts will be familiar to those operating or well-versed in the land registration system, but merit an explanation here since they are the basis of the technical issues discussed in this Consultation Paper.

2.22 We often refer to people “owning” land (or, indeed, other things) without questioning what this means. It could be said that the only real owner of land in England and Wales is the Crown. Under the feudal system the Monarch granted rights over parcels of his or her land and it remains the case that all land is held in “tenure” from the Crown; the tenure historically identified the terms on which the land was held, such as the provision of military, spiritual or other services to the Monarch. What owners, in fact, have is a bundle of rights that enables them to do whatever they like to the land in question and protects their entitlement to do so.20 One of those rights of ownership, and arguably the most important, is the right to exclude everyone else from the land.21

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20 Subject to any provisions of the criminal or civil law that regulate the exercise of those rights in the public interest.

2.23 A bundle of rights carrying with it the idea of ownership of a piece of land will often be referred to as an estate in that land. The essential element of an estate, and the difference between types of estate, is the duration for which those rights have been granted. English law recognises two legal estates: the freehold, which lasts forever, and the leasehold, which lasts for a fixed period of time.\(^2\)\(^2\) Importantly, there can be more than one estate in the same piece of land at the same time. For example, the owner of the freehold may grant a person a lease to last for 99 years. The owner of the lease may then grant a lease (known as a sub-lease) to another person for, say, 21 years.

2.24 An estate in land is only one type of property right that can exist in land. In addition, English law recognises five legal interests in land.\(^2\)\(^3\) These are rights that, not being part of a bundle of rights that suggest ownership, are nonetheless rights relating to a piece of land which may be binding upon (and are therefore enforceable against) subsequent owners of the land. Of the five legal interests in land, two are particularly relevant to this Consultation Paper:

1. Easements and profits à prendre. An easement is a right to make some limited use of land, such as a right of way, and a profit à prendre is a right to remove natural products from land (such as turf or game).

2. A mortgage. A mortgage is a property right granted to use land as security for a debt or loan. The bank or building society does not own the property but, if it is sold without repayment of the mortgage, the mortgage continues over the property since it is not a normal debt owed by the seller. It is an interest in the property.

2.25 The estates and interests recognised at law are not the only property rights that exist in land. In addition to legal rights, a number of equitable interests in land exist. Equitable rights are so called because they have their origins in courts of equity, which historically operated entirely separately from the courts of law. The jurisdictions of law and equity have been merged procedurally and a single set of courts now applies both rules of law and rules stemming from the courts of equity.\(^2\)\(^4\) The distinction between legal and equitable rights is less significant in registered land than it is in unregistered conveyancing. In registered land, how important a right is, and how it is protected to ensure that it continues to bind when land is sold, are not dependent on whether the right happens to be legal or equitable. Equitable rights in land include the following:

1. Beneficial interests under a trust of land, which reflect equitable ownership of land. Beneficiaries have the right enjoy land, either through occupation or receipt of rents and profits.

\(^2\)\(^2\) Law of Property Act 1925, s 1(1). The estates are referred to in the legislation respectively as “an estate in fee simple absolute in possession” and “a term of years absolute”.

\(^2\)\(^3\) Law of Property Act 1925, s 1(2).

\(^2\)\(^4\) The procedural merger resulted from the Judicature Acts 1873 to1875.
(2) Restrictive covenants attached to freehold title to land. A restrictive covenant is a promise not to use land in a particular way, such a covenant not to build on land or use it for business purposes.

(3) Estate contracts. An estate contract is a contract for the creation of an estate or interest in land, including a contract for sale of a freehold estate or a contract to grant a lease.

2.26 The property rights we have mentioned above are not intended to be a complete list of rights which can exist in or over land. We have referred only to those property rights that are particularly important for the issues discussed in this Consultation Paper.

WHAT IS REGISTERED IN REGISTERED LAND?

2.27 It will be clear from what has already been said that title registration is far more than a collection of information.

2.28 Even deeds registration, which did not have any effect upon the validity of the registered deeds, was more than just information. It governed priority, and protected a purchaser from the effect of unregistered deeds. But because title registration is designed to eliminate the work of unregistered conveyancing it is far more than a record. The register is an active instrument which guarantees the validity of that which is registered.

The registrable interests

2.29 The law of England and Wales permits the co-existence of a complex web of rights and obligations over land, and the register of title is a register of legal rights over land. It registers only a specified range of interests in land, set out in section 2 of the LRA 2002. Some of those registrable interests can be registered as standalone titles with their own title number, others only as a benefit attached to another registered interest. Thus a freehold, or a legal lease for a term longer than seven years, will be registered with its own title number; the register for that title number will set out the ownership of the interest, a description of the land, and any further interests that benefit or burden the interest. By contrast a mortgage, or an easement, can only be registered as a right or a burden attached to a registered freehold or lease.

25 Restrictive covenants may also be attached to leases. Leasehold covenants have a separate legal history to covenants attached to freehold title. The enforcement of leasehold covenants (in respect of most leases granted on or after 1 January 1996) is now governed by the Landlord and Tenant (Covenants) Act 1995. See Chapter 12.

26 To a greater or lesser extent in different versions of deeds registration: see n 7 above.

27 Again, the way in which this is done varies in the different forms of title registration worldwide. But that the register is in every case an active register which in some way guarantees validity is a defining feature of title registration; a system that does not do this in any sense is not a system of title registration.

28 More colloquially: absolute ownership; less colloquially: a legal fee simple. See para 2.23 above.
2.30 So we can imagine a property – perhaps an ordinary semi-detached house – whose ownership is registered at Land Registry. The freehold is registered, and its title number is AB12345. The register sets out the extent of the land, including a plan, and states who the owner of the freehold is. If the freeholder grants a 99-year lease, then the lease too will be registered, under a different title number (AB67890, say). Thus there are two individual registers of title for one house. On each register, alongside the description of the land the register might set out a right of way over a neighbouring property. If the purchase of the lease was funded by a mortgage loan from a building society, then on the leasehold title the register will set out the details of the mortgage; the mortgage\(^{29}\) is a registered charge and its validity is guaranteed.

Rights that are recorded, not registered

2.31 The register of title will, however, record (not register) certain other interests in land. Interests are recorded on the register by means of a "notice".\(^{30}\) Entry of a notice means that the interest appears on the register, and its priority is protected (we say more about this below)\(^{31}\) but its validity is not guaranteed. So the register of title number AB12345 might include a notice of a restrictive covenant, one of the equitable interests in land we have explained in paragraph 2.25 above. The register does not guarantee its validity; but because it is noted, or recorded, on the register it will be enforceable against anyone who acquires the freehold, or any other interest in the land, if in fact the covenant is valid. Similarly, short legal leases of more than three years’ duration can be recorded on the register.\(^{32}\)

Property rights that can neither be registered nor recorded

2.32 There are some property rights that can neither be registered nor recorded; thus their validity is not guaranteed, and they cannot have their priority protected by being recorded.

2.33 Essentially these are beneficial interests under trusts. Those who designed the title registration system in the years before 1925 intended trust interests to be invisible and unprotected on the register. The intention was that if T (a trustee) held a registered freehold on trust for S (a beneficiary), the register would not protect S in any way. If T were to sell the land in breach of trust, S would have a personal claim against T but no claim against the purchaser of the land.

\(^{29}\) Assuming that it was properly registered.

\(^{30}\) LRA 2002, s 32. We consider notices in Chapter 9. A notice on the register is unrelated to the doctrine of notice used in unregistered land to determine the priority of equitable interests. We refer to the doctrine of notice at para 2.5 above.

\(^{31}\) At para 2.55 and following below.

\(^{32}\) Equitable leases of any duration can also be recorded on the register through a notice.
2.34 The reason that beneficial interests under trusts do not appear on the register is because it is anticipated that they will be “overreached” on a sale or other disposition of land, such as the grant of a mortgage. Overreaching is a legal mechanism though which, where certain conditions are met, beneficial interests are removed from land and attach instead to the proceeds of sale (or to the mortgage money). For overreaching to take place, the proceeds of the sale or mortgage must be paid to at least two trustees, or to a trust corporation.\[33\\]

2.35 In Chapter 1, we have noted that we have not pursued a suggestion that we should review the inability of beneficiaries to record their interests on the register.\[34\\] The inability to record beneficial ownership of land reflects the “curtain principle”, which we have explained above.\[35\\]

**Other information recorded on the register**

2.36 So far we have seen the register contains a register of ownership of freehold title to land and of leases of more than seven years’ duration. The register also records a number of other property rights in land, such as restrictive covenants and short leases, through the entry of a “notice”.

2.37 Another form of entry that may appear on the register is a “restriction”.\[36\\] A restriction does not record the existence of a property right in land, but it reflects a limitation on the ability of the registered proprietor to deal with the land.

2.38 In an example we used above,\[37\\] we said that if B is selling land to C, then C need not be troubled by any limitation on B’s ability to sell that is not shown on the register. A restriction is the method by which a restriction on B’s ability to sell can be shown on the register.\[38\\] If B is a trustee and under the trust deed B needs the consent of a specified person to sell the land, a restriction can be placed on the register to that effect. C then knows that he or she should not go ahead with the sale unless the consent has been obtained. If C buys the land and the restriction has not been complied with, then the disposition to C cannot be registered.\[39\\]

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\[33\\] Law of Property Act 1925, s 27(2).

\[34\\] See paras 1.20 to 1.21 above.

\[35\\] See para 2.18 above.

\[36\\] We consider restrictions in Chapter 10.

\[37\\] See para 2.13 above.

\[38\\] LRA 2002, s 40.

\[39\\] LRA 2002, s 41.
Similarly, we have seen that the reason beneficial interests under a trust cannot be noted on the register is because they can be overreached, or transferred into money, on a sale or mortgage. For overreaching to take place, the purchase or mortgage money must be paid to at least two trustees. To ensure that overreaching takes place, a restriction can be placed on the register to prevent a disposition by a sole proprietor.

A registered title – a freehold or a lease of more than seven years – is divided into three parts. A sample register is included in Appendix A. Each part of the register contains different information.

1. The property register identifies the title as freehold or leasehold and describes the land, including by reference to the title plan. Where the title is a lease, the property register will contain some details of the terms of the lease. The property register also lists any rights, such as rights of way, that benefit the title.

2. The proprietorship register gives the names and addresses of the registered proprietors and may also state the price paid for the land. Any restrictions appear on the proprietorship register.

3. The charges register contains any registered mortgages and any other burdens affecting the title. For example, the charges register will list any leases or easements the title is subject to. Notices of rights affecting the title, such as the burden of a restrictive covenant, will also appear on the charges register.

The proprietorship register will record a further piece of information about the registered title: the “grade” of title that has been awarded. Both freehold and leasehold titles may be given one of the following three grades: absolute, qualified or possessory. A fourth grade of good leasehold applies only to leasehold titles. The normal expectation is the award of an absolute title, which vests the estate in the proprietor subject principally to burdens on the register and to overriding interests. Qualified and possessory titles are awarded where there is a possible defect in the title or insufficient documentary proof. Good leasehold title may be awarded in place of absolute title where the freehold estate out of which the lease has been granted is not a registered title and where title to the freehold has not been deduced.

First registration

We conclude our discussion of what is registered in registered land with a consideration of how registration comes about.

40 Or a trust corporation: see Law of Property Act 1925, s 27(2); para 2.34 above.

41 Known as a Form A restriction. The registrar is required to enter this restriction whenever there are two or more registered proprietors and the survivor will not be able to give a valid receipt for capital money: see LRA 2002, s 44; Land Registration Rules 2003 (SI 2003 No 1417), r 94 (we refer to these rules as the “LRR 2003” throughout this Consultation Paper).

42 LRA 2002, s 11(3) to (5).

43 We consider qualified titles in Chapter 3 in relation to mines and minerals and possessory title in Chapter 17 in respect of adverse possession.
2.43 In 1925 the vast majority of the land in England and Wales was unregistered. Registration of title had been introduced in the nineteenth century.\(^{44}\) Initially this was on a voluntary basis; but certain areas were already subject to compulsory registration by the time of the LRA 1925.\(^{45}\) Following the enactment of the LRA 1925, title registration was rolled out gradually over the country. Statutory instruments gradually extended the areas of compulsory registration; within those areas, when land was sold or a lease of more than 40 years was granted, the title to the freehold or the lease had to be registered.\(^{46}\) The whole of England and Wales became an area of compulsory registration in December 1990.\(^ {47}\) Section 4 of the LRA 2002 sets out the circumstances where an estate in land must be registered; the events that trigger registration include, for leases of more than seven years, creation and, for those leases and also for freehold estates, sale, gift, and the grant of a first legal mortgage. So most of the remaining unregistered land is likely to be registered within the foreseeable future. Exceptions to that include Crown land, local authority land, and university campuses, since their ownership is unlikely to change. However, voluntary registration is permitted at any time, and many organisations have now registered their title voluntarily, because of the benefits that registration provides.

2.44 First registration can also occur as a result of adverse possession – colloquially known as squatting. The ancient rule at common law was that possession of land, as a trespasser, generates freehold ownership. In unregistered land, the Limitation Act 1980 provides that once someone has been in adverse possession of land for 12 years the “paper owner’s” title to the land is extinguished.\(^{48}\) At that point the squatter can register his or her own title.

2.45 A significant change made by the LRA 2002 was to protect registered title from adverse possession. Section 96 of the LRA 2002 provides that a registered proprietor’s title is not extinguished by the Limitation Act 1980; schedule 6 to the LRA 2002 provides for some limited circumstances in which, nevertheless, a squatter may succeed in an application to register his or her title. Chapter 17 of this Consultation Paper focuses on adverse possession and on some issues to which schedule 6 to the LRA 2002 has given rise.

THE REGISTER’S GUARANTEE OF TITLE

2.46 We said above at paragraph 2.12 that the register gives two promises, a positive and a negative one. Here we discuss further the positive promise.

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\(^{44}\) Registration of title had been recommended by a Royal Commission on Registration of Title (1857).

\(^{45}\) Compulsory registration was first introduced by the Land Transfer Act 1875.

\(^{46}\) LRA 1925, s 123. The transfer or grant became void in so far as regards the legal title if no application for registration was made within two months.

\(^{47}\) Registration of Title Order 1989 (SI 1989 No 1347).

\(^{48}\) Limitation Act 1980, ss 15 and 17.
2.47 The positive promise is that the registered proprietor owns the land. This has been described as the register’s positive warranty or guarantee or the “title promise”. It is essential for the success of a title registration system. Without some version of this promise, the purchaser must always examine the deeds so as to be sure that the registered proprietor really owns the land and that there is not another owner, the “true owner”, from whom B has perhaps taken the land by fraud.

2.48 But for a title registration system to make that promise is not a straightforward matter. Imagine a case where, at the outset, A is the registered proprietor of land. B buys the land, believing that the person selling it to him or her is A. In fact, the person with whom B is dealing is (unknown to B) a fraudster who is impersonating A and A is unaware of the sale. As a result of the fraud the transfer is void at common law, but B becomes registered proprietor in place of A. B subsequently sells the land to C. The transfer from B to C is an entirely genuine one (C is actually dealing with B, who has decided to sell the land) and C becomes the registered proprietor in place of B. At that point A discovers what has happened. We now have three people who have relied on the registration system, one of whom has the land (C), one of whom has the price of the land (B) and one of whom apparently has nothing (A). Yet all relied upon the register to give them a guaranteed title and all of them have acted entirely conscientiously. C wants to keep the land, A wants it back. And so the registration system has a dilemma: whom is it to protect? There is a policy choice to be made: is the register to protect the interests of purchasers (dynamic security) or the interests of secure title for landowners (static security)? Or should the law be flexible to be able to respond to the individual circumstances of the people involved in a particular situation?

2.49 Because the guarantee of title involves difficult choices, it is given in different ways in different systems of title registration. The exact extent to which the register of title for England and Wales gives that guarantee is a matter of some controversy and is the subject of Chapter 13 of this Consultation Paper. We can summarise it by saying that it is contained in two different provisions of the LRA 2002.

2.50 First, section 58 of the LRA 2002 gives a positive assurance that the registered proprietor of land has, or is to be treated for all purposes as having, the legal estate in land.

2.51 Second, schedule 4 to the LRA 2002 sets out the circumstances in which, despite the positive assurance made by section 58, the register can be altered to correct an unjustified entry. Schedule 8 then makes provision for persons who lose out because of the alteration of the register, in defined circumstances, to be compensated from Land Registry’s indemnity fund.

49 The term “title promise” was coined by A Goymour, “Resolving the tension between the Land Registration Act 2002’s ‘priority’ and ‘alteration’ provisions” [2015] Conveyancer and Property Lawyer 235.

50 The “legal estate” is the technical term for ownership. That too is a simplification, and the expert reader is asked to bear with that usage for the moment.
2.52 Alteration of the register can take two different forms. Some alterations are uncontroversial. For example, the register may have to be brought up to date when the registered proprietor dies, or changes his or her name. No-one is at fault and no-one has any objection to that sort of alteration. In some cases, by contrast, the registered proprietor has been registered as a result of his or her own fraud, and therefore the register must be altered to restore matters as they were before the fraud. Again, although the registered proprietor is at fault, once that has been proved there is no room for dispute that he or she must lose the land and cease to be registered proprietor.

2.53 However, other cases are more contentious, as is the case described at paragraph 2.48 above where it turns out that a registration took place as a result of forgery but there is a conflict between innocent parties. Schedule 4 states that in cases that involve the correction of a mistake (which is understood to include the registration of a void transfer), the register will not be altered in a way that prejudicially affects the title of a registered proprietor who is in possession of the property (in our example C, if C has gone into possession) unless he or she has contributed to the mistake by fraud or lack of proper care, or unless it would be unjust not to alter the register. Thus the statute sets up both a rule and a discretion to deal with the individual circumstances of these hard cases. And because there is provision for an indemnity payment, there is no all-or-nothing issue between the parties; either C or A will get, or keep, the land and the other should be compensated by the indemnity fund.

2.54 In Chapter 13 we explore some of the difficulties to which these provisions of the LRA 2002 have given rise and make provisional proposals for reform that would improve the law. In Chapter 14 we discuss the operation of the indemnity scheme and invite views on how the scheme might be reformed.

PRIORITIES IN REGISTERED LAND

2.55 The negative promise given by the register to a prospective purchaser is that there is nothing else affecting or burdening the land except what is seen on the register. In fact that statement is heavily qualified in all title registration systems. Moreover, the converse of that negative promise is that the registered estate is affected by the matters on the register. They have priority over any purchaser.

Priority, registration and recording

2.56 Priority is a central concept in land law. Because English law allows for the presence of so many enforceable interests in land, the law has had to develop complex rules for regulating their priority, in other words for determining the order in which interests in land are enforceable and which interests prevail over others.
Thus a farmer might purchase a farm with the assistance of a mortgage, then grant a short-term grazing tenancy over one of the fields, and then grant to a neighbour a right of way over another field. If the farmer then seeks to grant a lease of the whole of the farm, it will be important for a prospective tenant to know where he or she stands in relation to the mortgage, the grazing agreement and the right of way. If title to the farm is unregistered then the priorities as between these various rights will be determined by rules that depend not only upon when the rights were created but also upon whether they were legal or equitable. The complexity of those rules, and the potential for a purchaser to be bound by a right of which he or she should have known but did not, were among the reasons why title registration was introduced.

If title to the farm is registered, then all rights that are either registered or recorded will have priority over a prospective purchaser (by which we usually mean someone who is thinking of taking a lease, or a mortgage, or of buying the freehold). Thus whether the easement is legal and registered, or equitable and merely recorded on the register, it will be binding on a later lessee of the whole farm.

Therefore, a prospective purchaser knows which interests will have priority over him or her from an inspection of the register.

There are two exceptions to that simple position. The first is that it works only for purchasers who provide value and become registered proprietors. Only someone who buys the freehold and registers the purchase, or takes a lease or mortgage and registers it, can benefit from the priority rules. If the farmer instead gives the land to G (and G becomes registered), G will be subject to all the property rights that had priority over the rights of the farmer. Not all title registration systems make this exception. We discuss it in Chapters 6 and 7 below. The other exception is the existence of overriding interests.

Interests that override registered dispositions

Section 29 of the LRA 2002 states that a purchaser, following a registered disposition, will be bound by:

1. interests that are registered or recorded on the register;
2. interests that override registered dispositions;
3. interests that appear from the register to be excepted from the effect of registration; and

The rules of constructive notice: Megarry & Wade, paras 8-017 to 8-022.

This is a simplification. See Chapter 6 for a full discussion of these rules.

LRA 2002, s 28.

The text of the section distinguishes between registered charges and other interests on the register, but the practical effect is that the purchaser is bound by interests that are recorded or registered. As we have noted at para 2.31 above, recording of an interest by entry of a notice does not guarantee that the interest exists. In respect of an interest protected by notice, a purchaser would be bound only if the interest has in fact been validly created.
where the purchaser takes a lease, the covenants in the lease.\textsuperscript{55}

2.62 All except the second of those items can be seen by inspection of the register, or documents available from the register, and therefore conform to the ideal that the register indicates to the purchaser all the interests by which he or she will be bound.

2.63 The second item relates to the category of overriding interests we introduced at paragraph 2.14 above. This is the category of interests that bind a purchaser even though they do not appear on the register.\textsuperscript{56}

2.64 The category of overriding interests exists because land law recognises that there are circumstances in which it is unreasonable to expect a person to register his or her property right to secure its priority or enforcement.\textsuperscript{57} The existence of the category reflects a policy decision that in some circumstances the desire for the register to provide a complete and accurate picture of rights existing in relation to a piece of land should give way to a countervailing need to protect such a person’s rights.

2.65 A list of overriding interests that override registered dispositions is given in schedule 3 to the LRA 2002.\textsuperscript{58} The list includes leases granted for seven years or less, legal easements and profits à prendre, customary and public rights,\textsuperscript{59} local land charges\textsuperscript{60} and certain rights to mines and minerals.

2.66 The most controversial category of overriding interest is found in paragraph 2 of schedule 3; we can summarise it by saying that a purchaser will be bound by a property interest – of whatever kind – of someone who is in actual occupation of the land, provided that that occupation was discoverable on a reasonably careful inspection of the land and provided that the occupier has not unreasonably failed to disclose the right.

\textsuperscript{55} This statement is a simplification. For a full discussion of this category of interests binding on a registered disposition see Chapter 11.

\textsuperscript{56} The description of the category as “overriding interests” was contained in the LRA 1925. The term is not used in the LRA 2002, but remains a useful shorthand for the statutory reference to “interests that override”.

\textsuperscript{57} Land Registration for the Twenty-First Century (1998) Law Com No 254, para 4.4 (we refer to this report as “Law Com 254” and “our 1998 Consultation Paper” throughout this Consultation Paper).

\textsuperscript{58} A separate list is contained in schedule 1 of interests that override on first registration. This list overlaps with that in schedule 3, but is not identical. The reason for the differences is that when land is registered for the first time, registration is not intended to alter the priorities of interests. The list of interests which override first registration is more extensive than that which applies to registered dispositions, to ensure that this intention is met. For example, all legal easements will override on first registration (because legal easements always bind purchasers in unregistered land), whereas only some types of legal easements will override a registered disposition.

\textsuperscript{59} For a definition of customary rights, see the Glossary. Public rights are rights presently exercisable by any member of the public, whether an owner of land or not, by virtue of the general law: see Law Com 271, para 8.28 and explanatory notes, para 589.

\textsuperscript{60} See para 1.23 and following above.
2.67 For example, assume that freehold title to land is transferred from A to B. At the time of the transfer, X is in occupation of the land because A has granted X a 21-year lease, which is registered as a leasehold title. A has also granted X an option to purchase the freehold which has not been recorded on the register by a notice. On the transfer to B, X's option to purchase may bind B as an overriding interest under schedule 3, paragraph 2 because X is in actual occupation of the land.\textsuperscript{61} Similarly, assume that C is the sole registered proprietor of a house, where C lives with his or her partner D. As a result of contributions D has made, C holds the house on trust for himself or herself and D, and therefore D has equitable ownership rights in the house under a trust. C grants a mortgage over the house to E (a bank). As a result of D's occupation, his or her interest under the trust may bind E as an overriding interest.\textsuperscript{62} If so, then E's security will take effect only against C's share of the house.

2.68 In our examples, the purchaser B and the bank E will be aware of the risks of overriding interests and will take steps to try and ensure that they know of any property rights X or D have. The case law demonstrates however that the existence of overriding interests will not always be discovered.\textsuperscript{63} Land law rules are not designed to ensure either that purchasers and mortgagees always take free from (or are aware of the existence of) rights affecting land, or to ensure that property rights are always binding against purchasers and lenders. The rules seek to provide an appropriate balance between the interests of the parties.

CONCLUSION

2.69 It will be apparent from the overview in this chapter that land registration is a complex and technical matter. The law is correspondingly difficult. The fact the law is complex is not, however, an indication that the law is in need of reform. Land registration law has to take into account the different property rights that exist in relation to land and determine, in respect of them, whether and how they should appear on the register and what should happen when dispositions of the land take place. Sometimes the law needs to be complex in order to provide certainty. As we have seen in this chapter, certainty in dealings with land is important. When we buy land, we need to know exactly what rights we will have and who else may have rights that impact on our use of the land. We place significant reliance on the register to provide us with that information.

2.70 The law of land registration is important as it affects all of us in the rights we have in or over land, whether we own or rent the land we use and whether the land is our home or our business. Its importance extends beyond us and the property rights that we own as individuals. Effective land registration law underpins the smooth operation of the property market, which is essential for the health of the wider economy.

\textsuperscript{61} Ferrishurst Ltd v Wallcite Ltd [1999] Ch 353. For discussion of the protection of options for purchase as overriding interests see Chapter 11.

\textsuperscript{62} Williams & Glyn's Bank v Boland [1979] Ch 312.

\textsuperscript{63} Ferrishurst Ltd v Wallcite Ltd [1999] Ch 353, but most significantly in Williams & Glyn's Bank v Boland [1979] Ch 312 where a mortgagor bank was held to be bound by a beneficial interest held by the mortgagor’s wife.
PART 2
REGISTRATION OF TITLE
CHAPTER 3
THE REGISTRABLE ESTATES

INTRODUCTION
3.1 In this chapter we consider a number of discrete issues which are linked by the fact that they concern the provisions of the LRA 2002 dealing with registrable estates. The first issue that we consider occurs in a particular instance where the enlargement of a lease into a freehold results in there being two registered freehold titles to the same piece of land. We then address three situations where we have been asked to consider reform of the scope of the estates that are registrable. The first of these situations concerns the registration of title to an estate in mines and minerals under the LRA 2002. The second concerns the application of the LRA 2002 to discontinuous leases. Finally, we consider whether the minimum term at which a lease will be registrable should be reduced.

DUPLICATION OF FEES SIMPLE UPON ENLARGEMENT OF LEASEHOLD ESTATES

Background
3.2 It is possible, under section 153 of the Law of Property Act 1925, for a leaseholder in certain circumstances to enlarge his or her lease into a freehold estate (in the form of a fee simple). Upon an application to register the enlarged freehold estate, Land Registry’s practice until March 2013 was to close the freehold title belonging to the landlord, meaning that there was only ever one freehold estate on the register at any one time. However, following an informal consultation with the Law Society and others, Land Registry changed its practice and now keeps open the landlord’s freehold title upon registration of the new freehold estate. This section will first discuss the ambiguity of section 153 of the Law of Property Act 1925 as to the fate of the landlord’s freehold estate upon enlargement, and go on to analyse whether current Land Registry practice is problematic. We provisionally conclude that its practice is appropriate, although we invite consultees to share their experiences.

The ambiguity of section 153 of the Law of Property Act 1925
3.3 Section 153 of the Law of Property Act 1925 provides for enlargement of a lease into a fee simple where that lease was originally granted for a period of not less than 300 years, of which at least 200 years is unexpired, so long as:

1. there is no trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term; and

(2) there is no rent payable (or merely a peppercorn rent or other rent having no money value), or if rent was payable, it has subsequently ceased to be payable.  

3.4 There is a crucial ambiguity in section 153, namely that it does not provide explicitly for what is to happen to the landlord’s freehold estate upon enlargement. It is not clear even implicitly what was intended upon enactment of the section. On one approach, it has been suggested that the reversionary freehold title must be closed, as it is not possible for there to be more than one freehold estate in land.  

3.5 However, we take the view (as we did in our consultation paper, Land Registration for the Twenty-First Century (our 1998 Consultation Paper)) that it is perfectly possible for more than one freehold estate to exist in the same piece of land. The fact that “an estate in fee simple absolute in possession” is the only possible legal freehold estate does not prevent this, given that “absolute” in this context means that the fee is not determinable at any specific event, and “in possession” means that the fee simple is immediate, as opposed to in remainder or reversion. 

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2 Other conditions also apply; eg the lease must not contain a forfeiture clause (which entitles the landlord to determine the lease where there has been a breach of covenant): Law of Property Act 1925, s 153(2)(i).

3 See eg C Jessel, “Concurrent fees simple and the Land Registration Act 2002” (2014) 130 Law Quarterly Review 587. It is also argued in this article, at 597, that it is not possible for the landlord’s title to survive enlargement because of the rule against subinfeudation (the process by which a person who holds land under a superior tenure could create another, inferior tenure in that land for another person) enacted in Quia Emptores 1290. However, whether Quia Emptores has this effect has been disputed: see TPD Taylor, “The enlargement of leasehold to freehold” [1958] Conveyancer and Property Lawyer 101, 108 to 109.

4 [2010] EWHC 422 (Ch), [2010] 3 WLR 1125 (HC) at [38], by Roth J. This finding was set out in the Court of Appeal decision ([2010] EWCA Civ 1259, [2011] Ch 177), but the fate of the landlord’s title upon enlargement was not considered by the Court of Appeal.

5 Law Com 254, para 10.23. See also Law of Property Act 1925, s 1(5).

6 Law of Property Act 1925, s 1(1)(a).

7 Law Com 254, para 10.23; Megarry & Wade, para 6-013.

8 Megarry & Wade, para 6-017. Megarry & Wade does, however, assume that the reversion is extinguished upon enlargement: para 18-094.
3.6 Since it is possible for more than one legal fee simple absolute in possession to exist, and the LRA 2002 makes provision for the registration of title to legal estates\(^9\) in land, it follows that it is possible to have more than one freehold estate on the register in respect of the same piece of land. Moreover, section 153 of the Law of Property Act 1925 provides that the leasehold estate is to be enlarged into “a fee simple”,\(^10\) as opposed to the fee simple; this suggests that it could have been intended for the landlord’s freehold estate to coexist. The section also provides for the continuing enforceability of leasehold covenants, which suggests the former landlord might have some continuing rights.\(^11\) In addition, closing the landlord’s title could adversely affect those with interests in that title (such as a chargee), who did not consent to the granting of the lease.

3.7 We consider that the law is unclear as to the effect of a lease enlargement under section 153 of the Law of Property Act 1925 on the landlord’s freehold title. The issue of what provision section 153 should make in relation to the landlord’s estate upon enlargement is not a land registration issue, and is therefore outside the scope of the current project, although we acknowledge that the ambiguity is undesirable.

3.8 We also note that the issue of there being more than one freehold title on the register goes beyond Land Registry’s practice of what to do in relation to the landlord’s freehold title. Section 153 contains no limitations on the number of times that enlargement of a leasehold estate in a single piece of land can occur,\(^12\) and therefore it is plausible that more than one freehold estate could be registered by virtue of enlargement of a headlease and subleases derived from it, even if the “original” freehold title is closed.

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\(^9\) LRA 2002, s 2(a)(i).

\(^10\) Law of Property Act 1925, s 153(1) (emphasis added).

\(^11\) Law of Property Act 1925, s 153(8).

\(^12\) Law of Property Act 1925, s 153(2) states that “this section applies to and includes every such term as aforesaid whenever created, whether or not having the freehold as the immediate reversion thereon”. However, as specified in s 153(2)(ii), this is not possible in the case of “any term created by subdemise out of a superior term, itself incapable of being enlarged into fee simple”.
Land Registry practice

3.9 In March 2013 Land Registry announced that its former practice of closing the landlord’s title upon enlargement was ending, and that from that point it would leave both the landlord’s title and the new freehold estate on the register. This issue came to Land Registry’s attention because there has been a recent increase in applications to enlarge newly created leases, where the landlord’s estate is registered. One possible explanation for the increase in enlargement of newly created leases might be that long leases are being used as a device to make the burden of positive covenants run with freehold land. Land Registry receives a few of such applications each year.

3.10 Land Registry’s current practice has attracted criticism on the ground that having more than one freehold title on the register may result in confusion and, in extreme cases, fraud. Land Registry is aware of this, and for this reason details of the enlargement are included on the register of both freehold titles so as to avoid confusion between the fees simple and to facilitate cross-referencing between them. The landlord’s fee simple will have a note to the effect that the title used to be burdened by a lease which has since been enlarged. It will also contain an entry which records the possibility that the freehold estate has determined, if that is the effect of section 153 of the Law of Property Act 1925.

3.11 We consider this new practice to be sensible, in light of the indemnity and human rights implications of closing the landlord’s title upon enlargement. With regard to indemnity, if it was held that the effect of section 153 was not to deprive the landlord of his legal estate, closing the landlord's title would amount to a mistake. Land Registry would therefore have to indemnify a landlord whose title had been wrongly closed.

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14 See Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327, para 5.23 n 32. Currently only the burden of restrictive covenants can run with freehold land; this means landowners often use convoluted legal mechanisms to enforce the burden of positive covenants: Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327, paras 5.21 and following.


16 However, it is unclear what the extent of the loss would be in such a situation. Land Registry has suggested that any value in the landlord’s title lies in the leasehold covenants which are still performable upon enlargement: Law of Property Act 1925, s 153(8).
3.12 As for human rights, it is possible that closing the title might amount to a breach by Land Registry of section 6 of the Human Rights Act 1998, which provides that it is unlawful for a public authority to act in a way which is incompatible with a right under the European Convention on Human Rights (the Convention).\textsuperscript{17} It is arguable that closure of the title of the former landlord could be in breach of Article 1 of Protocol 1 to the Convention, which gives every natural and legal person the right to peaceful enjoyment of their possessions, save where deprivation of such possessions is in the public interest and proportionate. Although allowing a tenant to buy his or her landlord’s interest (and thus the landlord to be deprived of its interest) by virtue of the provisions on enfranchisement in the Leasehold Reform Act 1967 was held to be compatible with Article 1 of Protocol 1 in \textit{James v United Kingdom},\textsuperscript{18} emphasis in that case was placed on the fact that the landlord was compensated for the deprivation, even if not at full market value.\textsuperscript{19} There are no provisions for compensation of the landlord in section 153 of the Law of Property Act 1925.

3.13 As noted above, the legal effect of section 153 is unclear, and is not something which can be resolved as part of this project. We consider that the change in Land Registry practice was made for good reasons and there are legitimate concerns about closing the landlord’s title upon enlargement. We are not convinced that, at this point, there is evidence of any real problems posed by this practice in relation to the enlargement of leases under section 153. For all these reasons we consider that it would not be appropriate for us to propose any change to current Land Registry practice. Nonetheless we would like to give consultees an opportunity to draw our attention to any practical difficulties they have experienced as a result of the new procedure.

3.14 \textbf{We invite consultees to share their experiences of Land Registry’s new practice of allowing the landlord's freehold title to remain on the register following a lease enlargement under section 153 of the Law of Property Act 1925, and in particular any practical problems that have arisen out of this practice.}

\section*{MINES AND MINERALS}

\textbf{Introduction}

3.15 Mines and minerals are defined by the LRA 2002 as including “any strata or seam of minerals or substances in or under any land, and powers of working and getting any such minerals or substances”.\textsuperscript{20} It was reaffirmed in \textit{Bocardo SA v Star Energy UK Onshore Ltd}\textsuperscript{21} (\textit{Bocardo}) that there is a general presumption that an owner of the surface land owns the mines and minerals below it:

\begin{itemize}
\item \textsuperscript{17} The Convention is incorporated into the Human Rights Act 1998 by s 1 of that Act.
\item \textsuperscript{18} (1986) 8 EHRR 123 (App No 8795/79).
\item \textsuperscript{19} Above at [54].
\item \textsuperscript{20} LRA 2002, s 132(1). Whether a particular substance constitutes a mineral varies according to the circumstances: the factors that will be taken into account were summarised by Lawrence Collins LJ in \textit{Coleman v Ibstock Ltd} [2008] EWCA Civ 73, 2008 WL 370960 at [10].
\end{itemize}
The owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of it by a conveyance, at common law or by statute to someone else.\footnote{22}

3.16 In this part of the chapter we first summarise the law of registration of mines and minerals and then discuss potential changes that could be made within the land registration system to increase certainty and clarity. We acknowledge that such changes may also bring some disadvantages.

3.17 In this chapter, we will use the term “surface title” to refer to an estate in land which includes the surface of that land and “surface owner”\footnote{23} to refer to the proprietor of that estate. We understand that this terminology could be seen as problematic given that the owner of an estate in land also owns the area above and below the surface of the land (to an extent)\footnote{24} unless it has been alienated, but in a discussion of owners of mines and minerals the terminology is practically useful.

The current law

Rights in mines and minerals

3.18 Rights in mines and minerals can arise in a number of different ways, including by express grant or reservation, on enfranchisement of copyhold land, and by adverse possession.\footnote{25} Gold and silver\footnote{26} and oil and gas\footnote{27} are vested in the Crown. Coal and coal mines are generally vested in the Coal Authority.\footnote{28}

\footnote{22} Above at [27]. See also Megarry \& Wade, para 3-037.

\footnote{23} This terminology is used in discussions of mines and minerals: see eg Cavill and others, \textit{Ruoff \& Roper: Registered Conveyancing} (2016 looseleaf) para 9.012 (we refer to this text as “Ruoff \& Roper” throughout this Consultation Paper).

\footnote{24} \cite{2010} UKSC 35, [2011] 1 AC 380. It was also noted that ownership of land below the surface ends “as one reaches the point at which physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd so as to not be worth arguing about”: at [27]. Similarly, it was noted that ownership above the surface “has ceased to apply to the use of airspace above a height which may interfere with the ordinary user of land”: at [26].

\footnote{25} For a more detailed list, see Land Registry, \textit{Practice Guide 65: Registration of Mines and Minerals} (June 2015) para 3.

\footnote{26} \textit{The Case of Mines} [1568] 1 Plowd 310; Royal Mines Acts 1688, 1693; Attorney General \textit{v} Morgan [1891] 2 Ch 432.

\footnote{27} Petroleum Act 1998, s 2. Shale gas is vested in the Crown as a result of this provision; fracking (which refers to the process of extraction of shale gas) is therefore not relevant to the issues discussed in this chapter.

\footnote{28} Coal Industry Act 1994, s 7(3).
3.19 Rights in mines and minerals can take a number of different legal forms. The type of legal interest may depend on its origin, and will affect its treatment for registration purposes. Mines and minerals, “whether or not held with the surface”, fall within the general definition of “land” in the LRA 2002. This means that it is possible to register an estate in fee simple in mines and minerals. However, rights in mines and minerals can also constitute easements or profits à prendre. Land Registry takes the view that within the easements or profits category are rights arising out of former copyhold estates (often referred to as “manorial rights”). As such rights are not properly classified as an estate in fee simple, they cannot be registered with their own title. Most of the issues surrounding the registration of mines and minerals relate specifically to estates in mines and minerals; therefore it is estates in mines and minerals that this section of the chapter will particularly focus on.

3.20 If mines and minerals are granted out of land or reserved in a transfer, this normally carries with it an implied right to work the mines and minerals. If the transferor, upon reserving for him or herself the mines and minerals under the transferred land, wished to use this right in a way which would impinge upon the surface land, the reservation must be framed so as to clearly show that he or she was intended to have that right.

Registration of mines and minerals

3.21 In this section we will look at how rights in mines and minerals are treated by the LRA 2002. This includes the circumstances in which they must be registered, how the register shows whether a particular title includes mines and minerals, and how rights may be protected on a transfer of the surface title.

29 LRA 2002, s 132(1). Note, however, that for some purposes “land” excludes mines and minerals held apart from the surface: see LRA 2002, s 4(9), and para 3.22 below.
30 See para 2.24 above for an explanation of these rights.
32 Under LRA 2002, s 3(1)(a).
34 Hext v Gill (1872) LR 7 Ch App 699.
COMPULSORY REGISTRATION

3.22 We will see that an unregistered estate in land must be registered when one of a number of “trigger” events occurs.\textsuperscript{35} An unregistered estate in mines and minerals held apart from the surface of the land is excluded from the ambit of these compulsory registration provisions.\textsuperscript{36} This means that, if a separate estate (freehold or leasehold) in mines and minerals is carved out of an unregistered estate, it does not have to be registered. Similarly, the transfer of an unregistered estate in mines and minerals held apart from the surface does not have to be registered. However, an unregistered estate in mines and minerals held apart from the surface may be voluntarily registered.\textsuperscript{37}

3.23 The position is different for registered estates in mines and minerals. If there is a registrable disposition of a registered estate in mines and minerals (for example, a transfer of that estate) this must be registered.\textsuperscript{38}

CLASS OF TITLE

3.24 Land Registry Practice Guide 65 explains that mines and minerals are usually only registered with qualified title due to the difficulties of establishing absolute title to mines and minerals.\textsuperscript{39} This is a result of the different, and often ancient, ways in which rights in mines and minerals can arise.\textsuperscript{40} The effect of registration with qualified title is that it will not prejudice the enforcement of any estate, right or interest in the mines and minerals existing before the date of first registration.\textsuperscript{41}

3.25 The Practice Guide does, however, give some examples of where absolute title might be registered,\textsuperscript{42} including a landowner who can prove all of the following:

\begin{enumerate}
\item title directly from a crown grant which included mines and minerals;
\item that the land has never been the subject of a copyhold grant; and
\item that the mines and minerals have never, prior to the application for first registration, been disposed of.\textsuperscript{43}
\end{enumerate}

\textsuperscript{35} See para 4.1 below.

\textsuperscript{36} LRA 2002, s 4(9). There is a similar exception for grants out of demesne land (defined in LRA 2002, s 132 as “land belonging to Her Majesty in right of the Crown which is not held for an estate in fee simple absolute in possession”) by the Crown: LRA 2002, s 80(3).

\textsuperscript{37} Under LRA 2002, s 3. See LRR 2003, r 25 for the requirements which apply to such an application.

\textsuperscript{38} LRA 2002, s 27.

\textsuperscript{39} Land Registry, \textit{Practice Guide 65: Registration of Mines and Minerals} (June 2015) para 2.2. See para 2.41 above for an explanation of the different classes of title.

\textsuperscript{40} There is a more detailed explanation at Law Com 254, para 3.14.


\textsuperscript{42} Above, para 11.

REGISTRATION OF THE SURFACE TITLE

3.26 On first registration of the surface land, if the registrar is satisfied that the mines and minerals are included in or excluded from the applicant’s title he must make an appropriate note on the register. The registrar must also note exceptions and reservations resulting from enfranchisement of copyhold land. An application for a note to be entered on a registered title that the estate includes mines and minerals must be accompanied by evidence to satisfy the registrar of such an inclusion.

3.27 In this way the registrar will only examine title to mines and minerals where the proprietor is applying to have them expressly included within his or her title, or where a proprietor of mines and minerals held apart from the surface land is applying to have that estate registered. These rules imply that the absence of a note on the register either way will be inconclusive as to the ownership of the mines and minerals and any rights in them. The inconclusive nature of the absence of a note is further demonstrated by the fact that rule 70 of the Land Registration Rules 2003 (LRR 2003) specifies that where the description of the land in the property register includes reference to mines and minerals, this is not a note that the registered estate includes the mines or minerals for the purposes of the indemnity provisions in the LRA 2002.

TRANSFER OF THE SURFACE TITLE

3.28 On a transfer of the surface title the following possible situations can arise:

(1) Where the mines and minerals have been excluded from the transferor’s title, the transferee’s title will also exclude the mines and minerals.

(2) Where it is noted on the register that the transferor’s title includes mines and minerals, this note will be carried forward onto the transferee’s title.

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44 LRR 2003, r 32. The property register of a registered estate must, where appropriate, include details of the inclusion or exclusion of mines and minerals in or from the registration under this rule: LRR 2003, r 5(b)(i). The term “note”, as used in the LRR 2003, is to be distinguished from a notice (the effect of which is to preserve priority: see para 2.31 above and Chapter 9).

45 LRR 2003, r 5(b)(ii).

46 LRR 2003, r 71. However, it will generally be difficult for a landowner to prove that no one else owns the mines and minerals below his or her land, particularly for former copyhold land. If a landowner has worked the mines or minerals this is deemed a positive sign: Ruoff & Roper, para 9.012.

47 Ruoff & Roper, para 9.012.

48 Under LRR 2003, r 5(a). Rule 5 is the rule that regulates the contents of the property register. For an explanation of the property register, see para 2.40 above.

49 LRR 2003, r 70. See paras 3.33 to 3.34 below in relation to indemnity for mines and minerals.

50 Ruoff & Roper, para 20.011.

51 Above.
(3) Where a transfer of a surface title which did not expressly include mines and minerals is made, and the transfer expressly excludes mines and minerals, a note will be made on the transferee’s title that mines and minerals are excluded from that title. Land Registry informs us that it will also create a title to mines and minerals for the transferor, although that title will contain an entry under rule 70 of the LRR 2003 to the effect that the description of the land as including mines and minerals is not a note that the title includes mines and minerals for the purposes of the indemnity provisions. The title will also contain an entry which provides that the mines and minerals are only included in the registration to the extent that they were included in the transferor’s title.

(4) If the transferor’s title expressly included mines and minerals, on a transfer of the surface title which excludes the mines and minerals the transferor will obtain a new separate title to the mines and minerals which have been excepted.

(5) Where it is not specified whether a registered estate includes or excludes mines and minerals and the transfer does not mention mines and minerals, presumably a transfer does not change this position.

RIGHTS NOT CONSTITUTING A FREEHOLD ESTATE

3.29 Rights not constituting an estate in mines and minerals may be protected by a notice on the register. This means that their priority is protected against a future disposition of the surface land.

3.30 Alternatively, the rights might be protected if they are an overriding interest within schedules 1 and 3 to the LRA 2002. There are three types of mineral rights which constitute overriding interests. These are identical across schedules 1 and 3 and so can be dealt with together.

(1) “An interest in any coal or coal mine, the rights attached to any such interest and the rights of any person under section 38, 49 or 51 of the Coal Industry Act 1994 (c 21)”. The reason for them being overriding interests is that their complexity makes them unsuitable to registration.
“In the case of land to which title was registered before 1898, rights to mines and minerals (and incidental rights) created before 1898”. This is because, for properties registered before 1898, such rights were not registrable.\(^{59}\)

“In the case of land to which title was registered between 1898 and 1925 inclusive, rights to mines and minerals (and incidental rights) created before the dates of registration of the title”. These are overriding for the same reason as in (2) above.\(^{60}\)

3.31 As has been noted at paragraph 3.19 above, rights to mines and minerals can be (but are often not) a type of manorial right. Manorial rights used to be overriding interests under the LRA 1925.\(^{61}\) They remained overriding under the LRA 2002,\(^{62}\) but only for a ten-year period, until 13 October 2013.\(^{63}\) The only way in which the priority of manorial rights can be protected after this date is by noting them on the register. As a result, there was a spike in the registration of such rights, including rights in mines and minerals,\(^{64}\) so that they would not be extinguished upon a registered disposition.\(^{65}\) Manorial rights are discussed further in Chapters 8 and 9.

3.32 We have set out above the position in relation to rights in mines and minerals which do not comprise an estate in land. As explained at paragraph 3.19 above, the rest of this chapter will focus on estates in mines and minerals, as most of the issues that stakeholders have identified relate to the registration of such estates.

**Indemnity**

3.33 Paragraph 8 of schedule 2 to the LRA 2002 sets out that:

No indemnity is payable under this Schedule on account of –

(a) any mines or minerals, or

(b) the existence of any right to work or get mines or minerals,

unless it is noted in the register that the title to the registered estate concerned includes the mines or minerals.

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\(^{59}\) Law Com 254, paras 5.95 and 5.96; Law Com 271, paras 8.33 and 8.34.

\(^{60}\) Above.

\(^{61}\) LRA 1925, s 70(1)(j).

\(^{62}\) LRA 2002, para 11 of schs 1 and 3.

\(^{63}\) LRA 2002, s 117.

\(^{64}\) Justice Committee, *Manorial Rights* (HC 657, January 2015) paras 16 and 17.

\(^{65}\) Under LRA 2002, s 29.
3.34 The exclusion of mines and minerals from the indemnity scheme is because of the difficulties in establishing title to mines and minerals, outlined above. The exclusion means, for example, that if a surface title is silent as to whether mines and minerals are excluded, and there is an application to register a separate title to mines and minerals under that land, no indemnity will be payable to the surface owner.

**Issues with the current law**

**Uncertainty as to who owns mines and minerals**

3.35 We have already noted that, due to the varying and often ancient ways in which rights to mines and minerals can arise, it is often difficult to ascertain who owns the mines and minerals below a given plot of land. The fact that title to mines and minerals can be difficult to prove is evidenced by the fact that Land Registry rarely registers absolute title to mines and minerals.

3.36 The difficulty in establishing ownership to mines and minerals is arguably compounded by the fact that, as noted at paragraph 3.22 above, the creation of a new estate in mines and minerals out of an unregistered title and a disposition of an unregistered estate in mines and minerals held apart from the surface title are both excluded from compulsory first registration. Existing titles to mines and minerals are often unregistered and the land registration system allows this to remain the case.

3.37 Furthermore, in situations where title to mines and minerals is not expressly stated on the register it is unclear whether registration of the surface title includes the mines and minerals beneath it. Dr Charles Harpum and Janet Bignell QC have suggested that registration of surface land includes the mines and minerals below it by virtue of the fact that under the LRA 2002 that “land” includes mines and minerals, whether or not held with the surface. The common law presumption elucidated in *Bocardo* that the owner of the surface land owns the strata beneath it unless it has been alienated, combined with the effect of section 58 of the LRA 2002, also suggests that mines and minerals may be included in the registration of the surface title, even in the absence of an express note to that effect. Land Registry practice also supports this position: as noted at paragraph 3.28(3) above, Land Registry will create a separate title to mines and minerals (but exclude that title from indemnity) where on a transfer of a surface title which did not expressly include mines and minerals, mines and minerals are reserved to the transferor.

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66 We consider indemnity in Chapter 14.
67 See para 3.24 above.
68 LRA 2002, s 4(9). This was also the position under the LRA 1925, s 123(3)(b).
70 Discussed in detail in Chapter 13.
On the other hand, including mines and minerals within the registration of the surface title could deprive the owner of an unregistered estate in mines and minerals of his or her title where titles to the surface and to the mines and minerals were separate before the surface title is registered. Moreover, it seems odd that a proprietor of an estate in the surface land can essentially extend his or her estate merely by virtue of registration. The answer to this may be that the mines and minerals are included, but only presumptively: in the event that the presumption can be rebutted an application may be made to alter the register under schedule 4, paragraph 2(1)(b) or (c).\textsuperscript{71}

Notification of applications for registration of mines and minerals to surface owner

Land Registry’s current practice is to notify surface owners of an application to register an estate in mines and minerals under their land only if it is proposed to register absolute title to the mines and minerals. This means that a qualified title to mines and minerals can be registered without the knowledge of the surface owner, and thus the surface owner is given no chance to object to this registration. As noted above,\textsuperscript{72} it is more likely that mines and minerals will be held as a qualified title and therefore notice will not usually be given under current practice. This contrasts with the position where a unilateral notice is entered on the register of the surface title to protect an interest in mines and minerals which comprises a manorial right, when the registered proprietor will be automatically notified.\textsuperscript{73}

Cautions against registration of title to an unregistered legal estate

A person with an interest in unregistered land will be concerned to ensure that that interest is noted on the register if the land becomes registered at any point in the future. A caution against first registration is a means to ensure that this occurs.

Where a caution has been lodged against the registration of title to an unregistered legal estate, the registrar must give notice of a subsequent application for registration of that estate to the person who lodged the caution. This affords that person an opportunity to object to the registration, or (more commonly) to submit that his or her interest should be protected on the register.

A person with an estate in mines and minerals may want to lodge a caution against first registration of the surface title, so that the surface owner on registration does not falsely assert rights in the mines and minerals in his or her land. However, it is unclear whether this is permitted under the terms of section 15 of the LRA 2002, which sets out the circumstances in which a caution may be lodged.\textsuperscript{74}

\textsuperscript{71} Alteration of the register is discussed in Chapter 13.

\textsuperscript{72} At para 3.24 above.

\textsuperscript{73} See Chapter 9.

\textsuperscript{74} For example, LRA 2002, s 15(3) states that “no caution may be lodged … by virtue of ownership of a freehold estate in land".
Exercising rights in mines and minerals

3.43 Some stakeholders have argued that rights in mines and minerals are being used to inhibit development and to extract money from surface owners. For example, the lodging of a caution against first registration against the surface title by the owner of an estate in mines and minerals would be a powerful weapon for such an estate owner, in order to assert his or her rights in the event of (for example) a development of the surface land. Similarly, those with rights to work mines and minerals may be able to make a claim against surface owners who have built on their land.

Scope of the land registration project

3.44 As we have explained in Chapter 1, our current project is a review of the LRA 2002. While we acknowledge that the issues raised by stakeholders give rise to practical problems, some of these problems concern questions of ownership of mines and minerals which go beyond how such ownership is reflected in the land registration regime. Dealing with these issues would require a substantive analysis of the ownership of mines and minerals and the policy surrounding the existence of those rights. That work lies beyond a review of the LRA 2002. Specifically, uncertainty in relation to how rights to mines and minerals arise, whether registration of the surface title should include mines and minerals, and the way in which rights to mines and minerals are exercised, require investigations of issues of policy that go beyond land registration.

3.45 Some stakeholders have suggested that compulsory registration should be extended to require the registration of all estates in mines and minerals held apart from the surface by a certain date, failing which the title to mines and minerals should be vested in the surface owner or cease to be exercisable against the surface owner. Depriving owners of rights in mines and minerals would be controversial, and any reform along these lines would need to weigh the relevant competing interests in detail. Such a move would be more far-reaching than the phasing out of certain overriding interests\[75\] because it would involve automatically extinguishing rights in mines and minerals, whereas rights which used to be overriding merely lose priority when a registrable disposition takes place. For these reasons consideration of this suggestion is outside the scope of this land registration project. Extinguishing property rights also raises clear questions of compatibility with Article 1 of Protocol 1 to the Convention.

3.46 We are aware that in our 1998 Consultation Paper we stated that “rights to mines and minerals in registered land raise peculiar difficulties of a distinct kind that would be better resolved as a discrete exercise”.\[76\] As we have just noted, there are some issues to which this reasoning still applies, and we believe that, if there was sufficient support for it, there may be merit in a separate project on the law of mines and minerals to address the problems with the law which are out of the scope of this project. However, we believe that we could still make some significant improvements to the law in this area through amending the land registration regime, and we invite consultees’ views as to how this could be best achieved.

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75 Such as certain manorial rights: see para 3.31 above.

76 Law Com 254, para 3.15.
Reform of the registration of mines and minerals

Cautions against first registration

3.47 It was noted at paragraph 3.42 above that it is unclear whether a caution against first registration of a surface title can be lodged by an owner of an estate in mines and minerals held apart from the surface. In many instances, the unregistered estate in mines and minerals will be accompanied by powers to win and work, which affect the surface title. In this case the owner of the estate in mines and minerals may enter a caution against first registration as a person who is entitled to an interest affecting the unregistered surface title.77 Where no such powers accompany the estate, there is a question mark over whether section 15(3) of the LRA 2002, which prohibits cautions being lodged by virtue of ownership of a freehold estate in land, prevents the entry of a caution by the owner of the estate in mines and minerals.78 Section 15(3) certainly prohibits proprietors lodging a caution against their own titles. In our 2001 Report, we said:

It will cease to be possible for a person who owns either a leasehold estate or freehold estate that is capable of being registered with its own title, to lodge a caution against the first registration of that title. This is because the lodging of a caution against first registration of a legal estate is not intended to be a substitute for its registration.79

3.48 The same reasoning does not apply to cautions being lodged by the owners of estates in mines and minerals against the registration of a surface title, because they are not seeking to lodge a caution against the registration of their own title, but rather a separate one.

3.49 While a caution against first registration is usually entered to protect the cautioner, in this instance there is also arguably a benefit to the purchaser of the surface title in allowing cautions against first registration to be entered in respect of mines and minerals held apart from the surface. The presence of the caution should be revealed as part of the usual conveyancing searches and the purchaser of the surface title will therefore be aware that another party lays claim to the mines and minerals.

3.50 However, we also recognise that it might be unattractive to those wanting to deal with the surface title for cautions to appear against that title by virtue of a wholly separate estate in land. Some might see it as a barrier to conveyancing.80

3.51 We invite the views of consultees as to whether the law should be clarified so that it is possible for an owner of an estate in mines and minerals held apart from the surface to lodge a caution against first registration of the relevant surface title.

77 In this instance the caution is lodged under LRA 2002, s 15(1)(b), as opposed to s 15(1)(a).

78 See Law Com 271, para 3.58.

79 Law Com 271, para 11.18.

80 We note that a caution may already be lodged where the owner of an estate in mines and minerals has powers to work and win: see para 3.47 above.
**Triggers for compulsory first registration**

3.52 We have explained that it is often hard to ascertain from the register who has title to mines and minerals.\(^{81}\) We noted that this problem is partially attributable to:

1. the fact that mines and minerals held apart from the surface are not covered by the compulsory registration provisions;\(^ {82}\) and
2. the uncertainty surrounding whether the registration of a surface title includes the mines and minerals below it.\(^ {83}\)

3.53 We have explained that the question of whether registration of the surface title should include the mines and minerals beneath it is outside the scope of the project.\(^ {84}\) We consider, however, that part of the problem relating to uncertainty of ownership of mines and minerals could be solved by requiring first registration of estates in mines and minerals in the situations noted below.\(^ {85}\) It is in the interests of a complete and accurate register that as many interests in land as possible are included on the register.\(^ {86}\)

3.54 The exception of mines and minerals from compulsory registration was carried over into the LRA 2002 from section 123(3)(b) of the LRA 1925. This section was inserted by the Land Registration Act 1997,\(^ {87}\) but the 1997 Act did not change the original substantive position of mines and minerals under the LRA 1925 as excepted from compulsory registration.\(^ {88}\) The policy for this provision is therefore historic and seems to have its roots in the complexity and difficulty of proving rights in mines and minerals. It could be argued that the complexity of rights in mines and minerals should not be a reason in itself to keep them off the register. Registration in the situations specified below\(^ {89}\) would serve a purpose because it seems likely, at least where an estate in mines and minerals is separated from the surface estate, that the grantee may intend to exploit that estate in some way. Moreover, although rights in mines and minerals are often difficult to prove, it has been noted at paragraph 3.24 above that Land Registry can (and very often does) award qualified title to mines and minerals.

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\(^{81}\) See paras 3.35 to 3.38 above.

\(^{82}\) LRA 2002, s 4(9).

\(^{83}\) See paras 3.37 to 3.38 above.

\(^{84}\) See paras 3.44 to 3.45 above.

\(^{85}\) See paras 3.55 to 3.56 below.

\(^{86}\) Registrable dispositions of registered estates in mines and minerals are not covered here because they are already subject to compulsory registration: see para 3.23 above.

\(^{87}\) Land Registration Act 1997, s 1.

\(^{88}\) LRA 1925, s 120(1).

\(^{89}\) See paras 3.55 to 3.56 below.
SEPARATION OF MINES AND MINERALS FROM A SURFACE TITLE WHICH IS AN UNREGISTERED LEGAL ESTATE

3.55 Currently, by virtue of section 4(9) of the LRA 2002, a disposition which effects a separation of the mines and minerals from the unregistered legal estate comprising the surface title of which they previously formed part is not compulsorily registrable. Much of the uncertainty arising out of the ownership of mines and minerals is a consequence of the archaic way in which such rights have arisen. An express separation of mines and minerals does not give rise to the same uncertainty, and so does not support the exclusion from compulsory registration of a transfer of the mines and minerals out of the surface title. Although such dispositions may not frequently occur, where they do we provisionally consider that it could be beneficial for them to be registered.

TRANSFERS OF UNREGISTERED ESTATES IN MINES AND MINERALS HELD APART FROM THE SURFACE

3.56 Similarly, section 4(9) of the LRA 2002 means that a transfer of an existing unregistered legal estate in mines and minerals held apart from the surface does not fall within the provisions for compulsory first registration. This provision applies to the transfer of ancient estates in mines and minerals as well as recently created ones. While this exception may exist because of the difficulties in proving historic rights in mines and minerals, it is to be expected that some deduction of title would be made on a purchase of such an estate, and owners wishing to exercise their title against a surface owner would need to provide evidence in order to assert their rights.

LEGAL AND PRACTICAL ISSUES

3.57 We recognise, however, that requiring registration in the above situations could give rise to significant legal and practical problems. Although complexity is not a reason in principle to exclude mines and minerals from compulsory first registration, we understand that such registrations are as a result very difficult to complete, and are thus time-consuming and expensive for both the applicant and Land Registry. Such time and effort might not be worthwhile given that, in the vast majority of cases, Land Registry only awards qualified title to mines and minerals, and this title will not benefit from the indemnity scheme. The uncertain nature of ownership of mines and minerals also poses the risk of litigation. While we understand that owners of mines and minerals often do voluntarily register their title, in order for them to be easily identified by potential developers, it can be argued that owners of the mines and minerals should be able to choose whether to register their estates and thereby obtain these benefits. The problems in practice caused by the lack of a compulsory registration requirement for unregistered estates in mines and minerals must be weighed against the burdens which registration would impose on the owner of such an estate.

90 The same principles apply to the grant of a leasehold estate in those mines and minerals which would otherwise be registrable were the grant to extend to more than just the mines and minerals.


92 See para 3.43 above.
3.58 We noted above that, where an estate in mines and minerals is separated from the unregistered surface estate, this is likely to mean that the purchaser of the mines and miners intends to exploit them in some way. The same may be true on a transfer of an existing estate in mines and minerals held apart from the surface, but it will not necessarily be so. For example, if registration of mines and minerals was fully aligned with the general provisions on compulsory registration in section 4 of the LRA 2002, compulsory registration of an estate in mines and minerals would be triggered as a result of the death of the estate owner.93 We understand that estates in mines and minerals may be retained within the same family for generations. A requirement of compulsory registration could put an unnecessary burden on those who have inherited an estate in mines and minerals, but do not have any intention of dealing with that estate.

3.59 We invite the views of consultees as to whether the provisions of section 4 of the LRA 2002 should be amended so that compulsory first registration of an estate in mines and minerals is triggered where mines and minerals are separated from an unregistered legal estate, and where an unregistered estate in mines and minerals held apart from the surface is transferred.

3.60 We invite consultees to share their experiences of the extent to which the lack of compulsory registration of estates in mines and minerals is causing problems in practice.

Notification of applications for registration of mines and minerals to the surface owner

3.61 We noted above that Land Registry, on receipt of an application for registration of an estate in mines and minerals, does not notify the surface owner of this application unless it is proposed to register the estate with absolute title.94 We also noted above that it is very rare for absolute title to mines and minerals to be granted, as historic rights of ownership give rise to difficulties in meeting the standard of proof for that class of title.95 Therefore most surface owners will not be notified of an application to register mines and minerals under their land. This is problematic for two reasons.

(1) The surface owner will have no chance to object to the registration of the applicant’s title to mines and minerals. Since the mines and minerals title will only be registered with qualified title, it will not affect the surface owner’s rights if he or she in fact has a better title.96 However, we consider that even though this is the case, if the surface owner has a better title to mines and minerals, it is preferable for this to be resolved before the weaker title is registered, in the interests of having an accurate register.

93 Under LRA 2002, s 4(1)(a)(ii) an assent (by which property from a deceased person’s estate is conveyed by his or her personal representatives to the person entitled to inherit) triggers compulsory first registration.

94 See para 3.39 above.

95 See paras 3.24 and 3.25 above.

96 LRA 2002, ss 11(6) and 12(7).
(2) The surface owner’s ignorance of the title below his or her land could be problematic if the surface owner wishes to sell or develop the land. Under current practice, surface owners will only become aware of any title to mines and minerals below their land when they try to sell their title. The surface owner’s ignorance of the title below his or her land could be problematic if the surface owner wishes to sell or develop the land. Under current practice, surface owners will only become aware of any title to mines and minerals below their land when they try to sell their title.97 Surface owners wishing to develop their land would not generally search the register before beginning such developments, and would presume that digging into the strata below their property is unproblematic because under the common law the strata are presumptively included in the surface title.98

3.62 In order to address these problems, surface owners could be notified of applications to register mines and minerals below their land, even if it is only proposed to register the estate with qualified title.

3.63 It might be argued that this suggestion poses conceptual problems. It would seem odd, for example, for a proprietor of one flat in a block of flats to be notified when the flat below it became registered. Therefore, it must be asked why an estate in mines and minerals should be treated differently. In the Court of Appeal decision in Bocardo Lord Justice Aikens explained that:

It is not helpful to try and make analogies between the rights of an owner of land with regard to the airspace above it and the rights of the landowner with regard to the strata beneath the surface. First, there are many potential users of the airspace above land, whereas, generally speaking, the general public has no right to use or go into substrata beneath someone else’s land. Secondly, the use of the airspace above land is highly regulated by statutes and regulations concerning aviation, which have to take account of the actual and potential rights and duties of many others apart from those with a proprietary interest in the surface land.99

3.64 This comment was approved by Lord Hope of Craighead in the Supreme Court.100 The owner of the surface of land will, at least at common law, be presumed to own the mines and minerals below the surface unless it can be shown that they have been alienated.101 The level of uncertainty surrounding who has rights to mines and minerals could support its treatment as a special case.

97 The mines and minerals title will then come to light as part of the usual conveyancing searches carried out by the purchaser.
98 See para 3.15 above. As far as the surface owner is aware, nothing has occurred at this point to rebut the presumption.
99 Bocardo, SA v Star Energy UK Onshore Ltd [2009] EWCA Civ 579, [2010] Ch 100 (CA) at [61].
101 See para 3.15 above.
The arguments do not, however, all lie in favour of notification of the surface owner on an application to register an estate in mines and minerals underneath his or her surface title. Notification could cause stress and confusion for ordinary landowners. Upon receiving notification of an application for registration, it is foreseeable that surface owners will perceive that mines and minerals have been removed from their title, even if that estate is eventually only registered with qualified title. This perception might lead to surface owners spending money unnecessarily trying to block or reverse the registration of the mines and minerals. It might be that the benefit of notification will only be realised by more sophisticated surface owners, with a much larger proportion of surface owners being subjected to unnecessary worry concerning an estate which was never, in fact, in their title.\footnote{A parallel may be drawn with applications to register unilateral notices in respect of manorial rights, which have caused distress to a number of landowners: see para 9.122 and following below.}

We are also mindful that the notification to surface owners of applications could potentially be burdensome for Land Registry. This is particularly so in the case of those who, for historic reasons, own title to mines and minerals over a large area. Notification of all the surface owners in such situations would be a large administrative task.

We invite the views of consultees as to whether surface owners should be notified of an application to register title to the mines and minerals beneath their land, regardless of whether the title is to be registered with qualified or absolute title.

**DISCONTINUOUS LEASES**

**The problem: the protection of discontinuous leases in registered land**

A discontinuous lease is a lease where the tenant's right to possession is not constant but is instead broken up into separate time periods, with other parties having a right to possess the property for the periods in between. For example, a lease might give the tenant possession of a building for one week a year for a certain number of years, as is common in time-sharing arrangements of holiday homes.\footnote{Lewison and others, *Woodfall: Landlord and Tenant* (2016 looseleaf) para 6.010 (we refer to this text as "Woodfall" throughout this Consultation Paper).}

There is authority to the effect that the length of the term of a discontinuous lease is calculated by adding together the individual periods, rather than by measuring the span between the beginning of the first period and the expiry of the last. On this reasoning a lease for one week a year for 80 years creates a term of 80 weeks, not 80 years.\footnote{Cottage Holiday Associates v Customs and Excise Commissioners [1983] QB 735. See *Woodfall*, paras 5.086 and 13.010.} The effect of this is that in many instances the term of a discontinuous lease may not amount to more than seven years, the length at which a lease is a registrable estate.\footnote{LRA 2002, ss 4(1)(c) and 27(2)(b)(i). See para 3.80 and following below.}
3.70 The grant of a discontinuous lease out of a registered estate is, however, specifically provided to be a registrable disposition and therefore it does not operate at law until the relevant registration requirements are met. Accordingly, if that lease for 80 weeks is granted out of a registered freehold, it must be registered if it is to be a legal lease; and once it is registered (with its own title number), a notice will be entered on the landlord’s title to protect its priority (as well as alerting any potential purchaser to its existence).

3.71 However, a discontinuous lease granted out of an unregistered estate (freehold or leasehold) does not have to be registered if its term does not amount to more than seven years, although unlike other leases for seven years or less it can be registered voluntarily.

3.72 The absence of a requirement of registration of a discontinuous lease granted out of an unregistered estate can create difficulties if the landlord’s title later comes to be registered, because section 33(b) of the LRA 2002 provides that no notice may be entered on the register in respect of a leasehold estate in land which is granted for a term of three years or less and which is not required to be registered. If the term of the discontinuous lease, properly calculated in accordance with the methodology above, is for three years or less, no notice may therefore be entered in respect of it – even if the discontinuous lease itself has been registered.

3.73 There is therefore an anomaly, in relation to discontinuous leases granted out of unregistered land, in the interaction of sections 3(4) (which permits the registration of discontinuous leases of seven years or less) and 33(b) (which prevents the entry of a notice on the landlord’s register of title where the discontinuous lease is for a term of three years or less and was not required to be registered, which is the case where at the date of its grant the landlord’s title was unregistered).

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106 LRA 2002, s 27(2)(b)(iii).
107 LRA 2002, s 4(1)(c). A discontinuous lease is, however, compulsorily registrable if it takes effect in possession more than three months from the date of the grant: LRA 2002, s 4(1)(d). There is a suggestion in Woodfall, para 5.086 that any periods in a discontinuous lease after the first 21 years are void under the Law of Property Act 1925, s 149(3) on the grounds that they do not take effect in possession within that time. The same reasoning (that each period in a discontinuous lease is a fresh point at which the lease takes effect in possession) could lead to the conclusion that any period in a discontinuous lease after the first three months is void under LRA 2002, s 7(1) if the lease has not been registered (even if the first period occurred within three months of the date of the grant). We do not think that this interpretation of section 149(3) is correct (and it appears to be without authority); a discontinuous lease is a single letting (Smallwood v Shepards [1895] 2 QB 627). In any event, our proposal below would render such an interpretation of s 4(1)(d) unnecessary.
108 LRA 2002, s 3. A discontinuous lease granted out of registered land prior to the coming into force of the LRA 2002 could also be voluntarily registered under this section.
109 Where a discontinuous lease is granted out of an unregistered estate, but the reversion becomes registered before the discontinuous lease, the registrar is obliged to enter a notice in the register of the reversionary estate upon registration of the discontinuous lease: LRR 2003, r 37, which would appear to conflict with LRA 2002, s 33(b).
3.74 The discontinuous lease will nevertheless have its priority protected as an overriding interest on first registration of title to the reversion and on the registration of a registrable disposition of the reversion for valuable consideration.\textsuperscript{110} However, the tenant may still prefer to have notice of the lease entered on the register to the reversionary title, and it is anomalous for the protection of discontinuous leases to differ depending upon the time when the reversion was registered.

\textbf{Provisional proposals}

3.75 The obvious solution to this – admittedly minor – problem would be to amend the LRA 2002 to allow for the registration of a notice of a discontinuous lease which is itself not required to be registered, regardless of its length, and we so propose below.

3.76 However, we also think that it would be useful to provide that discontinuous leases granted out of an unregistered estate must be registered in the same way as discontinuous leases granted out of a registered estate. The requirement to register would apply to a discontinuous lease granted out of a qualifying estate.\textsuperscript{111} Land Registry does not currently keep figures for the number of discontinuous leases that are registered. Land Registry believes that the number of discontinuous leases granted out of unregistered land is low. The requirement should not therefore be of wide impact but, where it applies, it would assist in increasing the number of interests brought onto the register.

3.77 Accordingly we make both proposals. We make the separate proposal as to notices so as to ensure that a notice can be entered to protect discontinuous leases granted prior to any reform when their registration was not compulsory, and we ask consultees to answer our second question below even if they do not agree that the registration of discontinuous leases should become compulsory.

3.78 \textbf{We provisionally propose that the requirement of registration should apply to the grant of a discontinuous lease out of a qualifying estate.}

\textbf{Do consultees agree?}

3.79 \textbf{We provisionally propose that it should be possible to protect a discontinuous lease by notice on the register of title to the reversion, whatever the length of the discontinuous lease and whether or not it was compulsorily registerable.}

\textbf{Do consultees agree?}

\textsuperscript{110} Under LRA 2002, sch 1, para 1 and sch 3, para 1; that is, as a short legal lease. Para 2 of those schs, whereby an interest is overriding because the holder is in actual occupation, will necessarily be of only occasional relevance. The overriding interest analysis assumes that the lease constitutes an “unregistered interest” for the purpose of s 11(4)(b), schs 1 and 3. We discuss this further in Chapter 11.

\textsuperscript{111} As defined by LRA 2002, s 4(2), i.e an unregistered legal estate which is either a freehold estate in land or a leasehold estate in land for a term which at the time of the grant has more than seven years to run. This would align with the position in relation to reversionary leases in s 4(1)(d).
THE LENGTH OF LEASE WHICH IS REGISTRABLE

Background

3.80 Under the LRA 2002 it is usually only possible to register leases for a term of more than seven years. Such leases must be entered on the register in certain circumstances by virtue of the provisions on compulsory first registration and registrable dispositions. The historical reasons for allowing shorter leases to remain off the register include the fact that the register may traditionally have been seen as primarily a register of freehold title, and that leases of shorter terms are not sufficiently valuable to justify the burden on both Land Registry and leaseholders of requiring registration. However, short leases constitute common and important estates in land which cannot necessarily be discovered by searching the register; their omission from registration appears to be against the policy of having a complete and accurate register.

3.81 In this section we examine the possibility of lowering the threshold for registration of a lease from a term of more than seven years to a term of more than three years. We note the reduction from a term of more than 21 years to the current threshold in the LRA 2002. We see how a further reduction to a term of more than three years was contemplated in the context of electronic conveyancing. We provisionally conclude that, while a reduction in the threshold for the length of a registrable lease should not be permanently ruled out, the burdens of such a reduction outweigh the benefits in the current climate.

112 There are certain exceptions, for example, discontinuous leases, and leases which take effect in possession more than three months after grant. In this part of the chapter we are only concerned with leases which do not fall into these exceptional categories. Discontinuous leases are considered at paras 3.68 to 3.79 above.


114 See para 2.17 above.

115 Electronic conveyancing is discussed in Chapter 20.
The current law

3.82 In the LRA 2002 the length of lease which is registrable was reduced from a term of more than 21 years to a term of more than seven. Therefore, under the current law, legal leases of over seven years are voluntarily\textsuperscript{116} and compulsorily\textsuperscript{117} registrable. Legal leases for seven years or less cannot be registered\textsuperscript{118} but are protected as overriding interests: they remain binding following first registration\textsuperscript{119} and registered dispositions.\textsuperscript{120} Legal leases of more than three years may alternatively be protected through entry of a notice on the register.\textsuperscript{121}

3.83 The reduction in the length of registrable leases in the LRA 2002 was, at least partially, brought about as a result of changing trends in lease length. We acknowledged in our 1998 Consultation Paper that one of the reasons for reform was that traditional business leases of 25 years (which were registrable under the LRA 1925) were being replaced with leases of less than 15 years (which were not registrable).\textsuperscript{122} We argued that this constituted “a considerable barrier to our eventual goal of total registration” and was detrimental to the transparency of the property market.\textsuperscript{123} It was also argued that reform would make transfers and subleases easier to carry out, given the complexity of transactions in the system of unregistered land.\textsuperscript{124}

The prospect of a reduction to three years

3.84 At the time of the enactment of the LRA 2002 it was considered that the reduction in the threshold for registration to a term of more than seven years was a step towards the eventual goal of registration of all leases over three years. This is demonstrated by the fact that the LRA 2002 gives the Secretary of State the power to reduce the relevant term further,\textsuperscript{125} and the fact (noted at paragraph 3.82 above) that leases over three years are capable of protection by a notice. We said in our 2001 Report:

\textsuperscript{116} LRA 2002, s 3(3).
\textsuperscript{117} The grant of a leasehold estate out of an unregistered estate triggers compulsory first registration of the lease if it is for a term of years absolute of more than seven years from the date of the grant: LRA 2002, s 4(1)(c). The transfer of an unregistered lease with more than seven years to run also triggers compulsory first registration: LRA 2002, s 4(1)(a). The grant of a leasehold estate out of a registered estate is a registrable disposition if it is for a term of more than seven years from the date of grant: LRA 2002, s 27(2)(b)(i). The transfer of a registered lease is also a registrable disposition: LRA 2002, s 27(2)(a). These provisions are reflected in the fact that, under LRA 2002, s 15(3)(a)(ii), a caution against first registration cannot be lodged by virtue of ownership of a leasehold estate where more than seven years of the term are unexpired.

\textsuperscript{118} We have already noted that there are certain exceptions; we are not concerned with these here.
\textsuperscript{119} LRA 2002, sch 1, para 1.
\textsuperscript{120} LRA 2002, sch 3, para 1.
\textsuperscript{121} LRA 2002, s 33(b) precludes entry of a notice in respect of leases of three years or less.
\textsuperscript{122} Law Com 254, para 3.7.
\textsuperscript{123} Law Com 271, para 3.16.
\textsuperscript{124} Hansard (HL), 17 July 2001, vol 626, col 1385 to 1386 (Baroness Scotland).
\textsuperscript{125} LRA 2002, s 118.
It is likely that, when electronic conveyancing is fully operative, the period will be reduced to include all leases that have to be made by deed – in other words, those granted for more than three years.  

3.85 As indicated by the above quotation, the term of three years is the “logical break-off point” because leases of three years or less can be made at law without requiring a deed if certain requirements are fulfilled. All other leases must be created by deed to exist at law. The vision of a corresponding reduction in the length of registrable leases was to ensure consistency with the aim expressed in our 2001 Report that, when electronic conveyancing was introduced, every disposition requiring a deed would be carried out online, and so every disposition requiring a deed would be registered. Given that electronic conveyancing in this form is still some way off, a reduction cannot currently be justified in this way.

3.86 However, it is also worth noting that the average business lease length has continued to fall since 2002, to under seven years. The considerations taken into account in the reduction in 2002, particularly the aim of total registration and transparency in the property market, may suggest that the registrable lease length should be reduced to reflect this trend.

Difficulties posed by a reduction

3.87 There is therefore an argument that all leases of a length of more than three years should be registrable. However, we have concluded that the burden on tenants, landlords and Land Registry of requiring all leases longer than three years to be registered is too great to justify a reduction in the registrable lease length under the LRA 2002 in the current climate.

126 Law Com 271, para 3.17.
128 Law of Property Act 1925, s 54 provides that a lease “taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine” can be created without a deed.
129 Law of Property Act 1925, s 52.
131 See eg the Property Industry Alliance, Property Data Report (2015) p 9, at http://www.bpf.org.uk/sites/default/files/resources/PIA-Property-Data-Report-2015-single.pdf (last visited 21 March 2016). See also P Dollar, “Issues with long leases” (2015) 1518 Estates Gazette 86 where it is asserted that more than 80% of UK leases signed in the year to June 2013 were for a term of less than five years, and an even lower average lease length is cited.
3.88 With regard to tenants, the argument that a reduction will ease the burdens of conveyancing\(^{132}\) carries much less weight in relation to leases of seven years or less. The shorter the lease, the less likely it is to be alienated. Therefore many of those affected by the requirement to register will not receive any benefit from registering their title in terms of subsequent simplified conveyancing, but would still have to expend money and time in meeting the registration requirement. This point was acknowledged during the debates preceding the LRA 2002 in both the House of Lords and the House of Commons.\(^{133}\) In the House of Lords particular concern was raised over increasing burden on tenants in the agricultural sector.\(^{134}\) Equally, however, a requirement of registration without corresponding benefits would run contrary to the trend in favour of reducing regulation on businesses.\(^{135}\)

3.89 Tenants would obtain the benefit of the guarantee of title and access to an indemnity in the event of rectification of the register under the rules discussed in Chapters 13 and 14. However, the practical advantage of these benefits (as well as the potential cost to the indemnity fund) may be relatively minor in respect of short leases.

3.90 As for landlords, it might be argued that registration of short leases would be beneficial to landlords wishing to deal with the freehold estate, as the register would represent a more complete record of interests affecting the title.\(^{136}\) However, registration could also be burdensome for landlords – a freeholder would need to be vigilant to ensure that leases were promptly cleared off the freehold title following their termination.\(^{137}\) Moreover, the short leases under consideration are likely to be occupational leases which are easily discoverable by a purchaser of the reversion, so there is therefore arguably no need for them to be on the register.

3.91 A requirement of registration could result in increased costs for both tenants and landlords. Alongside the registration fee itself, the registration requirement may increase the likelihood that legal advisers will be instructed in relation to the transaction, which could result in legal costs for the parties to the lease. Any plan attached to the lease would need to meet Land Registry’s requirements, which could result in additional surveyor’s costs.

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\(^{132}\) See para 3.83 above.

\(^{133}\) *Hansard* (HL), 3 July 2001, vol 626, col 781 (Earl of Caithness); *Hansard* (HC), 11 December 2001, Standing Committee D (Mr Cash).

\(^{134}\) *Hansard* (HL), 3 July 2001, vol 626, col 781 (Earl of Caithness).

\(^{135}\) See, for example, *Hansard* (HC), 3 March 2016, vol 606, col 43WS.


\(^{137}\) Termination could occur through effluxion of time but also through other means (eg forfeiture). Some business leases may also benefit from security of tenure which means that termination is not automatic on the expiry of the term originally granted by the lease. These issues already affect existing registered leases but due to the more frequent “churn” of shorter leases their effects are likely to be intensified in the event of a reduction in the threshold of the length of lease that is registrable.
3.92 A lowering of the threshold of a registrable lease would result in an increase in the number of leases being registered at Land Registry. Given the lack of clear benefits to individual tenants and landlords, it is not clear that the resource implications to Land Registry of an increased workload are justified.

3.93 Furthermore, as noted above, the reduction to three years was envisaged in the context of electronic conveyancing. While we would not wish to rule out a review of a reduction in the threshold for registrable leases at some point in the future, we do not feel that such a reduction can be supported at the present time.\(^{138}\)

3.94 We provisionally propose that there should be no change to the threshold of the length of lease which is registrable under the LRA 2002.

**Do consultees agree?**

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\(^{138}\) We note that some of the disadvantages which we have referred to in the registration of leases of seven years or less could remain, even if registration took place under a system of electronic conveyancing.
CHAPTER 4
FIRST REGISTRATION

INTRODUCTION

4.1 Most land in England and Wales is registered. The shift from unregistered to registered conveyancing has been achieved by a “carrot and stick” approach. We have seen that first registration may be voluntary, or may be compulsory if any one of a number of trigger events set out in the LRA 2002 has occurred. The benefits of voluntary first registration include fee reductions, a simpler conveyancing process and access to the title protections built in to the registered land regime. Compulsory registration will be triggered by most of the common types of disposition, including a transfer and the grant of a first legal mortgage.

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2 See LRA 2002, s 3; see para 2.43 above.

3 See para 2.43 above.


5 For example, the guarantee of title (LRA 2002, s 58 and sch 8) and protection against adverse possession (LRA 2002, sch 6). See Chs 14 and 17 below.

6 For an exhaustive list of dispositions which trigger compulsory registration see LRA 2002, s 4.
4.2 Those acquiring an interest or estate in unregistered land will investigate title to the estate primarily through disclosure of the title deeds. The rules governing the protection of interests in unregistered land are distinct from the priority rules for registered land, now contained in the LRA 2002. As a general rule, in unregistered land, legal rights bind anyone taking an interest in the land. Owners of legal interests do not usually need to take any protective steps to secure the priority of their rights. The default position, in respect of equitable rights, is that they bind anyone taking an interest in the land except for a purchaser in good faith and for value of a legal estate without notice. This position applies, for example, to beneficial interests under a trust and equitable interests created prior to 1 January 1926. Some equitable interests, however, must be entered on the Land Charges Register in order to bind subsequent purchasers. Restrictive covenants, equitable easements and estate contracts are all examples of equitable interests which are required to be registered under the Land Charges Act 1972. The effect of non-registration of these interests is that the equitable interest is void as against specified purchasers.

4.3 In this chapter we consider how the unregistered and registered land regimes interact at the point of transition from one system to the other. Specifically, we explore the priority rules applicable to dispositions of interests which occur either simultaneously with the transaction that triggers compulsory first registration, or after that transaction but before registration takes place. This gap in time has been referred to as the “twilight period” as neither the rules of unregistered nor registered conveyancing seem wholly equipped to deal with this period. Our examination of this area includes discussion of the protection currently available to disponees and whether this protection is satisfactory.

4.4 At the end of the chapter we consider one further issue relating to first registration concerning the persons who may apply for a caution against first registration.

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7 See para 2.5 above.
8 Megarry & Wade, para 6-036. Certain legal interests, such as puisne mortgages, are land charges and are registrable as such.
9 Pitcher v Rawlins (1871-72) LR 7 Ch App 259.
10 Land Charges Act 1972, s 2, discussed at para 2.11 above. See generally Megarry & Wade, paras 6-029 to 6-038.
11 Land Charges Act 1972, s 4. Note that the exact consequences of non-registration vary according to type of land charge in question.
13 See paras 4.36 to 4.39 below.
TWILIGHT PERIOD

Background

4.5 As a matter of unregistered conveyancing, legal title to an estate will pass on the transfer, or grant, of that estate.\(^{14}\) Once a trigger for first registration under section 4 of the LRA 2002 has occurred, an application for registration must be made within two months.\(^{15}\) If this is not done the disposition will become void as regards the transfer, grant or creation of a legal estate.\(^{16}\)

4.6 If the disponee under the disposition which triggers first registration applies for first registration before making a further disposition of the land, no difficulty should occur. Even if the application for first registration takes a while to complete (because Land Registry needs to examine all the title deeds, and create a new title), the land can be dealt with in the meantime as if the registration had been completed. A provisional title number will have been allocated which will enable searches to be made, and further applications to be lodged, in the usual manner. Once completed, the original application for registration will take effect from the date on which that application was lodged with Land Registry.\(^{17}\)

4.7 The more difficult situation is where the disponee under the disposition which triggers first registration needs to make a further disposition of the land before an application for first registration has been made. This might be, for example, because the first disposition formed part of a back-to-back sub-sale.\(^{18}\) As we will see, the application of the rules which govern dispositions during this twilight period is not always straightforward.

Current law

4.8 In this section, we outline the existing legislative rules which purport to tackle the twilight period.

Section 14(3) of the Land Charges Act 1972

4.9 It is neither possible nor necessary to protect, by means of a land charge, an interest which is created in the same instrument as a conveyance, grant or assignment of an unregistered estate in land which triggers compulsory first registration. This position is arrived at by section 14(3) of the Land Charges Act 1972. That provision reads:

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\(^{14}\) Contrast the position in registered conveyancing under LRA 2002, s 27.

\(^{15}\) LRA 2002, s 6(1).

\(^{16}\) LRA 2002, s 7(1). If the disposition which has become void is a transfer, the title to the legal estate will revert to the transferor, who will hold the estate on a bare trust for the transferee. Other types of disposition will take effect as a contract to grant or create the relevant legal estate.

\(^{17}\) LRA 2002, s 74(a).

\(^{18}\) A back-to-back sub-sale occurs where two transfers, one from A to B and another from B to C, occur immediately after one another, with no real gap in between.
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.

4.10 An example may illustrate the effect of section 14(3) of the Land Charges Act 1972. A owns a piece of unregistered land. A decides to sell part of the unregistered land to B. The conveyance from A to B contains a restrictive covenant entered into by B for the benefit of A’s retained land. A restrictive covenant is a class D land charge and, under unregistered land rules, would ordinarily need to be protected on the land charges register. A restrictive covenant entered into by B for the benefit of A’s retained land is a class D land charge and, under unregistered land rules, would ordinarily need to be protected on the land charges register. The conveyance is completed which triggers first registration of B’s land. B is subject to a duty under section 6 of the LRA 2002 to apply for first registration of title within two months of the disposition. Section 14(3) of the Land Charges Act 1972 means that A does not need to, and should not, make an application to protect the restrictive covenant on the Land Charges register against B’s name. Land Registry affirms that “the purchaser’s restrictive covenants, etc, in such an instrument are not void for non-registration at the Land Charges Department”.

**Rule 38 of the LRR 2003**

4.11 The above example concerned the grant of an interest in an instrument which itself triggers first registration. Rule 38(1) of the LRR 2003 brings dispositions which occur after compulsory registration has been triggered, but before first registration takes place, into the LRA 2002 regime. Rule 38 states:

(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.

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19 Land Charges Act 1972, s 2(5)(ii).
21 The rationale for this provision may be that, as the interest is created in the same instrument as the disposition triggering compulsory first registration, the interest will always come to the attention of Land Registry when the instrument is disclosed in order to complete first registration.
23 R 38 is created under a power conferred by LRA 2002, sch 10, para 1.
4.12 The effect of rule 38 is that a disposition in the period between first registration being triggered and an application for first registration being made will be subject to the legal framework which regulates dealings with registered land, even though at the time of that disposition the land is not, in fact, registered. Again, an example may be of assistance. A transfers a piece of unregistered land to B and first registration is triggered. B then grants an easement to C. This easement will need to be completed by registration in order operate at law under section 27(1) of the LRA 2002. Since the easement will not be legal unless registered, it cannot be an overriding interest under schedule 3 to the LRA 2002. If C has a dispute concerning the priority of the easement, the rules of priority found in sections 28 and 29 of the LRA 2002 will apply.

4.13 It could be argued that it is possible to construe rule 38 as also being engaged when the grant of an interest which would otherwise be a land charge is effected in the same instrument as the disposition which triggers compulsory registration (for example, a transfer). The rationale for this position is that there is a moment in time between the transfer and the creation of the land charge. The authors of Ruoff & Roper suggest that the creation of the interest is subject to registered land rules in this situation although no authority is cited in support of the point:

It is specifically provided that, where an instrument conveys, grants or assigns an estate in land and creates a land charge affecting that estate, the Land Charges Act 1972 will not apply to the land charge if the title to the estate concerned becomes compulsorily registrable in consequence of that disposition. Thus, in that particular case, for registration purposes, the land is regarded as registered land whether or not the application for registration of title is lodged in time.

4.14 The better view, we consider, which is supported by other commentators, is that rule 38 applies only to dispositions which occur after compulsory registration has been triggered. Land Registry describes the scope of rule 38 in its publication Practice Guide 1: First Registrations:

Sometimes an unregistered estate that has become subject to compulsory first registration (because of a qualifying transfer, lease or mortgage) needs to be dealt with again before registration has been applied for.

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24 Sch 1 is not relevant as the grant of the easement is deemed to take place after the land has been registered.

25 See Ch 6.

26 Ruoff & Roper, para 8.014.02. Contrast with Ruoff & Roper at 8.014.03 which states that rule 38 operates where “a dealing with an unregistered estate in land takes place between the execution of a disposition, to which the compulsory registration of title provisions apply, and an application to register the title to the estate concerned”.

This is possible, but the Land Registration Act 2002 will apply to the later dealing or dealings as if the estate were already registered under rule 38 of the Land Registration Rules 2003.\textsuperscript{28}

**Priority protection of dispositions which occur after first registration is triggered but prior to registration taking place**

4.15 It will be apparent from the preceding discussion that certain rules of unregistered and registered conveyancing have been adapted in order to accommodate dispositions which occur in the twilight period. Questions have, however, been raised about whether these modifications are sufficient. The position of disponees who find themselves in the twilight period is peculiar: arguably neither regime – unregistered or registered – is designed with the protection of such disponees in mind. Hence, while it seems clear that one of the two regimes should govern disputes which arise from twilight period dispositions, the current law is ambiguous as to which regime applies.

4.16 This section of the chapter explores the avenues for priority protection open to disponees within the twilight period. By priority protection we mean a vehicle for a disponee of an interest to ensure that the interest is binding against a subsequent purchaser.\textsuperscript{29} Two situations are addressed. First, we consider the position of a disponee whose interest is created in the same instrument as the disposition which triggers compulsory registration. This scenario may arise, for example, in the context of a reservation of an interest upon transfer of an estate or grant of a lease for a term exceeding seven years.\textsuperscript{30} Second, we discuss the position of a disponee whose interest has been created after compulsory first registration has been triggered.

4.17 These two scenarios offer the simplest fact pattern of a twilight period problem. Additional complications may arise where there are multiple conveyances of the unregistered estate prior to an application for first registration being made, and/or where there is a failure to apply for compulsory first registration of title within the two-month time limit.\textsuperscript{31}


\textsuperscript{29} Priorities are discussed further in Part 3 below.

\textsuperscript{30} See para 4.10 above.

\textsuperscript{31} As was the case in *Sainsbury’s Supermarkets v Olympia Homes* [2005] EWHC 1235 (Ch), [2006] 1 P & CR 17.
Dealing is in the same transaction as the disposition which triggers compulsory registration

4.18 This scenario extends the example discussed at paragraph 4.10 above. In the scenario given in that paragraph, A was a vendor who had transferred part of his or her unregistered freehold to B. This disposition had triggered compulsory registration of title. In the deed effecting the conveyance, a restrictive covenant was entered into by B in favour of A's retained land. All material facts are the same in this situation, except that B has now sold the freehold on to C, who is the applicant for first registration. The question is whether (and if so, on what basis) C is bound by the restrictive covenant.

4.19 It is clear, as discussed at paragraph 4.9 above, that section 14(3) of the Land Charges Act 1972 prohibits A from protecting the covenant on the land charges register. Hence, the particular rule of unregistered conveyancing requiring certain equitable interests to be protected on the Land Charges Register in order for their priority to be preserved on a subsequent transfer of the legal estate is expressly disappplied. This provision does not, however, necessarily imply that all rules of unregistered conveyancing are redundant. It is possible that the default rule of unregistered conveyancing – the doctrine of notice – is reinstated upon the suspension of the land charges regime. If this analysis is correct, C would be bound by A's restrictive covenant unless C is a good faith purchaser for value of the legal estate without notice. A necessary step in a conveyance of unregistered land is deduction of title by reference to the deeds and title documents. B's title is derived from the same instrument as A's restrictive covenant. Since B would need to produce the conveyance from A to B in order to deduce title to C, C would, therefore, in all cases have notice of the covenant.

4.20 An unregistered land solution may not, however, be palatable. We have already noted that the sale of the freehold from B to C falls within the scope of rule 38 of the LRR 2003. This rule provides that the conveyance from B to C be conducted in accordance with the rules applicable to dispositions of registered land. Accordingly, it may be argued that section 14(3) of the Land Charges Act 1972 excludes all rules of unregistered conveyancing and, by implication, the rules found in the LRA 2002 should apply instead.

4.21 The difficulty with the analysis on registered land principles is that, outside the twilight period, whether C will be bound by the covenant will be determined by section 29 of the LRA 2002. The priority of the covenant will depend for these purposes on whether it is noted on the register. However, at the point of the transfer from B to C, no register has been created in respect of the title.

32 Applications for first registration may be made by successors in title: see LRA 2002, s 6(1).
34 A restrictive covenant is not capable of being an overriding interest.
4.22 A pragmatic approach to the application of principles of registered land may offer an answer to the problem. Central to the scheme of registered conveyancing is the idea that the order and priority between the transferee and pre-existing property rights is determined at the date of registration, not the date of transfer.\textsuperscript{35} In this scenario C is the first person to apply for registration. Rule 38 of the LRR 2003 provides that where a dealing occurs after compulsory first registration is triggered the LRA 2002 applies to that dealing as if it had taken place after the date of first registration. Therefore both the rules governing the process of first registration and the rules for establishing priority in transfers of registered land are engaged. Once the application for first registration has been made by C, the priority position can be easily seen. The process of first registration requires C to lodge documents in support of his or her title.\textsuperscript{36} The conveyance from A to B, which also creates A’s restrictive covenant, would be shown to Land Registry, revealing the existence of A’s rights.\textsuperscript{37} Land Registry would note all interests revealed in the title deeds on the register, including A’s restrictive covenant.\textsuperscript{38} Once the register is drawn up the priority question can be addressed. Since A’s restrictive covenant is noted on the register, it will bind C (whose transfer is treated as having taken place after the date of first registration).\textsuperscript{39} Prior to the application being made, the priority position (whether A’s covenant will bind C) can only be determined by extrapolating what will happen once the application for first registration is made. Following the reasoning above, it is possible for C to ascertain, at the point of acquisition of the land from B, that C will be bound by the restrictive covenant.

\textsuperscript{35} LRA 2002, s 29. See Ch 6.
\textsuperscript{38} LRR 2003, r 35(1).
\textsuperscript{39} LRA 2002, s 29(2)(a)(i).
4.23 It may be that, prior to the sale from B to C, A is able to apply for a caution against first registration. Entry of a caution against first registration will result in the cautioner being notified of an application for first registration of the burdened estate in land and being given an opportunity to object.\textsuperscript{40} There are two issues with the use of a caution against first registration. First, it seems that an application for a caution against first registration may not be submitted after rule 38 of the LRR 2003 is triggered, which will occur when there is a dealing with the land while it is subject to a requirement to register.\textsuperscript{41} A caution against first registration is a mechanism in respect of unregistered land, whereas rule 38 brings the dealing firmly into the registered land regime. If this position is correct, there is a premium on the timing of the application: a caution must be lodged prior to the sale from B to C.\textsuperscript{42} Secondly, and most importantly for an applicant in A’s position, a caution against first registration will not guarantee the priority of the interest.\textsuperscript{43}

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

4.24 The scenario discussed above related to the grant of an interest in the same instrument as the disposition which triggers compulsory registration. We have concluded that, although the law is arguably unclear as to which set of rules should apply to govern priorities in this situation, the beneficiary of such an interest should be protected against subsequent dispositions prior to an application being made for first registration.

4.25 We now move on to discuss a second scenario. We will also take as our example the means of protection available to a person with the benefit of a restrictive covenant entered into during the twilight period. Unlike the example used in the previous section, in this scenario the restrictive covenant is granted after the transfer of unregistered land which triggers compulsory registration. The fact pattern would appear as follows. A transfers the unregistered freehold in land to B, triggering first registration of title. B then enters into a restrictive covenant in favour of land owned by C. After this transaction, B sells the freehold on to D. D is the first applicant to apply for registration of title. This time the question is whether D is bound by C’s restrictive covenant.

\textsuperscript{40} LRA 2002, s 16(1). Cautions against first registration are further discussed at paras 4.36 to 4.39 below.

\textsuperscript{41} Ruoff & Roper, para 8.014.03.

\textsuperscript{42} It is not clear whether r 38 has the effect that the rules applicable to registered land operate at all times after the rule has been engaged. If this is the case, a caution against first registration can only be lodged prior to the first dealing after compulsory registration has been triggered. It may be, however, that r 38 only operates on particular dealings leaving the rules of unregistered land to apply in intervening periods. In our example this would mean that A could lodge a caution against first registration at any time until an application for first registration is actually made.

\textsuperscript{43} LRA 2002, s 16(3).
4.26 Rule 38 of the LRR 2003 provides that the land registration regime for dispositions of registered land will apply to both the grant of C’s restrictive covenant and the transfer from B to D. If the argument framed in paragraph 4.22 is applied, the priority of the transfer from B to D should be determined as if the process of first registration has been completed. In this case, although the document creating the restrictive covenant ought to be sent to Land Registry as part of the application for first registration, the restrictive covenant is not within a deed which is required to be produced in order to establish D’s title. Therefore C’s covenant could be missed off the register as it is plausible that an agreement between B and C would not find its way to Land Registry as part of the first registration application. Equally, if B fails to disclose the existence of C’s covenant, D may be unaware of the existence of the right. Furthermore, C could not personally make an application to Land Registry to note the covenant on the register as the land is unregistered at the time the covenant is entered into.

4.27 It may be that C can protect the restrictive covenant by entering a land charge on the land charges register against B. Entry of a land charge is expressly excluded by the Land Charges Act 1972 when the interest is created in the same instrument as the disposition triggering compulsory first registration. Where, however, the interest is created after the disposition triggering compulsory registration, it would appear a land charge may be entered so long as the interest cannot be protected under the LRA 2002. This position is reached by section 14(1) of the Land Charges Act 1972 which states:

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].

C, in this scenario, is not able to access the protective mechanisms found in the LRA 2002, such as entry of a notice, because at the point the restrictive covenant is entered into no register exists. Therefore, it seems that the land charges regime may remain in play.

45 Land Registry note at Land Registry, Practice Guide 1: First Registrations, (July 2015) para 4.3.12 that “generally there will be no rights, interests or claims known to the applicant other than those disclosed in the title documents or forms lodged”.
46 Land Registry, Practice Guide 1: First Registrations (July 2015) para 7.4; Ruoff & Roper para 8.014.03.
48 Land Charges Act 1972, s 14(3).
49 This is the position of Land Registry – see Land Registry, Practice Guide 1: First Registrations (July 2015) para 7.4. It was also implicitly approved by the court in Sainsbury’s Supermarkets v Olympia Homes [2005] EWHC 1235 (Ch), [2006] 1 P & CR 17.
4.28 Entry of a land charge would give D the tools to discover the existence of C’s restrictive covenant prior to purchasing the property. D’s conveyancer can conduct a land charges search prior to completion of the transaction with B. C’s land charge would show up on this search. Furthermore, the land charge is likely to come to the attention of Land Registry upon first registration by D. As standard practice, Land Registry requests that applicants for first registration submit, at a minimum, the following searches alongside the application for first registration:

(1) a search against the sellers in the most recent transfer on sale, and also their predecessors in title back to the preceding conveyance on sale; and

(2) a search against the estate owners and their predecessors in title back to the last conveyance on sale, if the time that has elapsed since that conveyance is such that there is a possibility of entries having been made against their names, or if the applicants are not the estate owners.

4.29 The registrar also has additional powers under rule 30 of the LRR 2003 to make and direct searches as well as to advertise the application for registration.

4.30 There are, however, problems with a solution premised on the application of the Land Charges Act 1972. First, failure to register the restrictive covenant on the land charges register would result in the covenant not binding subsequent disponees of the legal estate in land. The current law is unclear as to whether the land charges regime ought to be employed and, if it is engaged, C may not appreciate that entry of a land charge is necessary. Secondly, falling back on rules of unregistered conveyancing is uncomfortable when rule 38 of the LRR 2003 specifically states that the registered land regime should apply. The authors of Ruoff & Roper suggest that a land charge should only be registered where there has been a failure to register the estate within the two-month time limit.

4.31 A caution against first registration may not be an option available to C as rule 38 of the LRR 2003 has been triggered.

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50 For a discussion about how to conduct a land charge search see F Silverman (ed), Conveyancing Handbook (22nd ed 2015) E2.6. Equally, however, there is an argument that it is not necessary to conduct a land charges search once r 38 has been triggered.


52 See para 4.23 above.
Reform

4.32 It is clear that the twilight period is a theoretically problematic period in the conveyancing process. As we explained in paragraph 4.15 above, we believe that one conveyancing regime, either registered or unregistered, should govern twilight period disputes, for these rules dictate how the conveyancing process is conducted. Parties are entitled to know which regime they fall under, but the point of transition from unregistered to registered conveyancing rules can be unclear. The default position is that a conveyance is covered by unregistered conveyancing rules until it is transferred into the registered conveyancing regime. Section 14(3) of the Land Charges Act 1972 and rule 38 of the LRR 2003 attempt to effect such a transfer, however, these provisions do not fully align with each other. It would appear that no comprehensive framework of principles to be applied to this period exists.

4.33 The extent of the problem in practice is unclear, although one text has suggested that the problem is encountered.\(^{53}\) Commercial workarounds may, however, limit the difficulties that arise in twilight period conveyancing. Prospective disponees of an interest burdening an unregistered estate, upon or following the trigger of compulsory registration, may refuse to deal with the disponor until an application for first registration has been made.\(^{54}\) Equally, unregistered estate owners may voluntarily register their land in order to facilitate dealings with the property.

4.34 We invite consultees to provide evidence of difficulties they have encountered when undertaking conveyancing in the twilight period.

4.35 We invite the views of consultees as to the form of protection that should be provided in respect of dispositions that take place in the twilight period.


\(^{54}\) This scenario is only likely where the disponee of the interest holds greater bargaining power than the disponor of the unregistered estate – for example, where the disponee is a mortgagee.
WHETHER A PERSON WITH THE BENEFIT OF A DERIVATIVE INTEREST UNDER A TRUST CAN LODGE A CAUTION AGAINST FIRST REGISTRATION

4.36 In Chapter 3 above we considered whether the proprietor of an estate in mines and minerals can lodge a caution against first registration of the relevant surface title. In this chapter we consider the entitlement of one further class of persons to make such an application for a caution against first registration. Section 15 of the LRA 2002 provides that a person may 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. It is clear that, where an unregistered legal estate is held on trust, someone with a beneficial interest under that trust may apply for a caution on this ground. It is, however, debatable whether a person with a derivative interest under that trust is entitled to apply for a caution against first registration.

4.37 Examples of a derivative interest under a trust could be a charge of a beneficial interest, or a claim by one partner that the interest of the other partner in a property jointly owned with other family members is subject to a constructive trust and they are a beneficiary. A derivative interest under a trust affects the beneficial interest and not the legal estate. It is therefore unclear whether a person with such an interest meets the test in section 15 of the LRA 2002 for the lodgement of a caution. Land Registry currently accepts applications for cautions made on this basis.

4.38 As we will see in Chapter 10, the form of protection on the register that a person with a derivative interest under a trust is entitled to is limited. The only entry which may usually be made is a restriction which ensures that overreaching occurs. However, the fact that some protection is available suggests that the entry of a caution against first registration in these circumstances is appropriate, to ensure that the entry of such a restriction can be made on first registration. We therefore believe that Land Registry’s current practice should be put on a more secure statutory footing.

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55 See paras 3.40 to 3.42 and 3.47 to 3.51 above.
56 In Chapter 17 we explore the circumstances in which a person who is in adverse possession of unregistered land may lodge a caution against first registration.
57 See Law Com 271, para 3.57(3).
58 See Chapter 10 for more discussion of derivative interests under trusts.
59 Law Com 271, para 3.56(2) refers to “a person who claims to be entitled to an interest affecting [a] … legal estate”, which suggests that those with the benefit of derivative interests under trusts should be excluded. However, it also explains that this provision gives effect to the recommendation in Law Com 2 54 that “any person having an interest in unregistered land should be able to lodge a caution against first registration (thereby codifying present practice)”. The reference to “land”, rather than “legal estate”, suggests that the provision was intended to catch a wider group of interests.
60 A restriction in Form A: see Chapter 10 on restrictions, para 10.34.
61 It will not usually be possible to protect the derivative interest by a land charge. A general equitable charge (within land charge class C(iii)) excludes equitable charges affecting an interest under a trust of land: Land Charges Act 1972, s 2(4).
4.39 We provisionally propose 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.

Do consultees agree?
CHAPTER 5
THE POWERS OF THE REGISTERED PROPRIETOR

INTRODUCTION

5.1 An underlying principle of the LRA 2002 is for the register to be a complete and accurate statement of title. One important part of this principle is that an owner’s powers of disposition should be apparent from the register. A disponee can then rely on the register to determine whether there are any limitations on a registered proprietor’s powers of disposition.\(^1\) A disponee should not be concerned with any limitations that do not appear on the register.

5.2 The powers of a registered proprietor are addressed within the LRA 2002 through the concept of “owner’s powers”. Section 23 specifies the powers of disposition that constitute owner’s powers and section 24 explains who is entitled to exercise those powers. Section 26 then provides for the protection of disponees where registered proprietors act beyond their powers in a way that is not apparent from an entry on the register.

5.3 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. In this chapter we consider and consult on owner’s powers. We make provisional proposals about the interpretation of who is a person “entitled to be registered as the proprietor” under section 24(b), and the scope of owner’s powers. We also discuss owner’s powers in relation to the registration gap.\(^2\) Although the registration gap remains a cause of problems in practice, we conclude that the problems cannot be addressed by a legal solution.

THE SCHEME UNDER THE LRA 2002

5.4 The LRA 2002 defines the scope of owner’s powers in section 23:

(1) Owner’s powers in relation to a registered estate consist of—

(a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a mortgage by demise or sub-demise, and

(b) power to charge the estate at law with the payment of money.

(2) Owner’s powers in relation to a registered charge consist of—

(a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a legal sub-mortgage, and

\(^1\) Law Com 271, paras 4.3 to 4.4.
(b) power to charge at law with the payment of money indebtedness secured by the registered charge.

(3) In subsection (2)(a), “legal sub-mortgage” means—

(a) a transfer by way of mortgage,

(b) a sub-mortgage by sub-demise, and

(c) a charge by way of legal mortgage.

5.5 Section 24 states 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.

5.6 Accordingly, under the LRA 2002 a registered proprietor or a person entitled to be registered as the proprietor has the power to make a disposition of any kind permitted by the general law, including charging the estate with the payment of money, with some specific exceptions relating to mortgages. These powers of disposition include the ability to make registrable dispositions, dispositions which create legal interests but cannot be registered (such as short leases), and equitable interests.

5.7 Section 26 provides protection for disponees where the owner’s powers have been limited:

(1) Subject to subsection (2), a person’s right to exercise owner’s powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition.

(2) Subsection (1) does not apply to a limitation—

(a) reflected by an entry in the register, or

(b) imposed by, or under, this Act.

(3) 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 a disposition).

2 The “registration gap” is made up of two periods, together covering the time between completion of a disposition and its registration by Land Registry: see para 5.67 below and the Glossary.

3 Under LRA 2002, s 27.

5.8 The effect of section 26 is that, for the purpose of determining the validity or lawfulness of a disposition, the LRA 2002 does not extend the powers of disposition of the registered proprietor or person entitled to be registered as the proprietor. What owner’s powers do is protect a disponee from the effects of any limitation which is not either noted on the register or imposed by the LRA 2002. As explained in our 2001 Report and set out in section 26 itself: the purpose of owner’s powers “is to prevent the title of the disponee being questioned”.5

5.9 Section 26 means, for example, that the validity of a disposition is unchallengeable on the basis that the registered proprietor (or person entitled to be registered as the proprietor, as the case may be) lacked the legal capacity to make the disposition. A purchaser is only bound by a limitation if there is an entry in the register reflecting that limitation (usually this entry will take the form of a restriction) or the limitation is imposed by the LRA 2002 (in which case the purchaser should be aware of it).

5.10 Under the LRA 2002, therefore, a disponee is able to presume that, save for what is apparent from any entries on the register, there are no legal or equitable limitations that will affect the validity of the disposition. The disponee can proceed without looking behind the register, which is meant to be a complete and accurate statement of the title.6 As we said in our 2001 Report, “a person can rely upon the register to tell him or her whether there are any limitations on the powers of a registered proprietor and can safely act in reliance upon it”.7

5.11 The other consequence of owner’s powers is that, even where there was a limitation on the registered proprietor’s powers of disposition which would (in the absence of owner’s powers) have affected the validity of the disposition, as long as that limitation was not reflected on the register then the registration of that disposition is not a mistake. It therefore cannot be the subject of an application for alteration of the register on the grounds of correction of a mistake.8

SIMPLIFICATION AND CLARIFICATION OF THE POWERS UNDER THE LRA 1925

5.12 Although the LRA 2002 introduced the language of 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 be a simplification and clarification of the existing law on this point.9

5 Law Com 271, para 4.9.
6 See Ruoff & Roper, paras 13.002 to 13.003.
7 Law Com 271, para 4.3.
8 Chapter 13 discusses alteration of the register. In contrast, an omission by Land Registry to put a restriction on the register, or the removal of a restriction, may be a mistake.
9 Ruoff & Roper, para 13.003.01; Hansard (HL), 30 October 2001, vol 627, col 1348 to 1349 (Baroness Scotland of Asthal).
5.13 Taken together, numerous provisions within the LRA 1925 appeared to give a registered proprietor the same powers of disposition as an owner of unregistered land, barring any limitation recorded in the register of title. We say “appeared” because the extent of the powers under the LRA 1925 of a registered proprietor was unclear, due to the numerous provisions addressing powers of disposition within that Act. In particular, the dispositive powers of a registered proprietor who was a trustee had been called into question.\(^{10}\) However, although the powers of a registered proprietor were not explicitly set out in one place under the LRA 1925, registered proprietors were thought to be able to “exercise all or any powers of disposition unless some entry on the register exists to curtail or remove those powers...”\(^{11}\)

5.14 Persons entitled to be registered as the proprietor were also given the power to transfer or charge the land before being registered as owner. Section 37 of the LRA 1925 provided that:

\[
(1) \text{Where a person on whom the right to be registered as proprietor of registered land or of a registered charge has devolved by reason of the death of the proprietor, or has been conferred by a disposition or charge, in accordance with this Act, desires to dispose of or charge the land or to deal with the charge before he is himself registered as proprietor, he may do so in the prescribed manner, and subject to the prescribed conditions.}
\]

\[
(2) \text{Subject to the provisions of this Act with regard to registered dealings for valuable consideration, a disposition or charge so made shall have the same effect as if the person making it were registered as proprietor.}
\]

5.15 As we explain at paragraphs 5.22 to 5.24 below, the power to transfer or charge the land in section 37 of the LRA 1925 is particularly significant in respect of purchase mortgages (a charge on the property granted by the purchaser on acquisition to secure payment of a loan which is made to fund part of the purchase price) and sub-sales.

**UNCERTAINTIES ABOUT THE APPLICATION AND SCOPE OF OWNER’S POWERS**

5.16 Although the concept of owner’s powers is not therefore new under the LRA 2002, there is uncertainty about their application and scope. Most of this ambiguity centres on the category of persons entitled to be registered as the proprietor. Two particular questions emerge from both litigation under the LRA 2002 and submissions from stakeholders.

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\(^{10}\) Law Com 271, para 4.3 and n 2. This was particularly the case in regard to trustees’ powers of disposition: see para 5.54 and following below.

\(^{11}\) Law Com 271, para 4.3, citing *Bank of India v Sood* [1997] Ch 276, 284.
(1) Who can exercise owner’s powers? In particular, what are the conditions that a person must meet in order for that person to be “entitled to be registered as the proprietor”?

(2) What is the scope of owner’s powers? In particular, what are the powers that a person entitled to be registered as the proprietor can exercise?

5.17 We examine each of these questions in turn below.

**Who can exercise owner’s powers?**

5.18 Section 24 of the LRA 2002 provides that both the registered proprietor, and a person entitled to be registered as the proprietor, are entitled to exercise owner’s powers. However, the LRA 2002 does not define the expression “entitled to be registered as the proprietor”. The question for consideration is therefore: what does a person have to do to be entitled to be registered for the purposes of section 24?

5.19 We are of the view that a disposition in a person’s favour of the freehold or a registrable lease or charge makes that person entitled to be registered as the proprietor, and therefore entitled to exercise owner’s powers in respect of the estate or charge. This interpretation flows from the origin of owner’s powers within the LRA 1925 and the purpose of owner’s powers in the LRA 2002.

5.20 There was no intention for the LRA 2002 to depart significantly from the LRA 1925 in regard to who was entitled to exercise owner’s powers. We have seen that a disposition or charge in a person’s favour was sufficient within the LRA 1925 for that person to dispose of or charge the land. It was intended to remain so within the LRA 2002.13

5.21 The intention to continue to give powers of disposition to persons with a right to be registered due to a disposition or charge in their favour can also be seen in our 2001 Report. The explanatory notes to the draft Bill annexed to that Report named “a disponee who has not yet been registered as proprietor” as one of two examples of persons entitled to be registered as the proprietor.14

5.22 The purposes of extending owner’s powers to persons entitled to be registered as the proprietor within the LRA 2002 favours this interpretation. Extending owner’s powers to persons entitled to be registered serves a practical purpose: it enables common conveyancing practices, specifically purchase mortgages and sub-sales.

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12 See para 5.14 above.

13 That the previous land registration system permitted persons entitled to be registered as the proprietor to exercise powers of disposition, by prescribing that they use the same forms of disposition as registered proprietors and satisfy the registrar of their entitlement to be registered was discussed at Hansard (HL) 17 July 2001, vol 626, col 1424 (Lord Bassam of Brighton) and Hansard (HL) 30 October 2001, vol 627, col 1345 (Baroness Scotland of Asthal).

14 Law Com 271, explanatory notes, para 114. However, the explanatory notes to the LRA 2002 did not include a disponee as an example of someone entitled to be registered; the only example provided was “the personal representatives of an owner who has died”: LRA 2002, explanatory notes, s 24, para 56.
5.23 Purchase mortgages are ubiquitous: they enable B, immediately after purchasing the land from A, to charge the land to C (a mortgagee bank), which provides part of the purchase funds. If owner’s powers were not extended to persons who have a transfer or disposition in their favour, B would not be able to create a charge in favour of C until the transfer had been lodged with Land Registry and completed by registration. This follows from section 27(1), under which a registrable disposition does not operate at law until it is registered. Without owner’s powers, purchase mortgages, as they currently operate, would be made difficult or impossible.

5.24 Sub-sales similarly require owner’s powers to be extended to persons who have a disposition in their favour. Sub-sales are a common conveyancing practice: in a sub-sale, A sells to B, who immediately sells on to C. Without an extension of owner’s powers to disponees, B would have to be registered as proprietor before executing the transfer to C. However, because of the extension, B need not apply to Land Registry to be registered as proprietor before the sub-sale or at all: instead, C can register directly as the proprietor, simply including the transfer from A to B with C’s application to Land Registry.

5.25 Personal representatives of deceased registered proprietors also benefit from the extension of owner’s powers to persons entitled to be registered as the proprietor. They can transfer or charge the land of the deceased person without first having to be registered themselves as proprietor.

5.26 Our conclusion as to what is necessary in order for a person to be “entitled to be registered as the proprietor” is not intended to suggest that owner’s powers can be acquired by a person prior to completion of the relevant disposition in his or her favour. Accordingly, the above discussion is consistent with the Supreme Court’s decision in *Scott v Southern Pacific Mortgages Ltd*, in which Lord Collins affirmed the Court of Appeal’s decision that purchasers cannot create proprietary rights until the completion of the transaction.

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15 Ruoff & Roper, para 13.003.04.
16 Ruoff & Roper, para 13.003.04.
20 Above at [79]. However, we do disagree with the decisions of the High Court and Court of Appeal on the point of nemo dat and owner’s powers: see para 5.35 and following below.
5.27 We do not consider that a person with a disposition in his or her favour need establish anything further in order to be entitled to exercise owner’s powers under the LRA 2002. In particular, such a person would not need to establish that he or she had complied with any of the formalities necessary in order for the disposition or charge to be registered. For example, in the scenarios at paragraphs 5.23 and 5.24 above, where the relevant title contained a restriction, it would not be necessary for B to show that the restriction could be satisfied at the point of the disposition to C. Similarly, B would not need to have obtained a Stamp Duty Land Tax (“SDLT”) certificate at the point of the disposition to C. While such matters may properly be a pre-condition to registration, they are not in our view necessary in order for owner’s powers to arise in B’s favour.

5.28 Requiring anything further than a disposition in B’s favour risks making section 24(b) meaningless. For section 24(b) to have value, there must be a material distinction between section 24(a), a registered proprietor, and 24(b), a person “entitled to be registered as the proprietor”. Requiring compliance with registration formalities blurs the distinction between the two. If compliance with restrictions or an SDLT certificate is required before a transferee can be entitled to be registered for the purposes of exercising owner’s powers, there is no reason why every step necessary to successfully apply for registration should also not be required, up to and including providing a correctly prepared application form (Form AP1) and payment of Land Registry’s fee.

5.29 Moreover, requiring compliance with formal requirements for registration would prevent disponees from granting mortgages or engaging in sub-sales. Preventing purchase mortgages and sub-sales would be wholly unworkable given their widespread use as well as contrary to the purpose of extending owner’s powers to persons entitled to be registered as the proprietor in the first place. If the purpose of extending owner’s powers to persons entitled to be registered as the proprietor is to enable disponees to make dispositions of their property before registration, requiring more than a disposition in a person’s favour is unnecessary and counter-productive.

5.30 We provisionally propose that express provision should be made in the LRA 2002 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.

Do consultees agree?

21 Such a certificate must to be produced in order for a transfer to be registered by Land Registry: Finance Act, s 79(1). The point here is that the payment of SDLT, and subsequently obtaining the certificate, is not necessary in order for B to be “entitled to be registered”, and so to exercise owner’s powers by effecting the transfer or charge to C. As a matter of practice, depending on the circumstances of the transaction, C may require proof that B has paid any necessary SDLT before C is prepared to enter into the transaction – but this is a matter for negotiation between the parties, not legal necessity in order for the disposition from B to C to be valid.

22 This discussion is not intended to address or affect Land Registry’s evidentiary requirements or pre-conditions for completing an application for registration.

23 See paras 5.15 and 5.22 to 5.24 above.
The scope of owner’s powers

5.31 We have explained above what we consider to be necessary in order for a person to be “entitled to be registered as proprietor” for the purpose of exercising owner’s powers. Once a person has demonstrated that he or she is entitled to be registered as proprietor in accordance with the principles outlined above, a further question then arises: what is the extent of the powers conferred upon that person as a result?

5.32 As we will see, the courts have reached conflicting answers to this question. The resulting uncertainty does not just affect the powers of a person who is entitled to be registered. There is also uncertainty over the powers of a registered proprietor.

5.33 In both cases the uncertainty appears to arise from the wording of section 23(1), 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 requirements, limit owner’s powers. Two examples may be given. The first is whether the common law principle that no one can convey what he or she does not own applies to owner’s powers under the LRA 2002. This principle is often referred to by lawyers by its Latin name of nemo dat quod non habet, or simply “nemo dat”, and we will adopt this abbreviation in the discussion which follows. The second example of where uncertainty has arisen in this context relates to whether trustees’ powers of disposition may be limited beyond what is reflected in the register.

5.34 We consider each of these examples below. We conclude that for the purpose of determining the validity of the disposition in respect of the disponente, section 26 should be strictly construed. The powers of registered proprietors, and persons entitled to be registered as the proprietor, to make dispositions should be construed as being free from any limitation under common law, equity and statute, except those reflected on the register or imposed by the LRA 2002. Section 26 does not, however, shield disponors from personal liability for exercising powers of disposition that they did not have under the common law, equity or statute.

Uncertainty surrounding nemo dat

5.35 According to section 27(1) of the LRA 2002, before dispositions which are required to be completed by registration are in fact registered, they have no effect at law. Consequently, persons who are entitled to be registered as the proprietor, but who are not yet registered, only have an equitable interest in the registered estate; their interest does not become legal until registration. The question then arises: can a person entitled to be registered as the proprietor, who only has an equitable interest, exercise owner’s powers by making a legal disposition? Under the common law principle of nemo dat, an equitable owner can only create equitable interests – not legal ones. To put the question another way: does nemo dat apply to the exercise of owner’s powers?

APPROACH TAKEN BY THE COURTS

5.36 This question has not been before the courts frequently, but when it has, the decisions have been inconsistent.
5.37 In *Bank of Scotland plc v King*, the court addressed the consequences of a sale of property in which the purchaser failed to pay the entire purchase price to the sellers (who were the registered proprietors). The purchaser had used mortgage finance to fund part of the purchase and had executed a charge in the usual way on completion. Mr Justice Morgan found that a valid transfer of the property from the sellers to the buyer had occurred, even though it had not been completed by registration. The court ruled that the mortgagee could register its charge on the property, which remained registered in the sellers’ names. The purchaser was able to grant an effective charge even before he became registered proprietor by virtue of section 24(b) of the LRA 2002, and even though the registered title remained vested in the sellers. Although the purchaser was not registered as the proprietor and therefore was only an equitable owner, using owner’s powers he nevertheless could create a legal charge. The principle of *nemo dat* was not mentioned.

5.38 The subsequent case of *Redstone Mortgages plc v Welch* also appeared to find that *nemo dat* did not limit the exercise of owner’s powers. However, in *Scott v Southern Pacific Mortgages Ltd* the High Court held that this issue had been wrongly decided in *Redstone*.

5.39 *Scott v Southern Pacific Mortgages Ltd* is a well-known case which reached the Supreme Court. Both the High Court and the Court of Appeal determined that a purchaser who had not yet become registered as proprietor was unable to create a legal lease during the registration gap, because *nemo dat* continued to apply. This was one of three preliminary issues which fell to be considered in the case. However, when the case reached the Supreme Court, the case was resolved on the first preliminary issue, and the Supreme Court did not determine the *nemo dat* point.

5.40 The scope of owner’s powers came before the courts again most recently in *Skelwith (Leisure) Ltd v Armstrong*. There, a mortgagee who was the registered proprietor of a charge over golf club premises assigned the charge by deed to the assignee. The assignee did not apply for registration of the assignment in order to become the registered proprietor of the charge. Instead, the assignee entered into a contract for the sale of the golf club.

25 *Bank of Scotland v King* [2007] EWHC 2747 (Ch), [2008] 1 EGLR 65 at [68].
28 [2010] EWCH 2991 (Ch) at [61] to [62].
29 [2010] EWHC 2991 (Ch) at [61] to [63]; [2012] EWCA Civ 17, [2012] 1 WLR 1521 at [58] to [61].
30 [2014] UKSC 52, [2015] AC 385. However, Lady Hale discussed the registration gap in her judgment at [113] to [114].
31 [2015] EWHC 2830 (Ch), [2016] 2 WLR 144.
First, Mr Justice Newey determined that owner's powers under section 23(2) did not just apply to powers to make dispositions of the charge itself, but also applied in relation to powers to make a disposition of the property which is the subject of the charge. We respectfully disagree with this analysis. In our view, the power in section 23(2) to make a disposition “in relation to an interest of that description” means a power to make a disposition of the charge.32

However, based on the interpretation that section 23(2) of the LRA 2002 did apply, Mr Justice Newey followed the Court of Appeal’s decision in *Scott v Southern Pacific Mortgages Ltd*,33 determining that *nemo dat* limits owner’s powers. He held that a person entitled to be registered as the proprietor under section 24 does not necessarily have all the powers of a registered proprietor, and the difference between equitable and legal ownership at common law continues to apply:

> It has, as it seems to me, to be asked whether an equitable owner would be “permitted under the general law” to make dispositions of the relevant kinds. That implies, in my view, that a person who has no more than equitable ownership of a charge will not be entitled to exercise a power unless the terms of the particular statute or other instrument conferring the power allow for its exercise by someone lacking legal ownership.

> In other words, it is not enough for a person entitled to be registered as a charge’s proprietor and with equitable ownership of it to demonstrate that he could have exercised a power had he been registered as the proprietor. He must also show that the power is exercisable by an equitable owner under “the general law”.34

The court interpreted the language in section 23, that owner’s powers consist of “power to make a disposition of any kind permitted by the general law in relation to an interest of that description”, to incorporate into owner’s powers the limits of the common law relating to the power to make dispositions (and in particular, *nemo dat*).35 On this interpretation, section 24 of the LRA 2002 did not enable the assignee to exercise the power of sale. However, the assignee was able to exercise the power of sale under the Law of Property Act 1925.

In spite of the careful analysis by the courts, case law has not provided a consistent interpretation of owner’s powers. It is apparent that the LRA 2002 is unclear on whether owner’s powers supersede *nemo dat*, or whether *nemo dat* continues to limit the powers which can be exercised by persons entitled to be registered as the proprietor. Clarity is needed.

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32 See para 19.8 and following below.
34 [2015] EWHC 2830 (Ch), [2016] 2 WLR 144 at [57] to [58].
35 LRA 2002, s 23(1)(a) and (2)(a).
We consider that the common law principle of *nemo dat* should not limit owner’s powers. A person entitled to be registered as the proprietor should have the same powers to make dispositions as a registered proprietor.

We believe that this policy reflects the intention behind the LRA 2002: the exercise of owner’s powers by persons entitled to be registered as the proprietor was not intended to be limited in any substantive way.

In our 2001 Report, we stated in both the text and the explanatory notes to the draft Bill that the right to exercise owner’s powers conferred on entitled persons would be subject to rules. We commented that “such rules are likely to explain how owner’s powers are to be exercised”.

This rule-making power was contained in clause 24(2) of the draft Bill. It was not the case, however, that the power was intended to limit the substance of owner’s powers. This intention was explained during debate in the House of Lords. The House of Lords considered that clause 24(2) was superfluous because the power to prescribe the form of registrable dispositions was included elsewhere in the Bill. The Lords removed the clause, making it clear that “rules as to the exercise of proprietor’s powers should relate only to the form of dispositions and should not be able to limit the substantive scope of what a proprietor can do”.

Specifically, the House of Lords’ amendments were intended:

- to eliminate any possibility of rules imposing substantive restrictions on the powers that can be exercised – who can exercise them, or what provisions parties to dispositions can validly agree and include: for example, in a lease, as to alienation; or in a charge, as to the circumstances in which repayment can be demanded.

The House of Lords envisaged that similar rules to those made under the LRA 1925 – that the registrar must be satisfied that the person exercising owner’s powers was entitled to be registered as the proprietor before registration of a disposition – would be enacted under the new LRA 2002. The House of Lords limited the rule-making power under the LRA 2002 so that rules could achieve this restricted purpose but no more. The rule-making power was “intended to deal with the manner in which the rights to deal with the land are exercised and [did] not seek to restrict the actual powers of disposition” of a person entitled to be registered as the proprietor.

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36 Law Com 271, para 4.5 and explanatory notes, para 115. See clause 24(2) of the draft Bill.

37 Law Com 271, para 4.5 n 9.


39 Another amendment about rule-making powers was considered at the same time as the deletion of clause 24(2).


We note that a general power to make rules governing the form and content of registrable dispositions is provided for in section 25, and that currently the rules that have been made do not generally distinguish between dispositions made by a registered proprietor and a person who is entitled to be registered as the proprietor.\textsuperscript{42} Paragraph 2 of schedule 10 to the LRA 2002 also allows rules to be made which specify the seller’s obligations with respect to proving title or perfection of title under a contract for a disposition.\textsuperscript{43}

We also think that this meaning is necessary in order to fulfil the original intention of extending owner’s powers to persons entitled to be registered as the proprietor. As discussed at paragraphs 5.22 to 5.24 above, owner’s powers were extended to enable common conveyancing practices. If, due to \textit{nemo dat}, a person who was not yet registered could not make a disposition which was capable of operating at law, whether creating a mortgage or further selling on the property, this intention would be defeated.

\textbf{THE CREATION OF LEGAL SHORT LEASES BY A PERSON WHO IS ENTITLED TO BE REGISTERED AS PROPRIETOR}

Followed to its logical conclusion, this interpretation of owner’s powers also means that it is possible for a person who is entitled to be registered as proprietor (and hence who is merely an equitable owner) to create a legal lease of the property, where the lease is not required to be completed by registration. We are mindful that this is contrary to the conclusion reached by the High Court and the Court of Appeal in \textit{Scott v Southern Pacific Mortgages Ltd},\textsuperscript{44} and that it will also be a controversial proposition for advocates of \textit{nemo dat}.

This conclusion does not, however, necessarily mean that a tenant of a short lease is thereby able to obtain priority over a chargee who has advanced money to finance the purchase – as was the concern of the courts in that case. We explore this further in Chapter 8.\textsuperscript{45}

\textbf{Other limitations on owner’s powers: limitations on trustees}

We have discussed above whether the concept of \textit{nemo dat} operates to limit owner’s powers under the LRA 2002. We have concluded that it does not. This is not, however, the only uncertainty that has been identified in relation to the scope of owner’s powers. Other limitations on a person’s powers of disposition of land may arise out of the common law, equity or statute. Should these limitations affect disponees under the LRA 2002, even if they are not reflected by an entry on the register?

\textsuperscript{42} With exceptions for specific types of persons entitled to be registered as the proprietor, for example, personal representatives of deceased owners: LRR 2003, r 162.

\textsuperscript{43} No rules have been made under the LRA 2002, sch 10, para 2: see J Farrand and A Clarke, \textit{Emmet & Farrand on Title} (1986 looseleaf) para 5.042 (we refer to this text as “\textit{Emmet & Farrand}” throughout this Consultation Paper).

\textsuperscript{44} Support for this view can however be found in P Milne, “Legal leases by equitable owners of registered land” [2012] \textit{Conveyancer and Property Lawyer} 243, 244 to 246.

\textsuperscript{45} See para 8.51 and following below.
5.55 We think they should not. The protection of disponees is the purpose of section 26 of the LRA 2002; therefore, disponees should be protected from limitations imposed on trustees that are not reflected on the register or imposed by the LRA 2002. Like the position in relation to nemo dat, other limitations should be inapplicable for the purpose of questioning the validity of a purchaser’s or other disponee’s title.

5.56 An example of such a limitation may occur in the context of trustees who sell or mortgage property. It is generally accepted that trustees’ ability to overreach beneficial interests under a trust is based on their powers as trustees. Therefore, overreaching of beneficial interests can only occur when the disposition is within the powers of the trustees. Consequently, because a disponee might not know of a limitation on the trustees’ powers, there is a risk that he or she may unwittingly end up bound by beneficial interests.

5.57 Previously, it was believed that the LRA 1925 provided adequate protection to purchasers of registered land by giving 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, thought to be already protected.


5.58 However, in 1998, Mr Graham Ferris and Professor Graham Battersby suggested that, in the case of a disposition of registered land under the LRA 1925, overreaching of beneficial interests did not occur when a trustee seller disposed of land beyond his or her powers.\textsuperscript{49} They disagreed that purchasers of registered land were protected under the LRA 1925, suggesting that, even if a limitation was not noted on the register, a purchaser’s title would be burdened by the beneficial interests.\textsuperscript{50} They also argued that this problem had been exacerbated by the Trusts of Land and Appointment of Trustees Act 1996 because it is their view that the 1996 Act extended the circumstances in which trustees would be considered to have acted outside their powers. In their view the effect of the 1996 Act is that any disposition in breach of trust is outside trustees' powers and therefore does not give effect to overreaching.\textsuperscript{51}

5.59 Although not everyone agreed with the so-called Ferris and Battersby effect,\textsuperscript{52} the LRA 2002 intended to address this issue. To ensure that beneficial interests would not burden disponees' titles, 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. The LRA 2002 saves the disponee from having to investigate whether there is a limitation on the disponor's powers not reflected on the register or under the Act.\textsuperscript{53}


\textsuperscript{53} See Law Com 271, para 4.3 to 4.4. The principle that only limitations reflected on the register or imposed by the LRA 2002 should limit owner's powers in favour of a disponee, and that limitations imposed by other statutory provisions should not undermine a disposition’s validity, was discussed in Hansard (HL), 30 October 2001, vol 627, col 1348 to 1349 (Baroness Scotland of Asthal).
Despite the provisions of the LRA 2002, some doubt remains over the extent to which a disponee of registered land can be affected by limitations on the powers of trustees which are not reflected in the register. In 2009 the judge in HSBC Bank plc v Dyche\(^{54}\) doubted that the requirements for overreaching of the beneficial interest were satisfied by the unauthorised disposition and charge of registered land. The judgment implicitly endorses Ferris and Battersby’s suggestion that, as a result of the Trusts of Land and Appointment of Trustees Act 1996, overreaching will not take place in registered land where a disposition is a breach of trust.\(^{55}\)

We consider that limitations on trustees not reflected on the register or by the LRA 2002, and any other limitations imposed “by the general law in relation to an interest of that description”, were not intended to limit a person’s right to exercise owner’s powers for the purpose of the title of a purchaser or other disponee. In light of the fact that the LRA 2002 does not appear to have been interpreted in the way which was intended, we believe that clarification is necessary in order to ensure that limitations not protected on the register or imposed by the LRA 2002 cannot be used to question a disponee’s title, as intended by section 26 of the LRA 2002.

**Proposal**

As we expressed in our 2001 Report, owner’s powers are not meant to enlarge a proprietor’s powers of disposition at law. Dispositions outside an owner’s legal authority are not rendered lawful, and the consequences can be visited personally on him or her. Disponees, and the validity of dispositions should, however, be protected. Absent a limitation on owner’s powers reflected in the register\(^{56}\) or imposed under the LRA 2002, a registered proprietor or person entitled to be registered as the proprietor should be taken to have unlimited dispositive powers.\(^{57}\) The limit imposed in section 23(2)(a) and (b) by reference to “a disposition of any kind permitted by the general law in relation to an interest of that description” refers to the types of disposition a freehold owner can make, meaning registrable dispositions, dispositions that create legal interests which cannot be registered, and equitable interests. This interpretation is buttressed by the exceptions that immediately follow: in section 23(1)(a) “other than a mortgage by demise or sub-demise” and in 23(2)(a) “other than a legal sub-mortgage”. These are types of dispositions, not circumstances in which types of dispositions can be made. The reference to the “general law” was not intended to restrict owner’s powers to the principle of *nemo dat* or restrictions imposed by common law, equity or statute.


\(^{56}\) Such limitations are usually reflected on the register in the form of a restriction: see Chapter 10.

\(^{57}\) Law Com 271, paras 4.4, 4.9 and 4.11.
5.63 We provisionally propose that, for the purpose of preventing the title of a disponee being questioned, the exercise of owner’s powers of disposition by both registered proprietors and persons entitled to be registered as the proprietor should not be limited by:

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

(2) other limitations imposed by the common law or equity or under other legislation; or

(3) any limitation other than those reflected by an entry on the register or imposed under the LRA 2002.

Do consultees agree?

**Concurrency of powers**

5.64 The result of conferring unlimited powers of disposition on both registered proprietors and persons entitled to be registered as the proprietor is that the registered proprietor and the person entitled to be registered as the proprietor each have the concurrent right to exercise owner’s powers over the land. Where a property has been transferred, and the new owner has yet to be registered, what happens if the registered proprietor continues to make dispositions of the land?

5.65 The answer to this question comes from outside the LRA 2002. The registered proprietor, A, holds the legal title on trust for the disponee, B, who is entitled to be registered as the proprietor. If A exercises owner’s powers, he or she will be personally liable to B for breach of trust. A person taking a disposition from A will, however, be protected in the absence of any entry on the register limiting A’s powers. This is entirely proper, as it must be possible for a person acquiring an interest in land to look at the register and rely on the fact that the person named as proprietor has owner’s powers.

5.66 This leads us to the final issue which we consider as part of this chapter: the registration gap.

**THE REGISTRATION GAP**

5.67 Much of the value in 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. This is the time between completion of the disposition and registration of the disposition by Land Registry. Because of the operation of section 27(1) of the LRA 2002, a disposition only takes effect in equity during this time, not at law. Although owner’s powers enable a person who is entitled to be registered to enter into valid dispositions of the land during the registration gap, they do not, and we suggest should not, solve all the practical problems of dealing with and managing estates in land during the registration gap.
5.68 The registration gap has two component parts. The first is the gap between completion of the disposition, and an application being made to Land Registry for registration of that disposition. This gap should be covered by a priority search, which means that provided the application is submitted within the priority period conferred by that search, the disponee’s priority should be protected. Technological advances also mean that it is often possible for an application to be submitted very soon after completion, which in practice keeps this part of the registration gap to a minimum. The second part of the registration gap is the period of time between the application being submitted to Land Registry, and its completion by registration. Once completed, registration will be backdated to the date the application was received. However, as we will see, the applicant for registration may still experience difficulties during this period.

Practical problems: assignments of leases and the reversion

5.69 We considered the problems of the registration gap in our 1998 Consultation Paper:

Because the legal title does not pass until the transferee of a legal estate has been registered, the transferor (and not the transferee) has the rights that go with the legal estate, such as the right to exercise a break clause in a lease, or (presumably) to enforce any positive covenant.

5.70 As we noted in the 1998 Consultation Paper, the registration gap causes particular problems for assignee landlords and tenants. The problems were highlighted by Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd in 1996. In that case, the tenant and registered proprietor of a 25-year lease assigned the lease to a new tenant. After the assignment, but before the new tenant registered the assignment, the outgoing tenant exercised his personal and non-assessable right to terminate the lease. The Court of Appeal determined that the lease had not been assigned as between the outgoing tenant and landlord for the purposes of the lease: the lease required the assignment of the legal estate, which had not passed prior to registration of the assignment.

58 Priority searches are explained at para 6.64 and following below.
59 LRA 2002, s 74.
60 Law Com 254, para 11.6.
61 Law Com 254, paras 11.26 to 11.27.
5.71 The implication from Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd\(^63\) is that only registered proprietors can serve valid break notices, at least in the case of “old” leases, meaning leases granted before the Landlord and Tenants (Covenants) Act 1995 came into force on 1 January 1996.\(^64\) Although it is not clear, it could be that this is not a problem for “new” leases. Assignments of leases granted after 1995 or of the reversion to such leases are governed by the Landlord and Tenant (Covenants) Act 1995, which enables both a legal and equitable assignment to pass the benefit and burden of covenants. This may cover break clauses. Therefore, for leases granted after 1995, a landlord or tenant whose assignment was not yet registered might be able to validly serve or be served a break notice.\(^65\)

5.72 Practical problems can also arise for tenants and landlords of both new and old leases with respect to serving statutory notices.\(^66\) For example, under Part II of the Landlord and Tenant Act 1954 an assignee landlord who has not yet been registered may not be able to serve a notice terminating a tenancy, and similarly an unregistered assignee of a lease may not be able to request a new tenancy under that Act.\(^67\) There are also questions over the correct party against whom to initiate forfeiture proceedings when a lease has been assigned but the assignment is pending registration.\(^68\)

\(^{63}\) Above.

\(^{64}\) See Landlord and Tenant (Covenants) Act 1995, s 1(2); Landlord and Tenant (Covenants) Act 1995 (Commencement) Order 1995 (SI 1995 No 2963), art 2.


\(^{66}\) For example, a reversioner’s counter-notice under the Leasehold Reform, Housing and Urban Development Act 1993, s 21: T Weekes, Property Notices: Validity and Service (2\(^{nd}\) ed 2011) para 3.54. For problems in the context of common law notices, see eg K Reynolds and W Clark, Renewal of Business Tenancies (4th ed 2012) para 3-96.

\(^{67}\) Landlord and Tenant Act 1954, ss 25 and 26; D Stevens, “The gap is widening” (2015) 1528 Estates Gazette 70, 71 to 72.

\(^{68}\) K Reynolds and W Clark, Renewal of Business Tenancies (4\(^{th}\) ed 2012) para 3-96 n 175; Woodfall, paras 17.090 and 17.128; Emmet & Farrand, para 9.017; D Stevens, “The gap is widening” (2015) 1528 Estates Gazette 70, 72.
5.73 These problems may have worsened since our 2001 Report: concerns have been raised by a number of stakeholders that the registration gap has been lengthening, not shortening. Although electronic lodgement of Land Registry applications and electronic payment of Stamp Duty Land Tax are both now possible, full electronic conveyancing has not materialised in the form envisaged in our 2001 Report.\(^{69}\) Registration can now take a long time.\(^{70}\) This delay raises problems for affected proprietors, who in the interim may not be able to serve or receive notices in relation to the property.\(^{71}\)

5.74 We recognise that these are real problems. And these problems are not new. However, we consider that they are practical problems, caused by operational limitations – resources within Land Registry – rather than legal ones. In our view a legal solution is not appropriate.\(^{72}\)

Discussion

5.75 In our 1998 Consultation Paper, we consulted on this issue, asking consultees whether they preferred one or more of the following options.

1. The law should remain unchanged.

2. The law on an assignment of a registered lease should replicate the law where the title to the lease is unregistered, so that as between the persons whose rights and liabilities are affected by the assignment, the assignment should take effect as if it were a legal assignment even though it is not registered.

3. The law should provide that where a transfer of any registered estate is not completed by registration within a stipulated period of time, Land Registry should charge an additional fee for registration.

4. Any other option as specified by the consultee.\(^{73}\)

\(^{69}\) See Chapter 20.

\(^{70}\) For example, stakeholders have reported to us that it can take up to six months from the date of an application to Land Registry for that application to be completed. Statistics obtained from Land Registry indicate that the average times for applications completed in February 2016 (the last full calendar month for which information was available prior to publication of this Consultation Paper) were as follows: updates to the register (dealings) 6.71 working days, first registrations 36.96 working days, new leases 49.67 working days and transfers of part 48.09 working days.

\(^{71}\) We understand, however, that Land Registry is trying to mitigate the issues relating to delay in registration. First, if Land Registry is advised that delay in registering an application is causing practical problems, it will try to expedite the application. Secondly, Land Registry recently introduced a service called “Application Enquiry”, which replaced the existing “Day List Enquiry”. The free service will give users updates on the progress of applications.

\(^{72}\) We also acknowledge that in some cases delays arise for reasons outside of Land Registry’s control, eg where an application is not in order, there is a prior application on the day list or an objection is received to an application.

\(^{73}\) Law Com 254, paras 11.29 and 12.80.
5.76 Although many consultees preferred option (2), which would essentially move the point in time at which an assignment of a lease takes effect at law from registration to the time of assignment, we ultimately determined not to make any recommendations to address this issue in our 2001 Report. At the time we considered that the law provided an adequate remedy in trust law, by making the assignor and registered proprietor a trustee for the assignee, and that electronic conveyancing would in any event eliminate the registration gap in time.74

5.77 During the course of this project, stakeholders have again recommended that the Law Commission look at options for amending the law to address the problem. Two main legal solutions have been suggested to us. However, we think that neither is a fitting response to the problem.

5.78 One recommendation is to change the time at which legal title passes from the point of registration to the date of the transfer. This recommendation is similar to the option that we consulted on in our 1998 Consultation Paper discussed at paragraph 5.75 above, although broader, extending both to assignments of leases and assignments of the reversion.

5.79 We consider that this option is not viable today. In 1998, changing the time title passes in assignments of leases may have appeared more feasible. The desire for reform may have been prompted by the then-recent case Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd75 and the considerable concern that it caused. By now, as we discuss at paragraph 5.84 below, practical solutions have been devised to address the concerns. The option in 1998 would not have addressed the whole problem: it would only have assisted an assignee tenant on the assignment of a lease, not a landlord who had been assigned the reversion. The potential reform would therefore not have solved a significant part of the problem, since, based on our engagement with stakeholders in our current project, the assignment of reversions are the greater source of concern; we also cannot see a reason of principle for distinguishing between assignment of a lease and assignment of the reversion. Finally, in 1998 title by registration was a relatively new idea, whereas now it is an entrenched and fundamental part of the regime of land registration in England and Wales. We consider that this option, both as it applies to changing the time at which legal title passes in assignments of leases and assignments of the reversion, would undermine the structure of land registration under the LRA 2002, which is to make legal title contingent on registration.

5.80 Similarly, we also do not consider that an appropriate solution would be to vest legal title once the application for registration is received by Land Registry, before it has been completed. Although once title is registered, it is backdated to the date Land Registry received the application,76 it is our view that legal title passing at the point the application is received would undermine the integrity of the register. Moreover, the purchaser would have to provide evidence of his or her application when attempting to exercise powers as legal owner.

74 Law Com 271, para 1.20.
76 LRA 2002, s 74; LRR 2003, r 20.
5.81 The second proposal we received was to take away the registered proprietor’s power to deal with the land once he or she has transferred the land. This is already the case as between the registered proprietor and disponee: the registered proprietor holds the land on a trust for the disponee, so is personally liable to the disponee for any unauthorised dealing with the land. It is not clear how this would be done as between the registered proprietor and third parties, such as potential purchasers. It was suggested to us that prospective purchasers and others would be responsible for ascertaining that a registered proprietor continues to have power to make dispositions of the land. However, this would undermine the conclusiveness of the register. Under this option, therefore, some sort of entry would need to be made on the register to reflect the limitation on the registered proprietor’s powers, presumably by way of a restriction. This would necessitate an application to Land Registry. In this situation, it may be as well for a purchaser to simply lodge the application for registration of the transfer. This application will of course be visible to anyone searching the day list of the affected title. Similarly, Land Registry’s procedures mean that it will be clear to a person applying for an official copy of the title that there is an application pending. It seems to us that this proposed solution does not address the real cause of difficulties, which is not the fact that the registered proprietor retains powers, but the fact that a purchaser from the registered proprietor may not yet have them.

5.82 Finally, we do not think that owner’s powers are the answer to problems arising in the registration gap. We do not consider that owner’s powers should be used to enable a person entitled to be registered as the proprietor to have all the rights that accompany legal title. Owner’s powers are designed for a specific purpose: to facilitate the making of dispositions of the land in the circumstances we have outlined earlier in this chapter, while protecting disponees. They are not intended to confer all the other powers of a legal owner on a person who is entitled to be registered. Otherwise, there would be no significance in legal title passing only on registration.

5.83 We also consider that caution is necessary in giving legal rights of ownership to a person not yet registered. If, for example, owner’s powers were expanded to enable persons entitled to be registered as the proprietor to issue notices pursuant to every statute under which notices can be served, there could well be unforeseen and unintended consequences. For example, extending legal rights of ownership may cause difficulties where the application for registration is found to be defective and is rejected.

5.84 We therefore consider that the proposed legal responses to the registration gap are inappropriate. They are also unnecessary because practitioners have devised practical responses. One is for the seller to grant a power of attorney in favour of the buyer, so that the buyer can serve notices and take other steps in the seller’s name. A buyer can also seek obligations from the seller not to exercise rights under occupational leases, to pass on any notices that are received to the buyer, and to take action at the direction of the buyer.77

Conclusion

5.85 We acknowledge the practical problems that stakeholders are experiencing with the registration gap. However, it seems to us that any of the potential solutions to these problems may bring with them their own problems. The profession has devised practical ways of dealing with this operational issue, which appear to work and are well understood by those operating them. Although the registration gap is a feature of registered conveyancing under the LRA 2002 (and is likely to remain so for the time being), the majority of transactions are processed within timescales which mean that the gap does not cause any issues. We recognise that complex or non-standard transactions may take longer to process, but as we explained above we are unconvinced that a legal solution is appropriate to deal with an operational problem.

78 See Chapter 20.
PART 3
PRIORITIES
CHAPTER 6
THE GENERAL AND SPECIAL RULES OF PRIORITY IN SECTION 28 AND SECTION 29: THE DIFFERENCE BETWEEN REGISTRABLE DISPOSITIONS AND THE GRANT OF OTHER INTERESTS IN REGISTERED LAND

THE BACKGROUND LAW

6.1 As we explained in Chapter 2, there are many different types of interest capable of existing in land apart from freehold and leasehold estates. Sometimes these interests may conflict. It is therefore important in any system of land registration for there to be clear rules governing the relative priority of different interests. For example, a person with the benefit of a contract to purchase the freehold estate may need to know whether he or she will be bound by a restrictive covenant entered into by the seller between exchange and completion. Grantees of options require certainty as to whether they are bound by any prior unregistered interests.

6.2 The LRA 2002 deals with priority of interests in registered estates in sections 28 and 29. The “basic rule” in section 28(1) states that:

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.

It makes no difference for the purposes of the basic rule whether the interest or the disposition is registered.

6.3 The effect of the basic rule is that interests granted out of registered land have priority according to their date of creation, with earlier interests taking priority over later interests (and later interests being subject to interests granted earlier).

6.4 The basic rule is, however, subject to 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.

6.5 Section 29(1) therefore offers a valuable benefit for registered interests which fall within its scope, by giving them priority over interests which would ordinarily have priority under the basic rule but which are not protected at the time of registration. Section 29(2) explains which interests will be protected for these purposes:

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1 The priority of interests affecting registered charges is dealt with by sections 28 and 30. Our proposals in this chapter apply equally to interests affecting registered charges.

2 LRA 2002, s 28(2).
For the purposes of subsection (1), the priority of an interest is protected—

(a) in any case, if the interest—

(i) is a registered charge or the subject of a notice in the register,

(ii) falls within any of the paragraphs of Schedule 3, or

(iii) appears from the register to be excepted from the effect of registration, and

(b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.

Broadly speaking, the effect of registration of a disposition which falls within section 29 is that the disponee will take the property subject only to registered charges, interests which are the subject of a notice on the register, and overriding interests. In particular, the disponee will not be affected by any unregistered interests that are neither overriding interests nor excepted from the effect of registration.

6.6 It can be seen from paragraph 6.4 above that there are two hurdles which must be cleared before a disposition can benefit from the priority protection granted by section 29. First, the disposition must be a registrable disposition; and secondly, it must be for valuable consideration. We deal with the requirement for valuable consideration later in Chapter 7. In this chapter we look at the limitation of section 29 to registrable dispositions.

THE EXCLUSION OF INTERESTS WHICH DO NOT AMOUNT TO REGISTRABLE DISPOSITIONS FROM SECTION 29

6.7 As outlined above, the priority rule in section 29 only protects someone who acquires an interest under a registrable disposition. It does not protect the purchaser of any other right. “Registrable disposition” means a disposition which is required to be completed by registration under section 27. Section 27 applies to transfers, the grant of certain kinds of lease, the grant of a legal charge, and the creation of some other interests, including certain easements, profits à prendre and rentcharges.

3 Overriding interests. See the Glossary.

4 Where an estate is registered with qualified title, the register may list estates, rights and interests which are excepted from the effect of registration: LRA 2002, s 11(6). The registered proprietor will be subject to these interests.

5 Which is then completed by registration.

6 LRA 2002, s 132(1).
6.8 There are some understandable, but notable, absences from section 27. It does not apply to interests which are only capable of existing in equity, not at law. This means that restrictive covenants and estate contracts are outside the scope of section 27 – and therefore of section 29. A developer who buys an option, for example, and protects it on the register by a notice, cannot rely on the absence of entries at the time of noting to give the option priority over any unregistered rights.

6.9 We will use the term “unregistrable interests” to describe the interests which are outside the scope of section 27. Such interests may of course be capable of being the subject of an entry in the register by way of notice or restriction, but grants of such interests are not “registrable dispositions” within the meaning of the LRA 2002.

6.10 The grant of an interest which is a registrable disposition, but which has not in practice been registered, would also be outside section 29. This would include mortgages, leases and easements that are equitable because they have not yet been registered.

6.11 So, the priority of interests following a registrable disposition which has been registered is determined by section 29, but otherwise priorities are governed by section 28. The timeline below shows how section 28 applies to determine the priority between two competing interests. Some practical illustrations of the rule then follow.

6.12 Interest 1 has priority over Interest 2 because it was created first, despite the fact that Interest 2 was first to make it onto the register. The holder of Interest 2 may have no means of discovering the existence of Interest 1 (having looked at the register before Interest 2 was created and found it to be clear), yet he or she still takes subject to it. Interest 1 may subsequently find its way onto the register, but this is not necessary in order to preserve its priority as against Interest 2. The order of priorities may be upset on the registration of a subsequent disposition for valuable consideration under section 29, when Interest 1 may be defeated if it has not been protected by an entry on the register. Interest 2, protected by a notice, would survive.

6.13 A conflict could arise between two competing interests in the following examples:

   (1) Interest 1 is a restrictive covenant. Interest 2 is an option.

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7 Notices are the subject of Chapter 9. Restrictions are discussed in Chapter 10.

8 Such an equitable interest may also arise where the legal formalities for its creation have not been complied with (for example, because the interest has not been created by deed). In this case the interest is not registrable under LRA 2002, s 27 because it is not capable of being legal.

9 Note that the priority of charges under the Inheritance Act 1984 is determined by that Act and not the priority rules in the LRA 2002: LRA 2002, s 31.
The basic rule dictates that the restrictive covenant has priority over the option (even if the option has been noted on the register). However, if the purchase of the estate which is the subject of the option is made for valuable consideration and is completed by registration before an entry is made in the register to protect the covenant, the purchaser will take free from the covenant. If on the other hand the restrictive covenant is noted on the register before any disposition made pursuant to the option is registered, the grantee of the option will (on the subsequent disposition) take the property subject to the restrictive covenant.

(2) Interests 1 and 2 are both equitable mortgages.

R1 is the registered proprietor of a registered freehold estate in land. He executes successive charges by way of mortgage to M1 and M2 respectively. The charges are not completed by registration so they take effect only in equity. M2 protects its charge by entry of a notice on the register.

M1’s equitable charge would take priority over that of M2. The disposition which created M2’s charge was not completed by registration so the special priority rule in section 29 would not apply.

It would make no difference to the priority between the unregistered interests that M2 protected its charge with a notice, while M1 did not. M2’s notice would not affect the priority of the interests affecting the estate unless R1 were to make a registered disposition of the estate for valuable consideration. The effect of the notice is only to record the burden of an interest affecting the land, and to protect its priority against a later registered disposition for value.10

(3) Interest 1 is an option. Interest 2 is a sale contract.

X, the proprietor of a registered freehold estate, grants Y an option to purchase the land, which Y fails to protect by a notice. X then contracts to sell the land to Z, who enters a notice in the register in respect of his estate contract. Before X can complete the sale to Z, Y exercises his option and seeks specific performance against X. Z also seeks to enforce his contract against X. Y will be successful and will obtain specific performance in his favour. When the sale is completed pursuant to the court’s decree, and Y is registered as proprietor, he will be entitled to have Z’s notice removed from the register, because Y’s option being first in time had priority over Z’s estate contract.11

Note, however, that if Z’s sale contract is completed and registered before Y either protects or attempts to enforce his or her interest, Z will take free of Y’s interest.

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10 Example adapted from Ruoff & Roper, para 15.038.
11 Example adapted from Megarry & Wade, para 7-063.
6.14 While in all these examples the holder of Interest 2 may have a contractual claim in damages against its grantor, in many instances this may not be adequate compensation. Similarly, where Interest 2 is an estate contract, the fact that the existence of Interest 1 may constitute a breach of contract which would entitle the holder of Interest 2 to terminate may not be sufficient comfort. This point can be seen particularly acutely in the case of commercial options, where the option often has a long duration, and the grantee of the option may expend a considerable amount of money (for example in obtaining planning permission) during that time. If the grantee subsequently finds that the land is burdened by (for example) a restrictive covenant not to develop, the fact that he or she may have a right to withdraw from the sale is not likely to be an adequate remedy—and not all the grantee’s losses may be recoverable from the grantor.

6.15 So, buyers or mortgagees of land for valuable consideration can rely on the state of the register and a priority search to protect themselves against pre-existing but unknown interests, provided that they register the disposition of the estate or charge. By contrast, a person who takes an interest in land that cannot be registered cannot protect him or herself in that way. Interests that are unregistrable may nonetheless be very valuable.

THE CASE FOR REFORM

6.16 The existence of a special priority rule to protect certain types of disposition for valuable consideration was not new in the LRA 2002. An equivalent provision existed under the LRA 1925. Criticism of the limitations of the rule can, however, be found at least as far back as the 1970s. We have examined the rule on a number of occasions.

6.17 In Transfer of Land – Land Registration (Fourth Paper) (1976) Law Commission Working Paper No 67, the existing exclusion of unregistrable interests from the rule was considered. The working paper suggested changes in the way the rule should apply where one or both of the competing interests was an equitable financial charge, but concluded that the case for wider reform was unconvincing. Despite this, the working paper acknowledged that:

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12 There will not always be a contractual claim against the grantor, as where the contract for Interest 2 provides that it is granted subject to those interests which the seller does not and could not reasonably know about: see eg Law Society, *Standard Commercial Property Conditions* (2nd ed) condition 3.1.2(c).

13 Including a tenant of a registrable lease.

14 Priority searches are considered at para 6.64 and following below.

15 The same applies to someone who acquires a registrable estate but fails to register it—eg M2 in example 2 at para 6.13 above. However, M2 could protect itself by registering the charge.

16 LRA 1925, ss 20 and 23.
... it is right in principle that a person parting with money for an interest in land, or taking a substantial interest in it (eg under a registrable lease) should be entitled to rely on a search of the register; and should take free from any prior interest which should have been (but was not) entered in the register, if, and to the extent to which, the existence of such prior interest would be prejudicial to him.\textsuperscript{17}

The suggestions in this paper were not implemented, and the issue was reconsidered in a number of subsequent reports.

6.18 By the time of the Law Commission’s Third Report on Land Registration (1987) Law Com No 158, things had moved on. That report expressed the view that:

... the only proposal which can be defended in the context of registration is that all minor interests, not merely financial ones, should rank for priority according to their date of entry on the register.\textsuperscript{18}

6.19 The issues with the present law were also discussed in our 1998 Consultation Paper:

There is no doubt that the issues raised in both the Law Commission’s Fourth Working Paper on Land Registration and its Third Report on Land Registration are important ones. The present law is unsatisfactory if it is judged by what it is reasonable to expect of a system of registered title. It appears to suffer from three principal defects—

(1) It is uncertain. The rules which regulate the priorities of overriding interests and minor interests are nowhere clearly defined.\textsuperscript{19}

(2) It provides no security for minor interests. This is because—

(a) protection on the register confers no priority over existing but unprotected minor interests, which may not be readily discoverable; and

(b) there is no system of priority searches available in relation to the creation of minor interests which it is intended to register.

\textsuperscript{17} Para 110.

\textsuperscript{18} Para 4.97. The recommendations in the Third Report were also supported in the Law Commission Report on Transfer of Land – Land Mortgages (1991) Law Com No 204, para 3.22.

\textsuperscript{19} This has been addressed by LRA 2002, s 28.
(3) It can lead to anomalies. In particular, an unprotected minor interest which has priority to a later minor interest can lose that priority if either—

(a) the later minor interest is registered as a registered disposition; or

(b) the later minor interest is protected by an entry on the register, and there is then a registered disposition of the land which has the effect of extinguishing the unprotected minor interest.20

Our 1998 Consultation Paper expressed the view that there were a number of ways in which these problems could be addressed, of which a scheme of priority by registration was one, but not necessarily the best.

6.20 Our 1998 Consultation Paper then went on to outline two potential developments that would have an impact on the solution to the problems of priority. The first development was the anticipated introduction of electronic conveyancing. The effect of electronic conveyancing was expected to be that the creation and registration of a right would be indivisible. Registration would therefore necessarily confer priority on the right, even if a “first in time of creation” rule was retained. The second contemplated development was the possible extension of official searches with priority to protect a wider range of transactions.21

6.21 Our 1998 Consultation Paper asked whether readers would favour (1) the introduction of a first in time of registration system for the priority of minor interests of the kind proposed in the Law Commission’s Third Report on Land Registration;22 or (2) leaving the present law unchanged and awaiting the introduction of a system of electronic conveyancing. Our 1998 Consultation Paper expressed a strong preference for (2).23

6.22 Option (2) was also supported by the majority of consultees who responded to this question. Some of those who supported it did so because they believed electronic conveyancing was imminent. Others expressed the view that there was no pressing need at that time to devise a new system of priority for minor interests. On the other hand, some of those who supported option (1) said that it was consistent with the principle of registered conveyancing that interests should have priority in the order in which they appear on the register unless a contrary intention is shown, and that a failure to register should be presumed to be negligence. Some of these consultees were also of the view that electronic conveyancing was sufficiently far off to justify change in the interim.

20 Law Com 254, para 7.27.
21 This appears to be a reference to outline applications, which were introduced by the Land Registration (No 3) Rules 2000 (SI 2000 No 3225), inserting a new rule 83A into the LRR 1925. See para 6.66 below.
22 (1987) Law Com No 158.
23 At para 7.32.
6.23 Ultimately our 2001 Report did not recommend reform of the priority of unregistrable interests, citing the impact of electronic conveyancing as the main reason.\(^{24}\) In light of the fact that the vision of electronic conveyancing from that time is yet to be realised,\(^{25}\) it is now our view that the question of the priority of unregistrable interests deserves reconsideration.

6.24 Reform would support those who rely on the register. The goal of the LRA 2002 was that the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land online, with the absolute minimum of additional enquiries and inspections.\(^{26}\) Our proposals would extend this objective to those acquiring unregistrable interests in registered land, as well as registrable ones.

6.25 We do not believe that reform should be limited to equitable financial charges, as proposed by the Fourth Working Paper.\(^{27}\) One reason for this is our understanding that it is uncommon these days for lenders to take an express equitable charge.\(^{28}\)

6.26 By contrast, anecdotal evidence suggests that option agreements have become the usual means of disposal and acquisition of development land and are of considerable commercial significance; yet the grantee of an option has no reliable means of protecting him or herself against prior unregistered rights. The problem is exacerbated when there is a long period of time between the grant of an unregistrable interest such as an estate contract and the completion of that contract by way of a registrable disposition. This is because the holder of the estate contract is exposed to the risk of a prior interest being noted on the register during that period with the result that the prior interest can no longer be defeated on the subsequent registrable disposition under section 29.

6.27 The principle of the proposed reforms is not a new one in conveyancing terms. While it is not necessarily expected that outcomes in registered land will dovetail with those in the unregistered system, we note that it is already the case in unregistered conveyancing that certain types of unregistrable interest\(^{29}\) are susceptible to being defeated by a later unregistrable interest if the first interest is not registered as a land charge.\(^{30}\)

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\(^{24}\) Law Com 271, para 5.3.

\(^{25}\) See Chapter 20.

\(^{26}\) Law Com 271, para 1.5.


\(^{28}\) See Law Com 254, para 7.23: “It is the normal practice of lenders to create a registered charge unless the terms of an earlier charge make that impossible”.

\(^{29}\) As defined in para 6.9 above, ie an interest the grant of which (were the land registered) would not fall within LRA 2002, s 27.

\(^{30}\) Where the first interest is capable of registration as a land charge under Class A, B, C (excluding estate contracts) or F; Land Charges Act 1972, s 4. This includes equitable charges but not restrictive covenants or equitable easements. Valuable consideration must be given for the second interest.
6.28 In addition, it was contemplated in our 2001 Report that, once electronic conveyancing was introduced, the noting on the register of a contract for the making of a registrable disposition of a registered estate or charge could confer a priority period for an application in respect of that disposition. Section 72(6)(a)(ii) of the LRA 2002 accordingly allows rules to be made in respect of such a priority period. No such rules have in fact been made, since electronic conveyancing has not progressed as expected. While different in effect from our proposals in this chapter, the provision demonstrates a move towards providing enhanced protection for those entering into estate contracts which are noted on the register.

PROPOSALS

6.29 We think that it should be possible for those acquiring unregistrable interests in registered estates to protect themselves against prior interests which do not appear on the register. In order to obtain this protection, the unregistrable interest must itself be protected on the register by a notice. The level of protection obtained through entry of a notice would match that currently offered to disponees under registrable dispositions by section 29.

6.30 We provisionally propose that if an unregistrable interest is noted on the register, that interest should be subject only to the interests set out in section 29(2) of the LRA 2002.

Do consultees agree?

6.31 If the notice was subsequently removed from the register, the interest protected by the notice would cease to benefit from the priority protection in our proposal above. The position would once again be governed by section 28. This means that a prior interest which had been postponed to the interest under the notice may once again regain its priority. We do not believe there is any conflict between this outcome and our analysis of the effect of section 29 in Chapter 8, as it is merely an application of the principle that the prior interest is postponed, not extinguished.

31 Law Com 271, paras 9.68 to 9.71.
32 Electronic conveyancing is discussed in Chapter 20.
33 LRA 2002, s 72(6)(a)(ii) applies only to estate contracts, and is intended only to confer a priority period within which the consequent disposition may be registered, as opposed to the entry of the notice conferring priority on the estate contract in and of itself.
34 In Chapter 9 we make provisional proposals to reform the law relating to notices under the LRA 2002, but these proposals do not affect the proposals we make in this chapter. We note that, under the current law, the priority effect of an agreed notice and a unilateral notice is the same: LRA 2002, s 32(3). If our proposals in this chapter were implemented against the background of the current law it would therefore not be material, for the purpose of attracting the enhanced priority protection, whether the notice was an agreed notice or a unilateral notice.
35 See paras 6.4 and 6.5 above.
36 For example, because the registered proprietor successfully applied for cancellation of a unilateral notice.
Registrable dispositions which are not completed by registration

6.32 We have so far been discussing the priority of unregistrable interests.\(^{37}\) We have considered carefully whether those who take a registrable disposition, but fail to register, should also be able to benefit from our proposals if they protect their interest by way of a notice. Examples include mortgagees, or grantees of an easement, who did not complete their acquisition by registration under section 27, but did lodge a notice to protect their equitable interest.\(^{38}\) In doing so we have taken into account that non-registration may not be simply the result of inaction and other factors may be at work: for example, the presence of a restriction on the register\(^{39}\) may prevent that person from completing the transaction by registration.

6.33 We have also been mindful of the fact that non-registration is not the only reason why an interest which is capable of existing at law may exist only in equity. There may have been a defect in the formalities of the interest’s creation (for example, it was not made by deed).\(^{40}\) In this scenario, the resulting equitable interest cannot be completed by registration under section 27.\(^{41}\) If protected by a notice on the register, should the interest be capable of benefiting from our proposals as to enhanced priority protection?\(^{42}\)

6.34 On balance, we are unconvinced that the disponee under a disposition which is of a type which, assuming all proper formalities are met, would be registrable, but who does not meet those formalities or who fails to register, merits special protection against prior interests.\(^{43}\)

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\(^{37}\) As explained in para 6.9 above.

\(^{38}\) See M2 in example 2 at para 6.13 above.

\(^{39}\) Restrictions are discussed in Chapter 10.

\(^{40}\) See Law of Property Act 1925, s 52.

\(^{41}\) See eg Ruoff & Roper, paras 13.001 and 16.002 n 13.

\(^{42}\) In our view, such a person should certainly be in no better position than the disponee under a registrable disposition (which disposition does meet all the necessary formality requirements) but who only protects his or her interest by way of notice rather than completion by registration. Otherwise, the former obtains an advantage through having not complied with the formality requirements.

\(^{43}\) We are aware that in taking this view, we are diverging from the view expressed in the Law Commission’s Third Report on Land Registration (1987) Law Com No 158, para 4.98.
6.35 An example will illustrate why we have formed this view. T is the owner of a registered estate. T holds the land on trust for a beneficiary, B. Because the land is subject to a trust, a restriction appears on the register which provides that no disposition by a sole proprietor of the registered estate under which capital money arises is to be registered.44 The restriction facilitates circumstances in which overreaching can take place. If T wants to raise money by way of a mortgage on the property, in order for the mortgagee to register its mortgage it would need to comply with the restriction. Such compliance would entail the appointment of a second trustee to hold the land and grant the mortgage, which means that the mortgage advance would be paid to two trustees and B’s interest would be overreached. If the mortgagee could, however, obtain priority over B simply by protecting the mortgage by way of notice, rather than completing the mortgage by registration, it would not need to comply with the restriction.45 In this way the mortgagee would circumvent the overreaching mechanics and still secure priority for the mortgage over B’s beneficial interest. We do not think that this outcome is desirable, and so believe that where a disposition is registrable, it must be completed by registration – in the absence of which the basic rule of priority in section 28 will apply.46

6.36 We provisionally propose that a person who takes an interest under a registrable disposition, but who fails to complete that disposition by registration, should not be able to secure priority against prior interests through the noting of that interest on the register.

Do consultees agree?

6.37 We provisionally propose that a person who takes an interest under a disposition which is of a type which would have been registrable if all proper formalities for its creation had been observed, but who fails to observe those formalities, should not be able to secure priority against prior interests through the noting of that interest on the register.

Do consultees agree?

The requirement for valuable consideration

6.38 As noted above, section 29 only applies to dispositions which are made for valuable consideration. We review this requirement in Chapter 7 below. We take the view that the priority rules applicable to registrable dispositions and unregistrable interests should be on an equal footing and therefore the proposals we make in relation to the reform of the valuable consideration rule are equally applicable to the grant of unregistrable interests.

44 A “Form A” restriction.


46 Noting of the interest will still be permitted, but the priority of that interest as against earlier interests will be governed by the basic rule in s 28. This preserves the position under the current law.
6.39 There are some interests which cannot be the subject of a notice on the register. These interests will not be able to benefit from our proposed reform. Many of these interests are already overriding interests, and so their priority will be protected on the grant of a subsequent interest. Others are adequately dealt with in other ways.

6.40 One interest which cannot be protected by notice on the register does, however, warrant more detailed consideration. This is an interest under a trust of land. Such interests are capable of being overreached and accordingly a restriction is the appropriate type of entry on the register in respect of these interests. A restriction does not confer priority, but regulates the circumstances in which a disposition may be the subject of an entry in the register. In the context of a trust, a restriction is usually entered in order to ensure that overreaching occurs when a registrable disposition takes place.

47 LRA 2002, s 33.
48 A special rule already exists for the grant of a leasehold estate in land which does not involve a registrable disposition, which has the same priority as if it were a registrable disposition: LRA 2002, s 29(4).
49 These include: a leasehold estate in land which is granted for a term of three years or less and is not required to be registered; an interest under a relevant social housing tenancy and interests in coal/coal mines (LRA 2002, sch 3, paras 1, 1A and 7); and PPP leases (PPP leases are leases created for public-private partnerships relating to transport in London: see LRA 2002, s 90). An interest which is capable of being registered under the Commons Act 2006 is also capable of being an overriding interest under LRA 2002, sch 3, para 3. Note that the effect of sch 3, para 3 is that, following our reform, a right of common which has not in fact been registered under the Commons Act 2006 could lose its priority to a subsequent estate contract which is noted on the register, if the commons right was not obvious on a reasonably careful inspection of the land, has not been exercised within one year preceding the estate contract and is not within the actual knowledge of the disponee under that contract. This could have implications for development sites, where at present pre-existing rights of common may be registered at any time up to registration of the disposition pursuant to the estate contract and still bind the acquiring developer.
50 Restrictive covenants made between lessor and lessee should be apparent from the lease. Their transmission is dealt with by the Landlord and Tenant (Covenants) Act 1995 (so far as “new” leases under that Act are concerned) and by common law principles of privity of estate (in relation to “old” leases). There is no intention to disturb these rules, which are discussed further in Chapter 12.
51 See LRA 2002, s 33(a). Interests under a settlement under the Settled Land Act 1925 are also excluded from protection by notice, and are not capable of being overriding interests.
52 LRA 2002, s 40(1). Restrictions are discussed in Chapter 10.
53 See para 6.35 above.
6.41 The other reason why interests under a trust merit careful consideration is their mode of creation. Most unregistrable interests have to be created in writing and signed by the grantor.\(^{54}\) As a result, those entering into them are likely to take legal advice as part of the transaction, and would be advised that the interest should be protected on the register. While some trust interests may be created expressly, interests under resulting, implied and constructive trusts arise informally, without writing and therefore without any opportunity for legal advice.\(^{55}\)

6.42 The priority of beneficial interests under a trust can be protected, in some circumstances, under the current law. If the beneficiary of a trust is in actual occupation, then his or her interest may be protected as an overriding interest.\(^{56}\) Where this is the case, the beneficiary’s interest will be protected against the grant of a subsequent unregistrable interest under our proposals. However, where the beneficiary is not in occupation, the grantee of a subsequent unregistrable interest who notes it on the register would take free from the beneficiary’s interest.\(^{57}\) It must be remembered, however, the reason why beneficial interests under trusts cannot be protected by notice is that it is the policy of the LRA 2002 that such interests should not bind others taking interests in the land: overreaching is facilitated where possible.

**Home rights**

6.43 Home rights are statutory rights granted to a spouse or civil partner to occupy the matrimonial or civil partnership home. They arise in favour of a person who cannot claim a right of occupation by virtue of any beneficial estate or interest or under any contract or statute, but whose spouse or civil partner is entitled to occupy the home on one or other of these bases. Home rights are also available to a spouse or civil partner who is a beneficial co-owner, with an equitable, but not a legal, interest in the home.\(^{58}\)

6.44 Where a person with the benefit of home rights is in occupation of the home, he or she must not, except with the leave of the court, be evicted or excluded from it by his or her spouse or civil partner. Alternatively, if the person with home rights is not in occupation, he or she has a right, with leave of the court, to enter and occupy the home.\(^{59}\)

\(^{54}\) Otherwise they take effect at will only: Law of Property Act 1925, ss 53 and 54.

\(^{55}\) Law of Property Act 1925, s 53(2). Other rights affected by our proposals may also arise informally, such as an equity by estoppel.

\(^{56}\) LRA 2002, sch 3, para 2. Note, however, that an interest will not be overriding if it has been overreached: City of London Building Society v Flagg [1987] UKHL 6, [1988] AC 54.

\(^{57}\) This is despite the fact that overreaching will not have occurred, as overreaching only takes place on a conveyance of the legal estate: Law of Property Act 1925, s 2.


\(^{59}\) Ruoff & Roper, para 45.006.
This right to occupy the home constitutes a charge on the estate or interest in the property. Home rights can be protected in the register by an agreed notice. Home rights are not capable of being an overriding interest (even if the spouse or civil partner is in actual occupation of the dwelling-house). This means that, if no notice of the home rights is entered on the register, they cannot bind a person who takes a registrable disposition of the property under section 29 of the LRA 2002 (such as a buyer of the property). The policy of the legislation is that such rights should not be capable of binding purchasers unless they are registered.

Under the current law, a home rights notice could be entered on the register after contracts have been exchanged for a sale of the property but before that sale is completed and still bind the buyer. The effect of the proposals in this chapter would be that, provided the sale contract was noted on the register, if the home right was not registered at the point the sale contract was noted then it could not bind the buyer. This is because, under our proposed reforms, the effect of noting the sale contract on the register would be to secure priority for the buyer against prior unregistered interests that were not overriding interests – which would include any home rights. The holder of the home right would therefore need to enter it on the register at an earlier stage under our proposals than under the current law.

We believe, however, that our proposals are unlikely to have a prejudicial effect in practice on those with the benefit of home rights. This is because it is standard practice, on a purchase of a property which is a home, for the buyer to raise enquiries of the seller in order to ascertain whether there is anyone else with rights over the property or who is living there. If the result of these enquiries, or an inspection of the property, reveals that there is another adult occupant other than the seller, the buyer will usually insist that other person signs the sale contract to confirm that he or she will vacate the property on completion. This should bring to the fore any claims to a right to occupy the property. Where a person has signed a contract to say that he or she will vacate, it does not seem right that the person should be able subsequently to lodge a notice at Land Registry protecting his or her right to remain in occupation.

Nonetheless, we wish to ensure that our proposals do not have any unforeseen impact on those with the benefit of home rights.

Do consultees believe that home rights should be excluded from the effects of our proposal that noting an interest (such as a sale contract) on the register should secure priority against prior unregistered rights (which would otherwise include home rights)?

Family Law Act 1996, s 31(2) and (5). The charge has the same priority as if it were an equitable interest created at the latest of the dates set out in s 31(3).

LRR 2003, rr 80(a) and 82.


We note that the Law Commission’s Third Report on Land Registration (1987) Law Com No 158 specifically considered home rights and proposed to exclude them from the ambit of reform: see para 4.99.
Transitional provisions

6.50 We turn now to the position of those who take an unregistrable interest in registered land prior to the implementation of our reforms. It would be possible to provide for our proposals to apply to these interests, but with transitional provisions. For example, holders of existing unregistrable interests could be allowed a certain period of time in which to apply for them to be noted on the register: failure to note an interest by the expiry of this period would result in it being susceptible to being defeated by a subsequent unregistrable interest which was granted and noted after the end of that period. This approach is similar to the approach which was taken in relation to certain interests which remained overriding under the LRA 2002 for only a limited period of time after that Act was brought into force. Consideration would need to be given to the appropriate length of time: for most of the formerly overriding interests under the LRA 2002 a period of ten years was allowed, although in some instances a shorter period of three years was prescribed.65

6.51 On the other hand, the setting of any sort of a deadline is onerous. It has been shown to cause considerable difficulty in other contexts66 and may lead to litigation.

6.52 Transitional provisions could also be very complex. There are a number of different permutations depending on the date of (first) creation and (secondly) entry on the register of, in each case, Interest 1 and Interest 2 in the examples we gave in paragraph 6.13 above. Each of these events could occur prior to reform, during the transitional period (whatever that may be) or following the transitional period.

6.53 On balance we consider that it would be both simpler and fairer to leave the priority of existing unregistrable interests undisturbed by our proposals. A person who takes an unregistrable interest post-reform and notes that interest on the register will still take subject to unregistrable interests created pre-reform, but will take free of unregistered interests created post-reform. Since some unregistrable interests are of limited time duration in any event,67 the number of pre-reform interests which survive in this way would diminish with time.

6.54 We provisionally propose that the priority of unregistrable interests created pre-reform should remain unchanged.

Do consultees agree?

If consultees disagree, please state what period of time consultees consider should be allowed in order for holders of existing rights to note them on the register, before the rights become vulnerable to subsequent interests.

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65 Three years was the applicable period for some easements under sch 3, para 3 as well as a right under sch 12, para 18(1) (registered land held on trust for a squatter).

66 For example, the interests which lost their status as overriding interests in 2013 have given rise to some vexed questions: see Chapters 8 and 13.

67 For example, estate contracts and equitable leases.
Indemnity

6.55 The effect of our proposals to change the priority of unregistrable interests is not to confer a state guarantee of title on these interests. So, for example, a person who takes a transfer of an option agreement which has been noted on the register does not receive an indemnity if the option agreement subsequently turns out to have been forged. However, if the new priority rule is to have teeth, it is necessary to consider whether any changes to the existing indemnity rules are required.

6.56 As will be seen in Chapter 13, in some circumstances it is possible for the register to be altered so as to include an interest which has been mistakenly omitted from it. This might be because notice of the interest was removed in error by Land Registry, or its removal may have been made pursuant to an application but it subsequently transpires that the application was founded on a mistake. On the subsequent alteration of the register, the holder of an unregistrable interest who originally took free of the deleted interest under our proposals may be adversely affected. As this person relied on the register, he or she should be entitled to an indemnity. Our proposals may therefore result in a greater call upon Land Registry’s indemnity fund.

6.57 We provisionally propose that the holder of an unregistrable interest which has been noted on the register, whose priority is adversely affected by alteration of the register to correct a mistake, should be able to apply for an indemnity from Land Registry.

Do consultees agree?

6.58 In order to help assess the financial impact of our proposals it would be helpful if consultees could provide examples of any situations under the current regime in which a holder of on unregistrable interest has suffered loss because of the subsequent discovery of a prior interest, which has priority.

6.59 We invite consultees to submit examples of situations in which the holder of an unregistrable interest has suffered loss as a result of the discovery of a prior unregistrable interest with priority.

68 Indemnity is discussed further in Chapter 14.
69 For example, the removal of notice of a lease which has been wrongfully forfeited, as in Gold Harp Properties Ltd v Macleod [2014] EWCA Civ 1084, [2015] 1 WLR 1249.
70 The current provisions in the LRA 2002 governing the availability of an indemnity depend on there having been a mistake, the correction of which would prejudicially affect the title of the registered proprietor. In the circumstances contemplated here, it is arguable that the registered proprietor’s title may not be prejudicially affected (eg if the registered proprietor was already bound by the deleted interest prior to its wrongful removal from the register), but the holder of the unregistrable interest may be. The current indemnity provisions would therefore need to be amended in order to provide for the necessary indemnity in this situation.
Impact of our proposals on conveyancing practice

6.60 Our proposals do not mean that an unregistrable interest must be noted on the register; merely that if it is, a priority advantage will ensue, and if it is not, the interest is vulnerable to losing priority in a greater range of circumstances than it is at present. In practice, conveyancers would normally note these types of interests to ensure their priority against a subsequent registrable disposition. Our proposals would not therefore impose an additional burden on those entering into these types of transactions.

6.61 One possible exception may be estate contracts. It is not common practice, at least in a residential conveyancing transaction, for the sale and purchase contract to be noted on the register pending completion. Such a contract is, if unprotected, vulnerable to a disposition which is completed by registration prior to the registration of the disposition contemplated by the contract. However, the relatively short timeframe between exchange and completion in such transactions means that in most instances the risk of a competing transaction is small and the view is commonly taken that the benefits of an entry on the register are outweighed by the disadvantages of the time and cost of applying for a notice and then removing it again following completion. On the basis that parties to such contracts are currently prepared to take the risk of a subsequent competing registrable disposition, we believe that neither increasing the range of interests to which the contract is vulnerable nor offering additional priority protection against prior competing interests for the period between exchange of contracts and registration of the transfer is likely to change the current practice of not protecting the contract by way of a notice.

6.62 Where an estate contract is not noted on the register, and between exchange and completion an earlier competing interest finds its way onto the register, whether the buyer has any recourse against the seller depends on the terms of the contract. It is possible that the seller may attempt to defend a claim on the ground that the buyer could have protected him or herself through noting the contract.

6.63 We believe that our proposals on the relative priority of unregistrable interests will not lead to a material increase in the number of unregistrable interests being noted on the register, and therefore will not increase the burden on those entering into transactions for the grant of these interests, nor result in any additional resource requirements for Land Registry.

Do consultees agree?

71 F Silverman (ed), *The Law Society’s Conveyancing Handbook* (21st ed 2014) para 5.3.4. The handbook states that the contract needs to be protected by entry of a notice and that a solicitor who fails to do so may be liable in negligence. In acknowledging however that this is not common practice, the handbook advises that it is good practice to note the contract in the following, non-exhaustive circumstances: where (a) there is more than two months between contract and completion; (b) there is reason to doubt the seller’s good faith; (c) a dispute arises between seller and buyer; (d) the seller delays completion beyond the contractual completion date; (e) payment is to be made by instalments; (f) the transaction is a sub-sale; or (g) the transaction is an option.

72 See para 6.14 above.
Priority searches

6.64 In this section we consider the impact of our proposals on official searches. There are different types of official search, but we are concerned here with official searches with priority (priority searches). A priority search is a search of the register, and it has two main functions. First, it performs an “updating” function: telling a prospective applicant whether there have been any changes to the register since he or she last looked at a copy of the register, and whether there are any applications pending against it. Secondly, it grants a priority period within which the applicant can lodge an application for registration. It is often thought that a priority search “freezes” the register, such that no entries can be made in the register while the priority period is running. In fact, this is not quite accurate. Section 72(2) of the LRA 2002 provides that where an application is protected by a priority search and is submitted within the priority period granted by that search:

any entry made in the register during the priority period relating to the application is postponed to any entry made in pursuance of it.

In practice, however, the registrar usually exercises the power available under section 72(5) to defer dealing with another application in these circumstances until the priority period has expired.

Dispositions which may be protected by a priority search

6.65 The only type of transaction which may be protected by a priority search is a registrable disposition made for valuable consideration:73 in other words, a transaction which falls within section 29.74

6.66 Other third party interests which cannot be protected by a priority search may be protectable by an outline application under rule 54. An outline application reserves a period in which applicants may lodge their applications, which will then be registered with effect from the date and time of the outline application.75

6.67 Outline applications have a number of drawbacks.

(1) The interest must exist at the time the outline search is made. Outline applications cannot therefore be made in advance of completion of a transaction, and in practice are made immediately afterwards.

(2) Outline applications can only be made in relation to the whole of a registered title, not part.

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73 LRR 2003, rr 131 and 147.

74 See para 6.7 above.

75 Outline applications are unnecessary where an application is made immediately online following completion of the disposition, because in that situation the application has priority immediately: Land Registry, Practice Guide 12: Official Searches and Outline Applications (September 2015) para 8.1.
(3) The period in which the applicant has to lodge their substantive application is much shorter than a priority search – four business days as opposed to 30 business days.\(^{76}\)

6.68 As we have seen, currently the grantee of an unregistrable interest will be subject to a prior unregistrable interest, and it makes no difference whether either interest is noted on the register.\(^{77}\) Since the effect of a priority search is that entries made in the register during the priority period are postponed to the application protected by it, it would not be appropriate to extend official searches to unregistrable interests without also changing the rules relating to the priority of those interests.

6.69 In any event, there would be an advantage to those taking an unregistrable interest in being able to ensure that their interest is not subject to a subsequent registrable disposition which is registered before the unregistrable interest can be noted on the register. The current system leaves the grantees of unregistrable interests exposed at the time they enter into the interest: unlike grantees under registrable dispositions, there is no period of time during which the grantees of unregistrable interests know that they can safely enter into the transaction without being at risk of being subject to a subsequent competing interest.

6.70 As outlined above, the types of transaction which may currently be protected by a priority search have an intrinsic link to the transactions which are protected by section 29. We believe that, if the types of transaction which benefit from section 29 protection are extended, so too should priority search protection be extended to these transactions. Using our examples in paragraph 6.13 above, if, once the subject of an entry on the register, the holder of Interest 2 will not be subject to unregistered Interest 1, he or she should be able to protect himself or herself against the registration or noting of Interest 1 between the completion and noting of Interest 2. This facility would get around one of the key limitations of the outline application explained at paragraph 6.67 above.

6.71 We provisionally propose that it should be possible to make an official search with priority in relation to an application to note an unregistrable interest.

Do consultees agree?

\(^{76}\) LRR 2003, rr 54 and 131.

\(^{77}\) LRA 2002, s 28. See paras 6.2 to 6.3 above.
Applications ancillary to an application to register a disposition which is protected by a priority search

6.72 Rule 151 of the LRR 2003 makes provision for a priority search to protect more than one application, where the application protected by the priority search is dependent on a prior registrable disposition affecting the same registered land. The typical example of this is a purchase made with the aid of a mortgage. A priority search which is made to protect the application to register the charge will also protect the application to register the transfer on which the charge is dependent.78

6.73 In order for rule 151 to apply, however, both the applications in question must comprise an application to register a registrable disposition. Stakeholders have noted that there are other examples of applications which are interrelated in a similar way to the example set out above, for which no specific priority provision is made by the land registration regime. The result in these cases is that each application must be protected separately in accordance with the method of protection which is appropriate for that particular application. This procedure is not only cumbersome, but can also mean that the applications are at risk of receiving different priority, despite their interrelationship.

6.74 One such scenario is an application to register a charge, where the charge also contains an agreement by the parties to the making of a further entry on the register: for example, a restriction preventing the registration of dispositions without the consent of the chargee,79 or a note of an obligation by the chargee to make further advances.80 The only way in which priority can be secured for the restriction, or the entry relating to the obligation to make further advances, is by the making of an outline application.81 Unlike the priority search made in respect of the application to register the charge, which may be made in advance of completion of the charge, the outline application can only be made once the charge has been completed.82 This delay carries a risk that another party may have obtained priority for a competing application in between the making of the priority search to protect the charge, and the outline application to protect the ancillary matters contained within the charge.

6.75 This can best be illustrated by way of an example.

X is the registered proprietor of a registered title. On 1 April, A lodges a priority search in respect of a legal charge which X intends to grant to A.


79 Restrictions are discussed in Chapter 10.

80 Further advances are discussed in Chapter 18.

81 This is because such applications are not applications to register a registrable disposition (as required by LRR 2003, rr 131 and 147). See Land Registry, Practice Guide 12: Official Searches and Outline Applications (September 2015) para 9.

82 See para 6.67 above.
On 4 April, X grants a legal charge in favour of B. The charge is lodged for registration on 5 April. B has not carried out a priority search. B’s charge is not registered immediately as the registrar defers dealing with it under section 72(5) of the LRA 2002.83

On 8 April, X grants the charge in favour of A. This charge is lodged for registration on 9 April at which time B’s charge has not yet been registered. The charge to A contains an application for a standard form restriction that no disposition of the registered estate by the proprietor of the registered estate is to be registered without a written consent signed by A.

A’s charge will be registered in priority to B’s charge because it is protected by the priority search. That search does not, however, confer priority on the application for entry of the restriction, so the restriction does not catch the application to register the charge to B. B’s charge will therefore be registered without any consent from A being required.84

6.76 Although stakeholders have raised the issue with us in the context of a charge, the same difficulty could arise in relation to a transfer which contains an agreement by the parties for the entry of a restriction on the relevant title in order to protect obligations set out in that transfer.

6.77 It is clear that it would not be appropriate for us simply to propose that a priority search which is made to protect a particular registrable disposition (for example a charge or a transfer) should also confer priority on any applications which are ancillary to that registrable disposition. In the example set out at paragraph 6.75 above, before B took its charge it would be able to see that there was a pending priority search protecting a charge to A. B may be content that its charge will therefore rank behind A’s. If it was to be provided, without more, that A’s priority search in relation to the charge would also protect any accompanying application for a restriction, B is at risk. B cannot tell from looking at the day list85 that the charge to A also contains an application for a restriction which, if entered in priority to B’s charge, could prevent the registration of the charge to B. It seems to us that this is unfair.

83 See para 6.64 above.

84 In the example the registrar has deferred dealing with the registration of B’s charge under LRA 2002, s 72(5). It is not mandatory for the registrar to do so, but even if no such deferral occurs the outcome in the example is unaffected. The charge to B could be registered on 5 April and an entry made on the later registration of A’s charge to show that it has priority over B’s charge (under LRR 2003, r 101). It would not be possible to cancel B’s registered charge because B was unable to obtain a consent to the charge from A.

85 The day list is a record showing the date and time at which every pending application against a registered title is made, including applications for a priority search.
6.78 The solution seems straightforward. As long as the priority search made by A makes it clear that priority is sought, not just for the charge itself, but also for the accompanying restriction, both applications will be apparent from the day list. B now knows that it must make further investigations as to what the future restriction is to provide, in order that B can ensure that it can comply with the restriction and its charge will be registered. This solution would require some changes to Land Registry’s forms.  

6.79 We provisionally propose that a priority search should also protect any ancillary applications arising out of the document which effects the registrable disposition which is the subject of the priority search, provided those ancillary applications are specified on the application form for the priority search.

Do consultees agree?

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86 We envisage that this could be done through the addition to form OS1 of standard form boxes to cover the various different types of ancillary application: for example, a restriction, a note of an obligation to make further advances or a note of a maximum amount for which a charge is security (in each case under LRA 2002, s 49), and so on.
CHAPTER 7
PRIORITIES UNDER SECTION 29: VALUABLE CONSIDERATION

INTRODUCTION

7.1 In Chapter 6, we considered the special priority which section 29 of the LRA 2002 affords to registrable dispositions which fall within its scope. We made provisional proposals to extend that special priority to unregistrable interests, provided those interests are protected by a notice on the register.

7.2 In this chapter we review a particular aspect of section 29. This is the requirement that, in order for any disposition to benefit from that section, the disposition must be made for “valuable consideration”.

THE REQUIREMENT TO GIVE VALUABLE CONSIDERATION

7.3 The concept of valuable consideration therefore serves an important role in regulating the priority between interests in land. Section 29(1) of the LRA 2002 provides:

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.

7.4 As we have seen, there is a necessary link between the dispositions which benefit from the special priority rule in section 29, and the dispositions in respect of which a priority search can be made.¹ The concept of valuable consideration therefore also forms part of the test determining which dispositions can benefit from priority protection under section 72 of the LRA 2002. Rule 147(1) of the LRR 2003 provides:

A purchaser may apply for an official search with priority of the individual register of a registered title to which the protectable disposition relates.

Rule 131 makes clear that “protectable disposition” means “a registrable disposition … of a registered estate or registered charge made for valuable consideration”.

¹ See paras 6.65 to 6.70 above.
7.5 The requirement of valuable consideration was derived from the equivalent provisions under the LRA 1925. The idea that the claims of a donee of a gift are regarded as less compelling than those of a person who has provided some consideration in return is deeply rooted in English land law. This idea can be found in the unregistered as well as the registered land system, although it is not always expressed in the same way. As we will see, however, this idea is more vulnerable to challenge in a registered land system.

THE MEANING OF VALUABLE CONSIDERATION

7.6 Section 132(1) of the LRA 2002 provides that:

“valuable consideration” does not include marriage consideration or a nominal consideration in money.

7.7 This provision is the only light that the LRA 2002 itself sheds on the meaning of valuable consideration. It does not assist in determining what constitutes consideration itself (which is more commonly a question for the law of contract), and it does not make clear what will render something “valuable” consideration as opposed to simply consideration. For further assistance on these matters it is necessary to rely on the common law. We will explore this further as we review the problems that have been identified with the definition of valuable consideration.

PROBLEMS WITH THE CURRENT APPROACH

7.8 Stakeholders have told us that there is uncertainty relating to the requirement to give valuable consideration. This leads to uncertainty for those acquiring interests in land as to whether the general rule of priority in section 28 of the LRA 2002, or the special rule in section 29, applies. The distinction is important, as we have seen, since it governs whether the interest will be subject to pre-existing rights which did not appear on the register (and which were not overriding interests).

7.9 A consequential, and practical, difficulty also ensues which is that if a disposition is not made for valuable consideration then it is not capable of being the subject of a priority search. At the point at which a priority search in respect of a disposition is made, Land Registry cannot tell what the consideration will be for that disposition. Consequently, applicants for registration may believe they have the benefit of a priority search when in fact they do not, because the relevant disposition has not been made for valuable consideration. As a result, a transaction could lose priority to a competing disposition.

2 H G Beale (ed), Chitty on Contracts (32nd ed 2015) para 4-002.
3 To the extent that in the course of preparing this Consultation Paper we found that most texts do not even attempt to analyse or justify the rule.
4 Contrast for example Land Charges Act 1972 s 4(5) with s 4(6) of the same Act (see s 17 for the definition of “purchaser” which makes reference to valuable consideration).
5 See para 7.54 below.
6 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 271, para 5.8 for an explanation of why marriage consideration was excluded under the LRA 2002.
7.10 We believe that uncertainty arises, in different forms, from three particular elements of the valuable consideration requirement. First, it is not always clear whether something constitutes consideration. Secondly, it is uncertain when consideration will be regarded as “valuable”. Thirdly, the meaning of “nominal consideration in money” (which, as we have seen, the LRA 2002 excludes from being valuable consideration) is unclear; in particular, is there a monetary threshold below which a sum of money will fall outside the meaning of valuable consideration? We consider each of these issues in turn.

What constitutes “consideration”?

7.11 Consideration is a central concept in the law of contract. Consideration must be given in order for a contract to be enforceable. Chitty on Contracts explains:

> The traditional definition of consideration concentrates on the requirement that “something of value” must be given and accordingly states that consideration is either some detriment to the promisee (in that he may give value) or some benefit to the promisor (in that he may receive value).8

7.12 Consideration is not necessary under contract law, however, where the contract takes the form of a deed.9 The dispositions which are registered under section 29 of the LRA 2002 will usually take the form of deeds, as this is a requirement for the creation of most legal interests in land.10

7.13 For this reason we believe that, in analysing the meaning of “valuable consideration” in the context of section 29, only limited assistance can be drawn from the law of contract. The concept of consideration in contract law is performing a different function from the concept of valuable consideration in section 29. General contract law is concerned with whether an enforceable agreement has been reached.11 Section 29 is concerned with whether one interest in land (which has undoubtedly been created) has priority over another.

7.14 The most common example of consideration is money. However, the payment of money from a disponee to a disponor in return for the acquisition of an interest in land is only one of a variety of ways in which a transaction may be structured. Where transactions do not fit neatly within this consideration paradigm, it may not always be clear whether they are made for “valuable consideration”.

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7 See paras 6.2 to 6.6 above.
8 H G Beale (ed), Chitty on Contracts (32nd ed 2015) para 4-004.
9 Above, para 4-001.
10 Law of Property Act 1925, s 52.
11 H G Beale (ed), Chitty on Contracts (32nd ed 2015) para 4-001.
**A reverse premium**

7.15 One uncertainty surrounds whether or not the payment of a reverse premium constitutes valuable consideration for the purposes of the LRA 2002. A reverse premium is a payment from the disponor of an interest in land to the disponee. A reverse premium does not meet the orthodox definition of consideration. That is because it is a central element of contract law that consideration must move from the promisee.

7.16 A reverse premium may arise for example in the context of the assignment of a lease which is “overrented” (that is to say, the rent payable under the lease exceeds that which would otherwise be payable for the property on the open market at that time). The outgoing tenant may wish to rid itself of the lease to the extent that it is willing to pay someone to take the lease off its hands. This is clearly a commercial transaction; it is a bargain (as opposed to a gift), but the money and the land interest are both moving from the transferor.

7.17 It seems to us however that in most instances where a reverse premium is payable, some consideration would still be moving from the disponee. In the lease assignment example above, consideration may take the form of an indemnity covenant given by the incoming tenant to the outgoing tenant. Where a reverse premium is paid by a landlord to a tenant on the grant of a lease as an inducement for the tenant to take the lease, the tenant will also be entering into covenants with the landlord, which would constitute consideration.

7.18 For these reasons, while the reverse premium presents an interesting conceptual problem, we do not believe that it is likely to be causing problems in practice in the context of the valuable consideration requirements of section 29. We invite consultees to tell us if they disagree. In particular, we invite consultees to share any examples of transactions for which no form of consideration is given other than the reverse premium.

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12 See for example J E Adams, “Driving backwards – the impact of reverse premiums” [1991] Conveyancer and Property Lawyer 254, 255. The author expresses the view that “considerable hardship to the arm’s length assignee for a reverse premium would result” if a reverse premium were not to constitute valuable consideration for the purposes of a priority search.

13 H G Beale (ed), Chitty on Contracts (32nd ed 2015) para 4-037.

14 See para 7.59 and following below for a discussion of the concept of a bargain versus a gift.

15 Indemnity covenants are discussed further at paras 7.22 to 7.26 below. It is likely that, even in the absence of an indemnity covenant, the fact that the assignee assumes the tenant’s obligations under the lease, in and of itself, constitutes valuable consideration: see Johnsey Estates Ltd v Lewis & Manley (Engineering) Ltd (1987) 54 P & CR 296 (CA).
When is consideration “valuable”?

7.19 Section 29 refers not simply to “consideration”, but to “valuable consideration”. On one interpretation, it could be argued that the intention is to exclude some forms of consideration which would otherwise constitute consideration (for example, under the general law of contract). There is an inherent difficulty here, because generally speaking if the parties to a disposition have made provision in the document for consideration this will usually be because that consideration, at least subjectively, has a value.

7.20 In *Midland Bank v Green*, a case on the interpretation of the Land Charges Act 1972, Lord Wilberforce appeared to treat the concept of valuable consideration as broadly equivalent to consideration:

"Valuable consideration" requires no definition: it is an expression denoting an advantage conferred or detriment suffered. What each Act does is, for its own purposes, to exclude some things from this general expression: the Law of Property Act includes marriage but not a nominal sum in money; the Land Charges Act excludes marriage but allows "money or money's worth".

7.21 In this section we consider whether three particular forms of consideration constitute “valuable consideration” for the purposes of section 29 of the LRA 2002.

*Indemnity covenants*

7.22 There may be some dispositions, for example the assignment of a business lease, where no money changes hands between the parties. A market rent is payable under the lease and the assignment does not attract a premium. Nevertheless, it would be commonplace for the incoming tenant to agree with the outgoing tenant that the incoming tenant will comply with the tenant covenants under the lease, and to undertake to indemnify the outgoing tenant in relation to any breach of covenant which occurs following the assignment.

7.23 Similarly, a transfer of a registered title is likely to contain a covenant by the transferee with the transferor that the transferee will comply with the burden of any interests affecting the property which are referred to on the title, and indemnify the transferor against any non-compliance.

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16 Contrast for example LRA 2002, s 4 which refers to “valuable or other consideration”.

17 Not least because one of the leading contract cases on the meaning of consideration itself uses the term “valuable consideration”: *Currie v Misa* (1875) LR 10 Ex 153, 162.


19 Assignment is a term used to describe the transfer of a lease.

20 The outgoing tenant may remain liable following assignment if the lease is an “old” lease for the purposes of the Landlord and Tenant (Covenants) Act 1995, or (if the lease is a “new” lease) if it has entered into an Authorised Guarantee Agreement with the landlord under that Act.
7.24 An indemnity covenant fits the traditional contract law analysis of benefit given and detriment suffered.\textsuperscript{21} In \textit{Johnsey Estates Ltd v Lewis & Manley (Engineering) Ltd},\textsuperscript{22} the Court of Appeal considered section 77 of the Law of Property Act 1925 (covenants to be implied into certain dispositions). The Court of Appeal approved a decision of the county court that

the assumption by the [incoming tenant, otherwise known as the assignee] in the deed of assignment of the obligation to pay the rent and to comply with the other covenants in the lease, and if necessary to indemnify the [outgoing tenant, otherwise known as the assignor] if he failed to comply with those obligations and the [assignor] was required to do so, while the assignee was holding under the lease, provided consideration passing from the ... assignee and thus was valuable consideration [for the purposes of section 77].\textsuperscript{23}

7.25 Lord Justice Bingham (later Lord Bingham) said:

The assignor obtained an obvious benefit because, although remaining liable to the landlord under his original contract, he ceased to be primarily liable and gained the benefit of another party being also liable. The assignee for his part undertook a responsibility in that he undertook a responsibility to pay rent to the original landlord. Looking at the matter as a commercial transaction ... it is in my judgment quite impossible to regard this transaction as one otherwise than for valuable consideration.\textsuperscript{24}

We agree with this analysis.

7.26 On that basis, we think it is settled that an indemnity covenant is capable of constituting valuable consideration. We do not consider that any amendment is required to the LRA 2002 in this regard. We would, of course, invite consultees to tell us if they believe otherwise.

\textit{Land with a negative value}

7.27 We are used to thinking of land as a valuable asset: often highly valuable. However, there are circumstances in which land is not only not valuable, it actually has a negative value. One example is where the land is contaminated. The costs of “cleaning up” the land to the requisite environmental standards may exceed the current market value of the de-contaminated land.

\textsuperscript{21} See para 7.11 above.
\textsuperscript{22} (1987) 54 P & CR 296 (CA).
\textsuperscript{23} Above, 299 to 300.
\textsuperscript{24} Above, 301.
7.28 If land with a negative value is being sold, this sale may attract the payment of a reverse premium to “offset” the negative value. This scenario therefore potentially combines two uncertainties that we are examining in this chapter. However, in the example of the contaminated land above, a buyer of the land is likely to be taking on liabilities in connection with that land: either under statute, or by virtue of the terms of the contract with the seller, or both. The assumption of these liabilities is a detriment suffered by the buyer which in our view clearly constitutes valuable consideration.

7.29 The LRA 2002 already contains some provisions for land with a negative value. Section 4 of the LRA 2002 governs when an unregistered estate must be registered. The triggers for compulsory registration include a transfer, and the grant of a lease of more than seven years. In each case the requirement to register applies whether the transfer or lease is “for valuable or other consideration, by way of gift or in pursuance of an order of any court”. Section 4(6) provides that “if the estate transferred or granted has a negative value, it is to be regarded as transferred or granted for valuable or other consideration” for these purposes.

7.30 In one sense it might be thought of as odd that section 4 of the LRA 2002, which deals with triggers for first registration, contains provisions deeming land with a negative value to be “valuable or other consideration” for the purposes of that section; but section 29, which deals with registrable dispositions, contains no reference to land with a negative value. An examination of the history of the provisions does not shed as much light as one might expect. The first registration provisions in the LRA 2002 were broadly carried over from the LRA 1925. The reason for this was that those provisions had already been extensively overhauled by virtue of the Land Registration Act 1997. The 1997 Act replaced wholesale the section of the LRA 1925 which dealt with triggers for compulsory registration, but left untouched the sections which dealt with registrable dispositions. There was a clear policy under the Land Registration Act 1997 to bring unregistered estates onto the register, and in doing so the net was cast wide. The draft Bill which was annexed to the Law Commission report that preceded the Land Registration Act 1997 did not contain any reference to land with a negative value. It appears that the provision (which became section 123(6)(b) of the LRA 1925) may have been added before the Bill was introduced into Parliament. It may be that the issue of a registrable disposition of land with a negative value was simply not in the contemplation of the drafter, who had been instructed to achieve a different goal; namely increasing the rate at which unregistered land was brought onto the register.

25 LRA 2002, s 4(1)(a) and (c).
26 Important changes were made to the categories of leases which are compulsorily registrable; but otherwise the provisions were largely left untouched.
27 LRA 1925, s 123.
28 LRA 1925, ss 20 and 23.
30 Above.
7.31 We do not believe that allowing dispositions of land which has a negative value to benefit from the priority protection of section 29 in any way undermines the policy pursued in either 1997 or 2002. Such transfers are not gifts – on the contrary, the buyer will usually suffer a detriment in taking the property on. Allowing priority protection in these circumstances supports those who are willing to buy “difficult” or “problem” pieces of land.

_A peppercorn_

7.32 Finally in this section we come to the peppercorn, the payment of which is a traditional means of providing consideration where that is required, but where commercially no payment is appropriate. A peppercorn can constitute valid consideration for the general purposes of contract law.\(^{31}\) The more difficult question is whether a disposition made in consideration of a peppercorn will be made for valuable consideration for the purposes of section 29 of the LRA 2002.

7.33 In many instances, whether a peppercorn is valuable consideration may not matter if another form of consideration is also given; for example on the grant of a lease the tenant will usually enter into covenants with the landlord, even if no monetary rent is payable. It would be possible for us to leave the matter there as far as the peppercorn is concerned, and that may indeed be the practical answer. However, in case consultation responses illustrate that there are transactions which are structured in such a way that a peppercorn is the only consideration given, we would like to consult on whether a peppercorn should be capable of constituting valuable consideration for the purposes of section 29.

7.34 We believe that if the parties have stipulated a peppercorn in their documentation, this provision is likely to be indicative of a bargain, rather than a gift. The fact that the parties felt it necessary to ascribe a value at all points to this conclusion.

7.35 However, we also consider that, where a peppercorn has been bargained for, it is unlikely actually to be paid. We discuss below the effect of non-payment of a monetary sum and whether non-payment makes the monetary consideration “nominal”. We note that, however, only nominal consideration in money is excluded from the definition of valuable consideration in the LRA 2002. The question of whether a peppercorn is “nominal consideration” is not therefore relevant to determining whether it constitutes valuable consideration for the purposes of section 29.

7.36 We explain below that, under the law of contract, consideration is necessary but need not be adequate.\textsuperscript{32} The requirement in section 29 for consideration to be “valuable”, however, means that conceivably something which is a mere token does not meet the requirement.\textsuperscript{33} It is possible that a court may find that a peppercorn, particularly one that is not in fact handed over, does not constitute valuable consideration. To explore whether such a finding would be a problem, we ask consultees to give us examples of transactions where the only consideration is a peppercorn, and where they believe that those transactions should have the protection of section 29. We would be particularly interested to know why, if the parties believe that the transaction is deserving of the protection of section 29, a peppercorn is selected as the consideration, as opposed to a relatively low monetary amount.

7.37 This brings us to the next uncertainty which we have identified with the valuable consideration test in section 29: what constitutes “nominal consideration in money”?

**What constitutes “nominal consideration in money”?**

7.38 The basic position in contract law is that consideration is necessary but need not be adequate. By this we mean a court will not usually judge the adequacy of consideration.\textsuperscript{34} The result of this is that as a matter of contract law it is not necessary to ascertain whether consideration is “nominal”, since even nominal consideration will suffice to make a contract binding. Such an enquiry is necessary, however, in the land registration context, since the LRA 2002 tells us that “nominal consideration in money” is excluded from the definition of valuable consideration.

7.39 We have quoted above from *Midland Bank v Green*.\textsuperscript{35} This was a case on the interpretation of section 13(2) of the Land Charges Act 1972. The case concerned the sale of land from a husband to his wife for the sum of £500. The transfer was made in order to defeat an option that had been granted to the couple’s son. It was argued on behalf of the son that £500 was to be regarded as nominal consideration. For the purposes of the appeal it was not necessary to determine whether or not this was the case because, unlike the Law of Property Act 1925 and the LRA 1925, the Land Charges Act 1925 does not exclude nominal consideration from its ambit. Nonetheless, Lord Wilberforce commented:

"Nominal consideration" and a "nominal sum" in the law appear to me, as terms of art, to refer to a sum or consideration which can be mentioned as consideration but is not necessarily paid. To equate "nominal" with "inadequate" or even "grossly inadequate" would

\textsuperscript{32} H G Beale (ed), *Chitty on Contracts* (32nd ed 2015) para 4-014.

\textsuperscript{33} Contrast however the approach of Lord Wilberforce, under which valuable consideration is treated as broadly akin to consideration. See paras 7.11 and 7.20 above.

\textsuperscript{34} H G Beale (ed), *Chitty on Contracts* (32nd ed 2015) para 4-014.

\textsuperscript{35} [1981] AC 513.
embark the law upon inquiries which I cannot think were contemplated by Parliament.36

7.40 Midland Bank v Green has been described as “an illustration of the efficacy of a small but not nominal purchase price”.37 On this view, “nominal consideration” refers to a situation “where there is really no payment at all”.38

7.41 The alternative view of the phrase “nominal consideration” is that it refers to something very small; in the context of section 29, a low amount of money. This view would appear to be that taken by the authors of Chitty on Contracts:

On the facts of [Midland Bank v Green] the £500 was paid and was more than a mere token, so that consideration was not nominal on either of the two views stated above. But if the stated consideration had been only £1, or a peppercorn, it is submitted that it would have been nominal even if it had been paid, or delivered, in accordance with the intention of the parties. So to hold would not lead to inquiries as to the adequacy of consideration; for distinction between a consideration that is a mere token and one that is inadequate (or even grossly inadequate) is, it is submitted, clear as a matter of common sense.39

7.42 Stakeholders tell us however that in practice the distinction is far from clear. It is not uncommon for commercial dispositions to be made in consideration of £1. This may occur for example in the context of dispositions made by an insolvency practitioner.

7.43 In Johnsey Estates Ltd v Lewis & Manley (Engineering) Ltd,40 the county court had to consider whether the assignment of a lease had been made for valuable consideration for the purposes of section 77 of the Law of Property Act 1925 (covenants implied into certain dispositions). The definition of valuable consideration in section 205(1)(xxi) of the Law of Property Act 1925 excludes nominal consideration in money. In the Court of Appeal Lord Justice Glidwell quotes Judge Hopkin Morgan QC, who said at first instance:

As to whether the payment of £1 amounts to valuable consideration, it appears to me that, on its own, it does not. It was a payment in money but of a very small amount.41

36 Above, at 532.
37 Emmet & Farrand, para 2.003.
41 Above at 299. The judgment of the Court of Appeal notes that Judge Hopkin Morgan QC referred to a comment in J Farrand (ed), Wolstenholme and Cherry's Conveyancing Statutes. This is presumed to be a reference to (13th ed 1972) vol 1, p 340 of that work, where in the context of the definition of valuable consideration in the Law of Property Act 1925, s 205(1)(xxi) it is stated that “the object is to rule out a nominal consideration of, say, 50p”. 
7.44 The judge at first instance went on to note, however, that this point was not the end of the matter, because the assignment also contained an indemnity covenant given by the assignee, which he held constituted valuable consideration. When the case was appealed, the Court of Appeal, as we have seen, confirmed that an indemnity covenant by an assignee of a lease can constitute valuable consideration for the purposes of the Law of Property Act 1925. The issue as to whether £1 amounted, on its own, to valuable consideration did not form part of the appeal and so the Court of Appeal said that it need not concern itself with the question of whether the judge at first instance was correct on this point.

7.45 We can contrast the approach of the County Court in *Johnsey Estates Ltd v Lewis & Manley (Engineering) Ltd* with the view expressed by the High Court in *Westminster City Council v Duke of Westminster*. Again, it was not necessary in this case for the court to decide the point. However, in the context of the meaning of “nominal consideration” for the purposes of section 84(7) of the Law of Property Act 1925 Mr Justice Harman said:

> In my judgment 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. The fact that the value of the property given far exceeds the value of the consideration given for it does not make the consideration ‘nominal’.

7.46 It seems to us that there can be no principled distinction between consideration of £5 (even adjusted subsequently for inflation), and consideration of £1. It is impossible to see where a line could be drawn.

7.47 We believe that the exclusion of “nominal consideration in money” from the definition of valuable consideration in section 29 no longer serves a useful purpose. If, on the one hand, its original intent was to exclude small monetary sums (even if paid), doubt has been cast on this interpretation by analogy with judicial interpretation of similar provisions in other statutes. If, on the other hand, its purpose was to exclude consideration which is referred to in the documentation but is not in fact provided, it seems arbitrary to limit the exclusion to monetary consideration as opposed to other forms of consideration.

42 At para 7.24 above.
43 The case was appealed to the Court of Appeal, where the decision of the High Court was reversed in part on another ground, but there is nothing in the Court of Appeal judgment to cast doubt on the statement relied on here.
45 Law of Property Act 1925, s 84 regulates the powers of the Upper Tribunal to discharge or modify restrictive covenants affecting land. Section 84 does not apply “where the restriction was imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes”: Law of Property Act 1925, s 84(7).
If “nominal consideration in money” was removed from the definition, it would remain necessary to show that a disposition had been made for valuable consideration in order for it to obtain the protection of section 29. We believe that this would still allow the courts the flexibility to find, in appropriate cases, that no valuable consideration has been provided where consideration is specified in transaction documents but nothing changes hands.

An illustration of this can be found in the case of *Halifax plc v Curry Popeck*. The facts were complex and involved a number of fraudulent transfers and mortgages by a husband and wife. The case was brought in order to determine the relative priorities between two of the mortgages, since the proceeds of sale of the property were insufficient to discharge all of the mortgages in full. It was agreed that Halifax had an equitable charge over the property by virtue of a proprietary estoppel. The question was whether Halifax’s interest had priority over a later charging order obtained by Bank of Scotland. In between the interest arising through proprietary estoppel, and the grant of the charging order, the property had been transferred by the husband and wife into the husband’s sole name. It was argued that this was a disposition which engaged section 29 of the LRA 2002, such that any interests affecting the property immediately prior to the transfer (including the equitable charge by proprietary estoppel) would have been postponed. If the charge by proprietary estoppel had already been postponed by the transfer of the property, it would no longer be capable of affecting Bank of Scotland, even though that bank’s charging order (being equitable) was not itself a registrable disposition capable of engaging section 29. Mr Justice Norris said:

> It is clear that the signed contracts [in relation to the sale] do not bear any relationship to any genuine transaction. It would equally appear to be the case that the consideration ultimately stated in the transfer does not bear any relationship to any transaction in the real world. [Counsel] says that one must look at the transfer and accept that there are only three possibilities: either on the facts it is a transfer for a nil consideration; or on the facts it is a transfer for a nominal consideration; or on the facts it is a transfer for valuable consideration.

> It seems to me that there is also a fourth possibility. That is that the transfer is part of a fraudulent enterprise in which the concept of consideration is entirely meaningless.

**OPTIONS FOR REFORM**

We have identified a number of uncertainties arising out of the requirement in section 29 that valuable consideration must be given in order for a disposition to benefit from the special priority protection of that section.

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48 See the discussion of the effect of s 29 in Chapter 8 below.
7.51 There are a number of options open to us in order to try to address these uncertainties. These range from the radical (abolishing the requirement of valuable consideration altogether), to the more piecemeal (clarifying the definition of valuable consideration so as to make it clear whether or not particular types of transaction are included). Three main options are considered below. After considering all the options, we conclude that our preference is to clarify the existing definition of valuable consideration. We then ask consultees whether they agree with our provisional proposals as to which types of transaction should fall within section 29. Finally in this section of the chapter we examine whether our proposed reforms should extend to the term “valuable consideration” as it is used in other parts of the LRA 2002.

Protecting those who acquire interests gratuitously

7.52 A review of the valuable consideration requirement of section 29 would not be complete if we did not consider the most radical option of our three: removing the valuable consideration requirement altogether. There is a case to be made for extending the protection of section 29 to those who acquire their interest by way of gift, or otherwise gratuitously.

7.53 We noted at the beginning of this chapter that, in a dispute between two rights holders, the claims of a donee of a gift have historically been regarded as less compelling than those of a person who has provided value for his or her interest. Land law in England and Wales has been reluctant to allow the donee to prevail in these circumstances. The registered proprietor who created the third party right was bound by the interest, so (the argument goes) why should his or her successor in title not be similarly bound, where the successor has given nothing and suffered no detriment in acquiring title?

7.54 However, in a system of land registration it can also be argued that it is reasonable for those with the benefit of rights to protect them by registration. If they do not, a priority consequence may ensue.

7.55 Some jurisdictions do give protection to donees. This approach is adopted by some of the Australian states.

7.56 Removing the valuable consideration requirement would be an effective way to eliminate any uncertainty surrounding the outer limits of the concept. It would, however, represent a significant change to the law and a significant extension to the operation of section 29.

7.57 We welcome consultees’ views on this option for reform, but are provisionally of the view that it should not be pursued. This is partly due to the fact that we do not wish to completely overhaul the law in this area, which (despite the problems identified above) appears to be working relatively well in the majority of cases.

50 See para 7.5 above.

51 For example, New South Wales (see A J Bradbrook, S V MacCallum, A P Moore and S Grattan, *Australian Real Property Law* (5th ed 2011), para 4.320, citing *Bogdanovic v Koteff* (1988) 12 NSWLR 472 (Court of Appeal)), Queensland (see Land Title Act 1994, ss 180 and 184) and the Northern Territory (see Land Title Act, ss 183 and 188).
We are also mindful of the impact which this option would have if combined with the proposals we made in Chapter 6 in relation to the ability of an unregistrable interest to secure priority through its noting on the register. The combination of these policies could produce an outcome which allows a person who has acquired an unregistrable interest without giving anything for it (for example, the benefit of a restrictive covenant) effectively to defeat the earlier interest of a person who may have paid a significant amount for his or her right, but who failed to register it. We anticipate that this outcome may be unpalatable and so this option may fail to attract sufficient support.

**A policy which excludes protection for “gifts”**

Our second option is less dramatic in policy terms, but arguably still so in drafting terms as it involves recasting section 29 entirely. Rather than providing a requirement for valuable consideration, the section would make no stipulation as to consideration; save that it would expressly exclude dispositions which are effected either by way of gift or inheritance. This would have the effect of bringing within section 29 all transactions which are, by their nature, bargains, to the exclusion of gratuitous dispositions.

There are, however, a number of problems with this approach which have led us to the conclusion that this is not a desirable policy. Two stand out in particular.

First, the language of “gift” is not well-suited to describe many of the situations in which transfers of interests in property occur, even those which may appear on their face to be gratuitous. For example, if one company assigns the lease of its premises to another company, it would be very unusual for this to be referred to as a gift, even if no premium is paid for the assignment. The term “gift”, in the sense in which it is understood in common parlance, is confined to the familial and personal contexts. It does not easily translate to the commercial context and so in our view it is an undesirable test where many of the transactions to which it would have to be applied take place in a commercial arena.
7.62 Secondly, we are not convinced that the term “gift” possesses any greater definitional certainty than valuable consideration. For example, there is authority to suggest that a transaction can still be treated as a gift even in a situation where some form of consideration is given. This begs the question as to the threshold below which consideration is considered sufficiently nominal that the transaction is classified as a gift, and in doing so leads to a very similar problem as presently exists in relation to the definition of valuable consideration in the LRA 2002. “Gift” is also a concept which has a number of meanings across different areas of law, and making it the legal test for whether or not protection is given under section 29 would risk importing those meanings into the land registration context when they were not intended to be so. We think that this could give rise to uncertainty and, in turn, litigation.

7.63 We therefore do not propose that the valuable consideration requirement should be recast in terms of whether or not a disposition is by way of gift. We do, however, see strength in the argument underpinning such an approach; the pertinent question is essentially whether the parties’ arrangement is a bargain, driven by commercial factors with an element of gain on both sides, or whether it is truly gratuitous. Dispositions of the former nature, generally, will attract the protection of section 29, while those of the latter nature will not. We have borne this in mind when formulating our provisional proposals for reform.

Clarifying the scope of the valuable consideration requirement

7.64 We are provisionally of the view that there is no need for sweeping reform of the valuable consideration requirement. The concept has operated for a long time in the law of registered land. The problems brought to our attention can be resolved in discrete changes, not an overhaul — and those problems aside, the term is largely understood. Any dramatic change in terminology or approach runs the risk of generating further uncertainty of the very kind we are trying to resolve.

7.65 Our provisional proposals therefore focus on clarifying the scope of the valuable consideration requirement, rather than introducing a new test.

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52 See *Howard v Earl of Shrewsbury* (1866-67) LR 2 Ch App 760 and *Mansukhani v Sharkey* (1992) 24 HLR 600. In the latter case, there was a transfer of a flat from parents to son in consideration of natural love and affection. The son also covenanted to keep up the mortgage instalments and indemnified his parents against their personal liability on their covenants under the mortgage. Nevertheless, the judge held that the transaction was a gift, because the parents were not “striking a commercial bargain or doing anything but conferring a benefit to their son” (604). This case was concerned with whether the son became the landlord “by purchasing the dwelling-house or any interest therein” for the purposes of Case 9 of schedule 15 to the Rent Act 1977.

53 For example, the term has received particular consideration in the context of taxation law.
7.66 We ask specific questions below in relation to the three issues identified: reverse premiums, land with a negative value, and “peppercorns”. We also make a proposal to remove the exclusion of “nominal consideration in money” from the test for valuable consideration under the LRA 2002. We have seen that, where the consideration expressed in the transaction documents was not paid and was never intended to be paid, the courts do not need to rely on a classification of the consideration as “nominal” in order to avoid the operation of section 29.54 We believe that the removal of the “nominal consideration in money” part of the test will confer certainty on genuine commercial transactions without hampering the courts’ ability to deal appropriately with cases where, like in Halifax plc v Curry Popeck, “the concept of consideration is entirely meaningless”.55

7.67 We do not make any proposals in relation to indemnity covenants as we believe that it is settled by Court of Appeal authority that such covenants constitute valuable consideration for the purposes of the Law of Property Act 1925, and we find it difficult to see how a different interpretation could be reached under the LRA 2002.

PROVISIONAL PROPOSALS AND QUESTIONS FOR CONSULTEES

7.68 We provisionally propose that the requirement of valuable consideration in section 29 of the LRA 2002 should be retained, but should be clarified.

Do consultees agree?

7.69 We provisionally propose 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.

Do consultees agree?

7.70 We do not believe that it is necessary to make any special provision for a reverse premium in the LRA 2002.

Do consultees agree? If consultees disagree, we invite consultees to share any examples of transactions for which no form of consideration is given other than the reverse premium.

7.71 We provisionally propose 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.

Do consultees agree?

7.72 We invite consultees’ views as to whether it would be beneficial to clarify the effect of a disposition for which a peppercorn is the only consideration. We invite consultees to provide examples of dispositions which may be structured in this way.

54 At para 7.49 above.

If consultees agree that clarification would be beneficial, we invite consultees’ views as to whether a peppercorn should engage the protection of section 29 of the LRA 2002.

7.73 We invite consultees’ views as to whether there are any other types of bargain, not covered above, where consultees believe that it is unclear whether the disposition is made for valuable consideration for the purposes of section 29.

Please explain in each case whether it is believed that the disposition should be included within, or excluded from, the priority protection of section 29.

7.74 We outlined in Chapter 6 our proposals to extend the priority protection offered to a grantee of an unregistrable interest. More specifically, we proposed that where that interest is noted on the register it should be subject only to the interests set out in section 29(2) of the LRA 2002.56 If changes are made to the valuable consideration requirements for registrable dispositions which fall within section 29, then in our view those changed requirements must also apply to unregistrable interests which are noted on the register in accordance with our proposals in Chapter 6.

7.75 We provisionally propose that our proposals on reform of the requirement for valuable consideration under section 29 should apply both to registrable dispositions and unregistrable interests which are noted on the register in accordance with our earlier proposals.

Do consultees agree?

“VALUABLE CONSIDERATION” ELSEWHERE IN THE LRA 2002

7.76 The discussion in this chapter has focused on the concept of valuable consideration for the purposes of section 29 of the LRA 2002. The term “valuable consideration” does, however, feature elsewhere in the LRA 2002. It is important that, in considering any reform, we take into account the potential impact that any proposals we make might have on those other provisions.

7.77 For example, the term is also used in section 30 of the LRA 2002, which governs the effect of registered dispositions of registered charges. It seems unlikely that any question could ever arise in practice over whether the disposition of a registered charge could be for valuable consideration. Furthermore, the reforms that we have proposed in the context of section 29 of the LRA 2002 cannot easily be applied in the context of charges. Nonetheless, to the extent that our proposals can sensibly be applied to dispositions of charges, we see no distinction in principle between sections 29 and 30.

7.78 We invite consultees’ views as to whether any amendments are necessary to the definition of “valuable consideration” as it applies to section 30 of the LRA 2002.

56 See para 6.30 above.
7.79 There are two other particular provisions in the LRA 2002 which utilise the concept of valuable consideration,\footnote{There are also a number of other provisions which use the term “valuable consideration”, but we do not believe that they pose any particular problems: LRA 2002, ss 7(2)(b), 80(5) and sch 10 para 2.} about which we would like to seek consultees’ views.

7.80 Section 86 outlines the circumstances in which a disponee under a registrable disposition will take free from the interest of a trustee in bankruptcy. A number of requirements are set out, including that the disposition is made for valuable consideration, and that the disponee has no knowledge of the bankruptcy petition. We can see that removing the exclusion of “nominal consideration in money” from the definition of valuable consideration for all purposes could give rise to cause for concern when the context is the bankruptcy of the registered proprietor. However, if the disponee has no knowledge of the bankruptcy petition, it is hard to see why a small sum of money would be payable unless the transaction intrinsically had no capital value. Section 86 also contains a good faith requirement, which should prevent the intentional defeating of the trustee in bankruptcy’s title by paying what would otherwise have amounted to a nominal consideration in money. We have therefore provisionally formed the view that amending the valuable consideration requirements should not have an adverse effect on section 86 of the LRA 2002. However, we are cautious about making provisional proposals for reform in this area without ensuring that there are no unintended consequences.

7.81 \textbf{We invite consultees’ views as to whether any difficulties would arise if the proposed amendments to the meaning of valuable consideration were also to apply for the purposes of section 86 of the LRA 2002 (bankruptcy of the registered proprietor).}

7.82 The other significant place where the LRA 2002 refers to valuable consideration is in the indemnity provisions. We will see later that the LRA 2002 allows for indemnity to be reduced, or in some circumstances withheld altogether, on account of a claimant’s fraud, or lack of proper care.\footnote{LRA 2002, sch 10, para 5. See Chapter 14 on indemnity.} Paragraph 5(3) of schedule 8 extends this provision so that any fraud or lack of care on the part of a person from whom an indemnity claimant derives title (otherwise than under a disposition for valuable consideration which has been registered) is to be treated as if it were fraud or lack of care on the part of the claimant. Again, we do not anticipate that our proposals would, if applied to the definition of valuable consideration in the indemnity context, produce an unfair or unexpected result. A claimant who had inherited the property, or acquired it as a gift, would still be subject to the current limitations on indemnity.

7.83 \textbf{We believe that our proposals to clarify the meaning of “valuable consideration” for the purposes of section 29 can be applied equally to the meaning of that phrase in paragraph 5 of schedule 10 to the LRA 2002 (indemnity).}

Do consultees agree?
CHAPTER 8
PRIORITIES UNDER SECTION 29:
POSTPONEMENT OF INTERESTS, AND THE
PROTECTION OF UNREGISTRABLE LEASES

INTRODUCTION

8.1 So far in this part of the Consultation Paper we have considered the special rule of priority in section 29 of the LRA 2002. We have reviewed the types of dispositions which may take advantage of that special priority rule, and made provisional proposals to extend the benefit of that priority to unregistrable interests which are noted on the register.\(^1\) We have also looked at the requirement that, in order for a disposition to benefit from the priority protection of section 29, it must be made for valuable consideration, and made provisional proposals to clarify the meaning of that requirement.\(^2\)

8.2 In this chapter we will examine the effect of the operation of section 29 in more detail. First, we will analyse what it means to say that an interest whose priority has not been protected in one of the required ways has been “postponed” as a result of the operation of that section. We will then go on to look at subsection 29(4), which extends the protection conferred by section 29 to the grant of unregistrable leases.

POSTPONEMENT OF INTERESTS UNDER SECTION 29(1)

8.3 As a reminder, we set out section 29(1) again below:

> 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.

The priority of an interest will be protected for these purposes if (broadly) it is the subject of a notice on the register or it is an overriding interest.\(^3\)

Background: the 1925 regime

8.4 The language of “postpone” in section 29(1) was new to the LRA 2002. The equivalent provision in the LRA 1925 stated that:

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\(^1\) See Chapter 6.

\(^2\) See Chapter 7.

\(^3\) LRA 2002, s 29(2).
In the case of a freehold estate registered with an absolute title, a disposition of the registered land or of a legal estate therein, including a lease thereof, for valuable consideration shall, when registered, confer on the transferee or grantee an estate in fee simple or the term of years absolute or other legal estate expressed to be created in the land dealt with, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, including (subject to any entry to the contrary in the register) the appropriate rights and interests which would, under the Law of Property Act 1925, have been transferred if the land had not been registered, subject—

(a) to the incumbrances and other entries, if any, appearing on the register [and any charge for inheritance tax subject to which the disposition takes effect under section 73 of this Act]; and

(b) unless the contrary is expressed on the register, to the overriding interests, if any, affecting the estate transferred or created,

but free from all other estates and interests whatsoever, including estates and interests of His Majesty, and the disposition shall operate in like manner as if the registered transferor or grantor were (subject to any entry to the contrary in the register) entitled to the registered land in fee simple in possession for his own benefit.4

8.5 It is clear however that the introduction of the new language was not intended to change the law.5 In our 2001 Report we explained the effect of section 29 as follows:

The Bill necessarily refers to the prior interest being postponed to the later registered disposition. The disponee will thereby take free of the unprotected interest. That does not mean that the interest is necessarily destroyed. It may still remain valid as against interests other than that of the disponee under the registered disposition.6

8.6 *Ruoff & Roper* gives a more detailed example:

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4 LRA 1925, s 20(1). Dispositions of a leasehold estate were regulated by LRA 1925, s 23(1), which was in similar form.

5 See Law Com 271, para 5.6. See also C Harpum and J Bignell, *Registered Land* para. 9.4; and I Clarke and J Farrand (eds), *Wolstenholme & Cherry’s Annotated Land Registration Act* para 3-031.

6 Law Com 271, para 5.6 n 17.
… under this “special” priority rule, the interest which is not protected by one of the methods specified in ss 29(2) and 30(2) is postponed to “the interest under the disposition”. In other words, such an unprotected interest is not overtly declared to be “void” or “unenforceable” … . This means, quite properly, that if an interest is enforceable against the current registered proprietor but is not “protected” in any of the ways anticipated by these two sections, it will be “postponed to” (ie not have priority over and not be binding on) a registered disposition granted out of the title of the registered proprietor (eg a legal lease granted out of a registered freehold, a later registered charge), but that it will continue to bind the superior registered title.7

8.7 Notwithstanding the explanation which was given in our 2001 Report as to the effect of the new section 29, doubts have been raised as to whether the section in fact operates in the way intended.

Example scenarios

8.8 The issue which stakeholders have raised is whether a third party interest, once postponed on a disposition which falls within section 29 of the LRA 2002, can ever “revive” on a subsequent disposition which does not fall within section 29. Let us take a simple example.

A is a registered freehold proprietor. A enters into a restrictive covenant with his neighbour, Z. The covenant is not noted on A’s title. A then transfers the freehold for valuable consideration to B. B is registered as proprietor. B takes free from the covenant by virtue of the application of section 29. B then dies, and the land is transferred by B’s personal representatives to B’s heir, C. This transfer does not fall within section 29, so the basic rule of priority in section 28 applies. Is C bound by the covenant?

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7 Ruoff & Roper, para 17.003 (emphasis in original).
8.9 A different example – and the context in which the issue has been raised by a number of stakeholders – concerns an interest which was formerly an overriding interest under schedule 3 of the LRA 2002, but which ceased to be so on 13 October 2013.\(^8\) These interests include chancel repair liability and manorial rights.\(^9\) To use the same parties as in our example above (and assuming that Z is now the beneficiary of the chancel repair liability, or the holder of manorial rights): where the transfer from A to B was registered on or after 13 October 2013, then provided Z’s interest was not noted on the register, B will have taken free from it as it is no longer an overriding interest. However, the question has been raised as to whether, having been postponed in this way, Z’s interest is still capable of subsequently binding C under section 28, as overriding interests are irrelevant to this simple “first in time” rule.

**The effect of section 29**

8.10 It is, in our view, clear that the intention of section 29 was that C should not be bound by Z’s interest in the scenarios set out above. *Ruoff & Roper* explains this by reference to a further example:

R1 is the registered proprietor of a registered freehold estate in land. He executes successive charges by way of mortgage to M1 and M2 respectively. The charges are not completed by registration so they take effect only in equity. M2 protects his charge by entry of a notice. R1 makes a registered disposition for valuable consideration of the freehold to R2, without first discharging the mortgages. When the disposition to him is completed by registration, R2 takes subject to M2’s charge because he protected its priority with a notice, while M1’s charge was unprotected. R2 does nothing to discharge the charges. R2 then makes a registered disposition of the freehold to R3 by way of gift. Although the disposition to R3 is not made for valuable consideration, the priority of M1’s charge does not revive so as to take priority over the registered estate. This follows from the basic rule of priority in s 28. The previous disposition from R1 to R2 postponed the charge to the freehold. Once postponed in this way, its priority could not be affected by any later disposition of the freehold to R3. Although strictly ss 29 and 30 operate to postpone unprotected interests, their practical effect is to destroy them as against a subsequent disponee.\(^10\)

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\(^8\) By way of example, statistics provided to us by Land Registry indicate that, since 13 October 2013, Land Registry has received applications for notices in respect of chancel repair liability (including both agreed and unilateral notices) affecting 257 registered titles. We are advised by Land Registry there may be some variance between the data recorded and the actual number of titles processed; this figure is therefore indicative and may have a degree of inaccuracy.

\(^9\) For an explanation of chancel repair liability and manorial rights, please see the Glossary.

\(^10\) *Ruoff & Roper*, para 15.039.
The entry of a notice following a transfer of a registered estate under section 29

8.11 Our simple example in paragraphs 8.8 and 8.9 above can now be developed one stage further. Suppose that at some point after the transfer to B, the beneficiary of the third party right which has been postponed (Z) applies for the entry of a notice on the register in respect of that interest. The notice can be of no effect against B: the interest it purports to protect has already been postponed to B’s interest. B subsequently transfers to C. Let us assume that, this time, the transfer from B to C is made for valuable consideration, such that section 29 applies. Is C bound by Z’s interest, on the basis that it is now the subject of an entry in the register and so its priority is preserved as against C?

8.12 Here, Ruoff & Roper believes that the position is not so clear:

It remains possible that the late registration of an adverse interest by means of a notice after a registrable disposition has occurred, can cause the interest to spring back into life so as to take effect against future dispositions. It has been “postponed”, not destroyed and perhaps the postponement is now over. This would indeed be an unexpected consequence but it might arise because the Act does not postulate a clear “voidness rule” as regards unprotected interests.¹¹

8.13 However, this conclusion is at odds with the example cited at paragraph 8.10 above. If it is accepted that – on a transfer of the freehold to C which is not made for valuable consideration (and hence does not engage section 29) – Z’s interest is not capable of binding C, this can only be because the interest has now been postponed to the freehold itself. This being the case, the entry of a notice in the circumstances set out at paragraph 8.11 above cannot make the interest binding against C.

8.14 As is acknowledged in Ruoff & Roper, any other conclusion could have serious economic consequences:

For example, a registered proprietor, RP, may be subject to a restrictive covenant as the original covenantor and then seek to sell the land to X. If this covenant is not entered by way of notice, it is postponed to the interest of X and X need not adjust his offer price – the interest is ineffectual as far as he is concerned. Should the interest then be registered after this disposition, it could revive so as to bind anyone who buys from X. Thus X is affected by a blot on his title that was not present when he purchased the land. Of course, a purchaser from X would find the notice after an official search so he, at least, would be warned, but he must also adjust his view of the value of the land.¹²

¹¹ Ruoff & Roper, para 42.003.

¹² Ruoff & Roper, para 42.003 n 11 (emphasis in original). The same point is made in M Dixon, “Priorities under the Land Registration Act 2002” (2009) 125 Law Quarterly Review 401, 405.
8.15 This does not, however, mean that it is impossible for Z to enter a notice after a transfer for valuable consideration has been registered. We will examine below why this is the case, and make a provisional proposal as to how this situation could be improved.13

A more complex example

8.16 Before we turn to look at the procedure when an application is made to enter a notice of an interest which would appear to have been postponed by virtue of section 29, let us first consider one more variant on our original example scenario. In paragraphs 8.8 and 8.9 above, the disposition to C was of the same interest as the disposition to B: both B and C took a transfer of the freehold.

8.17 It is possible however that C’s interest may instead be a derivative interest carved out of the freehold. This can be illustrated by reference to the case of *Halifax plc v Curry Popeck*.14 The facts of the case have already been set out in Chapter 7, but we repeat them here for ease of reference. A husband and wife effected a series of fraudulent transfers and mortgages. The case was brought in order to determine the relative priorities between two of the mortgages, since the proceeds of sale of the property were insufficient to discharge all of the mortgages in full. It was agreed that Halifax had an equitable charge over the property by virtue of a proprietary estoppel. The question was whether Halifax’s interest had priority over a later charging order obtained by Bank of Scotland. In between the proprietary estoppel interest arising, and the grant of the charging order, the property had been transferred by the husband and wife into the husband’s sole name. It was argued that this was a disposition which engaged section 29 of the LRA 2002. On the facts, the court found that it was not.15 However, in case this conclusion was challenged, the court went on to consider the position if the transfer did have the benefit of section 29.

8.18 It was submitted that the effect of a transfer under section 29 was that it “wiped the title clean of any prior unprotected equitable interests”.16 The court agreed:

On the assumption of a transfer for valuable consideration, equitable interests binding the disponer do not bind the disponee as interests in land, even if the disponee was a party to the creation of those interests. This will mean that if the disponee then creates a subsequent equitable obligation binding the estate, there will be no question of competing equities.17

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13 See para 8.24 and following below.
15 See para 7.49 above.
16 At [49].
17 At [51], by Mr Justice Norris.
On this view, Halifax’s interest having been postponed by virtue of the transfer under section 29, Bank of Scotland’s charging order would take priority. The court noted that this construction of section 29 “would seem to accord with the Law Commission’s intention in promoting the 2002 Bill”. We agree.

8.19 This view of the effect of section 29 has however been questioned by Professor Martin Dixon:

Does it matter that under s 29 priority is ceded to “the interest under the disposition”? In Popeck, Halifax was asserting its priority against the Bank of Scotland, not against the transferee. The transferee, [the husband], did enjoy priority under s 29, his estate being the relevant “interest under the disposition”. Of course, the Bank of Scotland had a derivative interest – an equitable charge – but this was “not the interest under the disposition” and it is not clear that s 29 requires priority to be given to all derivative interests simply because they are carved out of an interest having priority. It might be otherwise - ie that priority was enjoyed – if the second disponee held the same interest as the first disponee.19

8.20 Professor Dixon acknowledges, however, that on this interpretation of section 29:

the first disponee [in our examples, B] is to some extent compromised in his ability to deal with his land, and it may well appear that an interest which did not actually bind him does, in practice, have a detrimental effect. However, this appears to be the effect of the reformulation of the priority rule in s 29 and we should remember that it will be rare for an interest ever to gain protection after a priority disposition. If there is such a rare case, the first disponee may still alienate his entire interest without limit … .20

8.21 We agree that, if section 29 does not “wipe the title clean”, B’s ability to deal with his land is compromised. We see no reason of principle to distinguish between a transfer of the freehold to C, and (say) the grant of a lease to C of 999 years.

8.22 It would also appear that, contrary to Professor Dixon’s expectations, applications are being made to note interests which, on their face, have lost priority by virtue of section 29. At the very least, the prospect of such an application being made has led Land Registry to issue detailed guidance on how it will deal with an application in these circumstances,21 which has in turn led stakeholders to raise the issue with us as a cause for concern.

18 At [52].
21 See para 8.27 below.
8.23 Having set out our analysis of the legal effect of section 29, we turn now to review the practical problems which may still arise when an application is made to Land Registry for the entry of a notice on a registered title in relation to an interest which would appear, on its face, to have lost its priority to the estate comprised in that title by virtue of the operation of section 29.

Land Registry practice on an application to enter a notice in respect of an interest which has been postponed under section 29

8.24 In this part of the chapter we will consider whether it is possible for the holder of an interest which has been postponed by virtue of a transfer of the freehold under section 29 to apply for a notice to be entered on the freehold title register in relation to that interest.22

Former overriding interests

8.25 The context in which stakeholders have raised this issue with us is where the interest concerned is one which was formerly overriding under schedule 3 to the LRA 2002, but which lost that overriding status on 13 October 2013.23 Typically this would be an interest which comprises either the benefit of chancel repair liability or manorial rights.24

8.26 The first point to make is that such interests did not cease to exist on 13 October 2013; they merely lost their overriding status. The starting position is therefore that:

After 12 October 2013, [formerly overriding interests] can be ... protected [by notice] provided they bind the then registered proprietor.25

8.27 It might be thought that, where a transfer has been registered after 12 October 2013, it would not thereafter be possible to enter a notice on the title in respect of a former overriding interest. However, this is not the case. Land Registry explains the position by reference to an example in the form of a question and answer:

[Question] I registered a transfer on 14 October 2013. Will Land Registry reject any future application to register a unilateral notice to protect a claimed manorial right?

[Answer] No, we will register the unilateral notice.

22 The same analysis would apply where a transfer of a registered lease made for valuable consideration has been registered, and an application is subsequently made for a notice against the leasehold title. However, it is simpler to use the freehold example.

23 By virtue of LRA 2002, s 117(1).

24 For an explanation of chancel repair liability and manorial rights, please see the Glossary. The full list of interests which lost their overriding status on 13 October 2013 was set out in LRA 2002, schs 1 and 3, paras 10 to 14 and 16, and comprises: franchises; manorial rights; a right to rent which was reserved to the Crown on the granting of a freehold estate; a non-statutory right in respect of an embankment or sea or river wall; a right to payment in lieu of tithe, and a right in respect of the repair of a church chancel.

Land Registry cannot require evidence that the interest claimed validly affects the property; all we can require is that the nature of the interest claimed is an interest capable of being protected by notice. A manorial right is capable of being protected by notice. It would not be appropriate for the registrar to try to investigate whether or not the transfer was a registrable disposition for valuable consideration that may potentially result in the interest no longer binding the proprietor when it is not a requirement that the applicant lodges any supporting evidence that the claimed interest exists.

The applicant who lodges a unilateral notice is responsible for ensuring that they have a valid interest and there is liability under s 77 if they lodge a notice without reasonable cause. You should also bear in mind the effect of a notice; it does not make a claimed interest valid, it is merely capable of preserving any priority that a valid interest already has against a subsequent registrable disposition for valuable consideration that is registered.

It will remain open to the proprietor to apply to cancel the unilateral notice by lodging a UN4. If the proprietor does we will serve a notice on the notice holder. If they lodge a non-groundless objection and the parties cannot agree about whether or not the notice should be cancelled there will be a dispute. The matter will then be governed by s 73 of the Land Registration Act 2002 and unless the objection can be disposed of by agreement between the parties, we must refer it to the Land Registration division of the Property Chamber, First-tier Tribunal.26

Discussion

8.28 Although the issue which has been raised with us by stakeholders relates specifically to the entry of a notice in respect of a former overriding interest, the issue is not confined to such interests. It will be apparent from the examples set out in the earlier part of this chapter that the questions raised apply to a notice in respect of any interest which appears to have been postponed following a registered disposition under section 29.

8.29 In each case, the issue appears to boil down to whether (and if so, why) a notice can be entered on the register in respect of an interest after that interest has been postponed under section 29. As will be seen, we conclude that a notice may be entered in these circumstances. However, the reasoning behind that conclusion is important, and we hope will put many consultees’ minds at rest. We also make provisional proposals which we think may address some of the concerns with the present situation.

8.30 The discussion which follows necessarily reflects the position under the current law. The starting position is section 32(1) of the LRA 2002:

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A notice is an entry in the register in respect of the burden of an interest affecting a registered estate or charge.

8.31 If an interest has been postponed to the registered estate by virtue of the operation of section 29, it will no longer “affect” that estate, and so will no longer be capable of protection by way of a notice. This is uncontroversial. However, section 32 does not provide the answer to the issue under discussion because it begs the question as to whether an interest has been postponed. Further, the fact that an interest is the subject of a notice does not necessarily mean that the interest is valid.27

8.32 We will see in Chapter 9 that under the LRA 2002 an applicant may apply for one of two types of notice: agreed, or unilateral.28 In order to approve the entry of an agreed notice without the registered proprietor’s consent, the registrar must be satisfied as to the validity of the applicant’s claim. Where there has been an intervening disposition which would appear to have engaged section 29, the registrar may not accept the application at all. Alternatively, if the application was accepted, the notice will not be entered on the register pending resolution of any dispute which subsequently arises.29

8.33 It is far more likely, however, that an applicant in these circumstances would apply for a unilateral notice. There are a number of reasons why such an application may be successful, even if the register would appear to show that there has been an intervening registered disposition of the registered estate under section 29. We examine each of these in turn below.

UNCERTAINTY AS TO THE LAW

8.34 The first point is that we accept that doubts have been raised about the effect of section 29.30 If Land Registry were to refuse to accept an application for the entry of a notice on the ground that the interest had been postponed under section 29, then, given the uncertainty surrounding the law, this decision could be the subject of challenge by way of judicial review. If the rejection of the application for the unilateral notice resulted in the applicant losing priority in circumstances where the interest should properly have been entered on the register, this may result in an indemnity claim being made against Land Registry.

27 LRA 2002, s 32(3).
28 See para 9.7 below. We note that the outcome of the discussion in this chapter may in some respects be different if consultees were, in response to Chapter 9, to favour the replacement of the current “dual system” of notices with a single form of notice, which required the interest to be established before the notice could be entered on the register.
29 Which dispute may have to be referred to the Tribunal (as defined in the Glossary) under LRA 2002, s 73(7).
8.35 We wish to lay the doubts about the effect of section 29 to rest. An applicant for a unilateral notice would therefore not be able to rely on any ambiguity in section 29 in order to get his or her application accepted. However, as we will see, clarifying the effect of section 29 does not mean that the application for a unilateral notice will be rejected.

THE THRESHOLD FOR ENTRY OF A UNILATERAL NOTICE

8.36 As the question and answer example at paragraph 8.27 above explains, on an application for a unilateral notice Land Registry cannot require evidence that the interest claimed validly affects the property. All the LRA 2002 requires is that the applicant claims to be entitled to the benefit of an interest affecting a registered estate. All Land Registry can therefore require is that the nature of the interest claimed is an interest capable of being protected by notice. The applicant does not need to support the claim to the interest with any evidence, and there is no power for Land Registry to compel evidence to be provided.31

8.37 In Chapter 9 we make provisional proposals to reform the procedure relating to unilateral notices. As will be seen, our preferred option for reform is not to increase the evidence which needs to be provided at the point of application for a unilateral notice. However, we do make proposals to require the beneficiary of a unilateral notice to present evidence in support of their claim in the event that the registered proprietor applies to cancel the notice.

8.38 These proposals would assist where a unilateral notice is entered to protect an interest despite an intervening registered disposition which had the apparent effect of postponing that interest.

8.39 In addition, we make a further provisional proposal below which would increase the scrutiny of the initial application for the unilateral notice in the circumstances which would appear to be of most concern to stakeholders.32

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31 The procedure for the entry of a unilateral notice is explained in Chapter 9: see para 9.17 and following below.

32 See para 8.48 below.
DID THE TRANSACTION WHICH IS CLAIMED TO HAVE POSTPONED THE INTEREST ENGAGE SECTION 29?

8.40 A disposition will only engage section 29 (and therefore have the effect of postponing an unprotected interest) if it is made for valuable consideration. As we saw in Chapter 7, the meaning of this expression is not always entirely clear. Although Land Registry is required to enter the price paid, as set out in a transfer, on the register, valuable consideration may take a non-monetary form. Even where money was expressed to be paid, where the sum was very small there is a possibility that under the current law it is excluded from constituting valuable consideration. Furthermore, where the register shows that a more than nominal sum of money was paid for the property, this is no guarantee that such a sum actually changed hands. As we have seen, there are circumstances in which the courts may find that a disposition is not for valuable consideration, even where the transactional documents on their face would appear to indicate otherwise.

8.41 In these circumstances it is not appropriate for Land Registry to decide whether or not a disposition was for valuable consideration, such that it engaged section 29 and postponed the interest which is the subject of the application.

Questions for consultees

8.42 We have set out above a range of reasons why it may still be possible to enter a unilateral notice to protect an interest even where it may initially appear that the interest has been postponed pursuant to section 29. We appreciate however that stakeholders are understandably concerned that the current procedure for entry of a unilateral notice may result in notices being entered on the register in circumstances where the interest which the notice purports to protect has in fact already been postponed by section 29.

8.43 As set out in Chapter 9, there may be good reasons why a land registration system should retain a method of entry of a notice without supporting evidence. We think however that there may be a way of adapting the procedure governing applications for unilateral notices to deal with the issue under discussion in this chapter, without undermining the principle that such notices can, in general, be entered on the register without supporting evidence.

33 LRR 2003, r 8(2). See also Land Registry, Practice Guide 7: entry of price paid or value stated data in the register (June 2015) para 6.

34 See para 7.49 above.

35 See eg para 9.59 below.
8.44 For example, if consultees are particularly concerned about the entry of notices to protect former overriding interests following a disposition under section 29, it may be possible to amend form UN1 (the application form for a unilateral notice) so that it requires an applicant to state whether the interest for which protection is sought is of a type which ceased to be an overriding interest on 13 October 2013. If the applicant answers this question in the affirmative, the form could go on to ask the applicant whether the register indicates that there has been a registered disposition of the title since that date, and if so require the applicant to explain the grounds on which the applicant believes the interest binds the current registered proprietor. Alternatively, the form could simply identify that the nature of the interest sought is one of the former overriding interests. This would prompt Land Registry to check whether the register indicates that there has been a registered disposition of the title since 13 October 2013. If so, this could trigger a requisition to the applicant requiring him or her to explain the grounds on which the applicant believes that the interest binds the current registered proprietor. In either case, if the applicant shows a case which is not groundless for why the interest remains binding, Land Registry would proceed to enter the notice in the usual way. If, on the other hand, the applicant can offer no reason why the interest continues to bind, the application for the notice will be cancelled.

8.45 This procedure would offer an initial “filter” of the applications which are perceived by stakeholders to be particularly problematic. It could be a useful additional protection for registered proprietors where blanket applications are made to register, for example, manorial rights against a large number of properties in the same area.

8.46 We are mindful, however, that the burden of proof to show that a disposition was made for valuable consideration, and hence attracted the protection of section 29, is on the party who seeks to rely on that provision – usually the registered proprietor. It would be inconsistent with this principle – as well as impractical – to expect an applicant for a unilateral notice to produce evidence that a disposition was not for valuable consideration. In most instances the applicant will have no reason to believe that a registered disposition was not for valuable consideration where the register indicates that this is the case. In these circumstances the application for entry of a notice will be rejected. However, there may be circumstances where there are legitimate doubts about the consideration for the disposition and therefore the applicant wishes to maintain its application for the entry of a notice unless and until the registered proprietor can show (on an application for cancellation of the unilateral notice) that the disposition fell within section 29.

36 This is the current test for an objection under LRA 2002, s 73 – we believe it could equally be applied in this context.
37 If the applicant for the unilateral notice is claiming that the interest was erroneously missed off the title on first registration, an application to alter the register under schedule 4 may be appropriate. See Chapter 13 for a discussion of the principles which will apply to such an application.
38 See the discussion of such applications in Chapter 9.
8.47 The discussion above relates to interests which had overriding status until 12 October 2013. We have focused on applications for notices in relation to such interests because this is the context which appears to be causing most concern to stakeholders. In theory the issue of an intervening registered disposition postponing a prior right under section 29 could arise in relation to any unregistered right, not merely former overriding interests. In relation to expressly granted interests, however, the unilateral notice application is already likely to flag to Land Registry the possibility that the right may not affect the registered estate, which could result in Land Registry raising a requisition in order for it to be satisfied that a right exists which is capable of protection by notice. In order to assess the impact our proposal below could have, we also invite consultees to submit evidence of their experience of the extent to which the issues discussed in this part of the chapter are causing problems in practice.

8.48 We provisionally propose 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.

Do consultees agree?

8.49 We invite consultees to provide evidence of the extent to which applications are being made for unilateral notices on registered titles where there has been an intervening disposition which engaged section 29, resulting in the postponement of the interest which is the subject of the notice to the interest under the intervening disposition.

40 Land Registry, Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register (November 2015) para 2.7.2 provides that, in the context of form UN1, “a statement or certificate which does not name any of the parties where there is an instrument under which the interest arises is not acceptable” and “any discrepancy with the name shown in the register should be explained as should any situation where the registered proprietor is not a party to an instrument under which the interest has arisen.”
8.50 We also note that the proposals which we made in Chapter 6 to confer priority on unregistrable interests upon their being noted on the register may assist in the context of the scenarios discussed in this chapter. If a sale contract is noted on the register, under our provisional proposals the sale contract would take priority over any unregistered interests (save for overriding interests). Noting the contract would secure priority for the purchaser’s interest over the former overriding interest at an earlier stage than is currently the case.\(^{41}\) Again, however, it is not the case that an application for registration of a unilateral notice made after the sale contract was noted would be rejected. If for any reason the sale contract was terminated before it could be completed, and the notice protecting it was accordingly removed from the register, the former overriding interest would no longer have lost priority, and the beneficiary of the former overriding interest would have secured priority through the entry of a notice against any future dispositions of the land.

**THE EFFECT OF SECTION 29(4) ON THE GRANT OF AN UNREGISTRABLE LEASE**

8.51 In the first part of this chapter we considered what it means to say that an interest whose priority has not been protected has been “postponed” as a result of the operation of section 29(1). We now turn to look at an issue arising out of a different subsection of section 29.

**Background**

8.52 Subsection (4) of section 29 extends the protection conferred by section 29(1) to the grant of 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 effect as if—

(a) the grant involved such a disposition, and  
(b) the disposition were registered at the time of the grant.

8.53 In this part of the chapter we will explore the effect of section 29(4) and, in particular, how it operates when a priority search protecting a competing disposition has been made.

\(^{41}\) Our provisional proposal would help to address a problem which has been identified in relation to the risk of a notice protecting chancel repair liability being entered on the register between exchange of contracts and completion of a sale: see P Williams, “When the experts get it wrong” [2014] *Conveyancer and Property Lawyer* 369, 372 to 374.
The effect of section 29(4)

Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition (typically, where the lease is for seven years or less), section 29(4) means that the lease will take effect for the purposes of section 29 as if it did involve such a registrable disposition, and as if that disposition were registered at the time of grant. The High Court and the Court of Appeal in Scott v Southern Pacific Mortgages Ltd were concerned that this meant that the tenant of an unregistrable lease granted following completion of the purchase of a property could, through the application of section 29, obtain priority over a chargee who had advanced money to finance the purchase.

The argument runs as follows. The mortgage is created first, before the lease. However, at the time the lease is created, it is deemed (for the purposes of section 29) to be registered. Registration has the effect set out in section 29(1). This provision means that the lease is subject only to registered charges, interests which are the subject of a notice on the register, overriding interests, and the other interests set out in section 29(2). If the mortgage has not been registered by the time of grant of the lease (which is likely to be the case where the lease is granted shortly following completion of the purchase), the tenant of the lease is not subject to it.

It is clear that the courts in Scott v Southern Pacific Mortgages Ltd found it unpalatable that the unregistrable lease in that case could take priority over the prior mortgage. There were a number of preliminary issues in the case, of which the second preliminary issue related to section 29(4). Judge Behrens, sitting as a High Court judge, gave three reasons why section 29(4) did not operate to confer priority on the tenant over the mortgagee. The first two of these reasons related to the fact that the purchaser who granted the lease had not yet been registered as the proprietor of the property, and so did not yet have legal title. These arguments are derived from an understanding of owner’s powers which differs from the interpretation we have put forward in Chapter 5. We would further comment that the scenario of a mortgage, immediately followed by the grant of an unregistrable lease, may occur outside of the context of a purchase where the mortgage is the acquisition finance. The same scenario (and hence the same competition in priority between a mortgage and an unregistrable lease) could equally arise where there is no change in ownership of the property, such as where a buy-to-let property is remortgaged shortly before the grant of an assured shorthold tenancy to an occupier. The fact that the issues may arise outside the context of an acquisition suggests that, whatever the solution to the apparent problem posed by the effect of section 29(4), it does not lie in the application of owner’s powers.

43 [2010] EWHC 2991 (Ch) at [61] to [63]. Lord Justice Etherton for the Court of Appeal agreed with the conclusion on the second preliminary issue, essentially agreeing with the 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].
The impact of a priority search

8.57 We are left with Judge Behrens’ third reason for finding that, despite section 29(4), the lease in *Scott v Southern Pacific Mortgages Ltd* was not binding on the mortgagee. This reason was that the lease could not prevail over the mortgage where the mortgagee had made a priority search prior to the grant of the mortgage, and had submitted its application for registration of the mortgage within the priority period conferred by that search. We explained at paragraph 6.64 above that, where an application is protected by a priority search, and is submitted within the priority period granted by that search, any entry made in the register during the priority period relating to that application is postponed to any entry made in pursuance of it. This result, it is argued, flows from section 72 of the LRA 2002.

8.58 The argument set out in the previous paragraph is undoubtedly attractive. It means that, provided the mortgagee has made a priority search and submitted its application within the priority period, it will take priority over an unregistrable lease that was created between the grant of the mortgage and its registration. The outcome, we would submit, is right. At the time the mortgage was granted, the lease did not exist, and the mortgagee had no means of finding out about it. The mortgagee made a priority search, and submitted its application on time. The mortgagee could have done nothing further to protect itself against subsequent interests.

8.59 That this conclusion is the right outcome is demonstrated by the fact that, if the lease was for a term of more than three years, it is possible to apply for a notice to be entered in respect of it. Had such an application been made immediately following the grant of the lease, while the priority period in relation to the charge was still running, the entry of the notice would have been postponed to the subsequent registration of the charge under section 72. It cannot be the case that a lease which is protected by notice obtains a lesser priority than one which is not.

8.60 The argument at paragraph 8.57 above may, however, go too far, and produce outcomes which are not just or desirable. The argument relies on the fiction in section 29(4) that the unregistrable lease has been registered at the time of grant. The fiction is expressed to apply for the purposes of section 29. The argument set out at paragraph 8.57 above necessitates extending that fiction, so that the lease is also deemed to be registered for the purposes of section 72. If this is the case, there will be a deemed entry on the register in respect of the lease, which entry would be postponed if it were made during a priority period protecting a charge. Neither section 29(4) nor section 72, however, so provide. The argument – attractive though it is – relies on reading into one or both sections words which are not there.

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44 [2010] EWHC 2991 (Ch) at [63].
45 LRA 2002, ss 33 and 34.
If followed to its conclusion, the interpretation which the argument demands be adopted of sections 29(4) and 72 could also give priority to a mortgagee where the mortgage is created after the lease. Take the following example. A mortgagee carries out a priority search to protect an intended charge. Between the priority search being made and the grant of the charge, an unregistrable lease is granted. The mortgage is then granted, and an application for registration of the mortgage submitted within the priority period.

The scenario set out in the previous paragraph is profoundly different from that set out at paragraph 8.55 above. Here, the mortgage has been created after the lease. The lease is first in time, and on registration of the mortgage it will be an overriding interest. If section 72 has the effect suggested at paragraph 8.60 above, this would mean that the tenant’s lease was instead postponed to the mortgage, as it was granted during the priority period relating to that mortgage. This outcome would undermine the inclusion of unregistrable leases as a category of overriding interests in the LRA 2002. We therefore consider that it cannot be correct.

**Question for consultees**

The discussion above suggests that there is an unhappy mismatch between section 29(4) and section 72 of the LRA 2002. The effect of section 29(4) in terms of the priority afforded to an unregistrable lease where there is a concurrent priority search is unclear. The two different scenarios we have outlined suggest that the outcome ought to be different where the lease is granted prior to a competing interest such as a mortgage, as opposed to where the lease is granted after it.

Section 29(4) was not, however, new in 2002. It replicates the law under the LRA 1925. It is in a way surprising that the priority problem highlighted by *Scott v Southern Pacific Mortgages Ltd* does not appear to have arisen for determination by the courts before. We would like to gather evidence as to the extent to which section 29(4) causes problems in practice.

We invite consultees to provide evidence of the extent to which section 29(4) has operated to confer priority on an unregistrable lease over an interest which is protected by a priority search.

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46 It will therefore be an "interest affecting the estate immediately before the [mortgage]" for the purposes of section 29(1).

47 LRA 2002, s 29 and Sch 3 para 1.

48 LRA 1925, ss 19(2) and 22(2). See Law Com 271, para 5.15 and I Clarke and J Farrand (eds), *Wolstenholme & Cherry’s Annotated Land Registration Act 2002* (2004) para 3-032.

CHAPTER 9
PROTECTION OF THIRD PARTY RIGHTS ON THE REGISTER PART I: NOTICES

INTRODUCTION

9.1 In Chapter 2 we saw that there are many different types of interest in land which may be held by someone other than the registered proprietor. Someone with these and similar interests will want to ensure that his or her interest is protected in the event that the land changes hands. This usually means that he or she will want to ensure that his or her interest binds a successor in title. However, as we shall see, protection in the land registration regime does not always mean that the interest must (or indeed can) bind a successor. There are other ways in which some rights can properly be protected, including controlling the circumstances in which a disposition of the land can take place.1 Broadly, protection of an interest under the LRA 2002 can occur in one of two ways: via an entry on the register, or off-register via the mechanism of overriding interests.2

9.2 Under the LRA 1925, there were four means of protecting third party rights on the register:

(1) notices;
(2) cautions;
(3) restrictions; and
(4) inhibitions.3

9.3 Only two of these: notices and restrictions, remain under the LRA 2002. In this chapter we will consider notices. Restrictions are considered in Chapter 10.

9.4 The importance of a notice is that the entry of a notice will preserve the priority of an interest on a registered disposition of the registered estate for valuable consideration under section 29 of the LRA 2002.4 A notice is therefore the best way of ensuring that a third party right binds successors in title.

9.5 In this chapter we will first consider the current law governing the entry of a notice under the LRA 2002. In particular, we will look at the different types of notice which are available, and the procedure applicable to each. We will then examine the issues which have been raised with us in relation to how these procedures are working in practice. We consider what features a system of protection of third party rights on the register should have. Finally, we make some provisional proposals for reform which we believe address stakeholders’ concerns while retaining some of the strengths of the current system.

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1 Take for example a right such as a beneficial interest under a trust, or a contractual obligation which is protected by a restriction.
2 Overriding interests are considered in Chapter 11.
3 See LRA 1925, Part IV.
4 See Chapter 6.
CURRENT LAW

9.6 The term “notice” is used a number of different ways in the LRA 2002. In this chapter we are only concerned with a notice which is an entry in the register to protect a third party right. The formal definition of a notice for these purposes is “an entry in the register in respect of the burden of an interest affecting a registered estate or charge”.

9.7 This definition is mirrored by section 34 of the LRA 2002, which provides that “a person who claims to be entitled to the benefit of an interest affecting a registered estate or charge” may apply for a notice. The application may be for either an agreed notice or a unilateral notice. The registrar may also enter a notice without an application being made. For example, the registrar will enter appropriate notices in the course of first registration and as part of the processing of certain types of registrable disposition (such as leases). Such notices are not described as either agreed or unilateral, but function in the same way as agreed notices. Land Registry Practice Guide 19 explains:

The term ‘agreed notice’ applies only to notices entered following an application to the registrar under section 34(2)(a) of the Land Registration Act 2002. However, all notices other than unilateral notices are treated in the same way as agreed notices once entered in the register. Where referring to notices that have already been entered in the register, this guide prefers reference to ‘notices (other than unilateral notices)’ rather than to ‘agreed notices’, to avoid confusion; similar terminology is adopted in the Land Registration Rules 2003.

9.8 By rule 80 of the LRR 2003, certain interests are only capable of protection by agreed, as opposed to unilateral, notice.

9.9 Whichever type of notice is used, the fact that an interest is the subject of a notice does not necessarily mean that the interest is valid, but does mean that the priority of the interest, if valid, is protected.

9.10 In the following sections we examine in more detail the procedure applicable to, first, an agreed notice, and then a unilateral notice.

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5 For example, Land Registry may serve notice of an application on another party (here the term “notice” essentially just refers to a means of communication). The concept of “notice” is also used to determine the circumstances in which a first registered proprietor may be bound by certain interests which exist off-register: see LRA 2002, s 11.

6 LRA 2002, s 32.

7 LRR 2003, r 35(1).

8 See LRA 2002, sch 2, para 3(2)(b).

9 Occasionally there will be references in textbooks or commentary on land registration law to a “registrar’s notice”; however this is not a term of art used in the LRA 2002 or the LRR 2003.


11 See further para 9.127 below.

12 LRA 2002, s 32(3).
Agreed notices

Entry of an agreed notice

9.11 The registrar may only approve an application for an agreed notice if:

(1) the applicant is the registered proprietor;

(2) the registered proprietor (or a person entitled to be the registered proprietor) consents; or

(3) the registrar is satisfied as to the validity of the applicant’s claim.\(^{13}\)

9.12 The last of these is important. An agreed notice does not mean that the registered proprietor has agreed to its entry. It can be entered if the applicant demonstrates that he or she is entitled to the interest claimed, even without the agreement of the registered proprietor. Where the interest claimed has been granted by an instrument or is the subject of a declaration in a court order, that instrument or order must accompany the application.\(^ {14}\) However, it might also be possible to apply for an agreed notice without such a document.\(^ {15}\) The nomenclature of an “agreed notice” therefore has the potential to be slightly misleading. Perhaps somewhat counter-intuitively, an agreed notice can be entered unilaterally. It may be that, in light of experience since the LRA 2002 came into force, the terminology itself would benefit from reform.

9.13 A registered proprietor who has consented to the entry of the notice will not usually receive notice of the application (either before or after it is completed). Land Registry is not obliged to serve notice on the registered proprietor before approving an application for an agreed notice which is made without that proprietor's consent. In most cases Land Registry will determine the application on the basis of the evidence lodged without involving the proprietor. However, if no evidence is lodged that the proprietor consents, Land Registry will notify the proprietor, but usually only after the application has been completed.\(^ {16}\)

\(^ {13}\) LRA 2002, s 34(3).

\(^ {14}\) LRR 2003, r 81.

\(^ {15}\) For example, if the applicant was claiming an easement by prescription, supported by a statutory declaration.

\(^ {16}\) Land Registry, Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register (November 2015) para 2.3.2. Observe that where the application is to note chancel repair liability, Land Registry will serve notice on the proprietor before completing the application: see Land Registry, Practice Guide 66: Overriding Interests Losing Automatic Protection in 2013 (January 2016) para 3.6.3. The same is true if Land Registry receives an application for an agreed notice of a claim to a prescriptive easement: Land Registry, Practice Guide 52: Practice Guide 52: Easements Claimed by Prescription (August 2015) para 3.1.
9.14 The entry of an agreed notice on the register must give details of the interest protected.\textsuperscript{17} This is usually achieved either by extracting the relevant part of the document creating the interest onto the face of the register, or by noting on the register that a copy of that document has been filed and hence is available for public inspection.\textsuperscript{18}

**Removal of an agreed notice**

9.15 In order for an agreed notice to be cancelled, evidence must be supplied that the interest has determined. If the registrar is not satisfied that the interest has come to an end, he or she may make an entry detailing the circumstances in which the applicant claims the interest has determined.\textsuperscript{19}

**Unilateral notices**

9.16 The unilateral notice was introduced by the LRA 2002 as part of the replacement for the caution which was available under the LRA 1925, but which was not carried over into the LRA 2002. A caution provided a means by which a person interested in the land could ensure that he or she was warned of any proposed dealing, and given an opportunity to assert priority for his or her interest.\textsuperscript{20} As long as a caution remained on the register, it prevented the registration of any disposition of the land. However, it did not confer priority on the interest which was the subject of the caution. As such, it was perceived to be a relatively weak form of protection for the interest. Like the unilateral notice, however, a caution could be entered without the registered proprietor's consent, and without the production of any supporting evidence.\textsuperscript{21}

**Entry of a unilateral notice**

9.17 There are no statutory criteria which applicants for a unilateral notice must meet other than the general criterion in section 34 that they must claim to be entitled to the benefit of an interest affecting a registered estate or charge. This means that:

A unilateral notice may be entered without the consent of the relevant proprietor. The applicant is not required to satisfy the registrar that their claim is valid and does not need to support their claim to the interest with any evidence.\textsuperscript{22}

\textsuperscript{17} LRR 2003, r 84(3).

\textsuperscript{18} Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (November 2015) para 2.3.2. For more details about the public right of inspection, see para 9.53 below.

\textsuperscript{19} LRR 2003, r 87.

\textsuperscript{20} *Clark v Chief Land Registrar* [1994] Ch 370, 383, by Nourse LJ.

\textsuperscript{21} See Law Com 254, paras 6.10 to 6.18.

\textsuperscript{22} Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (November 2015) para 2.3.3. Details of the nature of the interest claimed must, however, be provided in order for the registrar to be satisfied that the interest is capable of being protected by unilateral notice: see para 2.7.2 of the Practice Guide.
9.18 We commented above that the terminology of an “agreed notice” could be ambiguous, since it is not always necessary to obtain the registered proprietor’s agreement to its entry. A similar comment can be made in relation to unilateral notices. Although, as we will see, a unilateral notice may be entered without the registered proprietor’s consent, there may be good reasons why unilateral notices are used even where the registered proprietor has consented to the entry of a notice on his or her title.

9.19 The level of detail which will appear on the register in the case of a unilateral notice is considerably less than is required for an agreed notice. The entry of a unilateral notice must give “such details of the interest protected as the registrar considers appropriate”. Current Land Registry guidance is that the application form must disclose the nature of the applicant’s interest, particulars of any written agreement under which the interest arises (such as the parties’ names), and must refer to the registered proprietor by name. Land Registry notes that:

The applicant might … choose to apply for a unilateral notice when seeking to protect an interest of a commercially sensitive nature and wishes to take advantage of the confidentiality afforded by the limited wording of the unilateral notice entry.

9.20 The registrar has to notify the registered proprietor of the entry of a unilateral notice. However, the proprietor will only receive notice of the application after it has been completed, not before.

9.21 In our 2001 Report we acknowledged that, because a unilateral notice may be entered without the consent of the registered proprietor, safeguards were necessary for that proprietor. We identified three principal safeguards.

First, a person must not exercise his or her right to apply for a notice without reasonable cause. Any person who does apply for a notice without reasonable cause is in breach of this statutory duty and is liable in tort accordingly to any person who suffers damage in consequence of that breach.

Secondly, where a unilateral notice is entered by the registrar, he must give notice of the entry to the proprietor of the registered estate or charge to which it relates and to such other persons as rules may provide.

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23 LRR 2003, r 84(5).
26 LRA 2002, s 35.
Thirdly, and following from this, the Bill makes provision for the
cancellation of a unilateral notice. Both the registered proprietor of the
estate or charge to which the notice relates and any person who is
entitled to be registered as the proprietor of that estate or charge may
apply to the registrar for the cancellation of a unilateral notice. When
such an application is made, the registrar must serve a notice on the
person who is identified on the register as the beneficiary of the
unilateral notice. That notice must inform the beneficiary—

(1) of the application; and

(2) that if he or she fails to exercise his or her right to object
before the end of the period specified in the notice, the
registrar will cancel the notice.27

9.22 The first of these safeguards (the duty not to apply for a notice without
reasonable cause) is examined at paragraphs 9.30 to 9.33 below. We have
already looked at the second safeguard of notice being given to the registered
proprietor.28 We turn now to the third safeguard, the procedure for cancellation of
a unilateral notice.

Removal of a unilateral notice

9.23 There are number of ways in which a unilateral notice can be removed from the
register. The principal methods are:

(1) the beneficiary may apply for its removal under section 35(3); or

(2) the registered proprietor may apply for it to be cancelled under section
36.29

9.24 An application by the registered proprietor for the notice to be cancelled under
section 36 may be made at any time, and without giving a reason.30 The registrar
will give the beneficiary notice of the cancellation application. If the beneficiary
does not object within 15 business days,31 the notice will be cancelled. If the
beneficiary does object, section 73 will apply (see below). The procedure laid
down by the LRA 2002 for dealing with objections (which applies to an objection
to any form of application, not just an application to cancel a unilateral notice) is
therefore of key importance to understanding the concerns of stakeholders in this
area.

27 Law Com 271, paras 6.28 to 6.30.
28 See para 9.20 above.
29 In addition, where the entry of the unilateral notice is a mistake an application may be
made for alteration of the register under LRA 2002, sch 4: see Chapter 13. An application
may also be made directly to the High Court for removal of a unilateral notice from the
register pursuant to that court’s inherent jurisdiction: see Nugent v Nugent [2013] EWHC
4095 (Ch), [2015] Ch 121.
30 Land Registry, Practice Guide 19: Notices, Restrictions and the Protection of Third Party
Interests in the Register (November 2015) para 2.8.2.
31 This period can be extended at the request of the beneficiary, but not beyond 30 business
days: LRR 2003, r 86(3).
Objections

9.25 Section 73 of the LRA 2002 provides a right, in certain circumstances, for a person to object to an application that has been made. An objection must be made by way of a signed written statement, which has to include the grounds for the objection.32 However, no evidence has to be lodged in support of the statement.33

9.26 If the registrar is satisfied on the basis of the statement submitted that the objection is groundless, then he need take no further action in respect of it and the application may be completed. Mr Justice Floyd in the High Court decision in Silkstone v Tatnall described this as a “very low threshold” for the objector to get over:

The Registrar may therefore throw out groundless objections; but anything which passes this very low threshold must be referred to the [Tribunal].34

9.27 Assuming that the objection is not groundless, the registrar must give notice of the objection to the applicant. The application cannot then be completed until the objection has been disposed of. Land Registry Practice Guide 37 explains that there are a number of options available to the parties once an objection to an application has been made.

(1) The applicant may withdraw the application.

(2) The objector may withdraw the objection.

(3) The parties may decide to negotiate to see whether they can reach an agreement as to how the objection is to be dealt with and how the application is to be completed.

(4) One of the parties may decide to commence court proceedings.35

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32 LRR 2003, r 19(2).
33 The objector’s evidence may be produced voluntarily as part of the process of negotiation following notice of the objection being given to the applicant, but this is not a statutory requirement. See Ruoff & Roper, para 48.001 n 12.
34 [2010] EWHC 1627 (Ch), [2010] 3 EGLR 25 (HC) at [17].
If it is not possible to dispose of an objection in one of these ways, the registrar has no discretion but must refer the ensuing dispute to the Tribunal. In January 2016 Land Registry changed the way it handles disputed applications. It will now usually allow six months for a disputed application to be resolved before it makes a referral to the Tribunal (that period may be shortened where one or more of the parties to a dispute indicate that they do not wish to negotiate and may be increased where Land Registry feels the circumstances require it). Previously, Land Registry did not specify a particular period of time after which the dispute would usually be referred. The change has been made on the basis that a long-running unresolved dispute is in no-one’s best interests.

SUMMARY OF THE OBJECTION PROCEDURE

The procedure outlined above applies to all objections to applications which are made under the LRA 2002. In the specific context of this chapter, what the procedure means is that, if a registered proprietor applies to cancel a unilateral notice which has been registered against his or her title, the beneficiary of the notice may object to that cancellation. The beneficiary can do so on the basis of a statement which gives the grounds for objection, but Land Registry has no power to require the objector to lodge any evidence in support of the objection. As long as the objection is not groundless, Land Registry will notify the registered proprietor. If the parties cannot reach agreement then Land Registry has no choice but to refer the dispute to the Tribunal.

Duty not to apply for a notice or object without reasonable cause

Section 77 of the LRA 2002 provides that:

1. A person must not exercise any of the following rights without reasonable cause—
   
   a. the right to lodge a caution against first registration under section 15,
   
   b. the right to apply for the entry of a notice or restriction, and
   
   c. the right to object to an application to the registrar.

2. The duty under this section is owed to any person who suffers damage in consequence of its breach.

LRA 2002. s 73(7). For an explanation of the Tribunal, see the Glossary and Chapter 21. As an indication, in a typical month Land Registry receives somewhere in the region of 675 objections to applications. Of the overall number of objections, about 30 to 35% are groundless from the outset. A further 10 to 15% of the overall number of objections will result in a referral to the Tribunal. The other objections are disposed of in one of the ways set out at para 9.27 above.


See https://www.gov.uk/government/news/changes-to-how-we-handle-disputed-applications (last visited 21 March 2016). The announcement states that Land Registry lawyers will be able to exercise a discretion to extend this period in exceptional, unavoidable circumstances when cogent reasons have been given for the need for additional time.
9.31 Section 77 is a general provision which applies to a number of different applications. In the context of this chapter, section 77 means that a person who, without reasonable cause:

1. applies for the entry of a notice;
2. objects to an application for a notice; or
3. objects to an application for cancellation of a notice,

may be liable in damages for breach of statutory duty.

9.32 In addition, the registrar has a power under section 76 of the LRA 2002 and rule 202 of the LRR 2003 to make an order against one party (for example, an applicant) on behalf of another party (such as a registered proprietor) requiring the payment by the first party of the second party’s costs.

9.33 A person who dishonestly makes a statement that he or she knows is, or might be, untrue or misleading, and intends by doing so to make a gain for him or herself or another person, or to cause loss to another person or expose that person to a risk of loss, may commit the criminal offence of fraud under section 1 of the Fraud Act 2006.39

STAKEHOLDER CONCERNS AND PROPOSALS FOR REFORM

9.34 In this part of the chapter we will review the concerns which have been raised by stakeholders in relation to the notices system under the LRA 2002. Unlike some of the other issues we have been considering in this Consultation Paper, these concerns do not raise difficult questions of law. They essentially concern matters of procedure, and the answers to the problems under discussion will be driven by policy. That is not to downplay the importance of the issues – the current law can create real difficulties and is perceived to be unfair. The strength of feeling is demonstrated by both the number of stakeholders who have raised issues with us, and the differing interests of those stakeholders. We have explained that the system of notices was substantially revised under the LRA 2002.40 We are mindful of the potential negative impact that further reforms, relatively soon after, may have. However, we believe that stakeholders’ concerns illustrate that some reform is necessary.

The two-tier system of agreed and unilateral notices

Issue

9.35 We have outlined above the current procedure which applies to the entry of a unilateral notice, and to an application by the registered proprietor for its cancellation. There are a number of aspects of this procedure which give stakeholders cause for concern. We will consider each of these aspects individually below; however, it is also important to view these points cumulatively in order to assess the effect of the procedure in practice, and evaluate suitable proposals for reform.

39 There is a warning to this effect on the application form for a unilateral notice (form UN1).
40 See paras 9.2 and 9.3 above.
9.36 The first point is that, as we have seen, very little information needs to be provided to the registrar in order to enter a unilateral notice on the register.\footnote{See para 9.17 above.} This means that it is possible to enter unilateral notices without applicants needing to show that they are entitled to the right which purports to be protected by the notice. If the applicant makes the application for the unilateral notice without reasonable cause, he or she will be liable to any person who suffers damage as a result. However, this potential liability does not appear to deter unmeritorious applications in practice,\footnote{See for example the cases cited in the Justice Committee, \textit{Manorial Rights} (HC 657, January 2015). The report is discussed in paras 9.41 to 9.44 below.} and we are told anecdotally that it is often difficult for a registered proprietor to prove the necessary loss.

9.37 Secondly, the registered proprietor is not given an opportunity to object before a unilateral notice is entered on the title. Instead, the proprietor is notified that the notice has been entered, and informed that an application for its cancellation must be made if the registered proprietor disagrees that the applicant has the interest claimed. This requires action on the part of the registered proprietor. Some registered proprietors may find it off-putting to have to take such a formal and pro-active step. Others may feel worried or distressed on receipt of a notification that an entry has been made on their title without their consent. This is particularly the case if Land Registry is not able to provide much information about what lies behind the notice, because it has only been provided with limited information itself.

9.38 The third perceived difficulty with the current unilateral notice process is that, even if the registered proprietor does apply for cancellation of a unilateral notice, the objection procedure does not contain any requirement for the beneficiary of the unilateral notice to produce evidence in support of the claim. If the registered proprietor does apply for cancellation, and the beneficiary of the notice objects, the beneficiary will need to provide a statement giving the grounds for the objection. However, without the need to support that statement with evidence, it may be difficult for the registered proprietor, or for legal advisers, to assess the strength of the beneficiary’s claim. This may hamper any attempts between the parties to negotiate a solution, with the result that the dispute is referred to the Tribunal.

9.39 Registered proprietors can therefore find themselves embroiled in proceedings in the Tribunal in order to challenge a notice which has been entered against the title without their consent, and without the production of any evidence. Under the current system, it is only by a referral to the Tribunal that the beneficiary of the notice can be compelled to produce evidence and the claim can be properly evaluated by all parties.\footnote{See the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, rr 28 and 30.}

9.40 This seems to us both an undesirable and an inefficient outcome. If the beneficiary of the notice could be required to produce evidence at an earlier stage, this could be assessed by both the registered proprietor and by Land Registry. This would facilitate the resolution of any resulting dispute at a much earlier stage, before it was necessary to involve the Tribunal.
The issues outlined above were thrown into sharp relief by the report of the House of Commons Justice Committee on Manorial Rights, published in January 2015.\(^{44}\) Manorial rights are certain rights which were retained by lords of the manor in England and Wales when copyhold land became freehold in the early 20\(^{th}\) century. They can include rights to mines and some minerals, sporting rights such as hunting, shooting and fishing, and rights to hold fairs and markets.\(^{45}\)

Manorial rights, along with another type of adverse interest, chancel repair liability, have been thrust into the spotlight because of a recent change in the way in which these interests may be protected under the LRA 2002. Until 12 October 2013, these interests (along with a number of others) were overriding interests, meaning that they bound a purchaser of the registered estate for valuable consideration without their appearance on the register.\(^{46}\) These interests no longer override such dispositions made on or after 13 October 2013 with the result that if they are to bind a purchaser they need to be protected on the register by way of a notice.\(^{47}\)

The change in the status of manorial rights and chancel repair liability led to an increase in the number of applications made to note such interests. The Justice Committee reports that around 90,000 applications were made to note manorial rights in the year leading up to October 2013.\(^{48}\) The experience of those subject to such applications has highlighted some of the problems that registered proprietors have experienced with the unilateral notice procedure.


\(^{46}\) LRA 2002, s 117. See Chapter 11 for more information on overriding interests.

\(^{47}\) LRA 2002, s 29. For an explanation of the change that was made on 13 October 2013, see Law Com 271, para 8.35 onwards.

\(^{48}\) Justice Committee, *Manorial Rights* (HC 657, January 2015) p 3. The report later notes that these applications had been made by 142 applicants, and that around 16,000 applications challenging the notices had been received by Land Registry from landowners: see para 16.
9.44 The Justice Committee suggested that the use of unilateral notices to protect manorial rights claims skews the burden of proof away from the claimant of the notice and onto the registered proprietor. The Justice Committee thought that this results in a practical inequality where the landowner shoulders the cost of disproving the claim, when in fact there is little evidence of the claim’s validity. In one particular instance, around 500 households in a particular locality received notices from Land Registry that a unilateral notice to protect manorial rights had been entered against their respective titles. The report says that, while many of those residents submitted an initial application for cancellation of the notice, most did not pursue the matter any further, due to the perceived cost that would be incurred in so doing.

9.45 The specific recommendations of the Justice Committee are considered at paragraphs 9.122 to 9.128 below. Stakeholders have raised similar issues with us in relation to the use of unilateral notices to protect a claim to the benefit of chancel repair liability.

9.46 In considering whether any reform is needed in this area we are mindful that, so far as manorial rights and chancel repair liability are concerned, the October 2013 date has now passed. While there is still a benefit to be gained by noting interests which have lost their overriding status if the land burdened by the relevant interest has not yet changed hands, the initial impetus to do so has been and gone. We have therefore asked ourselves to what extent it could be said that any recommendations we may make for the reform of the unilateral notice procedure would, to use a well-known metaphor, be shutting the stable door after the horse has bolted.


50 Justice Committee, Manorial Rights (HC 657, January 2015) para 14. Technically, no evidence is required to support an application for cancellation of a unilateral notice. However, the evidence of landowners to the Committee was that, in practice, they were required to disprove the manorial rights claim as their only option to get the claimant to agree for the notice to be cancelled and avoid a reference to the Tribunal: see eg Justice Committee, Manorial Rights (HC 657, January 2015) paras 20 to 21; Written evidence from Rhun ap Iorwerth AM, Assembly Member for Ynys Môn (submitted to the Justice Committee, 26 March 2014); Written evidence from Albert Owen MP, Member of Parliament for Ynys Môn (submitted to the Justice Committee, 7 March 2014).

51 Chancel repair liability is the liability of an owner of land to pay for the repair of the chancel of a parish church: see Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2004] 1 AC 546.
9.47 We believe, however, that there is still a need to carry out a review of the procedure relating to unilateral notices. The procedure suffers from the inherent difficulties which we have outlined above. The applications to note manorial rights and chancel repair liability have illustrated the problems that these defects can cause in practice. The unilateral notice procedure, however, may be used in relation to any kind of third party interest in land. We do not believe that it is right that the only way in which a registered proprietor can require a person who lodges a notice against their title to produce evidence in support of that notice is through being a party to litigation.

Proposals for reform

9.48 We are therefore of the view that reform of the system of notices under the LRA 2002 is needed.

9.49 We will begin the discussion of our proposals for reform by setting out the objectives which we consider any reform of the law of notices under the LRA 2002 ought to achieve.

OBJECTIVES UNDERPINNING REFORM

9.50 The primary purpose of a notice is to preserve the priority of an interest on a registered disposition of the registered estate for valuable consideration under section 29 of the LRA 2002. It seems to us that any reform of the law governing the entry of notices needs to balance the following objectives.

(1) The notice, once entered, should be a secure means of protection for the beneficiary.

(2) It should be possible to enter a notice on 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 that 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.

(5) There should be a means by which those who choose to keep the details of their interest confidential can do so.

We can add to this list a general objective of any law reform: the law must be clear, and straightforward to apply.

52 This is supported by statistics provided to us by Land Registry which indicate that, since 13 October 2013, Land Registry has received applications for unilateral notices in respect of manorial mines and minerals affecting 2523 registered titles. We are advised by Land Registry that there may be some variance between the data recorded and the actual number of titles processed; this figure is therefore indicative and may have a degree of inaccuracy.

53 See para 9.4 above.

54 Or at least, have an application accepted onto the day list, which preserves its priority. See para 9.87 below. For an explanation of the day list, see the Glossary.
9.51 It is immediately apparent that some of these objectives conflict. The goal of making the register complete and accurate pulls in the opposite direction from enabling parties to keep details of their interests off the register. Enabling an applicant to enter a notice without delay (which will usually mean without production of supporting evidence) may cause anxiety to a registered proprietor who does not know what the notice is or what it protects.

9.52 We consider that the first four objectives are relatively uncontroversial. Objective (5) (that there should be a means by which applicants can choose to keep the details of their interest confidential) may be considered more contentious, and merits further scrutiny.

9.53 The objective assumes that preserving the ability for parties to keep sensitive details of their transactions off the register is a legitimate objective of a land registration system. We acknowledge that there are good arguments to the contrary. Prior to 1990, the register was not open. It was not possible for someone who was not the registered proprietor to obtain a copy of a document referred to on the register.\footnote{Subject to limited exceptions, such as where a person was authorised by the registered proprietor, or pursuant to a court order. LRA 1925, s 112.} Confidentiality was, therefore, not an issue. In 1990, this changed and it became possible for anyone to obtain a copy of information held by Land Registry.\footnote{Land Registration Act 1988, s 1, amending LRA 1925, s 112. Leases and charges were still exempt; this exemption was removed by the LRA 2002. S 66 of the LRA 2002 now provides a general right of inspection of documents kept by the registrar which are referred to in the register, as well as other documents kept by the registrar which relate to an application to Land Registry.} In our Second Report on Land Registration: Inspection of the Register (1985) Law Com No 148, we argued that the ownership of land (a finite resource) is a matter of legitimate public interest, that there is also a legitimate private interest in having an open register (for example for tenants to identify immediate and superior landlords), and that an open register contributes to easier conveyancing of land, as title can be more easily verified.\footnote{Second Report on Land Registration: Inspection of the Register (1985) Law Com No 148, para 18.}

9.54 The changes were not, however, wholeheartedly embraced by those involved in dealings with registered land. Our 2001 Report noted that under the LRA 1925 regime in force at that time:

> Cautions are often lodged in respect of agreements in preference to a notice in order to protect their confidentiality. This is because the entry of the caution on the register gives no indication as to the matter that lies behind it. A number of those who responded to [our 1998 Consultation Paper] were concerned that it should remain possible to preserve commercial confidentiality in the same way after cautions had been abolished.\footnote{Law Com 271, para 6.26.}
9.55 We recognise that some stakeholders may feel that the time has come to move to a fully open register. We recognise the arguments of principle in favour of such an approach, but anticipate that, as at the time of our 1998 Consultation Paper, there is likely to be a considerable amount of stakeholder opposition to such a strategy. On this basis we feel that, in order for our proposals on notices to attract sufficient support, a method of retaining confidentiality needs to be built in.

9.56 There are a number of reasons why we have reached this conclusion. The first is that, even where a unilateral notice is applied for, certain basic details in relation to the interest protected by the notice will always appear on the register. These include the nature of the interest (for example, an option), particulars of any written agreement under which the interest arises, such as the date and parties’ names and the name of the person with the benefit of the interest.59 This will enable a person looking at the register to see that a named person is claiming a particular right over the land. Under the current system, however, if a unilateral notice is used it is possible to avoid sending a copy of the document creating the right (in our example, the option agreement) to Land Registry. This means that the detailed contents of that document (including, for example, information which the parties would consider to be commercially sensitive) are unavailable to a person searching the register.

9.57 It is important to explain that, where an interest has been protected by a unilateral notice in this way, a prospective purchaser of the registered title is likely to refuse to proceed unless a complete copy of the document creating the interest is disclosed to him or her by the registered proprietor. This will enable the purchaser to form a view on the extent to which the interest will affect him or her should the purchase proceed. The confidentiality secured in relation to an interest by a unilateral notice is therefore not aimed at withholding the details of such interests from a person dealing with the land; rather, it is concerned with keeping ancillary terms which have been negotiated as part of the transaction out of the wider public domain (such as from neighbours, business competitors or the media).60

59 See para 9.19 above.

60 The proposals in this chapter do not affect the existing requirement for the price paid for land when it is sold to be entered on the register: LRR 2003 r 8(2). See further Land Registry, Practice Guide 7: Entry of Price Paid or Value Stated Data in the Register (June 2015).
9.58 If the parties knew that the option agreement in our example above would have to be sent to Land Registry, it is possible that they would attempt to adopt a workaround in order to avoid this. Such a workaround might, for example, be to create a second document which contains the confidential information, which would not need to be sent to Land Registry. Such a strategy is not, however, without risk: section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 requires all the terms of the transaction to be located in one document, and while this can be achieved by the option incorporating the terms of the second document by reference, the law reports are full of examples which illustrate that in practice it is easy to get this wrong.61 The creation of two documents rather than one is likely to result in additional costs for the parties to the transaction.

9.59 In many instances the desire to keep the finer details of the transaction off the register will be shared by both the person with the benefit of the interest, and the registered proprietor. What is not acceptable, in our view, is for details of the interest to be kept from the registered proprietor. We have argued above62 that the current system leans too far towards protecting an applicant for a unilateral notice in that, even if the notice is challenged by the registered proprietor, the beneficiary of the notice still cannot be compelled to produce evidence of their claim. In this chapter we make proposals which will address that imbalance.

9.60 Our proposals preserve the current feature of confidentiality, but not at any price. In most circumstances where a unilateral notice is used for reasons of confidentiality, it is our understanding that the registered proprietor would have granted the interest in question and the deal struck between the parties is likely to contain contractual provisions which prevent the unilateral notice being challenged (see paragraph 9.100 below). These arrangements form part of the commercial deal and are not usually controversial. This is very different from the manorial rights situation which was under consideration by the Justice Committee, where the application to enter a notice in respect of the right was not made with the consent or knowledge of the registered proprietor.

9.61 We have set out, in some detail above, our analysis of why we consider that the law governing the entry of notices under the LRA 2002 should include a means by which those who choose to keep details of their interest confidential can do so. This is because this objective may be considered to be the most contentious of the five objectives we set out for reform at paragraph 9.50 above. We noted that some of those objectives may conflict with each other;63 the task of reconciling them is not an easy one. In developing our provisional proposals we have considered a number of different options.

9.62 Those options broadly fall into two categories. The first category involves a return to a single notice system. The second category involves retaining a dual notice system, but making adjustments to the unilateral notice procedure so that it provides greater protection to registered proprietors.


62 See paras 9.38 to 9.40 above.

63 At para 9.51 above.
None of our proposals are intended to affect the current position that the entry of a notice – of whatever type – is effective to protect the priority of the interest to which it relates, although it will not guarantee the validity of the interest.\textsuperscript{64}

We set out below the different options we have considered. We set out all of the options because we recognise that consultees may prefer one of the options we have discounted to our preferred option, and we would like to hear if that is the case, just as we would like to hear from those who think that no reform is warranted.

**OPTION 1 – A SINGLE FORM OF NOTICE**

Prior to the LRA 2002, there was only one form of notice. Applicants also had the option of lodging a caution. This was to some extent replaced by the unilateral notice under the LRA 2002, although as we have seen the effect of a unilateral notice is very different from a caution.\textsuperscript{65}

One of the key features of a unilateral notice is that no evidence need be lodged in support of the application. However, this is also one of its most problematic qualities, as identified by the Justice Committee. One option would therefore be to abandon the possibility of the entry of a notice without the provision of evidence, and require all applications to be supported by evidence to satisfy the registrar of the validity of the claim, as for agreed notices at present.

\textsuperscript{64} LRA 2002, s 32(3).

\textsuperscript{65} See para 9.16 above.
This option, which is essentially a return to a single notice system, would meet many of the objectives we set out for a notice system at paragraph 9.50 above. As the notice would not be entered unless Land Registry was satisfied that the interest was valid, there would be no need to provide for a mechanism for the registered proprietor to apply to cancel the notice. The notice would therefore be a secure form of protection for the beneficiary. The register would contain full details of the interest, so the goal of making the register as complete and accurate as possible would be met. The registered proprietor should not be given undue cause for concern as the beneficiary would need to establish that they were entitled to the interest in question before a notice could be entered. Although the entry of the notice on the register would not be as quick as is currently the case with a unilateral notice, due to the need for Land Registry to examine the evidence, the application would secure priority in the meantime through its entry on the day list.

However, the objective that a notice should be capable of being entered swiftly may be hampered if a party has to delay submitting the application in order to gather together all the evidence. While a registered proprietor may prefer the evidence to be submitted at the same time as the application for the notice, this preference has to be balanced against the third party’s need to secure priority for his or her interest (for example, if the third party becomes aware of an impending sale which could result in loss of priority). A system which required all supporting evidence to be lodged at the point of application could make it impossible for the holder of a right to take swift action to protect it.

This objection is not insurmountable. It could, for example, be provided that an initial application may be made for a notice without supporting evidence. The application would be entered on the day list and would secure priority from that point. However, the legislation could provide that the application would automatically be cancelled if supporting evidence was not then received within a certain period of time.

We mention for completeness that there is an alternative type of single notice system, which would take the form of the other extreme to that set out above. Under such a system, any notice could be entered on the register without evidence, as long as the application was not groundless. The registered proprietor could then object to the application, or apply for cancellation of the notice, at which point evidence to support it would need to be supplied. We have not considered this option, for a number of reasons. In non-contentious cases where the registered proprietor is unlikely to object to the entry of the notice (eg where they are a party to the document in question), details of the interest may never find their way onto the register. While this issue could be dealt with by providing that this form of notice could be “warned off” at any time, requiring the production of evidence, this reduces all notices to the precarious nature of unilateral notices, giving the beneficiary no security. It also undermines the quality of information on the register. We therefore believe that this option is not worth pursuing.

The notice would, of course, be capable of removal if the interest it protected came to an end, as is presently the case with agreed notices under LRR 2003, r 87.
9.70 It seems to us that the main difficulty with a single notice procedure, which always requires the submission of evidence in support, is that it would make it very difficult for parties who wish to keep the details of the protected interest confidential to do so. This is because, under section 66 of the LRA 2002, any person may inspect any document kept by the registrar which is referred to in the register of title, or any other document kept by the registrar which relates to an application to him.

9.71 One way around this difficulty could be to provide that no evidence need be supplied in support of the application if the registered proprietor has consented to the application. This would be the case in many commercial arrangements which currently utilise the unilateral notice procedure in order to obtain confidentiality for the protected interest. However, we are not convinced that this is a desirable solution. First, it is possible that parties would choose this option by default, even in cases where currently they would make an application for an agreed notice accompanied by a copy of the document creating the right. This practice would result in less information being available on the register, which would be a backwards step in land registration terms. Secondly, where no evidence has been supplied in support of a notice on the register, the registrar will be unable to satisfy him or herself as to the validity of the claim. It seems to us that in such cases there must be an easy way of applying to remove the notice. Otherwise, the register could become cluttered with uncertain and potentially invalid entries, which could have an adverse effect on the marketability of a title. At present that ability is built into the unilateral notice regime, whereby the registered proprietor can apply at any time, and without giving a reason, for its cancellation. A similar ability could, in theory, be built in to option 1. However, this ought not to apply where evidence has been supplied to satisfy the registrar of the validity of the interest, as in this instance the beneficiary of the notice should be able to rest safe in the knowledge that the interest has been securely protected and cannot be challenged. If there are two possible methods of removing a notice, depending on whether or not evidence has been supplied in support, this points towards a dual, not a single, notice system.

9.72 An alternative solution to the confidentiality problem outlined above would be to provide that evidence of the interest claimed must be submitted to Land Registry, but would not be more widely available. It would not appear on the register and would not be available to an applicant who requested a copy of the evidence. In this way, Land Registry could satisfy themselves as to the validity of the interest claimed at the point of entry of the notice. It then becomes less important to build in a mechanism for removal of the notice from the register, save in the circumstances in which an agreed notice may currently be removed.

68 The objective of the LRA 2002 is that the register should be a complete and accurate reflection of the state of the title of the land at any given time, with the absolute minimum of additional enquiries and inspections: Law Com 271, para 1.5.

69 See para 9.104 below.
There is currently a procedure which may be used in order to exempt certain information from the public right of inspection. This is authorised by section 66(2) of the LRA 2002, which provides that the right to inspect is subject to rules which may provide for exceptions to the right and impose conditions on its exercise. In pursuance of that power, rule 136 of the LRR 2003 provides that a person may apply for the registrar to designate a document an “exempt information document” if he or she claims that the document contains “prejudicial information”. Prejudicial information is defined as:

1. information that relates to an applicant who is an individual and which if disclosed would, or would be likely to, cause substantial unwarranted damage or substantial unwarranted distress to the applicant or someone else; or

2. information that if disclosed would, or would be likely to, prejudice the commercial interests of the applicant.

This procedure operates as follows. The applicant will submit with the application a copy of the document which excludes the prejudicial information, alongside a full unedited copy so that Land Registry can see what information has been excluded. Provided the registrar is satisfied that the application is not groundless, he or she must designate the document as an exempt information document.

If the application is successful, only the copy of the document which excludes the prejudicial information will be subject to the general right of inspection under section 66 of the LRA 2002. However, a person may apply at any time for a copy of the exempt information document (in other words, the full unedited copy). In that instance, Land Registry will notify the person who made the original application for the document to be designated as an exempt information document, and that person will have an opportunity to make representations to the registrar.

The registrar must provide a full, unedited copy of the document to the person who has applied for it if:

1. none of the information excluded from the document is prejudicial information; or

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70 LRR 2003, r 131.
71 The registrar may cancel the application if he considers that designating the document an exempt information document could prejudice the keeping of the register: LRR 2003, r 136(4).
73 Unless he or she is satisfied that such notice is unnecessary or impracticable: LRR 2003, r 137(3).
(2) although all or some of the information excluded is prejudicial information, the public interest in providing a full copy of the document to the applicant outweighs the public interest in not doing so.\textsuperscript{75}

9.77 From this it can be seen that the exempt information document procedure does not provide a failsafe means of keeping information off the register and away from the public right of inspection. This is contrasted with the unilateral notice procedure, under which an applicant need not send the supporting document to Land Registry at all. We also recognise that the process of preparing an edited version of a document is an additional step in the application process which would need to be factored into an impact assessment of the effect of our proposals. If Option 1 (a single notice system) is supported by consultees, we would wish to know how suitable the current scheme of exempt information documents is considered to be for preserving the confidentiality of interests protected by a notice under this system.

9.78 In terms of the procedure for a notice application under option 1, it is likely to follow the current regime which applies to agreed notices. On that basis, the notice would only be entered if the registrar was satisfied as to the validity of the applicant’s claim. In most applications for an agreed notice, Land Registry will determine the application on the basis of the evidence lodged without involving the proprietor. Land Registry is not obliged to serve notice on the registered proprietor before approving an application for an agreed notice, but there are circumstances in which it may exercise its discretion to do so.\textsuperscript{76} If Land Registry exercised its discretion to serve notice on the registered proprietor, who then objected to the application, a dispute would result. If the parties could not agree, the dispute would be referred to the Tribunal under section 73 of the LRA 2002.\textsuperscript{77} The application would remain on the day list in the meantime.\textsuperscript{78}

\textsuperscript{75} LRR 2003, r 137(4).

\textsuperscript{76} See para 9.13 above. LRR 2003, r 17 enables the registrar, before completing or proceeding with an application, to give notice to anyone if he considers that it is necessary or desirable.

\textsuperscript{77} See paras 9.25 to 9.28 above.

\textsuperscript{78} This is not without its disadvantages: see para 9.89 below. If Land Registry rejected the application on the basis of inadequate evidence supplied without reference to the registered proprietor, the applicant may of course submit a further application with stronger evidence. If the applicant felt aggrieved by Land Registry’s decision to reject the application, it would be possible to apply for judicial review of that decision, but this would be a last resort. The applicant may also consider issuing court proceedings against the registered proprietor for a declaration of the existence of the right, following which an application for an agreed notice could be made on the basis of the court order obtained. In the meantime, where a declaration from the court is being sought, the applicant could apply for the entry of a notice in respect of a pending land action.
We are mindful of the fact that Option 1 could be considered somewhat radical. This is because it has been possible since at least the coming into force of the LRA 1925 for a third party interest to be protected on the register immediately on application, with little cause needing to be shown. We have, however, been reflecting on why there should be a need for a method of protection which has this feature. The significance cannot be one of priority, as priority is preserved from the time that the application to enter a notice is submitted.\(^7\) We suggested at paragraphs 9.68 to 9.69 above that, in order to ensure that priority can be obtained swiftly, a mechanism could be built in which permitted the supporting evidence to follow the initial application within a certain period of time. We discuss at paragraph 9.106 below the potential impact, in terms of delay, that a disputed application could have on subsequent applications that rank behind it. Other than this point, however, we are not currently convinced that immediate entry of a notice on application is an essential feature of a land registration system.

The benefit of a single notice procedure, where evidence in support of the notice always has to be provided, is that any issues or disputes can be dealt with upfront, at the time of application. Option 1 is also attractive in terms of its simplicity: a single procedure applicable to all notices.

Nonetheless, the difficulty in adapting the Option 1 procedure to keep sensitive information off the register has led us to consider other options for reform.

OPTION 2 – RETAINING TWO TYPES OF NOTICE, BUT ADAPTING THE PROCEDURE FOR UNILATERAL NOTICES – AN OVERVIEW

Option 1 comprised the replacement of agreed and unilateral notices with a single form of notice, which must be supported with evidence. We have seen that this presents difficulties for those who wish to keep sensitive details of their land transactions off the register. We therefore also explore another option, which would retain the distinction between agreed and unilateral notices, but tighten up the procedure in relation to unilateral notices in order to provide greater protection for the registered proprietor. We also make proposals under this option for a change in the existing terminology used to describe the two types of notice under the LRA 2002.

As we have identified, one of the main problems with the current procedure is the fact that the beneficiary of the notice cannot be required to produce evidence in support of his or her claim at any point before a dispute reaches the Tribunal. Option 2 addresses this deficiency. There are two variants of Option 2, which differ according to the point at which the evidence must be provided.

Our 2001 Report noted that:

\(^7\) LRR 2003, r 20(1).
The essence of a unilateral notice is that it does not require the consent of the registered proprietor of the estate or charge to which it relates. It can be entered even though the applicant has not satisfied the registrar as to the validity of his or her claim.80

9.85 In keeping with this idea of the function of a unilateral notice, the first variation of Option 2 (which we will call Option 2A) would retain the ability for an applicant to apply for, and enter, a unilateral notice without the production of any evidence to Land Registry. Land Registry would notify the registered proprietor that a unilateral notice had been entered on the title. The registered proprietor would then be at liberty to apply for cancellation of the notice. So far, this mirrors the existing procedure. However, if the registered proprietor applies for cancellation, the beneficiary of the notice would then be required to produce evidence in support of the interest claimed if he or she wished to maintain the notice on the register. If no such evidence was provided within a given time frame, the notice would be cancelled. On the production of evidence, this could be reviewed by the registered proprietor and by Land Registry. If the parties could not agree as to the existence of the interest, a dispute would arise which would be referred to the Tribunal as at present.

9.86 Option 2A would enable the entry of a unilateral notice without delay (objective 2). It would also enable those who wish to keep information off-register to do so, provided the registered proprietor did not apply for cancellation of the notice (objective 5).81 It could still result in anxiety for a registered proprietor who receives notification that a unilateral notice has been entered against his or her title. However, the registered proprietor will not be forced into proceedings before the Tribunal without seeing what evidence the beneficiary of the notice has to support the claim to an interest. This change should enable the registered proprietor to make a more informed decision about whether to sustain a challenge to the notice.


81 This is no different from the present system of unilateral notices.
The second variation of Option 2 (which we will call Option 2B) is to require the applicant for the notice to produce their evidence at an earlier stage in the process. If that stage is the point of application itself,\(^{82}\) this turns an application for a unilateral notice into an application for an agreed notice – which is essentially Option 1 above. So Option 2B does not require evidence to be provided in support of the initial application. However, the difference between this procedure and Option 2A is that, under Option 2B, the notice is not entered in the register immediately. Instead, on receipt of an application for a unilateral notice, Land Registry will notify the registered proprietor of the application. The proprietor would then have an opportunity to object to the application. The priority of the application would be preserved in the meantime, as it would be entered on the day list.\(^{83}\) In instances where the registered proprietor has in fact consented to the interest (for example, because he or she was a party to the document creating it), no objection should be forthcoming and the notice can then proceed to be entered on the title. If the registered proprietor did object, this would trigger the provision of evidence in support of the claim in much the same way as under Option 2A. Any ensuing dispute would be referred to the Tribunal. Land Registry could not complete the application for the unilateral notice until the dispute had been resolved. It would therefore remain on the day list as a pending application.

Option 2B prevents the unilateral notice being entered on the register in cases where the registered proprietor objects. It therefore represents a move away from the vision of a unilateral notice in our 2001 Report. We are mindful of one of the concerns of stakeholders, articulated at paragraph 9.37 above, that some registered proprietors may feel a sense of injustice where a notice is entered on their title without their consent. Registered proprietors may feel less threatened by being notified of a pending application against their title, as opposed to notification of a notice having already been entered, which may feel like something of a “done deal”. In reality, however, the ability to apply for cancellation of the unilateral notice means that the end result is much the same.

\(^{82}\) Subject to a grace period for provision of the evidence: see para 9.69 above.

\(^{83}\) If the application was subsequently completed and the notice entered on the register, the entry would take effect from the date the application was entered on the day list: LRR 2003, r 20(1).
9.89 There should be no adverse effect on the priority of the unilateral notice if it was not entered immediately: the application for the notice will have been entered on the day list when it was received by Land Registry and its priority will take effect from that time.\textsuperscript{84} However, for so long as there is an uncompleted application on the day list, the completion of any subsequent applications on that title will be prevented. The unilateral notice application therefore has the potential to cause delays to other pending applications which rank behind it. Such pending applications, as and when completed, would of course take subject to the unilateral notice, which ranks ahead of them. It may be that the effect of a unilateral notice appearing on the title on the one hand, and an application for a unilateral notice appearing on the day list on the other, are the same from a purchaser’s perspective. In either case the existence of the unilateral notice would be of sufficient concern that a purchaser would not be prepared to complete his or her purchase until the notice (or application for a notice, as the case may be) had been disposed of. However, it seems to us that there may be practical reasons why a subsequent applicant may need his or her application to be completed, even if this will be subject to the unilateral notice. If the registered proprietor does object to the application for the unilateral notice, and the consequent dispute is referred to the Tribunal, the application could remain on the day list for many months until the matter is determined. It does not seem to us desirable that the day list should be “clogged up” in this way.

9.90 We are therefore provisionally of the view that the unilateral notice should still be entered on the register immediately on application.\textsuperscript{85} Any concerns about the entry of the notice being a “done deal” could be addressed through Land Registry guidance and, in particular, the correspondence between Land Registry and registered proprietors.\textsuperscript{86}

9.91 Our preference between the two options outlined above is therefore for Option 2A. In the next section we will consider this option in more detail.

\textsuperscript{84} LRR 2003, r 20(1).

\textsuperscript{85} If consultees favour Option 2B, we are of the view that a relatively short time period should be allowed for the registered proprietor to object. We invite consultees’ views as to what this time period should be. Currently a beneficiary of a unilateral notice has 15 business days to respond to an application for cancellation of the notice: LRR 2003, r 86(3). We are provisionally of the view that it would not be appropriate to allow any longer period for a registered proprietor to object to the entry of a unilateral notice under Option 2B. If the registered proprietor does not object within this time frame, the unilateral notice will be entered on the register. However, the notice may still be challenged at any time thereafter, as it is inherent in the nature of unilateral notices that they are precarious. If the registered proprietor does object within the time laid down, the matter will proceed along the same lines described in para 9.85 and following above.

\textsuperscript{86} Currently the letter which Land Registry sends to a registered proprietor in these circumstances informs the proprietor of the form that should be used if the proprietor wishes to apply to cancel the notice, and advises the proprietor that this form may be downloaded from Land Registry’s website. It would be possible, for example, to go further so that Land Registry could enclose the application form with the notification to a registered proprietor that a notice had been entered on his or her title.
9.92 We explained at paragraph 9.12 that experience has shown that the current terminology of agreed and unilateral notices may be confusing for stakeholders, and arguably does not reflect the ways in which these notices can come to be entered on the register.

9.93 At present, an agreed notice gives full details of the interest protected. In the proposed scheme which follows, we will use the term “full notice” to denote a notice which reveals such details of the interest protected as an agreed notice would currently supply. We will use the term “summary notice” to describe a notice which does not contain all the details of an agreed notice: the notice contains a “summary” of the interest protected to the same extent as the current unilateral notice, but it is possible for some information to remain off the register.

9.94 It is important for the integrity of the register that as many interests as possible are protected by way of a full notice. At present, the vast majority of applications to note rights such as restrictive covenants and easements would be made by way of an agreed notice. Full details of the rights, including a copy of the document creating them, would therefore be available to someone inspecting the register. We have no wish to disturb this practice, which works well.

9.95 It would therefore be possible under our proposals to enter a full notice:

1. if the registered proprietor agrees; or
2. if the registrar is satisfied as to the validity of the applicant’s claim.

This is intended to mirror the position in relation to the entry of an agreed notice under the current law.\(^\text{87}\) It would encompass applications which were accompanied by the document creating the third party right, from which Land Registry could verify the validity of the claim. It would also include applications consequent on a court declaration of the existence of the third party right.

9.96 We wish to retain a mechanism for parties to keep everything other than the basic details of their property rights off the register, in the circumstances in which they can currently do so. It would therefore also be possible under our proposals to enter a summary notice.

9.97 We set out below how we envisage that the summary notice procedure would work. At Figure 1 below we illustrate the procedure in the form of a flowchart, and highlight in bold text where it differs from the current unilateral notice procedure.

\(^{87}\) LRA 2002, s 34(3).
Figure 1:

Applicant applies for summary notice. Application gives basic details of the interest for which protection is sought.

Application goes on the day list upon receipt at Land Registry.

A notice is entered on the register.

Yes

Land Registry notify the registered proprietor. The registered proprietor is told that they may apply for cancellation.

Yes

The registered proprietor applies for cancellation.

No

Reject

No

Land Registry check that the details supplied indicate that there is an interest which is capable of protection.

Yes

Land Registry notify the beneficiary of the notice of the registered proprietor’s application to cancel the notice.

The beneficiary of the notice makes an initial response within 15 business days (may be extended to up to 30 business days).

Yes

No

Notice is cancelled

No

Is the beneficiary’s objection groundless?

Yes

The beneficiary has a further 25 business days (40 business days in total) to produce evidence in support of the notice.

No evidence is supplied

Evidence is given

No

Land Registry examine the evidence. Is Land Registry able to determine the application on the basis of the evidence supplied?

No

Parties attempt to negotiate to reach an agreement. If no agreement is reached within 6 months Land Registry refer the dispute to the First-tier Tribunal

Yes

Does the evidence satisfy the registrar as to the validity of the interest claimed?

No

Notice remains on the register

Yes
An applicant would make an application for a summary notice giving basic details of the interest which is sought to be protected, along the lines of the current form UN1. Land Registry would check that the details supplied indicate that there is an interest which is capable of protection by a notice on the register. Provided that they do, a summary notice would be entered on the register.

We initially considered whether the procedure governing an application for a summary notice should distinguish between applications which are made with the consent of the registered proprietor, and those which are made without. In most of the scenarios in which a unilateral notice is currently sought for reasons of confidentiality, our understanding is that the interest protected has usually been expressly granted by the registered proprietor. The existence of the interest is not therefore in dispute. Either the desire to keep the sensitive details of the deal off the register is shared by both parties, or alternatively it is open to the grantee of the interest to negotiate for the grantor’s agreement to protection by way of a unilateral notice only. We understand that commercial agreements commonly include a provision which forbids the grantor from objecting to the entry of a unilateral notice, and from applying for its removal.

On reflection, however, we believe that it is important that a registered proprietor should be notified of an entry that is made on his or her title. It is reasonable that a registered proprietor should be aware that another person has registered rights over his or her property, and we identified this in our 2001 Report as an important safeguard of the unilateral notice procedure. If Land Registry notifies the registered proprietor of the entry of a summary notice in all cases, it does not add anything to the process to ask at the initial stage whether the application is made with the registered proprietor’s consent.

It would be open to the registered proprietor to apply at any time for cancellation of the summary notice. This mirrors the current procedure whereby a unilateral notice may be challenged. If the beneficiary of the notice objected, this would trigger the need to produce evidence of the claim as described further in paragraph 9.105 below.

It is important that the registered proprietor’s ability to challenge a summary notice is retained. This was a further reason why we dismissed the need to build in a step in the process asking whether the registered proprietor had consented to the entry of the notice. It could be argued that a notice should not be capable of challenge when the registered proprietor has consented to its entry. However, we believe that the availability of this procedure is important for three reasons.

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88 See para 9.21 above.
First, land changes hands over time and the identity of the registered proprietor may change. The new registered proprietor has not consented to the entry of the notice and should be able to apply for its removal. If the beneficiary of the notice wants the security of knowing that his or her notice cannot be challenged in this way, they ought to prove their claim and apply for a full notice. Secondly, it is important for the integrity of the register that rights which do not appear in full on the register can be challenged. Take for example a right which is granted by a registered proprietor and protected by way of a summary notice. The registered proprietor then dies. No copy of the agreement which granted the right can be found with the deeds, and the person with the benefit of the notice cannot be contacted. A sale of the property by the deceased’s personal representatives could be delayed or even prevented altogether if a buyer cannot ascertain the nature of the right which has been protected. Thirdly, the entry of the summary notice, like a unilateral notice at present, confers immediate priority on the interest protected. It does so without the beneficiary of the interest needing to prove their case. This is a valuable benefit of a unilateral notice over the caution which it replaced, but it must necessarily come with safeguards, of which the ability of the registered proprietor to apply for the notice to be cancelled is one. As outlined above, we believe that in practice many parties will transact on terms which, as a matter of contract, prevent the grantor of the interest from applying for cancellation, but we believe that this point is best left to freedom of contract and not built into the land registration legislation.

If the registered proprietor applied to cancel the summary notice, Land Registry would notify the beneficiary of the notice, who would then have a set period of time in which to respond. The beneficiary of a unilateral notice currently has 15 business days in which to object to an application to cancel. This period may be extended to 30 business days at the beneficiary’s request. Under the present system, all the beneficiary has to do within this time frame is demonstrate a case for the retention of the notice that is not groundless. Under our proposed system, the beneficiary of a summary notice would be required to do much more if an application to cancel the notice is made. We are provisionally of the view, however, that the beneficiary should be allowed some time to gather the evidence in support of the interest claimed. We therefore propose that the beneficiary should have to make an initial response within the current time frame of 15 business days. If the beneficiary does not do so, the summary notice will be cancelled.

89 LRA 2002, s 36(3); LRR 2003, r 86(3).
90 LRA 2002, s 73.
91 Subject to the right to apply for an extension: see para 9.106 below.
If the beneficiary lodges an initial objection within the time frame allotted then, provided that this initial objection is not groundless, and provided the registered proprietor does not at that stage wish to withdraw his or her application to cancel, the beneficiary would be afforded a further period of time in order to gather their evidence in support of the interest claimed. We would like to consult on what period of time consultees believe should be appropriate for this purpose. We bear in mind that under our procedure there will be a heavier burden on beneficiaries to produce evidence than is currently the case. Equally, however, there is merit in the argument that a person who wishes to lodge a notice against another’s title should be sure of their case before applying for the notice and should have carried out much of the work required in support before so doing. We are also mindful that a dispute over a unilateral or summary notice can delay a pending transaction with the title in the meantime, which can cause hardship to the registered proprietor. Bearing all that in mind, we provisionally propose that the beneficiary of the notice should have a period of no more than 40 business days (8 weeks) in total to provide a substantiated response to the application for cancellation of the summary notice. This period includes the initial period of 15 business days in which to submit the initial objection. That initial period may, as at present, be extended to 30 business days at the request of the beneficiary of the notice, but time will continue to run on the final deadline so that all evidence which the beneficiary wishes to be considered must be submitted within 40 business days of the notification of an application to cancel.

If the beneficiary of the summary notice does not lodge evidence in support of his or her claim within 40 business days, the application to cancel will be completed and the summary notice will be removed.

If the beneficiary of the summary notice lodges evidence in support of their claim within 40 business days, Land Registry will examine the evidence lodged.

For arguments to the contrary, see the discussion at paras 9.68 to 9.69 above.
We have considered what threshold the evidence supplied should meet in order to sustain the objection. It seems to us that there are only two choices, borrowed from the current agreed and unilateral notice procedures respectively. Either the beneficiary of the notice must satisfy the registrar as to the validity of the interest protected by the notice, or, alternatively, the requirement could simply be that the evidence supplied shows that the objection is not groundless.

On a “groundless” test, if the evidence shows that the objection is groundless then Land Registry would dismiss the objection and proceed to cancel the summary notice. If the evidence shows that the objection is not groundless, then Land Registry would, as at present, attempt to assist the parties in reaching an agreement in cases where it is appropriate and likely to be useful. If, having considered the evidence, the parties cannot dispose of the objection by agreement, the dispute will be referred to the Tribunal.

If, on the other hand, the beneficiary of the notice was required to produce evidence to satisfy the registrar as to the validity of the interest protected by the notice, then this would put the registered proprietor in a similar position as if the beneficiary of the unilateral notice had applied for an agreed notice in the first place. If the beneficiary of the notice was unable to produce the requisite evidence to meet the threshold, the notice would be cancelled. As in the case of applications for an agreed notice at present, however, there may be grey areas where Land Registry is unable to determine the matter on the basis of the evidence supplied and needs to involve the registered proprietor. In this instance, if the parties cannot agree as to how the matter should be dealt with, a dispute will arise which may – eventually – be referred to the Tribunal.

The difficulty with setting the threshold which the evidence must meet in order for the notice to be sustained on the register at a test which requires the registrar to be satisfied as to the validity of the interest is that it may present too high a hurdle for applicants with rights which are difficult to prove (for example, a right claimed by virtue of a proprietary estoppel). Removal of the notice in these circumstances leaves the former beneficiary of the notice exposed in the event of a subsequent disposition of the land, even if in fact he or she does have the right claimed.

The threshold is a point along a spectrum, where “not groundless” is the lowest point of the spectrum, and the highest point would be absolute satisfaction, where there was no room for any doubt about the existence of the interest. The latter would be impractical to use as the basis of a threshold for the entry of a notice of a property right (consider for example an application to note an easement which has been acquired through prescription, as well as interests which are the particular focus of stakeholders in the context of this part of the consultation paper such as chancel repair liability and manorial rights). Such a high threshold would be likely to be very difficult for applicants to meet, even in cases where the right was not contested. The current test for the entry of an agreed notice means, in effect, that the registrar is satisfied that it is more likely than not that the interest exists (see Land Registry, Practice Guide 52: Easements Claimed by Prescription (August 2015) para 3.1).

It seems to us that it is not possible to select any point along the spectrum other than the tests currently employed in the LRA 2002, but we would like to hear if consultees disagree. It has been suggested that a possible alternative test is whether (in the case of an objection) the objection has a “real prospect of success”: see K Harrington and C Auld, “The new Land Registration Tribunal: neither fish nor fowl?” [2016] Conveyancer and Property Lawyer 19, 22. However, as the authors acknowledge, this is a test which is currently applied by the courts. We do not believe that it would be an easy test for Land Registry to apply, taking into account the very different context in which it operates – and as set out at para 9.50 above the law must be clear and straightforward to apply.
On balance, we are provisionally of the view that, if the registered proprietor applies to cancel the unilateral notice, then the evidence which the beneficiary of the notice must provide in order to sustain the notice ought to be equivalent to that which would be needed if an agreed notice had been applied for.

The procedure outlined above retains the benefit of the unilateral notice mechanism in terms of speed of entry of notice on the register, without the need to provide supporting evidence at the point of application. It also builds in an ability, with the consent of the registered proprietor, to keep confidential details of an interest off the register. However, it strengthens the current unilateral notice procedure to provide greater protection for the registered proprietor against claims made against a title without the production of evidence. Knowing that they may be required to produce evidence of their claim may provide a deterrent effect to those tempted to apply for the registration of a summary notice without first carrying out appropriate investigations. However, it should not put off those who are legitimately entitled to make a claim. Both the registered proprietor and Land Registry will have an opportunity to review the evidence lodged in support of the claim before a dispute is referred to the Tribunal, which evens out the disparity of information available to both sides under the current unilateral notice procedure. It should encourage more effective negotiations and therefore hopefully reduce the number of disputes which have to be referred to the Tribunal. This will not only result in cost savings but may give registered proprietors the tools to negotiate when previously they may have felt they had no choice but to withdraw their cancellation application in order to avoid being dragged into Tribunal proceedings.

We accept that, if our proposals were implemented, there may remain cases where, after the production of evidence, the parties are still unable to reach agreement, and so a referral to the Tribunal is made. We acknowledge that this is far from ideal for all parties concerned. However, there will always be a need for the judicial system to intervene to determine the existence of property rights. A land registration system alone cannot provide the solution to every difficult case.

We provisionally propose that it should be possible to protect a right by one of two kinds of notice: a full notice and a summary notice.

Do consultees agree?

We provisionally propose that an application for a summary notice should not need to be accompanied by any evidence to support the interest claimed.

Do consultees agree?

If the beneficiary of the summary notice does provide evidence to satisfy the registrar of the validity of his or her claim, there is a strong argument that from that point onwards the notice should be secure and not vulnerable to a further application for cancellation. If consultees support our proposed summary notice procedure then we will consider whether further protection should be provided to the beneficiary of the summary notice in this situation. Some protection may be available through LRR 2003, r 202 (provision for payment of costs by a party in relation to proceedings before the registrar, where the costs have been occasioned by the unreasonable conduct of that party).
We provisionally propose that, if a registered proprietor applies to cancel a summary notice, the beneficiary of the summary notice will be required to make an initial response within 15 business days (subject to an extension of up to a maximum of 30 business days). The response must demonstrate a case for the retention of the notice which is not groundless.

Do consultees agree?

We provisionally propose that, in the event that the beneficiary submits an initial response objecting to cancellation of the notice, the beneficiary must produce evidence to satisfy the registrar of the validity of the interest claimed. Evidence must be provided within a maximum of 40 business days of the original notification of the application to cancel.

Do consultees agree?

If Option 2 were taken forward, it would be necessary to stipulate how existing unilateral notices should be treated. Should they continue to be governed by the existing regime (with the result that a beneficiary cannot be required to produce evidence in support of his or claim in the event of an application to cancel being made by the registered proprietor)? We believe that this is undesirable and that the similarities between the current system and our proposals mean that such a beneficiary should be subject to the requirement to produce evidence.

We provisionally propose that where an application is made to cancel a unilateral notice following implementation of our reforms, the beneficiary of that notice should (following an objection to cancellation) be required to produce evidence to satisfy the registrar of the validity of the interest claimed.

Do consultees agree?

RECOMMENDATIONS OF THE MANORIAL RIGHTS COMMITTEE

We noted above\(^{95}\) that the House of Commons Justice Committee made a number of recommendations in its report on Manorial Rights which are pertinent to our review of the law and procedure relating to notices under the LRA 2002.

The Committee outlined its recommendation that the Law Commission should consider manorial rights in its current Land Registration project in paragraphs 31 and 32 of the report:

\(^{95}\) At paras 9.41 to 9.45 above.
In light of the above, we believe there is a case for considering improvements to the existing processes and procedures for registering manorial rights as defined and required by the 2002 Act, and that there is an opportunity for the Law Commission to do so as part of its forthcoming project on land registration. We note that the Law Commission considers this project to be a wide-ranging review of the 2002 Act, with a view to amendment of elements that could be improved in light of experience with its operation. We would consider the inclusion of such work on manorial rights within the Law Commission's current project to be separate and in addition to any consideration of a wider review of the law related to the general principle of manorial rights, which would not appear to fall within the scope of the Law Commission's current project.

In this context, we recommend that the following should be considered as proposals for change to the existing process:

- Ending the use of unilateral notices as a mechanism to place manorial rights claims on the register, and providing for the use of agreed notices as the only mechanism by which manorial rights may be registered. Such changes would ensure that claimants are required to provide suitable supporting evidence before an entry on the register is made.

- Changing where current and future claims to manorial rights sit on the register and, in particular, moving those currently placed on the charges register to elsewhere on the register.

- Measures to strengthen the ability of the Land Registry to provide legal advice to either party, or tailored advice about individual notices.

- Reinstating the ability of the Land Registry to adjudicate in some cases where disputes over manorial rights claims arise, although resolution through the Land Tribunal or Courts may on some occasions still be necessary.

9.124 The Government responded to the Justice Committee in July 2015. It said:

The Government recognises the anxiety that the registration of manorial rights under the process established by the Land Registration Act 2002 has caused to some property owners. Registration has made patent the existence of claims to manorial rights over land that had sometimes been obscure or even unknown.
The Government appreciates the concerns expressed by some of the witnesses to the Committee that the registration of a right of which they were previously unaware against their property may reduce its value or hinder its sale. The Government is not aware that the problems feared as a result of the requirement of registration have actually materialised in practice. In this light, the Government considers that committing resources to extensive research or a fundamental review of manorial rights as recommended by the Committee would at this time be disproportionate.

Nonetheless, in response to the concerns of home owners and others affected, the Government will keep the issue of manorial rights under review and, if significant problems arise in practice, will give further consideration to the need for reform in the context of discussions on a future Law Commission programme. In the meantime, the Law Commission will consider the Committee’s recommendations on unilateral notices and look at what statistical evidence is available as part of its current land registration project.97

... 

The Law Commission has confirmed that it will consider the recommendations in respect of ending the use of unilateral notices in manorial rights applications and of changing where manorial rights claims appear in the register. This will be carried out within the Commission’s Land Registration Project as part of a wider review of the protection of third party interests. In support of that work the Land Registry will look at what statistical evidence is available.

Currently the Land Registry does not provide legal advice. If it were to do so, this would inevitably lead to conflict of interest issues. The Government believes it is important that the Land Registry remains impartial.

The judicial functions of the Land Registry were transferred to what is now the First-tier Tribunal in 2003. This followed a review by the Law Commission which concluded that there could be a perception that a senior lawyer in the Land Registry is not sufficiently independent since some cases may involve the decisions of officials of the Land Registry. The Commission recommended that, as a matter of principle, it was desirable to create a completely independent office for adjudication. The Government believes that this still holds good and so the present arrangements should continue.98

... 

97 Above, paras 3 to 5.
98 Above, paras 7 to 9.
For [the reasons given in previous paragraphs, not cited here], and in particular in the absence of clear evidence that significant practical difficulties are being caused by the existence of manorial rights, the Government does not consider that referral of a specific project to the Law Commission outside its normal programme of law reform or the commitment of resources to the necessary preliminary work on the financial implications of abolition is currently justified. For similar reasons we do not believe that applying resources to undertaking the research proposed by the Committee in relation to the exercise of manorial rights would currently represent a worthwhile use of public money.

The Government will, however, keep the issue under review and will give further consideration to the need for reform in the context of discussions on a future Law Commission programme in the event of significant problems arising in practice.99

Based on this response, as part of the current land registration project we have examined two particular recommendations of the Justice Committee:

(1) ending the use of unilateral notices in manorial rights applications; and

(2) changing where manorial rights claims appear in the register.

We believe that the reforms which we have provisionally proposed100 will address the mischief at which these recommendations of the Committee were aimed. In this part of the chapter we will explain why we favour a different approach to that taken by the Committee.

99 Above, paras 18 to 19.

100 See paras 9.116 to 9.121 above.
The Committee recommended that manorial rights should only be capable of protection by agreed, rather than unilateral notices. It will be recalled that the registered proprietor's consent is not necessarily required for the entry of an agreed notice: an agreed notice may be entered if the applicant satisfies the registrar of the validity of his or her claim. Accordingly, the reason for this recommendation of the Committee was so that applicants could be required to produce evidence in support of their claims, which is not currently the case where a unilateral notice is applied for. The provisional proposals we have made above, however, would build this requirement into the unilateral notice process. We note that rule 80 of the LRR 2003 currently provides for certain interests to be protectable only by way of an agreed, rather than unilateral, notice. Our 2001 Report reveals that the reason for singling certain interests out for protection solely by way of an agreed, rather than unilateral, notice was not in fact for the protection of the registered proprietor, but for the protection of the beneficiary of the notice, as the notice would then be secure and not vulnerable to an application for cancellation. We believe that to add manorial rights to this list of interests would be to distinguish such rights unduly from other types of third party right which can currently be protected by a unilateral notice. The provisional proposals we have made will achieve the result which the Justice Committee was seeking; namely, requiring a person claiming a right over land to produce evidence in support of his or her claim.

The Committee also recommended that consideration be given to locating unilateral notices to protect manorial rights in a different part of the register: the Property Register, as opposed to the Charges Register. The rationale for this was that there is an analogy with an entry made on first registration as a result of inspection of the title deeds to the effect that manorial rights are excluded from the title – which will appear in the Property Register. There may be a perception that entries in the Property Register are of less concern to those examining the register than entries in the Charges Register.

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101 See para 9.11 above.

102 The interests dealt with in this way are home rights; a HM Revenue & Customs charge in respect of inheritance tax; an order under the Access to Neighbouring Land Act 1992; a variation of a lease under section 38 of the Landlord and Tenant Act 1987; a public right; and a customary right.


The Property Register has two primary functions: to describe the extent of the property, and show which rights benefit the property.\textsuperscript{105} It is for the former reason that, where it is apparent on first registration that rights reserved to the lord of the manor are excepted, an entry will be made on the Property Register. The Charges Register, in contrast, shows matters which adversely affect the property.\textsuperscript{106} A unilateral notice represents a claim to an interest which burdens the registered estate,\textsuperscript{107} and therefore we believe the correct place for this is in the Charges Register.\textsuperscript{108} A conveyancer should of course examine all entries on a title, in all parts of the register. One of the reasons why a unilateral notice may give cause for concern is that the person claiming the interest has taken positive action to protect that interest. This may (but does not necessarily) indicate that there is an intention to enforce the right. It may also indicate (given that no evidence currently has to be provided in support of a unilateral notice) the potential for a dispute. This contrasts with entries made routinely at the time of first registration, which may have been some time ago, and which will in any event have been made on the basis of evidence supplied to Land Registry. Such entries accurately reflect the state of the title but do not indicate that there has been recent activity by those with the benefit of the rights.\textsuperscript{109} In our view this cause for concern with a unilateral notice would remain wherever on the register the notice appeared, and so for this reason also we do not believe that changing where unilateral notices protecting manorial rights appear on the register would address the underlying concerns of the Justice Committee.\textsuperscript{110}

The majority of this chapter has been concerned with the structure and processes of the current two-tier notice regime under the LRA 2002. The remainder of this chapter focuses on some other issues that stakeholders have raised in relation to notices. We will consider these issues on the assumption (contrary to our provisional proposals) that no reform to the present notices system is made, although we comment that if changes are made to that system then this may have a consequential effect on some of the other issues discussed below. The first issue concerns who may apply for cancellation of a unilateral notice.

Who may apply for cancellation of a unilateral notice

\textbf{Issue}

Section 36 deals with the cancellation of unilateral notices. An application for the cancellation of a unilateral notice can only be made by:

\textsuperscript{105} LRR 2003, r 5.
\textsuperscript{106} LRR 2003, r 9.
\textsuperscript{107} LRA 2002, s 32(1).
\textsuperscript{108} By LRR 2003, r 84(1) a notice under s 32 of the LRA 2002 must be entered in the charges register.
\textsuperscript{109} Neither do they indicate that there has not been any such activity: such entries are silent either way.
\textsuperscript{110} It could also cause confusion, as the “double entry” nature of a unilateral notice would mean that the name and address of the beneficiary of a unilateral notice protecting manorial rights would be the first name and address that a person reviewing the register would come across, when normally this would be the name and address of the registered proprietor.
(1) the registered proprietor of the estate or charge to which the notice relates; or

(2) a person entitled to be registered as the proprietor of that estate or charge.\(^{111}\)

9.132 We understand from Land Registry that it receives applications to cancel a unilateral notice from agents, receivers and liquidators. It is unclear, from the present wording of the LRA 2002, whether such persons are entitled to apply.

INSOLVENCY PRACTITIONERS

9.133 The uncertainty surrounding who can apply to cancel a unilateral notice can be problematic in an insolvency context, where often the insolvent registered proprietor may be unwilling to make or co-operate with the application.

9.134 It is worth noting at the outset that this issue does not concern a trustee in bankruptcy of a sole registered proprietor, because all of the bankrupt’s assets vest in the trustee in bankruptcy upon bankruptcy.\(^{112}\) In this situation, the trustee is entitled to apply for cancellation of the notice on the basis that he or she is entitled to be registered as the proprietor in accordance with section 36(2).

9.135 We understand that it is common for security documents to contain a power of attorney which would enable a secured lender to take action in the name of the borrower to protect the security. This would appear to cover an application to cancel a unilateral notice. However, these provisions would not assist an insolvency practitioner.

9.136 In order to analyse whether it is appropriate to allow applications by insolvency practitioners, it is helpful to consider the legal status of the various kinds of insolvency practitioner in relation to the insolvent person. Law of Property Act receivers,\(^{113}\) administrators\(^{114}\) and administrative receivers\(^{115}\) are agents of the insolvent person. Administrators\(^{116}\) and administrative receivers\(^{117}\) also have the power to use the company seal and execute documents in the name of the insolvent person. Whilst liquidators are not agents of the insolvent person, they similarly have the power to use the company seal and execute documents in the name of the insolvent person.\(^{118}\)

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\(^{111}\) LRA 2002, s 36(1).

\(^{112}\) Insolvency Act 1986, s 306.

\(^{113}\) Law of Property Act 1925, s 109(2).

\(^{114}\) Insolvency Act 1986, sch B1, para 69.

\(^{115}\) Insolvency Act 1986, s 44(1)(a).

\(^{116}\) Insolvency Act 1986, sch B1, para 60 and sch 1, paras 8 and 9.

\(^{117}\) Insolvency Act 1986, s 42(1) and sch 1, paras 8 and 9.

\(^{118}\) Insolvency Act 1986, sch 4, para 7.
Taking into account this statutory context, we take the provisional view that insolvency practitioners should be able to apply for the cancellation of a unilateral notice. Given that statute has conferred upon these practitioners the power to deal with the insolvent person’s property as the agent of the insolvent person and/or in the name of the insolvent person, it seems desirable that practitioners are able to deal with registered land as fully as the insolvent person. This is especially so since most of these practitioners could already legally sign documents (including, presumably, a Land Registry form) in the name of the registered proprietor. It does not seem desirable for insolvency practitioners to be treated differently simply because the manner in which the document has been signed makes it clear that it has been signed by the insolvency practitioner, in his or her capacity as such.

POWERS OF ATTORNEY

Similar considerations come into play in relation to attorneys, whose position is also unclear under section 36. Attorneys can sign a document in their own name on behalf of the donor, and that document will have effect as if it was signed by the donor. We consider that it follows that an attorney should be able to sign a Land Registry form to cancel a unilateral notice with the same effect as if it had been signed by the registered proprietor.

JOINT PROPRIETORS

There is a separate question as to whether, where the registered proprietor comprises more than one person, it is necessary for all of them to apply for cancellation. The wording of section 36 would suggest that it is, and this is reflected in Land Registry Practice Guide 19:

Where there are joint proprietors, or more than one person is entitled to be registered as a joint proprietor, then it is considered that each of the joint proprietors, or each of those people, must apply.

We believe that this is the right approach, but would invite consultees to tell us if they disagree.

Proposals for reform

We provisionally propose that it should be clarified that an insolvency practitioner appointed in respect of an insolvent registered proprietor is able to apply to cancel a unilateral notice on behalf of the registered proprietor.

Do consultees agree?

We provisionally propose that it should be clarified that attorneys acting under a power of attorney may apply to cancel a unilateral notice on behalf of a registered proprietor who is the donor of the power.

Provided that the attorney is acting within the scope of the power of attorney: Powers of Attorney Act 1971, s 7.

Do consultees agree?

9.143 We have considered whether the issues which have been raised with us in this part of the chapter are limited to the persons who may make applications for cancellation of a unilateral notice, or are an issue more generally in relation to other types of applications. We have concluded that this issue is confined to the context in which it was raised, because of the special provision made in section 36 for applications to cancel unilateral notices. However, we invite consultees to tell us if they disagree.

9.144 We invite consultees to share with us other situations in which they believe the persons who can make applications to Land Registry are unnecessarily limited.

Noting the beneficiary of an agreed notice

Issue

9.145 A unilateral notice must state that it is a unilateral notice and identify the beneficiary of the notice.\(^\text{121}\) This means that a unilateral notice has a double entry, similar to the entries made in respect of a registered charge. Land Registry Practice Guide 19 explains:

> There are two elements to a unilateral notice entry: the first part gives brief details of the interest protected and identifies that the entry is a unilateral notice; the second part gives the name and address of the person identified by the applicant as the beneficiary of the notice. This information is necessary as it is the beneficiary who will be served with notice and required to prove the validity of the interest if the relevant proprietor applies to cancel the notice.\(^\text{122}\)

9.146 In contrast, an agreed notice will be effected by a single entry on the register. It will not identify the party with the benefit of the right protected by the notice. Land Registry Practice Guide 19 says:

> An agreed notice gives notice of the interest to which it relates; its object is not to identify the beneficiary of that interest and it is not possible to note the devolution of title to an interest protected by an agreed notice.\(^\text{123}\)

9.147 It is possible to apply to Land Registry to update the beneficiary of a unilateral notice (for example, if the benefit of an option or other estate contract has been assigned). It is not possible to do this if the person entitled to an interest protected by an agreed notice changes. Land Registry notes that the identification of the beneficiary may be a factor which influences some applicants to choose a unilateral notice over an agreed notice, despite the precarious nature of the protection offered:

\(^{121}\) LRA 2002, s 35(2).

\(^{122}\) Land Registry, Practice Guide 19: Notices, Restrictions and Protection of Third Party Interests (November 2015) para 2.3.3.

In some cases, the fact that the identity and address of the beneficiary of a unilateral notice will be entered in the register will make that form of entry preferable. These details can be updated if the identity of the beneficiary should change …

However the applicant should always be aware that the beneficiary of a unilateral notice may be required at any time to prove the validity of their claim.124

9.148 An agreed notice is not vulnerable to cancellation in the same way as a unilateral notice, and so there is not the same need to identify the person who may object to its cancellation, and include his or her contact details.125 However, a useful purpose would arguably be served by the inclusion of similar information on the register in relation to an agreed notice.126 This information would make the register more complete and transparent, and assist a person reviewing the title in identifying who has the benefit of rights to which the estate is subject.

9.149 We are mindful of the fact that the interests protected by agreed notices may take a number of different forms. The result of this is that the benefit of the interest may be transmitted in different ways. For example, an express assignment would be required in order to effect a transfer of the benefit of an estate contract. In this case, the parties would no doubt have reviewed the entry on the register protecting the estate contract as part of the due diligence process, and we anticipate that it would be relatively straightforward for them to arrange for the relevant entry on the register to be updated following completion. In other circumstances, however, the benefit of an interest is acquired automatically; such as, for instance, the benefit of an easement, which passes on a sale of the benefited land. In this case an application to update the register of title to the burdened land may not be such an obvious course of action. We understand from Land Registry that, in order to address this, it would be possible for the entry which identifies the beneficiary of the agreed notice to cross-reference to the proprietor of the benefiting title number, rather than identifying the beneficiary by name.127


126 The same is true of a notice which is entered by the registrar, without an application (sometimes referred to as a registrar’s notice: see para 9.7 above).

127 The issue could, however, occur where the benefited land was unregistered, unless an application to update the entry on the burdened title was made at the same time as an application for first registration of the benefited land (which is likely to have been triggered by the disposition which effected the transfer of the easement).
9.150 We do not propose that beneficiary information would have to be added to existing agreed notices as this is likely to be difficult and time-consuming. To use the easement example above, the land benefited by the easement may have been sub-divided a number of times since the easement was first granted. Although it would be possible to permit beneficiary information to be added to an existing entry in respect of the burden of the easement on a voluntary basis, this may not be comprehensive and so has the potential to be misleading (for example, where the owner of the burdened land was seeking a release of the easement, there is a risk that he or she may not approach all benefited parties.)

9.151 Information on the persons with the benefit of an interest protected by an agreed notice could be collected more easily in relation to new applications for agreed notices. Even here, however, there may be practical difficulties. For example, where houses on a new housing estate are sold for the first time, restrictive covenants are likely to be imposed on all the plots. Determining which plots have the benefit of the covenants over a particular neighbouring plot is notoriously difficult.128

9.152 We would like to explore in more detail with consultees the possible benefits and any potential disadvantages to including the beneficiary of an agreed notice on the register.

CONSULTATION QUESTIONS

9.153 We invite consultees' views on what benefits would accrue if an agreed notice could identify the beneficiary of that notice, in a similar way to the entries made in relation to a unilateral notice? Would there be any disadvantages to identifying the beneficiary of an agreed notice in this way?

9.154 If consultees support identifying the beneficiary of an agreed notice on the register, should this be mandatory or optional?

128 We made recommendations which would address this problem in Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327.
CHAPTER 10
PROTECTION OF THIRD PARTY RIGHTS ON
THE REGISTER PART II: RESTRICTIONS

INTRODUCTION

10.1 In Chapter 9 we considered notices as a means of protecting a third party right on
the register. In this chapter we consider the other method of protecting such a
right: a restriction. Some third party rights, such as an interest under a trust of
land, cannot be protected by a notice and can only be protected by way of a
restriction.1

10.2 Notices and restrictions perform different functions. Unlike a notice, a restriction
does not protect the priority of a third party right. Instead, a restriction regulates
the circumstances in which a disposition of a 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 on the register in respect of that disposition
unless the terms of the restriction are complied with, or the registrar makes an
order to disapply or modify the restriction.3 So a restriction prevents the
registration of dispositions, and hence the passing of legal title to the disponee.4
As such it can be a powerful means of protecting a third party interest. As we will
see, however, restrictions also have the potential to cause delays and disputes.5
Disputes over restrictions account for around 30% of the annual referrals made
by Land Registry to the Tribunal.6

10.3 In this chapter we will first look at the circumstances in which a restriction may be
entered on the register, and the form that restriction may take, under the current
law. We will then review some of the concerns that stakeholders have raised
about restrictions. In particular, we will examine their use to protect contractual
obligations, and interests under trusts. This will lead to a discussion of what the
purpose of restrictions should be.

CURRENT LAW

10.4 There are many different types of restriction, but most restrictions will require one
of the following:

(1) the giving of notice to a particular person;

(2) the consent of a particular person;

1 LRA 2002, s 33.
2 LRA 2002, s 40(1).
3 LRA 2002, s 41.
4 LRA 2002, s 27(1).
5 One illustration of the scale of the impact which restrictions can have is that in the quarter
from November 2015 to January 2016, Land Registry sent over 28,000 requisitions for
evidence of compliance with a restriction. This amounts to approximately 9% of all
requisitions sent by Land Registry in that period.
6 See the Glossary.
(3) a certificate by a particular person that the terms of a given document, or a statute, have been complied with; or

(4) an order of the court or the registrar.

10.5 The LRR 2003 prescribe a number of standard forms of restriction. It is possible to apply for a restriction which departs from these standard forms, but it will cost more and will only be approved if the registrar is satisfied that the terms of the proposed restriction are reasonable, that applying the proposed restriction would be straightforward and that its application would not place an unreasonable burden on the registrar. These limitations reflect the potential power of a restriction to prevent the completion of a disposition by registration.

10.6 A restriction may be entered if it appears to the registrar that it is “necessary or desirable” in order to:

(1) prevent invalidity or unlawfulness in relation to dispositions of a registered estate or charge;

(2) secure that interests which are capable of being overreached on a disposition are overreached; or

(3) protect a right or claim in relation to a registered estate or charge.

We will return to this test as we examine particular concerns that stakeholders have raised in relation to restrictions.

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9 LRA 2002, s 42(1). No restriction may be entered under (3) above to protect the priority of an interest which is, or could be, the subject of a notice: s 42(2).
STAKEHOLDER CONCERNS AND PROPOSALS FOR REFORM

The use of restrictions to protect contractual obligations

**Issue**

10.7 One of the functions of restrictions, as laid down in the LRA 2002, is to prevent the registration of an invalid or unlawful disposition. Invalidity or unlawfulness may arise in a number of ways. For example, the registered proprietors may be trustees who hold the land on trust. If the trustees go beyond the scope of their powers, and do something which they have no right to do, the resulting transaction will be void under the general law. In contrast, if the trustees had the relevant power to enter into the transaction, but failed to give proper consideration to relevant matters in taking the decision to do so, then under the general law the transaction will be voidable. The first of these would be an “invalid” disposition for the purposes of the LRA 2002; the second is likely to be classified as “unlawful”. The distinction is, in practice, blurred as far as dealings with registered land are concerned, because as we have seen, a registered proprietor has “owner’s powers”, which are taken to be free from any limitation affecting the validity of the disposition save for a limitation which is reflected on the register. In the examples set out above, a restriction is therefore a way of reflecting on the register a limitation on the powers of the trustees.

10.8 As an alternative example, the registered proprietor may have contracted with a third party not to dispose of the land without complying with certain conditions. A disposition in breach of this contractual obligation may not be invalid, but as it would constitute a breach of contract it would be unlawful, and hence may be protected by a restriction. From this it can be seen that the function of restrictions is broader than simply the protection of property rights.

10.9 In our 2001 Report we gave specific examples of the potential use of restrictions to prevent a breach of contract in the following situations.

(1) Where the registered proprietor has contracted with a third party that he or she will not make a disposition without the consent of that third party, for example pursuant to a right of pre-emption.

(2) Where a chargor agrees with a chargee to the exclusion of the statutory power of leasing under section 99 of the Law of Property Act 1925.

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11 See Chapter 5.

12 In Chapter 5 we make proposals to ensure that people who deal with registered proprietors need only take into account restrictions on the powers of the registered proprietor which are entered on the register.

13 Law Com 254, para 6.56 stated that “Although restrictions could be employed to protect property rights ... it would not be the only function of such entries. As a corollary of this, the entry of a restriction would not confer priority on, or preserve the priority of, any right that it was entered to protect”.

14 Law Com 271, para 6.40.
On a housing or industrial estate where freehold units are sold off but common parts of the estate are vested in a management company which undertakes maintenance obligations in return for the payment of a service charge by each freehold unit owner. As the burden of a positive covenant will not pass to successive freehold owners, a new freehold owner must give a direct covenant to the management company to pay the service charge. The requirement to give this covenant is protected by a restriction in favour of the management company.

Land Registry has told us that it believes the use of restrictions has increased since the coming into force of the LRA 2002. In particular, Land Registry’s experience is that, since that time, the use of restrictions as a means of preventing a breach of contract has intensified. Land Registry reports frequent difficulties experienced by applicants in complying with such restrictions. In some instances this difficulty may be because the contractual mechanism underpinning the restriction leaves scope for debate as to what is required in order to comply with the restriction. In others, the party with the benefit of the restriction is uncooperative, even when supplied with what is required by the underlying contract. In these situations the applicant may attempt to get around the restriction by applying for it to be disapplied or modified; however this will not be appropriate in the majority of such cases.

These difficulties illustrate some of the current practical problems with the operation of restrictions to protect contractual obligations. There is, however, a broader question of policy, which is whether the use of restrictions for the purpose of preventing contractual unlawfulness is affording those with the benefit of such restrictions a greater degree of control than is desirable or, in some instances, than is permitted by the general law. Based on its work with its stakeholders, two scenarios are perceived by Land Registry to be particularly problematic: restrictions protecting obligations in registered charges, and restrictions protecting obligations in registered leases.

It is not possible to carry out a like-for-like comparison under the LRA 2002 as against the LRA 1925, partly because a restriction will also be used under the LRA 2002 in circumstances where previously a caution would have been used under the LRA 1925.

For example, the terms of a contractual agreement may prohibit the registered proprietor from transferring the land without procuring a deed of covenant to do a particular thing from the purchaser in favour of the counterparty to the agreement. This may then be protected by a restriction requiring a conveyancer’s certificate specifying that the terms of the agreement have been complied with. Where the agreement does not specify the form of the deed of covenant, disputes can arise as to what is sufficient and a conveyancer may not be certain whether he or she is able to give the required certificate.

This may be, for example, because there is a dispute over costs payable to the beneficiary of the restriction (e.g. a leasehold management company). Alternatively the person whose consent or certificate is required under the terms of the restriction may be uncontactable, or may take a long time to deal with the matter.
10.12 The first scenario occurs where a registered title is subject to a registered charge. The registered proprietor may have contracted with the chargee that he or she will not further charge the registered estate without the chargee’s consent. In this situation, as well as the entries in the charges register protecting the charge, the title may also contain a restriction in favour of the chargee,\(^{18}\) preventing any disposition of the registered estate being registered without that chargee’s consent.\(^{19}\) The effect of this could be to limit the potential for the registered proprietor to obtain subsequent finance elsewhere. Where such finance is obtained, Land Registry’s experience is that registered proprietors entering into second charges, the lenders and their respective legal advisers are not always alive to the presence of a restriction on the register. The result is that a second charge is entered into, but cannot be completed by registration, causing problems for the borrower, the lender and Land Registry itself.

10.13 The restriction could also delay registration of a transfer of the registered estate while a discharge of the charge is awaited, preventing application of Land Registry’s early completion policy.\(^{20}\)

10.14 We understand from Land Registry that the number of standard charges containing a request for a restriction requiring the consent of the chargee to a disposition has increased since the LRA 2002, and that provisions for such a restriction are now a standard clause in most mortgages.\(^{21}\)

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\(^{18}\) This was also given as an example of a use of a restriction to protect against unlawfulness in Law Com 271, para 6.40(2) n 144.

\(^{19}\) Such a restriction would usually be in Form P: see Appendix C to Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (November 2015) for the text of this restriction. The restriction would, among other things, prevent the registration of a second charge without the consent of the first chargee.

\(^{20}\) Early completion is a means by which a transfer to a buyer (and the buyer’s new mortgage) may be registered prior to receipt of the discharge of the seller’s mortgage. For more information on early completion, see The Law Society’s Practice Note “Land Registry early completion” 9 July 2009 at https://www.lawsociety.org.uk/support-services/advice/practice-notes/land-registry-early-completion/ (last visited 21 March 2016), and Land Registry, *Practice Guide 31: Discharges of charges* (June 2015) para 2.3.

\(^{21}\) According to data provided by Land Registry, as at 18 February 2016 there were 13,139,539 registered charges and 7,831,048 charge restrictions.
RESTRICTIONS PROTECTING OBLIGATIONS IN REGISTERED LEASES

10.15 The second scenario arises in the context of leasehold titles. Restrictions are sometimes used to ensure compliance with the terms of the lease, and may require the consent of the landlord or management company to the registration of a disposition of the lease. In many situations however this may go beyond both what the lease terms themselves, and the general law, provides.

10.16 For example, a registered lease may require an incoming assignee to execute a deed of covenant in favour of a management company. The management company may protect this obligation by way of a restriction on the registered title. An assignment made in breach of covenant is effective, although there may be consequences for liability under the tenant covenants under the Landlord and Tenant (Covenants) Act 1995 and there may well be other consequences under the lease. The restriction therefore goes further than the common law position, by preventing the assignee from obtaining legal title to the lease.

10.17 There are other examples of circumstances in which a restriction may be used to regulate the registration of a disposition of a registered lease, such as the grant of an underlease where the headlease requires a direct covenant to be given by the undertenant to the head landlord.

10.18 Restrictions protecting obligations in a registered lease also have the potential to cause unfairness and hardship where the lease itself has been complied with (for example, the requisite deed of covenant has been supplied), but the landlord or management company has not provided the necessary consent or certificate to allow the registration to proceed.

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22 Land Registry’s experience is that restrictions are increasingly being used for this purpose.

23 We are aware that particular problems can arise where a restriction requires the consent of a particular named person, as the restriction does not then keep pace with changes over time, such as a transfer of the reversion or a change in the management company. These difficulties are discussed in Land Registry, Practice Guide 19A: Restrictions and Leasehold Properties (June 2015), which also outlines the approach Land Registry will take to such restrictions in order to address these problems. The scenario discussed in this section is not confined to restrictions which refer to a named person and represents a broader issue.

24 The consent of the landlord or the management company to the transaction may or may not be required under the lease. Where it is not required, a restriction designed to protect the obligation to provide the deed of covenant which requires the consent of the landlord or the management company to the registration of the disposition (as opposed, for example, to a certificate of compliance with the obligation) goes beyond the terms of the lease.

25 Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2) [1979] 1 WLR 1397.

26 For example, if the lease contains a clause allowing the landlord to forfeit for breach of covenant.

27 As noted in Ruoff & Roper, para 44.018 n 35. The Landlord and Tenant (Covenants) Act 1995 would not make the covenants in the headlease enforceable against the undertenant.

28 This might be for unconnected reasons, eg if there was a service charge dispute between the seller and the management company, or there may be a dispute about the level of fee payable to the landlord or management company in respect of the transaction. The tenant may have the right to seek a declaration that the landlord or management company is unreasonably withholding or delaying consent.
10.19 Aside from the two scenarios described above, restrictions are also used to protect a range of other contractual arrangements. These include prohibitions on dispositions contained in rights of pre-emption or option agreements, mechanisms designed to ensure that positive covenants bind successors in title, and as a means to secure compliance with overage agreements. These restrictions do not appear to be causing the same problems as in the two scenarios outlined above, and are no doubt performing a useful function for the persons who benefit from them. In the event that reform is perceived to be necessary, however, there is arguably no reason of principle why it should be limited to the two areas identified above and should not extend to other contractual arrangements. This is because although law reform should address practical problems, ultimately it must also be underpinned by a consistent policy: in this case as to the function of restrictions. We discuss this further below.

Discussion and questions for consultees

10.20 We are mindful that the use of restrictions to protect contractual arrangements is a long-standing feature of the land registration system, which predated the LRA 2002. The device is relied on in a range of both commercial and residential transactions. We acknowledge that restrictions can secure real practical benefits in ensuring that contractual obligations are complied with. The question is whether that practical benefit is something which a land registration system should be providing. At the heart of this question is the proper function of restrictions.

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29 For example, arrangements for the maintenance of a fence or a shared driveway. Unlike leasehold covenants considered above, positive covenants relating to freehold land do not automatically bind successors in title. A restriction can provide a means to ensure that such covenants bind a purchaser of the registered estate: see Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327, para 5.24 n 33. On the one hand it could be argued that the restriction is therefore providing a useful function of enabling the enforcement of covenants which would not otherwise be enforceable. On the other hand, the restriction is thereby facilitating a greater degree of control of the use of land than is permitted by the general law.

30 Overage is a term used to describe an additional payment which must be made by a buyer of land to the seller post-completion, in the event that a specified event (such as the grant of an enhanced planning permission) occurs. An obligation to pay overage is a contractual obligation and not an interest in land. As such, it cannot be the subject of a notice on the register in order to bind successive purchasers of the property. Restrictions are often used as a means of enforcing an obligation to procure a deed of covenant from a subsequent purchaser to pay the overage.
10.21 We can see that restrictions protecting contractual obligations can give rise to operational difficulties, even for applicants who are able and willing to comply. We do not wish to downplay the impact which these difficulties may have on those who encounter them. We believe however that at least some of these operational difficulties are capable of being addressed by an operational solution. For example, in the context of the second charge issue outlined at paragraph 10.12 above, the onus is on the second chargee, and (where appointed) its legal advisers, to search the register and discover the presence of the restriction before entering into the charge. Similarly, where a party to a lease is unreasonably refusing or delaying its consent as required by a restriction, the registered proprietor will usually be entitled to seek a declaration from the court to that effect. We do not therefore believe that a land registration solution is appropriate to address these sorts of difficulties.

10.22 Law reform must be driven by policy. We recognise that there may be policy arguments in favour of limiting the use of restrictions for the purpose of protecting contractual obligations, in order to protect consumers in situations where those underlying contractual prohibitions were not freely negotiated. Without tackling the content of the contractual obligation itself, however, these issues cannot be properly addressed. A change in the permitted use of restrictions to exclude the protection of certain contractual obligations would not result in their exclusion from the underlying contracts. So, for example, an unwitting borrower could still find him or herself in breach of contract through the taking of further secured finance.

10.23 Some of these issues are not new. Similar submissions were made during the project that led up to our 2001 Report in relation to the use of restrictions on further borrowing in charges. In that Report we noted that it was unclear whether this sort of contractual provision in a charge could be challenged under competition law. We expressed the view that it would be inappropriate for us to opine on the validity of such agreements as part of a land registration project.31 We remain of that view, but believe that a wider review of the function of restrictions can be carried out without undue trespass.

31 Law Com 271, paras 7.26 to 7.27. See further Chapter 18 below.
10.24 While a technical argument could be mounted that the reference in section 42 of the LRA 2002 to restrictions being entered to prevent invalidity or unlawfulness was intended to limit their use to (for example) the sorts of breaches of trust outlined in paragraph 10.7 above, it is clear that, prior to the LRA 2002, restrictions were also being used to protect contractual obligations. It is also clear that such continued use was contemplated in our 2001 Report. It seems obvious that the reference to “unlawfulness” is capable of extending to the protection of contractual, as well as proprietary, rights. We are provisionally of the view that the practical benefit secured by the use of restrictions to protect contractual obligations is not outweighed by the criticisms we have outlined. The restriction affords a convenient device to ensure the performance of obligations which, although not in themselves proprietary, are often very closely related to the proprietary nature of the title upon which they feature, and frequently the beneficiary of the restriction also has a proprietary interest in the land in that title.32

10.25 We have provisionally formed the view that it should continue to be possible to protect contractual obligations by means of a restriction.

Do consultees agree?

10.26 We have identified above two particular areas in which the use of restrictions to protect contractual obligations is perceived to be particularly problematic: in relation to obligations in registered leases, and obligations in registered charges. In the next question we ask consultees whether, even if it remains possible as a general principle to protect contractual obligations by means of a restriction, there should be any exceptions to this principle.33 We have explained our view that any law reform in this area should be underpinned by a clear and consistent policy.34 We therefore ask consultees who are in favour of exceptions for certain contractual obligations to tell us why a distinction should be made between the various different types of contractual obligations.

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32 This is the case in relation to restrictions which protect a mortgagee and a landlord (although usually not a management company). The same could be said, for example, of a restriction which benefits the grantee of an option.

33 If, on consultation, reform was thought to be necessary, we take the view that restrictions entered pre-reform should not be affected.

34 See para 10.19 above.
10.27 We did consider whether, even if there were to be a general or a specific prohibition on the use of restrictions to protect contractual obligations, it should still be possible to enter such a restriction by agreement between the parties.\[^{35}\] However, we are not currently persuaded that this would be a principled outcome. First, in the event that the weight of opinion is that restrictions should not be used to protect contractual obligations, the arguments set out above in support of this view will not be negated if consent is given. We have already identified a criticism of the present position that in some instances the relevant contractual obligations are not freely negotiated, and this is likely to be the case for an agreement regarding the entry of a restriction too: “contracting-out” of a prohibition would likely become commonplace. Secondly, the operational difficulties outlined arise further down the line, at the time of a disposition which engages the restriction, which may be long after the consent to entry of the restriction has been given. Therefore, permitting restrictions to be entered with consent does not assist with these difficulties either.

10.28 There is a further reason why we consider that consent to the entry of a restriction in these circumstances is not the solution. If one party to a contract has entered into an obligation as part of that contract, it would not normally be open to that party to dictate how the other party may enforce that contractual term; in this case, by requiring express consent to the entry of a restriction.

10.29 We invite the views of consultees as to whether there are any particular types of contractual obligation which should not be capable of protection by way of a restriction. If so, please explain why these obligations should be treated differently from other contractual obligations.

The use of restrictions to protect interests under trusts

General principles

10.30 We have so far been examining the use of restrictions to protect contractual obligations. We turn now to look at their use in protecting a different kind of right: a beneficial interest under a trust of registered land.

10.31 We saw at paragraph 10.6 above that the registrar may only enter a restriction if it is necessary or desirable in order to:

1. prevent invalidity or unlawfulness in relation to dispositions of a registered estate or charge;
2. secure that interests which are capable of being overreached on a disposition are overreached; or
3. protect a right or claim in relation to a registered estate or charge.\[^{36}\]

\[^{35}\] The contractual obligation will of course, by definition, be made by agreement. The point here is that specific consent is given to the entry of a restriction to protect that obligation.

\[^{36}\] LRA 2002, s 42(1).
In Chapter 2 we explained the “curtain principle”: that beneficial interests should, by and large, be kept off the register.\footnote{See para 2.18 above. No notice may be entered in relation to an interest under a trust: LRA 2002, s 33(a)(i).} A purchaser of land should not be concerned with beneficial interests provided that they are overreached. To ensure that overreaching occurs, when registered land is subject to a trust, a restriction should 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.\footnote{Unless the registered proprietor is a trust corporation.} This is known as a Form A restriction.\footnote{The full wording of a Form A restriction can be found at Appendix C to Land Registry, *Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register* (November 2015).}

In this part of the chapter we will begin, somewhat counter-intuitively, by examining whether a beneficiary of a derivative interest under a trust (as opposed to a direct beneficiary of the trust) may enter a restriction and, if so, what the terms of that restriction should be. We will then re-examine how the law and practice on restrictions has developed in relation to direct beneficial interests under trusts. Ultimately we conclude that no reform in this area is necessary.

**Derivative interests under trusts**

A derivative interest under a trust is an interest which is granted out of a beneficial interest. Examples of such interests could be a charge of a beneficial interest, or a claim by one partner that the beneficial interest of the other partner in a property jointly owned with other family members is subject to a constructive trust (a sub-trust) and they are a beneficiary. As the registered estate is subject to a trust, a Form A restriction should already be on the register. The question sometimes arises whether the holder of the derivative interest is entitled to the entry of a further restriction, in addition to the Form A restriction.

We noted at paragraph 10.31 above that, as well as being a means to ensure that overreaching occurs, restrictions may also be entered in order to prevent invalidity or unlawfulness, or to protect a right or claim, in each case in relation to a registered estate. However, where the interest is not in the registered estate itself, but in a beneficial interest in that estate, in our view these other criteria for the entry of a restriction will not be met.\footnote{The exception is where a statutory charge of a beneficial interest arises in favour of the Lord Chancellor under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 25. In this instance the effect of reg 22(4) of the Civil Legal Aid (Statutory Charge) Regulations 2013 is that a restriction may be necessary in order to prevent unlawfulness in relation to a disposition of the registered estate.} The question of whether a restriction would be “necessary or desirable” in order to protect the derivative interest under the trust therefore does not arise.
In one instance, however, the LRA 2002 makes specific provision for the protection of a right which would not otherwise amount to a right in relation to the registered estate. Our 2001 Report noted that “charging orders over beneficial interests under a trust of land are fairly common”, and that they could be protected by a caution against dealings under the LRA 1925. Section 42(4) of the LRA 2002 therefore provides 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 (in other words, the legal estate). This could arise for example where a property is jointly owned by a married couple who co-own the property on trust for themselves. A creditor may obtain a charging order over the beneficial interest of one spouse in the property, to secure a debt owed by that spouse to the creditor. Despite the principle that a purchaser should not be concerned with the beneficial interests (including any interests which derive out of such beneficial interests), the effect of the LRA 2002 is that the creditor in this situation may obtain a restriction over the legal estate.

The standard form restriction (Form K) which may be entered in these circumstances provides that no disposition may be registered without a certificate by the applicant that written notice of the disposition was given to the beneficiary of the charging order. The restriction does not require the consent of the holder of the charging order.

This limitation on the form of restriction that can be entered (and hence limited level of protection which is offered) has been criticised. However, any greater degree of control (such as a restriction requiring the consent of the chargee) would be neither necessary nor desirable for the purposes of section 42. This is because such a restriction would represent a “stranglehold” on the legal estate and circumvent overreaching.

41 Law Com 271, para 6.43.

42 Known as a restriction in Form K. For the full text of the restriction, see Appendix C to Land Registry, Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register (November 2015). Any person with the benefit of a charging order over a beneficial interest in registered land held under a trust of land who is applying for a restriction in Form K to be entered in the register will be regarded as having a sufficient interest to apply for that restriction for the purposes of LRA 2002, s 43(1)(c) (LRR 2003, r 93(k)).

43 See Megarry & Wade, para 7-078 n 532, and R Jackson (ed), The White Book Service 2015, Civil Procedure, Volume 1 para 73.4.1.
10.39 One suggestion which has been made is that the restriction should require notice to be given before the disposition itself takes place, as this would give the chargee an opportunity to make its interest known before the proceeds of sale are dispersed.\textsuperscript{44} We have considered this but have formed the view that such a requirement would be undesirable for a number of reasons. If, for whatever reason, notice is not given before the disposition, the restriction could never be complied with in accordance with its terms and the title would be sterilised. In addition, unless the restriction is very prescriptive the potential for disputes is great: how far in advance of the disposition must notice be given, must the terms of the disposition be settled before notice is given, and so on. It is essential that it is very clear what must be done in order to comply with a restriction, because of their potential to prevent the registration of a disposition and hence the passing of legal title.

10.40 So, a person with a charging order over a beneficial interest under a trust can enter a restriction in Form K, but under the law as it stands it is not possible for the holder of any other derivative interest under a trust to enter a restriction. Although the ability to protect a charging order of a beneficial interest by way of a restriction may be considered to be something of an anomaly, such orders are evidentially clear,\textsuperscript{45} as well as being frequently encountered. We are not currently convinced that holders of other derivative interests under trusts should be able to apply for a restriction (other than a restriction in Form A), as this would represent too much of an incursion into the curtain principle and would be neither necessary nor desirable in order to protect such interests. Given that it would be possible to create further derivative interests out of derivative interests (a sub-charge on a beneficial interest, or a sub-sub-trust), there would be no limit on the number of restrictions which could exist. Extending the protection to holders of beneficial interests under trusts beyond that which the law currently provides therefore risks cluttering the register.

10.41 \textbf{We provisionally propose:}

\begin{itemize}
  \item[(1)] that it should continue to be possible to enter restrictions in Form K in relation to charging orders over beneficial interests; but
  \item[(2)] that the ability to enter restrictions should not be extended to holders of other derivative interests under trusts.
\end{itemize}

\textbf{Do consultees agree?}

\textit{Beneficial interests under trusts}

10.42 We have looked at the position in relation to the entry of a restriction to protect a derivative interest under a trust. We now turn to the position in relation to a beneficial interest itself.

\textsuperscript{44} We acknowledge that it may have been contemplated in Law Com 271 that notice would be give prior to the disposition; see para 6.43 n 155. For the reasons given above, however, we are no longer convinced that such a requirement would be desirable.

\textsuperscript{45} Contrast, for example, a claim that a beneficial interest in the registered title is itself subject to a constructive trust.
In most instances where there is a trust, a Form A restriction will be the only form of restriction which is necessary or desirable under section 42 of the LRA 2002. Any other form of restriction could give the beneficiary a right to which they were not entitled under the terms of the trust and so may thwart overreaching.

One exception is where the terms of an express trust prohibit dispositions without obtaining the consent of a beneficiary, where an alternative form of restriction may be appropriate which prohibits the registration of a disposition without that beneficiary’s consent. In this case the restriction is preventing invalidity or unlawfulness.

In addition, where a Form A restriction is considered insufficient to protect a beneficiary’s interest under a trust of land, he or she may also apply for the entry of a restriction in standard Form II pursuant to section 42(1)(c) of the LRA 2002:

No disposition of the registered estate … is to be registered without a certificate signed by the applicant for registration or their conveyancer that written notice of the disposition was given to [name] at [address].

This restriction is almost identical to standard Form K, discussed above. It does not prevent overreaching, as it only requires notice to be given after the disposition has taken place.

We conclude that, given the curtain principle outlined above (a purchaser of land should not be concerned with beneficial interests provided that they are overreached), the existing mechanisms for the protection of beneficial interests under trusts are sufficient and that no further protection is appropriate.

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46 Standard Form N. See also Form B. For the full text of these standard form restrictions, see Appendix C to Land Registry, Practice Guide 19: Notices, Restrictions and the Protection of Third Party Interests in the Register (November 2015).


49 It is also currently possible for a beneficiary to receive notification from Land Registry that a disposition has taken place via a non-statutory service: Property Alert. For more information about Property Alert, see https://propertyalert.landregistry.gov.uk/ (last visited 21 March 2016).

50 We understand from Land Registry that restrictions in form II are mostly used where there is a potential dispute: typically in a case where the beneficiary is not also a registered proprietor. Form II restrictions are not as common as restrictions in form A because the latter must be applied for where the land is held on trust and the proprietor, or the survivor of joint proprietors, will not be able to give a valid receipt for capital money: LRR 2003, r 94(1). This will include many instances of home ownership where there are two or more registered proprietors who hold the land on trust for themselves. In the typical home ownership scenario there are no beneficiaries who are not also legal owners and so a restriction in form II will serve no purpose.
The entry of a restriction pursuant to section 46

10.48 We noted above that section 42(4) of the LRA 2002 specifically provides for the entry of a restriction to protect a chargee under a charging order of a beneficial interest under a trust, although such an interest would not otherwise be capable of protection within that section. Section 42 is concerned with the entry of a restriction by the registrar, which will usually (but not necessarily) be as a result of an application.

10.49 In contrast, section 46 of the LRA 2002 is concerned with the power of the court to order the registrar to enter a restriction. The grounds on which the court can order a restriction are more restrictive than those in section 42. The court may only order the entry of a restriction if it is necessary or desirable for the purpose of protecting a right or claim in relation to a registered estate or charge. There is no equivalent in section 46 to section 42(4), which provides that the chargee under a charging order of a beneficial interest under a trust is treated as having a right or claim in relation to the trust property.

10.50 There are two possible problems arising from this. First, it is unclear whether the LRA 2002 authorises a court to make an order for the entry of a restriction to protect a charging order over a beneficial interest under a trust. However, it is our understanding that such orders are commonplace.

10.51 The second problem is that, where the court does make such an order, it may not always order a restriction in Form K. Inconsistencies can arise between the protection of charging orders over beneficial interests in individual cases. For the reasons outlined at paragraph 10.38 above, we believe that the only appropriate restriction is one in Form K.

10.52 We provisionally propose 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.

Do consultees agree?

51 See para 10.6 above.

52 See R Jackson (ed), The White Book Service 2015, Civil Procedure, Volume 1 para 73.4.1.
CHAPTER 11
OVERRIDING INTERESTS

INTRODUCTION

11.1 Overriding interests\(^1\) are interests that are not protected on the register but are, nonetheless, binding on any person who acquires an interest in registered land.\(^2\) The LRA 2002 distinguishes between interests which will override the first registration of land (under sections 11 and 12 and schedule 1), and interests which will override upon a subsequent registered disposition of that land (under section 29 and schedule 3).\(^3\) The lists of interests in schedule 1 and schedule 3 are similar, but not identical.

11.2 Overriding interests are problematic from a land registration perspective. They bind a purchaser notwithstanding the fact that they do not appear on the register. They therefore undermine the “mirror principle” that the register should be a complete and accurate record of the title.\(^4\) We identified in our 2001 Report that they also present an impediment to one of the main objectives of the LRA 2002; that it should be possible to investigate title to land almost entirely online.\(^5\) Their existence, in the main, reflects the fact that there are certain interests where the law considers that it is unreasonable (or in some cases undesirable) for the holder of the interest to have to protect the interest by registration.\(^6\)

11.3 Overriding interests existed under the LRA 1925, but sweeping changes were made by the LRA 2002. In particular, the types of interest which are capable of overriding a registrable disposition were reduced. This was part of a clear policy to restrict overriding interests, so far as possible, for the reasons outlined above.\(^7\) Some changes did not come into force immediately but were instead deferred, with the result that certain categories of interest retained their overriding status for a number of years after the LRA 2002 came into force, but lost that status thereafter.\(^8\)

11.4 Because of the overhaul of overriding interests undertaken in 2002, we do not believe it is necessary to re-embark on a further comprehensive review of overriding interests as part of this project. Instead, we have focused on particular issues which stakeholders have raised in relation to overriding interests.

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\(^{1}\) The LRA 2002 does not in fact use the term overriding interests; rather, it refers to “interests which override”. Nonetheless the term overriding interests is still in common use and we use it in this chapter for convenience.

\(^{2}\) Law Com 271, para 2.24.

\(^{3}\) First registration is discussed in Chapter 4. Registered dispositions under section 29 are discussed in Chapters 6 to 8.

\(^{4}\) See para 2.17 above.

\(^{5}\) Above.

\(^{6}\) Law Com 271, para 2.25.

\(^{7}\) Above.

\(^{8}\) LRA 2002, s 117. Some of the consequences of the loss of overriding status for these interests are discussed further in Chapter 8 above and Chapter 13 below.
In this chapter we will consider three such issues.\(^9\)

1. The types of interest which are capable of protection as an overriding interest by virtue of the interest holder being in actual occupation of the land.\(^{10}\)

2. What it means to say that an interest must be “unregistered” in order to override.\(^{11}\)

3. Subsection 29(3) of the LRA 2002, which provides that, once noted on the register, an interest can never again obtain overriding status for the purposes of section 29.

**THE TYPES OF INTEREST WHICH ARE CAPABLE OF PROTECTION AS AN OVERRIDING INTEREST WHEN COUPLED WITH ACTUAL OCCUPATION**

One of the most common, and also well known, types of overriding interest is a right belonging to a person who is in actual occupation of the land.

**Actual occupation overriding interests under the LRA 2002**

The LRA 2002 cut down the circumstances in which an overriding interest can be claimed on the basis of occupation. It did this in a number of different ways. These included removing protection from those who were merely in receipt of rents and profits of the land, as opposed to in actual occupation, and limiting the extent of the overriding interest to the land of which the right holder was in actual occupation (even if the right held extended to a larger area of land).

The result is paragraph 2 of schedule 3 to the LRA 2002, which sets out the full circumstances in which an interest will be an overriding interest on the basis of actual occupation:

> An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—

- an interest under a settlement under the Settled Land Act 1925 (c 18);

- an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;

- an interest—

\(^9\) A further issue was raised by stakeholders in relation to overriding interests which lost their overriding status on 13 October 2013. Stakeholders drew our attention to the fact that it is still possible to enter a unilateral notice in relation to such interests even after there has been an intervening disposition for valuable consideration under section 29 of the LRA 2002. The legal questions raised by this issue are in fact not confined to formerly overriding interests, but affect any interest which has been postponed under section 29 of the LRA 2002. We therefore considered this issue in Chapter 9.

\(^{10}\) Under LRA 2002 sch 1, para 2 and sch 3, para 2.

\(^{11}\) See LRA 2002, s 11(4)(b) and s 12(4)(c) and the headings to sch 1 and sch 3 respectively.
(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time;

(d) a leasehold estate in land granted to take effect in possession after the end of the period of three months beginning with the date of the grant and which has not taken effect in possession at the time of the disposition.

11.9 Schedule 1, which deals with interests which will override first registration of the land, also makes provision for the interests of persons in actual occupation. However, paragraph 2 of schedule 1 does not contain as many limitations as paragraph 2 of schedule 3. This is because first registration will not necessarily occur in the context of a disposition (for example, if land is registered voluntarily) and so the concepts of making enquiries, inspecting the land and so on are not appropriate in this context. For this reason we will focus our discussion on schedule 3, rather than schedule 1.

**Does the basis of actual occupation matter?**

11.10 There is a body of case law on when a person will be in actual occupation for the purpose of the overriding interest provisions. Much of that case law is irrelevant for the purposes of the issue which we have been asked to consider. However, two points are worth making. First, it is clear that, although the interest which is protected must be a proprietary right, the basis of the occupation need not be. It is perfectly possible, for example, for a proprietary right to be protected by occupation pursuant to a licence. Secondly, the interest which is protected need not be the interest which is the basis for the occupation.

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14. Indeed, in some cases the interest which is protected cannot be the same as the basis for the occupation, where the basis of occupation is only a licence (which is a non-proprietary right).
In many cases, the interest alleged to be overriding will also be the reason the occupier is entitled to be present on the burdened land (e.g., an equitable lease, beneficiary’s interest under a trust of land), but there is no necessary reason why this should be so and there are a number of examples where it was not. In this sense, the term “occupiers rights” is misplaced, for the issue is simply that the claimant must be in actual occupation of the land and holding a property right; not in actual occupation of the land because of the property right.  

Which interests can be overriding when coupled with actual occupation?

11.11 Not all interests in land are capable of constituting an overriding interest on the basis that their holder is in actual occupation. Certain types of interest are excluded by statute.  

11.12 Interests which have, however, been held to be overriding by virtue of their holders being in actual occupation include a beneficial interest under a trust of land, an option, an unpaid vendor’s lien, and the right to seek equitable rectification of a document.  

Should estate contracts be protected as overriding interests if the beneficiary of the contract is in actual occupation?

11.13 We noted above that the interest which is protected as an overriding interest need not be the interest which is the basis for the occupation. An example will illustrate this point.

15 Ruoff & Roper, para 17.014 (emphasis in original).

16 See for example LRA 2002, s 87 (which includes a pending land action; a writ or order affecting land made by a court for the purposes of enforcing a judgment; an order appointing a receiver or sequestrator; and a deed of arrangement) and Family Law Act 1996, s 31(10)(b) (home rights). Ruoff & Roper, para 10.023 contains a more extensive list.


20 Blacklocks v JB Developments (Godalming) Ltd [1982] Ch 183; Cherry Tree Investments Ltd v Landmain [2012] EWCA Civ 736, [2013] Ch 3015. Further examples are given in Ruoff & Roper, para 17.014.

21 See para 11.10 above.
The decision in Ferrishurst Ltd v Wallcite Ltd

11.14 In *Ferrishurst Ltd v Wallcite Ltd*,22 a tenant occupied offices under a sub-underlease. The sub-underlease contained an option to purchase the superior underlease.23 A third party acquired title to the freehold and the underlease, but the option was not noted against the title. When the tenant attempted to exercise the option to purchase the underlease, the third party argued that it was not bound by the option. The Court of Appeal held that the third party was bound by the option by virtue of it founding, when coupled with actual occupation, the basis of an overriding interest.

11.15 Referring to the case of *Webb v Pollmount*,24 Lord Justice Robert Walker in *Ferrishurst* said:

His occupation of the dwelling house in the character of a tenant did not send out any obvious message that he also had an option to purchase the reversion. Nevertheless that option was protected as an overriding interest because of his occupation.25

11.16 *Ferrishurst* was a decision under section 70(1)(g) of the LRA 1925, which was the predecessor to paragraph 2 of schedule 3 to the LRA 2002. However, there is no reason to think that the law is any different on this point under the LRA 2002.26

Discussion

11.17 We understand that the outcome in a case such as *Ferrishurst* is a cause of concern among some stakeholders. A purchaser of land will inspect that land, and make cross-checks against the title documentation that he or she has been shown by the vendor. Where the inspection reveals that a third party may be occupying the site, and that person’s presence is not explained by the documents supplied, purchasers will make further enquiries to ascertain the basis of the occupation, and whether they will be bound to allow the occupation to continue in the event that the purchase goes ahead. Where, however, the occupation is explained by the title documents supplied (for example, the third party has a lease of the site, and a copy of the lease is with the deeds), the occupation is unlikely to raise any “alarm bells” with the purchaser.

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23 Note that the option in this case was contained within the sub-underlease itself, which means that it would have been discoverable on reading the sub-underlease. It is possible, however, that an option could be granted to a tenant under a stand-alone document.
26 The decision was also notable for a different reason. The option extended to both land which was comprised in the sub-underlease, and land which was outside that demise. The Court of Appeal held that this did not matter, and the option was binding as to the full extent of the land subject to it, even though the sub-undertenant was only in occupation of part of the land affected. That part of the decision has been reversed by the LRA 2002, sch 3, para 2, which stipulates that an interest belonging to a person in actual occupation will only override “so far as relating to land of which he is in actual occupation”.

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11.18 The LRA 2002 will of course protect a purchaser who makes enquiries of an occupier, where the occupier fails to disclose an interest when he or she could reasonably have been expected to do so.\footnote{LRA 2002, sch 3, para 2(b).} Purchasers will, however, be vulnerable if they fail to make further enquiries of the occupier once it is seen that the position “on the ground” and the title deeds match up.

11.19 It seems to us that the issue which has been raised goes to the heart of the policy of allowing overriding interests based on actual occupation. Does the law strike the correct balance between, on the one hand, protecting purchasers from interests in the land which are not reasonably discoverable by them and, on the other, the need to retain a category of interests which override because it would be unjust for them to lose priority? In order to answer this question we must consider two further questions: how extensive the enquiries that purchasers are required to make should be, and whether, in a system of registered land, there should be an expectation on interest holders to register their rights.

11.20 It seems clear that in many cases the interest which is protected by actual occupation falls into the archetype of an overriding interest: a right which it is unreasonable to expect to be registered. In our 1998 Consultation Paper we explained the case for a category of overriding interests based on actual occupation as follows:

It is unreasonable to expect all encumbrancers to register their rights, particularly where those rights arise informally, under (say) a constructive trust or by estoppel. The law pragmatically recognises that some rights can be created informally, and to require their registration would defeat the sound policy that underlies their recognition. Furthermore, when people occupy land they are often unlikely to appreciate the need to take the formal step of registering any rights that they have in it. They will probably regard their occupation as the only necessary protection. The retention of this category of overriding interest is, we believe, justified … because this is a very clear case where protection against purchasers is needed but where it is “not reasonable to expect or not sensible to require any entry on the register”.\footnote{Law Com 254, para 5.61.}

11.21 In our 2001 Report, after citing the above passage, we went on to say:

By contrast, it is in principle reasonable to expect that expressly created rights which are substantively registrable should be registered, and these should no longer enjoy the protection of this category of overriding interests. Although this goal will not be achieved at once, the introduction of electronic conveyancing will in time bring it about, because registration will become a necessary adjunct of the express creation of many rights.\footnote{Law Com 271, para 8.53 (emphasis in original).}
11.22 The argument for the retention of a class of overriding interests based on actual occupation where those interests are informally created\textsuperscript{30} is compelling. We have no desire to call into question such overriding interests, which we believe are an important and well-established feature of the law on land registration.

11.23 The interest which was found to be overriding in \textit{Ferrishurst} was an option, which is a type of estate contract. Such interests of course must be created expressly, in writing, and signed by both parties.\textsuperscript{31} We have considered what other types of interest are usually created expressly, where it is also possible that the grantee of the interest may be in actual occupation of the land. We have concluded that estate contracts are the main example of such a type of interest, and so have approached this issue in the context of estate contracts. We would, however, be interested to hear from stakeholders if there are any other expressly created types of interest in land which may commonly be coupled with actual occupation and so give rise to an overriding interest on this basis.\textsuperscript{32}

11.24 Where an interest in registered land is created expressly, as explained in our 2001 Report, there is an argument that it is reasonable to expect that interest to be protected by registration. The vision in that Report of an electronic conveyancing system in which all interests in land have to be created electronically and are simultaneously registered has not, however, been realised.\textsuperscript{33} Elsewhere in this Consultation Paper we have taken the view that it is worth tackling problems with the current land registration system which could eventually be resolved through electronic conveyancing.\textsuperscript{34} We do not consider that this course of action is appropriate here. Our main reason for adopting this position is that, in the case of actual occupation overriding interests, protection for purchasers is already provided against interests which are undiscoverable provided that enquiries are made of the occupier.

\textsuperscript{30} Such as, for example, a beneficial interest under a constructive or resulting trust, or an interest under a proprietary estoppel. See para 11.20 above.

\textsuperscript{31} Law of Property (Miscellaneous Provisions) Act 1989, s 2.

\textsuperscript{32} One possible further example could be a vendor’s lien. It is not common for a vendor to remain in actual occupation following completion of the sale, but this could occur for example in the context of a sale and leaseback transaction.

\textsuperscript{33} See Chapter 20 below.

\textsuperscript{34} See para 6.23 above, in the context of our proposals to offer enhanced priority protection to unregistrable interests which are noted on the register.
11.25 If an expressly created interest is to be protected on the register, this would normally be by way of a notice. We have already acknowledged that the form of priority protection which can be obtained for the entry of a notice is limited.\textsuperscript{35} Where the holder of an interest is in actual occupation the limitations of priority searches for this purpose do not cause practical problems, because the interest binds a third party as an overriding interest. If protection as an overriding interest were to be removed, this could create a “race to registration” which the occupier may lose. This position is arguably unfair given that the fact of the occupation should have led the purchaser to make enquiries as to the existence of any interests held. This problem would, however, be addressed if our proposals in Chapter 6 were adopted.

11.26 We also note that, at present, a person who takes an interest under a registrable disposition (for example, a transfer), but whose application for registration is rejected for an administrative reason (perhaps failure to reply to a requisition within the requisite time frame), will benefit from an overriding interest if he or she is in actual occupation. Such an interest (by definition) falls into the category of an interest which it is reasonable to expect to be registered. We would, however, be extremely hesitant about removing protection in these circumstances. It seems to us that an overriding interest based on actual occupation plugs a useful “gap” where otherwise the transferee may be vulnerable to a loss of priority, without causing undue prejudice to any person who deals with the land during that time.\textsuperscript{36} If interests under registrable but unregistered dispositions are retained within the protection of paragraph 2 of schedule 3, we find it difficult to justify the removal of estate contracts from the protection of that section.

11.27 There is an argument that an interest holder can obtain improved protection under the registered land regime than under the equivalent provisions for unregistered land.\textsuperscript{37} To take the example of an estate contract, this would need to be registered as a land charge in order to bind a purchaser of unregistered land. There is no protection where the beneficiary of the contract is in actual occupation of the land. Under the LRA 2002 the estate contract may be binding as an overriding interest if coupled with actual occupation. However, the LRA 2002 forms a complete and stand-alone system for dealings in registered land. It is not always appropriate, or helpful, to make comparisons on a micro level with the position in unregistered land.

\textsuperscript{35} See Chapter 6, where we make proposals to extend priority searches to cover the entry of a notice of an unregistrable disposition as part of our proposals in relation to the priority of unregistrable dispositions which are protected by notice.

\textsuperscript{36} It is particularly important that a person should not be left worse off as a result of an attempt to register, as otherwise this could create a disincentive to apply for registration. We are aware that we are here departing from the view expressed in Transfer of Land – Land Registration (Second Paper) (1971) Law Commission Working Paper No 37, at para 14. This working paper formed part of a series of consultation papers on land registration in the 1970s, which informed recommendations made by the Law Commission in reports published during the 1980s. Not all of the provisional proposals from the working papers were adopted.

11.28 It seems to us that the issue which we have to consider turns on the extent to which the law should impress upon those taking registrable interests in land a duty to carry out extensive and detailed enquiries of occupiers. The LRA 2002 already contains protection for a disponee where occupation of the interest holder would not have been obvious on a reasonably careful inspection of the land at the time of the disposition.\textsuperscript{38}

11.29 We can see that, in the case of large multi-let commercial sites such as shopping centres, the duty to enquire of occupiers imposed by the LRA 2002 may be time-consuming to comply with. However, provided enquiries are in fact made, a purchaser will be protected. It is difficult to justify removing an existing protection for an occupier of a single-let site on the basis that it produces an administratively burdensome result where the purchase is not of a single site, but of a much larger property.

Question for consultees

11.30 We believe that it should continue to be possible for an estate contract to be protected as an overriding interest where the beneficiary of the contract is in actual occupation.

Do consultees agree?

THE MEANING OF “UNREGISTERED INTEREST”

11.31 Schedules 1 and 3 to the LRA 2002 are headed “Unregistered interests which override [first registration and registered dispositions respectively]”. Sections 11(4)(b) and 12(4)(c) of the LRA 2002 make similar reference to “unregistered interests” within schedule 1, although the expression is not used in section 29, which governs registered dispositions.\textsuperscript{39}

\textsuperscript{38} LRA 2002, sch 3, para 2(c)(i).

\textsuperscript{39} The expression “unregistered interest” is used in a number of other places in the LRA 2002: for example, s 37 (entry of a notice by the registrar in respect of an unregistered interest); s 71 (duty to disclose unregistered interests); and s 117 (reduction in unregistered interests with automatic protection).
A question has been raised whether the fact that an overriding interest must be an “unregistered interest” means that, where the benefit of an interest appears on the register, that interest cannot be overriding even though the burden of the interest does not appear on the title which is subject to the interest. An example will illustrate this. Say an easement is granted at a time when both the benefiting and burdened titles are unregistered. There are likely to be a significant number of cases where an easement has been registered upon first registration of the title to the benefited land, but no notice has been entered upon the subsequent first registration of the title to the burdened land (because the title deeds to the latter 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 have operated as an overriding interest on first registration of the title to the burdened land, and the estate will have vested in the proprietor free from the easement.

The LRA 2002 does not define the term “unregistered interest”. Section 132 does however define the word “registered” to mean “entered in the register”. Despite this seemingly broad definition, in fact the LRA 2002 only uses the term “registered” in the context of legal estates and interests, to which the registration guarantee applies.

The LRA 2002 also contains a definition of a “registrable disposition” – being a disposition which is required to be completed by registration under section 27. The detailed requirements for registration of a registrable disposition are set out in schedule 2 to the LRA 2002. Where the disposition is the grant of an easement, a notice must be entered in the register and, if the easement is created for the benefit of a registered estate, the proprietor of the registered estate must be entered in the register as its proprietor.

The easement example given in the main body of the text is probably the most common example of where this problem of interpretation could occur and the easiest to understand. A less common example would be a discontinuous lease which is granted out of unregistered land. The lease does not have to be registered, but may be by virtue of LRA 2002, s 3(4). If the registration of the lease means that it is not an “unregistered interest” for the purposes of schedule 1, then it will not operate as an overriding interest upon the first registration of the landlord’s title. This can be a problem as, depending on the length of the term, the effect of LRA 2002, s 33(b) may be that no notice of the lease can be entered on the landlord’s title. In Chapter 3 we recommend that the grant of a discontinuous lease out of unregistered land should be compulsorily registrable.

In Chapter 13 we discuss the circumstances in which, where an interest is missed off the register on first registration, the register can be altered subsequently to include the interest.

For example, the scope of the LRA 2002 (s 2); what estates may and must be registered (ss 3 and 4); the effect of registration (ss 9 and 10); dispositions required to be registered (s 27); and the effect of registered dispositions (ss 29 and 30).

LRA 2002, s 132(1).

LRA 2002, sch 2, para 7.
11.35 Schedules 1 and 3 to the LRA 2002 are not, however, headed “unregistrable interests”, but “unregistered interests”. It is clear that the list of interests in these schedules comprises both interests which are capable of registration in the narrow sense outlined above (for example, a legal easement,\textsuperscript{45} or an interest belonging to a person in actual occupation where that interest was registrable (such as a 10 year lease)), as well as interests which are not (for example, short leases).

11.36 The question which has been raised amounts to whether, for the purposes of deciding if an interest is an unregistered interest within the meaning of schedules 1 and 3, the status of the registration of the benefit is relevant. We argue that it is not, for a number of reasons.

11.37 First, not all interests which are overriding under schedules 1 and 3 have a benefiting title. Take the example of a public right, or a beneficial interest under a trust. No separate title can be opened for either of these interests; neither are they appurtenant to a title. The same is true for a short lease.

11.38 Secondly, the purpose of schedule 3 is to set out a list of interests which will bind a person taking a disposition of the burdened land, despite the fact that they do not appear on the register of title to that land. This is apparent from section 29. The only thing which should therefore be relevant is the status of the interest in relation to the burdened land. While the fact that the benefit of an interest has been registered may aid its discoverability as far as a purchaser of the burdened land is concerned,\textsuperscript{46} this will not always be the case. Registration of the benefit of an easement against the benefiting title may be of no assistance to a purchaser of the burdened title, who would not be expected to search every neighbouring title to see if any adverse interests existed over his or her own title.

\textsuperscript{45} An express grant of an easement out of registered land will not be legal unless registered, but prescriptive easements will fall within this category. A prescriptive easement is capable of registration, despite the fact that it does not fall within LRA 2002, s 27 – see LRR 2003, r 73A(1)(b) and Land Registry, \textit{Practice Guide 52: Easements Claimed by Prescription} (August 2015) paras 3.1 and 3.2.

\textsuperscript{46} For example, where a discontinuous lease granted out of unregistered land has been registered, a purchaser of the unregistered reversion may make an index map search which should reveal the existence of the lease.
11.39 The third, and in our view most compelling, reason why registration of the benefit of a right does not mean that the right cannot be an “unregistered interest” is that, if it were otherwise, the beneficiary of the right would be penalised for having registered the benefit of the right on his or her title. At paragraph 11.32 above we give the example of an easement which is granted at a time when both the benefitting and burdened titles are unregistered, but where the benefit of the easement has been registered on first registration of the title to the benefited land. A purchaser of the unregistered burdened land will be bound by the easement regardless of the status of registration of the benefit.47 However, the easement will only override on first registration if it is an “unregistered interest”. It is true that the beneficiary of an easement over unregistered land could lodge a caution against the first registration of that land. However, it should not be the case that grantees who have registered the benefit of their easements are worse off than grantees who have not done so. This would create an incentive to keep the benefit of interests off the register.

11.40 We therefore conclude that the fact that the benefit of an interest has been registered does not preclude that interest from being an “unregistered interest” for the purposes of schedules 1 and 3 to the LRA 2002, and therefore from being an overriding interest on a disposition of the burdened land.48 This analysis can sit comfortably with the definition of “registered” in section 132 of the LRA 2002 (as meaning “entered in the register”), if that section is taken to refer to the register of the burdened title. An interest is therefore unregistered if it is not entered on the register of the burdened title. Section 132 says nothing about registration of the benefit.

11.41 We believe that the fact that the benefit of an interest has been registered should not preclude that interest from being an “unregistered interest” (and so overriding) for the purposes of schedules 1 and 3 to the LRA 2002.

Do consultees agree?

ONCE NOTED ON THE REGISTER, AN INTEREST CAN NEVER AGAIN OBTAIN OVERRIDING STATUS

11.42 As we have seen, the effect of a registrable disposition of a registered estate for valuable consideration is, broadly, that the interest under the disposition will be subject only to matters referred to on the register, and overriding interests under schedule 3. Section 29(3) of the LRA 2002 provides that an interest will not be an overriding interest for these purposes if it “has been the subject of a notice in the register at any time since the coming into force of this section”.

47 A purchaser of unregistered land will be bound by legal interests in the land, such as a legal easement.

48 Helpfully this is also the conclusion reached by the authors of Ruoff & Roper at para 36.004.
This means that, if an overriding interest is noted on the register, it can never again re-obtain its overriding status. For so long as the notice remains on the register, this rule causes no difficulties. However, it may be problematic in the event that, for some reason, the notice protecting the interest is removed from the register. No longer protected by a notice, and no longer an overriding interest, the interest is vulnerable in the event of a registered disposition of the estate for valuable consideration.

Our 2001 Report makes it clear that the interest is denied overriding status even if the removal of the notice from the register was a mistake. In this case, however, the holder of the interest should be able to apply for an indemnity if he or she suffers loss as a result.

In this part of the chapter we review the policy considerations which lay behind the inclusion of section 29(3). We consider whether in fact the subsection may create a disincentive to bring overriding interests onto the register, and whether it could generate a windfall for purchasers.

Policy behind section 29(3)

There is little discussion of section 29(3) in our 2001 Report. However, the policy of the LRA 2002 was to reduce the impact of overriding interests. Our 2001 Report explains that, as part of that policy, where overriding interests exist they should be brought onto the register where possible. This process may occur voluntarily through the person with the benefit of the interest applying for a notice on the register. However, it may also occur as a result of rules requiring the disclosure to Land Registry of overriding interests on first registration, or the registration of registrable dispositions.

49 There is an interesting, though we believe academic, question as to the basis on which the interest loses its overriding status on entry of a notice in the register. On one view, this is the straightforward application of section 29(3). On another view, the entry of a notice on the burdened title in respect of the interest means that the interest is no longer “unregistered”, and so no longer capable of falling within schedule 3. On this view, section 29(3) only comes into play at such time (if at all) as the notice is removed from the register.

50 Law Com 271, para 8.95.

51 See para 11.3 above.

52 Law Com 271, paras 8.90 to 8.95.

53 LRR 2003, rr 28 and 57.
Does section 29(3) create a disincentive to bring interests onto the register?

11.47 We can see that it is possible that, contrary to the policy of the LRA 2002 of facilitating overriding interests being brought onto the register, the effect of section 29(3) may in fact create a disincentive to register. This is because, where the holder of an overriding interest is considering whether to apply for a notice in relation to his or her interest, it is relevant to take into account that in some ways the notice may offer weaker protection for the interest than schedule 3; 54 the interest is vulnerable in the event that the notice is, for whatever reason, removed or cancelled from the register.

11.48 It must also be considered that, as explained above, the notice may not have been entered on the register at the instigation of the holder of the interest. The interest may instead have been disclosed to Land Registry as part of an application for registration made by another person, the result of which is that Land Registry has exercised its power under section 37 of the LRA 2002 to enter a notice on the register. 55

A windfall for purchasers?

11.49 Section 29(3) has the potential to create an unhappy mismatch between what has happened on the register, and the position on the ground. An example will illustrate this point.

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54 This will not always be the case. For example, where the interest is a legal easement, it must meet certain criteria in order to override under sch 3, para 3. Fulfilment of these criteria would not be necessary in order to protect priority if a notice of the easement was entered on the register.

55 Rule 89 of the LRR 2003 provides that Land Registry must give notice to any person who appears to be entitled to the interest protected by the notice on the register, or whom the registrar otherwise considers appropriate. However, Land Registry is not obliged to give notice to a person whose name and address for service are not entered on the register. In any event, even if notice is served on the interest holder, it would appear to be for information purposes only since, once entered on the register, the notice can only be removed upon evidence that the interest it protects has determined (LRR 2003, r 87).
Suppose a notice is entered on the register to protect an interest of a person who is in actual occupation of the land. The notice is subsequently removed, but the person remains in actual occupation. By virtue of section 29(3), the interest which was protected by the notice is no longer capable of being an overriding interest. But this is not immediately apparent to a purchaser of the relevant land. The purchaser will inspect the land in the usual way, and should discover the existence of the occupier. The purchaser should then, if properly advised, go on to make enquiries of the occupier as to the nature of any interests which he or she may hold. The occupier may be unaware of the fact that the interest had ever been entered on the register, or unaware that the notice protecting the interest has been removed from the register, or unaware of the consequences of the removal under section 29(3) – or all three. The purchaser’s behaviour is exactly as it would have been if the interest were still capable of being an overriding interest. It has to be, because the purchaser cannot, from the face of the register, see that there was once a notice protecting the interest which has subsequently been removed. The occupier may believe that he or she has an overriding interest – the purchaser may believe that the occupier has an overriding interest – but in fact no such overriding interest exists. It seems to us that in this situation section 29(3) creates a windfall for the purchaser that may not have been intended.

Effect of removal of the notice from the register

Despite the potential problems with section 29(3) outlined above, we can also see that there are circumstances where it produces the outcome that parties expect. For example, say an application is made by the holder of an overriding interest for a unilateral notice in relation to that interest. The registered proprietor wishes to sell the property, and the unilateral notice is an obstacle to the sale. At the request of the buyer, the registered proprietor secures the cancellation of the notice. Although the cancellation of the notice (by itself) does not mean that the right has ceased to exist as a proprietary right, it does mean that the right will not bind the buyer as it is neither noted on the register, nor an overriding interest. If, however, on cancellation of the unilateral notice, the interest could once again fall within schedule 3 and so be an overriding interest, removal of the unilateral notice of itself would not be sufficient for the buyer’s purposes. It would be necessary to go further and ensure that the interest was brought to an end.

56 For example, if it was disclosed as part of an application to Land Registry under LRR 2003, rr 28 and 57, and the occupier had not received notice of the entry being made on the register.

57 It would be possible to ascertain this by examining historic copies of the title register, but this is not routine practice in conveyancing transactions. In order to obtain a copy of a historic edition of the register it is also necessary to specify the date as at which the register is wanted. It would be almost impossible in this scenario to know which dates to search the register to look for the notice.

58 For example, the purchaser may have adjusted the amount he or she was prepared to pay for the land as a result of the overriding interest which was thought to exist.

59 It is assumed for these purposes that the beneficiary of the unilateral notice fails to respond to an application to cancel the notice.
Allowing interests which have been protected by way of a unilateral notice to regain their overriding status could therefore have the effect that the beneficiary of the notice has less incentive to respond to an application to cancel it within the time period laid down by the LRA 2002, as cancellation will no longer be fatal to the ability of the interest to bind a purchaser.\textsuperscript{60}

Questions for consultees

We have set out the arguments for and against section 29(3). We believe that these are evenly balanced and so would like to ask consultees an open question as to whether section 29(3) should be retained, along with a question which asks consultees to provide evidence of circumstances in which the section has operated in practice.

11.54 We invite consultees' views as to whether section 29(3) of the LRA 2002 serves a useful purpose and should be retained.

11.55 We invite consultees to provide examples of situations where section 29(3) has either created a problem in practice, or conversely performed a useful function.

Transitional provisions

11.56 In the event that consultees are against the retention of section 29(3), it would be necessary to consider whether any transitional provisions would be required in the event of its repeal. For example, such provisions may be needed to govern the position where a notice is removed from the register prior to repeal of section 29(3), but a disposition takes place following repeal. We ask consultees who are in favour of the repeal of section 29(3) to include their views as to the rules which should govern this scenario.

11.57 We invite consultees' views as to whether any transitional provisions are necessary in the event of the abolition of section 29(3).

\textsuperscript{60} In Chapter 9 we discuss a range of options for the reform of notices under the LRA 2002. Consultees' views on these reform options will also inform our future thinking in relation to section 29(3).
CHAPTER 12
LEASE VARIATIONS AND REGISTRATION

INTRODUCTION

12.1 In Chapter 3 we reviewed the registration requirements of the LRA 2002 in relation to leases. We provisionally concluded that no change is necessary to reduce the length of a lease which is registrable from the current threshold of a term exceeding seven years.¹

12.2 In this chapter we consider whether a variation of a lease needs to be registered or recorded at Land Registry in order to bind successors in title both to the landlord and the tenant. As such, the chapter is not confined in its scope to variations of registered leases. Where an unregistered lease is varied, the parties still need to consider whether it is necessary to make any entry on the landlord’s title, where that title is registered, in order for the variation to bind successors in title to the landlord.²

12.3 This chapter is not concerned with the form which that variation must take, or any formality requirements that it must meet – either in land registration terms, or under the general law.³ Instead, we focus on whether the effect of the variation is such that it ought to be registered under the LRA 2002.

12.4 At the end of this chapter we ask, as a separate issue, for consultees’ views on the severity and extent of any problems with the Landlord and Tenant (Covenants) Act 1995 (the 1995 Act).⁴

BACKGROUND LAW

12.5 A number of stakeholders have suggested to us that the registration status of variations of leases is uncertain. The law in this area is certainly complex as it depends on the interplay between the LRA 2002 on the one hand, and the common law and statutory provisions which regulate the transmission of the benefit and burden of landlord and tenant covenants in leases on the other.

¹ Under LRA 2002, ss 4(1)(c) and 27(2)(b)(i). Leases for a term of seven years or less may be compulsorily registrable if, for example, they are discontinuous or take effect in possession more than three months after the date of grant: see para 12.7 below in relation to leases granted out of a registered estate.

² Where the landlord’s title is unregistered, the parties need to consider whether protection is required under the Land Charges Act 1972. Protection in these circumstances is out of the scope of this Consultation Paper.

³ In particular, we do not address whether a variation should in particular circumstances be classified as a variation or a “rectification” of the lease, or whether it is possible to rectify a lease by agreement between the parties. Land Registry requirements must be observed in relation to the form of documents which alter the effect of a deed which effects a registrable disposition: Land Registry, Practice Guide 68: Amending Deeds that Effect Dispositions of Registered Land (June 2015).

⁴ See paras 12.45 to 12.48 below.
12.6 We will focus our discussion in this chapter on the relationship between the LRA 2002 and the 1995 Act. The majority of the 1995 Act (including the sections discussed in this chapter) applies only to leases granted on or after 1 January 1996.\(^5\) The outcome in relation to leases entered into prior to that date would appear, however, to be the same.\(^6\)

12.7 Section 27(2) of the LRA 2002 sets out which dispositions of a registered estate (that is, in this context, either the landlord’s registered reversion, or the tenant’s registered lease) are required to be completed by registration:

(a) a transfer,

(b) where the registered estate is an estate in land, the grant of a term of years absolute—

(i) for a term of more than seven years from the date of the grant,

(ii) to take effect in possession after the end of the period of three months beginning with the date of the grant,

(iii) under which the right to possession is discontinuous,

(iv) in pursuance of Part 5 of the Housing Act 1985 (c 68) (the right to buy), or

(v) in circumstances where section 171A of that Act applies (disposal by landlord which leads to a person no longer being a secure tenant),

(c) where the registered estate is a franchise or manor, the grant of a lease,

(d) the express grant or reservation of an interest of a kind falling within section 1(2)(a) of the Law of Property Act 1925 (c 20), other than one which is capable of being registered under the Commons Registration Act 1965 (c 64) [Part 1 of the Commons Act 2006],

(e) the express grant or reservation of an interest of a kind falling within section 1(2)(b) or (e) of the Law of Property Act 1925, and

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\(^5\) There are exceptions, set out in s 1 of the 1995 Act, where the Act will not apply to leases entered into on or after that date. These are not relevant for the purposes of the issues discussed in this chapter.

\(^6\) For example, section 142 of the Law of Property Act 1925, which provides for the burden of the covenants entered into by a landlord of a lease to run with the reversion and so bind the landlord’s successors in title, only applies to covenants which have “reference to the subject-matter of the lease”. A tenant’s option to purchase the reversion would not fall into this category and would not bind a successor in title to the landlord unless registered: see Woodfall, para 18.034. It has been held that section 142 also applies to covenants which are not within the lease: T M Fancourt, *Enforceability of Landlord and Tenant Covenants* (3\(^{rd}\) ed 2014) para 4-12. See also G Fetherstonhaugh, “When in doubt, play it safe with deeds of variation” (2008) 0807 Estates Gazette 140. The burden of the tenant’s covenants will bind the tenant’s successors in title at common law under a doctrine known as privity of estate, provided they “touch and concern” the demised premises.
(f) the grant of a legal charge.

12.8 If a disposition is required to be completed by registration, it does not operate at law unless the relevant registration requirements\(^7\) are met.\(^8\) It can be seen that, although the grants of certain types of lease are registrable dispositions, section 27 says nothing about variations of those leases. Section 27 is also concerned with “dispositions” of registered land. Many lease variations will not involve such a disposition. There is therefore no general rule that a variation of a registered lease is required to be completed by registration.\(^9\) In any event, the question which arises is the extent to which lease variations must be registered in order to bind successors in title to the landlord and tenant. This is a question of priorities. Section 27 determines the circumstances in which interests will operate at law. It does not – or at least, not directly – have anything to say about priorities.\(^10\)

12.9 We have seen that questions of priority in relation to registered land are normally regulated by sections 28 and 29 of the LRA 2002.\(^11\) However, where leases are concerned the position is more complex. In relation to the leases to which section 3 of the 1995 Act applies:\(^12\)

1. the burden and benefit of all landlord and tenant covenants\(^13\) of the tenancy will pass on an assignment of the premises demised by the tenancy, or the reversion in them;

2. where the assignment is by the tenant, then as from the assignment the assignee becomes bound by the tenant covenants of the tenancy; and

3. where the assignment is by the landlord, then as from the assignment the assignee becomes bound by the landlord covenants of the tenancy.\(^14\)

12.10 However, critically, for our purposes, section 3(6) goes on to provide that:

6. Nothing in this section shall operate –

\(^7\) The registration requirements are set out in LRA 2002, sch 2.

\(^8\) LRA 2002, s 27(1).

\(^9\) We note that this analysis contrasts with the approach taken in Land Registry, Practice Guide 68: amending deeds that effect dispositions of registered land (June 2015) para 4.5.2.

\(^10\) We say “not directly”, because, of course, the fact that an interest is classified as equitable rather than legal (because of non-compliance with section 27) may have an effect on its priority, such as, for example, where the interest is an easement. An equitable easement cannot have its priority protected as an overriding interest.


\(^12\) See n 5 above.

\(^13\) A “landlord covenant” is a covenant falling to be complied with by the landlord of premises demised by the tenancy. Similarly, a “tenant covenant” is a covenant falling to be complied with by the tenant of premises demised by the tenancy: see the 1995 Act, s 28(1).

\(^14\) There are exceptions to this principle set out in the 1995 Act, s 3.
(b) to make a covenant enforceable against any person if, apart from this section, it would not be enforceable against him by reason of its not having been registered under the [Land Registration Act 2002] or the Land Charges Act 1972.

12.11 The first point to note is that the word “covenant” is widely defined by the 1995 Act to include a “term, condition and obligation”, and includes covenants in “collateral agreements”. A collateral agreement is “any agreement collateral to the tenancy, whether made before or after its creation”: this therefore clearly includes documents which effect lease variations.\(^{15}\) Section 3(6)(b) then begs the question: which covenants need to be registered under the LRA 2002 in order to be enforceable against a successor in title to the landlord or the tenant?

12.12 Section 29 of the LRA 2002 governs priorities on the registration of a registrable disposition of a registered estate (that is, either the landlord’s registered reversion, or the tenant’s registered lease) 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. The priority of an interest will be protected for these purposes if:

1. the interest is a registered charge, or the subject of a notice on the register;
2. the interest is an overriding interest under schedule 3;
3. the interest appears from the register to be excepted from the effect of registration; or
4. (in the case of a disposition of a registered lease) if the burden of the interest is incident to the estate.

12.13 The last category is particularly interesting for present purposes. We explained in our 2001 Report that:

This will include, for example, the burden of restrictive covenants affecting that estate. Such matters are not entered on the register, as there is no need for them to be. Any person dealing with the property will, in practice, always examine the lease.\(^{16}\)

An example of such a restrictive covenant would be a covenant in the lease restricting the nature of the use which the tenant can make of the premises (for example, permitting use as a shop but for no other purpose).

\(^{15}\) The 1995 Act, s 28(1).

\(^{16}\) Law Com 271, para 5.13.
12.14 Accordingly, a restrictive covenant made between landlord and tenant, so far as relating to the property let, cannot be the subject of a notice on the register.17

12.15 There is surprisingly little analysis in the legal texts of the interrelationship between section 3(6)(b) of the 1995 Act and the LRA 2002. Section 3(6)(b) refers to a covenant which has not been “registered” under the LRA 2002. This is not confined to dispositions which have been completed by registration under section 27; the term “registered” is defined by the LRA 2002 to mean “entered in the register”.18 This could include protection of a covenant by notice on the register.

12.16 There would appear to be two schools of thought as to the basis on which the usual landlord and tenant covenants in a lease bind successors in title. One approach is that the covenants are “interests affecting the estate”, but the burden of the covenants binds those taking a disposition of a registered lease by virtue of section 29(2)(b) of the LRA 2002 on the basis that the covenants are incident to the estate.19 This approach is supported by section 12 of the LRA 2002, which deals with the effect of registration of a person as the proprietor of a leasehold estate.20 It provides that the estate is vested in the tenant subject to a number of “interests affecting the estate”. This list includes interests which are the subject of an entry on the register, and overriding interests. Section 12(4)(a) also lists, as “interests affecting the estate”:

implied and express covenants, obligations and liabilities incident to the estate.

12.17 The alternative approach is that the landlord and tenant covenants in the lease are not – with some exceptions21 – “interests affecting the estate” for the purposes of section 29 of the LRA 2002. “An interest affecting a registered estate” means “an adverse right affecting the title to the estate”.22 It has been argued that landlord and tenant covenants are not matters of title.

12.18 Alan Riley explains the position as follows:

17 LRA 2002, s 33(c). This is narrower in effect than the equivalent provision under the LRA 1925, which did not permit the entry of a notice in relation to any restrictive covenant made between a landlord and a tenant. The result of this was that a restrictive covenant entered into by a landlord in relation to land other than that demised by the lease was not protectable: see Oceanic Village Ltd v United Attractions Ltd [2000] Ch 234; Law Com 271, para 6.13.

18 LRA 2002, s 132(1). See para 11.33 above.


20 Section 12 applies where a registrable lease is granted out of an unregistered estate.

21 One such exception would be a restrictive covenant made between a landlord and tenant, so far as relating to the demised premises. However, even in this case it has been argued that the enforceability of the covenant is derived from the application of the 1995 Act, not the LRA 2002: see T M Fancourt, Enforceability of Landlord and Tenant Covenants (3rd ed 2014) para 17-16.

22 LRA 2002, s 132(3)(b).
A distinction should be drawn between matters of title (dealt with by the LRA 2002), and matters of privity of estate or contract (dealt with by the [1995 Act]). The terms of a lease are matters of privity of estate or contract and are generally excepted from the requirements of registration. Although title to the lease may be registered, the covenants and conditions of the lease do not appear on the register – they are not burdens on the title, in the normal sense, but matters of privity of estate or contract (or incidents of ownership).23

We note however that the reference to “incidents of ownership” suggests that the covenants may, after all, fall within section 29(2)(b) of the LRA 2002.

12.19 Timothy Fancourt QC, in his book *Enforceability of Landlord and Tenant Covenants*, explains that:

Generally, landlord and tenant covenants are not void for non-registration because such covenants do not fall within the types of interest which are registrable as interests affecting a registered estate under the Land Registration Act 2002 (in the case of registered land) or as land charges under the Land Charges Act 1972 (in the case of unregistered land).24

12.20 As between these two approaches, we think the better view is probably that the landlord and tenant covenants are not usually interests affecting the estate. Their transmission is governed by the 1995 Act, and not the LRA 2002. In most instances, however, we believe that which approach is correct is academic, as the priority of the interests would (in the event that we are wrong) be preserved by virtue of section 29(2)(b) of the LRA 2002.25

12.21 It seems to us that registration under the LRA 2002 cannot be required in relation to a lease variation which does not involve a disposition of, or the grant of an interest out of, either the landlord’s registered title or the registered lease itself.

**WHICH TYPES OF COVENANT COULD SECTION 3(6)(B) OF THE 1995 ACT APPLY TO?**

12.22 We have explained that the term “covenant” has a wide meaning, including an obligation entered into by the landlord or tenant, and that “registered” can include the entry of a notice on the register in respect of the covenant. In this part of the chapter we set out examples of dispositions which would, in our view, clearly require registration under the LRA 2002 in order to bind a successor in title to the landlord or the tenant (as the case may be). This would be the case whether the disposition occurred in the original lease or as part of a subsequent variation.


25 The choice of approach does, however, have significance in relation to whether covenants may be protected by a notice on the register: see para 12.37 and following below.
A lease which is granted on or after 19 June 2006 and the grant of which is a registrable disposition under section 27(2)(b) of the LRA 2002 must contain certain "prescribed clauses". Part of the aim of these clauses is to ensure that, where the lease contains provisions which need to be specifically protected by registration, these clauses are drawn to Land Registry’s attention so that appropriate protective entries can be made on the register.

Prescribed clauses will not, however, assist the parties when registrable provisions are included within an unregistrable lease or within a deed of variation. In these instances separate action must be taken to protect the interest granted if it is to bind successors in title.

A purported lease variation which amounts to a surrender and re-grant

Some lease variations will have the effect, as a matter of law, of a surrender of the existing lease and the grant of a new lease. Such a variation will be a registrable disposition for the purposes of section 27 of the LRA 2002. This will be the case if the extent of the demise or the length of the term is increased.

The grant of an easement

The grant of an easement out of registered land is a registrable disposition which must be completed by registration under section 27 of the LRA 2002. In Part 5 we provisionally propose that easements granted within leases not exceeding seven years should not need to be completed by registration in order to operate at law. We are in this chapter not concerned with easements granted within the lease itself, but instead with easements created subsequently by means of a variation of the lease. We provisionally propose in Part 5 that easements which benefit leases exceeding three years but are created outside the lease (for example, by virtue of a lease variation) should still be completed by registration. This requirement would not, however, apply to a variation of a lease not exceeding three years where the variation consists of the grant of an easement (in which event the easement will be an overriding interest).

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26 LRR 2003, r 58A. See also Land Registry, Practice Guide 64: Prescribed Clauses Leases (June 2015).

27 *Friends Provident Life Office v British Railways Board* [1996] 1 All ER 336.

28 See para 16.32 below.

29 We propose that these easements should be completed by registration (and therefore would not be capable of being overriding interests) because a formal process of executing a deed is needed to create both the lease and the variation to confer the express easement benefiting it. This means that legal advice is likely to have been taken in both instances.

30 See para 16.40 below.
An option to renew a lease

12.27 It is established that an option to renew a lease of unregistered land will be void against an assignee of the reversion if it has not been registered under the Land Charges Act 1972. The same principles would apply in relation to a lease of registered land if the option has not been registered against the landlord’s reversionary title. However, in practice the option may be binding as an overriding interest if the tenant is in actual occupation, unless the tenant failed to disclose the option when he or she could reasonably have been expected to have done so. For the purposes of the 1995 Act, the option is a covenant by the landlord to renew the tenancy on request by the tenant.

Tenant covenant to offer to surrender the lease

12.28 A lease may contain a covenant or obligation by the tenant to surrender (or to offer to surrender) the lease to the landlord in particular circumstances (for example, before assigning the lease). This constitutes an estate contract and therefore an interest affecting the leasehold estate. As such, it must be protected on the register of the leasehold title in order to be enforceable against subsequent assignees.

Landlord covenant to sell the reversion to the tenant

12.29 Similarly, an option for the tenant to purchase the landlord’s reversion (which is essentially a landlord covenant to sell the reversion to the tenant if the criteria for exercise of the option are met) is an estate contract, which needs to be protected on the landlord’s title in order to bind successors in title. However, in practice the option may be binding as an overriding interest if the tenant is in actual occupation.

Landlord covenant not to use property other than the land demised for a particular use

12.30 We noted above that a restrictive covenant made between landlord and tenant, so far as relating to the property let, cannot be the subject of a notice on the register, and will instead be protected on a registered disposition of the relevant registered estate as an interest incident to that estate under section 29(2)(b) of the LRA 2002. However, a covenant by the landlord not to use property, other than 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 in title to that property.

31 *Beesly v Hallwood Estates Ltd* [1960] 1 WLR 549; *Phillips v Mobil Oil Co Ltd* [1989] 1 WLR 888. See also *Woodfall*, para 18.008.

32 By virtue of LRA 2002, sch 3, para 2. See also Chapter 11.


34 *Webb v Pollmount Ltd* [1966] Ch 584.

35 *Oceanic Village Ltd v United Attractions Ltd* [2000] Ch 234.
Summary

12.31 In essence, therefore, the sorts of landlord and tenant covenants which fall within section 3(6)(b) of the 1995 Act, and which need to be registered in order to be enforceable against successors in title, are those creating interests in land which, were they to have been created outside a landlord and tenant context, would have needed to be registered. Easements, restrictive covenants, and estate contracts all fall within this description.

SHOULD IT BE POSSIBLE TO RECORD OTHER TYPES OF LEASE VARIATIONS ON THE REGISTER?

12.32 Many lease variations will not effect any of the dispositions or create any of the land interests set out above. Where section 3 of the 1995 Act applies to the lease which has been varied, such variations will be binding on successors in title to the landlord and the tenant as covenants contained in “collateral agreements” to the lease. Registration, or noting, of the variation at Land Registry is not necessary in order to make the variation bind successive landlords and tenants. Lease variations which do not need to be registered could include, for example, an amendment to the covenant to repair or to the frequency with which rent must be paid, or an alteration to the permitted use.

36 With the exception noted at para 12.14 above.

37 It is assumed for these purposes that the variation is not expressed to be personal: the 1995 Act, s 3(6)(a).
12.33 We do not consider as an option making the registration of all lease variations compulsory. There are a number of reasons for this. The first is that the 1995 Act was developed for the purpose of enabling covenants in leases to run and bind successors in title. Requiring registration in all circumstances would undermine that purpose. The second reason is that, in any event, registration could and should not be required in order to make a variation of an unregistered lease bind a successor in title (for example, a person buying the landlord’s interest where the reversion to the lease is registered) – save to the extent the subject-matter of the variation requires registration on the principles outlined earlier in this chapter. If the lease is not registrable, then as a general rule a deed of variation of that lease should not need to be registered either. The third reason why we do not think registration of all lease variations should be compulsory is that some variations may arise relatively informally, perhaps by an exchange of letters passing between landlord and tenant. The land registration system has always been wary of requiring those with the benefit of informally acquired rights to register them or risk losing them.38 Fourthly, a requirement of compulsory registration may have a disproportionate impact on landlords rather than evenly applying to both landlords and tenants. This is because most tenants would be in actual occupation of the demised premises, with the result that any landlord covenants imposed on a lease variation (of which the tenant necessarily has the benefit) may bind successors in title to the landlord as overriding interests despite their non-registration.39 A requirement of registration could therefore in practice affect mainly variations which need to be noted against the tenant’s title. If registration of lease variations were compulsory there could also be resource implications for Land Registry. Finally, variations to leases are voluntarily entered into; requiring their registration would therefore be to impose an additional regulatory requirement on landlords and tenants with consequent increases in costs for those parties. This would need to be justified in terms of economic benefits which would result from compulsory registration.

12.34 Although we do not believe that all lease variations should need to be registered, there is a strong case for supporting their registration on a voluntary basis. Recording lease variations on the register of title to both the lease and the reversion supports the “mirror principle”, and the main objective of the LRA 2002, as explained in our 2001 Report:

The fundamental objective of the Bill is 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 given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections.40

38 This is one of the rationales underpinning overriding interests: see Chapter 11.
40 Law Com 271, para 1.5.
12.35 As we note at paragraph 12.38 below, a significant number of applications are currently made to record lease variations on the register. It is not clear how many of these are made in circumstances where it is not necessary to either complete the variation by registration, or protect its priority, pursuant to the principles discussed earlier in this chapter. It may be that, given the uncertainties over when it is necessary to register, applicants prefer to “play it safe”. However, it may also be that parties to leases see a benefit in all of the lease documents being referred to in one place: on the register. The case for being able to voluntarily record lease variations on the title to a registered lease and/or a registered reversion is to enhance the quality of information which is available about the lease to a prospective purchaser of the lease or the reversion. However, as noting would be voluntary, a purchaser would still need to make enquiries in order to ascertain whether any other variations exist. The register would not therefore be – indeed as it is not now – a reliable record of the covenants contained in the lease at any given time.

12.36 We turn now to the form which entries on the register relating to lease variations may take, and how those entries fit within the structure of the existing land registration regime.

12.37 Section 34 of the LRA 2002 provides that a person who claims to be entitled to the benefit of an interest affecting a registered estate may apply for the entry in the register of a notice in respect of the interest.41 “An interest affecting a registered estate” means “an adverse right affecting the title to the estate”.42 Two points arise out of this definition. First, the right must be adverse. This requirement suggests that it would not be possible to make an entry by way of a notice against a leasehold title in respect of a deed of variation which benefits the tenant (for example, a relaxation in the use covenant). Some sort of entry in the Property Register43 of the title to the lease would appear to be appropriate – but that entry cannot be a notice as presently defined. The second point is that, in order to be protected by a notice, the right must affect the “title to the estate”. As we have already observed, it is unclear whether a covenant in a lease affects the title to either the lease itself, or the landlord’s estate.44 Provision is made, however, by rule 84(4) of the LRR 2003 for a notice of a variation of an interest protected by a notice (which would include a notice of a lease on the landlord’s title). Rule 84(4) provides that the entry must give details of the variation.45

41 The fact that an interest is the subject of a notice does not necessarily mean that the interest is valid: LRA 2002, s 34(3).
42 LRA 2002, s 132(3)(b).
43 See para 2.40 above.
44 See paras 12.16 to 12.21 above.
45 See also LRR 2003, r 81. This rule makes provision for applications for an agreed notice, but expressly includes within its remit “an agreed notice in respect of any variation of an interest protected by a notice”, which could presumably include a lease which is noted on the landlord’s title.
12.38 Land Registry’s practice is currently to allow for (i) an application for the register to be altered (to bring it up to date) by the effect of the variation being noted in the landlord’s and the tenant’s individual registers, or (ii) an application for a notice to be entered in the landlord’s title in respect of the deed of variation. In the six months between April and September 2013, Land Registry “registered” 9,975 variations to leases (made on Form AP1), noted 60 variations in the form of an agreed notice and 2 as unilateral notices.

12.39 Stakeholders have told us that the legal position in relation to the registration of lease variations is confusing. As we have seen, the existing provisions of the LRA 2002 also do not seem well equipped to deal with entries on the register in respect of lease variations. We believe that it would be beneficial for the LRA 2002 to provide a clear mechanism to permit the recording of variations to leases on the landlord’s or the tenant’s title (or, where both are registered, on both). Such a mechanism should make it clear that recording a lease variation is not necessary save where expressly required in order for a disposition effected by the variation to operate at law under the LRA 2002, or in order to preserve the priority of the interest.

12.40 We provisionally propose 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.

Do consultees agree?

12.41 The discussion above has focused on the registration of a document which varies the terms of a lease. This issue appears to be the main focus of stakeholders who raised concerns with us. There are, however, a number of other documents ancillary to a lease which may be entered into between the landlord and the tenant during the life of the lease. These include licences (or permissions) given by the landlord to the tenant (for example, to assign the lease, or alter the premises), as well as rent review memoranda (which record a change to the level of rent payable under the lease).

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46 The notice on the landlord’s title is entered pursuant to LRR 2003, r 84(4), discussed at para 12.37 above. There is no equivalent provision which would enable the entry of a notice of the variation on the tenant’s title.

47 The statistics do not indicate what the substance of the variation was in each case.

48 We note that LRR 2003, r 78 used to provide that “an application to register the variation of a lease or other disposition of a registered estate or a registered charge which has been completed by registration must be accompanied by the instrument (if any) effecting the variation and evidence to satisfy the registrar that the variation has effect at law”. Rule 78 was repealed in 2008, as its purpose was thought to be served by rule 129, which provides that an application for alteration of the register must be supported by evidence to justify the alteration.
12.42 These documents do not usually have the effect of varying the lease;\(^49\) rather, they are granted pursuant to it (and are contemplated by the existing terms of the lease). A person acquiring the lease or the reversion would want to see all such documents, as they complete the picture of the obligations arising under the lease at any given point in time. The case for permitting their entry on the register is therefore arguably the same as it is for deeds of variation: to support the goal of the register being a complete and accurate record of the state of title to the lease.

12.43 Against this argument is the fact that to permit the noting of such ancillary documents, which are commonplace, risks “cluttering” the register. The entries would need to be removed from the landlord’s title on expiry of the lease. Given that noting such documents at Land Registry is not necessary in order to make the obligations they contain bind successive landlords and tenants, it may be that the costs which could be generated if noting were permitted outweigh any benefits of such documents appearing on the register.

12.44 **We invite the views of consultees as to whether express provision should be made to permit the recording of any other documents which are ancillary to a lease on either the landlord’s registered title, or the tenant’s registered title, or both.**

**ISSUES CONCERNING THE 1995 ACT**

12.45 Moving away from land registration, we are aware of widespread dissatisfaction with a number of aspects of the 1995 Act.\(^50\) For example, there are concerns about the scope of Authorised Guarantee Agreements, following the Court of Appeal’s decision in *K/S Victoria Street v House of Fraser*\(^51\) in which the court confirmed that a “direct guarantee” was not permitted under the 1995 Act.\(^52\)

12.46 We were urged during the consultation that underpinned our current Programme of law reform to take on a project to address these issues. At that time, we were unable to gain sufficient Government support for that work to proceed.

12.47 We would welcome consultees’ views on the severity and extent of problems with the 1995 Act. In particular, it would be very helpful if consultees could provide evidence (anonymised if necessary) of costs caused by problems with the 1995 Act, or examples of these issues as they arise in practice. These submissions will not be taken forward as part of this project but will be considered in the context of whether there is sufficient support for a separate project to address these issues.

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\(^49\) Although they may do so; see eg *Topland Portfolio No. 1 Ltd v Smiths News Trading Ltd* [2014] EWCA Civ 18, [2014 All ER (D) 129 (Jan), where a licence to alter was held to effect a variation to the lease.


12.48 We invite the views of consultees on the severity and extent of problems with the Landlord and Tenant (Covenants) Act 1995. We invite consultees to provide evidence in support of their views.
PART 4
INDEFEASIBILITY
CHAPTER 13
ALTERATION AND RECTIFICATION OF THE REGISTER

INTRODUCTION

13.1 One of the major objectives of title registration is to remove the need for a purchaser to read the deeds to the property. Instead the intention of registration is that title is set out before the purchaser and is visible, if not at a glance, then at least in one single register of title.¹ Not needing to look at title deeds is generally advantageous. In particular it avoids the need for title to be investigated on each conveyance. Such an investigation is inefficient. It is time consuming and repetitive. Investigating title through deeds also carries the risk of human error and of documents simply being lost or destroyed. For this objective to be achieved, however, the purchaser and others dealing with land need to be able to rely on what the register says.

13.2 Accordingly, registration operates as a guarantee or promise of title. This guarantee is provided in section 58 of the LRA 2002, which provides “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 title promise means that the purchaser can rely on the register and act on the basis of what the register says. If the register says that Mr or Ms V is the registered proprietor of a freehold title, then a purchaser can buy the land without checking the validity of the transaction under which Mr or Ms V became proprietor.² How solid is that title promise? In other words, how secure is the registered proprietor’s title? We call that the indefeasibility question, because the answer to that question is in the law relating to indefeasibility. To some extent a registered title is indefeasible; but indefeasibility is never absolute, and different registration systems give different answers to the question. In the LRA 2002 the answer is given in the provisions about the alteration of the register.

Alteration of the register in the LRA 2002

13.3 There are some circumstances in which the register must inevitably be altered; in other words, there are circumstances where it cannot be correct. Obvious examples include cases where the registered proprietor has died, or where there is a typographical error in the address of the property.

13.4 Schedule 4 to the LRA 2002 states that the register may be altered, by the registrar or by order of the court, for the purposes of:

(1) correcting a mistake;

¹ See para 2.12 above.

² We adopt the terminology “title promise” and “priority promise” to describe the effect of LRA 2002, ss 58 and 29 (respectively). This is the terminology used by Amy Goymour in her article: A Goymour, “Resolving the tension between the Land Registration Act 2002’s ‘priority’ and ‘alteration’ provisions” [2015] Conveyancer and Property Lawyer 235, 257.
(2) bringing the register up to date

(3) giving effect to an estate, right or interest excepted from the effect of registration;³ or

(4) removing a superfluous entry.⁴

13.5 The purposes listed at 2, 3 and 4 above are relatively straightforward. They are instances where there is really no choice about altering the register, and therefore alteration is not a discretionary matter. That does not mean that their scope is invariably clear or uncontroversial. Some uncertainty has arisen as to whether, in particular circumstances, an alteration of the register is properly classified as having been made for purpose (2) (bringing the register up to date) or whether in fact it falls within purpose (1) (correcting a mistake).⁵ That can be significant because the classification of an alteration as being for the first purpose – the correction of a mistake – is closely linked to the availability of an indemnity. While the dividing line between the second and first purposes is therefore not always clear, although the division between the two is important.

13.6 In paragraph 13.1 above we have explained that purchasers and others dealing with land need to be able to rely on what the register says. The ability to rely on the register is reinforced by the availability of an indemnity. Where the register is altered to correct a mistake, but not when it is altered for any of the other purposes listed in paragraph 13.4 above, a person who suffers loss as a result of that alteration may be entitled to an indemnity. We consider the operation of the indemnity provisions of the LRA 2002 in Chapter 14. Not every alteration of the register to correct a mistake will entitle a person to an indemnity. An indemnity is payable only where, in addition to being to correct a mistake, the alteration “prejudicially affects the title of a registered proprietor”.⁶ The LRA 2002 calls an alteration of the register to correct a mistake that prejudicially affects the title of a registered proprietor a “rectification” of the register. The close link between mistake and indemnity means that the interpretation of mistake as the purpose for altering the register carries particular significance.

13.7 “Mistake” is a broad concept,⁷ which encompasses scenarios ranging from the very simple to the very complex. At the simple end of the spectrum the correction of a typographical error is an alteration of the register to correct a mistake. At the

³ Alteration of the register for any of these three purposes may be ordered by the court, or effected by the registrar: LRA 2002, sch 4, paras 2 and 5.

⁴ This final category is listed in the LRA 2002, sch 4, para 5 as a reason why the registrar may alter the register, but not in para 2 as a reason why the court may order it.

⁵ For example, there is debate whether an alteration to record an overriding interest on the register is the correction of a mistake (purpose 1) or bringing the register up to date (purpose 2). See Swift 1st Ltd v Chief Land Registrar [2015] EWCA Civ 330, [2015] Ch 602, at [6] and Elizabeth Cooke, “Chickens coming home to roost” [2014] Conveyancer and Property Lawyer 444, 444 to 445.

⁶ LRA 2002, sch 8, para 11(2).

⁷ It is intended to encompass the long list of cases set out in section 82 of the LRA 1925 where the register might be corrected. The LRA 1925 used the term “rectification” to include all cases where the register is amended, whereas the LRA 2002 uses the term “alteration” to include all such cases and gives a specialised meaning to “rectification”. See para 13.66 and following below.
complex end, mistake includes the accidental registration of a certain field in the
title both to A’s farm and to B’s farm (a situation known as “double registration”); and
the registration of title to land following a forged or otherwise void disposition. In the text box below we outline two scenarios arising from fraud. Fraud has provided an important context in which the operation of the provisions of the LRA 2002 have been tested in case law. However, it is important to bear in mind that fraud is only one possible cause of a mistake.

<table>
<thead>
<tr>
<th>Scenario 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>A is the sole registered proprietor of Blackacre. A fraudster steals A’s identity and forges a transfer of Blackacre to B, who becomes registered proprietor in place of A. Alternatively a fraudster using A’s identity forges a mortgage over Blackacre to B, who becomes registered proprietor of the charge. Neither A nor B have any knowledge that anything is wrong and have been entirely conscientious throughout. A forged disposition has no effect at common law, but once it is registered B’s title is guaranteed (section 58 of the LRA 2002). Later A discovers what has happened and wants to be reinstated as registered proprietor or have the charge removed.</td>
</tr>
</tbody>
</table>

We call this the **AB** scenario.

<table>
<thead>
<tr>
<th>Scenario 2</th>
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<tbody>
<tr>
<td>A is the sole registered proprietor of Blackacre. A fraudster steals A’s identity and forges a transfer of Blackacre to B, who becomes registered proprietor in place of A. B then sells the land to C, or grants a mortgage over the land to C; for example, to fund the purchase of the land. C becomes registered proprietor in place of B, or becomes registered proprietor of the charge. B as proprietor and C as chargee (or C alone if he or she has become proprietor) as the case may be have no knowledge that anything is wrong and have been entirely conscientious throughout. Later A discovers what has happened and wants to be reinstated as proprietor against C, or be reinstated as proprietor against B and have C’s charge removed.</td>
</tr>
</tbody>
</table>

We call this the **ABC** scenario.

**13.8** The AB and ABC scenarios, above, are an endeavour to distil the essence of the problematic case. Something has happened that should not have happened – a forged transfer – and which would have no effect on the legal title at common law, but which has effect in registered land because of the title promise contained in section 58 of the LRA 2002. The party or parties against whom A wishes to be reinstated on the register (or, in the case of a charge, have removed from the register), are, as may often be the case, innocent. They are “victims” of the forgery perpetrated by another party. Each of A, B and C has or has had a

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9 In practice a party may be innocent but careless, to a greater or lesser extent. In this chapter we assume that B and C are entirely innocent and completely conscientious; in Chapter 14 we explore the implications for indemnity where B or C is innocent but could have taken steps that would have revealed the problem.
guaranteed title.

13.9 Each party’s guarantee of title will be honoured, but they cannot all be honoured in the same way. In the AB scenario, either A will be reinstated as proprietor and B will lose his or her property rights, or A will lose his or her property rights leaving B’s intact. In the ABC scenario, either A will be reinstated and C (or B and C) will lose their property rights, or A will lose his or her property rights leaving C (or B and C’s) rights intact. The party or parties who lose their property rights will have a right to claim an indemnity under the terms of Schedule 8 to the LRA 2002. In some cases an indemnity will be perfectly satisfactory to the recipient; in other cases it will not. Take the AB scenario above. If B is a mortgagee, then B’s interest is purely financial; if A is reinstated as registered proprietor and B is repaid the outstanding loan (with interest and costs) by way of indemnity then both parties are satisfied. But if the void disposition was a transfer to B (during A’s absence in hospital perhaps, or while employed abroad), who has paid full value for the property, moved in, taken up employment in the vicinity and moved his or her children into local schools, B will want to stay in his or her new home while A, equally, will want to return home.

13.10 The scenarios we have outlined involve fraud, but we have noted at paragraph 13.7 that a “mistake” can arise through other reasons, including a double registration. Hence, it may be that in the AB scenario instead of a forged transfer or mortgage, B becomes registered with land that is also included in A’s title. Similarly, as in the ABC scenario, the double registration of B may come to light only after B has transferred the land to C. The double registration may add significantly to the value or amenity of B’s land; for example, by providing B with a parking space that B would not otherwise have. Here, A and B or A and C can both point to section 58 of the LRA 2002 as providing a promise of their title, but only one of those promises can be kept. Ultimately one party can keep the land and the other will be indemnified. We consider double registration further below at paragraph 13.128 and following.

13.11 We can see from these examples that the indefeasibility question is not an easy one to answer and that a number of different answers are possible.

The structure of our discussion of indefeasibility

13.12 In this chapter we first consider the general approach that should be taken to indefeasibility. In order to do so we:

(1) discuss the objectives that should be met in answering the indefeasibility question;

(2) explore the different versions of indefeasibility found in the Torrens systems, the law of England and Wales, and Scotland;

10 We look in detail at the provisions of schedule 8 and the scheme of indemnity in Chapter 14. For the purposes of this chapter we make the assumption that the indemnity will give the recipient the full value of what he or she has lost; we acknowledge that in practice that may not always be the case; see 14.147 and following.

(3) explain why there is a need for reform of the provisions of the LRA 2002 about indefeasibility; and
(4) make provisional proposals for reform.

13.13 Having made provisional proposals for reform, we consider three aspects of indefeasibility that raise further questions:

(1) particular issues arising through double registration;
(2) rectifications relating to derivative interests (a term used to describe a property right that has been granted out of a superior right); and
(3) whether rectification should operate retrospectively.

13.14 It will be appreciated that the law relating to rectification is closely connected to the provisions of the LRA 2002 relating to indemnity. Chapter 14 explores indemnity and invites views for reform in that area too.

OBJECTIVES IN THE LAW RELATING TO INDEFEASIBILITY

13.15 Because there are a number of possible answers to the indefeasibility question, it is useful to look at this topic on a principled level. An assessment of what the law should be trying to achieve will enable us to evaluate possible solutions. We take the view that the law relating to indefeasibility should achieve four objectives.

(1) Clarity: it should be possible to determine the answer in a given situation as easily and with as little litigation as possible.
(2) Finality: there must come a point, at some stage in a chain of transactions, when there is no question of a registered proprietor losing his or her title because of a mistake that occurred.
(3) Fact-sensitivity: the rules used to determine who gets the land and who gets an indemnity need some in-built flexibility to ensure that the land should pass to or remain in the ownership of the person who most needs it or values it.
(4) Reliability of the register: to be able to rely on the register means knowing that if title is lost, either because the register transpires to have been wrong, or because something happens to remove a name from the register when it should not have been, then an adequate indemnity will be available.12 An adequate indemnity is one that fully compensates a person for his or her loss, in the cases where the party who takes an indemnity is not only innocent of fraud but also has taken all proper care.13

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12 In Chapter 14 we consider the indemnity provisions of the LRA 2002. One of the options for reform we raise would limit the circumstances in which mortgagees are able to claim an indemnity.

13 A party who is innocent of fraud but has not been as careful as he or she should have been may, in some cases, receive less than the full indemnity; this is already provided for in the LRA 2002.
The first of these objectives is uncontroversial.

The second is open to question. Should the register track the position in unregistered land, so that a disposition is no more effective in registered land than it would be at common law – including where there are consequences at common law not only for B but also for subsequent parties, C, D, E and so on? Noting that the courts have sometimes appeared to adopt that approach, we are not convinced by this reasoning. The guarantee of title that lies at the heart of the indefeasibility question is unique to registered land. As a result, we do not find the analysis of what would happen in unregistered land, in the absence of a guarantee, useful in determining what should happen in registered land, where the guarantee is made. Accordingly, we think that while finality cannot be an absolute requirement, it is an important value.

The third objective reflects a crucially important value. In particular, the English approach to indefeasibility has long been embedded with the idea that a registered proprietor who is in possession of land deserves a special level of protection. The protection given to possession is, however, subject to a discretion, and so there is ample scope for sensitivity to the circumstances.

The fourth objective is equally important, and we address it in Chapter 14. In this chapter we work on the basis that there is provision for indemnity at a level that fairly and realistically compensates loss.

The first three of these objectives are not always compatible. Fact-sensitivity may point in a different direction from the need for finality. An objective may be impossible to achieve: what if both parties equally want and need the property as their home?

We have not referred in our list of objectives to the concepts of static and dynamic security. Those concepts reflect (respectively) the interest of owners in the stability of their ownership and the interest of the market in having rules that ensure that a purchaser will not be caught out by prior interests of which he or she was unaware. English law does not explicitly make a choice between those two interests. In this respect, English law stands in contrast to the Torrens systems (whose approach we explain below at paragraphs 13.23 to 13.26) with their overt preference for dynamic security. We consider that it is unnecessary to engage in an academic debate over the merits of these two forms of security or stability. We think that the objectives we have set out above capture what is important in the law on this topic in England and Wales.

**DIFFERENT RESPONSES TO INDEFEASIBILITY**

The title promise or guarantee provided by the register is given in different ways in different systems.

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14 The protection given to proprietors in possession in the LRA 2002 reflects that provided in the LRA 1925, s 82(3).


Indefeasibility in the Torrens systems

13.23 We begin with the Torrens systems. Note the plural “systems”; the first such system was devised by Sir Robert Torrens in South Australia in 1858, but many further title registration systems were modelled on that first statute and are known as the Torrens systems. They are all different. In the Torrens systems two approaches to indefeasibility have developed, but not every system has definitively adopted one or other approach.

13.24 Most Torrens systems operate a form of “immediate indefeasibility”, which provides dynamic security. In such systems if A is registered as proprietor and B buys the registered land from him or her and becomes registered, the land is B’s (as long as B is innocent of wrongdoing). That is the case even if it turns out that the sale would have been void at common law because, for example, the transfer was forged by a third party. That promise of course means that A will lose the land; but the registrar will indemnify him. Immediate indefeasibility is found throughout Australia and New Zealand.

13.25 Some other Torrens systems, for example Ontario, Canada, operate what is known as “deferred indefeasibility”, which favours static security. Although there are different forms of deferred indefeasibility, their common element is that in the AB scenario above, B would have to relinquish the land to A. If, however, the problem went undiscovered until after B had sold the land to C (an equally innocent party) then C’s title to the land would be secure (although A would be compensated).

13.26 Thus, the Torrens systems differ in their response to the AB scenario, but are identical in their response to the ABC scenario.

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17 Real Property Act 1858 (South Australia).

18 This might happen for a number of reasons; eg, if the sale was effected by means of a forged power of attorney. Compare with Fitzwilliam v Rittall Holdings Services Ltd [2013] EWHC 86 (Ch), [2013] 1 P & CR 19.

19 P O’Connor, “Deferred and immediate indefeasibility: bijural ambiguity in registered land title systems” (2009) 13 Edinburgh Law Review 194, 201 to 204. It is interesting to note that it took some time for it to become clear that immediate indefeasibility was indeed the effect of these statutes. The point was established by Frazer v Walker [1967] 1 AC 569 (PC), a decision of the Privy Council relating to the New Zealand statute. Immediate indefeasibility is now established in New Zealand, in all Australian jurisdictions, Singapore and British Columbia. A recent trend in some jurisdictions has been to depart from immediate indefeasibility in respect of registered charges obtained by fraud where the chargee failed to take reasonable steps to check the identity of the chargor. We consider the position of mortgagees in at para 14.102 and following below.

20 B Ziff, Principles of Property Law (4th ed 2010) pp 475 to 476. Ontario operates what is called “hyper-deferred indefeasibility”, otherwise known as “deferred indefeasibility plus”. Under this system, B would not be protected in the AB scenario if he or she dealt with the fraudster and had a realistic opportunity to avoid the fraud: p 476. We note that it has been questioned whether Ontario is a Torrens jurisdiction, rather than based on the English model: see P O’Connor, “Deferred and immediate indefeasibility: bijural ambiguity in registered land title systems” (2009) 13(2) Edinburgh Law Review 194, 208 and 211.
Indefeasibility in England and Wales

13.27 The response of the system in England and Wales, as it is expressed in statute,\textsuperscript{21} to these two situations is neither deferred nor immediate indefeasibility. The LRA 2002 takes an approach that we described in our 1998 Consultation Paper as “qualified indefeasibility”.\textsuperscript{22} The LRA 2002 produces variable results depending upon who is in possession of the land. In the AB situation, the LRA 2002 says that if there is an application to correct a mistake in the register and B is in possession of the land then the register may not be rectified against him or her unless either:

\begin{enumerate}
\item he or she caused or contributed to the error by fraud or carelessness (not in our example); or
\item it would be unjust not to rectify the register.\textsuperscript{23}
\end{enumerate}

13.28 The effect of this rule is to prefer the innocent transferee where he or she is in possession of the land, subject to the narrowly phrased escape route where the interests of justice nevertheless favour the restoration of A to the register and to the land.\textsuperscript{24} Where B is not in possession the statute provides that the register must be rectified unless there are exceptional circumstances that dictate otherwise.\textsuperscript{25} There is little judicial guidance on what may constitute such circumstances.\textsuperscript{26}

13.29 What has been rather less clear in the system in England and Wales is the answer in the ABC situation. In the language of the LRA 2002, is the registration of C a mistake? If it is, then the answer is determined, on the face of it, by possession. If C is in possession, then he or she is unlikely to lose the land, but if C is not in possession then A will be restored to the register save in exceptional circumstances. It would appear that this was also the answer under the LRA 1925. That is because the LRA 1925 authorised rectification (subject to protection

\textsuperscript{21} Reference is made here to the provisions of the LRA 2002 which, we believe, were intended to replicate the results of the provisions in the LRA 1925. We discuss below the rather different approach brought to the cases by the courts; see 13.42 and following below.

\textsuperscript{22} Law Com 254, para 8.47 and the following paragraphs.

\textsuperscript{23} LRA 2002, sch 4, paras 3 and 6; the relevant provision in the 1925 Act was differently worded but appears to have been to the same effect.

\textsuperscript{24} The judge at first instance in Malory Enterprises Ltd v Cheshire Homes (UK) Ltd would have rectified the register on this basis if, contrary to his view, the registered proprietor in that case was in possession: see [2002] EWCA Civ 151 [2002] Ch 216 at [15]. In Parshall v Hackney [2013] EWCA Civ 240, [2013] Ch 568 the Court of Appeal took the view that it would be unjust not to rectify against the proprietor in possession, because that proprietor was taking advantage of a mistake by Land Registry: see [97]. It is difficult not to see here a strong preference for the static security interest: see para 13.21 above.

\textsuperscript{25} LRA 2002 sch 4, paras 3(3) and 6(3).

\textsuperscript{26} It has been suggested that the fact that some features of a case are out of the ordinary is not necessarily sufficient for the circumstances to be exceptional: Murphy v Lambeth LBC (2016), judgment 19 February 2016 (unreported). In MacLeod v Gold Harp [2014] EWCA Civ 2084, [2015] 1 WLR 1249 neither delay on the part of the party seeking rectification nor the fact the current registered proprietor could realise a greater financial return on the land was sufficient to establish exceptional circumstances.
for the registered proprietor in possession)\textsuperscript{27} in any case where the title was registered in the name of a person who would not have been the owner of the estate had the title been unregistered.\textsuperscript{28} It now appears that the same answer is reached by the LRA 2002.\textsuperscript{29}

13.30 Accordingly, the system in England and Wales is inherently flexible. The legislation gives a privileged position to possession, with the result that the answer to a given problem is uncertain without knowledge of the facts on the ground. It could be argued that a weakness of the Torrens systems is their inability to respond to possession, which is often at least a proxy indication of where justice, or at least convenience, might lie. Indeed, the New Zealand Law Commission has recommended that some flexibility should be introduced into the legislation to enable consideration of possession in indefeasibility questions.\textsuperscript{30} Another way of putting it is to say that the person in possession may well value the property most.\textsuperscript{31} But that is not necessarily the case. A might be out of possession for all manner of deserving reasons.\textsuperscript{32}

**Indefeasibility in Scotland**

13.31 There is a further family of title registration systems, prevalent throughout Europe referred to as the German system. The Scottish land registration system is now modelled on that approach. Again, it is important to bear in mind that there are different models of the German system. We confine our discussion to the particular approach that has been adopted in Scotland.\textsuperscript{33}

13.32 When Scotland adopted title registration in 1979 it could have adopted, and adapted, the Torrens, English or German model.

13.33 The Land Registration (Scotland) Act 1979 was closely modelled on the English LRA 1925. It replicated the English principle of qualified indefeasibility, although without the proviso that the register could be altered to the prejudice of the

\textsuperscript{27} LRA 1925, s 82(3).

\textsuperscript{28} LRA 1925 s 82(1)(g).


\textsuperscript{30} Law Commission (New Zealand), *A New Land Transfer Act* (Report No 116, 2010) paras 2.4 to 2.16. A Land Transfer Bill which would implement the Law Commission’s recommendations is currently before the New Zealand Parliament.


\textsuperscript{32} There is little guidance in the case law as to the meaning of “possession” for the purposes of establishing whether a person is a proprietor in possession. It is clear from LRA 2002, s 131 that possession requires physical possession, but that is different from a requirement of “occupation” that is used, eg, in the context of overriding interests in sch 3, para 2 of the Act. It has been suggested that guidance may be derived from the definition of possession in case law on adverse possession. See eg, *Balevents Ltd v Sartori* [2014] EWHC 1164 (Ch); *Murphy v Lambeth Borough Council*, unreported, judgment 19 February 2016 (Ch).

proprietor in possession if it would be unjust not to alter it. Accordingly, it put the proprietor in possession in a very strong position, without any discretionary safety net for A in the AB situation. The same was almost certainly true in the ABC situation.

13.34 The Scottish Law Commission exposed, in its 2004 discussion paper Void and Voidable Titles, deep disquiet with the 1979 Act’s expression of the English qualified indefeasibility system and the practical outcome in the AB and ABC situations. The Scottish Law Commission referred to the outcomes as “expropriation” and queried the position under the European Convention on Human Rights, without going so far as to say that the system was actually non-compliant. It quoted the reactions of persons in A’s position, as described by the Keeper of the Registers of Scotland:

Proprietors disadvantaged in this way are understandably upset. Experience shows that they do not accept the explanation that the system of registration in Scotland forbids rectification of the register except in the circumstances specified in section 9 ... On these occasions the remedy of indemnity ... is not always seen as equitable.”

13.35 Void and Voidable Titles also quoted from someone in A’s position:

I find it difficult to believe that a distinguished group could concoct such a piece of legislation. In fact this is a thief’s charter duly protected by the State.

13.36 The Land Registration (Scotland) Act 2012, enacted following the Scottish Law Commission’s 2010 Report, resolved that disquiet by providing that:

(1) in the AB situation, where the transfer to B is void (but B is innocent) and A seeks reinstatement, B never gets to keep the land but is compensated; and

(2) in the ABC situation, C keeps the land if, at the time A claims it back, C, or C and B in aggregate, has/have been in possession of the land for a year or more. If so, A gets compensation; otherwise A gets the land back and C gets compensation.

13.37 Importantly, the Scottish system is now what can be described as a negative

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34 Land Registration (Scotland) Act 2012, s 9.
36 Above, para 5.33.
37 Above, para 4.31.
38 Above.
meaning that a registered proprietor’s title is not conferred by registration. He or she has only the title, if any, conferred by the disposition to him or her. B’s position is never secure no matter how long he or she stays in possession. And, if B transfers the land to C before being in possession of the land for a year, C’s position is also insecure until the land has been in the combined possession of B and C for a year. This “negative” approach to title registration in Scotland stands in contrast to the “positive” approach in Torrens systems and in the English legislation. In Torrens systems, as well as under English legislation, title is conferred on B by virtue of registration, even if that title may subsequently be lost through the operation of deferred (Torrens) or qualified (English) indefeasibility.

THE CASE FOR REFORM

13.38 Our analysis of the law of England and Wales above, set out the effect of the provisions of the statute. There seem to us, however, to be two major problems with the general operation of indefeasibility as it stands.

13.39 First, case law has developed in a way that was not envisaged in our 2001 Report. The case of Malory Enterprises Ltd v Cheshire Homes (UK) Ltd introduced two different analyses; one has now been held to be wrong and not to be followed, but the other is still part of the law. The Malory decision appears to us to cause a number of difficulties.

13.40 Secondly, the statutory provisions have been found to be ambiguous as to the position of C. Case law has now established that in our ABC scenario rectification is available against C. Accordingly, C’s position is never final; nor is that of D, E, F and so on as further dispositions take place. As we noted above, views differ as to the desirability of this situation. We are alive to the importance of possession, but we take the view – as has the Scottish Parliament in its recent reforms – that in some situations security of title should no longer depend upon possession. Further, we consider that a registered proprietor and a purchaser should both be able to rely upon the title conferred by the register, even though only one of the parties will ultimately be able to keep the land and the other will need to be indemnified.

13.41 We now elucidate those problems further, so as to make clear the need for reform.

Malory and the two analyses based on overriding interests

13.42 Malory is a Court of Appeal decision under the provisions of the LRA 1925. The decision was given after our 2001 Report had been published and just a few days before the Land Registration Bill (which became the LRA 2002) received Royal


LRA 2002, s 58; see para 13.2 above.


The different approaches that have been adopted to C’s position are summarised below, para 13.64 and following.

See para 13.17 above.
Malory is an example of a case within our AB scenario. The matter was litigated between A (Malory Enterprises Ltd, the appellant) and B (Cheshire Homes (UK) Ltd, the respondent to the appeal). Land that was registered in Malory Enterprise Ltd’s name was transferred by fraud to Cheshire Homes (UK) Ltd. When the fraud was discovered, Malory Enterprises Ltd sought to be restored as registered proprietor. It framed its claim in two very different, but related, ways which we label ‘the Malory 1 argument’ and ‘the Malory 2 argument’.

**The Malory 1 argument**

The Malory 1 argument is that when the land was the subject of a void transfer from A to B, that transfer did not change the equitable ownership of the property. A therefore became a beneficiary under a trust. As A had remained in actual occupation, B took the land subject to A’s beneficial interest as it was an overriding interest.45

This argument is, in a sense, a very instinctive argument for an English lawyer. The transfer to B was made without A’s consent; how could A be said to have parted with its beneficial interest in the land? Surely A remained the “true owner” – and the imposition of a trust would reflect that position. The argument is apparently supported by the wording of section 69 of the LRA 1925 (the title promise in the legislation) which states that the registered proprietor is deemed to have vested in him or her the legal estate, without mention of the beneficial interest. The Court of Appeal also took the view that the fraudulent transfer to B was not a disposition.46 Therefore, the transferee did not get the benefit of section 20 (the priority provision in the legislation) which stated that the registered proprietor under a registered disposition would take the land free of all other estates and interests.

It is hard to see why this argument was adopted. The plain words of the LRA 1925 would have produced the result for which Malory Enterprises Ltd argued. In the LRA 1925, provision for rectification was contained in section 82, with protection for a registered proprietor provided by section 82(3). In Malory, the current registered proprietor was not in possession of the disputed land, and so section 82(3) would not have availed it. Section 82 of the LRA 1925 was phrased so as to confer discretion.47 As a result an argument based on rectification did not guarantee the return of the land, while one based on an overriding interest (if successful) did. On the facts, however, Cheshire Homes (UK) Ltd did not dispute that rectification should be ordered.48 The most likely explanation for Malory Enterprise Ltd’s approach is that it wanted to clarify ownership during the period.

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45 In an AB scenario, at least under the LRA 2002, it is doubtful that any interest A obtains pre-dates B’s registration. If it does not, then there can be no question of the interest binding B as an overriding interest. The use of overriding interests in an AB scenario in Malory may be explained by differences between the provisions of the LRA 1925 and LRA 2002 relating to governing priorities. The differences between the statutes is discussed by Emma Lees, “Richall Holdings v Fitzwilliam: Malory v Cheshire Homes and the LRA 2002” (2013) Modern Law Review 926.

46 Malory at [65].

47 The LRA 1925, s 82(1) provided that “the register may be rectified” (emphasis added).

48 Malory at [22].
before rectification and to ensure that it had retained a sufficient interest in the land all along to be able to take action in trespass against Cheshire Homes (UK) Ltd.  

13.47 The Malory 1 argument is a deeply problematic approach. It is unprincipled; it nullifies the provisions of the statute for protection of the proprietor in possession; it is vulnerable to random outcomes; and it raises problems where an indemnity is claimed. The Malory 1 argument has now been held to be wrong and cannot be relied upon, but it is worth re-capping the reasons why it was so problematic.

POINTS OF PRINCIPLE

13.48 The Malory 1 argument assumes that A held two things – the legal title and the beneficial interest – and transferred only one. But that is not how legal and equitable interests behave.

A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title. Therefore to talk about the bank "retaining" its equitable interest is meaningless.  

13.49 In the light of that principle, A can only retain an equitable interest in the land if there is some reason why B should be a trustee for him. In the absence of wrongdoing on the part of B – as is the case in our AB and ABC scenarios – there is nothing to make B a trustee. If there is wrongdoing on the part of B so that a trust analysis is possible, Malory 1 is still problematic. It would mean that the mechanism through which the indefeasibility question is answered is different according to whether a case involves fraud. That is inconsistent with the statute, which contemplates that all cases will be resolved through schedule 4. Schedule 4 draws a careful balance between the parties that is intended to be used to determine the answer to questions of indefeasibility. The policy reflected in the legislation may be undermined if questions are answered outside the schedule.

13.50 Accordingly, the Malory 1 argument appears to us to be unprincipled. While that might seem to be an academic quibble, it is well known that unprincipled law inevitably leads to inconsistencies and difficulties – as we will now see by considering the consequences of the argument.

49 Malory at [88]. Cheshire Homes (UK) Ltd, in contrast, was concerned principally with avoiding liability for trespass for the period during which it was registered proprietor and with safeguarding its ability to claim an indemnity.


52 In Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] AC 669, 705 Lord Browne-Wilkinson said that a trust can be imposed only where the trustees' conscience is affected by the trust, or by the factors giving rise to it. The fact that there is a mistake on the register does not enable any conclusion to be drawn as to the state of the registered proprietor's conscience.
THE EFFECT OF THE MALORY 1 ARGUMENT UPON THE PROPRIETOR IN POSSESSION

13.51 If B holds on trust for A, then A is entitled to have the land re-transferred to him under the principle in *Saunders v Vautier*. That case enables an adult beneficiary (where certain conditions are met) to require the trustees to transfer the property to him or her and so bring the trust to an end. The principle is not affected by who is in possession of the land. Accordingly, the special protection created in the statute for the proprietor in possession is nullified. Even if B is in possession of the land he or she simply must, on indisputable trust law principles, transfer it to A. This must happen no matter whether a fair result on the facts is achieved and even if it would not be unjust not to rectify the register or it would be unjust to rectify it.

13.52 This particular problem is not so relevant in the ABC scenario. C will only be bound by A’s beneficial interest if A remains in actual occupation of the land when it is transferred to C. It is only if A remains in actual occupation that his or her beneficial interest will continue to be protected as an overriding interest on the transfer to C. It is possible, albeit unusual, that A will still be in occupation on a subsequent disposition. If A is in actual occupation then C cannot be in possession, so the problem noted above does not arise.

THE POSSIBILITY OF RANDOM OUTCOMES

13.53 As Malory 1 depends on the imposition of a trust, the beneficial interest will not prevail over a purchaser if it is overreached. Section 2 of the Law of Property Act 1925 states that an equitable interest in land will be overreached – that is, transferred to the proceeds of sale – if land is transferred by two trustees or a trust corporation. If the transferors happen to be two people – a husband and wife co-owning, for example – then the beneficial interest will be overreached and the beneficiary’s claim will be to the proceeds of sale. As we have noted, however, the statute contemplates that the indefeasibility question will be answered by the factors identified in schedule 4. The LRA 2002 does not anticipate that the outcome of a claim to alteration of the register will depend on the happenstance of whether the transferee is a sole or joint proprietor.

THE EFFECT OF THE MALORY 1 ARGUMENT ON A CLAIM FOR INDEMNITY

13.54 It is well-established that if the register is amended so as to give effect to an overriding interest, the registered proprietor who appears to lose out as a result – either because he or she loses the title or because the title is now subject to an adverse entry – will not be paid an indemnity. This is the principle in *Re Chowood’s Registered Land*. It is easiest to understand in the more usual case

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53 (1841) 41 ER 482.
54 The beneficiary must be of full mental capacity and the beneficial interest must be an interest in possession.
55 LRA 2002 sch 4, para 3; LRA 1925 s 82(3).
56 LRA 2002, sch 4, para 3(2)(b).
57 See para 1.20 above.
58 See para 13.49 above.
59 [1933] 1 Ch 574; see also para 13.61 below.
where, for example, X acquires an easement by long use over Y’s land. Y sells to Z. The easement is an overriding interest\(^{60}\) and therefore binds Z. If X now applies to have the easement registered, and the burden set out on Z’s register of title, Z loses nothing because he took subject to the easement. Accordingly, although there is now a new burden on Z’s register, Z does not get an indemnity.

13.55 The same reasoning means that when B (and/or C in the ABC scenario) loses the land to A because B/C took subject to A’s overriding interest B/C apparently gets no indemnity.

13.56 We have to ask whether this outcome is problematic. There is an argument that B/C does not deserve an indemnity. B/C only took the land subject to A’s interest because A was in actual occupation of the land. It could be said that B/C has only him or herself to blame because he or she did not take the statutory escape-route of asking A about his or her interest.\(^{61}\)

13.57 That argument is not a strong one. As we explain below,\(^ {62}\) it may be unrealistic to expect B to make enquiries of A. To deny B/C an indemnity is contrary to the policy of the LRA 1925 (and now of the LRA 2002), which envisages that the amendment of the register in these circumstances should generate a right to indemnity.\(^ {63}\) The fundamental difficulty with the Malory 1 argument is that it artificially creates a claim to an overriding interest where the legislation does not envisage that there will be one. The legislation assumes that the fact pattern in Malory will be resolved through the application of provisions of the legislation concerned with indefeasibility.

**Malory 1 and the LRA 2002**

13.58 As we said above, Malory was decided under the 1925 Act. It had not been anticipated in our 1998 Consultation paper or 2001 Report that section 58 of the LRA 2002 would confer legal title only. True, section 58 of the Act refers only to the registered proprietor having the legal estate in the land; this is because section 58 cannot guarantee that the legal owner will also always be the beneficial owner.\(^ {64}\) But the transfer to B and then to C, assuming each is innocent, was intended to carry with it the legal and beneficial title in the absence of reasons why B should be made a trustee of the land. Our analysis of indefeasibility\(^ {65}\) did not envisage that the beneficial interest of someone in A’s position would survive the fraudulent disposition; nor is there any mention of C

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\(^{60}\) LRA 2002, sch 1, para 3 and sch 3, para 3; LRA 1925, s 70(1)(a).

\(^{61}\) LRA 2002, sch 3, para 2; LRA 1925, s 70(1)(g): the purchaser takes subject to any rights in the land held by anyone in actual occupation of the land, unless the purchaser asks such a person about his or her rights and the person does not disclose them.

\(^{62}\) See para 13.63 below.

\(^{63}\) It has also been suggested that to deny B an indemnity is to infringe his or her rights under Article 1 of the First Protocol to the European Convention on Human Rights: *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] EWLandRA 2009_1459, [2011] EGLR 123 at [61]. The argument has some force although B would get nothing if his or her title was unregistered; it could be said, therefore, that the argument begs a question about the effect of having a registered title.

\(^{64}\) For example, the registered proprietor may have made an express declaration of trust.

\(^{65}\) Law Com No 254, Part VIII and Law Com 271, Part X.
being bound by that beneficial interest as an overriding interest by virtue of A’s actual occupation. Disputes about rectification were intended to be solved by reference to the terms of schedule 4.

13.59 Nevertheless, the Malory 1 analysis persisted, and was also applied to cases decided under the LRA 2002. In Swift 1st Ltd v Chief Land Registrar (Swift), the Court of Appeal held that the decision in Malory on the Malory 1 argument was decided without reference to authority and is wrong. As a result, the Malory 1 argument can no longer be relied upon.

**The Malory 2 argument**

13.60 The Malory 2 argument is that A held a further interest in the land, namely the right to seek rectification of the register and that, again by virtue of A’s occupation of the land at the point of disposition to B, that interest bound B as an overriding interest.

13.61 The Malory 2 argument still represents the law. It was applied by the Court of Appeal in Swift, which accepted that a right to seek alteration or rectification is an overriding interest where the party with the right is in actual occupation of the land. The fundamental difficulty with Malory 2 is therefore the same as that with Malory 1 explained above. The argument artificially creates a claim to an overriding interest where the legislation does not envisage that there will be one. Malory 2 is capable of giving rise to strange consequences because where the register is altered to give effect to an overriding interest no indemnity is paid to the registered proprietor. That was the point decided in Re Chowood’s Registered Land and discussed above. Views differ on the exact analysis to take, but both lead to the same conclusion; no indemnity is paid because the register is altered, not rectified. Either the alteration is to bring the register up to date, or it is correcting a mistake, but not in a manner prejudicial to the registered proprietor who always held subject to that interest.

13.62 The application of Re Chowood’s Registered Land to the situation is therefore potentially disastrous for someone in the position of B (and/or C in the ABC scenario). The Court of Appeal in Swift found itself able to avoid that
consequence by a creative interpretation of a provision in the LRA 2002,\textsuperscript{75} and which has the effect of saving an indemnity for B/C only where the disposition giving rise to the right to alter or rectify was forged. If the disposition is void for some other reason, or if the mistake is, for example, an error in the plans, the Malory 2 analysis means that no indemnity is available. This problem would not have arisen if the situation had been resolved under the terms of schedule 4 to the LRA 2002 without reference to overriding interests.

13.63 Our discussion has been premised on the understanding that B (and/or C in the ABC scenario) is an innocent transferee. If that is the case then to deny B/C an indemnity is unacceptable; if B/C must lose the land in favour of the innocent A, then B/C must be compensated in full for his or her loss. There is an argument that B/C should not be compensated if A was in discoverable actual occupation,\textsuperscript{76} because B/C should have discovered A and should have asked A what, if any, interest A held. But that may be unrealistic. B/C may have taken every proper care and might be expecting A to be in occupation. In \textit{Swift}, for example, a fraudster executed a charge over A’s home in favour of B. B thought that it was dealing with A; there was no reason for B to knock on the door and ask A questions when B believed that it was corresponding with A. If B/C was not as diligent as might be expected, then that is taken into account in determining the level of indemnity payable.\textsuperscript{77} In this respect, an overriding interest analysis means that the “winner” takes the land and the “loser” is left with nothing. In contrast, a claim to rectification following which the party or parties who lose the land are able to claim an indemnity enables a more nuanced approach.

\textbf{The position of C and the meaning of “mistake”}

13.64 Leaving aside the courts’ use of the two Malory arguments, we turn now to a different problem in the current law, namely the uncertainty over the intended effect of the statutory provisions. These provisions were drafted and enacted before the decision in \textit{Malory};\textsuperscript{78} thus the arguments we have called Malory 1 and Malory 2 were not in the contemplation of the draftsman.

13.65 It will be recalled from the discussion above that in the Torrens systems of land registration the title of C, in the ABC scenario, is unassailable. A major uncertainty following the enactment of the LRA 2002 was whether that was intended to be the effect of the statutory provisions in England and Wales.

13.66 The reason for the uncertainty was the use of the term “mistake”. That term was used in the LRA 1925, but it is afforded a much more prominent role in the LRA 2002 than in the previous legislation. Subsection 82(1)(a) to (g) of the LRA 1925 listed specific grounds on which the register could be rectified and then, in

\textsuperscript{75} LRA 2002, sch 8, para 1(2)(b); \textit{Swift} at [51]. For an analysis of this use of the provision see E Cooke, “The register’s guarantee of title Fitzwilliam v Richall Holdings Services [2013] EWHC 86 (Ch); [2013] 1 P & CR 19” [2013] \textit{Conveyancer and Property Lawyer} 344.

\textsuperscript{76} LRA 2002, sch 3 para 2.

\textsuperscript{77} LRA 2002, sch 8, para 5 enables an indemnity to be reduced to the extent that a claimant is responsible for his or her loss through lack of proper care. No indemnity is paid where the loss is wholly a result of the claimant’s lack of proper care. See further para 14.40 and following below.

\textsuperscript{78} As noted at para 13.42 above, \textit{Malory} was decided shortly before the Land Registration Bill received Royal Assent.
paragraph (h), gave a “catch-all” provision. Subsection 82(1)(h) enabled rectification “in any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register”. In the LRA 2002 “correcting a mistake” is used as a general ground for altering the register. The intention, as explained in our 1998 Consultation Paper, was to encompass the list of specific grounds “within the one general principle that the register could be rectified, as a matter of discretion, where there was an error or omission in it”.79 The distillation of the specific grounds listed in the LRA 1925 into a general principle and the consequential prominence afforded to “mistake” gave rise to the question whether any change in the law was intended.80

13.67 If we unpack the details of the ABC scenario, we can see that the two dispositions are very unlike each other. The disposition81 from A to B is fatally flawed. It is done without A’s consent, or even knowledge; it would pass nothing at common law. Therefore, it makes sense to regard its registration as a mistake. If the registrar had known the facts he or she would not have registered it. But the disposition from B to C is made with the full knowledge and consent of both parties. Were it not for the previous void disposition there would be nothing wrong with it. Indeed, it is void at common law because B has no title as a result of the flaw in the previous disposition, and not because anything is wrong with the disposition itself. Accordingly, there is a strong case for saying that the registration of C is not a mistake.

13.68 If that is correct, a number of consequences appear to follow.

13.69 First, we have a measure of finality that could not be achieved under the LRA Act 1925. Finality is one of the objectives for which we argued above.82

13.70 Arguably, however, we have finality too soon. That is certainly the case if C is a mortgagee. Take the case where B innocently takes under a transfer that is void for forgery or for any other reason and mortgages the land, whether to finance the purchase or otherwise. B’s mortgagee is C. It would be wholly undesirable for the register to be able to be rectified against B, but not against C; that would leave A with an undischarged mortgage to pay off. Far better, in those circumstances, for the mortgagee to have an indemnity, along with B.

13.71 If C’s registration is not a mistake then the provisions of the LRA 2002 do not provide any protection to A and so the guarantee of title is nullified. This is because indemnity is available only where there is, or could have been, “rectification” in the new, technical sense assigned to the word by the LRA 2002. As we have explained in paragraph 13.6 above, rectification is the name given to an alteration of the register in a way that:

(1) involves the correction of a mistake; and

79 Law Com 254, para 8.41.
81 Or other event such as the erroneous inclusion of a particular field on a title plan.
82 See para 13.15 above.
Accordingly, if the registration of C is not a mistake, then the correction of the register to remove C is not rectification (and therefore C would get no indemnity). Equally, a decision not to remove C is not a situation where there is a mistake whose correction would be a rectification, and therefore in that situation A would get no indemnity. Such an outcome appears contrary to the intention of the legislation and would be unsupportable. Courts have reached different conclusions on the position of C. The view that C’s registration is not a mistake and so rectification is not available against C has found some support. Courts have, however, found no difficulty in reasoning that rectification is available against C. In doing so, it has been suggested that that either C’s registration is part and parcel of the mistaken registration of B or that reversing the mistaken registration of B necessarily involves reversing its consequence, namely the registration of C.

While nothing falls on the interpretation taken to provide for rectification to be available against C, it is essential that C’s position is not indefeasible. We conclude that the registration of C must be subject to rectification on the basis that there is a mistake.

That conclusion resolves the problem about indemnity. But it does mean that, at any point, a registered proprietor who is not in possession is vulnerable to rectification as a result of an event that affects a previous transaction. If rectification is available against C, then equally it must be available against subsequent purchasers or mortgagees. The fact that a transfer from A to B was void for fraud may come to light not only after B has transferred the land to C, but after C has transferred to D, who has granted a mortgage to E, and so on. As well as C’s title being potentially defeasible on the basis that there is a mistake, so are the titles of D and E.

PROVISIONAL PROPOSALS FOR REFORM

In proposing reform we bear in mind the objectives we listed above: clarity, finality, fact-sensitivity and reliability. It is not the case that all four objectives can be achieved perfectly. In particular, how do we balance fact-sensitivity against finality? A provision that C, or perhaps D or E, is unassailable may mean that someone who is not in possession of the land will retain it at the expense –
physical but not financial – of someone who has been occupying it as a home all along. That would be a difficult result to bear and, as will be seen, for that reason we do not propose absolute finality for a transferee where the party who was mistakenly removed from the register has remained in possession of the land. Subject to that, our proposals render the law much clearer, and much more secure even if not generating absolute finality, while continuing to give priority to a registered proprietor in possession. In the next chapter we discuss the fourth of our objectives, reliability, and consider the role played by indemnity in land registration.

13.76 The structure of our provisional proposals is as follows.

(1) First, we consider, but reject, the idea of moving away from the broad category of “mistake” as a ground of alteration of the register, or of providing a statutory definition of mistake.

(2) Secondly, we propose that the right to seek alteration or rectification of the register should no longer be able to be an overriding interest. That in effect disposes of the Malory 2 argument and leaves the way for the law relating to indefeasibility to be set out clearly in the statute without the use of concepts that were not intended to be employed in this context. Without the need to consider overriding interests, indemnity can no longer be blocked by the principle in Re Chowood’s Registered Land.\textsuperscript{88}

(3) Thirdly, we propose a new set of rules relating to the position of A, B and C (and C’s successors in title).

**Alteration, rectification and mistake**

13.77 We noted above, at paragraph 13.66, that the language of “mistake” was not new to the provisions on alteration and rectification of the register in the LRA 2002, but that the term is afforded a much greater role than it had under the LRA 1925.

13.78 It is undeniably the case that much of the criticism directed at schedule 4 to the LRA 2002 has at its root uncertainty as to the scope of mistake. We have noted above,\textsuperscript{89} that case law has now established that in the ABC scenario rectification is available against C.

13.79 The uncertainty in C’s position has been attributed, at least in part, to the absence of a full definition of mistake in the LRA 2002.\textsuperscript{90} The legislation expressly provides only that mistake includes omissions.\textsuperscript{91} Notwithstanding, with the benefit of experience in the application of the LRA 2002, there now appears to be a degree of consensus as to what constitutes a mistake. The authors of *Megarry & Wade* suggest “that there will be a mistake whenever the registrar would have

\textsuperscript{88} [1933] 1 Ch 574.

\textsuperscript{89} See para 13.72 above.


\textsuperscript{91} LRA 2002, sch 4, para 11.
done something different had he known the true facts at the time at which he made or deleted the relevant entry in the register”. 92 Similarly, Ruoff & Roper suggests:

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 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. 93

13.80 Dr Simon Cooper summarises the position through the proposition that within particular parameters “it may be postulated that a correctable mistake occurs whenever a change is made to a register but nobody was entitled to procure that change at the moment when it was made”. 94

13.81 We have considered, but have rejected, the suggestion that a definition of mistake should be provided in the legislation. Alteration and rectification of the register is inevitably a contentious issue where hard cases will arise. It seems neither practicable nor desirable for statute to attempt to predict and deal comprehensively with every situation in which the question of alteration or rectification will arise. Hence, any statutory definition will not be exhaustive. At best, a definition is likely to replicate the LRA 1925 insofar as specific instances of mistake would be supplemented with a “catch all” provision. The concept of mistake thus appears intentionally broad as it enables the courts to respond flexibly to new issues as and when they arise. Rather than being helpful, we are concerned that a statutory definition may create uncertainty by raising questions about the status of existing authorities, or requiring matters that have been resolved by the case law to be "recast" within a new legislative scheme.

13.82 We have concluded that, rather than attempting to define mistake, clarity and certainty are more likely to be achieved through resolving specific problems that have arisen under the current law and developing the framework within which the broad concept of mistake operates.

The right to seek alteration or rectification of the register

13.83 We explained above the mischief that results from the Malory 2 argument, namely that the right to seek alteration or rectification95 of the register is a property right and can therefore function as an overriding interest if A is in actual occupation of the land. In the language of the LRA 2002, rectification is a form of alteration of the register and the application would usually be for alteration.

13.84 We are not convinced that the right to seek alteration or rectification of the register is in fact proprietary. To be a property right in land, a right must be clear

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92 Megarry & Wade, para 7-133.
93 Ruoff & Roper, para 46.009.
95 As to this terminology, see para 13.60 above.
and readily identifiable, and capable of transmission to successors in title.\textsuperscript{96} In fact what A has is uncertain; of course A can apply to seek rectification or alteration, but whether he or she will get it is a matter for discretion in these circumstances. It is hard to imagine that such a “right” could be sold or devised by will. The policy of the statute is to protect A, not to give A a marketable or transmissible asset.\textsuperscript{97}

13.85 Nevertheless, the Court of Appeal has found the right to be proprietary\textsuperscript{98} and this view finds support in commentary on the decision.\textsuperscript{99} There is an argument that it may be useful to be able to enter a unilateral notice to protect A’s interests in circumstances where a problem has come to light and is perhaps being investigated or negotiated, at a stage before litigation is practicable. Only proprietary interests can be protected by a notice.\textsuperscript{100} Land Registry may, however, enter a registrar’s restriction where A alleges that fraud has taken place.\textsuperscript{101} This practice provides some protection for A.

13.86 In fact, the mischief arising from the Malory 2 argument – that the right to alter or rectify is a property right binding as an overriding interest when coupled with occupation – should affect only the ABC scenario. Clearly A can seek rectification of the register against B, whether or not his or her right to do so is a proprietary right, and the application may or may not be successful. The possibility of A’s right to alter or rectify binding on B as an overriding interest should not arise. As we have noted above,\textsuperscript{102} under the LRA 2002 A’s right comes into existence only when B is registered. The mischief we need to address relates only to C in the ABC scenario. Further, the mischief does not arise as a result of treating the right to alter or rectify as proprietary, but through the consequential protection of the right as an overriding interest when coupled with occupation. Therefore, we consider that all that is needed to prevent the difficulties given rise to by the Malory 2 argument is a provision that the right to seek alteration or rectification of the register cannot be an overriding interest.\textsuperscript{103}

13.87 \textbf{We provisionally propose that the ability of a person to seek alteration or rectification of the register to correct a mistake should not be capable of being an overriding interest pursuant to paragraph 2 of schedule 3 to the LRA 2002.}

\textsuperscript{96} National Provincial Bank Ltd v Ainsworth [1965] AC 1175, 1247 to 1248.

\textsuperscript{97} True, the Court of Appeal in Malory was swayed by the comparison with the right to rectify a document, which is an equity (\textit{Blacklocks v JB Developments (Godalming) Ltd} [1982] Ch 183) and can be protected by notice as a result of specific statutory provision in section 116 of the LRA 2002. But the right to rectify a document does not involve issues of land registration policy; it is not governed by the same discretion; and the very fact that specific provision was needed in section 116 demonstrates the lack of clarity as to the nature of the equity and the extent to which it can bind successors in title.

\textsuperscript{98} Malory, at [68] and [69].

\textsuperscript{99} Emmet and Farrand, para 5.111.

\textsuperscript{100} LRA 2002, s 32.

\textsuperscript{101} LRA 2002, s 42(1)(a).

\textsuperscript{102} See n 45 above.

\textsuperscript{103} This is not without precedent, see in the context of matrimonial home rights: Family Law Act 1996, s 31(10)(b).
Do consultees agree?

13.88 In making this provisional proposal we note our conclusion at paragraph 13.73 above that rectification is available against C. Reversing Malory 2 will not therefore mean that C’s title becomes indefeasible. It ensures that a claim to rectification of the register against C as a result of a flaw in the previous transfer from A to B cannot be circumvented by seeking to enforce an overriding interest against C.

New rules for indefeasibility

13.89 In considering further statutory provision, intended to make exhaustive provision for our AB and ABC scenarios, it is important to keep in mind that we are discussing policy, not drafting. We are not suggesting interpretation or adaptation of the words of schedule 4; rather, we are setting out what we think should happen in each of the scenarios. That policy, modified as required following consultation, will be translated into statutory wording by Parliamentary Counsel in the draft Bill annexed to our final report on this project.

13.90 In the paragraphs that follow we look first at the position of mortgagees, and then at further provision for A, B and C.

The position of mortgagees

13.91 A mortgagee of land has an interest that is financial only – indeed, centuries of mortgage law reform, by the courts and Parliament, has been focused on ensuring that mortgagees are entitled to repayment of loans, interest and costs but do not get the windfall of land in addition.

13.92 We think that in our AB and ABC scenarios, whether the mortgagee is B or C, its only interest in the land is financial. Therefore, when a mortgagee’s title to a registered charge is registered by mistake or as a result of a mistake, the mortgagee should get an indemnity (subject to what we say below, in paragraph 13.97) and questions about rectification should be addressed on that basis.

13.93 In fact, that is the result in most cases under the existing statutory provision. Section 133 of the LRA 2002 provides that, in effect, for the purposes of the LRA 2002 a registered chargee is never in possession of land; and that will be the case even where the mortgagee has taken possession of the land in preparation for sale. Accordingly, the mortgagee will never benefit from the special protection given by schedule 4 to the registered proprietor in possession.

13.94 Nevertheless, there are cases in the current law where the registered chargee’s position is not clear. It may be that no one is in possession of the land. In that case, the register must be rectified in A’s favour unless there are exceptional circumstances that justify doing otherwise. It is difficult to imagine exceptional circumstances where it would be right not to rectify in A’s favour so as to remove a charge, but easy to imagine circumstances where the chargee was able to prolong litigation by arguing that such circumstances existed. The matter should be put beyond doubt.

13.95 We provisionally propose 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 so as to correct that mistake by removing its charge.

Do consultees agree?

13.96 Our provisional proposal is framed carefully so as to make provision as follows.

(1) In the AB scenario, where B is a mortgagee, the register is rectified and B is limited to claiming an indemnity.

(2) In the ABC scenario, where C is B’s mortgagee, if the register is rectified so as to remove B, then C’s charge will also be removed and both B and C will be limited to claiming an indemnity. Conversely, if the register is not rectified against B, then C’s charge also remains on the register and no question of indemnity arises.

13.97 In Chapter 14 we discuss the operation of the indemnity provisions of the LRA 2002 and invite consultees’ views on possible reforms. One of those reforms would limit mortgagees’ entitlement to an indemnity to circumstances in which the charge is granted on the basis of a mistake on the register. If adopted, that would mean that there may be circumstances in which a mortgagee could not oppose rectification but would not be entitled to an indemnity.

Further provision for A, B and C

13.98 With the position of mortgagees in respect of indefeasibility thus considered, the rest of our policy discussion relates only to cases where both the parties in dispute have a registered estate: in other words, a freehold or leasehold rather than a charge. We recall that the objectives of finality and fact-sensitivity have to be looked at together because they may be in conflict. The scheme for indefeasibility that follows is an endeavour to reconcile the two objectives as nearly as possible.

13.99 First, we set out the effect of our proposals and then explain the reasoning that lies behind them. We are presenting the proposals in this way as it is helpful to bear in mind the combined effect of our proposals alongside the reasoning that underpins each of them individually. In setting out our proposals we have used the existing statutory language which variously provides for a discretion to apply in “exceptional circumstances” or where it would be “unjust not to rectify”. We agree that any discretion should be set at a high bar, though we leave open whether the current language should be retained or whether the description of the circumstances in which discretion applies could usefully be rationalised.

13.100 Where a registered proprietor’s name (A in our scenarios) is removed from the register by mistake or omitted from the register, we consider that the provisions on alteration and rectification should achieve the following outcomes.

104 This replicates the results in [Ajibade v Bank of Scotland plc [2008] EWLandRA 2006_0163] and reverses the result in [Guy v Barclays Bank plc [2008] EWCA Civ 452, [2008] EGLR 74: see n 85 above.

105 See para 13.20 above.

106 Where, eg the boundary shown on the title plan is in the wrong position. See further our discussion of the general boundaries rule in Chapter 15.
(1) So long as A remains in possession, then A should be reinstated as proprietor unless there are exceptional circumstances. 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 proprietors in possession.

(4) If B or C is the registered proprietor in possession, then in the ten year period following the mistaken removal (or omission) of A from the register, B or C’s title should be protected unless:

   (a) it is unjust not to rectify; or

   (b) the proprietor in possession caused or contributed to the mistake by fraud or lack of proper care.

(5) If B or C is the registered proprietor in possession, then ten years after the mistaken removal (or omission) of A’s name, B or C’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 “long stop”.

(6) If neither A nor B or C 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 or C 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 long stop, entitlement to an indemnity is unaffected.

13.101 In many cases, our proposals endorse the position under the current law. They reflect the particular sympathy felt towards A, who is removed (or omitted) from the register by mistake, and the special protection currently provided to a proprietor in possession. Our proposals provide an element of discretion, drawn from the current law, to enable the courts to balance finality with fact-sensitivity. The principal change between the current law and our proposals is the provision of a ten-year long stop. We consider that after ten years the need for finality should become paramount, subject to provision for situations where finality would benefit a party who caused or contributed to the mistake by fraud or lack of proper care. We consider, however, that the long stop should not operate against A, the party removed (or omitted) from the register by mistake, if A remains in
possession.

13.102 We believe that our proposals will also provide clarity (the first objective in paragraph 13.15 above). They amount to a complete set of propositions which, if translated into statute, will account for all the cases that might raise the indefeasibility question. They do not provide a complete set of answers in all cases, because our proposals involve some discretion. We consider that discretion is important. The factual circumstances that may lead to an application for alteration of the register are too complex and various for the statute to dictate the outcome in every case. But the provisional proposals we have made will enable solutions to be devised in all circumstances and without there being issues of principle left unresolved.

13.103 Where we provide a long stop on the availability of rectification, in order to achieve finality, we have taken the view that the availability of an indemnity should not be affected. In that respect, we consider that the need for finality does not override the other objective of reliability stated in paragraph 13.15.

PROPOSALS FOR A

13.104 The registered proprietor who loses land as a result of fraud commands a lot of sympathy, particularly since he or she would lose nothing at common law. So A, in our two scenarios, should be in a strong position when arguing that his or her registered title should be restored to the register. Sympathy for A is countered only by the countervailing policy to protect a registered proprietor in possession, or by the need for finality in cases where A is not in possession. This is because, as we have explained, possession often reflects where land is most valued or needed.

13.105 The provisions of the LRA 2002 already put A in a strong position by providing that where the register can be rectified it should be, save in exceptional circumstances, unless to do so would prejudice a registered proprietor in possession. Accordingly, so long as B or C is not in possession, A will almost certainly be restored to the register. Malory 1 gave A an unanswerable argument as against B, and as against C where A was in actual occupation at the time of the transfer to C. But that argument was deeply problematic and has rightly been overruled.

13.106 Our proposals therefore retain the protection given to A under the current provisions of the LRA 2002, at least where A remains in possession. Accordingly, (for example) in a situation where A was defrauded by a family member and his or her title was transferred to B, who is innocent of the fraud, for so long as A remains in possession of the land A should be entitled to be restored to the register. We use the example of a family member because it appears to us more likely that the fraud will endure for a long time before being discovered where the fraud takes place within the family.

13.107 The same protection should be afforded to A’s successors in title, whether his or
her estate or a transferee. In fact, a transfer for value is unlikely to take place without the problem being discovered. But A’s personal representatives or the beneficiary under A’s will might well discover it and should then step into A’s shoes, where those parties are in possession.

13.108 Should there be any discretion to depart from what we propose? A’s position is so strong that it is tempting to feel that the rule should be absolute. We think, however, that there are circumstances where the courts may take a different view. For example, there have been cases where opportunism bordering on sharp practice put A in possession at the time when the matter was litigated. 108 In circumstances such as these, the court might feel that the merits of the case demands a different outcome. Accordingly, we propose a discretion to enable some flexibility, mirroring that found under the current law.

13.109 We provisionally propose 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, save in exceptional circumstances.

Do consultees agree?

13.110 We provisionally propose that a successor in title to that proprietor should be restored to the register if he or she took over possession of the land, save where there are exceptional circumstances.

Do consultees agree?

13.111 There are two aspects of our provisional proposals that require additional consideration.

13.112 First, should the special protection afforded to A when A is in possession, apply only where A is personally in possession? The sympathy felt towards A is likely to be strongest when that is the case and it would be possible to confine the protection accordingly. The current protection afforded to a proprietor in possession in schedule 4 is not, however, so confined. It is interpreted in light of section 131 of the LRA 2002, through which the status of proprietor in possession is extended to proprietors who possess through a tenant, mortgagee, licensee or beneficiary in possession. We consider that the protection afforded to A, who remains in possession having mistakenly been removed (or omitted) from the register, should mirror that afforded to a proprietor in possession. Therefore, we feel that A should be considered to be in possession in the same circumstances as would a proprietor in possession under section 131.

13.113 Secondly, should A’s possession be required to be continuous, or should A benefit from special protection where there have been periods of non-possession? We note that by conferring special protection on A when A is not personally in possession reduces (but does not remove) the possibility of

108 See eg Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch), [2013] 1 P & CR 19 where the locks to the property were changed in order to prevent the applicant from taking possession. The Scottish Law Commission was troubled by similar examples, see Report on Land Registration (2010) Scot Law Com No 222, para 21.23.
possession being discontinuous. There is no requirement in schedule 4 that to benefit from the current protection afforded to a proprietor in possession a person must be continuously in possession. Again, we feel that the protection afforded to A, who remains in possession having mistakenly been removed (or omitted) from the register, should mirror that afforded to a proprietor in possession. Therefore we do not feel that there should be a specific requirement of continuous possession on A’s part. We also consider that the discretion within our proposals will provide courts with the flexibility to reach the appropriate outcome in difficult cases.

13.114 We provisionally propose 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.

Do consultees agree?

PROPOSALS FOR B AND C

13.115 We take B and C together, and make proposals for their position provided that their title is registered.

13.116 We considered above the position where A is in possession of the land. Where A is not in possession of the land, it may be that the other party is in possession. In that case, we think that the current law should be preserved, subject to one point.

13.117 The provisions of schedule 4 currently protect the registered proprietor in possession subject to a discretion where it would be unjust not to rectify the register. We think that this discretion should remain. It is particularly useful where possession has been for a very short time, or has fluctuated over time so that the registered proprietor is in possession almost by chance. We also take the view however – and we say more about this below – that there should come a time when finality becomes the dominant objective and, accordingly, that discretion should not be preserved indefinitely. We have suggested that, unless A is in possession, after ten years the registered proprietor’s title should become indefeasible except (mirroring the current law) for situations in which he or she

109 For example, the property may be left empty in circumstances in which possession is not maintained.

110 In the case where A discovers the fraud before B, the transferee under the forged transfer, has registered his or her title, then B has nothing (through application of the general law) and there is no need to rectify the register at this point. If the problem is discovered after B has registered his or her title and then transferred to C, but before registration of C’s title, then A’s application is to be restored to the register and for the removal of B’s name from the register.
was party to the fraud or was careless.

13.118 We have not, therefore, adopted the Scottish position. Under the Scottish statute, it will be recalled,111 B's title is vulnerable for ever, and C's title is vulnerable until B and C's combined time in possession of the land amounts to one year. We think that level of uncertainty for B and C would be unacceptable in the property market in England and Wales. Under the current law (which our proposals would retain) B or C has a strong level of protection as soon as he or she becomes a proprietor in possession. Under our proposals, B and C's titles become unassailable after ten years, even if they have never been in possession, unless A has continued to be in possession. Hence B and C's position in English law (which we consider further below) is, and will remain, stronger than that of equivalent parties in Scots law.

13.119 Nor do we wish to follow the Scots' lead by making C's position stronger than B's. If C is placed in a stronger position, the law is too easily manipulated. It is easy to imagine B routinely transferring for value to a nominee – or, where B is a company – to another company within a group – in order to escape B's vulnerability.

13.120 We provisionally propose that the register should not be rectified 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.

Do consultees agree?

13.121 So far, we have considered the position where A remains in possession having been mistakenly removed from the register and where B or C has become a proprietor in possession. It remains to be considered separately what the position should be where neither A nor B or C is in possession. The current law provides, in effect, that where none of the parties is in possession A should nevertheless be restored to the register,112 save in exceptional circumstances. That is a good default position given the sympathy for A who has been removed (or omitted) from the register by mistake. But does there come a time when what the register says is placed beyond doubt?

13.122 Where none of the parties are in possession we think that there should come a point where there is finality. After ten years we consider that the need for finality in the register should take precedence over the sympathy felt for A, who is not in possession of the land. Hence we suggest that where neither A nor B or C is in possession of the land, after ten years the register should not be rectified, subject of course to the exception of fraud or lack of proper care.

111 See para 13.37 above.

112 LRA 2002, sch 4, paras 3(3) and 6(3).
We provisionally propose 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 that proprietor is not in possession of the land. Exceptions should be provided only for where the new registered proprietor consents to the rectification or where he or she caused or contributed to the mistake by fraud or lack of proper care.

Do consultees agree?

Why ten years?

Selecting a period of time after which finality should become dominant inevitably involves an element of judgement on which views will differ. Any period of time that we propose may be considered too long by some and too short by others. We have suggested ten years for consistency with the period provided in schedule 6, under which an application for registration may be made on the basis of ten years of adverse possession. We are not suggesting that indefeasibility is analogous to adverse possession, but the choice of the same period provides an element of internal consistency within the LRA 2002.

Possible alternatives include the 12 year limitation period for actions to recover land provided by the Limitation Act 1980, or the six-year limitation period applied to actions founded on simple contract. We do not feel, however, that there is a strong case for aligning the period after which a title will become indefeasible with a limitation period. There would also be no particular rationale for alignment with the limitation period applied to contracts. Indeed, it may be misleading to provide alignment with a limitation period as the long stop is not intended to mark a period of limitation. It is intended to draw a balance between the competing objectives of finality and fact-sensitivity but, as we have noted above, at paragraph 13.103, its operation will not affect the availability of an indemnity.

We provisionally propose that the period of time after which the register becomes final should be ten years.

Do consultees agree?

Having set out our general proposals on rectification, we turn our attention to three specific issues in respect of which we make recommendations for reform:

(1) cases of double registration;

(2) derivative interests; and

(3) retrospective rectification.

DOUBLE REGISTRATION

Double registration describes the situation where the same plot of land is mistakenly registered concurrently under two separate freehold titles. For example, where A and B are registered proprietors of adjoining freehold titles to

113 We discuss sch 6 in Chapter 17.
neighbouring land, but both of their titles include a strip of land at the boundary or the corner of a particular field.

13.129 The registration of the same plot of land in two different titles is something that should not happen. As Lord Justice Mummery commented, "even someone who knows nothing about land registration would realise that concurrent registration of title to the same piece of land in the names of different people is bad news". Double registration will generally be preceded by a double conveyance of the same plot of land. A search of the index map on the second application for registration should reveal that the plot is part of an existing registered title. Double registration appears most likely to arise where a new title is being created – for example, where B’s application is for first registration of unregistered land – or through an independent error by Land Registry in the process of registration.

13.130 The fact of double registration means that there is a mistake on the register; the same plot of land cannot be owned by different people with the same title. It will generally be possible to identify which party’s registration is a mistake as an investigation will reveal which title, under the general law, the double registered plot should form part of. Merely establishing that does not, however, resolve the issue. Once double registration takes place, both parties can point to section 58 of the LRA 2002 to establish their title regardless of the position under the general law.

13.131 In this section, we consider the courts’ treatment of double registration in registered land and the criticism that has been directed at the leading case, Parshall v Hackney. We consider that our proposals on alteration of the register should apply equally in cases of double registration and that they will resolve the concerns raised at the operation of the current law. We also make an additional proposal to deal with a specific consequence of our policy that arises in its application to double conveyancing.

The current law

13.132 The effect of double registration in registered land was brought into sharp focus by the decision in Parshall v Hackney. That case arose from the double registration of a small triangular plot of land. The land had an amenity and financial value disproportionate to its size as it was situated in Chelsea and, when used in conjunction with adjoining land, it provided a parking space. Title to the plot of land belonged to No 29 and was registered with the title to that property in 1904. The double registration took place in 1980 when neighbouring land, No 31, was registered for the first time. The registration of the plot with the title of No 31 was a mistake, but the land was used by the owner of No 31 to create a parking space. Through a subsequent error, the plot was removed from the title to No 29, leaving No 31 as the sole registered proprietors.

115 For example, as happened in Parshall v Hackney [2013] EWCA Civ 240, [2013] Ch 568.
116 There is one exception to this proposition. Two people may own freehold title to the same plot of land where there has been a statutory conversion of a long lease into a freehold under the Law of Property Act 1925, s 153. We discuss that provision in Chapter 3.
118 Above.
When the mistakes came to light, the owners of No 29 applied for rectification of the register. The owner of No 31 sought to resist rectification on the basis that they had acquired title through adverse possession. The Court of Appeal held that where concurrent registration arises it was lawful for either registered proprietor to take and remain in possession. Therefore, the owner of No 31 could not claim to have been in “adverse” possession of land, which requires unlawful possession. Lord Justice Mummery explained that the case did not involve “relativity of titles” that provides the basis of a claim to adverse possession, but instead concerned “equality of registered titles”. Having dismissed the claim to adverse possession, the Court of Appeal ordered rectification in favour of No 29.

The court noted the existence of a discretion not to rectify, but concluded:

The points forcefully advanced ... against rectification could not disguise the plain unvarnished fact that [the owner of No 31] is seeking to take the benefit of a mistake by the Land Registry, which had occurred through no fault on the [part of the owners of No 29] and which it would be unjust not to correct.

The decision in Parshall v Hackney has attracted criticism, much of which has questioned the court’s conclusion that registration precludes a claim to adverse possession.

We agree that the outcome in Parshall v Hackney is unsatisfactory. One factor that seems particularly striking is that there is nothing the owner of No 31 could have done that would have alerted her to the fact of the double registration. Both properties had changed hands in the time since the plot of land had been incorporated into the parking space used by No 31. As Dr Lu Xu has commented, it is difficult to see what the current owner of No 31 could have done differently, while, in contrast, the owners of No 29:

had every reason to notice the mistake during the purchase of the house ... As potential purchasers, they must have observed that the disputed land was being used by someone other than the vendor from whom they were buying.

The effect of Parshall v Hackney is that the party whose title under the general law includes the double registered plot appears invariably to be able to obtain rectification. A possible resolution of the dispute through adverse possession is precluded, while the interpretation of the court’s discretion not to rectify leaves little room for argument in favour of the other registered proprietor.

In Parshall v Hackney the court noted it was common ground between the parties that the provisions of the LRA 1925 applied to the case. There is, however,
nothing to suggest that the outcome would be different under the LRA 2002. In the terms of schedule 4, the owners of No 29 would apply for alteration of the register. The alteration would be a rectification as it would involve the correction of a mistake prejudicial to the owner of No 31 as registered proprietor. The owner of No 31 would benefit from the protection afforded to proprietors in possession, through which rectification is awarded only with their consent, unless they have substantially contributed to the mistake through fraud or lack of proper care, or unless it would be unjust not to rectify. The court’s interpretation of the latter exception would preclude an argument in favour of the owner of No 31.

13.138 It should be noted that although the owner of No 31 lost title to the double registered land, following rectification she would be entitled to indemnity. The fact the parties engaged in three rounds of litigation to resolve ownership illustrates that the case is one in which the parties valued the land more than they did the sum likely to be recovered through indemnity for loss of the land.

Proposals for reform

13.139 We agree with the Court of Appeal’s judgment insofar as it establishes that cases of double registration should be resolved by the operation of the provisions on alteration, rectification and indemnity, rather than through adverse possession.

13.140 We acknowledge, in this respect, that some commentators have argued in favour of applying adverse possession in situations of double registration. There are, however, difficulties in that approach. As we have noted, it was common ground between the parties to Parshall v Hackney that the case fell to be considered under the LRA 1925. If adverse possession had been applied on the facts of the case, then it appears that the owner of No 31 would have obtained title as 12 years of adverse possession would have been completed before the LRA 2002 came into force. Under the limitation scheme in operation under the LRA 1925, the owner of No 31 would have obtained an unassailable title to the land automatically after 12 years of adverse possession. That is not the case under the LRA 2002, where adverse possession entitles a claimant to apply to be registered as proprietor under schedule 6. There is an initial problem with invoking schedule 6 in relation to double registration, as the schedule provides a procedure through which a person may become a registered proprietor. That does not sit comfortably with a case of double registration where the applicant under schedule 6 would already be the registered proprietor. Even if that difficulty was overcome, in a case of double registration the practical outcome of an application is likely to be that the claimant will be registered only where the application can be brought within the specific provisions found in schedule 6, paragraph 5(4) in respect of adjoining land. That would provide a route to resolve most, but not all, cases. It would not provide a solution where the double

124 See n 121 above. At para 17.25 and following we discuss whether two of these conditions should be removed.

125 We explain the schedule 6 procedure in Chapter 17 where we consider the general operation of adverse possession. The practical outcome of the application given in this paragraph assumes that when the claimant applies for registration, notice will be given to the other registered proprietor who, in response, requires the application to be dealt with under paragraph 5. Under that paragraph the claimant’s application will be rejected unless it falls within one of three cases, including the provision for adjoining land in paragraph 5(4).
registration concerns land that is not adjoining land in the claimant’s title; for example where there is a path or driveway between the claimant’s land and the plot that is subject to double registration. Further, it would arguably leave schedule 6, paragraph 5(4) to resolve issues that it was not designed to resolve.

13.141 We consider that our policy in respect of indefeasibility will provide an appropriate outcome to cases of double registration. As we now explain, its application would have the effect of reversing the outcome in *Parshall v Hackney*.

13.142 As a prelude to our discussion of indefeasibility, we outlined two scenarios arising from fraud, which we termed the AB and the ABC scenario. Each of those scenarios has an analogous factual situation arising from double registration.

(1) A, the party entitled to the land under the general law, is registered proprietor when B is registered with the same land. Alternatively, it may be that B is registered (incorrectly) first and A, who is entitled under the general law, is then registered. This situation is analogous to the AB scenario.

(2) Following the double registration, B (the party who is not entitled to the land under the general law) transfers the land to C. This situation is analogous to the ABC scenario.

13.143 Under our proposals, if A (or A’s successors in title) remain in possession of the land, then A will be able to retain the land and the register will be rectified against B unless there are exceptional circumstances.\(^{126}\)

13.144 If B or C is in possession and the application for rectification is made within ten years of the mistake,\(^{127}\) then B or C will retain the land (and rectification will be made against A) unless it would be unjust not to rectify or the party who is registered proprietor (B or C) substantially caused or contributed to the mistake though fraud or lack of proper care. In view of the interpretation of the “unjust” exception in *Parshall v Hackney*, the practical outcome of a case where the application for rectification is made within ten years is that rectification will be awarded, even where B or C is in possession. That interpretation of “unjust” appears a potential source of unfairness, particularly where the claimant has no means of knowing that their registration is derived from a mistake on the part of Land Registry.

13.145 After ten years, however, our long stop applies and the title of B or C is indefeasible subject only to an exception where the party who is registered proprietor caused or substantially contributed to the mistake through fraud or lack of proper care. Hence, the effect of our proposals would be to reverse the outcome of *Parshall v Hackney* on the facts as there had been over ten years’ possession by the owner of No 31 since their mistaken registration.

13.146 Where neither A nor B or C is in possession, then, in the absence of exceptional

\(^{126}\) Rectification (rather than alteration) will always be in issue because the register is being altered to correct a mistake in a manner prejudicial to the registered proprietor.

\(^{127}\) In cases of double registration, the mistake is the registration of the party who is not entitled to the land under the general law.
circumstances, A will retain the land if the application for rectification is made within ten years. After ten years, B’s (or C’s) title becomes indefeasible subject only to the exceptions in cases of fraud or lack of proper care.

13.147 It should be reiterated that the operation of the long stop would not prevent the party against whom the register is rectified from claiming an indemnity.

13.148 In cases of double registration, the operation of the long stop may, however, cause a practical difficulty. Take for example the case where A is registered proprietor and part of the plot of land is then double registered in B’s name. B takes possession of the land that is the subject of double registration and remains in possession for ten years. At that point, B’s title becomes indefeasible. That does not solve the problem, however, because the plot is still subject to double registration in A’s name.

13.149 The concept of mistake may be sufficiently flexible to say that A’s continued registration is a mistake now that B’s title is indefeasible. We are concerned, however, that it could instead be argued that the register should be altered to remove A. The fact that B’s title is indefeasible could mean that an alteration of the register is now necessary to bring the register up to date within schedule 4, paragraph 2(1)(b). We consider that such a result would be unfair. It would mean that A could be deprived of his or her title without an indemnity in circumstances that could not happen under the current law. Such an outcome could raise questions of compatibility with Article 1 of Protocol 1 to the European Convention on Human Rights.

13.150 We consider that A’s position should be put beyond doubt. Where, as a result of the operation of the long stop, a double registration remains on the register, the party who does not benefit from the long stop should have their title amended to remove the double registration. The party whose title is amended in such circumstances should be entitled to an indemnity.

13.151 We provisionally propose the following:

(1) Cases of double registration should be resolved through the application of our proposals in respect of indefeasibility. Therefore, in a case of double registration, a claim to adverse possession should not be possible.

(2) Where as a result of the operation of the long stop a double registration remains on the register, the party who does not benefit from the long stop should have their title amended accordingly to remove the double registration. The party whose title is amended in such circumstances should be entitled to an indemnity.

Do consultees agree?

DERIVATIVE INTERESTS

13.152 In the above discussion we have concentrated on the case where the application for alteration or rectification relates to the registration of the proprietor of an estate. An application for alteration or rectification may also relate to a derivative interest, a term used to describe a property right granted out of a superior right.
An application is most likely to arise when a derivative interest held by a party has been omitted from the register and a registrable disposition of the title has taken place.

13.153 As well as making a “title promise” in section 58, the LRA 2002 also contains a “priority promise” in section 29. We have considered section 29 in Chapters 6 to 8. The effect of the priority promise is that the omission of the derivative interest from the register may mean that it ceases to be enforceable following a registered disposition for valuable consideration of the legal estate it affects, such as an ordinary sale of the land. Generally, following a registered disposition the derivative interest will no longer be enforceable unless it was protected by the entry of a notice on the register or is an overriding interest. We have considered the entry of a notice in Chapter 9 and the operation of overriding interests in Chapter 11.

13.154 A similar priority promise is made in sections 11(4) and 12(4) of the LRA 2002 for when (respectively) a freehold or leasehold title is registered for the first time. The scope of the priority promises in these sections differs from section 29, reflecting specific matters that arise only on first registration. For the purposes of the current discussion it is not necessary to distinguish these provisions from section 29. The policy relating to the priority provisions of the LRA 2002 and the provisions on alteration and rectification should be the same, no matter whether the priority provisions relied upon relate to first registration or to a subsequent disposition; although the impact of that policy may differ in cases of first registration.

13.155 There are a number of reasons why an interest that should be recorded on the register has not been. It may be that the holder of the interest applied for entry of a notice but, though an error or omission, no entry has taken place. Or a notice may have been entered but wrongly removed – whether through fraud or otherwise. Errors may be most likely to arise in the creation of a new title on first registration of land, where the derivative interest is not carried over onto the register from the title deeds or from an entry in the register of land charges maintained under the Land Charges Act 1972.

13.156 It is important to emphasise that we are concerned in this chapter with situations in which the derivative interest should be recorded on the register, but has not been. That is significantly different from a case where nothing has taken place that would have resulted in the interest being recorded on the register (the owner of the interest has not applied to have the interest recorded and the land affected by the interest has not been subject to first registration) and where the policy of the LRA 2002 is that the interest should not be enforceable following a registered disposition in the absence of an entry on the register. The priority promise in section 29 (and in section 11) is intended to protect transferees of land against pre-existing property rights in such a situation.

13.157 In some cases the fact that an interest has been omitted from the register will not affect the enforceability of the right. This will be the case in two situations. The

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128 See para 13.171 and following below.

first is where the interest is enforceable, in any event, as an overriding interest under schedule 1 (on first registration) or schedule 3 (subsequent dispositions). As we have seen in Chapter 11, once an interest “has been the subject of a notice in the register” it can no longer be an overriding interest.\(^{130}\) Hence, if a notice has been entered on the register in respect of an interest and is subsequently mistakenly removed, the interest cannot be an overriding interest. Therefore, the possibility of protection as an overriding interest is confined to cases where the interest should have been subject of a notice, but no notice has ever been made. Secondly, the interest may continue to be enforceable as a matter of contract law. This scenario may arise on a voluntary first registration. For example, say that X has the benefit of a restrictive covenant over A’s unregistered land, which X has entered as a land charge. A applies for voluntary first registration and the burden of X’s covenant is omitted from the register. If A and X are the original parties to the covenant, then the covenant will continue to be enforceable as a matter of contract law.

13.158 For so long as the interest remains enforceable, the omission of the interest from the register is relatively unproblematic. When the omission is discovered, the register can be altered to record the interest. The alteration in this instance will not attract an indemnity. Either the alteration of the register is to bring the register up to date under schedule 4, paragraph 2(1)(b) – which never attracts an indemnity; or the alteration is to correct a mistake, but does not give rise to an indemnity because the alteration is not prejudicial to the title of the registered proprietor. There is no prejudice to the registered proprietor in such a case because he or she was bound by the interest in any event. Hence, it is established that alteration of the register to record an overriding interest does not result in the payment of an indemnity.\(^{131}\)

13.159 The difficult situation that remains is where, as a result of being omitted from the register, the effect of the priority promise is that the interest does not bind the current registered proprietor. Where the omission of an interest from the register results in the loss of priority, a policy question arises about the relationship between the priority promise (whether arising on first registration or a subsequent disposition) and the provisions on alteration and rectification of the register.

13.160 The policy choice is a difficult one. On one hand, there is an argument that the priority promise in the LRA 2002 should be no more immune to schedule 4 than the title promise. The Court of Appeal decision in *MacLeod v Gold Harp Properties Ltd* (“Gold Harp”)\(^{132}\) supports, as a general principle, the idea that the title promise and priority promise of the LRA 2002 should be interpreted analogously.\(^{133}\) That case deals with the application of schedule 4 in the context of competing derivative interests, which we return to below at paragraph 13.189 and following. But the approach appears to apply more broadly. As Amy Goymour explains, both the title promise and priority promise raise the central concern:

\(^{130}\) LRA 2002, s 29(3).

\(^{131}\) Re Chowood's Registered Land [1933] Ch 574.


\(^{133}\) *Gold Harp* at [98].
whether a prior interest-holder’s claim for alteration of the register should be permitted to undermine an innocent purchaser’s ... expectation that the register is correct.134

The concern appears valid. As we have seen in this chapter, a registered proprietor’s title (B or C in the scenarios we have discussed) is not indefeasible and through rectification under schedule 4 may be restored to A; in other words, the title promise in section 58 of the LRA 2002 is qualified by schedule 4. In light of that, it is difficult to argue why the priority promise should not equally be subject to rectification under schedule 4 so that a derivative interest held by X may (in appropriate circumstances) be restored to the register.

13.161 However, there is a difference between a mistake that affects the title promise and one that affects the priority promise. Where there is a mistake in the title to an estate, the disposition itself is impugned. The title promise has conferred a title that the registered proprietor should never have had. In contrast, where the mistake relates to the priority promise, there is no defect in, or problem with, the creation of the derivative interest, only with the preservation of its priority. Contrary to the policy endorsed in Gold Harp, courts have not always been favourable to rectification to restore a derivative interest.135

13.162 We acknowledge that the arguments are finely balanced, but provisionally we consider that it is preferable to maintain a consistent approach to the operation of rectification and indemnity in cases where the claim relates to the title promise and the priority promise. In order to replicate that policy, however, we need to make a specific recommendation in respect of the operation of the ten-year long stop. Additionally, a specific issue arises in the context of first registration in respect of interests that ceased to be overriding on 13 October 2013.

13.163 To illustrate the effect of our proposals it is useful to consider separately examples of how they would operate in the context of a registered disposition under the LRA 2002 and on first registration.

**Registered dispositions under the LRA 2002**

13.164 Consider the following examples:

1. X has the benefit of a restrictive covenant over A’s land. X had entered a notice on the title in respect of the covenant, but by mistake the notice was removed from the register. A transfers title by registered disposition to B.

2. Y has the benefit of a legal easement over A’s land.136 Notice of Y’s easement should have been entered against A’s title, but no entry has ever been made. A transfers title by registered disposition to B.

13.165 In the first example, section 29 operates to postpone X’s restrictive covenant on

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the disposition, so B takes free from the covenant. X can apply for the register to be altered to reinstate the covenant with priority. The alteration would be a rectification as it involves the correction of a mistake that prejudicially affects the title of the registered proprietor. As alteration is possible, it should be ordered unless there are exceptional circumstances, or B is in possession. If B is in possession, then alteration is possible only where B has, by fraud or lack of proper care, caused or substantially contributed to the mistake, or if it would be unjust for the alteration not to be made. If rectification is made, then B is entitled to indemnity; if rectification is not made, then X obtains an indemnity.

13.166 Our proposals on indefeasibility in title cases include a long stop to bring finality to the register after ten years. Where the mistake relates to the mistaken removal of a title, we have suggested that the ten year period should run from the time of the mistaken removal of the registered proprietor from the register. In the context of derivative interests, different considerations arise. The mistaken removal of X’s notice from the register may have taken place sometime before the disposition from A to B. The mistake had no effect at the time of the disposition however; A continued to be bound by the covenant despite the removal of the notice. The mistake had effect only following the registered disposition to B, when section 29 operated in B’s favour. Therefore, in the context of derivative interests, we consider that the ten year long stop should run from the time that, as a result of the mistake, the holder of the derivative interest loses priority; in our example, that would be ten years from the registered disposition from A to B. As a result, ten years after the disposition to B, X would no longer be able to seek rectification of the register to restore the restrictive covenant. That would not affect X’s entitled to an indemnity.

13.167 Our second example differs from the first in one respect. A legal easement is an overriding interest, as long as certain conditions in schedule 3, paragraph 3 are met. The easement has never been the subject of a notice on the register and therefore is not precluded from being an overriding interest. In this example, the easement may bind B on the registered disposition notwithstanding the mistake. If that is the case, then Y may still apply to have the register altered – but the alteration would not be a rectification. As we have seen, the exact interpretation of an alteration of the register to record an overriding interest is open to doubt, but on either interpretation no indemnity is payable to B because B is bound by the easement.

13.168 We have noted that there are a number of alternative conditions in schedule 3, paragraph 3 for an easement to be overriding. It is possible that Y fulfilled one of these conditions at the time of the disposition to B, but no longer fulfils any of the conditions at the time of a subsequent disposition from B to C. Hence, at the time of that disposition, Y’s easement is postponed to C. What if the mistaken omission of the notice comes to light only following the disposition to C? Y’s easement may have been created before title to the burdened land was registered.

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136 For example, Y’s easement may have been created before title to the burdened land was registered.


138 LRA 2002, Schedule 4, para 3(3).

139 See para 13.61 above.
We provisionally propose that section 29 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 long stop.

Do consultees agree?

We provisionally propose that, where the application for alteration or rectification relates to a derivative interest, the ten year long stop on alteration of the register should run from the time that, as a result of the mistake, the holder of the derivative interest lost priority, not from the time of the mistake.

Do consultees agree?

First registration

To consider how our provisional policy would operate on first registration we can adapt the examples used above:

(1) X has the benefit of a restrictive covenant over A’s land which X has entered as a land charge. A conveys title to B. The conveyance triggers first registration of title and X’s covenant is omitted from the register.

(2) Y has the benefit of a legal easement over A’s land. A conveys title to B. The conveyance triggers first registration of title and Y’s easement is omitted from the register.

In the first example, the general position in unregistered conveyancing is that as long as X has correctly registered the land charge before completion of a purchase, the land charge binds a subsequent purchaser. As a result, on the conveyance to B, B is bound by the covenant. First registration is not intended to affect priorities. Despite that intention, on first registration the priority promise in section 11(4) of the LRA 2002 means that the covenant is no longer enforceable against B. Under our provisional policy, section 11(4) (like section 29) is subject to schedule 4. X can then apply for alteration of the register, which would be rectification; it is the correction of a mistake which prejudicially affects the title of a registered proprietor. Whether rectification is ordered would then be determined...
by the same tests that we have outlined above in relation to a disposition under the LRA 2002 which results in the loss of priority of a restrictive covenant.\textsuperscript{142} Under our long stop provision, ten years after X loses priority as the result of the mistake (in other words, ten years after the land is first registered), rectification would no longer be available (although X would still be entitled to an indemnity).

13.173 The difference in the first registration scenario to the position in respect of a disposition under the LRA 2002 is that here B was bound by the covenant according to the priority rules of unregistered land.\textsuperscript{143} If rectification is ordered, then B may obtain a windfall; B is paid an indemnity in respect of an interest by which he or she was bound under the priority rules of unregistered land that applied to the conveyance. B’s windfall seems difficult to justify. There are two ways in which the outcome could be avoided, though neither is without difficulty.

13.174 First, it could be suggested that the alteration of the register in these circumstances is equivalent to an alteration to enter an overriding interest. In both instances, the alteration places on the register an interest that bound the registered proprietor. As we have seen at paragraph 13.61, no indemnity is payable where the register is altered in respect of an overriding interest. We acknowledge that the two situations are not analogous. In particular, entry of an overriding interest relates to an interest that currently binds the registered proprietor. In our scenario, the interest bound under the rules of unregistered conveyancing but ceased to do so on registration through the operation of section 11(4). An analogy with overriding interests appears to ignore the effect of the priority promise in that section.

13.175 Secondly, it would be possible to prevent rectification of the register and leave X with a claim to indemnity for the mistaken omission of the covenant. This solution would have the effect that the priority promise in section 11(4) was not subject to schedule 4. It seems undesirable for the priority promises provided in respect of first registration and a subsequent disposition to operate differently; more so if the effect was to give section 11(4) greater effect on first registration than is afforded to section 29 on a subsequent disposition.

13.176 Despite the difficulties in these arguments, we consider that a provision that conferred a windfall on B would be unacceptable. Therefore, we suggest that specific provision should be made whereby a transferee on first registration who is bound by a derivative interest under the applicable rules of unregistered land, but not under section 11(4) of the LRA 2002, should not be entitled to an indemnity where the register is rectified to reinstate the interest.

13.177 If there is a subsequent disposition of the land from B to C before the mistake comes to light,\textsuperscript{144} then C has never been bound by the covenant and so no question of a windfall arises. It should be noted, however, that X lost priority (and

\textsuperscript{141} Land Charges Act 1972, s 4. An exception is where the purchaser obtains an official search of the land charges register and the land charge is omitted from the search.

\textsuperscript{142} See paras 13.165 to 13.166 above.

\textsuperscript{143} Assuming that B did not obtain a clear land charges search: see n 141 above.

\textsuperscript{144} See eg \textit{Freer v Unwins} [1976] Ch 288.
so the ten year long stop began to run) on the first registration of the land; a fresh period does not begin to run on the subsequent transfer.

13.178 The second example differs from the first because – as is the case on a subsequent disposition – a legal easement is an overriding interest. On first registration, a legal easement is an overriding interest within schedule 1, paragraph 3. We have seen above that in the context of a registered disposition under the LRA 2002, legal easements are only overriding where certain conditions are met. Those conditions do not apply on first registration. If the mistake is discovered, Y in our example can apply to have the register altered. As the easement that binds B is an overriding interest, the alteration is not a rectification, see paragraph 13.61, and so no indemnity is payable.

13.179 If there is a subsequent disposition from B to C, then Y’s interest may remain overriding under schedule 3, paragraph 3. If so, then Y will be able to obtain an alteration of the register. Y’s easement will, however, cease to be overriding if Y cannot meet any of the conditions in schedule 3, paragraph 3. In that case, Y has lost priority as a result of the mistake from the time of the disposition to C. An alteration of the register would now be rectification and is subject to the analysis provided in respect of our second example above, at paragraphs 13.167 to 13.168.

13.180 We provisionally propose that section 11 should be subject to schedule 4. This means that where, through a mistake, a derivative interest has been omitted 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 is against the title, including the operation of the long stop.

Do consultees agree?

13.181 We provisionally propose 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.

Do consultees agree?

Interests that ceased to be overriding interests

13.182 As we have seen in Chapter 11, one of the reforms made by the LRA 2002 was to reduce the number of overriding interests. As a result, through transitional provisions a number of interests ceased to be overriding interests on 13 October 2013; ten years after the LRA 2002 came into force.\(^{145}\) For so long as an interest

\(^{145}\) LRA 2002, s 117. The rights concerned are: a franchise; a manorial right; a right to rent reserved to the Crown on the granting of any freehold estate; a non-statutory right in respect of an embankment or sea or river wall; a right to payment in lieu of title; a right in respect of the repair of a church chancel.
continues to be overriding, there is no reason to distinguish it from other overriding interests. Hence, if the land with the burden of a right was first registered on or before 12 October 2013, and the most recent registered disposition took place on or before that date, the interest is an overriding interest. If it was omitted from the register at the time of first registration or disposition, then an application for alteration of the register can be made.

13.183 If the interest is not on the register, and first registration or a registered disposition takes place on or after 13 October 2013, should alteration or rectification of the register still be possible? It may be that no prior disposition has taken place during the ten year transitional period since the LRA 2002 came into force, or that first registration or a disposition has occurred during the transitional period and the interest was omitted from the register at that time.

13.184 We consider that with one exception, no alteration or rectification of the register should be possible in respect of interests that ceased to be overriding on 13 October 2013 where first registration or a disposition of the affected estate has taken place on or after that date.

13.185 The policy of the LRA 2002 was to give the holder of these interests a period of time (ten years) in which to make appropriate arrangements to protect the right; though the entry of a notice on the register or a caution against first registration. In our 2001 Report we gave the following account of the interests:

All are relics from past times and are of an unusual character. Most of them can no longer be created. Those who have the benefit of such rights ought to be aware of them. These characteristics make them obvious and sensible candidates to be phased out. If such rights are to bind those who acquire registered land, they should be protected in the register.  

13.186 In our 2001 Report we suggested that the holder of a right that ceased to be capable of being an overriding interest would be able to seek rectification of the register against the first registered proprietor because the omission of the right from the register is a mistake. On reflection, we now consider that it would undermine the policy of providing holders of rights that ceased to be capable of being an overriding interest a limited time to protect their right to allow the right to be reinstated, after it had ceased to be binding, through an application for alteration or rectification.

13.187 An exception arises, however, where on first registration Land Registry omits a notice that should have been entered under rule 35 of the LRR 2003, or overlooks a caution against first registration. In these instances, the omission of the interest from the register is the result of fault on the part of Land Registry in respect of which the holder of the interest should not be disadvantaged. An application for alteration or rectification should therefore continue to be available in the way (and subject to the same limitations) as it is in respect of any other derivative interest.

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146 Law Com 271, para 8.8.
147 Law Com 271, para 8.39.
We provisionally propose 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 or a registered disposition of the affected estate takes place on or after that date. An exception should be made, however, where on first registration Land Registry omitted a notice in relation to the interest that should have been entered under rule 35 of the LRR 2003, or overlooked a caution against first registration.

Do consultees agree?

RETROSPECTIVE RECTIFICATION

So far, we have considered how indefeasibility should operate where the registered proprietor's title is challenged by a person who claims to be entitled to be the registered proprietor, and where the holder of a derivative interest claims that the registered proprietor should hold subject to his or her interest. The final question to consider is what happens where, as a result of rectification of the register, there are competing derivative interests. The question arises where one party – X – has a derivative interest, which could, for example, be a mortgage or lease, which is removed from the register, whether through fraud or another mistake. A competing interest – another lease, say, or another mortgage – is granted and registered in favour of Y. The mistake comes to light and X's interest is to be restored to the register. Had it not been for the mistake, X would have had priority over Y (leaving Y to claim an indemnity), but that priority has now been lost. Should X's interest be restored to the register with priority over Y, or should Y retain priority over X? This question is generally framed by asking whether rectification of the register should operate retrospectively. The question is of considerable practical importance. If X's lease is restored to the register without priority over Y's lease, then X is unable to obtain possession of the land. If X's mortgage is restored without priority over Y's mortgage, then the security for the loan (and the risk involved) will not be as good as X had expected or may now be inadequate. In both situations, X will, however, be entitled to an indemnity if the conditions for an indemnity are met.

Schedule 4, paragraph 8 to the LRA 2002 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" (emphasis added).

The effect of this provision was interpreted by the Court of Appeal in Gold Harp Properties Ltd v MacLeod (Gold Harp). That case arose out of a scheme by Mr Ralph to acquire the “roofspace” of property to convert into flats. The roofspace was held on a long (135 year) lease registered in the names of the claimants. Mr Ralph’s son, Matthew Ralph, obtained the freehold of the property and purported to forfeit the claimants’ lease by re-entry for non-payment of ground rent, following which Land Registry accepted Matthew Ralph’s application to close the title to the lease. In fact, the forfeiture was unlawful and so the alteration of the register was a “mistake”. Matthew then granted a new lease to Insignia – a
company controlled by Mr Ralph’s business associate. That lease was subsequently assigned to Lavender and then to Gold Harp Properties Ltd – both companies being owned and controlled by Mr Ralph. The Court of Appeal (confirming the decision at first instance) held that the claimants’ lease should be reinstated on the register with priority over Gold Harp Properties Ltd’s lease. Lord Justice Underhill considered that paragraph 8 of schedule 4 did not prevent him from restoring the register to the position as it would have been if the claimants’ lease had not been mistakenly removed. He considered that the reference to “for the future” in paragraph 8 meant that the consequence of his decision would operate only for the future; in other words, so that Gold Harp Properties Ltd would not have been violating the claimants’ right to possession in the meantime if it had gone into possession. Lord Justice Underhill considered his decision to be consistent with our 1998 Consultation Paper and 2001 Report.

In fact, with respect to Lord Justice Underhill, our policy in relation to retrospective rectification changed between our 1998 Consultation Paper and our 2001 Report. While at the time of publication of our 1998 Consultation Paper we supported retrospective rectification, the policy stated in our 2001 Report was that schedule 4, paragraph 8 should “accord with the manner in which the analogous provisions of [the LRA 1925] have been interpreted”. The provisions of the LRA 1925, as we explained in our 1998 Consultation Paper, had been interpreted so as not to enable retrospective rectification.

Gold Harp is based on a comprehensive discussion of authorities decided under the LRA 1925 and LRA 2002. Commentators have indicated agreement that the Court of Appeal’s interpretation of the LRA 2002 is correct. The fact that the case departs from the intended policy in our 2001 Report is not, itself, sufficient reason to reverse the decision. Against the decision is a concern that retrospective rectification may undermine trust and confidence in the register and produces uncertainty. Its effect, on the facts of the case, was that Gold Harp Properties Ltd, as the proprietor of a lease, lost priority to the claimants. Although on the facts there may be little sympathy towards Gold Harp Properties Ltd, the situation in other cases may be different.

Notwithstanding, in our discussion of derivative interests above at paragraph 13.152 above, we have expressed broad support for the idea that the title promise and the priority promise should be interpreted analogously. It was on that basis that the decision in Gold Harp was reached. We acknowledge that,

550 Law Com 271, para 10.8.
551 Law Com 254, para 8.33.
553 A Goymour, “Resolving the tension between the Land Registration Act 2002’s ‘priority’ and ‘alteration’ provisions” [2015] Conveyancer and Property Lawyer 253
whatever the intention was at the time, it is difficult to understand what schedule 4, paragraph 8 is intended to do if retrospective rectification is not permitted. We also note that prospective rectification is not itself without difficulty. In *Gold Harp*, its effect would have been to reinstate the claimants’ lease onto the register, but subject to Gold Harp Properties Ltd’s lease. Registration would give rise to the possibility of being reinstated in possession if Gold Harp Properties Ltd’s lease was to be determined, but it would also have left the claimants liable for the landlord’s leasehold covenants in Gold Harp Ltd’s lease.

13.195 We acknowledge that the operation of retrospective rectification is a matter on which there are likely to be different views and that the terminology used in schedule 4, paragraph 8 appears to conflict with the intention stated in our 2001 Report. At this stage, however, the decision in *Gold Harp*, agreement with its interpretation of the LRA 2002 and the possible adverse consequences of prospective rectification, we are not convinced that there is a sufficient reason to suggest reversing the decision. In reaching this conclusion, we have borne in mind that a party who loses priority as a result of retrospective rectification may be able to claim an indemnity. However, we would be interested to hear of any practical difficulties that consultees have experienced as a result of the decision.

13.196 **We provisionally propose that in the case of competing derivative interests, rectification should operate retrospectively.**

Do consultees agree?

13.197 **We invite consultees to share with us any practical difficulties that consultees have experienced following the decision in *Gold Harp*.**
CHAPTER 14
INDEMNITY

INTRODUCTION

14.1 Provision for payment of an indemnity is a common feature of systems of land registration. 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 the entitlement to an indemnity. A person who loses land through an error on the register is, in certain circumstances, entitled to be compensated in money. The availability of an indemnity was described by Theodore Ruoff as the “insurance principle” and, as such, as one of the basic principles that underpins systems of land registration. Theodore Ruoff explained the principle in the following terms:

The true [insurance] principle is this, that the mirror that is the register is deemed to give an absolutely correct reflection of title but if, through human frailty, a flaw appears, anyone who thereby suffers loss must be put in the same position, so far as money can do it, as if the reflection were a true one. A lost right is converted into hard cash.¹

14.2 While the existence of an indemnity is common to systems of land registration, the circumstances in which an indemnity is payable varies across jurisdictions. We have found it useful to look at other jurisdictions to contextualise our discussion. However, we also acknowledge that there is no single or generally accepted model for indemnity schemes. The scheme provided for England and Wales must be fit for the purposes of the scheme in this jurisdiction.

14.3 Two features of the indemnity scheme contained in the LRA 2002 should be highlighted at the outset. First, an indemnity is available as a first rather than last resort. If, for example, a registered proprietor (A) suffers loss through the fraud of a third party, (X) there is no requirement that A seeks to recover his or her losses from X. If the circumstances fall within the scope of the indemnity scheme, then A is entitled to an indemnity from Land Registry.² It is left to Land Registry, having paid the indemnity, to seek to recover its losses from X.³

14.4 Secondly, payment of an indemnity is not always dependent on a finding of fault on the part of Land Registry. The circumstances in which an indemnity is available are set out below.⁴ In broad terms, an entitlement to an indemnity arises either in conjunction with a power to rectify the register, or independently of rectification. Where the entitlement arises independently of rectification, the

¹ T Ruoff, An Englishman Looks at the Torrens System (1957) p 13. The mirror principle, referred to in the quote, is considered in Chapter 2.

² However, A will not be entitled to indemnity arising out of A’s fraud or lack of care: LRA 2002, sch 8, para 5.

³ See paras 14.44 to 14.51 below on the registrar’s rights of recourse.

⁴ See paras 14.35 to 14.39 below.
indemnity is triggered by an error, mistake or breach of duty by Land Registry. For example, an indemnity is payable where there is a mistake in an official search or where a document lodged at the registry is lost or destroyed.\(^5\)

14.5 As we have seen in Chapter 13, rectification is an alteration of the register which both “involves the correction of a mistake” and “prejudicially affects the title of a registered proprietor”.\(^6\) A mistake in the register may arise through fault on the part of Land Registry, but a mistake is not necessarily indicative of any such fault. For example, the mistake on the register may be the result of fraud in an underlying transaction which Land Registry had no means of detecting. Where an entitlement to an indemnity arises in conjunction with a power to rectify the register, Land Registry’s liability to pay the indemnity arises because, once the disposition has been registered, the risk of the disposition being valid passes from the parties to Land Registry.

14.6 On the basis of the analysis in paragraphs 14.4 and 14.5 above, there are two distinct rationales for Land Registry’s liability to pay an indemnity. In some circumstances Land Registry’s liability can be explained on the basis of fault. The imposition of liability in such circumstances is uncontroversial. It should be noted, however, that even where fault is the rationale for the indemnity, the claimant does not have to prove fault on Land Registry’s (or any other person’s) part.

14.7 In other situations, however, particularly those where an entitlement to an indemnity arises in conjunction with a power to rectify the register, Land Registry is liable because the risk of the validity of a transaction has passed from the disponee to Land Registry. Although the “insurance principle” is used generally to describe the availability of an indemnity, it is in this latter situation that Land Registry’s liability appears most closely related to that of an insurer, as it underwrites risks arising from the transaction. The scope of such liability is contentious and provides the focus of discussion in this chapter.

14.8 The risk of a transaction passes to Land Registry at the point at which Land Registry registers the transaction. For example, assume that A is the registered proprietor of a freehold title and a fraudster purporting to be A executes a transfer of the title to B, or grants B a registrable charge over A’s title. Up until the point that Land Registry registers the transfer or mortgage, B runs the risk that the person he or she is dealing with is not in fact A. As the risk remains with B, if the fraud is discovered prior to registration, then B bears the loss (subject to his or her ability to recover from the fraudster). However, the risk that the person dealing with B is not A passes to Land Registry when the disposition is registered. If the fraud is only discovered at that point, then B (or A, depending on the outcome of an application for rectification of the register) is entitled to an indemnity. Land Registry in turn must bear the loss, unless and to the extent that it is able to recover through its rights of recourse.\(^7\)

14.9 It is worth emphasising that entitlement to an indemnity does therefore involve an element of chance as to when the fraud is discovered. If the fraud comes to light

\(^5\) LRA 2002, sch 8, para 1(c) and (f).
\(^6\) LRA 2002, sch 4, para 1 and sch 8, para 11(2).
\(^7\) See paras 14.44 to 14.51 below.
prior to registration of the disposition, then B bears the loss because the risk remains with B. However, if the fraud is discovered after the disposition is registered, then B is entitled to an indemnity because the risk has passed. There is an element of serendipity as to whether the fraud comes to light before or after registration. That may depend, for example, on how busy Land Registry is and on how long it takes for a transaction to be registered. But the element of chance does not make the distinction arbitrary. Land Registry accepts the risk by registering the disposition, at which time there is a final opportunity to check the validity of the disposition. However, as we explain below\(^8\) Land Registry is often dependent on checks undertaken by the parties’ conveyancers and may have no further information available to identify a possible fraud or assess the risk that is being accepted.

14.10 Although Land Registry has the liability of an insurer, it is not in business as an insurer. Car insurers and home insurers, for example, charge premiums calculated according to the level of risk undertaken in respect of each policy; the higher the risk, the higher the premium. Land Registry’s fees for some transactions (including transfer of title and registration of a charge) differ according to the value of the transaction, but not individually according to the risk incurred. In the general course of events, Land Registry does not have information which would enable it to assess the risk of individual transactions. Put simply, Land Registry’s fees do not (and could not) reflect an actuarial calculation of the appropriate premium for the risk. Similarly, unlike an insurer, Land Registry cannot impose any financial limit on its potential liability.

14.11 Land Registry is therefore in a unique position. It has the liability of an insurer, but it is not in business as an insurer. In highlighting Land Registry’s position, it is not our intention to question the fundamental basis on which indemnity is provided. We do not question the basic principle that land registration should be underpinned by an indemnity scheme through which Land Registry incurs liability as an insurer of first resort. We do, however, consider that it is appropriate as part of an update of the LRA 2002 to consider the scope of the indemnity scheme and to discuss whether there are any circumstances in which Land Registry’s liability should be limited or even removed.

**Why review the indemnity scheme?**

14.12 We are aware that in our review of the LRA 2002 any proposals to change the operation of the indemnity provisions are likely to be contentious. There may be a natural inclination to resist any suggestion that the scope of the indemnity scheme should be narrowed. As we have explained in Chapter 1, during the course of our work on this Consultation Paper announcements by the Chancellor of the Exchequer indicated that the Government would consult on moving Land Registry operations into the private sphere. The Government’s consultation document was published on 24 March 2016, after the provisional policy contained in this Consultation Paper had been finalised.\(^9\) Against the background of the Government’s previous announcements it was already inevitable that discussion of indemnity would be subject to particular scrutiny. Notwithstanding, the operation of the indemnity scheme clearly falls within the scope of our

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8 See para 14.87 below.

9 See para 1.31 above.
independent review of the LRA 2002 and we consider that a review of the方案 is appropriate, irrespective of any possible move of Land Registry operations into the private sphere. As explained above, we are not questioning the fundamental basis of the indemnity, but calling for evidence and for views from consultees as to its future possible development.

14.13 The substance of the indemnity scheme contained in the LRA 2002 has not been changed since the Land Registration Act 1997 and the origins of the reforms implemented at that time pre-date that Act. The Land Registration Act 1997 implemented recommendations made in the first report of a joint working group of the Law Commission, Land Registry and the Lord Chancellor’s Department.10 Those recommendations, in turn, were drawn from our Third Report on Land Registration11 published in 1987, and a draft Bill published as our Fourth Report in the following year.12 As a result of that earlier work, we did not make further recommendations for reform in respect of indemnity in our 1998 Consultation Paper.13 The provisions were “completely recast” in accordance with the style of the LRA 2002.14 However, the substance of the provisions remained substantially unchanged. Hence the current scheme, though contained in the LRA 2002, is based on recommendations from 1987.

14.14 The landscape in which the indemnity scheme applies, particularly in respect of the incidence of fraud, has changed significantly since 1987.

14.15 In our Third Report, we acknowledged a “development” in the indemnity scheme, namely that payments were now made “for matters which no traditional title investigation would have revealed, for example, a forged charge”.15 What was a development in 1987 has since become a focus of debate in respect of the indemnity scheme. It is timely to consider whether the scope of the scheme remains appropriate for the context in which it is now being invoked and the factual situations out of which claims are being made. Indemnity schemes in other jurisdictions have evolved in the period since the scheme in the LRA 2002 was devised.16 Significant changes were recently introduced in Scotland in the Land Registration etc (Scotland) Act 2012, following recommendations made by the Scottish Law Commission.17

14.16 Land Registry does of course recover indemnity payments through fees and

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13 Law Com 254, para 2.42.
14 Law Com 271, para 10.29.
reports an annual surplus. That may be seen as an indication that there is no problem with the current law that merits review. However, that ignores the financial impact on Land Registry’s customers who bear the cost of the indemnity, no matter how careful they have been in their own transactions. And as Land Registry’s liability is uncapped, the risk of catastrophic loss ultimately represents a general risk for all taxpayers. In that respect, the rise in property value even since 2002 means that the financial consequences of fraud are significantly greater now than they were at the time the current legislation was enacted, let alone from 1987 when the principles on which the scope of the scheme is based were devised.

14.17 As the incidence of registered title fraud has increased, it has also become apparent that Land Registry, which ultimately bears the risk of fraud, is not necessarily best placed to detect and prevent fraudulent dispositions. As we have noted and discuss further below, Land Registry is dependent on checks undertaken by the parties’ conveyancers. While rights of recourse (discussed at paragraph 14.44 and following below) may help ensure that the minority of conveyancers whose conduct falls below standards reasonably expected bear the loss, it is also apparent that the sums recovered through Land Registry’s rights of recourse are relatively modest compared to indemnity payments made. The fact that the risk lies with Land Registry may mean that those who are dealing directly with the parties to a disposition and may therefore be best placed to identify fraud, do not have an incentive to develop best practice.

14.18 The absence of a review of indemnity in 2002, the increase in registered title fraud and the change in the level of risk might each justify a review of the indemnity scheme. We consider that their collective effect means that the case for a review is compelling. The scheme of indemnity that we have was not devised to take into account modern incidents of registered title fraud or the level of the financial risk involved in underwriting dispositions of land.

Our approach to reviewing indemnity

14.19 We have identified four options for reform:

(1) placing a cap on the level of indemnity that can be claimed;

(2) reforms relating to duties of care owed to Land Registry;

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18 See, most recently, Land Registry Annual Report and Accounts 2014/15 p 69.

19 By way of illustration, In 1987 the average UK house price (inc Scotland) was £43,164.50; in 2015 the average UK house price had risen to £193,900.25 (inc Scotland). The Office of National Statistics did not collect average house prices in 1987 and so figures have been collected from data supplied by the Nationwide Building Society. We have also used the Nationwide figures to supply the average 2015 house price in order to ensure a fair comparison. See Nationwide Building Society, Regional Quarterly Indices (Post ’73) http://www.nationwide.co.uk/about/house-price-index/download-data#xtab:regional-quarterly-series-all-properties-data-available-from-1973-onwards (last visited 21 March 2016).

20 See para 14.9 above.

21 See para 14.87 below.

22 See para 14.51 below.
(3) other reforms in respect of identity fraud;

(4) reforms relating to mortgagees.

14.20 These four general options for reform are not necessarily alternatives. Reform of the current indemnity scheme could take into account any one or more or all four of these options.

14.21 In addition, we consider two specific issues relating to the indemnity scheme. These are self-contained issues which arise for consideration regardless of any policy formulated in respect of the general options for reform. They relate to the following areas:

(1) limitation of actions;

(2) valuation of indemnity claims.

14.22 We make provisional proposals in respect of each of the issues, set out in para 14.21 above.

14.23 In the remainder of this chapter, we consider the purpose of an indemnity scheme and the link between fraud and indemnity. We then outline the current provisions before explaining our options for reform.

THE PURPOSE OF INDEMNITY

14.24 In considering the operation of the indemnity scheme in the LRA 2002, it is worth bearing in mind that indemnity is unique to registered land. In unregistered land all risks connected to dealings with land, including the risk of fraud, fall on the parties to the transaction. Why is it, in relation to registered land, that the state, through Land Registry, assumes some of the risks of transactions? In the same way, for example, that it was suggested in Law Com 254 para 2.9 that the new scheme of adverse possession being proposed (and subsequently introduced in the LRA 2002) may encourage voluntary registration to obtain the benefits registered title offers.

14.25 In the past, indemnity may have been considered necessary as a means of encouraging confidence in land registration and may have helped encourage registration. That rationale seems less convincing in the context of a mature and compulsory system of land registration. However, the availability of indemnity can be seen as one means through which registered titles are made qualitatively superior to their unregistered counterparts in the context of encouraging voluntary registration of remaining unregistered titles.23

14.26 In part the purpose of an indemnity can be linked to the general purpose of land registration in enabling people “to deal with land in as simple and easy a manner … as they can now deal with movable chattels or stock”;24 an enduring sentiment, reflected in the desire for easier, cheaper and quicker conveyancing. One of the key ways in which land registration makes conveyancing easier, cheaper and quicker is by replacing deeds as the primary source of information on a title. Title does not need to be investigated through deeds to establish a “root” of title on each transaction because the information contained in deeds is transferred to the

23 Royal Commission on Registration of Title (1857).

24 Royal Commission on Registration of Title (1857).
register. Parties to a transaction therefore need to be able to rely on the register and to transact on the basis of what the register says. Provision of an indemnity ensures that they are able to do so. The need to rely on the register arguably provides the strongest justification for the provision of an indemnity in registered land which is not provided for the equivalent transaction in unregistered land.

14.27 Two additional rationales appear pertinent to the provision of an indemnity. First, an indemnity is an integral aspect of security of a registered title. In essence it provides a degree of peace of mind. Parties can deal with the registered proprietor in the knowledge that his or her title is backed-up by a state guarantee. The guarantee gives those who deal with land the assurance that if title is lost, (for example through fraud) then they will not be left out of pocket. This assurance in turn provides confidence in the property market.

14.28 In the example at paragraph 14.8 above, if the transaction took place in unregistered land, B who is transacting with A, would have access to A’s title deeds, which would provide the evidence that A is the owner. Access to the deeds would provide B with a means of ensuring that the person with whom he or she is transacting is in fact A and not an impersonator purporting to be A. For B’s purposes, the register replaces the deeds as providing proof of A’s title. In the absence of access to the deeds, B is required to rely on the fact that A is the registered proprietor. The ability to rely on the register has been an integral part of land registration since registration was first introduced. It has become, and will continue to become, increasingly important as dispositions of land are dematerialised. In the past, that dematerialisation has, for example, seen the removal of Land Certificates. Some stakeholders have expressed concern that their removal has facilitated fraud. We note these concerns, but consider that in the context of continuing to move towards the goal of electronic conveyancing (which we discuss in Chapter 20), the reintroduction of Land Certificates is not a viable option.

14.29 Secondly, there is an argument based on economic efficiency. Transactions involving registered land could (like those in unregistered land) be left at the risk of the parties, who could choose whether to insure the risk through private title insurance. Insurers, in turn, would be able to calculate an appropriate premium for each transaction depending on the level of risk undertaken. Reliance on private insurance would mean that the greatest cost would fall on the parties to transactions that represent the largest risk. However, economically it is more efficient for a single “insurance” scheme to be provided through indemnity. Far from making conveyancing quicker, easier and cheaper, reliance on private insurance is likely to make conveyancing slower, more complex and more expensive. It adds an additional step into the conveyancing process, while the cost of individually negotiated insurance premiums is likely to far outweigh any savings parties may benefit from; for example, if land registration fees were reduced as an indemnity fund was no longer required.

FRAUD AND INDEMNITY

14.30 As we explain in detail below,25 there are a range of circumstances in which an indemnity is payable under the LRA 2002. Many of the instances in which an

25 See paras 14.35 to 14.39 below.
indemnity is payable do not involve fraud. Fraud will almost invariably not be an issue, for example, where an entitlement to an indemnity arises independently of rectification of the register. An indemnity is most likely to be claimed as a result of fraud where the claim arises through rectification of the register to correct a mistake, or where rectification is available but is not ordered.\footnote{26} Even in this instance, not every mistake on the register is the result of fraud. For example, as we have seen in Chapter 13 a mistake may take the form of double registration.

14.31 Notwithstanding, few would doubt that fraud now provides the most significant context in which indemnity claims arise. Fraud has provided the background for most of the leading cases in which courts have interpreted the provisions of the LRA 2002 on rectification of the register.\footnote{27} Those decisions impact on the availability of an indemnity as an indemnity may be claimed by a person who suffers loss by reason of rectification of the register or by a mistake whose correction would involve rectification.\footnote{28} As table one below shows, fraud also accounts for a significant proportion of sums paid through indemnity. Since 2008 to 2009, fraud has accounted for at least 50\% of indemnity payments made each year with the exception of 2012 to 2013. In 2012 to 2013, however, the figures are distorted by a single large payment of £5.1 million in relation to the mistaken removal of the burden of an easement from the register.\footnote{29} If that payment is put to one side, then fraud accounted for approximately 75\% of all other indemnity claims. The provision of an indemnity is a response to fraud, but it is not a solution to it. It is important that the fact an indemnity is payable is not seen as a reason to reduce efforts to prevent and combat fraud. It would be wrong as a matter of principle to do so. It would also overlook the fact that for many claimants a financial payment will not fully compensate the distress and inconvenience caused by being a victim of fraud. Theodore Ruoff tells us that through the insurance principle “a lost right is converted into hard cash”.\footnote{30} But money will not always be adequate compensation for the loss of property: for example, loss of a home to which there was a sentimental or emotional attachment.\footnote{31} However, as we have noted above those who may be in the best position to detect fraud may not be incentivised to develop best practice as the cost of fraud does not fall to be met by them.\footnote{32}

14.32 Land Registry has taken a proactive approach to combating fraud. We wish to draw attention, in particular, to its Property Alert service. This free monitoring service helps prevent fraud by providing an alert of any significant applications Land Registry receives to change the register: for example, an application for a transfer of ownership or the registration of a charge. The service will also provide


\footnote{27} LRA 2002, sch 8, para 1(1)(a) and (b).

\footnote{28} Land Registry, Annual Report and Accounts 2012/13 (June 2013) p 40.

\footnote{29} See para 14.1 above.

\footnote{30} See L Fox, Conceptualising Home: Theories, Law and Policies (1\textsuperscript{st} ed 2006).

\footnote{31} See para 14.17 above.
notification where an official search is received, which will usually precede an application for transfer or for a charge. Hence, Property Alert can help prevent the fraudulent disposition from taking place.

14.33 An individual can help prevent fraud by entering a restriction to prevent the registration of a sale or mortgage unless a conveyancer certifies that the application was made by that individual.33 A new form of restriction has also been introduced for companies. That restriction requires a conveyancer to certify that he or she is satisfied that the company transferring land or granting a lease or charge is the same company as the registered proprietor and that the conveyancer has taken reasonable steps to establish that the party executing a deed on behalf of the company held the stated office at the time of execution of the deed.34

14.34 Table 1: Percentage of indemnity claims attributed to fraud:35

<table>
<thead>
<tr>
<th>Year</th>
<th>Total indemnity paid</th>
<th>Indemnity paid as a result of fraud (including related costs)</th>
<th>Percentage of indemnity arising through fraud</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014 – 2015</td>
<td>£8.4m</td>
<td>£5.9m</td>
<td>70%</td>
</tr>
<tr>
<td>2013 – 2014</td>
<td>£11.2m</td>
<td>£7.2m</td>
<td>64%</td>
</tr>
<tr>
<td>2012 – 2013</td>
<td>£11.9m</td>
<td>£5.1m</td>
<td>43%</td>
</tr>
<tr>
<td>2011 – 2012</td>
<td>£9.3m</td>
<td>£7.2m</td>
<td>77%</td>
</tr>
<tr>
<td>2010 – 2011</td>
<td>£9.4m</td>
<td>£7.4m</td>
<td>79%</td>
</tr>
<tr>
<td>2009 – 2010</td>
<td>£7.8m</td>
<td>£5.0m</td>
<td>64%</td>
</tr>
<tr>
<td>2008 – 2009</td>
<td>£10.1m</td>
<td>£5.1m</td>
<td>50%</td>
</tr>
<tr>
<td>2007 – 2008</td>
<td>£9.1m</td>
<td>£4.0m</td>
<td>44%</td>
</tr>
<tr>
<td>2006 – 2007</td>
<td>£5.3m</td>
<td>£2.1m</td>
<td>40%</td>
</tr>
<tr>
<td>2005 – 2006</td>
<td>£14.1m</td>
<td>£8.6m</td>
<td>61%</td>
</tr>
</tbody>
</table>

33 By applying on form RX1 or, when the property is not being lived in, a Form RX restriction may be entered free of charge. See Government, *Protect your land and property from fraud* (February 2016), https://www.gov.uk/protect-land-property-from-fraud (last visited 21 March 2016).

34 A Form RX(Co) restriction. A company can enter the restriction in respect of up to three properties free of charge. See above.

35 Table compiled from Land Registry’s annual reports and accounts. Note: rounding of figures may result in variations from percentages recorded in Land Registry’s annual reports and accounts.
THE CURRENT SCHEME OF INDEMNITY

14.35 The circumstances in which an indemnity is payable are specified in paragraph 1(1) of schedule 8 to the LRA 2002:

(1) A person is entitled to be indemnified by the registrar if he suffers loss by reason of –

(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.

14.36 The circumstances listed in LRA 2002, schedule 8, paragraph 1(1)(c) to (h) are those in which an entitlement to an indemnity arises independently of a power to rectify the register.

14.37 The focus of this chapter is Land Registry’s liability under the circumstances in LRA 2002, schedule 8, paragraph 1(1)(a) to (b). Under these provisions, Land Registry is liable to pay an indemnity where a person suffers loss by reason of “rectification of the register” or “a mistake whose correction would involve rectification”. These provisions reflect Land Registry’s liability as insurer.

14.38 To understand the scope of these provisions it is necessary to refer to schedule 8, paragraph 11(2). That paragraph defines rectification as an “alteration” of the register which “(a) involves the correction of a mistake, and (b) prejudicially affects the title of a registered proprietor”. There is therefore a close link between the concept of “mistake” and payment of an indemnity. The combined effect of paragraphs 1(1)(a) to (b) and 11(2) of schedule 8 is illustrated in the text box below.

14.39 The options for reform that we consider below would change the circumstances in which an entitlement to an indemnity arises where the register is rectified, or where the registrar or court exercises the discretion not to rectify. The options for reform would not affect an entitlement to an indemnity that arises independently of a power to rectify of the register.
A is the registered proprietor of freehold title AB12345. By fraud on the part of a third party, A’s title is transferred to B, an innocent purchaser who becomes registered proprietor. As a result of the fraud, B’s registration is a mistake. The fraud is discovered and A seeks to be reinstated as proprietor. There are two possible outcomes of A’s application:

1. A is reinstated as registered proprietor and B receives an indemnity. B has suffered loss by reason of a rectification of the register and is entitled to apply for an indemnity under schedule 8, paragraph (1)(a).

2. A’s application to be reinstated is rejected and B remains registered proprietor. A has suffered loss by the mistake in B’s registration, the correction of which would involve rectification. A is entitled to apply for an indemnity under schedule 8, paragraph (1)(b).

Limitations on entitlement to an indemnity

14.40 In specified circumstances, a claim to indemnity may fail or the sum awarded will be reduced as a result of the claimant’s culpability. No indemnity is payable for loss suffered by a claimant “wholly or partly as a result of his own fraud” or “wholly as a result of his own lack of proper care”. Where the claimant’s loss is partly caused by his or her own lack of proper care, the sum payable is reduced to reflect his or her responsibility. In Prestige Properties Ltd v Scottish Provident Institution, Mr Justice Lightman suggested that “the extent of the ordinary duty of care owed by a solicitor to his client on the conveyancing transaction in question, as opposed to the duty provided for in a particular retainer which may extend or restrict that duty, may provide a yardstick as to the care to be expected of the claimant”.

14.41 The ability to reduce indemnity claims in respect of claimants who are partly responsible for their loss through lack of proper care was one of the innovations of the Land Registration Act 1997. The provision was originally conceived as a

36 LRA 2002, sch 8, para 5(1).
37 LRA 2002, sch 8, para 5(2).
38 Prestige Properties Ltd v Scottish Provident Institution [2002] EWHC 330 (Ch), [2003] Ch 1 at [36].
form of contributory negligence.\footnote{Property Law: Third Report on Land Registration (1987) Law Com No 158, para 3.27; Land Registration: First Joint Report with HM Land Registry (1995) Law Com No 235, para 4.4.} In fact, however, the provision goes further and losses may also be attributable to a lack of proper care through a failure to mitigate.\footnote{Prestige Properties Ltd v Scottish Provident Institution [2002] EWHC 330 (Ch), [2003] Ch 1 at [35].}

14.42 Although cast in terms of the claimant’s fraud or lack of proper care,\footnote{LRA 2002, sch 8, para 5 provides that the claimant’s fraud or lack of proper care is extended to that of “a person from whom the claimant derives title (otherwise than under a disposition for valuable consideration which is registered or protected by an entry in the register)”.} an indemnity may fail or be reduced through fraud or lack of proper care “by the claimant and by his servants and agents”.\footnote{Prestige Properties Ltd v Scottish Provident Institution [2002] EWHC 330 (Ch), [2003] Ch 1 at [36].} In Prestige Properties Ltd, Mr Justice Lightman explained that the distinction to be drawn is that between the claimant, his or her servants and agents on the one hand, whose conduct may result in an indemnity claim failing or being reduced, and the conduct of an “independent third party” on the other.\footnote{Above.} The conduct of third parties cannot affect the claimant’s claim, but may lead to a right of recourse on the part of Land Registry.\footnote{See paras 14.44 to 14.51 below.}

14.43 The options for reform that we consider below would not change the current circumstances in which a claim to an indemnity will fail, or the indemnity may be reduced. The options for reform would operate in addition to those current constraints.

**Rights of recourse**

14.44 The registrar is given certain rights of recourse in respect of indemnity payments that have been made. The extent of these rights also have their origin in the Land Registration Act 1997. In our Third Report, the Law Commission recommended that the rights of recourse contained in the LRA 1925 “should be clarified and strengthened so as to achieve, in substance, a more generally workable subrogation to the rights of those indemnified in favour of the registrar”.\footnote{Property Law: Third Report on Land Registration (1987) Law Com No 158, para 3.33.} The First Report of the joint working group of the Law Commission, Land Registry and the Lord Chancellor’s Department considered that the proposals in our earlier Third Report did not go far enough. The joint working group proposed, additionally, “that the Registry should also be given power to enforce any claim that the party who obtains rectification might have had if rectification had not taken place, such as to sue a solicitor for negligence”.\footnote{Land Registration: First Joint Report with HM Land Registry (1995) Law Com No 235, para 4.10.}

14.45 The rights of recourse, which are substantively unchanged from the Land Registration Act 1997, are now contained in schedule 8, paragraph 10 to the LRA 2002. We explained the scope of these rights and their effect in our 2001 Report.
in the following terms:

Where the registrar has paid an indemnity to a claimant in respect of any loss, he is given three distinct rights of recourse.

(1) First, [the registrar] is entitled to recover the amount paid from any person who caused or substantially contributed to that loss by fraud.

(2) Secondly, [the registrar] is entitled to enforce 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. This is akin to an insurer’s right of subrogation.

(3) Thirdly, where the register has been rectified, the registrar is entitled to enforce any right of action (of whatever nature and however arising) which the person in whose favour the register is rectified would have been entitled to enforce had it not been rectified.

The third right of recourse goes beyond an insurer’s right of subrogation. It is intended to cover the following type of case:

(1) Rectification is ordered in favour of X because of a mistake caused by the negligence of X’s solicitor.

(2) As a result of the rectification, Y suffers loss for which the registrar duly indemnifies her.

(3) The registrar can recover from X’s solicitor the amount of the indemnity he has had to pay Y. This is so, even though at common law, X’s solicitor might not have owed any duty of care to Y.

As the registrar has had to meet the cost of X’s solicitor’s negligence, it does, in principle, seem right that he should have a right of recoupment against that solicitor.48

Hence, in some circumstances the rights of recourse give the registrar 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 the shoes of that recipient, 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 particular defendant. For example, assume that A is mistakenly removed as registered proprietor and the mistake is attributable to negligence on the part of a conveyancer. When the mistake is discovered, the

48 Law Com 271, paras 10.51 and 10.52.
registrar indemnifies A. Under the rights of recourse the registrar, having paid the indemnity, can bring a claim against the conveyancer. However, for the claim to succeed, the registrar must establish that A would have succeeded in an action for negligence against the conveyancer. In order to do so, the registrar will need to establish, for example, that the conveyancer owed a duty of care to A. This aspect of the rights of recourse is significant to our discussion below as to whether a direct duty of care should be owed to the registrar by those who make applications to Land Registry.49

14.47 During the passage of the Land Registration Act 1997 through the House of Lords, Baroness Trumpington noted that the Law Society had expressed concern at the recommendations in the First Report of the joint working group50 that the rights of recourse might be used against solicitors and other professionals who “had quite innocently caused the situation which led to the payment of indemnity”.51 The Law Society’s concern was prompted by the decision in Penn v Bristol and West Building Society.52 There, Mr Penn and his business partner perpetrated a mortgage fraud by arranging for the transfer of a house jointly owned by Mr Penn and his wife to a purchaser (a party to the fraud) who raised money for the purchase through a mortgage. A solicitor who acted in the transaction mistakenly believed that he had been instructed by Mr and Mrs Penn and held himself out as such to the mortgagee. When the fraud came to light, Mrs Penn successfully had the mortgage set aside and the solicitor was held liable to the mortgagee for breach of warranty of authority.53 Liability for breach of warranty of authority is strict. The Law Society was apparently concerned that Land Registry would use its rights of recourse to recover indemnity payments from solicitors who had acted innocently in transactions that transpired to be fraudulent.

14.48 In response to the Law Society’s concern, Baroness Trumpington gave the following assurance: “It is neither the practice nor the intention of HM Land Registry to resort to its rights of recourse against those who are neither fraudulent nor negligent. It is a power that will continue to be used only in bad cases”.54

14.49 This assurance was repeated by Baroness Scotland during the passage through the House of Lords of the LRA 2002. Baroness Scotland noted that Land Registry’s practice in respect of the right of recourse would continue.55 She added, though referring specifically to the use of the rights of recourse in the context of electronic conveyancing, that “Land Registry also accepts that the burden lies with it to satisfy itself that there has indeed been a ‘bad case’ of fraud

49 See paras 14.62 to 14.85 below.
52 [1997] 1 WLR 1356.
54 Hansard (HL), 18 November 1996, vol 575, col 1166.
or negligence before seeking recourse against a conveyancer.”

14.50 In practice it is clear that the proportion of payments made under the indemnity scheme that are recovered through the rights of recourse are limited. These sums are shown in table two. It is of course the case that not all indemnity payments made are recoverable. For example, no rights of recourse would exist in respect of indemnity payments that result from Land Registry’s own errors. Available data does not enable us to establish the percentage of indemnity that is recoverable that is actually recovered.

14.51 Table 2: percentage of indemnity payments recovered under rights of recourse:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total indemnity paid</th>
<th>Recovery under rights of recourse</th>
<th>Percentage of indemnity recovered</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014 – 2015</td>
<td>£8.4m</td>
<td>£0.1m</td>
<td>1%</td>
</tr>
<tr>
<td>2013 – 2014</td>
<td>£11.2m</td>
<td>£2.2m</td>
<td>20%</td>
</tr>
<tr>
<td>2012 – 2013</td>
<td>£11.9m</td>
<td>£1.2m</td>
<td>10%</td>
</tr>
<tr>
<td>2011 – 2012</td>
<td>£9.3m</td>
<td>£0.5m</td>
<td>5%</td>
</tr>
<tr>
<td>2010 – 2011</td>
<td>£9.4m</td>
<td>£1.1m</td>
<td>12%</td>
</tr>
<tr>
<td>2009 – 2010</td>
<td>£7.8m</td>
<td>£0.2m</td>
<td>3%</td>
</tr>
<tr>
<td>2008 – 2009</td>
<td>£10.1m</td>
<td>£0.09m</td>
<td>1%</td>
</tr>
<tr>
<td>2007 – 2008</td>
<td>£9.1m</td>
<td>£0.07m</td>
<td>1%</td>
</tr>
<tr>
<td>2006 – 2007</td>
<td>£5.3m</td>
<td>£0.7m</td>
<td>13%</td>
</tr>
<tr>
<td>2005 – 2006</td>
<td>£14.1m</td>
<td>£0.2m</td>
<td>1%</td>
</tr>
</tbody>
</table>

OPTIONS FOR REFORM

14.52 In this part of the chapter we outline four options for reform on which we invite consultees’ views.

Option 1: placing a cap on the indemnity that can be claimed

14.53 In our examination of the purpose of indemnity above, we have noted the benefit of economic efficiency in the provision of a single insurance scheme through indemnity. We have also noted, however, that one of the challenges of the indemnity scheme is that Land Registry’s liability is uncapped.

14.54 During the course of our review of the LRA 2002 it has not been contended that

56 Above.
The indemnity scheme should be replaced by private title insurance and we do not raise that prospect as an option for reform. We consider that the purposes served by indemnity could not be replicated through reliance on private insurance without a significant risk to security of title and public trust and confidence in the property market, in addition to the loss of economic efficiency and the adverse impact on conveyancing transactions.

14.55 The role of private title insurance in a scheme of registration of title was recently examined by the Scottish Law Commission. In Scotland the person responsible for the land register and the indemnity scheme (the equivalent of the Chief Land Registrar) is known as the Keeper. The Commission reported that “the economic evidence available to us suggests that title insurance as a standard feature for conveyancing transactions would not be cost-effective for titles in the Land Register, because the Keeper’s indemnity … delivers comparable benefits at a much lower cost”. The Commission concluded that “it would be unfortunate if [title insurance] came into routine use for ordinary titles”.

14.56 However, as the Scottish Law Commission acknowledged, private insurance does play a role in registration of title. It is used in Scotland – as it is in this jurisdiction – in “non-standard cases” (or more complex cases) to cover risks that fall outside the scope of the indemnity scheme. For example, private insurance may be bought where the existence of a restrictive covenant affecting a title is apparent from the register, but the scope of the covenant is not, or where possessory (rather than absolute) title is awarded.

14.57 The use of private insurance as a supplement to, rather than a replacement for, an indemnity scheme is not unusual in systems of registration of title. So far, its use appears confined to covering exceptional risks of a type that are not covered by a state indemnity scheme.

14.58 We have considered whether the role of private insurance should be extended by placing a cap on the indemnity that could be paid to any party following a rectification of the register (or where rectification is available but is not ordered). Such a cap would mean that risks of a type generally covered by the indemnity

57 See paras 14.24 to 14.29.
59 Above, para 26.6. The report refers to work commissioned by the Keeper that revealed that property transaction costs in California, where private insurance is standard, are far higher than in Scotland and that this difference “is due essentially to title insurance premiums”.
60 Above, para 26.8.
61 Above.
62 The New Zealand Law Commission considered whether the emergence of private insurance indicated deficiencies with the Torrens system. It concluded that this was not the case and that “if those dealing with land choose to take out insurance to cover situations that are excluded from cover under the Torrens compensation provisions … this may complement the system”: New Zealand Law Commission (in conjunction with Land Information New Zealand), A New Land Transfer Act (Report No 116, 2010) para 4.35. The use of title insurance as a complement for the state guarantee is considered by P O’Connor, “Double indemnity – title insurance and the Torrens system” (2003) 3 Queensland University of Technology and Justice Journal 141.
would be excluded where the financial risk of the particular transaction is exceptional. Where a disposition of land (or a particular property right) is of exceptional value above the level of the cap, parties would need to consider private insurance to cover their potential losses above the cap. A cap could therefore maintain the benefit of an indemnity scheme, whilst protecting Land Registry from the risks of exceptional claims. No cap would apply where the indemnity claim arises through fault on the part of Land Registry.

14.59 We are not, however, convinced that any cap should be imposed. To ensure that the benefits of an indemnity scheme are maintained, the cap would need to be set at a high level to ensure that most indemnity claims (and therefore most dispositions of land) continue to be covered in full by the indemnity scheme. Yet the existence of the cap would mark a significant change in policy towards the indemnity. Notwithstanding our current view, in the context of a review of the indemnity scheme, we invite consultees’ views on the introduction of a cap.

14.60 We invite consultees’ views as to whether there should be a cap on the indemnity that can be paid to a claimant following rectification of the register (or where rectification is available but is not ordered), except where the mistake that leads to rectification is attributable to fault by Land Registry.

14.61 We invite consultees’ views as to the level at which any cap should be set.

Option 2: duties of care and Land Registry

14.62 Our second option for reform considers the duties of care owed in respect of applications made to Land Registry. Although the options that we discuss are not confined to conveyancers, they are most likely to be invoked against conveyancers. We acknowledge that the vast majority of conveyancers conduct their business in a professional manner and undertake dispositions of land with all due diligence. In considering the operation of duties of care, we are not seeking to impose requirements that go beyond the standard of reasonable care. We hope to incentivise best practice, but any liability should be confined to a failure to take reasonable care. Our primary concern therefore is to help prevent bad practice and to ensure that the financial consequences of bad practice fall on the minority whose conduct of business falls below a reasonable standard of care.

14.63 The rights of recourse provided in schedule 8, paragraph 10 are not exhaustive. Paragraph 10(1) states that the rights are “without prejudice to any other rights [the registrar] may have”. As well as not being exhaustive it is clear that the statutory rights of recourse are not comprehensive.

14.64 One example of where the current statutory rights of recourse may not enable recovery arises in the context of the fraudulent discharge of a mortgage. Say, for example, a fraudster purports to be a solicitor acting for a bank and sends to a (genuine) conveyancing firm a deed of discharge of a mortgage. The conveyancing firm accepts the document at face value and applies to Land Registry for the mortgage to be discharged. If the firm had taken reasonable steps, for example by checking whether the solicitor is registered with The Law Society, it would have discovered that the fraudster was not in fact a solicitor. The mortgage is discharged and the property is then sold to a purchaser, who is
innocent of the fraud. When the fraud comes to light, Land Registry indemnifies
the bank. To be able to invoke its right of recourse, Land Registry would have to
establish that the conveyancing firm owed a duty of care to the bank in respect of
the transaction. It is unclear whether a duty of care could be established as there
appears to be no nexus between the conveyancing firm and the bank; the firm is
not purporting to act for the bank. If the duty of care cannot be established, then
Land Registry’s rights of recourse are ineffective.63

14.65 As a matter of common law, it was held in the recent decision of the High Court in
Chief Land Registrar v Caffrey & Co64 that a solicitor owed a duty of care to Land
Registry in relation to an application to discharge a mortgage, when it transpired
that the deed of discharge had been forged. The forged discharge had been
provided to the solicitor by their clients, who were the mortgagors. Hence, while
the facts of the above example are different, it is possible that the conveyancer in
that example owes a duty of care to Land Registry. But the judge in Chief Land
Registrar v Caffrey & Co acknowledged that he was only “narrowly persuaded [to
impose the duty] on the peculiar facts of the case”.65 The solicitor did not appear
before the court and did not challenge allegations that negligent
misrepresentations had been made to the registrar.66 The imposition of a duty of
care between conveyancers (not only those who are solicitors) and Land Registry
on appropriate facts is, however, consistent with a wider principle of tort law. It
has been held that a solicitor might owe a duty of care to a party other than his or
her client if the solicitor and the third party have a sufficiently close and direct
relationship, marked by the knowledge that information given will be relied upon,
the damage of misinformation is reasonably foreseeable and that it is “fair, just
and reasonable” for a duty of care to be imposed.67 The conveyancer knows and
intends that Land Registry will rely on the application by removing the charge
from the register. It is reasonably foreseeable that Land Registry will suffer loss
through payment of an indemnity if the discharge transpires to be a fraud.
Therefore, the conveyancer should take reasonable care by taking reasonable
steps to ensure the correctness or validity of documents sent to Land Registry.

14.66 Although a duty of care has now been found to exist in certain circumstances at
common law, doubts remain as to its scope and its utility in enabling Land
Registry to recover its losses.

63 See para 14.46 above. In the recent decision in Chief Land Registrar v Caffrey & Co [2016]
EWHC 161 (Ch) it was held that a solicitor who had forwarded a forged deed of discharge
to Land Registry did not owe a duty of care to the bank, whose mortgage had been
removed from the register. Therefore, the registrar had no right of recourse against the
solicitor. The case went on to consider whether the solicitor owed a direct duty of care to
the fraudster: see para 14.65 below. Land Registry would have a right of recourse against
the fraudster but that is unlikely to be of practical value. The fraudster may not be
discoverable or have sufficient assets to repay the sum procured.

64 Above.

65 [2016] EWHC 161 (Ch) at [59].

66 Above. The nature of the alleged misrepresentations are explained at [47].

67 Gran Gelato v Richliff (Group) Ltd [1992] Ch 560, 569 citing Caparo Industries Plc v
Dickman [1990] 2 AC 605. While the claim in the case was against a solicitor, there is no
reason to believe that the same approach would not be taken in respect of a conveyancer
who is not a solicitor. In Chief Land Registrar v Caffrey & Co [2016] EWHC 161 (Ch)
Master Matthews commented at [55] that “if solicitors owe a duty of care in what they tell
the registry, so does anyone doing what they did”.

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14.67 As we have seen, when the current statutory rights of recourse were introduced assurances were given to Parliament in respect of the circumstances in which Land Registry would invoke their rights. Although directed at the statutory rights, the statements may be understood more generally as a statement of Land Registry’s practice in relation to all rights of recourse. Indeed, that may be the most logical reading of the statements if the saving in schedule 8, paragraph 10(1) is intended to preserve common law as well as other statutory rights of recourse. It is unclear whether the reference in those statements to a “bad case” is intended to refer to all cases of negligence, or to go further and limit Land Registry’s use of rights of recourse to “bad” situations of negligence. In that respect, it is perhaps significant that the assurances were made in the context of strict liability in *Penn v Bristol and West Building Society*.

Against that background, a “bad” case might reasonably be understood simply as meaning a case involving negligence, rather than as an indication of particular types of negligence. We acknowledge the significance of the assurances that were made in terms of reflecting the prevailing policy. We question the extent to which those assurance would as a matter of law prevent Land Registry from invoking a common law duty of care. However, those assurances do not, of course, limit the scope of future legislation.

14.68 If a duty of care is established in any particular case, and Land Registry is able to rely on the duty, a question arises as to its utility. Land Registry’s losses are pure economic losses, which are not generally recoverable as a matter of tort law. Such losses are recoverable in cases of negligent misstatement. However, in the example at paragraph 14.64 above there may have been no misstatement by the conveyancing firm, which has failed to carry out checks to determine whether the fraudster was in fact a solicitor acting for the bank.

14.69 The lack of clarity in relation to the common law position and limits on the utility of any common law duty of care raise a number of questions:

1. Could the utility of a common law duty of care be improved? (Option 2A)
2. Should a general statutory duty of care be imposed? (Option 2B)
3. Should there be a specific statutory duty of care in respect of identity? (Option 2C)

**Option 2A: could the utility of a common law duty of care be improved?**

14.70 As we have explained, one of the difficulties of the common law duty of care is that it would enable Land Registry to recover its economic losses only in situations in which the breach of duty involves making a misstatement. That may cover many, but not all situations. Land Registry’s forms have been drafted

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68 See paras 14.47 to 14.49 above.
69 [1997] 1 WLR 1356.
70 See eg *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 2 QB 27.
72 See para 14.68 above.
to ensure that in particular instances statements are made. For example, where a conveyancer makes an application to Land Registry to change the register, he or she is required to complete Form AP1. If one of the parties to the transaction is not represented, the conveyancer is required to verify that party’s identity. The conveyancer then signs to say “I confirm that I am satisfied that sufficient steps have been taken to verify the identity of [name] and that they are the registered proprietor or have the right to be registered as the registered proprietor”.73 In this way, the conveyancer is required to make a statement to Land Registry that sufficient steps have been taken. If that is not in fact the case, then the conveyancer may be liable for making a negligent misstatement.

14.71 The utility of a common law duty of care could be improved by amendments to Land Registry’s forms. In particular, conveyancers could be required to make a declaration on Land Registry’s forms to the effect that they have taken sufficient steps to satisfy themselves that documents relating to the application are genuine. If it transpired that a document had been forged or fraudulently presented (to the conveyancer or to Land Registry), the conveyancer would not necessarily be liable. However, this change would mean that where a conveyancer had not taken reasonable steps to ensure the validity of a document, he or she could be liable for making a negligent misstatement. In our example,74 it would mean that the conveyancing firm has made a representation to Land Registry that they have taken sufficient steps to satisfy themselves that the deed of discharge is valid. If they have not in fact done so, then they may be liable to Land Registry for negligent misstatement.

14.72 We invite consultees’ views as to whether conveyancers should be required to make a declaration on Land Registry’s forms to the effect that they have taken sufficient steps to satisfy themselves that documents relating to the application are genuine.

Option 2B: should a general statutory duty of care be imposed?

14.73 In Scotland, following recommendations of the Scottish Law Commission, a statutory duty of care to the Keeper has recently been introduced. The Scottish legislation provides a useful model for discussion of the issue in the context of England and Wales.

14.74 In Scotland, as we have suggested is the case in England and Wales, there may be a common law duty of care owed in respect of dealings with Registers of Scotland (the equivalent to Land Registry). In the absence of case law establishing the duty, the Scottish Law Commission recommended the introduction of a statutory duty of care owed to the Keeper.75 The recommendation has been implemented in the Land Registration etc (Scotland) Act 2012. The statutory duty exists alongside existing rights of recourse, which it is intended to supplement and not replace. It also operates as a supplement to any wider duty of care that may exist (or be found to exist) under the common law.

73 Form AP1, Panel 13(2).
74 See para 14.64 above.
Under section 111 of the Land Registration etc (Scotland) Act 2012 a duty is imposed on certain persons to “take reasonable care to ensure that the Keeper 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. In its report which lay behind the 2012 Act, the Scottish Law Commission emphasised that the duty is to take reasonable care. The imposition of the duty is not intended to raise the standard of what is already required of conveyancers (whilst acknowledging that what is reasonable may change over time) or to require conveyancers to adopt “best practice”. In respect of individuals (lay people, who are not acting in a professional capacity) who deal directly with Registers of Scotland it is suggested that it would be unusual for them to be found to have acted in breach of the statutory duty in the absence of “actual dishonesty”. The duty of care continues up until the point of application for registration. Hence, a conveyancer may be held liable on the basis of matters learnt up until that point, but not in respect of facts that come to light after the application for registration has been made, even if registration has not yet taken place.

Under the Land Registration etc (Scotland) Act 2012 the duty of care plays two roles. First, it provides the Keeper with a direct right of action against a person who acts in breach of the statutory duty to recover compensation “for any loss suffered as a consequence of that 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 their conveyancer. Hence, if an individual suffers loss as a result of his or her conveyancer acting in breach of duty towards the Keeper, then the individual cannot recover those losses as an indemnity from the Keeper. The individual would need to rely on a cause of action against the conveyancer.

The introduction of a statutory duty of care in England and Wales would take the form of a new statutory tort. The tort would apply to persons granting a deed intended to be registered or making an application for registration. The tort would be aimed primarily at conveyancers who are preparing deeds or applications on behalf of their client. Individuals (lay people, who are not acting in a professional capacity) would be subject to the duty imposed by the tort only when acting otherwise than through a conveyancer. As is the case in Scotland, such an individual is unlikely to be found to have acted in breach of duty under the tort in the absence of actual dishonesty on his or her part. It would be possible to go further than is the case in Scotland and exclude individuals from the scope of the new tort.

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76 Land Registration etc (Scotland) Act 2012, s 111(1) and (3).
77 Land Registration etc (Scotland) Act 2012, s 111(2) and (4).
79 Above.
80 Above, para 12.105.
81 Land Registration etc (Scotland) Act 2012, s 111(5) and (6).
82 Land Registration etc (Scotland) Act 2012, s 78(c).
14.78 The statutory tort would supplement rather than replace existing causes of action, both statutory and common law. The duty of care required under the statutory tort may, in some respects, be narrower than the common law duty of care: for example, in respect of the parties bound by the duty and the transactions to which it applies. It may also, however, be wider than the common law in those situations in which the tort applied. For example, a statutory tort could specifically enable Land Registry to recover pure economic loss in situations in which recovery of such loss may not be possible under the general law.

14.79 Under the LRA 2002, the quantum of an indemnity can already be reduced to take into account a lack of care on the part of the claimant. It would be consistent with this general provision for any statutory tort to operate as a limit on the availability of an indemnity.

14.80 We invite consultees’ views on the following issues.

(1) Should there be a general statutory tort imposing a duty to take reasonable care in respect of the granting of deeds intended to be registered and applications made to Land Registry, as a supplement to the existing statutory rights of recourse?

(2) Should any statutory tort be imposed on all those who grant deeds intended to be registered and make applications to Land Registry, or are there any categories of person (for example individuals) who should be excluded?

(3) Other than confining a statutory tort to a duty to take reasonable care, are there any exclusions or restrictions that should apply to the scope of the tort?

Option 2C: should there be a specific statutory duty of care in relation to identity?

14.81 The duty of care introduced in Scotland is a general duty of care in relation to deeds intended to be registered and applications made to the Keeper. It could potentially include, for example, a failure to take reasonable care in relation to facts or evidence supplied to the Keeper in respect of an application or deed. As we have seen, fraud now provides the most significant context in which claims to an indemnity arise. Identity fraud is the most significant type of fraud in relation to registration fraud. In its Annual Report and Accounts 2014/15, Land Registry noted that “fraud (usually by way of forgery) remains the single most significant cause of indemnity payments and this reflects the general trend over the past decade or so”.

14.82 It may be questioned whether a general statutory tort goes further than is necessary to solve the problems with the current law. It may be sufficient to confine a new statutory tort to a duty of care in respect of verifying identity. The arguments whether a statutory tort should be general or confined to identity appear finely balanced. On the one hand, a duty in respect of identity is more

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83 See para 14.31 above.
focused on the specific problems arising in relation to the current law and may
serve to focus attention on the practical importance of verifying identity. On the
other hand, if the principle of a statutory tort is accepted, there may be no good
reason for confining its scope to identity, even if that is the most prevalent type of
fraud. Indeed, a statutory tort confined to identity may 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.

14.83 A statutory tort in respect of identity checks would operate in the same way as
the general statutory tort outlined in paragraphs 14.73 to 14.80 above. That
means that it would exist as a supplement to, and not a replacement for, existing
statutory rights of recourse. Breach of the duty of care would give Land Registry
a direct right of action against the party in breach to recover an indemnity
payment made, but would also operate as a limitation on the availability of an
indemnity. Hence if an individual suffered loss as a result of a breach of the duty
by his or her conveyancer, he or she would not be entitled to an indemnity, but
would need to bring an action against the conveyancer.

14.84 The threshold for liability would again be based on taking reasonable steps. What
is reasonable would be determined either by reference to existing requirements in
respect of verification of identity (which we outline below)85 or by reference to
requirements set by Land Registry if it is given enhanced powers in respect of
identity checks, as is considered below.86

14.85 We invite 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.

Option 3: other options for reform in respect of identity fraud

14.86 In the preceding sections we have considered whether a statutory tort should be
introduced in respect of applications to Land Registry. We have explained that a
statutory tort could impose a general duty of care, which would include a duty in
respect of verifying identity, or could be confined to identity checks. In this section
we consider other options for reform to help prevent identity fraud in the context
of land registration. The options we discuss in this section could be introduced
alongside a statutory duty of care or as an alternative to a statutory duty. We
consider two options for reform:

(1) Option 3A: rationalisation of current identity checks; and

(2) Option 3B: enhancing Land Registry’s powers in respect of identity
checks.

The current law

14.87 Where an application is made to Land Registry it requires, in certain instances,
confirmation that a person’s identity has been checked. Land Registry sets out
when a person’s identity needs to be verified and how to confirm to Land Registry

85 See paras 14.87 to 14.88 below.
86 See paras 14.92 to 14.101 below.
that verification has taken place. Generally, Land Registry relies on checks carried out by conveyancers in respect of their clients. Conveyancers who make certain applications are also required to verify the identity of specified parties who are not themselves represented by a conveyancer. Unrepresented parties who lodge certain applications personally with Land Registry must have their identity verified by a conveyancer, Chartered Legal Executive or by a Land Registry officer.

14.88 The process of checking a person’s identity is not, however, generally specified by Land Registry. Instead, conveyancers must look to regulatory rules and guidance. There is no single source of rules and what is required or advised may depend on the type of application being made, whether the conveyancer is a solicitor and who the conveyancer represents. That is because requirements are set individually by different regulatory bodies, although there is no reason in principle why each body’s requirements should differ. Most conveyancers will be subject to Customer Due Diligence requirements in the Money Laundering Regulations. Compliance with Customer Due Diligence includes “identifying the customer and verifying the customer’s identity on the basis of documents, data or information obtained from a reliable and independent source”. Conveyancers acting on behalf of lenders in residential conveyancing transactions are also subject to guidance contained in the Council of Mortgage Lenders’ Handbook for England and Wales. This handbook provides separate guidance for solicitors (and those working in practices regulated by the Solicitors’ Regulation Authority) and licensed conveyancers. The former are directed to check the identity of a signatory of a document (unless the signatory is personally known) against a specific document or documents. Licensed conveyancers are directed to verify the identity of the seller’s legal representatives and of their client, but are not referred to a particular list of documents. All solicitors who carry out work involving land registration applications are subject to the Law Society’s

87 Land Registry, Practice Guide 67: Evidence of Identity; Conveyancers (June 2015).
88 Above.
89 See eg Form AP1, Panel 13(2).
90 Forms ID1, and ID2.
91 With the exception of when Form ID1 or ID2 is completed by a Land Registry officer. In that case, Land Registry specifies the document or documents that the officer can accept as proof of identity.
95 Note, not every application to Land Registry would trigger the application of the Money Laundering Regulations 2007 (SI 2007 No 2157) and so the scope of application of the Law Society’s guidance is broader.
guidance. This guidance also asserts the need to establish the client’s identity and indicates “warning signs” solicitors should be aware of to combat fraud. Finally, the Council for Licensed Conveyancers provides guidance to those whom it has licensed.

**Option 3A: rationalisation of current identity requirements**

14.89 The myriad sources of guidance causes some practical difficulties. First, it is not necessarily possible to ascertain what constitutes reasonable steps in respect of identity checks. An absence of clarity on this point may lead to uncertainty both as to what conveyancers should do to comply with any existing common law duty of care and what would be required if a duty of care was placed on a statutory footing. There is no reason to believe that compliance with the Money Laundering Regulations would preclude a finding of a breach of duty of care in tort. The Regulations are designed to prevent money laundering and terrorist financing, rather than to detect fraud. We understand that Land Registry takes the view that compliance by solicitors with the Council of Mortgage Lenders’ Handbook will fulfil their obligation to act with reasonable care and skill unless the evidence or the particular circumstances of the transaction should put the solicitor on alert. The Law Society and Land Registry’s Property and Registration Fraud Practice Note warns, however, that “even where you have followed usual professional practice the court may hold that the steps taken exposed someone to a foreseeable and avoidable risk and amounted to a breach of duty of care”.

Secondly, where professional standards have changed, there can be practical difficulties in ascertaining the standards applicable at the time a transaction took place. That may particularly be the case where reliance is placed on online sources which are subject to updates without ready access to archived editions. Thirdly, there seems no obvious reason why (for example) different guidance is provided to solicitors and to licensed conveyancers. The risk of fraud is the same regardless of who represents a party.

14.90 We acknowledge that the verification of identity is a general matter and is not confined to issues of land registration. However, to combat registered title fraud it is important that the process of identity verification undertaken in respect of

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We invite consultees to share their experience of any difficulties they have experienced with current requirements in respect of verifying identity and whether they consider that the requirements could usefully be rationalised.

**Option 3B: enhancing Land Registry’s powers in respect of identity checks**

14.92 As we have explained, Land Registry currently sets out when a person’s identity needs to be verified and how to confirm to Land Registry that verification has taken place. The statutory basis for Land Registry’s powers in respect of identity requirements are contained in the LRA 2002 and LRR 2003. Section 100(4) of the LRA 2002 enables the registrar to “prepare and publish such forms and directions as he considers necessary or desirable for facilitating the conduct of business of registration under this Act”. Schedule 10, paragraph 6(b) provides that rules may “make provision requiring applications under this Act to be supported by such evidence as the rules may provide”, while paragraph 8 confers a residual power for rules to “make any other provision which it is expedient to make for the purposes of carrying this Act into effect”. Finally, rule 17 of the LRR 2003 enables the registrar to require “the production of any further documents or evidence” and to “refuse to complete or proceed with an application, or to do any act or make any entry” until the documents or evidence is provided.

14.93 We have also noted that Land Registry generally relies on conveyancers to undertake identity checks, while conveyancers look to regulation and guidance to determine the process by which they do so.

14.94 A common feature of current identity verification regulations and guidance is that they are not designed to counter the specific risks that arise in property transactions. In particular, identity checks are generally designed to ensure that the client claiming to be Mr or Ms X is in fact Mr or Ms X. However, they do not necessarily go a step further – a step that can be essential in respect of registered title fraud – to ensure that the client is the registered proprietor of the property in question. Where one or more parties to a transaction are unrepresented, a conveyancer representing another party is required to confirm on Form AP1 that he or she is “satisfied that sufficient steps have been taken to verify the identity [of specified persons] and that they are the registered proprietor or have the right to be registered as the registered proprietor”.

14.95 Importantly, when an application is made to Land Registry, it is unable itself to determine whether to register a disposition is in fact the disponee. To continue the example in the preceding paragraph, Land Registry is unable to determine whether Mr or Ms X, whose identity as such has been checked by his or her conveyancer, is the same Mr or Ms X who is the registered proprietor. That is because Land Registry holds only basic information about registered proprietors – their names and addresses, as entered on the register.

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100 See para 14.87 above.

101 See para 14.88 above.

102 Form AP1, Panel 13(2).
14.96 The ability to combat identity fraud may be improved by enabling Land Registry to require parties to a transaction to comply with its own requirements as to identity assurance. There are a number of advantages in doing so. First, it would enable Land Registry to establish that the applicant is in fact the same person as the registered proprietor – that Mr or Ms X who has entered into a disposition is the same Mr or Ms X who is registered proprietor. Secondly, the information on identity could then be stored as a check for future transactions. Thirdly, Land Registry appears best placed to identify new and emerging forms of registered title fraud and the means through which to combat those risks.

14.97 It is acknowledged, however, that in order to be effective the power conferred on Land Registry would need to be broad. Fraud changes over time – for example, as technology develops – and Land Registry would need the flexibility to respond to developments. Further, it may be necessary for the verification of identity to be undertaken electronically (even where the application to which the verification relates is paper-based). The process may also involve some sub-delegation, for example to enable the use of existing credit reference agencies. For these reasons, it is arguable that the existing statutory provisions and rules under which Land Registry sets out its requirements in respect of identity would need to be extended. Such an extension may entail enabling the registrar, through Directions, to establish mandatory requirements in respect of identity verification, including provision for electronic verification of identity and sub-delegation.

14.98 It would be necessary to ensure that any new powers conferred on Land Registry were accompanied by appropriate safeguards: for example, through ensuring that information is stored securely,¹⁰³ is not made publicly accessible and is not used for purposes other than the prevention of fraud.

14.99 For the reasons explained in paragraph 14.97 above, it is not possible at this stage to set out the exact model that identity requirements imposed by Land Registry would take. However, in our discussions Land Registry have outlined the type of model that could be used. We explain that model here as an illustration to help inform consultees. However, at this stage we are inviting views on the principle of enhancing Land Registry’s powers to enable them to impose mandatory powers in respect of identity verification. If such a power is conferred, we consider that the format of the requirements would need to be subject to further scrutiny prior to their introduction.

14.100 A possible model would require the parties to a transaction, prior to making an application to Land Registry, to have their identities verified through an electronic system. On completion of that process, each party would be issued with a transaction authorisation code, which would then be attached to his or her application. It is anticipated that the application for a code would be made at the outset of a transaction, so that it does not delay completion. The transaction authorisation code would be issued by Land Registry, but could involve identity checks being carried out by a third party. The process could therefore operate in the same manner as “Verify”. “Verify” is currently an optional scheme being developed by the Government as a means of providing access to government services, for example to sign in to a personal tax account or apply for Universal

¹⁰³ Land Registry would not necessarily be storing the data itself if the identity checks are carried out by a third party: see para 14.100 below.
Credit. A person’s identity is verified by a certified company (as selected by the applicant) each time a service is used. The initial verification is estimated to take around ten minutes, with subsequent checks taking around one minute. An online identity check through a certified company could similarly become a way of gaining access to making an application to Land Registry.

14.101 We invite consultees’ views as to whether, in principle, 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.

**Option 4: limiting the circumstances in which mortgagees can claim indemnity**

14.102 The indemnity scheme provided in the LRA 2002 draws no distinction between different claimants, either in respect of entitlement to an indemnity or the circumstances in which an indemnity is payable. It is not, however, unusual in systems of land registration for some distinction to be drawn between different categories of claimant. For example, in Ontario a distinction is drawn between registered owners and good faith purchasers of land used for residential purposes and all other owners. As a result of recent amendments, indemnity is provided as a first resort only in respect of residential owners and purchasers and is provided as a last resort for other claimants.

14.103 A different trend in a number of jurisdictions has been to impose limitations on the situations in which mortgagees are able to obtain an indemnity. A number of jurisdictions have placed specific duties on mortgagees to confirm the identity of mortgagors and provide that mortgagees are ineligible to claim an indemnity if they act in breach of that duty. The New Zealand Law Commission has recently recommended the same limitation. The rationale for imposing specific duties on mortgagees is that lenders are seen as being best placed to prevent identity fraud.

14.104 Treating all claimants equally has been a consistent feature of the indemnity scheme in England and Wales. Departing from this principle is an idea that we approach with significant caution. We are also aware that any change to the ability of mortgagees to obtain an indemnity could have direct and indirect economic consequences in the property and wider financial services markets. However, from a comparative perspective, it is legitimate to raise questions as to the circumstances in which mortgagees are able to obtain an indemnity. The

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105 Land Titles Act 1990 (Ontario), s 57(4)(c), (4.1) and (4.2); Land Titles Act 1990 (Ontario), Regulation 690: Procedures and records, reg 64(1). See also Brian Bucknall, “Real Estate Fraud and Systems of Title Registration: The Paradox of Certainty” (2008) 47(1) Canadian Business Law Journal 1, 41.

106 For example, restrictions are in place in Australia in New South Wales (Real Property Act 1900, s 56C). Queensland (Land Title Act 1994, ss 9A, 11A, 11B, 185(1A) and 189(1)(ab)) and Victoria (Transfer of Land Act 1958, ss 87A and 87B).

The indemnity scheme contained in the LRA 2002 is more generous than many Torrens jurisdictions. We also note that the limitations on mortgagees' ability to claim an indemnity in some other jurisdictions are recent developments. These developments suggest that a debate has taken place in those jurisdictions that has not yet happened in England and Wales. In this part of the chapter we set out the arguments for and against treating mortgagees differently from other claimants in respect of indemnity. We then invite consultees' views on the following options for reform.

(1) Option 4A: limiting the ability of mortgagees to obtain an indemnity to cases of transactions entered into on the basis of “mistakes” in the register.

(2) Option 4B: placing a statutory duty on mortgagees to verify the identity of mortgagors.

The particular position of mortgagees

14.105 Whether mortgagees should be treated differently from other applicants for an indemnity raises a fundamental question of the purpose of the provision of an indemnity. As we have explained above the provision of an indemnity means that the state, through Land Registry, accepts some of the risks of dispositions of land. We have seen that the acceptance of this risk is justified in that it provides easier, cheaper and quicker conveyancing, peace of mind through certainty of transactions and confidence in the market, and economic efficiency.

14.106 Undoubtedly, some of the rationales for indemnity apply equally to mortgagees. In the residential and commercial contexts purchasers of land are often dependent on secured finance and therefore lenders are an integral part of property transactions. If lenders did not have the same protection as borrowers, then additional costs incurred by lenders may be passed on to borrowers, undermining the aims of cheaper conveyancing as well as the economic efficiency of a state indemnity scheme.

14.107 However, there are some respects in which mortgagees are different from other parties to a transaction. For an institutional lender, risk management is an integral aspect of business. The provision of an indemnity may be less significant for a lender than its own risk management decisions, though undoubtedly it would inform those decisions. It may be, however, that in its application to mortgagees, the indemnity scheme serves an additional objective of facilitating the operation of the mortgage market, for example by increasing lenders' willingness to lend. The availability of mortgage finance underpins access to home ownership and affordable home ownership has been a central plank of the housing policy of successive governments of different political persuasions for many years. In practical terms, a mortgage backed by the state guarantee may have a higher value than one that is not, which may be significant, for example in the context of securitisation.

14.108 We acknowledge that different views may reasonably be taken as to protection afforded to mortgagees by the indemnity. However, we are also conscious that

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108 See para 14.24 and following above.
the effects of removing or limiting the operation of the indemnity scheme to them may have wider repercussions for the operation of the property and wider financial services markets.

14.109 We invite consultees to provide evidence as to the significance of the indemnity scheme in lending decisions (in the residential and commercial sectors) and of the potential repercussions of reforms that limit its availability to lenders.

**Option 4A: limit the ability of mortgagees to obtain an indemnity to transactions entered into on the basis of “mistakes” in the register**

14.110 The first option we raise in relation to mortgagees is that their ability to claim an indemnity could be limited to situations in which they act on the basis of a mistake in the register, but not where the mortgage itself creates a mistake.

14.111 To explain this option it is necessary to distinguish between two situations. In the first situation, assume that A is the registered proprietor of a freehold title. A fraudster impersonating A grants a mortgage over the land to B Bank, which registers the mortgage. In the second situation, assume that C is the registered proprietor of a freehold title. A fraudster procures a transfer of C's title into the fraudster's name and becomes registered proprietor. Having obtained registration, the fraudster grants a mortgage over the land to D Bank.

14.112 In the first situation, there is no mistake on the register at the time the mortgage is granted; the register correctly identifies A as the registered proprietor of the estate. However, the registration of B Bank’s charge is a mistake because the mortgage has not in fact been granted by A. This situation represents, in a simplified form, the facts of *Swift 1st Ltd v Chief Land Registrar*.109 There, a mortgage was fraudulently granted over a home. When the fraud was discovered the register was rectified to remove the charge and Swift 1st Ltd (the mortgagee) was held to be entitled to an indemnity.110 The effect of Option 4A would be that a mortgagee in Swift 1st Ltd’s position would no longer be entitled to an indemnity.

14.113 It is important to emphasise that Option 4A would not affect the availability of an indemnity to parties other than a mortgagee whose transactions lead to a mistake on the register. Assume, in the first situation, that instead of granting a mortgage to B Bank, the fraudster transferred A’s title to E, who became registered proprietor of the estate. When the fraud comes to light the register is rectified to reinstate A as proprietor. Option 4A would not affect E’s entitlement to an indemnity. Registration of E, like registration of a charge to B Bank, creates a mistake in the register. Option 4A rests upon a policy decision to treat mortgagees differently (and less favourably) to other indemnity claimants.

14.114 In the second situation, at the time the mortgage is granted there is already a mistake on the register. The register contains a mistake when the fraudster becomes registered proprietor. Assume that once the fraud is discovered the register is rectified to reinstate C as proprietor and to remove D Bank’s registered

charge. Under Option 4A, in that situation (as is currently the case) the mortgagee would be entitled to an indemnity.

14.115 Why distinguish between these two situations? In both of the situations we have discussed, the bank (along with other parties involved) are victims of a third party’s fraud. We have acknowledged at paragraph 14.113 above that the effect of Option 4A would be that a mortgagee is unable to claim an indemnity in circumstances in which other victims of an equivalent fraud would be able to do so. The rationale for excluding mortgagees again relates to the extent to which the indemnity scheme should cover commercial risks undertaken by lenders and the ability of lenders to uncover cases of identity fraud.

14.116 In the first situation, the fraudster granting the mortgage is not the person he or she is purporting to be. The mortgagee is arguably best placed to uncover the identity fraud. If the mortgagee unveils the fraudster’s true identity, then it will be apparent that he or she is not in fact the registered proprietor, given that the fraudster and the registered proprietor are different people. The mortgagee does not need to look behind the register to reveal that fact. In the second situation, however, the fraudster is exactly who he or she purports to be. Any checks carried out by the mortgagee will simply confirm the fraudster’s identity and that the fraudster is the registered proprietor. The mortgagee is unable to discover the fraud without looking beyond the register.

14.117 We invite consultees’ views on whether the ability of mortgagees to obtain an indemnity should be limited to claims arising from mortgages granted on the basis of a mistake already contained in the register.

Option 4B: a statutory duty to verify the identity of mortgagors

14.118 As we have noted, a number of jurisdictions have placed specific duties on mortgagees to confirm the identity of mortgagors.111 Mortgagees who act in breach of the duty are unable to obtain an indemnity.

14.119 One of the options for reform we have discussed above (Option 2C) is the creation of a statutory tort to impose a duty of care in respect of identity on the part of a person granting a deed intended to be registered or making an application for registration.112 That duty would apply to mortgagees in respect of deeds granted and applications made to Land Registry directly by them, in the same way that it would apply to any other parties (including conveyancers and individuals).

14.120 A duty of care on the part of a person granting a deed or making an application for registration will, however, have limited effect in respect of mortgagees. Mortgagees would not usually grant deeds or make applications to Land Registry directly; the application to Land Registry will be made by a conveyancer. We

110 In Swift 1st Ltd the original charge was granted to GE Money Lending Ltd. The fraudster then granted a second charge in favour of Swift 1st Ltd, part of the proceeds of which was used to discharge GE Money Lending Ltd’s charge.

111 See para 14.103 above.

112 See paras 14.81 and following above.
have noted above that the indemnity scheme may not operate to incentivise those who are best placed to prevent fraud from developing best practice as they will not necessarily bear the financial costs of fraud. Mortgagees may be best placed to determine the identity of the mortgagor, but the imposition of a statutory duty of care on a person granting a deed intended to be registered or making an application for registration will not incentivise mortgagees to develop best practice to do so.

14.121 Therefore, our second option for reform in respect of mortgagees is to place mortgagees under a specific statutory duty to verify the identity of mortgagors. Mortgagees would be under a duty of care to Land Registry to take reasonable steps to verify the identity of mortgagors. What constitutes reasonable steps would need to be established by a regulator (the Financial Conduct Authority or Council of Mortgage Lenders) or could be determined by Land Registry, if Land Registry’s powers in respect of identity checks are enhanced as discussed at paragraphs 14.92 and following above. In the event of a breach of duty, where the registration of a charge is found to be a mistake the register would be rectified against the mortgagee without payment of an indemnity.

14.122 We acknowledge that the majority of lenders (as well as conveyancers) do act responsibly. In raising the possibility of a statutory duty of care we are not suggesting otherwise. However, the combined effect of imposing a duty of care on conveyancers and mortgagees will be twofold. First, it will incentivise best practice in the prevention of fraudulent dispositions of land. Secondly, it will help to ensure that in the minority of cases where standards of conduct fall below a reasonable level, the financial consequences are borne by the party (or parties) whose failure to conduct business to a reasonable standard of care has caused the loss.

14.123 We invite consultees’ views on whether 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.

14.124 Having set out our general options for reform, in the remainder of this chapter we consider the two self-contained issues identified above.

LIMITATION OF ACTIONS

14.125 A limitation period constitutes a timeframe in which legal proceedings must be commenced. If proceedings are brought after the limitation period has elapsed the court will, dependent on the nature of the claim, deny the claimant’s right or refuse to grant a remedy.

14.126 Limitation periods are intended to balance the rights of two parties: the claimant

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113 See para 14.17 above.
114 For example, see Law Commission (in conjunction with Land Information New Zealand), A New Land Transfer Act (Report 116, 2010) paras 2.19 to 2.24.
115 See para 14.21 above.
116 A McGee, Limitation Periods (7th ed 2014) para 1.01.
117 M Canny, Limitation of actions in England and Wales (2013) para 1.01.
and the defendant.\textsuperscript{118} On the one hand, it would be unfair to expect defendants to live under a perpetual threat of proceedings being brought against them.\textsuperscript{119} On the other hand, claimants need to be given a reasonable period in which to seek redress in order for their rights to be meaningful.

\textbf{Limitation period for indemnity claims}

\textit{The issue}

\begin{itemize}
\item \textbf{14.127} The limitation period which applies to claims for indemnity arises under paragraph 8 of schedule 8 to the LRA 2002. The provision reads:
\begin{quote}
For the purposes of the Limitation Act 1980 (c.58) –
\begin{enumerate}
\item a liability to pay an indemnity under this Schedule is a simple contract debt, and
\item the cause of action arises at the time when the claimant knows, or but for his own default might have known, of the existence of his claim.
\end{enumerate}
\end{quote}
\end{itemize}

\item \textbf{14.128} The fact that Land Registry’s liability to pay an indemnity is a simple contract debt means that the applicable limitation period is six years from the date on which the cause of action accrues.\textsuperscript{120} Schedule 8, paragraph 8(b) identifies when the cause of action accrues for the purposes of an indemnity claim.

\item \textbf{14.129} The language of schedule 8, paragraph 8(b) is opaque and challenging to understand. It can be difficult to establish the point at which time begins to run for the purposes of limitation. Stakeholders have reported that there are two views on when the limitation clock starts, which is the source of uncertainty. It has been suggested to us that some practitioners are so concerned about the confusing limitation period that they enter into “stand still” agreements with Land Registry in order to protect the rights of their clients.\textsuperscript{121}

\item \textbf{14.130} One interpretation of schedule 8, paragraph 8(b) is that the limitation period starts at the time of the rectification decision. That interpretation appears consistent with paragraph 1(1), under which a person is entitled to an indemnity for loss suffered as a result of (amongst other matters) the rectification decision. Further, schedule 8, paragraph 1(3) suggests that indemnity claims only mature after a decision has been taken as to whether the register should be altered.\textsuperscript{122} Starting the limitation period at the date of the rectification decision also prevents the

\begin{itemize}
\item \textsuperscript{118} Haward v Fawcetts [2006] UKHL 9, [2006] 1 WLR 682 at [2], by Lord Nicholls; see also M Canny, \textit{Limitation of actions in England and Wales} (2013) para 1.03.
\item \textsuperscript{119} Abdulla v Birmingham City Council [2012] UKSC 47, [2013] 1 All ER 649 at [41], by Lord Sumption; see also M Canny, \textit{Limitation of actions in England and Wales} (2013) para 1.02.
\item \textsuperscript{120} Limitation Act 1980, s 5.
\item \textsuperscript{121} Standstill agreements are contractual agreements between the parties to extend the limitation period: see M Canny, \textit{Limitation of actions in England and Wales} (2013) para 1.12.
\item \textsuperscript{122} Although, it is arguable that there is a difference between the “cause of action” for the indemnity claim arising (sch 8, para 8(b)) and an indemnity being “payable” (sch 8, para 1(3)).
\end{itemize}
undesirable position in which the claimant’s indemnity claim could be time barred because of protracted rectification proceedings.

14.131 The other view is that time runs from the point at which the claimant becomes aware, or ought to have become aware, of the mistake which will lead to rectification and/or an indemnity payment. This point in time would be prior to a decision regarding rectification being taken. The language of schedule 8, paragraph 8(b), in particular its emphasis on knowledge and constructive knowledge, is central to this interpretation. A 1987 Law Commission paper recommended that the references under the LRA 1925 to knowledge and constructive knowledge be replaced with a limitation period commencing on the “date of rectification”. This change in language was not adopted in the subsequent Law Commission report.

14.132 At present, no reported cases have tested the question of when the limitation period begins for indemnity claims. We are therefore interested in receiving information from consultees about how frequently this issue arises in practice. We would also like to hear how consultees’ practice is affected by uncertainty surrounding the limitation period.

14.133 We invite consultees to provide evidence in respect of the following issues:

(1) the incidence in practice of questions concerning the limitation period applicable to indemnity claims; and

(2) how their practice has been affected by questions concerning the limitation period applicable to indemnity claims.

Reform

14.134 We suggest that the view outlined at paragraph 14.130 above, that the limitation period starts on the date of the decision as to rectification, is preferable as a matter of policy. We believe that this approach enhances clarity and consistency in the law. It also reduces the likelihood of the limitation period operating in an unjust manner. We are, however, of the view that the wording of schedule 8, paragraph 8(b) does not readily invite this interpretation. We therefore provisionally propose schedule 8 be revised so as to ensure that this interpretation is adopted.

14.135 We are aware that rectification may, in certain circumstances, occur with the consent of the parties involved. We include within the definition of “decision as to rectification” the point at which it is agreed that the register will (or, as the case may be, will not) be altered.

123 LRA 1925, s 83(11), as originally enacted.


14.136 We provisionally propose that for indemnity claims under schedule 8, paragraph 1(a) and (b) the limitation period should start to run on the date of the decision as to rectification.

Do consultees agree?

14.137 We are also conscious that an indemnity may be claimed in circumstances where indemnity is claimed independently of a power to rectify the register. We make provision for these claims by retaining a knowledge based limitation for use in such circumstances.

14.138 We provisionally propose that for indemnity claims under schedule 8 paragraph 1(c) to (h) the limitation period should start to run when the claimant knows, or but for their own default would have known of the claim.

Do consultees agree?

Limitation period applicable to Land Registry’s statutory rights of recourse

The issue

14.139 As discussed in paragraph 14.44 and following above, schedule 8, paragraph 10 grants Land Registry statutory rights to recover from persons who would be primarily liable for the mistake but for the state guarantee. The LRA 2002 does not specify the limitation period applicable to the rights of recourse. 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.\(^{127}\)

14.140 The position in relation to Land Registry’s rights under schedule 8, paragraph 10(2) is less certain. As explained above, the rights under schedule 8, paragraph 10(2) enable Land Registry to step into the shoes of either the indemnity claimant or the person in whose favour the register has been rectified and take up the claims they could have alternately pursued.

14.141 As we have noted, the right contained in schedule 8, paragraph 10(2)(a) was described in our 2001 Report as being “akin to an insurer’s right of subrogation”.\(^{128}\) The subrogatory nature of this right suggests that the rules of limitation applicable to standard cases of subrogation may apply to Land Registry’s claims under this provision. In *Orakpo v Manson Investments* it was held that an insurer cannot claim through subrogation where the underlying claim of the claimant is time barred.\(^{129}\) While it remains a matter of statutory interpretation whether *Orakpo* applies to schedule 8, paragraph 10(2)(a), the analogy with subrogation suggests that time will usually begin to run for Land Registry from the date that a transaction is entered into which leads to a mistake

\(^{127}\) That approach may be seen as justified by analogy with the six-year limitation period provided for actions founded on tort and in respect of sums recoverable by statute. A six-year limitation period is provided for these causes of action under the Limitation Act 1980, ss 2 and 9 (respectively).

\(^{128}\) Law Com 271, para 10.51. Sch 8, para 10(2)(a) is based on our recommendation in First Report of a Joint Working Group on the Implementation of the Law Commission’s Third and Fourth Reports on Land Registration (1995) Law Com No 235, para 4.11 that Land Registry be “subrogated to the rights of any person to whom the indemnity is paid”.

\(^{129}\) *Orakpo v Manson Investments* [1977] 1 WLR 347, 366.
in the register. The length of the limitation period will depend on the nature of the underlying claim. Typically, the action will be founded on simple contract and the limitation period will therefore be six years.

14.142 This position is, however, problematic for two reasons. First, it is not clear that the same analysis can be applied to Land Registry’s similar right of recourse under schedule 8, paragraph 10(2)(b). This right exceeds the purview of the claims available through subrogation. It enables claims by Land Registry against a party who could not be sued by the person who has been paid an indemnity, but who could have been sued by the party in whose favour the register has been rectified, if rectification had not been made. A consistent limitation rule for both subsections of schedule 8, paragraph 10(2) is desirable because the provisions operate in a similar manner. Secondly, Land Registry’s ability to recoup some of the losses it suffers through payment of indemnity is threatened if there is a significant gap between the action causing the mistake and the indemnity payment. It is possible that the limitation period will already have expired at the time the indemnity is paid. We consider that the limitation period applicable to Land Registry’s rights of recourse under schedule 8, paragraph 10(2) should be rationalised and clarified. The limitation period should ensure that Land Registry has a reasonable opportunity following payment of an indemnity to assess the facts and determine whether to bring proceedings. We provisionally propose the following scheme of limitations.

14.143 Where a case falls within schedule 8, paragraph 10(2)(a), Land Registry should step into the shoes of the claimant so that, in the first instance, the limitation period is the remaining period that the indemnity claimant would have had if an indemnity had not been paid. Land Registry should, however, have a minimum of 12 months from the date the indemnity is paid to bring proceedings. Hence, where the claimant’s limitation period would have expired, or has less than 12 months to run, Land Registry should be given a limitation period of 12 months from the date of the indemnity payment.

14.144 Where a case falls within schedule 8, paragraph 10(2)(b), Land Registry should be able to rely on the limitation period applicable to the cause of action that would have been available to the person in whose favour the register has been rectified had rectification not been made. Again, however, Land Registry should have a minimum of 12 months to commence proceedings. That period should run from the date the register is rectified.

14.145 We consider that these proposals will clarify the limitation period applicable and bring a consistent approach to limitation periods for schedule 8, paragraph 10(2)(a) and (b). The provision of a relatively short – 12 month – minimum period will ensure that the interests of prospective defendants are not unfairly prejudiced.


131 Limitation Act 1980, s 6. The relevant contract will usually be the retainer between the conveyancer and the client.

132 Law Com 271, para 10.52.

133 For an example, see Law Com 271, para 10.52.
We provisionally propose 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), 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), 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.

Do consultees agree?

VALUATION OF INDEMNITY CLAIMS

Once it has been determined that an indemnity is payable a subsequent question arises: how much is due? Provision for valuation of a loss for which an indemnity is being claimed under schedule 8 to the LRA 2002 is found in paragraph 6. This paragraph reads:

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 the 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.

Schedule 8, paragraph 6 operates to impose a cap on the value of the estate, interest or charge that can be recovered. The indemnity paid may, however, include sums in addition to the value of the estate, interest or charge, for example, consequential loss. The value of the estate, interest or charge is determined following a valuation by a qualified surveyor or valuer for the claimant and the District Valuer Services for Land Registry.134 The valuation is conducted in accordance with general principles.135

The issue

The two limbs of schedule 8, paragraph 6 impose different limits on the value of the estate, charge or interest that can be recovered. Under sub-paragraph (a) the

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cap is based on the value “immediately before rectification”, while under sub-
paragraph (b) the cap is based on the earlier date of “the time when the mistake
which caused the loss was made”. The use of different times for valuing the
estate, interest or charge is a matter that we have considered in the past.
However, we believe that the rationale underpinning the distinction now requires re-examination. In particular, we are concerned that as a result of the different limits, fair and accurate compensation may not be provided. We are also aware that there are instances in which the courts have taken into account the impact of the two limbs of schedule 8, paragraph 6 when deciding whether the register should be rectified. It does not, however, seem right as a matter of policy for the level of indemnity payable to impact on the decision whether to rectify the register. As a result our attention has been drawn back to the capacity for the distinction to cause injustice.

14.150 Provision for valuation of estates, interests or charges was substantively unchanged by the 2002 reforms. Section 83(6) of the LRA 1925, the precursor to schedule 8, paragraph 6, was devised by the Scott Committee on the Transfer of Land almost 100 years ago. Scant reasoning accompanied the Scott Committee’s recommendation that a distinction be made between cases where rectification occurs and those where it does not. We subsequently rationalised the distinction as being a product of the “relatively stable land values” of the time; increases in property values were likely to be the result of improvements made by the registered proprietor. In our 1995 and 2001 reports, we further contended that the different times identified for valuation, combined with interest payments, enables accurate compensation where the character of land fundamentally changed between the mistake and the decision not to rectify the register. That is, that valuing the indemnity at the time of the mistake where the register is not rectified ensures that the claimant does not receive a “windfall” where the registered proprietor has developed or otherwise improved the land. We are now concerned that the LRA 2002 no longer achieves a fair and accurate measure of compensation in all cases. As house prices in England and Wales rise, the date at which the estate, interest or charge is valued is an increasingly significant


factor in the size of the indemnity due.\textsuperscript{141}

14.151 An example may be useful to illustrate our concerns. Assume that X is mistakenly entered as the registered proprietor of a house valued at the price of an average English house in January 2015. 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: £285,000. Within a single year, the component of the indemnity payment constituted by the value of the estate could differ by £21,000.

14.152 The current economic climate demonstrates that interest payments are not necessarily capable of filling the gap between the value of land at the time of the mistake and its valuation immediately before the rectification decision. Schedule 8, paragraph 9 of the LRA 2002 enables rules to be made dealing with interest payable in respect of indemnity payments. Rule 195 of the LRR 2003 permits simple interest to be paid from the date of the mistake\textsuperscript{142} in the circumstances outlined in paragraph 4 of that rule. Rule 195(4) reads:

\begin{itemize}
\item[(4)] Simple interest is payable –
\begin{itemize}
\item[(a)] where the period specified in paragraph (1) starts on or after 10 November 2008, at one percent above the applicable Bank of England base rate or rates, or
\item[(b)] where the period specified in paragraph (1) starts before that date,
\begin{itemize}
\item for the part of the period before that date, at the applicable rate or rates set for court judgment debts, and
\item for the part of the period on or after that date, at one percent above the applicable Bank of England base rate or rates.
\end{itemize}
\end{itemize}
\end{itemize}

Bank of England base rates are defined in rule 195(5) as the “announced official

\textsuperscript{141} The average mix-adjusted house price in England in January 2016 reached £306,000: ONS Statistical bulletin: House Price Index, January 2016, https://www.ons.gov.uk/economy/inflationandpriceindices/bulletins/housepriceindex/january2016/pdf (last visited 22 March 2016). In January 2015, the average mix-adjusted English house price was £285,000: ONS Statistical bulletin: House Price Index, January 2015, http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171778_398690.pdf (last visited 22 March 2016). In Wales, the average mix-adjusted house price was found to be £174,000 in January 2016: ONS Statistical bulletin: House Price Index, January 2016. In January 2015, the average mix-adjusted Welsh house price was £174,000: ONS Statistical bulletin: House Price Index, January 2015. We acknowledge that these national figures do not reflect variances in regional growth. The average house price in the North East in January 2016 was £156,000: ONS Statistical bulletin: House Price Index, January 2016. In January 2015 the average house price in the North East was £1,000 lower at £155,000: ONS Statistical bulletin: House Price Index, January 2015. We are also aware that the property market can be volatile: the recent recession did, for a period of time, cause house prices to fall.

\textsuperscript{142} LRR 2003, r 195(1)(b).
dealing rate”. The current Bank of England base rate is 0.5% and has been unchanged since March 2009. By way of example, interest payable at a rate of 1.5% on the value of a property at the time a mistake is made will not provide adequate compensation when, in the last year to January, average house prices in England have risen by 8.6%.

14.154 We are also satisfied that a change in the date of valuation need not lead to a windfall on the claimant. The sum paid as an indemnity could be calculated as the current value of the land in the condition that the land was in at the time of the mistake; not the value of the land in its current condition. For example, assume that A is mistakenly registered as proprietor of B’s development land. A has built a house on the land when the mistake is discovered and a decision is made not to rectify, but to pay B an indemnity. If the date of valuation is the date immediately before the decision not to rectify, then the indemnity payable to B would be the current value of the land as development land; not the current value of the land with the house, built by A.

Reform

14.155 We have provisionally concluded that the value of estates, interests or charges should, in respect of all parties, be capped at the value of the property on the date that the rectification decision takes place. This date is common to both parties to the rectification decision. We consider that this date provides a more reliable measure of compensation to the person indemnified.

14.156 Our proposal does not mean that the indemnity payable following a decision not to rectify will necessarily be more than would be the case under the current law. Whether that is the case is dependent on changes in the property value between the mistake and the decision not to rectify. Where property values rise, the indemnity payable will increase; but in the event of a fall in value, the indemnity will be less than under the current law. We acknowledge, however, that in the context of current trends in property values, it is more likely that the sum payable will increase, resulting in an overall increase in the total paid under the indemnity scheme.

14.157 It could be argued that the different dates used to determine the value of a claim under the current law reflect the “true” loss of the respective parties. A claimant who is denied rectification lost his or her title to the land at the date of the mistake. In contrast, the “true” loss of a claimant, against whom the register has been rectified, takes place at the time of rectification. This argument, however, overlooks the fact that but for the mistake, the claimant who has been refused rectification would have continued to own the property. Therefore, the market value of the land at the time of the decision not to rectify may be seen as representing the “true” loss to the claimant.

14.158 We have noted above that in order to prevent a claimant obtaining a windfall following a decision not to rectify, it will be necessary to establish the current

\[ \text{Bank of England Statistical Interactive Database – official Bank Rate history,}\]
\[ \text{http://www.bankofengland.co.uk boeapps iadb repo.asp (last visited 21 March 2016).}\]
\[ \text{ONS Statistical bulletin: House Price Index, January 2016.}\]
value of land in the condition that the land was in at the time of the mistake. In making our provisional proposal, we would be interested to hear evidence of any difficulties that may arise in establishing this valuation.

14.159 We provisionally propose 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 the current value of the land in the condition the land was in at the time of the mistake.

Do consultees agree?

14.160 We invite the views of consultees as to any difficulties that might arise in determining the current value of land in the condition the land was in at the time of the mistake.

145 See para 14.150 above.
CHAPTER 15
GENERAL BOUNDARIES

INTRODUCTION

15.1 Boundary disputes between neighbours are infamously long-running, contentious and unpleasant. In 2014 to 2015 between 160 and 170 boundary disputes were referred to the Tribunal alone.¹ Political and judicial² concerns have been raised about the harm caused by these “disproportionately bitter, protracted and expensive”³ feuds to all involved. Various political solutions have been put forward. Two Private Members’ Bills have sought to ameliorate the position of quarrelling neighbours by providing a new, surveyor-led, dispute resolution process.⁴ The Ministry of Justice announced in its January 2015 Scoping Study its intention to look for improvements to the existing adjudicatory procedures for boundary disputes, promote use of mediation and enhance the availability of information.⁵

15.2 The logistical challenge of finding a dispute resolution mechanism which saves emotion, energy and expense does not fall within the scope of this project. We are aware, however, that a number of legal issues contribute to the creation and perpetuation of boundary disputes between neighbours. The Ministry of Justice Scoping Paper on boundary disputes identifies legal problems as being a main cause of disputes:

From the evidence we have received it would appear that a wide range of factors can contribute to a boundary dispute between two parties. These factors can generally be divided into two categories, legal/technical issues and personal issues. …

¹ Ministry of Justice, Boundary Disputes A Scoping Study (January 2015) para 14. See Chapter 21 for an explanation of the jurisdiction of the Tribunal.
² See, for example, the Court of Appeal in Gilks v Hodgson [2015] EWCA Civ 5, [2015] 2 P & CR 4.
³ Ministry of Justice, Boundary Disputes A Scoping Study (January 2015) para 2.
⁴ See the Property Boundaries (Resolution of Disputes) Bill (introduced into the House of Commons in 2012) and the Property Boundaries (Resolution of Disputes) Bill (introduced into the House of Lords in 2015). The latter Bill had its second reading in the House of Lords on 11 September 2015. The Committee stage in the House of Lords is yet to be scheduled.
⁵ Ministry of Justice, Boundary Disputes A Scoping Study (January 2015) para 74.
Legal issues that can lead to boundary disputes include a frequent lack of adequate evidence to confirm the physical location of the boundary coupled with an unwillingness of the other party to accept assertions about the location without this substantiation; problems caused by changes in physical features; lack of clarity in the available documentation and consequential differences in interpretation or understanding of title deeds and plans, Ordnance Survey maps and different methods of mapping; badly prepared title deeds showing an inaccurate position for a boundary or other errors in conveyancing or by the Land Registry; developers seeking to maximise plots; and claims relating to adverse possession.6

15.3 In this chapter, we consider a number of specific legal issues which arise in the context of a dispute over land which forms a boundary between two properties. First, we provide a general overview of the “general boundaries” rule. Most boundaries are recorded at Land Registry in accordance with this rule and an understanding of the rule is essential in most boundary disputes. We then examine the practice, implicit in the LRA 2002 and expressly adopted by the courts, of categorising disputes as either “boundary disputes” or “property disputes”.7 As will be seen, the distinction is significant; no indemnity is payable where the register has been altered pursuant to a “boundary dispute”. However, stakeholders report that it is difficult to predict, in advance of litigation, whether a particular dispute will be treated as a “boundary dispute” or a “property dispute” by a court or Tribunal. We explore how the courts have dealt with this issue in practice before making a proposal as to how the law could be clarified. We note the role that adverse possession (a doctrine that we discuss in Chapter 17) plays in determining some cases that are classed as property disputes. We also explain how the proposals we have made in Chapter 13 will bring finality to some cases through the operation of a “long stop”.

THE GENERAL BOUNDARIES RULE

15.4 A boundary is the line which divides two adjacent properties. This line is typically conceived as being marked by physical features, usually by the presence of a fence or a hedge. However, an exact boundary line is a purely legal phenomenon: “an imaginary or invisible line”8 which determines where one person’s title to land stops and another person’s title begins. The majority of boundaries as shown on Land Registry title plans are “general boundaries”. General boundaries do not purport to show conclusive legal boundaries. Land Registry will draw up a title plan by adopting a “reasonable interpretation of the land in pre-registration deeds in relation to the detail on Ordnance Survey mapping”.9 The boundaries will be marked onto the title plan using red edging.10

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6 Ministry of Justice, Boundary Disputes A Scoping Study (January 2015) paras 19 and 20.
7 We use the terminology “dispute” in this chapter for convenience. It should be noted, however, that the fact a question as to the boundary is raised does not necessarily mean that there is a dispute.
The effect of the general boundaries rule is that the boundaries as shown indicate approximate boundaries, the accuracy of which is not guaranteed. In this respect, as we consider further below, general boundaries provide an exception to the title promise contained in section 58 of the LRA 2002.

15.5 Provision for general boundaries is found in sub-sections 60(1) and (2) of the LRA 2002. Prior to the enactment of the LRA 2002 the provision was found in rule 278 of the Land Registration Rules 1925 (LRR 1925). In our 2001 Report we recommended that, in light of the importance of the general boundaries rule, it should be enshrined in primary legislation. Sub-sections 60(1) and (2) of the LRA 2002 read:

(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.

15.6 The significance of the general boundaries rule stems from its long history in registered land conveyancing in England and Wales. The rule was introduced as a response to frustration felt at the operation of section 10 of the Land Registry Act 1862 (the statute which introduced voluntary registration of title). That provision required the extent of title to be “fully established”: legal boundaries would be precisely recorded on the register. The Royal Commission tasked with investigating section 10 of the 1862 Act reported in 1870 that the provision had two “mischievous” flaws:

First, notices have to be served on adjoining owners and occupiers which may and sometimes do amount to an enormous number, and the service of which may involve great trouble and expense... The second is that people served with notices immediately begin to consider whether some injury is not about to be inflicted upon them. In all cases of undefined boundary they find that such is the case, and a dispute is thus forced upon neighbours who only desire to remain at peace.13

15.7 The force of these problems resulted in the Royal Commission recommending a change in approach to the registration of property boundaries. Section 83(5) of the Land Transfer Act 1875, the product of the Royal Commission’s recommendations, was the first incarnation of the general boundaries rule. It provided that the register’s description of the recorded land would “not be conclusive as to the boundaries or extent of the registered land”. This position is

10 Land Registry, Practice Guide 77: Altering the Register by Removing Land from a Title Plan (July 2014).
11 See para 15.11 and following below.
12 Law Com 271, para 9.11.
reflected in the several later permutations of the general boundaries rule,\textsuperscript{14} including rule 278 of the LRR 1925 – the predecessor to the current iteration.

15.8 The general boundaries rule has, however, proved controversial. In 1972, following stakeholder complaints about imprecision in the location of registered boundaries, we re-examined the arguments for and against retention of the rule. We noted that the 1870 Royal Commission’s assumption that individuals would be content to let questions of boundary “lie dormant”\textsuperscript{15} was underpinned by a further assumption that the value of the disputed land would be low. We questioned the validity of this second underlying premise in light of “rising land values”\textsuperscript{16} – a consideration which is even greater in the twenty-first century. Nonetheless, we formed the view that the general boundaries rule was unproblematic in the vast majority of cases. The basis for this opinion was that an average property purchaser would be unlikely to contest an unclear boundary at the time of purchase. We suggested that reasons for adopting this stance included not wanting to begin neighbourly relations on the wrong foot and concerns about adding expense and delay to the completion of the purchase.\textsuperscript{17} We also considered that the issues associated with the general boundaries rule, on balance, were less problematic than those which would (and did) arise if precise boundaries were required to be registered.\textsuperscript{18}

15.9 Our 1983 Report reinforced the views expressed in our 1972 Consultation Paper. We noted that, in an increasingly urban environment (where space is at a premium), the ability to be sure of boundaries was more and more important.\textsuperscript{19} Significantly, however, we expressed concern about the fallout that would arise were the general boundaries rule to be removed after over a century of existence:

It seems to us that the basic problem is that in England and Wales the principle that boundaries are not precisely defined has for centuries been fundamental to the conveyancing process. It follows that the compulsory fixing of boundaries would necessarily involve provoking disputes.\textsuperscript{20}

15.10 This chapter does not re-open the debate about whether the general boundaries rule should or should not be retained. Nonetheless, we acknowledge that the rule has important implications where an application is made to alter the register by means of an alteration of the title plan. Whether a dispute that has given rise to such an application is classified as a “boundary dispute” or (conversely) a “property dispute” will affect both the rules governing the circumstances in which the register may be altered, and whether any indemnity is payable. We explore this issue in the next section.

\textsuperscript{14} See the Land Transfer Rules 1898, r 213 which was amended in 1903.


\textsuperscript{16} Above.

\textsuperscript{17} Above.


\textsuperscript{19} Property Law Land Registration (1983) Law Com No 125, para 2.21.

\textsuperscript{20} Property Law Land Registration (1983) Law Com No 125, para 2.24.
CLASSIFICATION OF DISPUTES

15.11 To understand the significance of a case being within the general boundaries rule in section 60 of the LRA 2002 it is necessary to consider the effect of that rule in the context of the guarantee of title provided by registration. As we have seen in Chapter 13, section 58 of the LRA 2002 deems the register to be conclusive. That section provides:

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.21

The general boundaries provision means that, unless a boundary has been fixed, the guarantee of title in section 58 is not a guarantee of the boundary. In other words, the guarantee provided by section 58 is qualified by the general boundaries provision in section 60.

15.12 As a result of the inter-relationship between the two provisions, where a dispute arises as to the boundary between adjacent properties it may be classified as a “boundary dispute” within section 60, or a “property dispute” within section 58. This classification is extremely significant because it determines whether an indemnity may be available. If a case is a property dispute within section 58, then an indemnity may be payable;22 but an indemnity is never payable in respect of a boundary dispute within section 60. That difference arises precisely because boundaries are not subject to the guarantee of title in section 58.

15.13 As we have seen in Chapter 14, an indemnity is payable where the register is rectified. A rectification is an alteration of the register to correct a mistake in a manner prejudicial to the title of the registered proprietor.23

15.14 Where a case is classified as a boundary dispute, the fundamental question asked is where is the boundary located.24 As Land Registry explains, “the general boundaries rule means that removal of land from a title plan does not necessarily remove any land from the registered title”.25 Instead, as Mr Justice Nugee, sitting in his former role as a Deputy High Court judge, explained in Derbyshire County Council v Fallon, removing land from a plan under section 60 merely produces “another general boundary in a more accurate position than the current general boundary”.26 Changing the boundary does not take away land from the registered proprietor. In Drake v Fripp Lord Justice Lewison therefore explained that in a

21 LRA 2002, s 58(1).
22 Classifying a case as a property dispute does not mean that an indemnity will always be payable. The conditions for payment of an indemnity must be met, while some property disputes will be resolved in a way that does not attract payment of an indemnity. For example, no indemnity is payable if title to the disputed land is claimed through adverse possession: see para 15.18 below.
23 LRA 2002, sch 8, para 11.
24 See further, C Sara, Boundaries and Easements (6th ed 2015) para 4-33.
25 Land Registry, Practice Guide 77: Altering the Register by Removing Land from a Title Plan (September 2015) para 1.2.
26 [2007] EWHC 1326 (Ch), [2007] 3 EGLR 44 at [26]. This was cited in Land Registry, Practice Guide 77: Altering the Register by Removing Land from a Title Plan (September 2015) para 1.2.
boundary dispute, the proposition that land has been “lost” by changing the boundary “is thus either question begging or wrong”. The register may be altered to correct the mistake, but the alteration is not prejudicial to the title of the registered proprietor because the position of the boundary is not guaranteed.

In contrast, when a property dispute is determined under section 58, the focus of the issue is the question of title: who owns what? This question reflects a comment by Lord Evershed Master of the Rolls that a case is a property dispute where the title plan was drawn in such a way that the registered proprietor “got the wrong property”. Where land is removed from a title plan under that provision, the land is being removed from the registered title. An application for alteration of the register may then constitute rectification – the application is based on a mistake and alteration to correct a mistake is rectification if it is prejudicial to the title of the registered proprietor.

Where there is an application to alter the register – whether the case is classed as a property dispute or a boundary dispute – the final decision on whether to order alteration is dependent on the application of the rules in schedule 4 to the LRA 2002. In *Derbyshire County Council v Fallon*, the council established that a strip of land shown within the red edging on Mr and Mrs Fallon’s title plan in fact belonged to the council. The case was held to fall within the scope of the general boundaries rule. An application by the council for alteration of the register was, however, refused. Where there is a power to alter the register, alteration must be ordered unless there are “exceptional circumstances”. Mr and Mrs Fallon had built on the land and the circumstances were such that the council was unlikely to be able to recover the land. The court considered that the case demonstrated “exceptional circumstances”. Mr Justice Nugee, sitting in his former role as a Deputy High Court judge, explained:

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28 Land Registry, *Practice Guide 77: Altering the Register by Removing Land from a Title Plan* (September 2015) para 2. Land Registry explains “despite the general boundaries rule, we try to show the land and its boundaries as accurately as possible, and we accept that there is a mistake in the register to the extent to which this has not been achieved”.

29 *Lee v Barrey* [1957] Ch 251.

30 Land Registry, *Practice Guide 77: Altering the Register by Removing Land from a Title Plan* para 1.2.

31 [2007] EWHC 1326 (Ch), [2007] 3 EGLR 44.

32 LRR 2003, r 126.

33 [2007] EWHC 1326 (Ch), [2007] 3 EGLR 44 at [36].
What then would be the purpose of altering the register? Given that it would not actually change the title to any of the land; and that the only purpose of altering a general boundary to show it in a different place is to make the register more accurate, in what sense would it be more accurate to alter this boundary? It would then accord with the council's paper title but not with the practical position on the ground. In effect if the Fallons can resist any claim to recover the land by the council, the council's paper title becomes a purely nominal or theoretical one, and the Fallons will have a de facto right to stay on the land.34

15.17 Land Registry summarises the practical difference between boundary disputes and property disputes in the following terms:

   For the removal of land from the title plan to be rectification, the land concerned must not only be within the red edging on the title plan but also within the registered title. Otherwise the title of the registered proprietor is not being prejudicially affected. In other words, there must be a property dispute – or, as the application will not always lead to a dispute, the circumstances must be such that if there were to be a dispute it would be a property dispute. Alteration following a boundary dispute, or in circumstances where were there to be dispute it would be a boundary dispute, will not be rectification.35

   This statement accurately captures the consequence of the classification of a case as involving a boundary dispute or a property dispute. It does not (and is not intended to) indicate how the distinction between the two is drawn.

15.18 Some cases that are classified as property disputes will be resolved through the law of adverse possession. We consider the operation of adverse possession in Chapter 17. There, we note that schedule 6 to the LRA 2002 specifically enables a person to obtain title to land adjacent to land that he or she owns through adverse possession where particular conditions are met.36 Where title is acquired by adverse possession, no indemnity is paid to the registered proprietor who has lost title. An alteration of the register to give effect to a successful claim to title by adverse possession is not a rectification of the register.

15.19 While the classification of cases as involving a boundary dispute or a property dispute is important, case law has not provided clear guidance on how the distinction is to be drawn. As a result, stakeholders have suggested that the interaction between the general boundaries rule and the guarantee of title is uncertain.

15.20 We agree that it would be beneficial to clarify how the distinction between boundary disputes and property disputes should be drawn. We acknowledge that the distinction is not one that can be reduced to a clear rule. As Lord Justice

34 Above, at [37].

35 Land Registry, Practice Guide 77: Altering the Register by Removing Land from a Title Plan para 1.2.

36 LRA 2002, sch 6, para 5(4). This provision cannot be invoked where a boundary has been determined under s 60.
Lewison noted, the classification of cases is ultimately “a question of fact and degree”. Notwithstanding, it is possible to identify factors that will assist in drawing the distinction.

15.21 In the remainder of this chapter we explain some of the criticism of the current position and consider how courts have approached drawing the distinction. We then explain how the provisional proposals we have made in Chapter 13 regarding rectification will assist in some cases, before making a provisional proposal for reform.

**Criticism of the current position**

15.22 The difficulty of classifying cases as boundary disputes or property disputes has led to criticism of the courts’ approach. Amy Goymour has suggested that the courts are too readily characterising property disputes as boundary disputes in order to avoid engaging section 58 and the subsequent issue of indemnity. She summarises the issue as follows:

Some judges have seemingly exploited – and enlarged – this exception to section 58 by giving a broader meaning to “boundary” land than might be warranted by a natural reading of the term. The cases reveal a remarkable propensity to characterise disputes between neighbouring registered landowners concerning land abutting a boundary line as mere “boundary disputes” (thereby not engaging section 58), even if the land-mass concerned covers a fairly significant geographical area, and the disposition might more naturally be classified as a normal “property dispute” (which *would* engage section 58).

15.23 Conversely, Kester Lees has argued that some cases have been characterised as property disputes when in fact they should be regarded as boundary disputes. One such instance of this, he argues, is *Parshall v Hackney*. That case (which we have considered in Chapter 13) involved a dispute over land used as a parking space which had been “double registered” under two different titles. The court treated the case as a property dispute, but Lees suggests that the case should have been seen as a boundary dispute.

15.24 Critiques of the classification adopted in individual cases are perhaps unsurprising when dealing with a matter of “fact and degree”. Those criticisms, however, reflect a lack of clear guidance in the underlying case law as to how the distinction is drawn.

15.25 When the expression “boundary dispute” is used, many people will naturally assume that small parcels of land are in issue. It can come as a surprise to learn

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that a “boundary” can be a significant plot of land. In *Drake v Fripp* the question arose whether a boundary was marked by a Cornish hedge or a fence.\(^\text{42}\) The hedge and fence were between four and five metres apart and the total size of the disputed land was around one and a half acres. The court held, notwithstanding the extent of the land in issue, that the case was a boundary dispute. Lord Justice Lewison explained:

> Nor do I accept that there is some limit to the quantity of land that might be encompassed in a boundary dispute. It must depend on all the circumstances and in particular the quantity of land abutting the boundary. A dispute over a strip of land a few centimetres wide but running the whole length of, say, a railway or a canal would plainly be a boundary dispute even if the area involved was many hectares … . I can see no objection to the ratio between the quantity of land at issue and the quantity of land remaining being a relevant consideration.\(^\text{43}\)

15.26 Despite the extent of the land, *Drake v Fripp* in many ways reflects a classic boundary dispute as the question raised was which of two physical features on the land marked the boundary. In contrast, while the land that was the subject of the dispute in *Parshall v Hackney* was small, it carried disproportionate amenity and financial value in providing a parking space in Chelsea, London. The proportion of the disputed land to the total size of the plot may be more significant than the size of the disputed plot alone. In *Drake v Fripp* one and a half acres was only about one per cent of the land that was being conveyed.\(^\text{44}\) In contrast, in *Knights Construction v Roberto Mac* the disputed land appears to have been similar in size to land within the remainder of the defendant’s title.\(^\text{45}\) That case was classed as a property dispute.

### RECOMMENDATIONS FOR REFORM

15.27 In this part of the chapter we begin by noting the possible impact on boundary disputes of the provisional proposals we have made in relation to alternation and rectification of the register. Having done so, we then consider how the classification of a case as involving a property or boundary dispute may be clarified.

### Our provisional proposals in respect of alteration and rectification of the register

15.28 In Chapter 13 we have made provisional proposals for reform of the current provisions concerned with alternation and rectification of the register. Our proposals include the introduction of a “long stop” so that, in certain circumstances, rectification of the register is prevented ten years after a mistake is made on the register. The application of the long stop does not affect entitlement to an indemnity.

15.29 Where a dispute is classified as a property dispute, our proposals, if adopted,


\(^{44}\) Practice Guide 77: Altering the Register by Removing Land from a Title Plan para 1.2.

would apply to the case. The long stop would mean that where land has been
incorrectly registered under a particular title, and remained registered under that
title for ten years, it may no longer be possible to obtain rectification. For
example, if B’s registered title includes land that in fact belongs to A, and B is in
possession of the land, then under our proposals after ten years A would not be
able to obtain rectification.\footnote{Unless A caused or contributed to the mistake
by fraud or lack of proper care: see para 13.100 above.} A’s entitlement to claim an indemnity would not,
however, be affected. In contrast, if in the same example, A remained in
possession of the land (despite the land being registered in B’s name) then A
would always be able to obtain rectification, as the long stop would not operate
where the true owner remains in possession of the land. In that case, B would be
entitled to claim an indemnity.

Classifying cases as property disputes or boundary disputes
15.30 As we have noted, case law has not provided clear guidance on how to classify
cases as boundary disputes or property disputes. Land Registry and judges are
required to make, in effect, a value judgment about whether a particular case falls
within one category of dispute or the other.

15.31 In its Practice Guide 77, Land Registry offers some guidance as to factors it uses
to categorise cases. Land Registry suggests that two factors might indicate that a
case is a property dispute.\footnote{Practice Guide 77: Altering the Register by Removing Land from a Title Plan para 1.2.}

(1) “The physical area of the land is significant relative to the land which is
accepted as falling within the registered title”.\footnote{Above, citing Drake v Fripp [2011] EWCA Civ 1279, [2012] 1 P & CR 4; Knights

(2) “The land is somehow physically distinguishable from the other land in
the registered title and of particular importance to the registered
EWCA Civ 240, [2013] Ch 568.}

Conversely, Land Registry suggests that neither of these factors appears to have
been present in cases classified as boundary disputes.\footnote{Practice Guide 77: Altering the Register by Removing Land from a Title Plan para 1.2
citing Lee v Barrey [1957] Ch 251; Derbyshire County Council v Fallon [2007] EWHC 1326

15.32 There are a number of common law presumptions which apply, in certain
circumstances, in order to determine where a boundary between two parcels of
land lies.\footnote{C Sara, Boundaries and Easements (6th ed 2015) paras 2-21 to 2-23.} Where, in order to decide a dispute, it is necessary to apply these
common law presumptions, then the matter is likely to be considered a boundary
dispute. This is reflected in the legislative history of section 60 of the LRA 2002,
the predecessor to which (as noted at paragraph 15.5 above) was contained in
the LRR 1925. 52 Rule 278(2) of the LRR 1925 provided:

(2) In such cases [those where boundaries have not been fixed] the exact line of the boundary will be left undetermined—as, for instance, 
*whether it includes a hedge or wall and ditch, or runs along the centre of a wall or fence, or its inner or outer face, or how far it runs within or beyond it; or whether or not the land registered includes the whole or any portion of an adjoining road or stream* (emphasis added).

15.33 We agree that the factors identified by Land Registry at paragraph 15.31 provide a good indication of when a case should be classified as a property dispute. We also agree that cases raising the application of common law presumptions constitute boundary disputes. We believe that clarity could be injected into the law in this area through the creation of a statutory list of indicative factors which may be used to separate boundary and property disputes. The list would be non-exhaustive, reflecting the fact that the categorisation of cases is never going to be a bright line. Flexibility is important to ensure that characteristics peculiar to particular disputes may be given consideration. A list would, however, provide guidance to courts, Land Registry and the parties to a dispute on the classification process. 53 By doing so it will aid consistency in decision making and enable parties to predict, at the outset, how their case is likely to be considered. That may, in turn, help encourage settlements.

15.34 In providing a non-exhaustive list, the following factors appear to be relevant to the classification of a case.

(1) The relative size of the contested land in comparison to other land clearly within the remainder of the registered proprietor’s title. Where the contested land is relatively small, that points towards the case being a boundary dispute. We emphasise that it is the *relative* size of the disputed land that is important, rather than the size of the disputed land alone.

(2) Where the disputed land is particularly important to the registered proprietor the case should generally be seen as involving a property dispute. We see this factor as operating as a qualification on the first, so that where the disputed land is important the case is likely to be a property dispute even if the disputed land is relatively small.

(3) Where a case raises the application of the common law presumptions—for example, whether a boundary includes a hedge, wall or ditch—the case should generally be classed as a boundary dispute.

52 In *Drake v Fripp*, Lewison LJ explained that the general boundaries rule in s 60 of the LRA 2002 was “in substance … the same as” r 278 of the Land Registration Rules 1925 (we refer to these rules as the “LRR 1925” throughout this Consultation Paper).

53 We did consider whether, as at present, the list could be given effect by way of a Land Registry Practice Guide. However, the list needs to be applicable to disputes which come before the courts as well as the registrar. It may be however that, in order to ensure that the list may be updated, it could be located in secondary, rather than primary, legislation.
(4) The manner in which the error in the boundaries shown on the title plan came about. How a dispute arises should not be determinative of its classification, but in combination with other factors it may point to one or other conclusion. For example, a case that arises because a fence has been replaced in a slightly different position, or a hedge is replaced with a fence, is likely to be a boundary dispute. In contrast, if Land Registry incorporates an additional parcel of land in a registered title, the case is more likely to be a property dispute.

15.35 We provisionally propose that there should be a non-exhaustive list of factors which may be used to distinguish boundary and property disputes. This list could include factors such as:

(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;

(3) the application of any of the common law presumptions; and

(4) the manner in which the error in the boundaries shown on the title plan came about.

Do consultees agree?

15.36 We invite the views of consultees as to the type of factors which should be given consideration when distinguishing boundary and property disputes.

CONCLUSION

15.37 A key goal of land registration is to provide a complete and accurate register. The general boundaries rule acknowledges that the register will never be entirely accurate. Total accuracy would require boundaries to be fixed and, as we have explained at paragraphs 15.6 to 15.10 above, the history of land registration suggests that doing so is not a realistic or achievable ambition. We consider that our proposed reforms, together with our proposals in respect of alteration and rectification of the register, will go some way to providing certainty.

15.38 The distinction between property disputes and boundary disputes will never be reduced to a bright line rule. The provision of a non-exhaustive list of factors will aid consistency and predictability, whilst retaining the flexibility needed to take into account particular characteristics of a case.

15.39 Where a case is classified as a boundary dispute, a registered proprietor may always feel that land has been “lost” or taken away through the boundary being moved. There may always be a sense of injustice or unfairness at land being “lost” in this way without an indemnity. Those responses are entirely reasonable, but reflect a misunderstanding of the nature of a registered title. Land Registry explains on official copies of title plans that “this title plan shows the general position of boundaries: it does not show the exact line of boundaries”.  

54 Practice Guide 77: Altering the Register by Removing Land from a Title Plan, para 1.1.
15.40 Where a case is classified as a property case, there are at least routes to obtaining finality. As we have noted at paragraph 15.18 above some property disputes may be resolved through the specific provision for boundaries contained in schedule 6, paragraph 5 to the LRA 2002. Our proposals in respect of alteration and rectification of the register will provide finality in some other property disputes through the operation of the long stop. Acceptance of the general boundaries rule means, however, that finality cannot be provided in all cases. The absence of finality is an inherent and unavoidable feature of the fact that a general boundary is not guaranteed.
PART 5
EASEMENTS
CHAPTER 16
EASEMENTS

INTRODUCTION

16.1 Easements are proprietary rights which enable persons to make some limited use of land belonging to someone else or to receive something from that person’s land. These rights are commercially and practically very valuable: easements can be used to facilitate access to land and save buildings from collapse. The prevalence of easements is high. Land Registry registered approximately 22,000 easements pursuant to deeds of grant between January and December 2015. We noted in our 2008 Consultation Paper, Easements, Covenants and Profits à Prendre that at least 65% of freehold titles are subject to at least one easement.

16.2 In this chapter we examine the treatment of easements by the LRA 2002. After setting out the background, we will focus on the registration requirements for an easement which benefits a short lease where that lease is not, itself, required to be completed by registration. Specifically, we ask whether it is reasonable to expect such an easement to be registered when no such requirement applies to the lease which the easement benefits. We then assess the interaction between the registration requirements and the overriding interest provisions in this context. Ultimately, we consider that reform in this area is needed. A provisional proposal for reform is put forward which, we believe, addresses the concerns which have been raised with the current law.

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3 Easements, Covenants and Profits à Prendre (2008) Law Commission Consultation Paper No 186, para 1.3. Figure correct as at 2008.

4 Under LRA 2002, s 27(2)(b). For the leases which are required to be completed by registration, see Chapter 3.
CURRENT LAW

Protection of easements under the LRA 2002

16.3 The LRA 2002 requires all easements which are expressly created out of registered estates to be completed by registration in order to operate at law.\(^5\) A notice of the easement will be entered on the register of the burdened estate. If the easement has been created for the benefit of a registered estate, an entry will also be made on the property register of the benefiting title.\(^6\) Because the easement is the subject of a notice on the register, its priority will be protected on a registrable disposition of the burdened estate for valuable consideration.\(^7\) An expressly granted easement which is not completed by registration in this way will take effect in equity only.

16.4 Easements which are not expressly granted or reserved are not required to be registered in order to take effect at law.\(^8\) Hence, implied easements\(^9\) and easements acquired through prescription\(^10\) are not required to be registered in order to be legal easements. The priority of these easements is ensured through their capacity to exist as overriding interests. Such easements must meet the requirements laid down in schedule 3, paragraph 3 to the LRA 2002 in order to attract this status.

16.5 Under schedule 3, paragraph 3 only legal easements are capable of overriding a registrable disposition for valuable consideration. In addition, in order to override the legal easement must:

(1) be within the actual knowledge of the person to whom the disposition is made;

(2) have been obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable; or

(3) have been exercised in the period of one year ending with the day of the disposition.\(^11\)

\(^5\) LRA 2002, s 27(2)(d). Easements fall within s 1(2)(a) of the Law of Property Act 1925, as referred to in that section.

\(^6\) LRA 2002, sch 2, para 7(2).

\(^7\) LRA 2002, s 29(1); see Part 3 above.

\(^8\) LRA 2002, s 27(2)(d).

\(^9\) Implied easements are discussed further at para 16.19 and following below.


\(^11\) LRA 2002, sch 3, para 3. For easements which were granted when the burdened land was unregistered see sch 1, para 3. All legal easements granted prior to first registration of the burdened land will be overriding interests.
In contrast, both legal and equitable easements could be overriding interests under the 1925 land registration regime. The generous priority protection conferred through the overriding interest provisions removed the incentive for those with the benefit of expressly granted easements to register their easements. This state of affairs undermined one of the principles underpinning the Law Commission project leading up to the LRA 2002: "rights which are expressly created over registered land should be completed by registration". Our 2001 Report concluded that reform of this area was necessary and recommended that expressly created easements should not take effect as overriding interests. This policy is reflected in schedule 3, paragraph 3 to the LRA 2002, discussed above. An easement which is expressly granted out of registered land must be registered in order to be legal; if it is not registered then it can only be equitable and so will never be an overriding interest.

The LRA 2002 also enables easements to be noted on the register. This is the only method by which the priority of an equitable easement can be protected since, as we have seen above, equitable easements are not capable of being overriding.

Notices may also be used to protect other types of easement. For example, the beneficiary of a non-expressly granted easement such as an easement acquired by prescription may choose to note it on the register. The priority of a legal non-express easement is arguably accorded greater security through entry of a notice than through reliance on the overriding interest provisions. Furthermore, holders of express easements may elect to protect their easements through entry of a notice rather than completion by registration. Choosing this route of protection would, however, mean that the noted easement is equitable rather than legal. Nonetheless, we understand that this option is taken in some circumstances.

**Protection of leases under the LRA 2002**

In contrast with the position in relation to expressly granted easements outlined at paragraph 16.3 above, not all leases are required to be completed by registration in order to be legal. Section 27(2)(b) of the LRA 2002 provides that only the following leases granted out of registered land must be registered to operate at law:

1. leases for a term of more than seven years from the date of grant;
2. leases which are to take effect in possession after the end of the period of three months beginning with the date of the grant;

12 *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 204, 219 to 221, approved by the Court of Appeal in *Thatcher v Douglas* (1996) 146 NLJ 282.

13 Law Com 254, para 5.9.

14 Law Com 271, para 8.65.

15 See para 16.3 above.

16 LRA 2002, s 32.

17 LRA 2002, sch 3, para 3(1).
(3) discontinuous leases;

(4) leases in pursuance of the right to buy under Part 5 of the Housing Act 1985; or

(5) leases where disposal by the landlord leads to a person no longer being a secure tenant (section 171A of the Housing Act 1985 applies).19

16.10 Hence, with the exceptions outlined above, short leases (leases for a term of seven years or less from the date of grant) do not have to be completed by registration in order to be legal. Their priority is protected as overriding interests under schedule 3, paragraph 1 to the LRA 2002.20 Furthermore, section 33(b) of the LRA 2002 bars the entry of a notice on the register in respect of a lease which is granted for a term of three years or less from the date of grant.21 By implication, it is possible for a lease of more than three years to be the subject of a notice on the register, even though if it is for seven years or less it cannot have its own registered title.

THE ISSUE

16.11 The registration requirements for short leases and easements for the benefit of short leases are therefore uneven. The LRA 2002 requires the tenant of a short lease to register their expressly granted easement, but not the lease which is benefited by it.

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18 Since it will not be subject to the criteria in LRA 2002, sch 3, para 3. Although note that once an interest has been noted on the register it can never again be to be overriding: LRA 2002, s 29(3). See Chapter 11.

19 In addition a lease granted out of a franchise or a manor must be registered: LRA 2002, s 27(2)(c).

20 Where the grant of a lease out of unregistered land was compulsorily registrable, it will not be capable of being an overriding interest under the LRA 2002, sch 3, para 1: see the LRA 2002, s 4(1)(d),(e) and (f).

21 Provided the lease is not otherwise required to be registered, eg because it takes effect in possession more than three months after the date of grant.
16.12 We have received a number of complaints from stakeholders about this state of affairs. Registration of express easements which benefit short leases has been criticised on the grounds of efficiency. Savings made in cost and effort by not registering short leases are thought to be lost by requiring the registration of easements for the benefit of those leases. Furthermore, many short-term tenants will not realise that they are required to register their expressly granted easements. Short term leases not exceeding three years may be legally created without a deed. Therefore, professional legal assistance in setting up the tenancy and accompanying rights may not be sought. Tenants who have not protected their expressly created easements on the register may be vulnerable in the event of a registrable disposition of the burdened land for valuable consideration. We explore why this may be the case below.

**Scope of the issue: formality requirements for the creation of easements**

16.13 We have therefore identified an issue with the registration requirements for expressly granted easements in short leases. However, in order to appreciate the extent of the problem it is necessary to examine in more detail the formality requirements for the creation of easements. Schedule 3, paragraph 3 to the LRA 2002 currently poses a bar to any equitable easement being an overriding interest. Failure to register an expressly created easement is merely one means by which an equitable easement can arise.

16.14 We consider below the formality requirements in relation to, first, expressly granted easements, and secondly, easements arising through implication. As will be seen, the law in this area is not always clear.

**Expressly granted or reserved easements**

16.15 Expressly granted easements are required to be made by deed in order to be legal. Section 52 of the Law of Property Act 1925 states:

> (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

16.16 There is an exception in section 52(2)(d) for “leases … not required by law to be made in writing”. This is intended to reflect the provisions of section 54(2) of the Law of Property Act 1925, which permits the creation of a lease without a deed (or even writing), provided that it:

> (1) takes effect in possession;

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22 Law of Property Act 1925, s 54(2).

23 See Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327, para 1.4 for more information about the importance of easements. It is possible that an equitable easement may be enforceable against the purchaser as a result of the doctrine in Wheeldon v Burrows (1879) 12 Ch D 31, or on the basis of non-derogation from grant, but this is far from certain.

is for a term of three years or less; and

is at the best rent reasonably obtainable without taking a premium.

16.17 Some textbooks suggest that easements which benefit leases that meet the criteria in section 54(2) of the Law of Property Act 1925 may also be created without a deed. However, section 52 does not provide for this and we take the view that all expressly granted easements must be granted by deed in order to be capable of operating at law. This requirement is necessary but not sufficient; as we have seen, an expressly granted easement out of a registered estate must also be completed by registration.

16.18 The difference in the underlying formality requirements for the creation of express easements and leases not exceeding a term of three years widens the scope of the problem considered in this chapter. Even if the requirement to register express easements which benefit short leases were to be removed, easements which have not been created by deed would remain equitable. Failure to comply with the necessary formalities may be inadvertent. An easement granted in a legal lease legitimately created without a deed (because it does not exceed three years), for example, would be equitable. Equitable easements cannot override registered dispositions and therefore many easements would still be at risk of accidental loss even where the person acquiring the burdened land is bound by the lease.

*Impliedly granted or reserved easements*

16.19 Having considered the position in relation to expressly granted easements, we now move on to consider implied easements. An easement may be implied into a conveyance in a number of different ways. For example, a right of way may be implied where a property is inaccessible except through property owned by a neighbour. The law is unclear on how the formality requirements affect the classification of an implied easement as legal or equitable.


26 This was the position we adopted in Easements, Covenants and Profits à Prendre (2008) Law Commission Consultation Paper No 186, para 2.5 n 4.


28 This is a simplified version of the example given in Easements, Covenants and Profits à Prendre (2008) Law Commission Consultation Paper No 186, para 4.81.
16.20 One school of thought is that easements which are implied into a deed will be legal, but in the absence of a deed, the implied easement will only be equitable.29 On this approach, many easements implied into leases for three years or less are likely to be equitable. Another school of thought 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".30 If this is correct, then an easement which is implied into a short lease which complies with section 54(2) of the Law of Property Act 1925 may be legal notwithstanding that the easement is not made by deed.31 This was the position that we adopted in our 2008 Consultation Paper, *Easements, Covenants and Profits à Prendre*.32 However, on reflection, we feel that the point may be more equivocal.

16.21 The distinction is significant because an implied easement is highly unlikely to be protected by a notice on the register and, as we have seen, only legal easements are capable of being overriding interests. The rationale for the implication of an easement is that the full extent of the rights benefiting or burdening the estate involved have not been expressly set out in the transfer or lease.33 The utility of implying easements into short leases is undermined if, by reason of their equitable status, they are not easily capable of binding the landlord’s successors in title.

**Legislative background**

16.22 This is not the first time that the Law Commission has considered the protection afforded by the land registration system to easements which benefit short leases. In our 1998 Consultation Paper it was provisionally proposed that:

1. All easements and profits à prendre should be overriding interests except where –
   a. they have been expressly granted; or
   b. they arise from a contract to grant such a right expressly;

2. without prejudice to the generality of that rule, the following easements and profits à prendre (whether legal or equitable) should be overriding interests unless and until they are noted on the register of the servient title:

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30 *Megarry & Wade*, para 28-002; see also *Wright v Macadam* [1949] 2 KB 744.
31 Another possibility is that implied easements may be legal notwithstanding that they are not required to be implied into a deed because they take effect "by operation of law": see Law of Property Act 1925, s 52(2)(g).
34 In other words, the burdened title.
... 

(d) those which are appurtenant to an overriding interest

(3) to the extent that there was any conflict between the principles in (1) and (2), those in (2) should prevail...  

16.23 The proposal contained a footnote which made it clear that the exception would apply to non-registrable leases:

This is to make it clear eg, that if A granted B a lease for 3 years together with a right of way over the land which A retained, B would not have to register his right of way because it would be appurtenant to B’s lease, which was an overriding interest.

16.24 Although this proposal was well received upon consultation it was not included in our 2001 Report or the LRA 2002. Post-enactment experience of the operation of the provisions of the LRA 2002 has led us to re-examine the position.

THE CASE FOR REFORM

16.25 Our proposals for reform are informed by two competing, but critical, principles: purchaser protection and reasonableness of registration. On the one hand, registration of easements enables buyers to determine the extent of any burdens or competing interests affecting the land they are seeking to acquire. On the other hand, it is not always reasonable to expect interest holders to register their interests. Interests in land can, for example, be transient; in such cases the benefits of registration are minimal but the burdens to the interest holder are great.

16.26 These two principles lie at the heart of the LRA 2002. Purchaser protection is provided in the LRA 2002 through the priority regime found in section 29. Overriding interests are an exception carved out of the rule in that section that interests which are not protected on the register will be postponed when there is a registrable disposition for valuable consideration. The overriding interests found in schedule 3 to the LRA 2002 exemplify situations where it would be neither reasonable nor sensible to require registration.

16.27 The balance between these principles is delicate. The weight accorded to each one depends on a number of factors. A particular feature which must be considered in relation to this chapter is whether the easement is granted in the same document as the lease. Our general proposals about registration and overriding interests assume that the easement is granted in the document creating the lease. Easements created after the lease has been made, but for the benefit of the lease, are considered at the end of this chapter.

35 Law Com 254, para 5.24.
36 Above, para 5.24 n 48.
37 Law Com 271, para 5.10.
38 Law Com 271, para 8.6.
The proposals we make below seek to enhance the protection of a tenant of a short lease with the benefit of an easement. We believe, for the reasons outlined at paragraphs 16.11 to 16.21 above, that the current law does not adequately safeguard a tenant. The proposals which we set out below are composite parts of this policy of protection; one proposal tackles loss of protection which may occur as a result of registration requirements, the other proposal addresses loss of protection through inadvertent breach of creation requirements.

Registration requirements

We consider that the majority of stakeholder concerns would be addressed by removing the requirement to register easements which benefit leases not exceeding seven years.39 This policy would realign the registration requirements for short leases and easements benefiting them. Acquisition of such an easement will inherently affect the value of the benefited lease. We therefore think that it is sensible that similar land registration rules apply to both interests. The result of the removal of the registration requirement would be that registration would not be necessary in order for the easement to operate at law.

We are, however, aware that this proposal has the capacity to impact negatively on purchasers of land. Two consequences follow from the proposal: there will be a reduction in the number of interests that appear on the register and there will be an increase in the number of overriding interests (as easements will be capable of being legal, despite their non-registration). We believe that the effect of these repercussions can be mitigated through retention of controls on the type of easements that can be overriding. The current requirements as to knowledge, inspection and use would operate as a limitation on the nature and number of overriding interests that will arise.40

We also acknowledge that this proposal takes a step back from the policy put forward in our 2001 Report that interests should be brought onto the register.41 This runs counter to the mirror principle.42 However, we believe that these objections are overcome by the principal argument in favour of this change: the unreasonableness of the present position in light of the short lease registration requirements. Moreover, while the removal of the registration requirement is proposed, we do not plan to stop individuals from choosing to register their easements.

We provisionally propose that, where the grant of a lease is not a registrable disposition, easements which benefit that lease and which are created within the lease itself should not be required to be completed by registration in order to operate at law.

Do consultees agree?

39 Easements benefiting leases which are registrable dispositions or are subject to compulsory first registration would still need to be completed by registration.
40 These requirements are currently found in LRA 2002, sch 3, para 3. See para 16.5 above.
41 Law Com 271, paras 2.13 and 8.1.
42 See para 2.17 above.
Overriding interests

16.33 Adoption of the proposal set out at paragraph 16.32 above will increase the number of easements which are legal and therefore capable of being overriding interests in schedule 3, paragraph 3. As discussed at paragraphs 16.15 to 16.21 above, easements which fail to meet the requisite formality requirements, for example, express easements created otherwise than by deed, will remain equitable.

16.34 We believe that tenants who have inadvertently failed to comply with the necessary formalities for the creation of an easement ought to be offered some protection in the land registration regime. The uneven formality requirements for the express creation of easements and the creation of leases not exceeding three years is likely to result in the creation of equitable easements. It is unlikely that a deed will be executed to grant any easement that benefits the lease where a deed was not required in order to create the lease. All equitable easements, under the current law, are incapable of existing as overriding interests. Moreover, legal advice is unlikely to be sought where the lease can be effected informally.

16.35 We propose that the law should be changed to enable all legal and equitable easements benefiting leases not exceeding three years\(^43\) to be overriding interests\(^44\).

16.36 An example illustrating how this proposal would work may be useful. A is the tenant and B is the landlord. A and B create a lease, either orally or by a document other than a deed, for two years in duration, at a market rent taking effect in possession. A term of the lease is that A is granted a right of way over land retained by B. This easement would be equitable as it has not been created by deed. Under the current law A would not be able to enforce this easement against C, a purchaser of the burdened land, unless it was noted against B’s title. Under our proposal the easement can operate as an overriding interest. Provided the easement (as is likely) meets requirements of knowledge, inspection or use A will be able to enforce the interest against C.

16.37 This proposal will have the effect of making some equitable easements overriding interests. We acknowledge that this contradicts our express recommendation in our 2001 Report that equitable easements should not be overriding interests\(^45\). We consider, however, that sound reasons justify our change in position. The protection of tenants will be enhanced by our proposal, many of whom will not be aware that their easements are equitable and therefore at risk of being postponed. Further, our policy is limited to easements which benefit leases not exceeding three years.

\(^{43}\) Where such leases meet the requirements in section 54(2) of the Law of Property Act 1925.

\(^{44}\) This policy will impact upon the draft Electronic Communications Code currently being considered by the Government. Current proposals are that code rights other than a right conferred by a lease override first and subsequent registrations. The effect of our proposals is that code rights which amount to easements but are granted within a lease (where that lease does not need to be registered) may also be overriding interests, depending on the circumstances.

\(^{45}\) Law Com 271, para 8.24.
16.38 We do not think that equitable easements which benefit leases granted for a term of more than three years but not exceeding seven years should be capable of being overriding interests. As explained above, leases for a term not exceeding three years do not have to be made by deed in order to be legal interests. Leases for a term of more than three years do, however, need to be made by deed in order to be capable of being legal interests. As persons who create a lease for a term of more than three years or have to use a deed in order for that lease to be capable of being legal they can reasonably be expected to use a deed to create the easements benefiting that lease. We believe, for the reasons discussed at paragraphs 16.15 to 16.17 above that a deed must be used in order to create an expressly granted or reserved easement. This formality requirement would arguably be undermined if we were to offer overriding interest protection to equitable easements benefiting leases granted for a term of more than three years but not exceeding seven years.

16.39 At paragraph 16.20 above we discuss two schools of thought on how the legal or equitable status of implied easements is determined. As we state at paragraph 16.19 above, the law is unclear on this point. Our proposal, set out at paragraph 16.40 below, will ensure that tenants of leases which are not created by deed with the benefit of implied easements are protected notwithstanding this uncertainty. The proposal enables all easements benefiting leases which meet the requirements in section 54(2) of the Law of Property Act 1925 to be capable of being overriding interests. This means that it does not matter which of the two schools of thought set out at paragraph 16.20 above is correct: no matter whether the implied easement is legal or equitable.

16.40 **We provisionally propose that all easements granted by or implied in leases which are not required to be created by deed by virtue of section 52(2)(d) of the Law of Property Act 1925, including equitable easements, should be capable of being overriding interests.**

Do consultees agree?

**Easements created after the lease**

16.41 In paragraph 16.27 above, we raised the point that the timing of a grant of an easement could influence where the appropriate balance between purchaser protection and reasonableness of registration falls. We have considered the various implications that timing has for easements created for the benefit of a short lease but after the lease has been completed. We have concluded that, for the reasons outlined at paragraph 16.34 above, a distinction should again be drawn between easements which benefit short leases that do not exceed three years and those that do.

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46 Provided they meet the criteria in section 54(2) of the Law of Property Act 1925.
16.42 The subsequent grant of an easement for the benefit of a lease not exceeding three years appears most likely to take place in the context of a transfer of the lease. It is unlikely that professional assistance will have been obtained in drawing up the transfer. Tenants who have forgotten to request a right of way over their landlord’s remaining land will probably not realise that they are required, by law, to do so by deed and that registration is required. We therefore have concluded that it is not realistic to expect registration of these easements and that they should be capable of being overriding interests. The treatment of easements for the benefit of leases not exceeding three years is therefore the same no matter whether the right has been granted at the same time as, or subsequently to, the lease.

16.43 The position is different for easements which benefit leases for a term of more than three years but not more than seven years. In this scenario legal advice about the grant of easement is likely to be taken because of the formal conveyancing process needed to create the lease in the first place. The fact that two separate deeds will need to be executed to create the lease and the easement is pertinent. While it seems unreasonable to require registration of particular terms in a single deed where that deed would otherwise be unregistrable, this argument does not hold true when the dispositions are contained in two separate documents. We therefore think that the grant of easements for the benefit of short leases exceeding three years, but created after the completion of the lease, should remain registrable dispositions.

16.44 We provisionally propose that:

(1) easements benefiting a lease which is not required to be created by deed by virtue of section 52(2)(d) of the Law of Property Act 1925, where those easements are created separately from the lease, should be capable of being overriding interests; but

(2) the grant of an easement benefiting any other lease which is created outside of the lease document should remain a disposition which must be completed by registration to take effect at law.

Do consultees agree?

47 Where such leases meet the requirements in section 54(2) of the Law of Property Act 1925.
PART 6
ADVERSE POSSESSION
CHAPTER 17
ADVERSE POSSESSION

INTRODUCTION

17.1 Adverse possession is the process through which one person may claim legal title to land owned by another through possession of the land without the owner’s permission for a particular period of time.\(^1\) The ability to obtain title to land through possession is contentious. It is not obvious that a person whose use of land is a trespass, for which the landowner may sue him or her, and in some circumstances may be a criminal offence,\(^2\) should thereby acquire legal rights over the land. There are circumstances, however, in which adverse possession plays a useful and practical role of ensuring that legal ownership comes to reflect the position that parties have assumed to be the case in practice, or frees up for use land which has been abandoned by the “true” owner.

17.2 The concept of adverse possession reflects the system of relativity of title that stems from the way in which land law in England and Wales has developed.\(^3\) In English law title is relative and depends on possession. The person with the best title to land is the person with the earliest claim to possession of the land. In unregistered land a title can, however, be extinguished if another person moves into adverse possession and remains in possession for 12 years – the limitation period for actions to recover land.\(^4\) In the context of unregistered land, the strongest justification for adverse possession is to facilitate conveyancing.\(^5\)

\(^1\) In unregistered land the owner is unable to enforce his or her title against the adverse possessor after 12 years, which is the limitation period for rights of action to recover land under the Limitation Act 1980, s 15. No limitation period applies in registered land, where a minimum of ten years’ adverse possession is required before an adverse possessor can apply to become the registered proprietor of the land under the LRA 2002, sch 6.

\(^2\) Squatting in a residential building was made a criminal offence under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 144. In Best v Chief Land Registrar [2015] EWCA Civ 17, [2016] QB 23 it was held that the registrar could not reject an application for title by adverse possession under the LRA 2002 on the basis that Mr Best’s occupation had been a criminal offence (although Mr Best had not been prosecuted for the offence).

\(^3\) See Chapter 2.

\(^4\) Limitation Act 1980, s 15.

\(^5\) Law Com 254, paras 10.09 and 10.10. See M Dockray, “Why Do We Need Adverse Possession?” [1985] Conveyancer and Property Lawyer 272, 278 and following.
17.3 Prior to the LRA 2002, adverse possession operated in registered land in an analogous manner to its application in unregistered land. After a claimant had been in adverse possession for 12 years he or she obtained a title to the land that could no longer be defeated by the registered proprietor. The registered title could not simply be extinguished at the end of the limitation period because for so long as the registered proprietor’s name was on the register the proprietor held legal title. Instead, the LRA 1925 provided that after 12 years the registered proprietor held the title on trust for the adverse possessor, who could then apply to become registered proprietor. There was no requirement that the adverse possessor applied for registration, however, and the trust would endure unless and until an application was made.

17.4 In our 1998 Consultation Paper we recommended that there should be a new scheme of adverse possession in registered land that recognises that title to registered land is based on registration and not simply on possession. We explained:

Where title is registered, the basis of title is primarily the fact of registration rather than possession. … The main weakness of the present law is that the principles which determine whether a registered proprietor will lose his or her title by adverse possession were developed for a possession-based system of title and not one founded on registration.\(^6\)

17.5 Therefore, we proposed a new scheme of adverse possession designed to reflect the idea of title being acquired by registration. In doing so, we identified four circumstances in which a registered title should still give way to a claim to ownership founded on possession.\(^7\)

1. First, where the registered proprietor has disappeared and cannot be traced. In this instance, adverse possession ensures that land does not become sterile.

2. Secondly, where dealings with land have taken place “off the register” so that the register no longer reflects reality.

3. Thirdly, where the register is not conclusive; for example, where boundaries have not been determined.\(^8\)

4. Fourthly, where a person enters into possession of land in the mistaken belief that he or she owns the land.

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\(^6\) Law Com 254, para 10.11.

\(^7\) Law Com 254, paras 10.11 to 10.16.

\(^8\) We discuss general boundaries in Chapter 15 and we note in that chapter the role that adverse possession can play in boundary disputes.
17.6 We explained in our 1998 Consultation Paper that the effect of our proposed scheme would be to protect registered land from claims to adverse possession, which would provide an incentive for voluntary registration. It has subsequently been suggested that registered land is “virtually squatter proof”.

17.7 Our proposals for adverse possession were implemented in the LRA 2002 and we explain the current law below. The Act marked a significant change to the operation of adverse possession in registered land. It introduced a wholly new procedure for claims. The operation of the procedure is of considerable practical importance. For example, statistics provided to us by Land Registry indicate that in the period 1 April 2015 to 31 January 2016 Land Registry received 598 applications for adverse possession made under the scheme introduced by the LRA 2002. In the financial year 2014/2015 there were 749 applications made under that scheme. We are advised by Land Registry that the way in which figures are derived means that there is a degree of inaccuracy and there may be some variance between the data recorded and the number of applications. These figure are therefore indicative.

17.8 Our current review is not designed to interfere with the basis of claims to adverse possession under the LRA 2002, or to make any fundamental changes to the framework governing applications for registration. The 2002 Act provided a wholly new procedure for governing claims to adverse possession in registered land, which reflected a clear policy decision “to reflect the logic of title registration and to strike a more appropriate balance between landowner and squatter”. In the period of time since the LRA 2002 came into force, a number of questions have arisen relating to the interaction between the general law governing adverse possession and the LRA 2002. Additionally, stakeholders have raised concerns with some specific aspects of the procedure in the Act that governs claims. But it has not been suggested to us that the policy that led to the changes in the LRA 2002 should be reviewed. The concerns raised with schedule 6 do not, in our view, indicate that the procedure as a whole is not working. Nor do we consider that it would be desirable, now that schedule 6 is established, to reconsider how applications are made. In this chapter we first set out the procedure introduced by the LRA 2002. We then consider three issues relating to the procedure under schedule 6 and four issues relating to the interaction between schedule 6 and the general law of adverse possession on which we make provisional proposals for reform.

9 Law Com 254, para 10.19.


11 See paras 17.9 and following below.

12 Law Com 271, para 14.4.

13 We acknowledge, however, that the approach to adverse possession taken by the LRA 2002 has been the subject of critique: see eg N Cobb and L Fox-O’Mahony, “Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002” (2007) 27 Legal Studies 236.
17.9 Under the LRA 2002, the ability of a registered proprietor to assert title against an adverse possessor is not subject to a limitation period.\(^{14}\) That is the case in respect of all claims in respect of which the claimant had not completed 12 years of adverse possession prior to the Act coming into force on 13 October 2003.\(^{15}\) The registered proprietor’s ownership of land is therefore protected, regardless of the length of time that a claimant has been in adverse possession. A registered title cannot be extinguished by another person’s adverse possession.\(^{16}\)

17.10 The new scheme governing claims to adverse possession is contained in schedule 6 to the LRA 2002. Under that schedule, a person who has been in adverse possession for a minimum of ten years can apply to the registrar to be registered as proprietor of the estate.\(^{17}\) The application for registration is made under schedule 6, paragraph 1 to the LRA 2002, which provides as follows:

A person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application.

When an application is made, the registrar is required to give notice to the registered proprietor and to other specified persons, including the proprietor of a registered charge affecting the registered estate.\(^{18}\) The registered proprietor (and others notified) have 65 business days from the date of issue of notification to respond to the notice. A response requires the registrar to deal with the application under schedule 6, paragraph 5.\(^{19}\) Under that paragraph, the registrar must reject the application for registration by the adverse possessor unless the application meets one of three “conditions” (which we consider at paragraphs 17.25 and following below).

\(^{14}\) LRA 2002, s 96(1).

\(^{15}\) Transitional provisions preserve the entitlement of those who had already completed 12 years of adverse possession to become registered proprietor: LRA 2002, sch 12, para 18.

\(^{16}\) LRA 2002, s 96(3).

\(^{17}\) This general provision is subject to a number of exceptions. For example, an application cannot be made against a registered proprietor who is incapacitated by mental disability, while a longer period of adverse possession is required where the claim relates to Crown foreshore. The matters considered in this chapter relate to the general scheme provided by the Act. Our provisional proposals will affect the exceptional cases only if and to the extent that the general scheme applies to those cases.

\(^{18}\) LRA 2002, sch 6, para 2. Registered proprietors can provide up to three addresses for service to be given on the register, one of which can be an email address: LRR 2003, r 198(4).

\(^{19}\) LRA 2002, sch 6, para 3. The period of 65 days is provided in the LRR 2003, r 189.
If no response to a notification is received within the prescribed period, or if one of the conditions in paragraph 5 is met, then the claimant “is entitled to be entered in the register as the new proprietor of the estate”.20 A statutory conveyance of the registered title is therefore made, as a result of which the claimant obtains title to the land by registration through his or her adverse possession. The title acquired is indefeasible, subject only (as are all registered titles) to a claim to alteration or rectification of the register under schedule 4 to the LRA 2002. It has been held that registration of a claimant as proprietor under schedule 6 will be rectified as a mistake if in fact the claimant was not in adverse possession of the land for the requisite period.21

Where a registered proprietor (or other person notified of the application) requires the application to be dealt with under schedule 6, paragraph 5, the claimant’s application for registration will be rejected unless the claim falls within one of three “conditions” (which we consider at paragraphs 17.25 and following below). The registered proprietor is then given two years in which to commence proceedings for possession of the land.22 If no such proceedings are commenced, then the claimant may make a further application for registration if he or she has continued to be in adverse possession.23 That further application does not initiate another notification to the registered proprietor. Instead, when an application is made under paragraph 6 the claimant “is entitled to be entered in the register as the new proprietor of the estate”.24

The outcome of a claim to title through adverse possession under the schedule 6 procedure will therefore either be that the registered proprietor vindicates his or her title and brings the claimant’s adverse possession to an end, or the claimant obtains title to the land by registration.

Where an application is required to be dealt with under schedule 6, paragraph 5 there are three situations – referred to in the statute as “conditions” – in which the claimant will be registered as proprietor despite his or her application being opposed. These conditions are given in paragraph 5(2) to (4) in the following terms:

(2) The first condition is that—

(a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and

(b) the circumstances are such that the applicant ought to be registered as the proprietor.

(3) The second condition is that the applicant is for some other reason entitled to be registered as the proprietor of the estate.

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20 LRA 2002, sch 6, paras 4 and 5(1).
22 LRA 2002, sch 6, para 6.
24 LRA 2002, sch 6, para 7.
(4) The third condition is that—

(a) the land to which the application relates is adjacent to land belonging to the applicant,

(b) the exact line of the boundary between the two has not been determined under rules under section 60,

(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and

(d) the estate to which the application relates was registered more than one year prior to the date of the application.

The first two situations are cases in which the claimant to adverse possession is in fact entitled to legal title to the land on some other basis; either through proprietary estoppel (the first condition) or “for some other reason” (the second condition). The third situation is the only one in which the claimant’s application succeeds on the basis of adverse possession.

17.15 Having now set out the procedure applicable to adverse possession claims under the LRA 2002 the rest of this chapter will explore issues that stakeholders have raised in relation to adverse possession. We have divided these issues into two broad categories. First, we consider those issues which arise out of the procedure in schedule 6 itself. Secondly, we review issues which relate to how the schedule 6 procedure relates to the general law of adverse possession.

THE SCHEDULE 6 PROCEDURE

Whether more than one application can be made

17.16 Schedule 6 does not specify whether a claimant to title by adverse possession, whose application for registration has been rejected, is able to make a second application under paragraph 1 of the schedule. As we have seen above, at paragraph 17.10, paragraph 1 is the provision under which an application for registration can be made where a person has been in adverse possession of the land for ten years, ending on the date of the application. The effect of the application is that notification is sent to the registered proprietor and to other specified persons.

17.17 An application under schedule 6, paragraph 1, may, however, be rejected before notification of the application is sent to the registered proprietor. That may happen for a number of different reasons. For example:

(1) The applicant has not paid the fee for the application;

(2) The applicant has not established that he or she has been in adverse possession;

(3) The applicant has not completed ten years of adverse possession.
17.18 Alternatively, an application may be rejected after notification of the application is sent to the registered proprietor. Once notification has been sent, the application for registration will be rejected when a counter notice has been issued by the registered proprietor (or another person given notice of the application) and the application does not meet any of the three conditions in paragraph 5. We refer to a rejection of an application in these circumstances as a rejection under schedule 6, paragraph 6.

17.19 Where an application is rejected under schedule 6, paragraph 6, we understand that Land Registry’s practice is not to accept a second application unless the adverse possessor fulfils the requirements under which schedule 6, paragraph 6 specifically permits a second application. Paragraph 6 permits a second application only where the adverse possessor has remained in adverse possession for a further two years and the registered proprietor has not vindicated his or her title.25

17.20 Land Registry’s practice prevents an opportunistic application being made where, for example, the adverse possessor is aware that the registered proprietor will not be able to reply to a notice from the registrar within the 65-day period; for example, because the registered proprietor is a neighbour whom the adverse possessor knows is away for an extended period. The practice also prevents an adverse possessor who did not seek to rely on one of the conditions in paragraph 5, or whose claim to come within one of the conditions was rejected, from making a second application to seek to obtain registration on the basis of one of the conditions. It is possible, for example, that the adverse possessor did not take legal advice at the time of the application, but has since done so and considers that one of the conditions may in fact be met.

17.21 We consider that there are sound reasons for not enabling a second application for registration when an adverse possessor’s application has been rejected under schedule 6, paragraph 6, save in the circumstances in which a further application is specifically permitted. The procedure in schedule 6 is designed to produce an outcome that puts the claim to adverse possession to rest. It is in the interests of both parties that there is finality to the claim. Schedule 6 provides finality by giving the registered proprietor two years in which to bring possession proceedings. A second application would mean that the two year period starts afresh. The land is likely to be unmarketable until the adverse possession claim is resolved and there is general interest in ensuring that the land does not remain economically sterile for longer than is necessary to resolve the adverse possession claim. We note that schedule 6 already provides one means through which (indirectly) the registered proprietor can prevent a second application from being made. Under paragraph 1(3), a person cannot make an application under schedule 6 if he or she is a defendant in possession proceedings. There is therefore an incentive for the registered proprietor to commence proceedings as soon as the adverse possessor’s claim is notified.

25 LRA 2002, sch 6, para 6(1) and (2).
17.22 Preventing a second application for registration when an application has been rejected under schedule 6, paragraph 6 will not prevent a second application when an application is rejected without notification being sent to the registered proprietor. The proposal will not therefore operate to prejudice an adverse possessor whose application is rejected for any of the reasons outlined in paragraph 17.17 above. For example, if an adverse possessor’s application is rejected because he or she omitted to pay the fee, then a second application can be made with payment of the fee. If the application failed because the adverse possessor had only been in adverse possession for nine years, then a second application can be made after ten years of adverse possession. It would also be possible (as appears to be the case at the moment) for an adverse possessor whose application is rejected because he or she has not established adverse possession to make a second application putting forward further evidence of his or her claim. There is perhaps an argument for preventing second applications in such cases. It is reasonable to expect the applicant to provide all relevant evidence at the time of the application and not to be able to have a “second bite at the cherry” if he or she fails to do so. There appears, however, no reason to differentiate such a case from one in which an application is made after nine years instead of ten. The provision of notice of an application to the registered proprietor is central to the procedure contained in schedule 6. Notice gives the registered proprietor a final warning of the need to act to vindicate his or her title to avoid its loss through adverse possession. Whether or not notification has been given therefore provides a logical point of distinction.

17.23 The law underpinning adverse possession claims is complex and has given rise to voluminous case law on the interpretation of individual elements of a claim. We understand that Land Registry encourages those who contact it directly in respect of adverse possession claims to seek legal advice. Applicants may also be assisted by Land Registry’s Practice Guide, though the guide is directed primarily at legal practitioners. There may be some merit in recommending on the statutory form ADV1 on which applications under schedule 6 are made that legal advice is sought. There seems, however, no compelling reason for such a statement to be included on one statutory form, while it would also be wrong to discourage those who are capable of doing so from making their own application. Notwithstanding, if our provisional proposal that a second application for registration should not be permitted when an application is rejected under schedule 6, paragraph 6 is accepted, then we consider that it would be beneficial for form ADV1 to be amended to draw applicants’ attention to that fact.

17.24 We provisionally propose that a claimant to title to land through adverse possession should be prevented from making a second application for registration when an application for registration has been rejected under schedule 6, paragraph 6, unless the conditions in that paragraph under which a second application is currently permitted are fulfilled.

Do consultees agree?

The three conditions in schedule 6, paragraph 5

17.25 As we have seen in paragraph 17.14 above there are three situations or “conditions” in which a claim to title by adverse possession will succeed even though the application is opposed by the registered proprietor. The first two of these conditions are situations in which the applicant in fact has a claim to the land other than through adverse possession. The third condition is the only one in which the claim to the land succeeds through adverse possession. In this section of the chapter we consider whether the first two conditions should be maintained and then examine a point of interpretation that has arisen in respect of the third condition.

The first and second conditions: other claims to title to the land

17.26 Where a claim to adverse possession falls within one of the first two conditions in paragraph 5, the applicant is in fact found to be entitled to the land for reasons other than adverse possession.

17.27 The first condition refers to claimants who are entitled to land through proprietary estoppel. Proprietary estoppel is a principle of equity through which one person (A) may establish a claim against another person (B) where B has assured A that he or she has or will acquire property rights in B’s land and A has relied on that assurance to his or her detriment. The focus of a proprietary estoppel claim is different from that of a claim to adverse possession. While adverse possession is concerned primarily with the claimant’s use of the land, proprietary estoppel is concerned with the relationship between the estoppel claimant and the registered proprietor. The evidence used to establish each claim is therefore different. Further, as we explained in our 2001 Report, proprietary estoppel does not necessarily lead to the claimant being awarded legal title to the land.27 A successful claim confers a so-called “inchoate equity” or a right to seek a remedy, which is satisfied by the award of “the minimum equity” to do justice.28 The remedy awarded in an estoppel claim covers a wide range from legal title29 to financial compensation.30

17.28 The second condition captures situations in which the claimant is entitled to the land for a reason other than adverse possession or proprietary estoppel.31 In our 2001 Report we gave the following two examples as illustrations of where the condition may apply.

27 Law Com 271, para 14.41.
28 Crabb v Arun DC [1976] Ch 179, 198, by Scarman LJ.
30 For example, Dodsworth v Dodsworth (1973) 228 EG 1115; Baker v Baker [1993] 2 FLR 247.
31 The second condition refers to an applicant being “entitled to be registered as the proprietor of the estate”. This terminology is the same as that used in section 24 of the LRA 2002 which says who can exercise owners powers, which we discuss in Chapter 5. In fact, however, from the examples given of when the second condition would be satisfied there does not seem to be an intention that the term be interpreted in the same way in each situation.
(1) The claimant is entitled to the land under the will or intestacy of the deceased proprietor.

(2) The claimant contracted to buy the land and paid the purchase price, but the legal estate was never transferred to him or her. In a case of this kind, the squatter-buyer is a beneficiary under a bare trust, and, as such, can be in adverse possession.\textsuperscript{32}

17.29 It appears from the inclusion of these first two conditions that schedule 6 is performing two distinct functions. On the one hand, schedule 6 provides a route for genuine claims to land based on adverse possession to be resolved. On the other, it is also being used to funnel into Land Registry claims to land which are in fact based on other grounds. There are some advantages in schedule 6 being used in this manner. The practical outcome of an application under schedule 6 where the claimant in fact has an entitlement to the land through estoppel or for some other reason is likely to be a referral to the Tribunal where the merits of the claim can be examined. In our 2001 Report we noted that permitting a claim on the basis of adverse possession could therefore provide a “cheap and simple avenue to registration” and avoid “costly court proceedings”.\textsuperscript{33} In the absence of the schedule 6 route, estoppel claims may still reach the Tribunal following another application; for example, an application for a notice to protect the claim to proprietary estoppel. An application by a person entitled under a will does not have another obvious route into the Tribunal, but we are not aware of any cases in which such a claim has been referred to the Tribunal under schedule 6. Conversely, it may be questioned whether the breadth of the two conditions means that schedule 6 is not the most appropriate route for claims to be made. As we have noted above the focus of a claim to proprietary estoppel is different from that to adverse possession.\textsuperscript{34} A claimant to estoppel may be better placed to establish the elements of the claim if it is made directly, rather than indirectly through an application (wrongly) founded on adverse possession. There is also a technical difficulty that if the claimant is in fact entitled to the land by virtue of proprietary estoppel or for some other reason, then the claimant’s possession may not in fact have been “adverse”. If the claimant has not been in adverse possession for ten years “ending on the date of the application” then he or she does not meet the condition of making an application under schedule 6.

\textsuperscript{32} Law Com 271, para 14.43.

\textsuperscript{33} Law Com 271, para 14.37.

\textsuperscript{34} See para 17.27 above.
17.30 We understand from Land Registry that the second condition is rarely successfully used, but that it does lead to applicants putting forward groundless claims. The one situation where we are aware the second condition is successfully used is where an applicant who had completed 12 years of adverse possession of registered land before the LRA 2002 came into force applies for registration under schedule 6. Under the LRA 1925, an adverse possessor was entitled to be registered as proprietor of the estate on completing 12 years of adverse possession and his or her entitlement is preserved under transitional provisions in the LRA 2002.\(^{35}\) It is essential for provision to be made for adverse possessors with an entitlement to be registered to be able to obtain registration. It would, however, be possible for specific provision to be made for adverse possessors in that position, rather than relying on the general terms of the second condition.

17.31 The first condition is, however, applied to cases. One feature of the use of the first condition is that when a case reaches the Tribunal under paragraph 5 of schedule 6, the Tribunal has an express statutory jurisdiction to determine the remedy to be awarded under estoppel.\(^{36}\) We discuss the jurisdiction of the Tribunal in Chapter 21. In that chapter we invite views on whether the Tribunal should have jurisdiction to determine the remedy to award an estoppel claimant where a claim to an estoppel is referred to the Tribunal.

17.32 We would like to call for evidence of the use of the first two conditions in paragraph 5. We also invite views from consultees on whether the first and second conditions should be removed from paragraph 5. Removal would help to focus claims under schedule 6 on the elements of adverse possession and ensure that title is secured under the procedure only in those cases where the claim to adverse possession is successful. The removal of the other conditions would not prevent people from claiming entitlement to land through proprietary estoppel or through other reasons, or from having such claims determined by the Tribunal following an application to Land Registry. It would, however, ensure that such claims are made directly on the appropriate grounds, rather than indirectly by means of a claim to adverse possession.

17.33 **We invite consultees to provide evidence relating to the use of the first two conditions in paragraph 5 of schedule 6.**

17.34 **We invite consultees’ views as to whether the first two conditions in paragraph 5 of schedule 6 should be removed.**

17.35 If the second condition were to be removed, it would be necessary to make specific provision for adverse possessors who completed 12 years of adverse possession of registered land before the LRA 2002 came into force to apply for and obtain registration.

\(^{35}\) LRA 2002, sch 12, para 18.

\(^{36}\) LRA 2002, s 110(4).
The third condition: reasonable belief the land belongs to the applicant

17.36 As we explained in our 1998 Consultation Paper, the third condition was designed to deal with a “common case where a person entered into possession of land under the mistaken belief, reasonably held, that he or she was the owner of the land”.\(^{37}\) We suggested that it might apply, for example, in situations where the boundary between properties was uncertain, a misrepresentation had been made to the applicant as to the physical extent of his or her land, or where natural features of the land led the applicant to believe the land belonged to him or her. In our 2001 Report, we explained that:

At some point prior to making the application to be registered, the squatter will have become aware that he or she is not in fact the owner of the land in issue. It is likely to be this realisation that prompts the application.\(^{38}\)

17.37 Adverse possession plays an important role in settling boundary disputes. Its use in that respect can be better understood by considering how boundaries operate in registered land and the context in which adverse possession may be used. We discuss the general boundaries rule in Chapter 15. In this chapter we are concerned with a particular question of interpretation that has arisen in respect of schedule 6, paragraph 5(4)(c). That sub-paragraph provides that in order for the condition to apply:

For at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him.

17.38 A question has arisen as to the required proximity between the claimant ceasing to hold a reasonable belief that the land belongs to him or her and the time an application is made under schedule 6. Paragraph 5(4)(c) appears open to three interpretations.\(^{39}\)

(1) The reasonable belief must be held for at least ten years and persist at the date of the application.

(2) The reasonable belief must be held for ten years at any time prior to the application, but need not persist on the date of the application.

(3) The reasonable belief must be held for at least ten years and cannot end more than a short time before the date of the application.

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\(^{37}\) Law Com 254, para 10.54.

\(^{38}\) Law Com 271, para 14.44.

The first two interpretations are based on the terms of paragraph 5(4)(c). The third is drawn from the Court of Appeal’s decision in *Zarb v Parry*. There, Lady Justice Arden explained the effect of paragraph 5(4)(c) in the following terms:

The necessary effect of the way that paragraph 5(4) is expressed is to make the unreasonable belief of the adverse possessor in the last ten years of his possession prior to the application for registration a potentially disqualifying factor even though his belief started out as reasonable but became unreasonable as a result of circumstances after the completion by him and/or his predecessor in title of a ten-year period of possession. The consequence of that is that the paper title owner will have a last chance to recover the land if the adverse possessor did not have a reasonable belief during the last ten years. The moral is that, as soon as the adverse possessor learns facts which might make his belief in his own ownership unreasonable, he should take steps to secure registration as proprietor.

The first interpretation would deny the third condition any practical application. It would require the adverse possessor to apply for registration immediately upon his or her reasonable belief coming to an end.

The second interpretation was implicitly suggested in our 2001 Report and has received support. A difficulty with the interpretation, however, is that it enables the claimant to leave the matter unresolved even after the claimant has reason to believe that the land does not in fact belong to him or her. As we have seen in paragraph 17.36 above, the third condition is intended to apply to cases where a person goes into possession of land in the reasonable belief that it belongs to him or her. It is clear from the fact that the belief must be held for at least ten years, that the condition is not concerned solely with a person’s belief at the moment of entry into possession, but is directed instead at a belief that endures. In *Zarb v Parry* Lady Justice Arden noted that “boundary disputes have a habit of reappearing until finally resolved”. The second interpretation would not encourage the resolution of boundary claims, but would instead enable the matter to continue unresolved at the risk of causing costs, delay and litigation at a later stage.

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41 Above, at [17].
46 Above at [58].
The third interpretation is consistent with the policy reflected in the third condition. It ensures that once a person’s reasonable belief comes to an end, ownership is determined through the schedule 6 procedure. It also reflects the fact that for so long as the reasonable belief is held the claimant would have no reason to make an application under schedule 6.

In our 2001 Report we suggested that the third condition would apply “where the boundaries where they appear on the ground and as they are according to the register do not coincide”. We gave as an example a case “when an estate was laid down, the dividing fences or walls were erected in the wrong place and not in accordance with the plan lodged at the Registry”. Adopting the third interpretation may be seen as limiting the circumstances in which the third condition could be used to resolve such a case. The interpretation places an onus on a person who discovers the error to apply under schedule 6, paragraph 1. If an application is not made within a short time, then the adverse possessor will not be able to rely on the third condition. It is, however, in the interests of all the parties in such a case to have the situation resolved and so there is good reason for requiring an application to be made promptly. Further, we do not consider that practical difficulties will necessarily follow if an application is not made in time. We consider that such an instance could be resolved under the general boundaries rule that we discuss in Chapter 15. In that chapter we consider how the circumstances in which a case is classified as involving general boundaries could be clarified.

The difficulty with the third interpretation, however, is that it is unclear what period of time can pass between the reasonable belief coming to an end and an application being made under schedule 6. Stephanie Tozer and Kester Lees suggested that *Zarb v Parry* reflects a *de minimis* principle, by which the authors mean that the court would not be concerned with a trivial or short gap between the reasonable belief ending and an application being made. On their view, the period of time that can elapse between the belief ceasing to be reasonable and an application being made will:

> vary from case to case … [but] generally the period is likely to be measured in weeks rather than months or years. The key is to identify the time period that a reasonable person acting promptly would need in order to get the application prepared.

We agree that the essential requirement is to provide time for an application under schedule 6 to be prepared. However, we consider it undesirable for the period of time to differ from case to case. In the absence of certainty, there is a risk of an inconsistent approach being adopted between applications as they are processed at Land Registry. Therefore we consider that it would be preferable to specify a period of time within which the application under schedule 6 needs to be made.

47 Law Com 271, para 14.46.
48 Above.
49 S Tozer and K Lees, “‘Reasonable belief’ in adverse possession” (2015) 1521 Estates Gazette 77.
50 Above.
We acknowledge that there may be difficulties in applying any particular time period to a set of facts. It may not always be clear at what point a person’s reasonable belief came to an end. That difficulty, however, is inherent in the operation of the third condition; for example, in establishing that a reasonable belief was held and maintained for at least ten years. A reasonable belief is necessary to distinguish cases within the third condition from other situations of adverse possession where (for example) a claimant may take adverse possession of land knowing that the land belongs to another person. Adverse possession is an area of law in which the need to determine exact dates is a feature of claims. Difficult cases are perhaps inevitable, but there will be situations in which particular facts or events point to determining the reasonableness of the applicant’s belief.

The question then arises as to the period of time within which claimants should be required to make an application under schedule 6 after their belief that the land belongs to them ceases to be reasonable. Claimants should be given sufficient time to enable them to seek to settle the matter with the adjoining land owner and to prepare their claim. It is important, however, that the matter is resolved as soon as possible as an outstanding dispute may impact on the ability of either party to deal with their land. We note that under paragraph 1(2)(a) of schedule 6 a person whose adverse possession is ended by eviction by the registered proprietor (or a person claiming under the registered proprietor) is given six months in which to make an application under schedule 6. Eviction is a definite act that will prompt a claimant to obtain legal advice. It would be difficult to set a different minimum in cases where the trigger for a reasonable belief no longer being held is less dramatic (for example, receipt of a surveyor’s report). We suggest, therefore, that the application should be made within six months of the reasonable belief coming to an end.

We provisionally propose that where an applicant relies on the condition in schedule 6, paragraph 5(4), his or her reasonable belief that the land belonged to him or her must not have ended more than six months from the date of the application.

Do consultees agree?

THE RELATIONSHIP BETWEEN THE SCHEDULE 6 PROCEDURE AND THE GENERAL LAW OF ADVERSE POSSESSION

Having reviewed the issues which relate specifically to the procedure in schedule 6, we now turn to examine the relationship between schedule 6 and the general law governing adverse possession. Stakeholders have drawn our attention to a number of particular aspects of this relationship that they consider to be unclear.

For example, to establish the date on which adverse possession commenced in order to determine whether ten years has been completed at the time an application is made under sch 6.

For example, in Zarb v Parry a surveyor’s report that supported the Parry’s belief as to the position of the boundary was one factor that demonstrated their belief was reasonable: [2011] EWCA Civ 1306, [2012] 1 WLR 1240 at [51]. Conversely, a claimant’s belief the land is his or hers may stop being reasonably held on the date of receipt of a surveyor’s report that concludes the land is not in fact owned by him or her.
First registration of an extinguished title

17.49 Where adverse possession takes place in unregistered land, the acquisition of title by the claimant is not subject to any particular process. The operation of relativity of title means that from the commencement of adverse possession the adverse possessor has a freehold title to the land. The title is weaker than the title held by the true owner (often referred to as the “paper owner”). After 12 years of adverse possession, the superior title of the true owner is simply extinguished. From that moment, the title acquired by the adverse possessor at the commencement of their possession becomes the strongest title to the land.

17.50 There is a risk that a title that has been extinguished through adverse possession will subsequently be registered for the first time. The owner whose title has been extinguished may be unaware of the adverse possession and apply for voluntary first registration. Alternatively, a disposition may take place that triggers compulsory first registration.

17.51 While the risk of an extinguished title being registered is undoubtedly a genuine one, and not merely a theoretical possibility, we are not aware that the matter has arisen in practice under the LRA 2002. Further, the chance of this set of facts arising diminishes as the proportion of land that remains unregistered continues to decrease.

17.52 One possibility for reducing the risk would be to enable an adverse possessor to enter a caution against first registration. That would ensure that he or she is alerted to any application for registration of the land. Under section 15(3) of the LRA 2002, a caution against first registration cannot be entered where the claim is to ownership of a freehold estate in land. In Turner v Chief Land Registrar it was held that this provision precludes an adverse possessor from entering a caution. There, Mr Turner had applied to enter a caution in respect of land on which he was in adverse possession. He had not yet been in adverse possession for 12 years and so the superior title had not been extinguished. Mr Turner wanted to enter a caution against first registration so that he would have the chance to object to an application for first registration that was defective, for example as being founded on a false or fraudulent title. Mr Turner argued that entering a caution would enable him to challenge the application and thereby preserve his own claim to title through adverse possession.

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53 We considered the nature of the adverse possessor’s title more fully in Law Com 254, paras 10.22 to 10.24.
54 Limitation Act 1980, s 17.
55 The issue arose under the previous legislation (the LRA 1925) in Re Chowood’s Registered Land [1933] Ch 574. Under the LRA 1925 the adverse possessor’s right bound the registered proprietor as an overriding interest. The decision is authority for the point (discussed at para 13.54 above) that a registered proprietor is not entitled to an indemnity where he or she is bound by an overriding interest.
56 It is estimated that 86% of land in England and Wales is now registered: Land Registry Annual Reports and Accounts 2014/15 (July 2015) p 9.
17.53 It would be possible to amend section 15 to enable a caution against first registration to be entered by an adverse possessor. That would enable adverse possessors who have not yet extinguished the owner’s title to seek to protect their claim on an application for first registration which was not well founded, as Mr Turner hoped to do. It would, furthermore, alert an applicant for first registration who has good title of the need to assert his or her title and bring the period of adverse possession to an end. It would also prevent first registration of a title that had in fact already been extinguished by adverse possession.

17.54 Notwithstanding these advantages, there are risks in allowing adverse possessors to enter a caution against first registration. In particular, there is a risk of the procedure being abused by the entry of a caution in the absence of a well-founded claim to adverse possession.

17.55 We consider that the risk of abuse of unfounded claims outweighs the possible advantages of enabling adverse possessors to enter a caution against first registration. In particular we note that the number of genuine claims to adverse possession of unregistered land is now likely to be small given the spread of registration, while much remaining unregistered land is likely to be rural and therefore more susceptible to spurious claims. Therefore we do not propose recommending reform of section 15 of the LRA 2002.

17.56 In the absence of ability to prevent first registration of an extinguished title, the question then arises as to the legal consequence of registration taking place.

17.57 As we have seen in Chapter 2, registration operates as a guarantee of title. A person who becomes registered with title to land is, under section 58 of the LRA 2002, deemed to be vested with the legal estate as a result of the registration even if he or she is not otherwise entitled to the estate. Even where a title has been extinguished through adverse possession, registration will operate to vest legal title in the proprietor. Under section 11 of the LRA 2002, the first registered proprietor takes the land subject to “interests acquired under the Limitation Act 1980 of which the proprietor has notice”. If the first registered proprietor has notice of the adverse possessor’s claim, then it seems that the adverse possessor could apply for alteration of the register under schedule 4 to reflect his or her entitlement to the land. The alteration would be made to give effect to a right “excepted from the effect of registration” and would not attract payment of an indemnity to the registered proprietor. Alternatively, if the adverse possessor is in occupation of the land, then his or her rights may also be protected on first registration as an overriding interest under schedule 1, paragraph 2. Again, an alteration of the register to give effect to an overriding interest does not attract payment of an indemnity.

59 LRA 2002, s 11(4)(c).
60 LRA 2002, sch 4, para 2(1)(c).
61 The circumstances in which an indemnity is payable are discussed in Chapter 14.
62 See para 13.54 above.
17.58 It is possible, however, that the first registered proprietor will not have notice of the adverse possessor's claim and that the adverse possessor will not be in occupation of the land. That may be the case, for example, where having extinguished title under the Limitation Act 1980 the adverse possessor has moved out of possession of the land at the time of first registration.63 In our 2001 Report we suggested that in such circumstances the registered proprietor would take free from the adverse possessor, who would not be able to obtain an alteration of the register.64 The interpretation given to mistake under the Act suggests that may not in fact be the case. As we have seen in Chapter 13, there is a mistake in the register “whenever the registrar would have done something different had he known the true facts” at the time an entry was made on the register.65 If the registrar was aware of the fact that the title had been extinguished, then the application for registration would have been rejected. Therefore the registration appears to be a mistake.

17.59 The more difficult question is whether alteration of the register would constitute rectification. For the alteration to be a rectification, it must be to correct a mistake in a manner that “prejudicially affects the title of the registered proprietor”.66 This question is significant; if the alteration is a rectification, then the registered proprietor would be entitled to an indemnity if the register is rectified in favour of the adverse possessor (and the adverse possessor would be entitled to an indemnity if a decision is made not to rectify). Further, a registered proprietor in possession is given specific protection in respect of rectification. The register cannot be rectified against a proprietor in possession without his or her consent unless the proprietor has caused or substantially contributed to the mistake, or it would be unjust not to make the alteration.67 In the absence of such protection, there would be a duty to alter the register against the registered proprietor unless "exceptional circumstances" could be shown.68

63 Once an adverse possessor has extinguished the owner's title under the Limitation Act 1980 the adverse possessor's title is the superior title to the land. The adverse possessor does not need to remain in possession to retain his or her title: a title that has been extinguished cannot be revived.
64 Law Com No 271, para 3.47.
65 See para 13.79 above.
66 LRA 2002, sch 8, para 11(2)(b).
67 LRA 2002, sch 4, para 3(2).
68 LRR 2003, r 126.
It could be argued that the registered proprietor’s title is not prejudicially affected precisely because title had been extinguished; it is the operation of adverse possession, not registration, that has “prejudicially affected” the registered proprietor’s title. This argument, however, appears incompatible with section 58 of the LRA 2002. Analytically, it is difficult to separate registration of a person as proprietor pursuant to a fraudulent disposition (which is recognised as giving rise to a claim to rectification), from registration of a title that has been extinguished. In both instances, the registered proprietor would not have been vested with title but for the registration. In the case of a forged disposition, an argument that losses arise from the forgery rather than from registration is specifically precluded by paragraph 1(2)(b) of schedule 8. That sub-paragraph reflects a provision contained in the LRA 1925 designed to reverse the controversial decision in A-G v Odell. In that case, which was decided under the Land Transfer Acts 1875 and 1897 (legislation that preceded the LRA 1925) a registered charge was transferred to Odell by forgery perpetrated by the chargee’s solicitor. When the forgery was discovered, the register was rectified to restore the charge. On Odell’s application for an indemnity, it was held that no indemnity was payable as the losses were attributable to the forgery, rather than to the rectification of the register. That decision was reversed by the LRA 1925. Schedule 8, paragraph 1(2)(b) now provides that “the proprietor of a registered estate or charge claiming in good faith under a forged disposition is, where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged”. To say that losses suffered by a person who becomes registered with title that had been extinguished are attributable to adverse possession rather than to registration would reintroduce the A-G v Odell fallacy long after it had been laid to rest.

[1906] 2 Ch 47.
17.61 It may appear counter-intuitive to suggest that a first registered proprietor who becomes registered with an estate that has been extinguished through adverse possession should be entitled to an indemnity; there was no estate in land to register. As we have seen in Chapter 14, however, it is a feature of the title promise made in the LRA 2002 (and in previous legislation) that an indemnity can be claimed by a person who, as a matter of common law, would not receive any title; for example because the transfer of land is void. There are a number of reasons for accepting the entitlement to an indemnity where a first registered proprietor is registered with an extinguished title. First, as explained above, the entitlement arises as a direct result of section 58 of the LRA 2002 and it is difficult to distinguish registration of an extinguished title from any other instance of the operation of section 58. Secondly, section 11(4), as we have seen in paragraph 17.57 above provides that on first registration the estate vests in the proprietor subject to rights acquired under the Limitation Act 1980 “of which the proprietor has notice”. This provision appears to represent a policy decision that the first registered proprietor does not take subject to rights acquired under the Limitation Act 1980 of which he or she does not have notice. Thirdly, under the LRA 1925, rights acquired by adverse possession were overriding interests that would have bound a first registered proprietor even in the absence of actual occupation by the adverse possessor at the time of registration. If that category of overriding interest had been maintained in respect of first registration, then it is clear that no right to an indemnity would arise. The registered proprietor’s entitlement to an indemnity is therefore in part the consequence of the policy decision to remove that category of overriding interest. Given that the set of facts that would give rise to an indemnity has not, as far as we are aware, arisen, it appears unlikely that acknowledging that the indemnity provisions are invoked will lead to significant claims, although it is not possible to discount either the risk of claims being made or their financial significance.

17.62 We provisionally propose 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 application for alteration of the register should be classed as a rectification.

Do consultees agree?

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70 LRA 1925, s 70(1)(f).

71 Under the transitional provisions in the LRA 2002, sch 12, para 7, a right acquired under the Limitation Act 1980 prior to the LRA 2002 coming into force was an overriding interest on first registration for three years.
Registration of possessory title by an adverse possessor

17.63 Under the general law of adverse possession, an adverse possessor is considered to acquire a freehold title from the moment that he or she enters into adverse possession. Although the matter is not beyond doubt, it appears that the adverse possessor's title is a legal freehold.\(^{72}\) The question then arises whether the adverse possessor can register his or her freehold title under section 9(5) of the LRA 2002. Section 9(5) (in so far as is relevant for the current discussion) provides that a person may be registered with possessory title "if the registrar is of the opinion – (a) that the person is in actual possession of the land …".

17.64 An application for registration with possessory title could arise in two circumstances. First, an adverse possessor of unregistered land could apply for registration prior to extinguishing title under the Limitation Act 1980. Secondly, an adverse possessor in registered land may apply for registration with possessory title (whether before or after completing ten years of adverse possession).

17.65 In the case of unregistered land, Land Registry's Practice Guide says that an application for registration prior to extinguishing title will be rejected.\(^{73}\) Commentators are divided on whether Land Registry's approach accurately reflects the current law.\(^{74}\) In the case of registered land it would appear contrary to the policy of the LRA 2002 to enable possessory title to be registered. Claims to adverse possession should be determined under schedule 6, which could be circumvented if registration with possessory title is secured under section 9(5). In particular, it should be borne in mind that possessory title is, on application, automatically upgraded to absolute title after 12 years provided that the applicant remains in possession.

17.66 There may in fact be little incentive for an adverse possessor to register a possessory title. Doing so may draw attention to his or her claim to the land and therefore prompt the registered proprietor to commence proceedings to bring the adverse possession to an end. There may also be a question, in light of the decision in *Parshall v Hackney*,\(^{75}\) whether a claimant who became registered proprietor with a possessory title could continue to be in adverse possession. There, in a different context,\(^{76}\) the court held that a person cannot be in adverse possession of land in respect of which he or she is a registered proprietor. Although in that case the claimant was registered with absolute title, it must at least be open to question whether a claimant could be in adverse possession following registration with possessory title.

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\(^{72}\) Law Com 254, para 10.23.

\(^{73}\) 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 (16 September 2015) para 8.

\(^{74}\) A summary of the different views is provided by S Jourdan and O Radley-Gardner, *Adverse Possession* (2nd ed 2011) paras 21.30 to 21.37.


\(^{76}\) The case concerned a situation of double registration, where the same piece of land had been registered under two different titles. The case is considered in Chapter 13.
17.67 In registered land, the argument against enabling registration of possessory title under section 9(5) of the LRA 2002 is overwhelming. It should not be possible for an adverse possessor to circumvent the procedure in schedule 6. Although the matter is not put beyond doubt by the legislation, the purpose of schedule 6 as providing the only route to acquisition of title by an adverse possessor was recognised by the court in Swan Housing Association Ltd v Gill.\textsuperscript{77}

17.68 In unregistered land, the arguments as to whether registration with possessory title should be permitted appear finely balanced. As the authors of Megarry & Wade explain, the argument against permitting registration is that an adverse possessor does not appear to meet the terms of section 9(5). That section refers to a person who is in occupation “by virtue of the estate”. An adverse possessor “is not in possession by virtue of that estate but vice versa”.\textsuperscript{78} Jourdon and Radley-Gardner suggest, however, that on Megarry & Wade’s interpretation an adverse possessor would not be entitled to apply for registration even after extinguishing title by adverse possession as he or she would still not be in occupation “by virtue of the estate”.\textsuperscript{79} Enabling registration even before title has been extinguished may reduce the risk, discussed at paragraph 17.50 above of a person becoming first registered proprietor of an extinguished title. In our discussion at paragraph 17.55 above we have rejected the idea of enabling adverse possessors to enter a caution against registration through the risk of abuse. That risk may not be as strong in the case of an application for registration with possessory title in respect of which greater evidence is required.

17.69 While the arguments in unregistered land are balanced, it would be an unnecessary complication for entitlement to a possessory title to differ according to whether the application relates to first registration of unregistered land or registration of title to land in respect of which there is an existing registered title.

17.70 We provisionally propose that an adverse possessor of unregistered land should not be able to apply for registration with possessory title until title has been extinguished under the Limitation Act 1980.

Do consultees agree?

17.71 We provisionally propose that an adverse possessor of registered land should not be able to apply for registration except through the procedure in schedule 6.

Do consultees agree?

\textsuperscript{77} [2013] 1 WLR 1253.

\textsuperscript{78} Megarry & Wade, para 7-036.

\textsuperscript{79} Above, para 21-035.
Can time continue to run when an adverse possessor is registered with possessory title before prior title has been extinguished?

17.72 Stakeholders have drawn our attention to uncertainty in the current law that arises where an adverse possessor of unregistered land obtains first registration with possessory title on the basis that he or she has extinguished the owner’s title, but it is subsequently shown that the title had not yet been extinguished. When these facts come to light, the possessory title is closed and the land reverts to being unregistered. It is unclear, however, whether the claimant’s use of the land during the period in which he or she is registered with possessory title can be a continuance of the adverse possession.

17.73 Different views on this point have been expressed in decisions of the Tribunal (and its predecessor, the Adjudicator). In two decisions, when Judge Owen Rhys was Deputy Adjudicator, he suggested that adverse possession cannot continue to run during a period of registration with possessory title.80 In Moore v Buxton, Mr and Mrs Buxton became first registered proprietors with possessory title of land on the basis of adverse possession. The prior title to the land was then purchased by Mr Moore who applied to alter the register on the basis that the title had not been extinguished at the date of the registration. It was held on the facts that Mr and Mrs Buxton had never in fact taken possession of the land. In a side discussion,81 however, Judge Rhys held that once Mr and Mrs Buxton became registered proprietors they could not be in adverse possession. Judge Rhys considered that there could not be two legal freehold estates in registered land. As Mr and Mrs Buxton were vested with legal title on registration,82 despite not having extinguished the prior title, Judge Rhys considered that the prior title became an equitable estate. The equitable estate was preserved on Mr and Mrs Buxton’s registration with possessory (rather than absolute) title,83 which would enable Mr Moore to seek alteration of the register to give effect to an estate “excepted from the effect of registration”.84 Under section 96 of the LRA 2002, no limitation period runs against “an estate in land … the title to which is registered”. Judge Rhys interpreted the reference to an estate in land in the provision as necessarily referring to Mr and Mrs Buxton’s registered estate.85 Judge Rhys also considered that for so long as Mr and Mrs Buxton were registered proprietors, they were entitled to possession. Mr Moore could bring possession proceedings against them only after obtaining alteration of the register and therefore did not have a cause of action to recover the land in order to enable section 17 of the Limitation Act 1980 to extinguish his title.86

82 LRA 2002, s 58.
83 LRA 2002, s 11(7).
84 LRA 2002, sch 4, para 5(c).
86 Above at [27].
17.74 This interpretation has some attractions. As we have seen at paragraph 17.66 above, in *Parshall v Hackney*\textsuperscript{87} (in a different context) it has been held that a person cannot be in adverse possession of land in respect of which he or she is registered proprietor. While that case concerns the position of parties with absolute title, there is consistency between Judge Owen Rhys’ analysis in *Moore v Buxton* and the court’s decision in *Parshall v Hackney*.

17.75 Notwithstanding, the reasoning in *Moore v Buxton* is not entirely unproblematic.\textsuperscript{88} In particular, it is not necessarily the case that there can only be one legal freehold title to registered land.\textsuperscript{89}

17.76 More recently, in *Sexton and Kember v Gill*,\textsuperscript{90} Judge Owen Rhys has revisited earlier decisions on the effect of registration with possessory title. He has concluded that registration does not preclude, during the period of registration, the operation of the Limitation Act 1980. We agree with this more recent conclusion. As a matter of policy, preventing adverse possession from continuing to run when a person is registered with possessory title creates difficulties. It appears to place at a disadvantage adverse possessors who seek to regularise their title by applying for registration, over those who keep quiet about their claim. Keeping the adverse possessor’s claim off the register appears inconsistent with the goal of creating a complete and accurate register and may create difficulties for a subsequent purchaser of the land who is unaware of the adverse possession.

17.77 It is important to note that an adverse possessor who applies for possessory title before the prior title has been extinguished may be acting entirely in good faith. For example, where an adverse possessor’s use of land has become more extensive over time, he or she may reasonably believe that possession of land commenced at an earlier time than is in fact found to be the case. Alternatively, the adverse possessor may have completed 12 years of possession, but be unaware that the land is subject to a different and longer period of limitation.\textsuperscript{91}

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\textsuperscript{87} [2013] EWCA Civ 240, [2013] Ch 240.

\textsuperscript{88} S Jourdan and O Radley-Gardner, *Adverse Possession* (2nd ed 2011) para 21.38. When Judge Owen Rhys was Deputy Adjudicator, he responded to their criticism in *Secretary of State for Transport v Quest Maidstone Ltd* [2011] EWLandRA 2010_0210 at [40].

\textsuperscript{89} This is discussed in the context of enlargement of leasehold estates under Law of Property Act 1925, s 153 at paras 3.4 to 3.6 above.

\textsuperscript{90} [2015] EWLandRA 2013_0472_0473.

\textsuperscript{91} Eg, *Secretary of State v Quest Maidstone Ltd* [2011] EWLandRA 2010_0210 where the land was owned by the Crown and therefore a limitation period of 30 years applied.
We consider that there are good reasons for enabling a limitation period to continue to run while an adverse possessor is registered with possessory title in the mistaken belief that the prior title has been extinguished. In the previous part of this chapter we recommended that an adverse possessor in unregistered land should only be able to apply for registration with possessory title once the title in respect of which he or she is in adverse possession has been extinguished. We do not consider these policies to be inconsistent with each other. The effect of our previous recommendation is that an adverse possessor should not be registered with possessory title before the prior title has been extinguished. The situation we are dealing with here is one in which the adverse possessor believes that he or she has extinguished title at the time of registration, but that belief proves to be wrong. To ensure consistency, however, we recommend that the period of adverse possession should only continue to run where the adverse possessor reasonably believes that the prior title had been extinguished.

We provisionally propose that where an adverse possessor in unregistered land is registered with possessory title in the reasonable (but incorrect) belief that the prior title has been extinguished, the period of adverse possession should continue to run while the possessory title is open.

Do consultees agree?

Adverse possession by a tenant

Under the general law of adverse possession, when a tenant obtains title to land through adverse possession a presumption is drawn that the tenant is acting on behalf of his or her landlord. Once title has been extinguished by adverse possession the land becomes subject to the terms of the lease. When the lease is terminated, title to the land acquired by adverse possession reverts to the landlord as part of the landlord’s freehold reversion. The operation of the presumption is contentious. As the late Mr Justice Laddie explained, “why should a tenant who trespasses on a third party’s land, perhaps distant from the land the subject of his tenancy, acquire title which passes to his landlord?” Mr Justice Laddie suggested that the rule appears “feudal”. In many cases, however, the tenant will have been able to occupy the land only because of his or her lease and the land and the practical benefit of the land will be connected to enjoyment of the leased land.

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92 Kingsmill v Millard (1855) 11 Exch 313, 318 to 319. For an account of the operation of the presumption see S Jourdan and O Radley-Gardner, Adverse Possession (2nd ed 2011) ch 25.

93 Batt v Adams (2001) 82 P&CR 32 at [38].

94 Above.

17.81 Whether the presumption should operate raises questions that go beyond the current update of the LRA 2002. The LRA 2002 did not intend to affect the operation of the presumption. As Dr Emma Lees has demonstrated, however, the procedure in schedule 6 is not currently compatible with the operation of the presumption. Schedule 6 requires an application to be made by "a person ... if he has been in adverse possession". A successful application results in the claimant being registered as "the new proprietor of the estate". These provisions enable a tenant to apply for registration as proprietor of the estate in relation to the land in which the tenant has been in adverse possession. That is the appropriate outcome only in a case where the presumption is rebutted.

17.82 Land Registry’s Practice Guide explains that it is prepared to treat the fact an application is made by the tenant as evidence that the tenant intended the encroachment to be for his or her own benefit. The application is treated in that way when it is apparent that the tenant is aware of the issues relating to encroachment as explained in the Practice Guide. Where it is not clear that the tenant is aware, Land Registry writes to the tenant and proceeds with the application only where the tenant confirms that he or she wishes to do so.

17.83 Schedule 6 does not, however, enable the landlord to apply to become registered proprietor on the basis of his or her tenant’s adverse possession, as the landlord is not the person who has been in adverse possession. Where the presumption applies, therefore, there is no means for the outcome of that presumption to be reflected on the register.

17.84 We acknowledge that the operation of the presumption in favour of the landlord is contentious, but we have explained that its operation lies outside the scope of the current project. While the presumption exists, the procedure in schedule 6 should allow the legal outcome of the operation of the presumption to be reflected on the register. That requires enabling the landlord to apply to be registered with title to the land on the basis of the adverse possession by the tenant. That would mean, in effect, that the land is added to the lease and so the tenant’s use of the land becomes subject to the terms of the lease. On the termination of the lease, the land will pass to the landlord with the freehold reversion. That will reflect the position that applies under the general law of adverse possession.

17.85 It would remain possible for the tenant to apply for registration under schedule 6 where the tenant intended the encroachment to be for his or her own benefit and so the presumption is rebutted.

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97 LRA 2002, sch 6, para 1(1).

98 LRA 2002, sch 6, para 4.


100 Above.
We provisionally propose that where a tenant is in adverse possession of land (other than land belonging to the landlord) and the presumption that the tenant is acting on behalf of his or her landlord is not rebutted, the landlord should be able to make an application under schedule 6 based on the tenant’s adverse possession.

Do consultees agree?

We have excluded from our proposal the situation where a tenant claims to be in adverse possession of land that is owned by the landlord. We understand that it is not uncommon for Land Registry to receive applications from tenants under schedule 6 who claim to be in adverse possession of their landlord’s land. Such applications may arise, for example, where a tenant has used a loft or a basement of a property that is not part of the lease. Where a tenant enters into possession of land belonging to the landlord that is not part of the lease, as Malcolm Merry explains, “it is to be presumed that the intention of the tenant is to annex to the demise the encroached-upon land so as to enable him to occupy that land as if it were part of the demise”. \(^{101}\)

Dr Emma Lees suggests that the principle of encroachment operates in such circumstances as:

an independent doctrine which relies on possession, but not on limitation or adverse possession in the strict sense. Nor is it a true proprietary estoppel, but something akin to it in the nature of a specific rule based on certain presumptions as to intention arising from the landlord and tenant relationship. It is therefore, in this author’s opinion, best understood as a doctrine separate from adverse possession.\(^{102}\)

Land Registry’s Practice Guide 4 provides that tenants who accept the presumption that the land is to be annexed to the lease can apply for first registration of leasehold title to the land.\(^ {103}\) An application for registration is possible only where the tenant’s lease has more than seven years to run, as leases for seven years or less are not registrable.\(^ {104}\) Alternatively the tenant may apply for alteration of his or her existing title on the basis of the annexation of the land by encroachment.

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104 LRA 2002, s 3(3).
PART 7
CHARGES
CHAPTER 18
FURTHER ADVANCES

INTRODUCTION

18.1 In this part of the Consultation Paper we examine two areas of the LRA 2002 relating to registered charges. In this chapter we review the provisions which deal with the tacking of further advances under a registered charge. In the following chapter we analyse the effect of a particular section of the LRA 2002 which governs sub-charges.

18.2 In the course of our review of these issues it has become apparent that in many instances they raise questions which go beyond the LRA 2002. The provisions in the LRA 2002 which deal with charges do not form a comprehensive code relating to the taking of security over registered land, but instead are underpinned by an extensive body of mortgage law, much of which applies in relation to a range of assets other than merely registered land. There is therefore a tension in any potential reform of this area between clarifying and improving the law in relation to charges of registered land, and avoiding trespass into the rest of the law of mortgages, or producing reforms which have unexpected or inconsistent effects.

18.3 This tension is not new. In our 1998 Consultation Paper we explained that “our proposals are not intended to be a substitute for the thorough reform of the law of mortgages which is undoubtedly required”. We also noted in our 1998 Consultation Paper that our 1991 Report, Transfer of Land – Land Mortgages, which made recommendations for sweeping changes to the law on mortgages, was not accepted by the Government because it was not supported sufficiently widely.

1 Tacking is explained at para 18.9 below.
2 Law Com 254, para 9.1.
3 (1991) Law Com No 204.
4 There was also some concern that it would not fit with the land registration scheme: see Written Answer, Hansard (HC), 19 March 1998, vol 308, col 709. This emphasises why it is important that the subject matter of land registration and mortgages are looked at in the round and not in isolation from one another.
18.4 Since that time there have been repeated calls for an examination of mortgage law. In July 2009 the then Government stated that it was asking the Law Commission to conduct a review of the fundamental principles of residential mortgage law, but no formal approach was made. In 2011 Land Registry responded to the Law Commission’s consultation on its Eleventh Programme of law reform identifying a number of problems with the current law. The project was considered for inclusion in the Programme, but it was not possible to gain sufficient Government support to enable us to carry out work in this area at that time.  

5 See 11th Programme of Law Reform (2011) Law Com No 330, http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc330_eleventh_programme.pdf (last visited 21 March 2016). We are aware that, since that time, a working party of the Financial Law Committee of the City of London Law Society has identified a number of areas where it believes the law of secured transactions could be improved and has published its own draft proposals: see www.citysolicitors.org.uk (last visited 21 March 2016).

18.5 We expect to be consulting on our Thirteenth Programme of law reform later this year. In advance of that consultation we would like to take the opportunity that this consultation paper now presents to ask for consultees’ views on whether a review of mortgage law is desirable. We would be happy to hear from consultees on this point either as part of a formal response to this Consultation Paper, or on a more informal basis if preferred.

18.6 We explained in our Eleventh Programme of Law Reform that a project on mortgage law could take a wide range of forms. We gave examples of both generic areas that could be examined (such as enforcement) and individual problems. Assuming that a project on mortgage law were to attract sufficient support, we envisage that the project would be likely to be focused on mortgages of land (though not exclusively registered land). It could however extend to instances where there are problems with the law as it applies to mortgages of all assets. We do not currently anticipate that the project would include issues which arise solely in the context of mortgages of non-land assets.

18.7 We invite the views of consultees as to whether the Law Commission should conduct a project reviewing the law of mortgages as it applies to land. If consultees consider a project should be so conducted, we invite consultees to share examples of areas that such a project should cover. Please include evidence as to the problems that the law is creating in practice and the potential benefits of reform.

18.8 Against this background we now turn to consider the issues that stakeholders have raised regarding the provisions of the LRA 2002 which govern further advances. As will be seen, after careful consideration of what can properly be achieved within the land registration regime, we conclude that many of these issues are not suitable for inclusion in the current land registration project. Such issues may however be appropriate candidates for review as part of a project conducting a wider review of mortgage law. We would therefore welcome submissions from consultees on the particular issues we have identified below. We stress, however, that the ambit of a project on mortgage law would in no way be limited to the issues which we identify below.

FURTHER ADVANCES UNDER SECTION 49 OF THE LRA 2002

Background

18.9 “Tacking” describes the means by which a creditor with a charge securing an original advance, is able to use the charge to secure a further advance and so obtain priority for the further advance over sums secured by any second or subsequent charge.footnote{7}

18.10 Even prior to the LRA 2002, there were at least three different sets of rules relating to tacking:

(1) for registered land under the LRA 1925;

(2) for unregistered land under the Law of Property Act 1925,footnote{8} and

(3) for other assets under common law.

It would therefore in theory be possible to make amendments to the registered land regime in isolation (and indeed, this approach was adopted in the LRA 2002). However, where the subject-matter of those amendments would raise wider questions about the right to tack which would also be applicable to other types of asset (including, but not limited to, unregistered land) we are of the view that it is not desirable to take forward those amendments in respect of registered land in isolation without considering the issue in the wider context.

18.11 We have therefore adopted the following approach in this chapter. Where the root of an issue is the wording of the LRA 2002, we have considered what solutions may be available. Even here, however, it may be that a range of solutions presents itself. A “narrow” solution would result in an amendment to the LRA 2002 to govern the position in relation to registered land. A “wide” solution may go further and also have an impact on tacking in relation to other assets. In this consultation paper, for the reasons outlined, we must necessarily contain ourselves to the narrow solutions. Where, on the other hand, the root of an issue lies not in the LRA 2002 but in the general law of tacking, we have taken the view that the issue is out of scope of this Consultation Paper.

18.12 We noted in our 2001 Report that the subject of further advances was the most contentious issue that emerged during the preparation of the draft Bill that became the LRA 2002.footnote{9} The result was section 49 of the LRA 2002, which deals with further advances made under registered charges. That section provides:

(1) The proprietor of a registered charge may make a further advance on the security of the charge ranking in priority to a subsequent charge if he has not received from the subsequent chargee notice of the creation of the subsequent charge.

footnote{7} Re Black Ant Company Ltd (In Administration) [2016] EWCA Civ 30 at [1], by Richards LJ.

footnote{8} Law of Property Act 1925, s 94. This remains in force in relation to unregistered land.

footnote{9} Law Com 271, para 7.1.
(2) Notice given for the purposes of subsection (1) shall be treated as received at the time when, in accordance with rules, it ought to have been received.

(3) The proprietor of a registered charge may also make a further advance on the security of the charge ranking in priority to a subsequent charge if—

   (a) the advance is made in pursuance of an obligation, and

   (b) at the time of the creation of the subsequent charge the obligation was entered in the register in accordance with rules.\textsuperscript{10}

(4) The proprietor of a registered charge may also make a further advance on the security of the charge ranking in priority to a subsequent charge if—

   (a) the parties to the prior charge have agreed a maximum amount for which the charge is security, and

   (b) at the time of the creation of the subsequent charge the agreement was entered in the register in accordance with rules.

(5) Rules may—

   (a) disapply subsection (4) in relation to charges of a description specified in the rules, or

   (b) provide for the application of that subsection to be subject, in the case of charges of a description so specified, to compliance with such conditions as may be so specified.

(6) Except as provided by this section, tacking in relation to a charge over registered land is only possible with the agreement of the subsequent chargee.

18.13 A number of issues have been raised with us in connection with section 49. We examine each of these in turn below, analyse whether they can properly be considered for inclusion within the project and, where appropriate, suggest some possible solutions.

\textsuperscript{10} The relevant rule is LRR 2003, r 108.
18.14 We would add one further comment, and corresponding question, by way of introduction to these issues. We noted in our 2001 Report that the tacking provisions in the LRA 1925 were not much employed.\(^1\) We have received anecdotal evidence to the effect that this remains true of the corresponding provisions under the LRA 2002. We understand that this is because, at least on high value commercial transactions, inter-creditor agreements, or deeds of priority, are likely to be used instead.\(^2\) However, we anticipate that there will be lower value transactions, particularly where the borrower is a natural person, where section 49(1) remains the only option for a second chargee to protect itself against further advances by the first chargee. As such, it may be that reliance on section 49 varies as between the primary and secondary tiers of the lending market.

18.15 We invite the views of consultees as to the circumstances in which the provisions in section 49 are most likely to be relied upon by all tiers of lender. Where lenders prefer to enter into agreements between themselves to regulate the position, is this because the legislation is perceived to be inadequate, or simply because commercially it is desirable for arrangements to be put on a contractual footing?

**Issue 1 – loans which provide for drawdown in instalments**

18.16 It has been submitted to us that it is not clear what should happen in the following situation:

A takes a secured loan of £1,000 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 instalments over 10 months. Five months into this process, A takes a further secured loan from C, which is drawn down immediately.

A similar scenario may arise, for example, where finance is provided to fund a development of land, where drawdown of each instalment is triggered by a specified stage in the development process having been reached.

18.17 The question that has been raised is whether, in the situation described in paragraph 18.16 above, the five instalments of the loan from B which are drawn down after the loan made by C are “further advances”, such that they only have priority over C’s loan if they are protected in one of the means provided for by section 49 of the LRA 2002. Typically this protection would be achieved through the noting on the register of the obligation to make the further advances, under section 49(3).\(^3\)

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\(^1\) Law Com 271, paras 7.19 and 7.23. Para 7.19 explains that the LRA 1925 did not abolish the common law rules on tacking.

\(^2\) LRA 2002, s 49(6) provides that, except as provided by s 49, tacking is only possible with the agreement of the subsequent chargee.

\(^3\) Section 49(3) is further considered at paras 18.42 to 18.46 below.
18.18 Section 49(3) was derived from section 30(3) of the LRA 1925, which was in similar terms.\textsuperscript{14} It is clear that it was intended that the scenario outlined above should be governed by section 49.\textsuperscript{15} We are not aware of anything which would alter that conclusion.

18.19 The meaning of the term “further advance” was recently considered in the case of Re Black Ant Company Ltd (In Administration).\textsuperscript{16} Mr Nicholas Strauss QC, sitting as a Deputy Judge of the High Court, said:

\begin{quote}
In the absence of any directly relevant authority on the meaning of “further advances”, one must start with the language of the statutory provisions, and with their purpose. As regards the language, the ordinary meaning of a “further advance” is obviously an advance of further or additional funds. As regards the purpose, it is in my view to ensure that priority is not obtained for an advance which a second mortgagee who had received truthful replies to normal enquiries would not know that the first chargee had made or was under an obligation to make.\textsuperscript{17}
\end{quote}

18.20 Although the facts of the case do not raise the issue under consideration here, it is apparent from section 49 that the fact that a lender is obliged to advance a sum of money does not preclude that sum constituting a further advance. This interpretation is supported by an article by Shearman & Sterling which describes the effect of the anti-tacking provisions in section 49 as being “to limit the priority afforded to the earlier registered charge to advances made by the time of the charge and to ‘further advances’ which the holder of the charge was obliged by its terms to make”.\textsuperscript{18}

\begin{itemize}
\item 14 See Law Com 271, explanatory notes, para 228 which accompanied the draft Bill. Our 1998 Consultation Paper identified a different problem with the wording of LRA 1925, s 30(3) which was solved by LRA 2002, s 49(3): see Law Com 254, para 7.9.
\item 15 See Law Com 254, para 7.7; Law Com 271, para 7.22.
\item 16 [2014] EWHC 1161 (Ch), [2014] All ER (D) 122 (Apr).
\item 17 Above at [24]. The Court of Appeal approved the statement that the court must start with the language and purpose of the statutory provisions: [2016] EWCA Civ 30 at [18].
\item 18 Shearman & Sterling, “United Kingdom: mortgages – tacking” (2014) 29 Journal of International Banking Law and Regulation N85, N86. See also R Coleman, “Further advances under a secured loan: Land Registration Act 2002 s.49” [2014] Conveyancer and Property Lawyer 430, where the author discusses whether a “first” advance can constitute a “further advance” where the advance is made after the charge is entered into, and a similar discussion in R M Goode, Legal Problems of Credit and Security (3rd ed 2003) para 5.19 in the context of Law of Property Act 1925, s 94.
\end{itemize}
18.21 Assuming that our analysis of the scenario in paragraph 18.16 above (as being governed by section 49) is correct, there remains a question as to whether consultees agree that this outcome is appropriate. We are conscious that this question goes to the heart of what constitutes a “further advance” and therefore has the potential to affect the law on tacking in relation to assets other than registered land.\(^{19}\) We therefore ask consultees to tell us if either they believe our conclusions in relation to the current law are incorrect, or they believe that the effect of the current law as we have described it is causing problems in practice. These submissions are unlikely to be taken forward as part of this project but will be considered in the context of whether there is a case for a wider review of mortgage law, as outlined at paragraphs 18.5 to 18.7 above.

18.22 We invite the views of consultees as to whether the fact that, where a loan is drawn down in instalments, those instalments are classified as “further advances”, is causing problems in practice.

**Issue 2 – further advances may only be made by the registered proprietor of the charge**

18.23 The second issue which stakeholders have raised with us is that section 49 only permits tacking by “the proprietor of a registered charge”. The problem has been described to us in the following terms:

In the case of syndicated loans, the proprietor of the charge will typically be the Security Agent as trustee for the syndicate banks generally. The Security Agent may itself be one of the lending banks and make its own further advances, but the other syndicate banks may make further advances direct to the borrower (or through a facility agent), according to their agreed contributions to the total loan. It cannot therefore be said that those advances are made by the “proprietor of the registered charge”. This reduces the usefulness of these statutory provisions.

\(^{19}\) So far as unregistered land is concerned, s 94(1) of the Law of Property Act 1925 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. It may therefore be that the point is of no consequence in relation to unregistered land, but it may still be of some matter in relation to tacking which occurs in relation to other types of (non-land) asset.
18.24 There are differences in the relevant wording used in section 49 of the LRA 2002 from that used in relation to registered land under section 30 of the LRA 1925 and that which governs unregistered land under section 94 of the Law of Property Act 1925. However, the differences are not material for the purposes of this issue and so it would appear that this is not an issue which has been created by the LRA 2002. The problem would seem to have existed in relation to registered land prior to the LRA 2002 and still exists in relation to mortgages of unregistered land, although we would expect that the tacking provisions applying to unregistered land are rarely used.

18.25 Given that the problem is not confined to registered land we have given careful thought as to whether it is appropriate for us to consider this issue as part of the current project. We are provisionally of the view that this issue can be distinguished from issue 1, above. Issue 1 raises questions about the interpretation of a specialised term or concept ("further advances"), which is also used in other contexts, outside registered land. On the other hand, the LRA 2002 devises a system which governs tacking in relation to registered land. There is already one method of tacking which is only applicable to registered land. In our view it would therefore be possible to extend these provisions to provide for tacking by persons other than the registered proprietor of the charge without trespassing on the tacking rules in relation to other assets.

18.26 It seems to us that the issue set out at paragraph 18.23 above amounts to a policy decision as to whether tacking should be permitted in the circumstances described. We therefore invite submission from consultees as follows.

18.27 We invite the views of consultees as to whether 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.

18.28 We invite consultees to submit evidence as to whether, given the use of inter-creditor agreements to regulate priority within the commercial lending market, an extension to the persons who can make further advances under section 49 would be likely to have an effect in practice.

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20 See LRA 1925, s 30(3), which permits tacking "where the proprietor of a charge is under an obligation, noted on the register, to make a further advance…".

21 Law of Property Act 1925, s 94(1) permits the making of further advances by "a prior mortgagee" (as defined in s 205(1)(xvi)).

22 Not least because the creation of a protected first legal mortgage will trigger first registration under LRA 2002, s 4(1)(g).

23 See LRA 2002, s 49(4).
18.29 It would be necessary to define carefully the class of persons who could make further advances on the security of a registered charge in this way. Given that we envisage that the proposal would be of most use in the context of syndicated loan transactions (as outlined above), one possibility could be to allow tacking by a person who is a beneficiary under an express trust of the registered charge. Another possibility could be to permit tacking by “the creditor or creditors to whom the obligation secured by the charge is owed”.24

18.30 If the ability to tack under section 49 was extended to persons other than the proprietor of a registered charge, this could not affect the provision governing the person to whom notice must be given in order to prevent tacking (by any person) under section 49(1), which would remain the registered proprietor of the charge. This is because it is not reasonable to expect a subsequent chargee to give notice to anyone other than the registered proprietor of the prior charge. It would be up to the parties involved in the syndication to make arrangements to ensure that such a notice was disseminated to the other lenders in order to avoid the making of a further advance without priority.

18.31 We invite the views of consultees, if they believe 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, as to who should be enabled to do so.

**Issue 3 – section 49(1) applies to notice of any subsequent charge (not just notice of registered charges)**

18.32 Section 49(1) provides that:

The proprietor of a registered charge may make a further advance on the security of the charge ranking in priority to a subsequent charge if he has not received from the subsequent chargee notice of the creation of the subsequent charge.

18.33 Section 49(1) does not just regulate priority as between registered charges. Any chargee – whether the proprietor of a registered charge or not – may give notice, and therefore prevent tacking, pursuant to section 49(1). It is therefore open to the holder of an equitable charge to give notice to a registered chargee and prevent that registered chargee from making any further advances on the security of the registered charge.

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24 We have gratefully borrowed this wording from the definition of a chargee at para 24.1 of the draft *Secured Transactions Code* (July 2015), prepared by the Secured Transactions Reform working party of the Financial Law Committee of The City of London Law Society. The discussion draft of the *Secured Transactions Code* can be found at www.citysolicitors.org.uk (last visited 21 March 2016).
18.34 In the scenario outlined in the previous paragraph, the registered charge may contain a prohibition on the creation of any further charges. This prohibition may be reflected in a restriction on the register which prevents the registration of a subsequent charge without the consent of the first chargee. The effect of this restriction is that any subsequent charge can only take effect in equity, as it cannot be completed by registration. It has been suggested to us that to allow a subsequent chargee of an unregistered charge to obtain priority over further advances made by the first (registered) chargee through the giving of notice to the first chargee is unfair as it circumvents the restriction on the register.

18.35 A restriction can only prevent the registration of a registrable disposition. It has no effect on a disposition which is not required to be (or not in fact) registered. So the entry of a restriction preventing the registration of a second charge cannot prevent the grant of a second charge which takes effect in equity (although it can, assuming the relevant formalities have been met in order for the charge to be capable of existing at law, prevent the completion of that charge by registration). In this sense, to borrow a well-used legal metaphor, a restriction can be used as a shield, but not as a sword. It seems to us that the argument which has been submitted to us is attempting to use the restriction to do a job for which it was not designed and ought not to be used.

18.36 Of all the modes of tacking permitted by section 49 of the LRA 2002, section 49(1) has the longest pedigree. We explained in our 2001 Report that:

The fundamental rule in relation to tacking at common law is that a first mortgagee, whose mortgage covers both what is due and further advances, cannot claim priority for those further advances over the mortgage of a second mortgagee, of whose mortgage he has notice when he made the further advances.

18.37 The rule preventing tacking by a first mortgagee who has notice of a second mortgagee therefore has its origins in common law. It is reproduced in section 94 of the Law of Property Act 1925 which governs tacking in unregistered land. This section makes it clear that it makes no difference whether the second mortgage is legal or equitable.

25 LRA 2002, s 27. We discuss the type of restriction referred to in Chapter 10. See in particular paras 10.12 to 10.14 and 10.20 to 10.25 above.

26 Law Com 271, para 7.19, citing *Hopkinson v Rolt* (1861) 11 ER 829. *Hopkinson v Rolt* is discussed at para 18.51 below.
Section 30 of the LRA 1925 was structured somewhat differently, and envisaged that Land Registry would serve a notice on a registered chargee before making an entry on the register that could affect the priority of any further advances made by the first chargee. Section 30 was therefore directed at situations where an entry was to be made on the register, but it is notable that that entry need not have been the completion of a subsequent charge by registration, but could have been the entry of a notice in respect of a subsequent charge.\textsuperscript{27} We noted, however, in our 2001 Report that lenders in the position of the second chargee preferred not to rely on this provision but instead served notice themselves on the first chargee under the common law rules of tacking. Section 49 of the LRA 2002 was therefore structured differently from its predecessor under the LRA 1925, to reflect the practice of lenders.\textsuperscript{28}

We have already noted in Chapter 10 that it would be inappropriate for us to opine on the validity of contractual provisions in charges prohibiting the creation of further charges.\textsuperscript{29} In our 2001 Report we similarly said that we would not take a position as between first and second tier lenders and that “we consider that we should adopt a similarly neutral approach to the tacking of further advances”.\textsuperscript{30}

We would further add that the question of whether it should be possible for an equitable chargee to give notice preventing tacking by a legal chargee is one which is not limited to charges over registered land. We therefore believe that it would not be appropriate to consider this issue in isolation as part of a project examining the LRA 2002. However, we would be happy to receive submissions on this issue from stakeholders in order to evaluate whether it could potentially form part of a wider review of mortgage law, as outlined at paragraphs 18.5 to 18.7 above.

As part of our call for evidence in relation to a separate project on mortgage law, we invite consultees to share their experiences of any benefits or difficulties caused by the principle that an equitable chargee may serve notice on a prior legal chargee and thereby prevent the legal chargee’s right to tack.

Issue 4 – further advances made pursuant to an obligation

The next issue which stakeholders have raised relates to section 49(3) of the LRA 2002:

The proprietor of a registered charge may also make a further advance on the security of the charge ranking in priority to a subsequent charge if—

(a) the advance is made in pursuance of an obligation, and

\textsuperscript{27} The distinction is important because a restriction does not prevent the entry of a notice.

\textsuperscript{28} Law Com 271, paras 7.23 to 7.25.

\textsuperscript{29} See para 10.23 above.

\textsuperscript{30} Law Com 271, para 7.27.
(b) at the time of the creation of the subsequent charge the obligation was entered in the register in accordance with rules.\textsuperscript{31}

18.43 Stakeholders have suggested that this provision is problematic. In order for a chargee to take advantage of section 49(3), the obligation to make further advances must exist not simply at the point of grant of the first charge, but at the time the further advance is made. By definition, by this time a second, competing charge has been entered into. The difficulty is that, at the very point at which a chargee needs to rely on section 49(3) to assert priority, the obligation which was set out in the first charge may have been released, with the result that reliance on the section is no longer possible.

18.44 Stakeholders have submitted various reasons why the original obligation to make a further advance may have been released. The first is that the charge document itself is likely to provide that the obligation to make a further advance does not apply if the borrower is in breach of covenant under the charge. The charge document is also likely to prohibit the borrower from granting subsequent charges. Since the borrower has done so, it will be in breach of the first charge, which will have released the lender from its obligation to lend. Indeed, it has been argued that the creation of a second charge always releases the first chargee from an obligation to make further advances, which would undermine section 49(3).\textsuperscript{32} The first charge may also require the borrower to comply with a number of covenants, including perhaps a covenant to keep the property in repair. It is very difficult to ensure absolute compliance with a repairing covenant, with the result that if at the time the further advance is made the borrower is in technical breach of its repairing covenant, the lender will not have been obliged to lend, and will no longer be protected by section 49(3).

18.45 We have already noted that section 49(3) was derived from section 30(3) of the LRA 1925, which was in similar terms. So far as unregistered land is concerned, section 94(1) of the Law of Property Act 1925 also 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. The issue which has been raised therefore goes beyond registered land and would appear to be a problem in relation to tacking rules more widely.

\textsuperscript{31} The relevant rule is LRR 2003, r 108.

\textsuperscript{32} 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.
The wide range of possible solutions to the issue also suggests that it is not suitable for inclusion in a project on land registration. This is a good example of an issue where it would be possible to construct a “narrow” solution within the LRA 2002, but where other potential solutions would have a much wider impact beyond land registration. We believe that a project focused on mortgage law is the right vehicle to compare and contrast these very different types of solutions. Therefore we do not make a recommendation in respect of this issue.

Issue 5 – advances up to a maximum amount under section 49(4)

Our final issue concerns a method of tacking which was introduced by the LRA 2002 under section 49:

(4) The proprietor of a registered charge may also make a further advance on the security of the charge ranking in priority to a subsequent charge if—

(a) the parties to the prior charge have agreed a maximum amount for which the charge is security, and

(b) at the time of the creation of the subsequent charge the agreement was entered in the register in accordance with rules.

(5) Rules may—

(a) disapply subsection (4) in relation to charges of a description specified in the rules, or

(b) provide for the application of that subsection to be subject, in the case of charges of a description so specified, to compliance with such conditions as may be so specified.

We explained in our 2001 Report that:

One such solution was suggested in Transfer of Land – Land Mortgages (1991) Law Com No 204, para 9.4: that the obligation to make further advances should, for the purposes of priority, be treated as continuing even if the obligation has been released by a subsequent default by the mortgagor. As set out at para 18.3 above, our recommendations in this Report were not accepted by the Government.

Our attention has for example been drawn to the approach which has been taken in certain parts of the United States, under which we understand that all future advances, whether optional or obligatory, are secured with the priority of the original mortgage, but the borrower can “cut off” the further advance clause in the original mortgage in order to raise finance elsewhere: see D A Whitman, “Mortgage Drafting: Lessons from the Restatement of Mortgages” (1998-1999) 33 Real Property, Probate, and Trust Law Journal 415, 422.

In our 2001 Report we commented that there may be types of secured lending for which the new form of registered charge should not be available at all, or only subject to specified conditions, and gave as a possible example by way of illustration a regulated agreement secured by a land mortgage under the Consumer Credit Act 1974: see Law Com 271, para 7.36. However, no rules have been made under s 49(5), and so s 49(4) is currently applicable to all forms of charge.
The justification for having a charge that secures a maximum security sum is that any intending Lender 2 will know from the amount of the security sum what the maximum liability of the borrower will be under the charge . . . . This enables Lender 2 to make a better evaluation as to whether the property is good security for the proposed second charge. This form of charge will therefore be advantageous to secondary lenders. Representatives of the primary lenders have objected to this new form of charge. They point to the difficulty of fixing a maximum sum in advance to cover (for example) a charge to secure an overdrawn current account. Lenders would tend to fix the maximum sum at a much higher level than the likely borrowings might appear to warrant to be sure that they were adequately secured. However, while acknowledging these difficulties, there might be forms of lending for which this form of charge is ideal. An example might be where a development is to be funded by a series of agreed advances secured on the land to be developed. In such a case it might well be possible to calculate the maximum potential liabilities with some accuracy at the outset. ... We would stress that this ... method of securing further advances is no more than an option. No lender is forced to adopt it and it has the considerable merit of simplicity.36

18.49 A mortgagee who is under an obligation to make further advances can of course avail itself of section 49(3) in order to tack, through noting that obligation on the register. Section 49(4) goes further because it allows a lender to tack up to the maximum amount stipulated even if the lender was not under any obligation to make the further advances.

18.50 We are aware that section 49(4) has been the subject of some criticism.37 In order to understand this criticism, it is first necessary to explain the effect of the nineteenth century decision in *Hopkinson v Rolt*.38

18.51 In *Hopkinson v Rolt*, the House of Lords decided (by a majority) that once a mortgagee has notice of a second charge, any advance thereafter made by the first ranking mortgagee will rank after the second charge. This was a departure from previous case law which had held that a second mortgagee, knowing about the first mortgage, took its security subject to the prior ranking of all advances made or to be made by the first mortgagee. Lord Chelmsford, in discussing the previous case, said:

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36 Law Com 271, para 7.35.
37 See paras 18.52 to 18.54 below.
38 (1861) 11 ER 829.
The reason upon which the doctrine proceeds is, “that it was the folly of the second mortgagee with notice to take such security”. Now, what is this but to say that a mortgagee, by taking a security for advances which may never be made, may effectually preclude a mortgagor from afterwards raising money in any other quarter? ... If it is to be held that [the first mortgagee] is always to be secure of his priority, a perpetual curb is imposed on the mortgagor’s right to encumber his equity of redemption.39

18.52 Stakeholders have submitted that section 49(4) of the LRA 2002 undermines the principle in Hopkinson v Rolt, and have directed us to a number of published criticisms of the subsection on this basis. Fisher & Lightwood’s Law of Mortgage makes the point that was acknowledged in our 2001 Report (extracted at paragraph 18.48 above):

Lenders are likely to fix a maximum sum at a much higher level than the borrowings might appear to warrant to be sure that they are adequately secured.40

The authors then continue:

The agreed amount being in excess of that which is anticipated to be advanced will also be appropriate so as to ensure that the maximum sum will provide a sufficient margin so as to secure any unpaid interest and costs ... . However, the effect of stipulating a high “maximum amount” is that this may impede the mortgagor's ability to raise further finance.41

18.53 Professor Sir Roy Goode is equally critical:

[Section 49(4)] represents a marked departure from the rule in Hopkinson v Rolt in that it applies even if the further advance is made after notice of the subsequent charge and is entirely voluntary. Effectively this enables the first chargee to obtain a monopoly of the debtor’s non-purchase-money financing by the simple device of specifying a maximum sum well beyond any amount that the chargee is likely to lend or the asset given in security is likely to be worth. This seems a retrograde step.42

18.54 Emmet & Farrand points out that the decision in Hopkinson v Rolt is grounded not in the effect of tacking on a subsequent chargee, but on its impact on the borrower, and suggests that section 49(4) does not strike the right balance between borrowers and lenders in this regard.43

39  (1861) 11 ER 829, 845.
41 Above, n 8.
43 Emmet & Farrand, para 25.213.
Section 49(4) was a creation of the LRA 2002, and applies only to tacking in relation to registered land. On the face of it, therefore, it would not be inappropriate for us to consult upon its possible repeal or replacement. The difficulty is that the arguments which have been levied in favour of its repeal rely on its apparent inconsistency with the principle in *Hopkinson v Rolt*. However, we are aware from our discussions with stakeholders that this principle is itself not wholeheartedly accepted by those who represent secured lenders, and there are some who would prefer a return to the position where unlimited tacking by a first mortgagee is permitted. What would appear to be a narrow issue relating to a subsection in the LRA 2002 in fact strikes at the heart of the policy underpinning tacking at common law. This is arguably not suitable for resolution by a land registration project.

Figures from Land Registry suggest that the use of section 49(4) fluctuates. In the six-month period between April and September 2012, Land Registry received 101 applications to note a maximum amount for which a charge is security pursuant to section 49(4). However, in the ten-month period between April 2015 and January 2016 the figure was a total of 16 applications.

We would like to gather evidence to see whether section 49(4) is having the impact in practice that commentators fear. The responses we receive will then inform the approach that we take in relation to the future of section 49(4). We therefore ask consultees the questions below.

We invite the views of consultees on the extent to which lenders are relying on section 49(4) to stipulate a maximum amount for which a charge is security.

We invite consultees to provide any evidence that reliance on section 49(4) in this way is preventing borrowers from obtaining further finance elsewhere.

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44 Or a system which, while in theory permitting unlimited tacking, builds in a different form of protection for the borrower such as (for example) that adopted in parts of the United States: see n 34 above.
CHAPTER 19
SUB-CHARGES

INTRODUCTION
19.1 In this chapter we analyse a provision of the LRA 2002 which relates to sub-charges. A sub-charge is a mortgage of the registered charge.

19.2 A chargee of land will have powers over the land which is the subject of the charge. We consider, when a sub-charge exists, in whom those powers are vested. We make provisional proposals which should protect those dealing with land which is subject to a sub-charge.

BACKGROUND LAW
19.3 Under the LRA 2002, a registered proprietor of a registered estate may create a legal mortgage in one of two ways:

(1) by a charge expressed to be by way of legal mortgage; or

(2) by a charge to secure the payment of money.

Following the LRA 2002 it is no longer possible to create a mortgage of a registered estate by demise or sub-demise.

19.4 The registered proprietor of a charge may wish to create a sub-charge. A legal sub-charge of a registered charge can only be created by charging at law with the payment of money indebtedness secured by the registered charge. It is not possible to create a sub-charge by a transfer by way of mortgage, sub-demise, or a charge by way of legal mortgage.

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1 For example, a power of sale under the Law of Property Act 1925, s 101.
2 LRA 2002, s 23(1)(a) and Law of Property Act 1925, ss 85(1) and 86(1).
3 LRA 2002, s 23(1)(b).
4 A mortgage by demise operates as a lease by the mortgagor to the mortgagee. We noted in our 1998 Consultation Paper that mortgages by demise were “virtually obsolete”: Law Com 254, para 9.4.
5 According to Land Registry, in the six months from April to September 2012, 541 sub-charges were registered.
6 LRA 2002, s 23(2)(b). It must also be completed by registration: LRA 2002, s 27(3)(b).
7 LRA 2002, ss 23(2)(a) and 23(3). LRA 2002, s 132(1) defines the term “sub-charge” in the LRA 2002 to mean a charge under s 23(2)(b). Note that LRA 2002, s 51, which provides for a registered charge to have effect (if it would not otherwise do so) as a charge by deed by way of legal mortgage, only applies to a charge over a registered estate, and not a charge of a registered charge.
19.5 The registered proprietor of a sub-charge will have the powers of a mortgagee in relation to the property which is the subject of the sub-charge (in other words, the principal charge). However, section 53 of the LRA 2002 supplements these powers by also conferring on the sub-chargee powers in relation to the property which is the subject of the principal charge: the land itself. Section 53 provides that:

The registered proprietor of a sub-charge has, in relation to the property subject to the principal charge or any intermediate charge, the same powers as the sub-chargor.

**THE EFFECT OF SECTION 53: CONCURRENT OR EXCLUSIVE POWERS?**

19.6 Section 53 therefore operates to confer powers on the sub-chargee in relation to the land which is the subject of the principal charge. However, we understand that there may be some uncertainty as to whether the effect of section 53 is to vest these powers exclusively in the sub-chargee for the duration of the sub-charge, to the exclusion of the sub-chargor, or whether the powers are held by the sub-chargee and the sub-chargor concurrently.

**Protection of disponees under the LRA 2002**

19.7 The answer is important if the sub-chargor wishes to exercise a power of sale. We have seen in Chapter 5 that section 24 of the LRA 2002 provides that a registered proprietor (of a registered estate or a registered charge) may exercise “owner’s powers”. Owner’s powers include a power to make a disposition of any kind permitted by the general law, subject to the limitations in section 23. Section 26 provides protection for those who deal with registered proprietors:

(1) Subject to subsection (2), a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition.

(2) Subsection (1) does not apply to a limitation—

(a) reflected by an entry in the register, or

(b) imposed by, or under, this Act.

(3) 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 a disposition).

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8 Under the terms of the sub-charge, and also the Law of Property Act 1925, s 101.
9 Section 53 also caters for the possibility of a sub-charge of a sub-charge.
10 We have already discussed some of those limitations at the start of this chapter, in relation to the kind of mortgages and sub-mortgages which are permitted by the LRA 2002.
19.8 Section 26 provides protection for disponees in relation to dispositions by a registered chargee of the registered charge itself. This is because section 23(2)(a) of the LRA 2002 defines owner’s powers in relation to a registered charge as “power to make a disposition of any kind permitted by the general law in relation to an interest of that description...”. We consider that the italicised words can only refer to the charge. This is supported by the fact that, by virtue of section 24, a person is only entitled to exercise owner’s powers over the registered estate if he or she is the registered proprietor of that estate (or entitled to be registered as proprietor).

19.9 We acknowledge that in expressing this opinion we are differing from the view taken by Mr Justice Newey in Skelwith (Leisure) Ltd v Armstrong, who said:

'It seems to me that the “owner’s powers” of the registered proprietor of a charge (who will be entitled to exercise such powers pursuant to section 24(a) of the LRA 2002) must be capable of extending to powers to deal with the charged property.'

19.10 However, we note that if owner’s powers in section 23(2)(a) extended to dispositions of the property subject to the charge, section 26 would similarly apply to such dispositions by a registered chargee. Dispositions by a chargee of the property subject to the charge are, however, the subject of a separate provision: section 52 of the LRA 2002.

19.11 Section 52 extends the protection offered to disponees under section 26 to dispositions by the proprietor of a registered charge of the property subject to that charge:

(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).

19.12 The powers of disposition referred to include a power of sale of the registered estate which has been charged. Our 2001 Report explained that the purpose of section 52 is:

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11 See also para 5.41 above.

12 [2015] EWHC 2830 (Ch), [2016] 2 WLR 144 at [48]. We also acknowledge that the view adopted by the learned judge is supported by Megarry & Wade, para 7-050 n 317, and Ruoff & Roper, paras 28.001, 28.002 and 28.008.

13 Under the Law of Property Act 1925, s 101.
... to protect any disponee in the case where, for example, the chargee purports to exercise a power of disposition (typically a sale or the grant of a lease) in circumstances where either it had no such power at all or that power had not become exercisable. In the absence of some entry on the register (such as a restriction), the disponee’s title cannot be questioned.14

The protection offered by section 52 confers greater protection on disponees than the corresponding provisions in the Law of Property Act 1925.15

19.13 The effect of section 52 is therefore that a purchaser of the registered estate from a registered chargee purporting to exercise a power of sale can assume for the purposes of the LRA 2002 that the chargee has the power to sell the registered estate, unless there is an entry on the register (usually in the form of a restriction) which limits that power.

19.14 Although section 52 is similar in effect to section 26, they are not identical. Both sections are subject to any entry on the register to the contrary. However, section 26 is also subject to any limitation on the powers of disposal which is imposed by, or under, the LRA 2002 itself. This qualification is not found in section 52.16

19.15 We noted above that it is uncertain whether section 53 vests powers in relation to the property subject to the principal charge exclusively in the sub-chargee for the duration of the sub-charge, or whether those powers are held by the sub-chargee and the sub-chargor concurrently.17 Section 52 is not expressed to be subject to any limitation on powers imposed by the LRA 2002. In theory this means that a purchaser of the registered estate from the principal chargee, where the title also contains a registered sub-charge, should not need to worry about what the true effect of section 53 is. Such a purchaser will, however, under the terms of section 52 still be bound by any entry in the register which reflects a limitation on the principal chargee’s powers. There will be an entry in the register in respect of the sub-charge. There is an argument that the entry referring to the sub-charge could constitute an “entry in the register to the contrary” for the purposes of section 52. This entry in relation to the sub-charge could then operate to negate any protection which could potentially be offered by section 52 to a disponee in relation to a sale of the registered estate by the principal chargee.

14 Law Com 271, para 7.7.
15 Law of Property Act 1925, s 104(2) and 104(3). Section 52 will, for example, protect a disponee even if the power of sale has not arisen: see Law Com 271, para 7.8.
16 This is presumably because the powers of disposition to which section 52 refers are not contained within the LRA 2002 itself, but outside that statute (for example, in the Law of Property Act 1925). Similarly, the limitations imposed by the LRA 2002 on the creation of certain types of mortgage (see s 23(1)(a) and 23(2)(a)) have no applicability in the context of a disposition by a chargee of the property subject to the charge.
17 See para 19.6.
18 In this chapter we will use the terms “sub-chargor” and “principal chargee” interchangeably to refer in each case to the registered proprietor of a charge over a registered estate, out of which the sub-charge is derived.
19.16 If the effect of section 53 is that, for so long as a registered sub-charge exists, the principal chargee no longer has a power of sale over the property which is the subject of the principal charge, then a purchaser of the registered estate from the principal chargee will not receive a good title. This is despite the fact that there is no restriction on the register which expressly limits dispositions of the registered estate by the registered chargee.

19.17 As we will see, the position is not necessarily any better if, in contrast, section 53 does no more than confer powers on the sub-chargee (without, in and of itself, taking them away from the sub-chargor).\(^\text{19}\) Arguably, the entry on the register in respect of the sub-charge may still be enough to indicate that the principal chargee's powers may be limited.

**Position prior to the LRA 2002**

19.18 Section 53 of the LRA 2002 was not intended to change the law.\(^\text{20}\) It seems that prior to the LRA 2002 there was some support in legal texts and commentaries for the suggestion that the grant of a sub-charge had the effect of suspending the chargee's rights under the principal charge.\(^\text{21}\) It could therefore be thought (given that there was no intention to change the law) that the effect of section 53 of the LRA 2002 was to vest the sub-chargor's powers in the sub-chargee to the exclusion of the sub-chargor.

**The case of Credit & Mercantile Plc v Marks**

19.19 However, in May 2004, not long after the LRA 2002 came into force, the Court of Appeal delivered its decision in the case of Credit & Mercantile Plc v Marks (Credit & Mercantile).\(^\text{22}\) In that case the registered proprietor of a house had granted a legal charge in August 2002 to secure a loan. The house owner fell into arrears with repayments and the chargee sought possession of the property. The house owner argued that the chargee was not entitled to possession because the chargee had, at the same time as the charge was entered into, granted a sub-charge.

19.20 The Court of Appeal examined the relevant statutory provisions under the LRA 1925 regime. It also reviewed the leading texts on the subject. Lord Justice Clarke, who delivered the judgment of the court, said:

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\(^{19}\) See discussion of the case of Credit & Mercantile plc v Marks [2004] EWCA Civ 568, [2005] Ch 81, at para 19.19 and following below.

\(^{20}\) See Law Com 271, para 7.12. The equivalent provision under the previous regime was rule 163(2) of the LRR 1925, which provided that “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 charge”.


\(^{22}\) [2004] EWCA Civ 568, [2005] Ch 81. The case is the result of an appeal from a County Court decision from 17 December 2003, although the original decision to grant possession was made in March 2003.
In all the circumstances we do not think that any of the texts to which we have referred supports a general proposition that, wherever there is a sub-mortgage, the principal mortgagee’s rights against the mortgagor are transferred to the sub-mortgagee and lost by the principal mortgagee or in some way suspended otherwise than as provided in the sub-charge. If any of them does support such a general proposition, we respectfully decline to follow it. In our view all depends upon the true construction of the sub-mortgage in the particular case.\textsuperscript{23}

19.21 The court referred to an earlier case, \textit{Owen v Cornell}.\textsuperscript{24} In that case a mortgage was created by demise for a term of three thousand years. The mortgagee gave notice to the mortgagor, calling in the loan. Subsequently the mortgagee created a sub-mortgage, being a sub-demise for a term of three thousand years less one day. Later, the principal mortgagee sought possession of the property. Lord Justice Clarke in \textit{Credit & Mercantile} summarised the decision in \textit{Owen v Cornell} as follows:

A mortgagee’s right of possession derives from his estate or interest in land and is not dependent upon fault. Despite the sub-charge, the principal mortgagee retains his estate and, even if he has transferred the right to collect the debt and thus cannot complain of default, that is irrelevant because he can take possession unless he is unable to do so by reason of the terms of the principal mortgage.\textsuperscript{25}

19.22 Although the type of mortgage in \textit{Owen v Cornell} was a sub-mortgage by demise, the Court of Appeal in \textit{Credit & Mercantile} thought it would be surprising if the position were different if the head mortgage and the sub-mortgage were each a charge by way of legal mortgage.\textsuperscript{26} Similarly, even though the land in \textit{Owen v Cornell} was unregistered, the Court of Appeal thought that this did not make a difference:

There is no doubt that the claimant retains its separate estate and interest in the land and, absent a transfer of its rights to the sub-chargee in circumstances in which it has divested itself of its right to possession under the principal charge, which (for reasons given above) it has not done, we see no reason why it should not exercise its right of possession under the principal charge. The importance of the \textit{Owen v Cornell} case, which in our opinion was rightly decided, is that it shows that the mere fact of a sub-mortgage does not prevent the principal mortgagee from exercising his rights under the principal mortgage or charge.

\textsuperscript{23} [2004] EWCA Civ 568, [2005] Ch 81 at [38].
\textsuperscript{24} (1967) 203 Estates Gazette 29.
\textsuperscript{25} [2004] EWCA Civ 568, [2005] Ch 81 at [42].
\textsuperscript{26} [2004] EWCA Civ 568, [2005] Ch 81 at [43].
Nor, in our opinion, is there anything in the relevant statutory provisions which leads to any other conclusion. ...27

19.23 The Court of Appeal found that the principal chargee in Credit & Mercantile had a right of possession under the principal charge. It held that “the mere existence of a sub-charge does not divest a principal chargee of such a right”.28 The court left open the possibility that a sub-charge could have such an effect, but thought that the particular form of sub-charge which had been used by the parties in that case did not, and there was nothing in the statutory provisions to lead to any other conclusion.29

ANALYSIS AND PROVISIONAL PROPOSALS

19.24 Credit & Mercantile was a decision under the LRA 1925 regime. The first question we need to consider is whether a similar approach would be taken to the interpretation of section 53 of the LRA 2002. The second question is then whether this is the right approach as a matter of policy, and how this approach would interplay with the other provisions of the LRA 2002 (in particular, section 52).

19.25 The particular form of sub-mortgage used in Credit & Mercantile was expressed to be a charge by way of legal mortgage. It is not possible to create a sub-charge in this manner under the LRA 2002. We note that the form of sub-mortgage in Owen v Cornell was a sub-mortgage by demise, but the Court of Appeal still felt able to apply the principles to the sub-charge in Credit & Mercantile. The court’s reasoning, set out at paragraphs 19.21 and 19.22 above, is essentially that the principal mortgagee retains a separate estate and interest in the land. We do not believe that any difference in the mode of creation of a sub-charge under the LRA 2002 is material to the interpretation of section 53 of that Act.

29 The court in fact found that the sub-chargee had no power to take possession under the terms of the sub-charge until one of a number of specified events had occurred: see above at [26]. So this was not a case of concurrent powers, but of an exclusive power to take possession being vested in the principal chargee.
19.26 The issue the court had to decide in *Credit & Mercantile* was whether the principal chargee had a power to take possession. In the land registration context the question will often be whether the principal chargee has a power of sale.\(^{30}\) We do not consider that the *Credit & Mercantile* decision is limited to the power to take possession. The Court of Appeal placed emphasis on both the conceptual and procedural difference between a transfer of the principal mortgage, which would result in the principal chargee’s rights being transferred to the sub-chargee, and the grant of a sub-charge, which results in the creation of a separate estate.\(^{31}\) In our view this difference applies equally to all rights created by the principal charge. That is not to say that the parties to a sub-charge cannot regulate between themselves how the powers should be distributed; merely that we agree with the Court of Appeal that there is no general proposition that in every case of a sub-charge the rights and powers under the principal charge are transferred to the sub-chargee and lost by the principal chargee.

19.27 For these reasons, we believe that a court which was faced with interpreting section 53 of the LRA 2002 would need to find compelling reasons to depart from the outcome in *Credit & Mercantile*. We have not found any such reasons.\(^{32}\) We have noted that there was no intention to change the law from the position under the 1925 regime. Even if at one time it was thought that the position was that the principal chargee’s powers were automatically transferred wholesale to the sub-chargee, *Credit & Mercantile* now shows the position to be different.\(^{33}\)

\(^{30}\) In the six month period from April to September 2012, Land Registry registered more than 15,000 transfers under a power of sale. The equivalent figure for the period from April to September 2015 was more than 6,000. The statistics do not distinguish what proportion of those were by sub-chargees.


\(^{32}\) We are mindful that, since the reasoning in *Credit & Mercantile plc v Marks* [2004] EWCA Civ 568, [2005] Ch 81 does not rely solely on statutory provisions applicable to land, it may be possible to apply the reasoning to sub-mortgages of other types of property. We are in this Consultation Paper only concerned with the effect of section 53 of the LRA 2002 in relation to sub-charges of registered charges, and offer no comment in relation to what the position should be under mortgage law more generally.

\(^{33}\) See also explanatory notes, para 242 which accompanied the draft Bill included in Law Com 271: “Clause 53 is based upon but extends the effect of rule 163(2) of the Land Registration Rules 1925. Whereas rule 163(2) applies only in relation to property subject to the principal charge, Clause 53 also applies to property subject to any intermediate charge”. 
19.28 We explained above\textsuperscript{34} that a purchaser from the principal chargee will, under the terms of section 52, be bound by any entry in the register which reflects a limitation on the principal chargee’s powers. We set out the argument that the entry in respect of the sub-charge could constitute an “entry in the register to the contrary” for the purposes of section 52. If the effect of section 53 is simply to confer powers on the sub-chargee (but not to the exclusion of the principal chargee), then the entry of a sub-charge on the register will not automatically mean that the powers of the principal chargee are limited for the purposes of section 52. However, this is not the end of the matter as far as a purchaser from the principal chargee is concerned. The decision in \textit{Credit & Mercantile} is not that powers will always be concurrent, but rather that there is no general principle that powers are exclusive to the sub-chargee, and that the position will always be governed by the terms of the sub-charge.

19.29 The fact that whether powers are retained by the principal chargee depends on the terms of the sub-charge is potentially problematic for a purchaser for two reasons. The first reason is that he or she may not be aware of the significance of the entry in relation to the sub-charge, and that the entry may indicate that the principal chargee no longer has a power of sale. Limitations on a power of disposal usually take the form of a restriction.\textsuperscript{35} The significance of the entry in relation to the sub-charge may, therefore, represent a trap for the unwary. The second reason is that even a purchaser armed with this knowledge will need to review the terms of the sub-charge to determine whether the relevant rights remain vested in the person with whom he or she is dealing.

\textsuperscript{34} At para 19.15 above.

\textsuperscript{35} See Law Com 271, para 7.7.
19.30 We believe that the preferable solution is that, unless there is a restriction on the register which limits the principal chargee’s powers of disposition of the registered estate, those powers will be taken to be free from any limitation. That would be the case even if in a particular scenario the terms of the sub-charge provide for the exclusive transfer of the principal chargee’s powers to the sub-chargee. The title of a purchaser from the principal chargee could not be questioned in these circumstances (although this would not affect the unlawfulness of the disposition as between principal chargee and sub-chargee).

It seems to us that this is an appropriate outcome which is in keeping with the treatment by the LRA 2002 of other limitations on the powers of disposition of registered proprietors. If the terms of the arrangement between the principal chargee and the sub-chargee are that the former’s powers are to be limited, the sub-chargee should enter a restriction on the title to reflect that limitation. In the absence of a restriction, a purchaser is entitled to assume that the principal chargee’s powers are unlimited.

19.31 An alternative approach would be to move away from the decision in Credit & Mercantile and propose as a matter of policy that section 53 should operate to transfer the principal chargee’s powers to the sub-chargee, subject to the ability of the parties to contract otherwise. Aside from the fact that we find it difficult to distinguish Credit & Mercantile in this way, we also think that the practical implications of this interpretation of section 53 would be undesirable. A purchaser would need to be aware of the limitation imposed by section 53, and examine the terms of the registered sub-charge in order to ascertain whether, despite that section, the power of sale was retained by the principal chargee.

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36 LRA 2002, s 52(2).
37 See also Chapter 10.
38 We note that the sub-charge in Credit & Mercantile plc v Marks [2004] EWCA Civ 568, [2005] Ch 81 contained a clause comprising an application for a restriction to be entered on the register which provided that no disposition by the principal chargee was to be registered without the consent of the sub-chargee or an order of the registrar. The court suggested that this provision was inconsistent with the idea that the power of sale had been transferred to the sub-chargee: at [18]. It thought that the effect of the clause was that the principal chargee retained its power of sale, subject to a restriction on the way in which it can be exercised. We see the attractions of this argument but respectfully submit that it could lead to anomalies. If correct, the argument would bar the use of a restriction where the powers have been completely transferred to the sub-chargee. Thus a sub-chargee who had allowed some powers to remain with the principal chargee, subject to limitations, would be in a better position to protect him or herself against the wrongful exercise of those powers than a sub-chargee who had insisted on all powers being exclusively transferred. The use of restrictions to protect contractual limitations on the powers of a registered proprietor is discussed in Chapter 10.
19.32 It would be possible to devise a gloss on such a system of exclusive, rather than concurrent, powers whereby a restriction was automatically entered on the title at the time of registration of the sub-charge, to prevent dispositions of the registered estate by the principal chargee. However, provision would also need to be made for sub-charges where the parties had agreed that the principal chargee should retain some or all powers, where a restriction would not be appropriate. The difficulty with this approach is that the entry in respect of the sub-charge remains a potential “entry in the register to the contrary” for the purposes of section 52. Purchasers could not then rely on the absence of a restriction on the register to protect them, and would need to examine the terms of the sub-charge to ascertain the exact position. In order to address this it would be necessary to provide that a purchaser would not be affected by the limitation on the principal chargee’s powers imposed by section 53 unless there was a restriction on the title. Some complicated transitional provisions may be necessary to deal with existing sub-charges under this system.

19.33 For these reasons, we favour the approach set out in paragraph 19.30 above.

19.34 **We provisionally propose that section 53 of the LRA 2002 should be clarified to ensure that its effect is to confer powers on a sub-chargee, not remove them from the sub-chargor. It would be open to the parties to a sub-charge to agree otherwise.**

*Do consultees agree?*

19.35 **We provisionally propose that, unless there is an appropriate restriction on the register, the powers of the sub-chargor shall be taken to be free from any limitation contained in the sub-charge. This would not affect the lawfulness of the disposition as between the sub-chargor and the sub-chargee.**

*Do consultees agree?*

19.36 A particular difficulty arises in connection with a discharge of the principal charge where a sub-charge has been entered into. We understand that it is unclear in this situation which party (the principal chargee or the sub-chargee) should execute a discharge of the principal charge. An application of *Credit & Mercantile* would suggest that the position will be governed by the terms of the sub-charge.
19.37 The issue with a discharge of the principal charge is that such a discharge is not a “disposition” of the charge. Section 52 would not seem to offer protection in relation to a discharge of the principal charge by the sub-chargee; nor would the combination of sections 23(2) and 26 offer protection to a person accepting a discharge of that charge from the principal chargee. Similarly, a discharge of a registered charge is not a disposition for the purposes of a restriction and so cannot be prevented by a restriction. So, on our proposals, a sub-chargee would not be able to protect itself against an unlawful discharge of the principal charge. We would like to consult on whether stakeholders believe that the discharge of a principal charge while there is an existing sub-charge is causing problems in practice.

19.38 We invite consultees to submit evidence of their experience of the discharge of a principal registered charge where there is an existing registered sub-charge. We invite consultees’ views on whether there needs to be a mechanism built into the land registration system to allow a sub-chargee to prevent the principal chargee from discharging the principal charge, where this would not be permitted under the terms of the sub-charge. How do consultees believe this could best be achieved?

Transitional provisions

19.39 It is necessary to consider the effect of our proposals on existing registered sub-charges. If the terms of an existing registered sub-charge limit the powers of disposition of the principal chargee over the registered estate, such limits would currently appear to be given effect by virtue of the fact that the sub-charge is protected by an entry on the register. This means that section 52(1) (protection of disponees) does not apply, with the result that a person dealing with the principal chargee needs to consult the terms of the sub-charge in order to establish what powers are retained by the principal chargee.

19.40 We believe that many sub-charges are likely to be commercial documents that have been negotiated between the parties’ legal advisers, and as a result will contain a detailed exposition of the respective rights of the parties. There may be circumstances where this is not the case, notably in relation to a statutory sub-charge (for example, see section 25 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (charges on property in connection with civil legal services)).


40 The sub-charge may also have been entered into prior to Credit & Mercantile plc v Marks [2004] EWCA Civ 568, [2005] Ch 81, in which case the sub-chargee may have taken the view that it was unnecessary to spell out in the sub-charge that all the powers under the principal charge were now vested in the sub-chargee, if the parties thought that that was the effect of the general law. If our interpretation of the LRA 2002, s 53 is correct, such a sub-chargee may be in an unfortunate position following Credit & Mercantile, but our proposals do not worsen the position for a sub-chargee under such a document.
19.41 Where an existing sub-charge does contain a limitation on the powers of the principal chargee, and if our proposals are adopted, the sub-chargee would need to apply for a restriction on the register in order to ensure that the limitation on the principal chargee’s powers was adhered to in practice. If the sub-chargee did not do so, the limitation would remain enforceable as between the principal chargee and the sub-chargee, but would not affect a purchaser from the principal chargee. We recognise that the restriction, being entered after the entry of the sub-charge, would not necessarily obtain the same priority as the sub-charge and may be subject to interests entered on the title during the intervening period.

19.42 As an alternative, it would be possible for transitional provisions to provide that, where the sub-charge was registered prior to implementation of our proposals, the entry of the sub-charge on the register is, as at present, enough to indicate that there is a limitation on the principal chargee’s powers of disposition, with the result that it would be necessary for a purchaser to examine the terms of the sub-charge. As this would preserve the difficulties of the current law, and give rise to a system whereby a person examining the register would need to check the date of registration of the sub-charge, we are provisionally of the view that this would not be desirable. Our proposals do not alter the contractual bargain which has been made between the parties, which would remain enforceable following reform. We acknowledge, however, that they could reduce the protection afforded to an existing sub-chargee through the land registration system.

19.43 We invite the views of consultees as to whether transitional provisions are necessary for existing sub-charges as a result of our proposals, or if it is sufficient that an existing sub-chargee may apply for a restriction in order to reflect any limitation on the rights of the principal chargee laid down in the sub-charge.
PART 8
ELECTRONIC CONVEYANCING
CHAPTER 20
ELECTRONIC CONVEYANCING

INTRODUCTION
20.1 Electronic conveyancing, or e-conveyancing, is a term without a universally accepted meaning, and, as we will see, different jurisdictions adopt different systems which may all be described as forms of electronic conveyancing. We will use the term to describe a process of dealing with land whereby all or part of the disposition occurs online.¹ The aim of the LRA 2002 was to enable electronic conveyancing to evolve, thereby achieving efficiency savings.² It was also envisaged that a switch to electronic conveyancing would lead to the closure of the registration gap.³

20.2 The LRA 2002 provides the framework for the creation of an ambitious electronic conveyancing model. In our 2001 Report a “dematerialised” conveyancing system was envisaged.⁴ Under that model, all aspects of a transaction, from information provision to registration, would occur electronically.⁵ Creation of interests would occur upon registration and registration would itself be concurrent with the completion of the transaction. It would also be possible for the registrar to manage and coordinate transactions on the network in order to minimise delays.⁶ Although the broad vision for electronic conveyancing was spelled out in our 2001 Report, the LRA 2002 did not contain detailed legislative provisions for its introduction. Instead, a flexible rule making power was included in the Act.⁷ It was felt that this power would best enable the relevant provisions to respond to technological developments.⁸

Progress towards electronic conveyancing
20.3 It is now over 12 years since the LRA 2002 was enacted. In that period several significant steps towards the implementation of electronic conveyancing have been taken.

¹ Law Com 271, para 2.41; Ruoff & Roper, para 1.011; Megarry & Wade, para 7-157.
² Law Com 271, paras 2.41 and 13.1.
³ See para 5.76 above.
⁴ Law Com 271, para 2.48.
⁵ Law Com 271, para 2.52.
⁶ Law Com 271, 13.63 to 13.65.
⁷ LRA 2002, sch 5, para 11(1).
⁸ Law Com 271, para 13.68; Law Com 254, paras 11.18 to 11.19.
20.4 Progress has been particularly strong in the mortgage context. Lenders are able to discharge mortgages electronically leading to their automatic removal from the register.\textsuperscript{9} Rules were also made in 2008 which enable the creation of electronic charges, however, Land Registry’s pilot scheme for electronic charges was halted in 2011.\textsuperscript{10}

20.5 It is also now possible for conveyancers who have a Network Access Agreement to make simple changes to the register online. For example, a conveyancer may effect a change to the register to remove the name of a deceased joint proprietor. In other instances, while the conveyancer cannot change the register itself, the conveyancer can, through use of Land Registry’s network services, lodge electronic applications for certain transactions.\textsuperscript{11} Even where the application cannot be made electronically, Land Registry is encouraging its submission online via the lodgement of scanned copies of paper documents through Land Registry’s e-DRS system.\textsuperscript{12}

20.6 Despite these positive steps, an electronic conveyancing system which implements the model set out in our 2001 Report has not been developed. After having spent a number of years working towards this goal, Land Registry halted the development of an electronic transfer system in 2011. In doing so, Land Registry cited a number of substantive concerns: fraud, timing and take-up and the effect of electronic signatures on overreaching.\textsuperscript{13} Take up of e-charges was also limited. Practitioners expressed concern about the system’s limited application (to re-mortgages and second and subsequent mortgages), the technical difficulties of the process and the use of electronic signatures.\textsuperscript{14}

20.7 We have seen in Chapter 14 that registered title fraud has been a focus of concern in the current paper-based system of conveyancing. It is essential that risks of fraud are minimised as electronic conveyancing is developed. However, conveyancing does not stand alone in a move towards the use of electronic signatures and while it is important that concerns are addressed, to an extent measures to prevent the fraudulent use of electronic signatures will be of general application and lie beyond land registration legislation. In Chapter 14 we have invited views on a number of measures, in the context of the indemnity provisions, that could help prevent identity fraud in respect of dispositions of land.

20.8 In respect of the timing and take-up of electronic conveyancing, Land Registry noted in 2011:

\textsuperscript{11} https://www.gov.uk/guidance/network-services (last visited 21 March 2016).

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In the current market conditions, uptake of a new electronic conveyancing system could be limited, and we do not believe we can justify the cost of setting up a system that, in the foreseeable future, is unlikely to be used by large numbers of conveyancers.\(^\text{15}\)

20.9 Although the property market is now in a healthier state than it was in 2011, the technological advances necessary to allay practitioner fears and achieve an electronic conveyancing model akin to that of our 2001 Report have not occurred.

**A new vision for electronic conveyancing**

20.10 For this wide range of reasons, the electronic conveyancing system which the LRA 2002 envisaged has not come to fruition. While, as we have seen, not all of these reasons relate to the legislative framework in the LRA 2002, this project represents an ideal opportunity to re-examine that framework to see how it can be adapted to facilitate and support the future development of electronic conveyancing.

20.11 In this chapter we focus on developing a new vision for electronic conveyancing. We will argue that the goals of electronic conveyancing need to be adjusted in response to the technical limitations that have become clear since the LRA 2002 came into force in order to provide a more realistic framework for a future electronic conveyancing system. It is important that new aims for electronic conveyancing are feasible and adaptable to future developments. Our starting point for the re-evaluation process is, therefore, the practical problems that stakeholders have identified with the existing legislation. Three problematic features of the current legislation have been drawn to our attention:

1. the requirement of simultaneous completion and registration;
2. the powers for bringing electronic conveyancing into force; and
3. the ability to overreach an interest under a trust of land where a single conveyancer has electronically signed a deed on the behalf of multiple trustees.

20.12 We will devote the rest of this chapter to a consideration of these issues, and make provisional proposals for reform.

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SIMULTANEOUS COMPLETION AND REGISTRATION

The vision for electronic conveyancing in our 2001 Report

20.13 A major goal of our 2001 Report was to enable a system whereby interests are created upon the simultaneous completion and registration of the transaction. Such a system would eliminate the “registration gap”: the period of time that elapses between completion of the transaction and registration. The registration gap is widely criticised as it undermines the register’s utility as a full and accurate record. While a registration gap is maintained, the risks of creation or termination of third party interests by the transferor prior to registration remain. Workarounds such as priority searches and backdating registration to the date the application enters the day list have ameliorated some, but not all, of the practical ramifications of these problems. Those who seek to deal with their interest in the land prior to registration may, for example, find that their capacity to transact is challenged. Moreover, the operational challenges and risks of a multi-stage registration process, namely duplication of effort and error, are heightened.

20.14 In our 2001 Report we devised an electronic conveyancing scheme predicated on a system in which creation of an interest and its registration would be indivisible. The power which was called for had a “double effect”: to mandate use of electronic conveyancing and to require simultaneous completion and registration of dispositions. Mandatory use of electronic conveyancing would lead to all dispositions being effected by a document in electronic form. The power to require simultaneous completion and registration would mean that the electronically created document would only take effect upon registration. Mandatory electronic conveyancing would also require estate contracts to be created electronically; such contracts would only be validated upon entry of a notice on the register. No interest, whether personal or proprietary, would be capable of arising prior to registration as no enforceable contract would exist. Thus, the registration gap would be closed.

16 Law Com 254, para 11.9; Law Com 271, para 2.56.
17 Law Com 271, para 2.45.
18 Law Com 271, para 13.77.
19 LRA 2002, ss 70, 72 and 74.
20 See Ch 5.
21 Law Com 254, para 11.7.
22 Law Com 271, para 13.76.
23 Law Com 271, para 13.74.
24 Law Com 271, para 2.54.
25 Law Com 271, para 13.78.
20.15 The legislative impetus for a move to simultaneous completion and registration is found in section 93 of the LRA 2002. That provision confers a power to require simultaneous electronic creation and registration of a number of dispositions. Upon exercise of the power, both dispositions and contracts to make dispositions would only have effect if they had been electronically sent to Land Registry and met the relevant registration requirements. Rules would be used to set the registration requirements for dispositions or contracts other than registrable dispositions. Reliance on secondary legislation to provide operational details reflects the general approach taken to legislating for electronic conveyancing discussed at paragraph 20.2 above. Non-compliance with either the registration or the electronic communication requirements would result in the disposition being devoid of legal or equitable effect. The thinking was that, if the disposition were to have any effect in the absence of these requirements being met, the principle of a complete and accurate register would be undermined.

Current problems with the vision for electronic conveyancing in our 2001 report
20.16 We consider that simultaneous completion and registration should remain the goal of electronic conveyancing. We have concluded, however, that it is not practical to move directly from a paper-based system to a model of electronic conveyancing based on simultaneous completion and registration. Stakeholders have identified a number of issues with the policy.

20.17 First, the policy in our 2001 Report assumed that technology would develop in a way that has not yet occurred. Simultaneous completion and registration, in the context of a chain of transactions, requires coordination between the dispositions. A particular challenge has been the development of a system that is broadly acceptable to the market.

20.18 Secondly, at the current time, a number of practical barriers stand to block implementation of simultaneous completion and registration. Some of these issues were anticipated in our 2001 Report, for example, the coordination of SDLT payments in an electronic conveyancing system. In contrast with the current system, where an SDLT certificate must be produced prior to registration, SDLT payment would need to be integrated into the registration process.

26 LRA 2002, s 93(1) states that the section applies to a disposition of: a registered estate, a registered charge and an interest which is the subject of a notice in the register. This provision is subject to the caveat that the disposition must also match a description specified by rules.
27 LRA 2002, s 93(2).
28 LRA 2002, s 93(3).
29 Law Com 271, para 4.13.
30 Law Com 271, para 13.79.
31 Law Com 271, para 2.64. See also Inland Revenue, Modernising Stamp Duty on land and buildings in the UK (2002) para 1.6.
Thirdly there remain, at this time, questions as to the desirability of simultaneous transactions. Commercially, the freedom for parties to structure their dealings so that they are completed at a time that suits their interests could be limited by a requirement for simultaneous registration. This is because notional registers would need to be devised and approved prior to registration. Registration would also depend on the state of other dealings that fall within the same transactional chain. Separately, there remain concerns about how the courts would treat incidences of non-compliance; for example where an attempt was made to create or deal with a property right outside the electronic conveyancing system.32 Those who suffer hardship in the wake of non-compliance may attract great judicial sympathy. Professor Martin Dixon has predicted that this sympathy may result in a “boom” in proprietary estoppel claims.33 As we noted in our 1998 Consultation Paper, proprietary estoppel can provide a legitimate safety net.34 An expansive approach to the application of the doctrine could, however, have the effect of circumventing the simultaneous completion and registration requirement and therefore operate contrary to the aim of a complete and accurate register.

The future for electronic conveyancing

In light of these concerns, simultaneous completion and registration does not provide a practical way forward at this time. We feel that for electronic conveyancing to become a reality it is necessary to step back from the goal. We consider that doing so opens up the avenues along which electronic conveyancing could develop.


34 Law Com 254, para 11.16.
Scotland, New Zealand, Ontario and Australia all have advanced systems of electronic conveyancing. In all of these jurisdictions, it is possible to create, execute and register certain kinds of dispositions electronically. There are some similarities and some differences in the electronic conveyancing systems used in different parts of the world. A clear similarity can be found in the signature and authentication requirements. In all of these models electronic signatures, held by professionals, are used at various stages of the process. Clients authorise use of the electronic signature by giving their consent on paper. A stark difference between the jurisdictions is the degree of manual registry checks prior to registration. New Zealand alone enables conveyancers directly to amend the register. In Ontario, upon submission of a document, the document sits on the register subject to being removed by registry staff when its checks are completed. In Australia and Scotland the registration is processed by registry staff.

Uptake of wide scale electronic conveyancing systems elsewhere in the world indicates the demand and opportunity for more electronic dealings in land to take place. Those developments demonstrate what can be achieved in the context of a flexible legal framework. As noted above, some steps have already been taken to bring electronic conveyancing to life in England and Wales. However, progress in the journey to a fully digital Land Registry is hindered by the rigidity of the current legislation. We think that the focus of legislation should no longer be on the implementation of a particular model of electronic conveyancing. Instead, flexibility should be injected into the provisions of the LRA 2002 in order to enable the development and take up of electronic conveyancing along different lines to that envisaged when then legislation was enacted.

Our provisional proposal is that the requirement of simultaneous completion and registration should be removed from the legislation. A consequence of this proposal is that it will be possible to create equitable property rights in between completion of the disposition (or creation of the estate contract) and registration. This will have the effect of replicating, for electronic conveyancing, the present position for paper based conveyancing.

We accept that, as a result of making this proposal, the registration gap will remain a feature of the landscape of registration. Over the years developments in paper based conveyancing, such as priority searches, online submission of SDLT returns and e-DRS, have occurred which have reduced the impact of the registration gap. We discussed the challenges that the gap continues to present in Chapter 5, however, we ultimately concluded that these operational problems cannot be resolved by a legal solution. We hope that providing greater flexibility will facilitate the further development of electronic dealings with land. As experience of electronic conveyancing develops, simultaneous completion and registration should remain the ultimate, if long term, goal.

35 This is not an exhaustive list of jurisdictions which have operational electronic conveyancing systems.


37 See paras 20.4 to 20.5 above.

38 See the Land Registration (Electronic Conveyancing) Rules 2008.
We provisionally propose that:

(1) simultaneous completion and registration should no longer be required in a system of electronic conveyancing implemented under the LRA 2002; and

(2) equitable interests should be capable of arising in the interim period between completion and registration.

Do consultees agree?

POWERS TO IMPLEMENT ELECTRONIC CONVEYANCING

A fertile environment for the implementation of electronic conveyancing needs appropriate legislative tools to be available. Conveyancers cannot move from a paper-based method of practice unless a power to validate dispositions transacted electronically exists. This is, in effect, a “switch on” power. Equally, when a dual (paper and electronic) system becomes unsustainable, a power is needed to require conveyances to be completed online. In other words, a “switch off” power. Such a power has been used by HMRC to require VAT returns to be filed online. We remain of the view that a period of overlap, where both methods of conveyancing are available, is both likely and desirable. This time would enable practitioners to trial the technology available.

The current legislative scheme does contain switch on and switch off powers. Section 91 of the LRA 2002 devises a scheme of electronic formality requirements which will replace those used in paper-based conveyancing. Use of these electronic formalities will only be valid if the disposition is also of a type which falls within subsection 91(2) and is of a kind specified by rules. The power to specify by rules constitutes the “switch on” power; it enables the Secretary of State to designate dispositions which may occur electronically.

39 We are aware that the analogy is not entirely complete – registration in the context of land has the effect of creating proprietary rights. It therefore goes beyond what is achieved by most other types of application outside the land registration context, which merely have an administrative function.

40 Law Com 271, para 13.67.

41 Individuals who wish to conduct their own conveyancing will remain able to do so: see LRA 2002, sch 5, para 7. We do not propose that there should be any change to this provision.

42 LRA 2002, s 91(3).


44 LRA 2002, s 91(2).

45 LRA 2002, s 128(1).
20.28 Section 93 of the LRA 2002 contains the switch off power. Subsection 93(2) requires that, upon activation of the provision, documents must be made and communicated electronically. Section 93 is triggered when the Secretary of State makes rules which require the provision to be applied to specific dispositions. At the moment, this power is indivisible from the power to require simultaneous completion and registration. We proposed at paragraph 20.25 above that the simultaneous registration element be removed from the LRA 2002. The effect of this change, if accepted, is that the purpose of section 93 would be solely to close off paper based conveyancing.

20.29 The necessary powers are, therefore, available in the existing legislation. The means of exercising these powers has, however, been called into question. In our 1998 Consultation Paper and 2001 Report it was emphasised that a legislative framework which permitted flexibility would be required in order to successfully implement electronic conveyancing. At the time, we concluded that the best means of building flexibility into the legislation was to enable electronic conveyancing to be brought in by means of rules. This mode of secondary legislation would also ensure that the rules received appropriate Parliamentary oversight.

20.30 Experience has, however, shown that the creation and amendment of rules to implement electronic conveyancing to be a cumbersome and time-consuming process. Land Registry has indicated to us that some of the existing rules took in excess of 60 weeks to be enacted. We feel that incremental implementation of electronic conveyancing is prevented by the need for this process to be repeated each time that a new interest is phased into the electronic conveyancing regime and out of the paper-based one.

20.31 A possible solution to this issue is to separate out two decisions: exercise of the “switch on” or “switch off” power and the timetable for phasing in and out modes of communication with Land Registry for particular interests.

20.32 The decision to “switch on” electronic conveyancing and then to “switch off” paper-based conveyancing should, we believe, remain in the hands of the Secretary of State. This decision has the capacity to significantly alter conveyancing practice in England and Wales and therefore ought to be subject to parliamentary scrutiny. We hope that the opportunity for parliamentary scrutiny will allay fears that significant changes will be effected without proper checks being carried out.

46 Land Registry has historically closed communication channels, such as fax, by means of a notice issued by the registrar under LRR 2003, sch 2. This method of closing communication can only be used to halt use of means other than post or document exchange.

47 LRA 2002, s 93(5).

48 LRA 2002, s 93(1).

49 Law Com 254, para 11.19; Law Com 271, para 13.68.
The detailed timetable for enabling and requiring particular types of transaction to be conveyed electronically could, however, be set by the Chief Land Registrar. The Chief Land Registrar is arguably the best placed person to determine the timetable as the role requires an understanding of the operational factors affecting the implementation of electronic conveyancing. We do not believe that it is necessary for exercise of the timetabling power, unlike the “switch on” and “switch off” powers, to be subject to parliamentary scrutiny. As discussed in paragraph 20.30 above, parliamentary scrutiny can be very time-consuming. We are concerned that the timetabling power cannot be effectively used while it remains subject to this process.

We also wish to enhance the requirement to consult with stakeholders prior to the introduction of electronic conveyancing and the removal of paper-based conveyancing. The LRA 2002 currently provides that the Secretary of State must consult “such persons as he considers appropriate” before exercising the switch off power.\(^{50}\) We wish to make it clear that this consultation requirement applies equally to use of the switch on power. Further, if the timetable is left to be developed by the Chief Land Registrar, it would also be appropriate to require that power to be exercised following consultation. This requirement would ensure that those directly affected would have their voice heard before the timetabling power is exercised.

We provisionally propose that:

1. the decision to enable electronic conveyancing and the subsequent decision to end paper-based conveyancing should be vested in the Secretary of State, to be enacted through secondary legislation;

2. following the enactment of such secondary legislation, the timetable for the introduction of electronic conveyancing and for ending paper-based conveyancing, in each case on a disposition by disposition basis, should be delegated to the Chief Land Registrar; and

3. the Secretary of State and the Chief Land Registrar should be required to consult with stakeholders before exercising their powers in respect of electronic conveyancing.

Do consultees agree?

OVERREACHING IN ELECTRONIC CONVEYANCING

Delegation to an agent

The discussion, thus far, has concentrated on improving the foundation for implementation of electronic conveyancing. This section of the chapter focuses on the potential interaction between an electronic conveyancing regime and overreaching.

\(^{50}\) LRA 2002, s 93(5).
The current electronic framework found in the LRA 2002 makes provision for a transacting person to delegate their power to sign for the disposition to an agent. This power of delegation was included to enable conveyancers to electronically authenticate dispositions for their clients. When our 2001 Report was written, we envisaged that for a transitional period only professional conveyancers would be issued with electronic signatures. Although we have since been informed that it is likely that electronic signatures will be widely available upon implementation of electronic conveyancing, we still believe this delegation power is commercially useful.

Issues with delegation to an agent

Questions have, however, been raised about whether overreaching will occur if all trustees delegate their power to sign a conveyance, and therefore to give receipt for capital monies, to a single conveyancer. Overreaching describes the process of transferring a beneficiary’s interest in a trust of land to the monies paid by the purchaser. In order for overreaching to be achieved the interest must be capable of being overreached and receipt of capital monies must be given by two or more trustees unless the trustee is a trust corporation.

It is clear that, under the current law, overreaching will not occur when the delegation takes place by power of attorney. Delegation by power of attorney is a formal process which must be completed by deed. Trustees are permitted to delegate their functions to an attorney by virtue of section 25 of the Trustee Act 1925. Section 7 of the Trustee Delegation Act 1999, however, provides that the overreaching requirements are not satisfied when a single attorney acts for two or more trustees:

(1) A requirement imposed by an enactment—

(a) that capital money be paid to, or dealt with as directed by, at least two trustees or that a valid receipt for capital money be given otherwise than by a sole trustee, or

(b) that, in order for an interest or power to be overreached, a conveyance or deed be executed by at least two trustees,

is not satisfied by money being paid to or dealt with as directed by, or a receipt for money being given by, a relevant attorney or by a conveyance or deed being executed by such an attorney.

51 LRA 2002, s 91(6).
52 Authentication by means of electronic signature is a necessary formality requirement in electronic conveyancing: see LRA 2002, s 91(3).
53 Law Com 271, paras 13.20 to 13.21.
55 See LPA 1925, s 2 for the full list of overreachable interests.
56 LPA 1925, s 27.
57 Trustee Act 1925, s 25(6).
(2) In this section “relevant attorney” means a person (other than a trust corporation within the meaning of the Trustee Act 1925) who is acting either—

(a) both as a trustee and as attorney for one or more other trustees, or

(3) as attorney for two or more trustees,

and who is not acting together with any other person or persons.

20.40 It may also be possible for trustees collectively to delegate their power to sign a conveyance to an agent. Section 11 of the Trustee Act 2000 confers on trustees a broad power collectively to delegate any or all of their functions to an agent. Section 11(2) contains express exceptions to the power to delegate and no reference is made in the sub-section to overreaching or trustees’ powers related to overreaching.

20.41 On the face of it, a beneficial interest in a trust of land will be overreached when trustees have delegated their power to convey or to execute deeds to an agent by means of section 11. Nothing in section 11(2) prohibits the delegation of the power, while the wording of section 7 of the Trustee Delegation Act is such that overreaching is prevented only when the delegation is to a “relevant attorney”.58 Delegation under section 11 is to an “agent” rather than an “attorney”.59

20.42 Land Registry, in its second consultation on electronic transfers, argued that trustees’ delegation of their power to sign a conveyance was permissible under section 11 of the Trustee Act 2000.60 Land Registry also contended, on the basis of counsel’s opinion, that overreaching would happen when the delegation occurs under section 11.61 However, a number of consultees expressed doubts as to the legitimacy of delegation of the signatory function under section 11 and therefore of overreaching occurring.62 While Land Registry reported that confidence in their view had been enhanced in the gap between the second and third consultations,63 doubts still permeated the third report on consultation responses.64

58 Trustee Delegation Act 1999, s 7(1).
59 Trustee Act 2000, s 11(1). This language also corresponds with that used to describe delegation in the electronic conveyancing context: see LRA 2002, s 93(6). This suggests delegation, for e-conveyancing purposes, was envisaged to occur via s 11 of the Trustee Act 2000.
Reform

20.43 We consider that delegation of the power to sign a conveyance to an agent should be permitted under an electronic conveyancing regime. The value of a delegation tool will be diminished if trustees and transferees are not confident their actions will ensure overreaching.

20.44 A number of respondents to Land Registry’s third consultation on electronic transfers argued that there is a need for clarification in the primary legislation.\(^{65}\) Our provisional policy is that the legitimacy of trustee delegation under section 11 of the Trustee Act 2000, in the context of electronic conveyancing, should be enshrined in statute. Although delegation under this provision is not likely to be effected by deed\(^{66}\) we believe that a number of checks will protect the beneficiaries’ interests against fraud. First, delegation will only occur if all trustees agree. Secondly, settlors who feel that collective delegation of the signatory function is inappropriate\(^{67}\) may exclude the operation of section 11.

20.45 We also consider that the non-application of the two trustee rule in section 7 of the Trustee Delegation Act 1999 to delegations to agents under section 11 of the Trustee Act 2000 should be confirmed in statute. We do, however, think that this confirmation should only extend to delegations to a conveyancer. Our belief is this position will ensure an effective compromise between the utility of delegation and the need to safeguard the interest of the beneficiaries. Again, our proposals here are confined to delegations of the signatory function in the context of electronic conveyancing.

20.46 Finally, we also provisionally propose to exclude the application of section 7 of the Trustee Delegation Act 1999 to delegation of the power of trustees, by power of attorney, to sign an electronic conveyance and give receipt for capital monies. We adopt this proposal in order to reverse a current oddity in the law, noted by an anonymous Land Registry consultee:

> It would seem strange if the more secure and formal process where there is an attorney, were to produce lesser protection than that of a mere agency.\(^{68}\)

Once more, we recommend that this proposal be limited to delegations to a conveyancer.

20.47 We provisionally propose that the following propositions of law should expressly be confirmed:

(1) trustees may collectively delegate their power to sign an electronic conveyance and give receipt for capital monies to a single conveyancer under section 11 of the Trustee Act 2000;

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\(^{65}\) Above, s 3, question 1.2.


\(^{67}\) Trustee Act 2000, section 26.

(2) a beneficiary’s interest in a trust of land will be overreached when trustees collectively delegate their power to a single conveyancer to sign and electronic conveyance and give receipt for capital monies; and

(3) a beneficiary’s interest in a trust of land will 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 monies.

For overreaching to take place it will remain necessary for the disposition that follows the delegation to be one with overreaching effect.

Do consultees agree?

20.48 The effect of our provisional proposal is that overreaching would take place when trustees collectively delegate their power to execute an electronic conveyance and give receipt for capital monies to a single conveyancer; either as an attorney under section 25 of the Trustee Act 1925, or as an agent under section 11 of the Trustee Act 2000. In doing so, our provisional proposal will remove what is seen as a legal barrier to the development of electronic conveyancing.
PART 9
JURISDICTION OF THE LAND REGISTRATION DIVISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
CHAPTER 21
JURISDICTION OF THE LAND REGISTRATION DIVISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

INTRODUCTION
21.1 The First-tier Tribunal (Property Chamber) took over the functions of the Residential Property Tribunal Service, the Agricultural Land and Drainage Tribunal and, most importantly for our purposes, the Adjudicator to HM Land Registry (the Adjudicator) on 1 July 2013.1 The office of Adjudicator to HM Land Registry was created by the LRA 2002,2 following our recommendation that there should be a completely independent office for the adjudication of land registration disputes.3 The functions that used to be exercised by the Adjudicator are therefore now exercised by the Land Registration division of the Property Chamber of the First-tier Tribunal. In this Consultation Paper we have, for ease of reference, referred to the Land Registration Division of the Property Chamber as "the Tribunal", although of course we recognise that the tribunal service is unified and the Land Registration division is not a free-standing tribunal.

21.2 As we will see below, the Tribunal operates primarily to determine disputes arising out of applications made to Land Registry which cannot be resolved by agreement. It does so in accordance with the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. With one exception,4 disputes are referred by Land Registry. The Tribunal’s running costs are paid by Land Registry.5

JURISDICTION OF THE TRIBUNAL
21.3 The jurisdiction of the Tribunal is conferred by statute (the LRA 2002); the Tribunal has no inherent jurisdiction.6 The jurisdiction conferred by the LRA 2002 is threefold.

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1 Transfer of Tribunal Functions Order 2013, art 4.
2 LRA 2002, s 107.
3 Law Com 271, para 16.1. Before 2002, the function of the Chief Land Registrar to hear a dispute subject to appeal to the court under rr 299 and 300 of the LRR 1925 was delegated to the Solicitor to HM Land Registry in accordance with the Chief Land Registrar’s powers in s 126(5) of the LRA 1925.
4 See para 21.4 below.
5 LRA 2002, s 108(5).
6 See Murdoch v Amesbury [2016] UKUT (TCC) at [57].
(1) If an objection which is not groundless is lodged against an application that has been made to the registrar, and a dispute arises which cannot be resolved by agreement, this “matter” will be referred to the Tribunal, which has jurisdiction to determine it.\(^7\) The Tribunal has the power, instead of deciding a matter, to direct a party to commence court proceedings.\(^8\)

(2) The Tribunal has jurisdiction to determine appeals regarding a decision of the registrar with respect to entry into, or termination of, a network access agreement.\(^9\)

(3) The Tribunal may, on application, make an order which the High Court could make to rectify or set aside a document which:

(a) effects a qualifying disposition of a registered estate or charge;
(b) is a contract to make such a disposition; or
(c) effects a transfer of an interest which is the subject of a notice in the register.\(^10\)

A “qualifying disposition” is a registrable disposition or a disposition which creates an interest which may be the subject of a notice on the register.\(^11\)

21.4 In situations (1) and (2), the issue in question reaches the Tribunal following an application to the registrar. The Tribunal’s jurisdiction under (3) is therefore the only instance in which an application is made directly to the Tribunal. Most disputes which come to the Tribunal fall under its jurisdiction at (1) above. That jurisdiction will now be examined in more detail. The jurisdiction referred to at (2) above, relating to network access agreements, has never been exercised. This will be discussed further below.\(^12\)

\(^7\) LRA 2002, ss 73 and 108(1)(a).
\(^8\) LRA 2002, s 110(1).
\(^9\) LRA 2002, s 108(1)(b) and sch 5, para 4. A network access agreement is an agreement entered into between the registrar and a person who is not a member of Land Registry which gives that person access to a Land Registry network: LRA 2002, sch 5, para 1. A member of Land Registry is a person who is either the Chief Land Registrar or Land Registry staff: LRA 2002, s 99(2).
\(^10\) LRA 2002, s 108(2).
\(^11\) LRA 2002, s 108(3).
\(^12\) See para 21.30 and following below.
Jurisdiction to determine matters arising out of an objection to an application to Land Registry

21.5 By virtue of section 73 of the LRA 2002, anyone may object to an application that has been made to the registrar. We have seen in Chapter 9 that a person must not object to an application without reasonable cause. Where an objection is made, the registrar must decide whether it is groundless. If it is groundless, the registrar may proceed to complete the application. However, if it is not groundless, the registrar must give notice of the objection to the applicant, and the registrar may not then determine the application until the objection has been disposed of. There are a number of ways in which an objection may be disposed of. If it is not possible to dispose of the objection by agreement, the registrar has no choice but to refer the matter to the Tribunal.

21.6 Most cases heard by the Tribunal are therefore referred to it by Land Registry (as opposed to resulting from applications by individual parties).

21.7 The courts have, on a number of occasions, examined the proper role of the Adjudicator and the Tribunal in determining a matter referred under section 73(7) of the LRA 2002. In the High Court decision in Silkstone v Tatnall it was disputed whether the Adjudicator had the power to refuse permission for one of the parties to withdraw their objection to the application once the matter had been referred to the Adjudicator. This involved consideration of whether the role of the Adjudicator was to deal with applications to which objections had been made, or whether it was to determine the existence or otherwise of the substantive rights in dispute. Mr Justice Floyd made the following comments about the jurisdiction of the Adjudicator (which is now the jurisdiction of the Tribunal):

I think that the reference to the Adjudicator is better viewed as a proceeding whose purpose it is to determine the underlying right, quite unlike the administrative procedure in the Land Registry. That is illustrated by the fact that one way in which the Adjudicator may carry out his function is by ordering a party to commence court proceedings, which would also have the effect of determining underlying rights. Proceedings before the Adjudicator are triggered precisely because it is necessary to determine those rights in order to dispose of the objection.

21.8 This decision was upheld at the Court of Appeal, where Lord Justice Rimer similarly said:

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13 LRA 2002, s 77. See paras 9.30 to 9.33 above.
14 See para 9.27 above.
15 LRA 2002, s 73. Land Registry currently allows the parties six months to reach agreement before making a referral to the Tribunal: see para 9.28 above.
17 Above at [28].
18 Above at [29].
A reference to an adjudicator of a “matter” under section 73(7) confers jurisdiction upon the adjudicator to decide whether or not the application should succeed, a jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application. If the adjudicator does not choose to require the issue to be referred to the court for decision, he must determine it himself.19

21.9 The fact that the Tribunal has the jurisdiction, in appropriate cases, to determine the underlying rights in dispute was confirmed in Jayasinghe v Liyanage.20 In this case there was an application for the entry of a restriction by virtue of a purported interest under a resulting trust. An objection was made to the application on the grounds that the interest claimed did not exist. It was decided that the Adjudicator (and thus now the Tribunal) could determine whether the interest existed, and not (as the appellant argued) merely whether it was arguable that there was a relevant right or claim allowing the registrar to enter a restriction in accordance with section 42(1)(c) of the LRA 2002.21 Mr Justice Briggs noted that the issue to be determined in this case, in order to deal with the objection to the restriction, was not only whether a relevant right or claim existed, but whether in accordance with section 42(1) it appeared to the registrar that it was necessary or desirable to enter a restriction. Given that section 73(7) requires the objection to be “disposed of”, Mr Justice Briggs held that the Adjudicator had jurisdiction to hold a trial in order to determine the existence of the beneficial interest in question.

21.10 The reasoning of the court in Jayasinghe v Liyanage was therefore closely tied to the wording of the underlying provision of the LRA 2002 under which the dispute had arisen. Notably, Mr Justice Briggs made it clear that the nature of the Tribunal’s jurisdiction will vary in each case relating to restrictions, depending on “the precise restriction sought, the nature of the claim or right thereby sought to be protected, and the basis of the objection which has led to the reference”.22 The discussion below, in relation to determination of boundaries and the recent case of Murdoch v Amesbury (Murdoch),23 is another illustration of how the jurisdiction of the Tribunal is dependent on the statutory provision giving rise to the referred dispute.24

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21 LRA 2002, s 42(1)(c) provides that the registrar may enter a restriction if it appears to him that 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.
22 [2010] EWHC 265 (Ch), [2010] 1 WLR 2106 at [18].
24 See para 21.15 to 21.24 below.
21.11 Finally, it is worth noting that the Tribunal has a special function in relation to a dispute arising out of an objection to an application to the registrar to be registered as proprietor of an estate by virtue of adverse possession.\textsuperscript{25} Such an application is governed by schedule 6 to the LRA 2002. An applicant may be entitled to be registered under this schedule if (among other reasons) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant. In a resulting dispute, the Tribunal has jurisdiction to determine how such an equity by estoppel can be satisfied, if the circumstances are not such that the applicant ought to be registered as proprietor. The Tribunal can make the same orders as the High Court can in these circumstances, and accordingly has the discretion to order that the equity be satisfied by a monetary award rather than an interest in land.\textsuperscript{26} This jurisdiction, only, however, applies where a matter has been referred to the Tribunal under schedule 6. In Chapter 17 we have raised a question whether an entitlement to land through estoppel should in fact enable a claim to succeed under schedule 6. The procedure to establish an estoppel claim does not sit well in the context of a claim for adverse possession. We go on to consider in this chapter the merits of conferring a wider jurisdiction on the Tribunal to determine how an equity by estoppel should be satisfied.

EXPANSION OF THE TRIBUNAL’S JURISDICTION

21.12 We have set out above a summary of the Tribunal’s existing jurisdiction, as laid down in the LRA 2002. A small number of stakeholders have raised the possibility of expanding the Tribunal’s jurisdiction. For example, it has been suggested that the Tribunal should be able to hear appeals from decisions made by Land Registry, such as a decision to reject an application. Currently decisions made by Land Registry are only capable of judicial review by the courts. Another suggestion that has been raised is that the Tribunal should have the power to declare that Land Registry should pay an indemnity, and determine the quantum of that indemnity.

\textsuperscript{25} LRA 2002, sch 6, para 1.

\textsuperscript{26} LRA 2002, s 110(4).
A number of factors have to be taken into account when considering reform of the Tribunal's jurisdiction. First, the ability to appeal from Land Registry decisions could risk undermining the certainty of the register which is currently ensured by the high threshold for a successful judicial review of a decision. For example, where the decision under appeal was a decision that an application should be rejected, consideration would need to be given as to whether the application should remain on the day list\(^{27}\) for the duration of the appeal. This could have the effect of sterilising dealings with land for an uncertain period until the appeal is heard. That is a particular concern as the availability of an appeal route to the Tribunal could operate to encourage litigation, even in unmeritorious cases.\(^{28}\)

Secondly, enabling the Tribunal to hear appeals from Land Registry's decisions would be a significant expansion of its current jurisdiction. There would need to be strong grounds for raising such a possibility and we have not received evidence to suggest that there is a need for such a fundamental re-examination. Thirdly, changing the form of challenges against Land Registry decisions would be a significant step for another reason. Parliament has delegated the business of land registration to Land Registry,\(^{29}\) in respect of which the Department for Business, Innovation and Skills is answerable to Parliament.\(^{30}\) Land Registry's functions are administrative. While the ability to appeal against an administrative decision is sometimes provided for, judicial review is the more usual remedy for a party who is aggrieved by a decision. In the case of Land Registry, provision for an appeal would appear directly to contradict the delegation to it of the business of land registration. In fact, judicial review will rarely be necessary, as there are already internal Land Registry procedures in place for decisions to be challenged.\(^{31}\)

Finally, as noted above, the Tribunal is funded by Land Registry.\(^{32}\) That does not in itself prevent the Tribunal from hearing cases in which Land Registry has an interest, as is demonstrated by the existing jurisdiction to determine appeals regarding decisions of the registrar concerning network access agreements. However, empowering the Tribunal to determine whether decisions made by Land Registry are correct, or whether Land Registry should pay an indemnity, could give rise to a perception of lack of independence.

In view of these factors we have decided not to take forward suggestions for a general expansion of the Tribunal’s jurisdiction. Notwithstanding, we consider that there are specific aspects of the Tribunal’s jurisdiction that merit further consideration.

\(^{27}\) See the Glossary.

\(^{28}\) For example, in instances where Land Registry has determined an objection to an application to be groundless. As we have seen at para 9.26 above, the threshold for “groundless” is very low.

\(^{29}\) LRA 2002, s 99.

\(^{30}\) See further para 1.9 above.

\(^{31}\) See https://www.gov.uk/government/organisations/land-registry/about/complaints-procedure (last visited 21 March 2016).

\(^{32}\) See para 21.2 above.
Jurisdiction to determine boundaries

21.15 One such area is the jurisdiction of the Tribunal when an objection is lodged to an application to determine a boundary under section 60(3) of the LRA 2002. Under section 60(1) of the LRA 2002, the boundary of a registered estate as shown for the purposes of the register is a general boundary only, unless shown as determined under that section. Section 60(3) allows rules to be made providing for the determination of “the exact line of a boundary”.

21.16 Rule 118 of the LRR 2003 provides that a registered proprietor may make an application to determine the exact line of a boundary. The application must be accompanied by a plan, and evidence to establish the exact line of the boundary. Owners of the land adjoining the boundary are then given notice of this application unless there is evidence the boundary has been agreed with the relevant owner, or there has been a court order determining the line of the boundary. Adjoining owners then have the opportunity to object to the application within a specified period of time. If their objection cannot be resolved by agreement then, as above, the matter will be referred to the Tribunal.

21.17 The jurisdiction of the Tribunal upon such a referral was discussed in the recent case of Murdoch v Amesbury. In this case an applicant had applied to Land Registry to determine a boundary dispute under section 60(3). An adjoining owner objected to the application, and the matter was referred to the Tribunal. It was decided that the application should be rejected because the plan supplied by the applicant was not within the required tolerances. The judge then went on to find where the exact line of the boundary lay. One of the parties appealed that decision to the Upper Tribunal, on the grounds that the Tribunal judge did not have jurisdiction to determine the exact line of the boundary. In the Upper Tribunal Judge Dight held that in this case, upon finding that the application to determine a boundary should be rejected because the plan was inaccurate, the Tribunal did not have jurisdiction to decide where the boundary did lie:

The issue for [the judge] was whether the plan was accurate, she had no power, in my judgment, to go on to consider the position where the plan was not accurate.

21.18 In this way Jayasinghe v Liyanage was distinguished, as the “matter” referred under section 73(7) was more limited in this case:

33 See further Chapter 15.
34 LRR 2003, r 119(1) and (2).
35 LRR 2003, r 119(3) to (5).
36 See para 21.3 above.
37 [2016] UKUT 3 (TCC).
38 The right to appeal from the Tribunal to the Upper Tribunal is conferred by s 111(1) of the LRA 2002.
40 Murdoch at [82].
41 See paras 21.9 to 21.10 above.
The essence of Mr Justice Briggs' decision was that it was open to the Adjudicator to conduct a full trial where appropriate. It is not authority for the proposition that the Adjudicator has jurisdiction to resolve issues which had not been referred to him. The issue before the learned Judge in the instant case was not whether there should have been a summary determination or a trial. In the instant case the boundary dispute was not referred to the learned Judge to determine, whereas the plan dispute was: the boundary dispute was not part of the "matter" referred.42

21.19 The full implications of this case – and the extent to which the Tribunal has jurisdiction to determine the exact position of the boundary upon a reference under section 60(3) – are unclear. It would appear that jurisdiction might depend on the nature of the precise matter referred and on whether the Tribunal can answer the “matter” referred without determining the position of the boundary.

21.20 This lack of clarity reflects a wider problem with the operation of the provisions on the determination of general boundaries. Section 60(3) of the LRA 2002 was not designed as a means of resolving boundary disputes,43 but rather to allow proprietors to determine their boundaries where they have good evidence of its exact location. This was recognised by Judge Dight:

The rules do not make provision for the objector to put in their own plan and contend for a different determined boundary, a factor which supports the contention that section 60(3) is not intended to provide a mechanism for resolving boundary disputes between neighbours but only for providing accurate public records as to the position of the boundary of a registered parcel of land.44

21.21 In practice, the situation is often not so simple – a proprietor may apply to have his or her boundary determined in the hope that no adjacent proprietors will object, or might not expect that there will be any such objections.

21.22 Therefore, section 60(3) can give rise to disputes which are referred to the Tribunal, but which the Tribunal may not be able substantively to resolve. This is the case even though the Tribunal may have heard all the evidence necessary to make a decision as to the exact location of the boundary. Indeed, an applicant whose application is rejected following a reference to the Tribunal might continue to make further applications (which in turn might be referred to the Tribunal) until his or her application is successful.

42 Murdoch at [81].

43 See Land Registry, Practice Guide 40, supplement 4: Boundary Agreements and Determined Boundaries (February 2016) at para 4: "Land Registry does not determine a boundary in the sense of resolving a disagreement as to where the exact line of the boundary is located".

44 Murdoch at [65].
21.23 We take the view that, on any reference under section 60(3), the Tribunal should have an express statutory jurisdiction to determine where the boundary lies. We consider this to be attractive as a matter of policy, given that it will reduce lengthy litigation between neighbours and thus will diminish the stress and inconvenience of parties. It will also reduce costs to parties and the courts service, since numerous applications in relation to the same boundary will not have to be made and considered.

21.24 We provisionally propose that the Land Registration Division of the First-tier Tribunal (Property Chamber) should be given an express statutory power to determine where a boundary lies when an application is referred to it under section 60(3) of the LRA 2002.

Do consultees agree?

Jurisdiction to determine estoppel remedies and beneficial shares

21.25 As noted above, the Tribunal only has the jurisdiction conferred upon it by the LRA 2002; it has no inherent or equitable jurisdiction. We have noted that the Tribunal has the power, in the case of adverse possession, to determine how an equity by estoppel can be satisfied. The Tribunal also has the power to determine the existence of a beneficial interest but it is not clear whether it has jurisdiction to declare the extent of that interest. Stakeholders have raised with us whether the Tribunal's powers should be extended so that, for example, it may determine how an equity by estoppel can be satisfied in disputes arising other than through schedule 6, and determine the extent of beneficial interests.

21.26 We appreciate the benefit of the Tribunal being able to decide issues such as these, where all (or a substantial proportion of) the relevant evidence has already been put before it. An express statutory jurisdiction to decide such issues would also reduce the need for extended litigation, and would therefore be more convenient and cost efficient for both the parties and the court system. Further, given that the Tribunal already has the power in respect of adverse possession applications to determine how an equity by estoppel can be satisfied, it is clear that Tribunal judges are already considered to have the expertise necessary to grant equitable relief in at least one of the above cases.

45 See para 21.3 above.

46 See para 21.11 above. We are, however, proposing that the provision on which this jurisdiction is based be removed: see Chapter 17.

47 See para 21.9 above.
21.27 However, there are also factors that would distinguish such a statutory jurisdiction from one in respect of boundaries. Above, we recommend that the Tribunal should have an express statutory power to determine where a boundary lies.\textsuperscript{48} Disputes as to boundaries are intrinsically linked with land registration, as the determined boundary will be recorded on the register. Instances of equitable relief, on the other hand, are not intrinsically linked to land registration. The curtain principle dictates that the land registration system is not concerned with the extent of a beneficial interest, and there is (properly) no provision in the LRA 2002 allowing for the extent of beneficial interests to be recorded on the register. Similarly, the issue of how an equity by estoppel is to be satisfied is not directly relevant to Land Registry who will, once the decision as to how it is to be satisfied has been carried into effect, simply register any resulting disposition in the appropriate manner. Further, we consider that there might be some cases where additional evidence would be relevant to determining the relief sought other than that put before the Tribunal to establish the claim.\textsuperscript{49}

21.28 \textbf{We invite the views of consultees as to whether 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 to:}

\begin{enumerate}
\item determine how an equity by estoppel should be satisfied; and
\item determine the extent of a beneficial interest.
\end{enumerate}

21.29 We understand that there are a number of other means by which the expansion of the Tribunal’s jurisdiction is currently being explored. This includes a group set up by the Civil Justice Council which is looking more generally at deployment across courts and tribunals in property cases.\textsuperscript{50}

\section*{UPDATING THE TRIBUNAL’S JURISDICTION}

21.30 As well as receiving submissions in support of expanding the Tribunal’s jurisdiction, some stakeholders have also raised with us the possibility of updating the Tribunal’s jurisdiction to take into account changing circumstances since 2002. In particular, as noted in Chapter 20, electronic conveyancing has not been implemented as was anticipated in 2002. This has an impact on the Tribunal’s jurisdiction in relation to hearing appeals from Land Registry’s decisions to enter into and terminate network access agreements.\textsuperscript{51}

\begin{footnotes}
\item See para 21.24 above.
\item Others have argued that the Tribunal should have a more inquisitorial, as opposed to adversarial, role and withhold from deciding matters other than whether an entry should be made on the register: K Harrington and C Auld, ”The new Land Registration Tribunal: neither fish nor fowl?” [2016] \textit{Conveyancer and Property Lawyer} 19, 23 to 25.
\item See \url{https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/working-group-on-property-disputes/} (last visited 21 March 2016).
\item LRA 2002, s 108(1)(b) and sch 5, para 4; see para 21.3 above.
\end{footnotes}
21.31 Under the system of electronic conveyancing envisaged by the LRA 2002, dispositions of land are to be conducted on a “secure electronic network” by authorised solicitors, licensed conveyancers, mortgage lenders and estate agents who have entered into network access agreements. An applicant has a right to enter into a network access agreement if he or she meets the criteria determined by the Lord Chancellor provided in rules. However, such substantive criteria never materialised (due mainly to the fact that electronic conveyancing has not been introduced in the form envisaged). Currently, in order to enter into a full network access agreement, the person only needs to be an individual authorised to carry out a reserved legal activity by an approved regulator or licensed body in accordance with the Legal Services Act 2007, or a business which is an employer of an authorised person.

21.32 The LRA 2002 also enables the termination of network access agreements. Part 5 of the Land Registration (Network Access) Rules 2008 outlines the situations in which a network access agreement can be terminated, based on the grounds in schedule 3, and suspended on termination pending appeal. Part 5 also enables the registrar to terminate all network access agreements if the registrar believes that operating the Land Registry network is no longer practicable. Land Registry informs us that it will only terminate network access agreements in exceptional circumstances, such as where the counterparty to the agreement has ceased to be a conveyancer.

21.33 As we have seen, the Tribunal has jurisdiction to determine appeals regarding a decision of the registrar with respect to entry into, or termination of, a network access agreement. Some stakeholders have suggested that the jurisdiction for the Tribunal to hear appeals on such matters is no longer necessary: the jurisdiction has never been exercised and in practice there would be no need for an appeal given that the substantive criteria envisaged in 2002 have not been realised and agreements are only terminated in exceptional circumstances.

52 LRA 2002, s 92 and sch 5; Law Com 271, paras 2.52 and 13.2.
53 LRA 2002, sch 5, paras 1(4) and 11. The registrar also has the power to provide training and education for those under a network access agreement: LRA 2002, sch 5, para 10; Law Com 271, para 13.46.
54 There are less stringent criteria to enter into a read-only or signature network access agreement: Land Registration (Network Access) Rules 2008, r 4(b).
55 Legal Services Act 2007, s 18.
56 Land Registration (Network Access) Rules 2008, r 4(a) and sch 1.
57 LRA 2002, sch 5, para 3(2); Law Com 271, para 13.55. The LRA 2002 lays out the particulars those rules may address: sch 5, para 3(3).
58 LRA 2002, s 108(1)(b) and sch 5, para 4.
However, we consider that the Tribunal’s jurisdiction should be retained so long as provisions still give the Lord Chancellor the power to impose more far-reaching conditions for entry into a network access agreement, and the registrar has the power to terminate on the grounds set out in schedule 3 to the Land Registration (Network Access Rules) 2008. These provisions are not currently causing practical problems and could prove useful in the future, given that electronic conveyancing is a work in progress. We therefore cannot see any benefit in removing them, even though they are not currently used. Accordingly we make no provisional proposals regarding the Tribunal’s jurisdiction in relation to network access agreements.
PART 10
CONCLUSIONS
CHAPTER 22
PROVISIONAL PROPOSALS AND
CONSULTATION QUESTIONS

THE REGISTRABLE ESTATES

22.1 We invite consultees to share their experiences of Land Registry’s new practice of allowing the landlord’s freehold title to remain on the register following a lease enlargement under section 153 of the Law of Property Act 1925, and in particular any practical problems that have arisen out of this practice.

[Paragraph 3.14]

22.2 We invite the views of consultees as to whether the law should be clarified so that it is possible for an owner of an estate in mines and minerals held apart from the surface to lodge a caution against first registration of the relevant surface title.

[Paragraph 3.51]

22.3 We invite the views of consultees as to whether the provisions of section 4 of the LRA 2002 should be amended so that compulsory first registration of an estate in mines and minerals is triggered where mines and minerals are separated from an unregistered legal estate, and where an unregistered estate in mines and minerals held apart from the surface is transferred.

[Paragraph 3.59]

22.4 We invite consultees to share their experiences of the extent to which the lack of compulsory registration of estates in mines and minerals is causing problems in practice.

[Paragraph 3.60]

22.5 We invite the views of consultees as to whether surface owners should be notified of an application to register title to the mines and minerals beneath their land, regardless of whether title is to be registered with qualified or absolute title.

[Paragraph 3.67]

22.6 We provisionally propose that the requirement of registration should apply to the grant of a discontinuous lease out of a qualifying estate.

Do consultees agree?

[Paragraph 3.78]
22.7 We provisionally propose that it should be possible to protect a discontinuous lease by notice on the register of title to the reversion, whatever the length of the discontinuous lease and whether or not it was compulsorily registerable.

Do consultees agree?

[Paragraph 3.79]

22.8 We provisionally propose that there should be no change to the threshold of the length of lease which is registrable under the LRA 2002.

Do consultees agree?

[Paragraph 3.94]

FIRST REGISTRATION

22.9 We invite consultees to provide evidence of difficulties they have encountered when undertaking conveyancing in the twilight period.

[Paragraph 4.34]

22.10 We invite the views of consultees as to the form of protection that should be provided in respect of dispositions that take place in the twilight period.

[Paragraph 4.35]

22.11 We provisionally propose 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.

Do consultees agree?

[Paragraph 4.39]

THE POWERS OF THE REGISTERED PROPRIETOR

22.12 We provisionally propose that express provision should be made in the LRA 2002 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.

Do consultees agree?

[Paragraph 5.30]

22.13 We provisionally propose that, for the purpose of preventing the title of a disponee being questioned, the exercise of owner’s powers of disposition by both registered proprietors and persons entitled to be registered as the proprietor should not be limited by:

(1) the common law principle that no one can convey what he or she does not own (*nemo dat quod non habet*);
other limitations imposed by the common law or equity or under other legislation; or

any limitation other than those reflected by an entry on the register or imposed under the LRA 2002.

Do consultees agree?

THE GENERAL AND SPECIAL RULES OF PRIORITY IN SECTION 28 AND SECTION 29: THE DIFFERENCE BETWEEN REGISTRABLE DISPOSITIONS AND THE GRANT OF OTHER INTERESTS IN REGISTERED LAND

22.14 We provisionally propose that if an unregistrable interest is noted on the register, that interest should be subject only to the interests set out in section 29(2) of the LRA 2002.

Do consultees agree?

22.15 We provisionally propose that a person who takes an interest under a registrable disposition, but who fails to complete that disposition by registration, should not be able to secure priority against prior interests through the noting of that interest on the register.

Do consultees agree?

22.16 We provisionally propose that a person who takes an interest under a disposition which is of a type which would have been registrable if all proper formalities for its creation had been observed, but who fails to observe those formalities, should not be able to secure priority against prior interests through the noting of that interest on the register.

Do consultees agree?

22.17 Do consultees believe that home rights should be excluded from the effects of our proposal that noting an interest (such as a sale contract) on the register should secure priority against prior unregistered rights (which would otherwise include home rights)?

22.18 We provisionally propose that the priority of unregistrable interests created pre-reform should remain unchanged.

Do consultees agree?
If consultees disagree, please state what period of time consultees consider should be allowed in order for holders of existing rights to note them on the register, before the rights become vulnerable to subsequent interests.

[Paragraph 6.54]

22.19 We provisionally propose that the holder of an unregistrable interest which has been noted on the register, whose priority is adversely affected by alteration of the register to correct a mistake, should be able to apply for an indemnity from Land Registry.

Do consultees agree?

[Paragraph 6.57]

22.20 We invite consultees to submit examples of situations in which the holder of an unregistrable interest has suffered loss as a result of the discovery of a prior unregistrable interest with priority.

[Paragraph 6.59]

22.21 We believe that our proposals on the relative priority of unregistrable interests will not lead to a material increase in the number of unregistrable interests being noted on the register, and therefore will not increase the burden on those entering into transactions for the grant of these interests, nor result in any additional resource requirements for Land Registry.

Do consultees agree?

[Paragraph 6.63]

22.22 We provisionally propose that it should be possible to make an official search with priority in relation to an application to note an unregistrable interest.

Do consultees agree?

[Paragraph 6.71]

22.23 We provisionally propose that a priority search should also protect any ancillary applications arising out of the document which effects the registrable disposition which is the subject of the priority search, provided those ancillary applications are specified on the application form for the priority search.

Do consultees agree?

[Paragraph 6.79]
PRIORITIES UNDER SECTION 29: VALUABLE CONSIDERATION

22.24 We provisionally propose that the requirement of valuable consideration in section 29 of the LRA 2002 should be retained, but should be clarified.

Do consultees agree?

[Paragraph 7.68]

22.25 We provisionally propose 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.

Do consultees agree?

[Paragraph 7.69]

22.26 We do not believe that it is necessary to make any special provision for a reverse premium in the LRA 2002.

Do consultees agree? If consultees disagree, we invite consultees to share any examples of transactions for which no form of consideration is given other than the reverse premium.

[Paragraph 7.70]

22.27 We provisionally propose 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.

Do consultees agree?

[Paragraph 7.71]

22.28 We invite consultees’ views as to whether it would be beneficial to clarify the effect of a disposition for which a peppercorn is the only consideration. We invite consultees to provide examples of dispositions which may be structured in this way.

If consultees agree that clarification would be beneficial, we invite consultees’ views as to whether a peppercorn should engage the protection of section 29 of the LRA 2002.

[Paragraph 7.72]

22.29 We invite consultees’ views as to whether there are any other types of bargain, not covered above, where consultees believe that it is unclear whether the disposition is made for valuable consideration for the purposes of section 29.

Please explain in each case whether it is believed that the disposition should be included within, or excluded from, the priority protection of section 29.

[Paragraph 7.73]
22.30 We provisionally propose that our proposals on reform of the requirement for valuable consideration under section 29 should apply both to registrable dispositions and unregistrable interests which are noted on the register in accordance with our earlier proposals.

Do consultees agree?

[Paragraph 7.75]

22.31 We invite consultees’ views as to whether any amendments are necessary to the definition of “valuable consideration” as it applies to section 30 of the LRA 2002.

[Paragraph 7.78]

22.32 We invite consultees’ views as to whether any difficulties would arise if the proposed amendments to the meaning of valuable consideration were also to apply for the purposes of section 86 of the LRA 2002 (bankruptcy of the registered proprietor).

[Paragraph 7.81]

22.33 We believe that our proposals to clarify the meaning of “valuable consideration” for the purposes of section 29 can be applied equally to the meaning of that phrase in paragraph 5 of schedule 10 to the LRA 2002 (indemnity).

Do consultees agree?

[Paragraph 7.83]

PRIORITIES UNDER SECTION 29: POSTPONEMENT OF INTERESTS, AND THE PROTECTION OF UNREGISTRABLE LEASES

22.34 We provisionally propose 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.

Do consultees agree?

[Paragraph 8.48]

22.35 We invite consultees to provide evidence of the extent to which applications are being made for unilateral notices on registered titles where there has been an intervening disposition which engaged section 29, resulting in the postponement of the interest which is the subject of the notice to the interest under the intervening disposition.

[Paragraph 8.49]
22.36 We invite consultees to provide evidence of the extent to which section 29(4) has operated to confer priority on an unregistrable lease over an interest which is protected by a priority search.

[Paragraph 8.65]

PROTECTION OF THIRD PARTY RIGHTS ON THE REGISTER PART I: NOTICES

22.37 We provisionally propose that it should be possible to protect a right by one of two kinds of notice: a full notice and a summary notice.

Do consultees agree?

[Paragraph 9.116]

22.38 We provisionally propose that an application for a summary notice should not need to be accompanied by any evidence to support the interest claimed.

Do consultees agree?

[Paragraph 9.117]

22.39 We provisionally propose that, if a registered proprietor applies to cancel a summary notice, the beneficiary of the summary notice will be required to make an initial response within 15 business days (subject to an extension of up to a maximum of 30 business days). The response must demonstrate a case for the retention of the notice which is not groundless.

Do consultees agree?

[Paragraph 9.118]

22.40 We provisionally propose that, in the event that the beneficiary submits an initial response objecting to cancellation of the notice, the beneficiary must produce evidence to satisfy the registrar of the validity of the interest claimed. Evidence must be provided within a maximum of 40 business days of the original notification of the application to cancel.

Do consultees agree?

[Paragraph 9.119]

22.41 We provisionally propose that where an application is made to cancel a unilateral notice following implementation of our reforms, the beneficiary of that notice should (following an objection to cancellation) be required to produce evidence to satisfy the registrar of the validity of the interest claimed.

Do consultees agree?

[Paragraph 9.121]
22.42 We provisionally propose that it should be clarified that an insolvency practitioner appointed in respect of an insolvent registered proprietor is able to apply to cancel a unilateral notice on behalf of the registered proprietor.

Do consultees agree?

[Paragraph 9.141]

22.43 We provisionally propose that it should be clarified that attorneys acting under a power of attorney may apply to cancel a unilateral notice on behalf of a registered proprietor who is the donor of the power.

Do consultees agree?

[Paragraph 9.142]

22.44 We invite consultees to share with us other situations in which they believe the persons who can make applications to Land Registry are unnecessarily limited.

[Paragraph 9.144]

22.45 We invite consultees’ views on what benefits would accrue if an agreed notice could identify the beneficiary of that notice, in a similar way to the entries made in relation to a unilateral notice? Would there be any disadvantages to identifying the beneficiary of an agreed notice in this way?

[Paragraph 9.153]

22.46 If consultees support identifying the beneficiary of an agreed notice on the register, should this be mandatory or optional?

[Paragraph 9.154]

PROTECTION OF THIRD PARTY RIGHTS ON THE REGISTER PART II: RESTRICTIONS

22.47 We have provisionally formed the view that it should continue to be possible to protect contractual obligations by means of a restriction.

Do consultees agree?

[Paragraph 10.25]

22.48 We invite the views of consultees as to whether there are any particular types of contractual obligation which should not be capable of protection by way of a restriction. If so, please explain why these obligations should be treated differently from other contractual obligations.

[Paragraph 10.29]

22.49 We provisionally propose:

(1) that it should continue to be possible to enter restrictions in Form K in relation to charging orders over beneficial interests; but
(2) that the ability to enter restrictions should not be extended to holders of other derivative interests under trusts.

Do consultees agree?

[Paragraph 10.41]

22.50 We provisionally propose 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.

Do consultees agree?

[Paragraph 10.52]

OVERRIDDING INTERESTS

22.51 We believe that it should continue to be possible for an estate contract to be protected as an overriding interest where the beneficiary of the contract is in actual occupation.

Do consultees agree?

[Paragraph 11.30]

22.52 We believe that the fact that the benefit of an interest has been registered should not preclude that interest from being an "unregistered interest" (and so overriding) for the purposes of schedules 1 and 3 to the LRA 2002.

Do consultees agree?

[Paragraph 11.41]

22.53 We invite consultees' views as to whether section 29(3) of the LRA 2002 serves a useful purpose and should be retained.

[Paragraph 11.54]

22.54 We invite consultees to provide examples of situations where section 29(3) has either created a problem in practice, or conversely performed a useful function.

[Paragraph 11.55]

22.55 We invite consultees' views as to whether any transitional provisions are necessary in the event of the abolition of section 29(3).

[Paragraph 11.57]
LEASE VARIATIONS AND REGISTRATION

22.56 We provisionally propose 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.

Do consultees agree?

[Paragraph 12.40]

22.57 We invite the views of consultees as to whether express provision should be made to permit the recording of any other documents which are ancillary to a lease on either the landlord’s registered title, or the tenant’s registered title, or both.

[Paragraph 12.44]

22.58 We invite the views of consultees on the severity and extent of problems with the Landlord and Tenant (Covenants) Act 1995. We invite consultees to provide evidence in support of their views.

[Paragraph 12.48]

ALTERATION AND RECTIFICATION OF THE REGISTER

22.59 We provisionally propose that the ability of a person to seek alteration or rectification of the register to correct a mistake should not be capable of being an overriding interest pursuant to paragraph 2 of schedule 3 to the LRA 2002.

Do consultees agree?

[Paragraph 13.87]

22.60 We provisionally propose 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 so as to correct that mistake by removing its charge.

Do consultees agree?

[Paragraph 13.95]

22.61 We provisionally propose 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, save in exceptional circumstances.

Do consultees agree?

[Paragraph 13.109]
We provisionally propose that a successor in title to that proprietor should be restored to the register if he or she took over possession of the land, save where there are exceptional circumstances.

Do consultees agree?

[Paragraph 13.110]

We provisionally propose 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.

Do consultees agree?

[Paragraph 13.114]

We provisionally propose that the register should not be rectified 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.

Do consultees agree?

[Paragraph 13.120]

We provisionally propose 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 that proprietor is not in possession of the land. Exceptions should be provided only for where the new registered proprietor consents to the rectification or where he or she caused or contributed to the mistake by fraud or lack of proper care.

Do consultees agree?

[Paragraph 13.123]
22.66 We provisionally propose that the period of time after which the register becomes final should be ten years.

Do consultees agree?

[Paragraph 13.126]

22.67 We provisionally propose the following:

(1) Cases of double registration should be resolved through the application of our proposals in respect of indefeasibility. Therefore, in a case of double registration, a claim to adverse possession should not be possible.

(2) Where as a result of the operation of the long stop a double registration remains on the register, the party who does not benefit from the long stop should have their title amended accordingly to remove the double registration. The party whose title is amended in such circumstances should be entitled to an indemnity.

Do consultees agree?

[Paragraph 13.151]

22.68 We provisionally propose that section 29 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 long stop.

Do consultees agree?

[Paragraph 13.169]

22.69 We provisionally propose that, where the application for alteration or rectification relates to a derivative interest, the ten year long stop on alteration of the register should run from the time that, as a result of the mistake, the holder of the derivative interest lost priority, not from the time of the mistake.

Do consultees agree?

[Paragraph 13.170]
22.70 We provisionally propose that section 11 should be subject to schedule 4. This means that where, through a mistake, a derivative interest has been omitted 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 long stop.

Do consultees agree?

[Paragraph 13.180]

22.71 We provisionally propose 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.

Do consultees agree?

[Paragraph 13.181]

22.72 We provisionally propose 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 or a registered disposition of the affected estate takes place on or after that date. An exception should be made, however, where on first registration 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 registration.

Do consultees agree?

[Paragraph 13.188]

22.73 We provisionally propose that in the case of competing derivative interests, rectification should operate retrospectively.

Do consultees agree?

[Paragraph 13.196]

22.74 We invite consultees to share with us any practical difficulties that consultees have experienced following the decision in Gold Harp.

[Paragraph 13.197]

INDEMNITY

22.75 We invite consultees’ views as to whether there should be a cap on the indemnity that can be paid to a claimant following rectification of the register (or where rectification is available but is not ordered), except where the mistake that leads to rectification is attributable to fault by Land Registry.

[Paragraph 14.60]
22.76 We invite consultees’ views as to the level at which any cap should be set.

[Paragraph 14.61]

22.77 We invite consultees’ views as to whether conveyancers should be required to make a declaration on Land Registry’s forms to the effect that they have taken sufficient steps to satisfy themselves that documents relating to the application are genuine.

[Paragraph 14.72]

22.78 We invite consultees’ views on the following issues.

(1) Should there be a general statutory tort imposing a duty to take reasonable care in respect of the granting of deeds intended to be registered and applications made to Land Registry, as a supplement to the existing statutory rights of recourse?

(2) Should any statutory tort be imposed on all those who grant deeds intended to be registered and make applications to Land Registry, or are there any categories of person (for example individuals) who should be excluded?

(3) Other than confining a statutory tort to a duty to take reasonable care, are there any exclusions or restrictions that should apply to the scope of the tort?

[Paragraph 14.80]

22.79 We invite 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.

[Paragraph 14.85]

22.80 We invite consultees to share their experience of any difficulties they have experienced with current requirements in respect of verifying identity and whether they consider that the requirements could usefully be rationalised.

[Paragraph 14.91]

22.81 We invite consultees’ views as to whether, in principle, 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.

[Paragraph 14.101]

22.82 We invite consultees to provide evidence as to the significance of the indemnity scheme in lending decisions (in the residential and commercial sectors) and of the potential repercussions of reforms that limit its availability to lenders.

[Paragraph 14.109]
22.83 We invite consultees’ views on whether the ability of mortgagees to obtain an indemnity should be limited to claims arising from mortgages granted on the basis of a mistake already contained in the register.

[Paragraph 14.117]

22.84 We invite consultees’ views on whether 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.

[Paragraph 14.123]

22.85 We invite consultees to provide evidence in respect of the following issues:

(1) the incidence in practice of questions concerning the limitation period applicable to indemnity claims; and

(2) how their practice has been affected by questions concerning the limitation period applicable to indemnity claims.

[Paragraph 14.133]

22.86 We provisionally propose that for indemnity claims under schedule 8, paragraph 1(a) and (b) the limitation period should start to run on the date of the decision as to rectification.

Do consultees agree?

[Paragraph 14.136]

22.87 We provisionally propose that for indemnity claims under schedule 8 paragraph 1(c) to (h) the limitation period should start to run when the claimant knows, or but for their own default would have known of the claim.

Do consultees agree?

[Paragraph 14.138]

22.88 We provisionally propose 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), 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), 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.

Do consultees agree?

[Paragraph 14.146]

22.89 We provisionally propose 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 the current value of the land in the condition the land was in at the time of the mistake.

Do consultees agree?

[Paragraph 14.159]

22.90 We invite the views of consultees as to any difficulties that might arise in determining the current value of land in the condition the land was in at the time of the mistake.

[Paragraph 14.160]

GENERAL BOUNDARIES

22.91 We provisionally propose that there should be a non-exhaustive list of factors which may be used to distinguish boundary and property disputes. This list could include factors such as:

(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;

(3) the application of any of the common law presumptions; and

(4) the manner in which the error in the boundaries shown on the title plan came about.

Do consultees agree?

[Paragraph 15.35]

22.92 We invite the views of consultees as to the type of factors which should be given consideration when distinguishing boundary and property disputes.

[Paragraph 15.36]
EASEMENTS

22.93 We provisionally propose that, where the grant of a lease is not a registrable disposition, easements which benefit that lease and which are created within the lease itself should not be required to be completed by registration in order to operate at law.

Do consultees agree?

[Paragraph 16.32]

22.94 We provisionally propose that all easements granted by or implied in leases which are not required to be created by deed by virtue of section 52(2)(d) of the Law of Property Act 1925, including equitable easements, should be capable of being overriding interests.

Do consultees agree?

[Paragraph 16.40]

22.95 We provisionally propose that:

(1) easements benefiting a lease which is not required to be created by deed by virtue of section 52(2)(d) of the Law of Property Act 1925, where those easements are created separately from the lease, should be capable of being overriding interests; but

(2) the grant of an easement benefiting any other lease which is created outside of the lease document should remain a disposition which must be completed by registration to take effect at law.

Do consultees agree?

[Paragraph 16.44]

ADVERSE POSSESSION

22.96 We provisionally propose that a claimant to title to land through adverse possession should be prevented from making a second application for registration when an application for registration has been rejected under schedule 6, paragraph 6, unless the conditions in that paragraph under which a second application is currently permitted are fulfilled.

Do consultees agree?

[Paragraph 17.24]

22.97 We invite consultees to provide evidence relating to the use of the first two conditions in paragraph 5 of schedule 6.

[Paragraph 17.33]
22.98 We invite consultees’ views as to whether the first two conditions in paragraph 5 of schedule 6 should be removed.

[Paragraph 17.34]

22.99 We provisionally propose that where an applicant relies on the condition in schedule 6, paragraph 5(4), his or her reasonable belief that the land belonged to him or her must not have ended more than six months from the date of the application.

Do consultees agree?

[Paragraph 17.47]

22.100 We provisionally propose 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 application for alteration of the register should be classed as a rectification.

Do consultees agree?

[Paragraph 17.62]

22.101 We provisionally propose that an adverse possessor of unregistered land should not be able to apply for registration with possessory title until title has been extinguished under the Limitation Act 1980.

Do consultees agree?

[Paragraph 17.70]

22.102 We provisionally propose that an adverse possessor of registered land should not be able to apply for registration except through the procedure in schedule 6.

Do consultees agree?

[Paragraph 17.71]

22.103 We provisionally propose that where an adverse possessor in unregistered land is registered with possessory title in the reasonable (but incorrect) belief that the prior title has been extinguished, the period of adverse possession should continue to run while the possessory title is open.

Do consultees agree?

[Paragraph 17.79]
We provisionally propose that where a tenant is in adverse possession of land (other than land belonging to the landlord) and the presumption that the tenant is acting on behalf of his or her landlord is not rebutted, the landlord should be able to make an application under schedule 6 based on the tenant’s adverse possession.

Do consultees agree? [Paragraph 17.86]

FURTHER ADVANCES

We invite the views of consultees as to whether the Law Commission should conduct a project reviewing the law of mortgages as it applies to land. If consultees consider a project should be so conducted, we invite consultees to share examples of areas that such a project should cover. Please include evidence as to the problems that the law is creating in practice and the potential benefits of reform. [Paragraph 18.7]

We invite the views of consultees as to the circumstances in which the provisions in section 49 are most likely to be relied upon by all tiers of lender. Where lenders prefer to enter into agreements between themselves to regulate the position, is this because the legislation is perceived to be inadequate, or simply because commercially it is desirable for arrangements to be put on a contractual footing? [Paragraph 18.15]

We invite the views of consultees as to whether the fact that, where a loan is drawn down in instalments, those instalments are classified as “further advances”, is causing problems in practice. [Paragraph 18.22]

We invite the views of consultees as to whether 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. [Paragraph 18.27]

We invite consultees to submit evidence as to whether, given the use of inter-creditor agreements to regulate priority within the commercial lending market, an extension to the persons who can make further advances under section 49 would be likely to have an effect in practice. [Paragraph 18.28]

We invite the views of consultees, if they believe 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, as to who should be enabled to do so. [Paragraph 18.31]
22.111 As part of our call for evidence in relation to a separate project on mortgage law, we invite consultees to share their experiences of any benefits or difficulties caused by the principle that an equitable chargee may serve notice on a prior legal chargee and thereby prevent the legal chargee’s right to tack.

[Paragraph 18.41]

22.112 We invite the views of consultees on the extent to which lenders are relying on section 49(4) to stipulate a maximum amount for which a charge is security.

[Paragraph 18.58]

22.113 We invite consultees to provide any evidence that reliance on section 49(4) in this way is preventing borrowers from obtaining further finance elsewhere.

[Paragraph 18.59]

SUB-CHARGES

22.114 We provisionally propose that section 53 of the LRA 2002 should be clarified to ensure that its effect is to confer powers on a sub-chargee, not remove them from the sub-chargor. It would be open to the parties to a sub-charge to agree otherwise.

Do consultees agree?

[Paragraph 19.34]

22.115 We provisionally propose that, unless there is an appropriate restriction on the register, the powers of the sub-chargor shall be taken to be free from any limitation contained in the sub-charge. This would not affect the lawfulness of the disposition as between the sub-chargor and the sub-chargee.

Do consultees agree?

[Paragraph 19.35]

22.116 We invite consultees to submit evidence of their experience of the discharge of a principal registered charge where there is an existing registered sub-charge. We invite consultees’ views on whether there needs to be a mechanism built into the land registration system to allow a sub-chargee to prevent the principal chargee from discharging the principal charge, where this would not be permitted under the terms of the sub-charge. How do consultees believe this could best be achieved?

[Paragraph 19.38]

22.117 We invite the views of consultees as to whether transitional provisions are necessary for existing sub-charges as a result of our proposals, or if it is sufficient that an existing sub-chargee may apply for a restriction in order to reflect any limitation on the rights of the principal chargee laid down in the sub-charge.

[Paragraph 19.43]
22.118 We provisionally propose that:

(1) simultaneous completion and registration should no longer be required in a system of electronic conveyancing implemented under the LRA 2002; and

(2) equitable interests should be capable of arising in the interim period between completion and registration.

Do consultees agree?

22.119 We provisionally propose that:

(1) the decision to enable electronic conveyancing and the subsequent decision to end paper-based conveyancing should be vested in the Secretary of State, to be enacted through secondary legislation;

(2) following the enactment of such secondary legislation, the timetable for the introduction of electronic conveyancing and for ending paper-based conveyancing, in each case on a disposition by disposition basis, should be delegated to the Chief Land Registrar; and

(3) the Secretary of State and the Chief Land Registrar should be required to consult with stakeholders before exercising their powers in respect of electronic conveyancing.

Do consultees agree?

22.120 We provisionally propose that the following propositions of law should be confirmed:

(1) trustees may collectively delegate their power to sign an electronic conveyance and give receipt for capital monies to a single conveyancer under section 11 of the Trustee Act 2000;

(2) a beneficiary’s interest in a trust of land will be overreached when trustees collectively delegate their power to a single conveyancer to sign an electronic conveyance and give receipt for capital monies; and
(3) a beneficiary’s interest in a trust of land will 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 monies.

For overreaching to take place it will remain necessary for the disposition that follows the delegation to be one with overreaching effect.

Do consultees agree?

[Paragraph 20.47]

THE JURISDICTION OF THE LAND REGISTRATION DIVISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

22.121 We provisionally propose that the Land Registration Division of the First-tier Tribunal (Property Chamber) should be given an express statutory power to determine where a boundary lies when an application is referred to it under section 60(3) of the LRA 2002.

Do consultees agree?

[Paragraph 21.24]

22.122 We invite the views of consultees as to whether 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 to:

(1) determine how an equity by estoppel should be satisfied; and

(2) determine the extent of a beneficial interest.

[Paragraph 21.28]
A: Property register

The register describes the registered estate comprised in the title.

CORNISHIRE: MARADON

1. (12.02.2003) The Freehold land shown edged with red on the plan of the above Title filed at the Registry and being 13 Augustine Way, Kerwick (PL14 3JP).

2. (12.02.2003) There are excluded from this registration the mines and minerals excepted by a Conveyance of the land in this title and other land dated 23 June 1883 made between (1) John Silver (2) Richard Haddock (3) Mary Golightly and others and (4) Henry McMurdo in the following terms and the land is also subject to the following ancillary powers of working:

   Excepting and reserving out of abstracting Conveyance all and all manner of limestone mines and minerals of every nature or kind whatsoever lying and being within and under the said piece of land thereby conveyed with full right liberty and power of digging for working getting and carrying away the same but without breaking or in anywise disturbing endangering or damaging the surface of the said piece of land or any buildings then or thereafter to be erected thereon.

3. (12.02.2003) The land has the benefit of the following rights granted by but is subject to the following rights reserved by the Conveyance dated 5 September 1920 referred to in the Charges Register:

   "Together also with the use by the Purchaser and the persons deriving title under him and his and their tenants servants visitors workpeople and others (in common with the Vendors and other the owner or owners for the time being of the hereditaments adjoining and adjacent to the hereditaments hereby conveyed and his and their tenants servants visitors workpeople and others) of the adjoining moiety of the said passage three feet wide not hereby conveyed..."
lying on the north west side of the hereditaments hereby conveyed and also with the use of the entirety of the said passage three feet wide on the North West side of the property hereby conveyed and the sewer or drains thereunder and also the use of all other ways passages pumps cisterns sewers or drains now used by or in connection with the hereditaments hereby conveyed in common with the Vendors or other the Owner or Owners for the time being of the said adjoining and adjacent hereditaments and his and their servants workpeople and others the Purchaser and the persons deriving title under him bearing and paying a proper proportion of the expense of keeping the entirety of the said passage the adjoining moiety of which is hereby conveyed and the sewer or drain thereunder and also all other the said ways passages pumps cisterns sewers and drains in proper repair and condition reserving nevertheless unto the Vendors and other the Owner or Owners for the time being of the said adjoining and adjacent hereditaments and their tenants visitors servants and others the use (in common as aforesaid) of the moiety hereby conveyed of the said passage three feet wide lying on the north west side of the hereditaments hereby conveyed and the sewer or drain thereunder they nevertheless bearing and paying a proper proportion of the expense of keeping the said passage and the sewer or drain thereunder in proper repair and condition"

B: Proprietorship register
This register specifies the class of title and identifies the owner. It contains any entries that affect the right of disposal.

Title absolute

1. (05.05.2013) ELIZABETH MARY TUDOR of 13 Augustine Way, Kerwick PL14 3JP

2. (05.05.2013) The price stated to have been paid on 1 May 2013 was £350,000.

3. (05.05.2013) RESTRICTION: No disposition of the registered estate by the proprietor of the registered estate or by the proprietor of any registered charge, not being a charge registered before the entry of this restriction, is to be registered without a written consent signed by the proprietor for the time being of the Charge dated 1 May 2013 in favour of High Street Bank PLC referred to in the Charges Register.

C: Charges register
This register contains any charges and other matters that affect the registered estate.

1. (12.02.2003) A Conveyance dated 5 September 1920 made between (1) Patrick Callaghan and others and (2) Jane Branwell and others contains the following covenants:-

The Purchasers do hereby for themselves respectively their respective heirs executors administrators and assigns COVENANT with the Vendors respectively their respective heirs and assigns in manner following that is to say That they the Purchasers respectively their respective heirs and assigns shall not carry on or suffer to be carried on the trade of a Boiler maker Tripe Boiler Fell Monger Soap Boiler Starch Manufacturer Bone Grinder Slaughterer of Cattle or any noxious or offensive trade or business upon any part of the piece of
land hereby conveyed or in or upon any buildings now or at any time hereafter to be erected thereon.

2. (05.05.2013) REGISTERED CHARGE dated 1 May 2013.

3. (05.05.2013) Proprietor: HIGH STREET BANK PLC (Co. Regn. No. 1234567) of 3 Park Avenue, Sunnytown SN12 5DR.

4. (23.03.2015) UNILATERAL NOTICE in respect of a contract for sale dated 19 March 2015 made between (1) Elizabeth Mary Tudor and (2) John Paul Jones.

5. (23.03.2015) BENEFICIARY: John Paul Jones of 82 Wilberforce Street, Milton, MN11 8WE.

End of register