

UNREGISTERED LAND AND PRIORITIES

CENTRAL ISSUES

1. Where A transfers land to C, priority questions arise as to whether B, who has pre-existing property rights, can enforce those rights against C. Property rights are capable of binding any third party later acquiring a right from A; therefore this issue is conceptualized as the *defences* question: does C have a defence against the enforcement of B's pre-existing property rights?
2. Priority rules differ between unregistered and registered land. The overreaching mechanism (discussed in Chapter 17) is the only rule that is common to both systems. This chapter considers the priority rules of unregistered land.
3. In unregistered land, the key distinction is between legal estates and interests on the one hand, and equitable interests on the other.
4. C generally has no defence against the enforcement of a pre-existing legal estate or interest held by B.
5. The enforcement of equitable interests in unregistered land used to be governed by the doctrine of notice. C would have a defence only if he or she were a bona fide purchaser of a legal estate in the land for value without notice of B's equitable interest. The doctrine is perceived as being a fundamentally ethical means of resolving priority issues, but had fallen out of favour by the time of the 1925 legislation and has largely been replaced with more mechanical means of determining priorities.
6. A number of equitable interests, and one legal interest, are registrable as land charges under the Land Charges Act 1972. This is a limited register of interests in unregistered land. Land charges are registered against the name of the holder of the legal estate at the time of registration.
7. Where B's interest is registrable as a land charge, its enforcement against C is entirely dependent on the provisions of the 1972 Act; the defence of bona fide purchaser is irrelevant. Controversially, this has been held to mean that C has a defence against B's unregistered land charge even where C, at the time of acquiring his or her own right in the land, knew about B's interest in the land.

1 INTRODUCTION

Where A transfers an estate in land to C, or creates a mortgage in C's favour, the question arises whether a third party, B, has any right that is binding on C. There are two distinct ways in which B may have a right that is binding on C. Firstly, B may have a new direct right against C, arising as a result of C's conduct (see section 7.1.2).

Secondly, B may have a pre-existing property right: a property right existing immediately before C acquired C's right in the land. Property rights are prima facie enforceable against third parties later acquiring a right from A; therefore any property right held by B at the time of the transfer is prima facie enforceable against C.

The difference between these two scenarios is illustrated in Figure 1.

As we noted in section 7.1.2, for example, B's pre-existing property right is not always binding on C. As we saw in Chapter 15, and as we considered in detail in relation to registered land in Chapter 16, the question of whether B's right does or does not bind C lies behind the 'priority triangle'. Because B's rights are prima facie binding on C, we can conceptualized the question as one of *defences*: does C have a defence to the enforcement of B's property right? This question is answered through land law's priority rules. These rules determine whether C has priority over B's property right, or is instead bound by them.

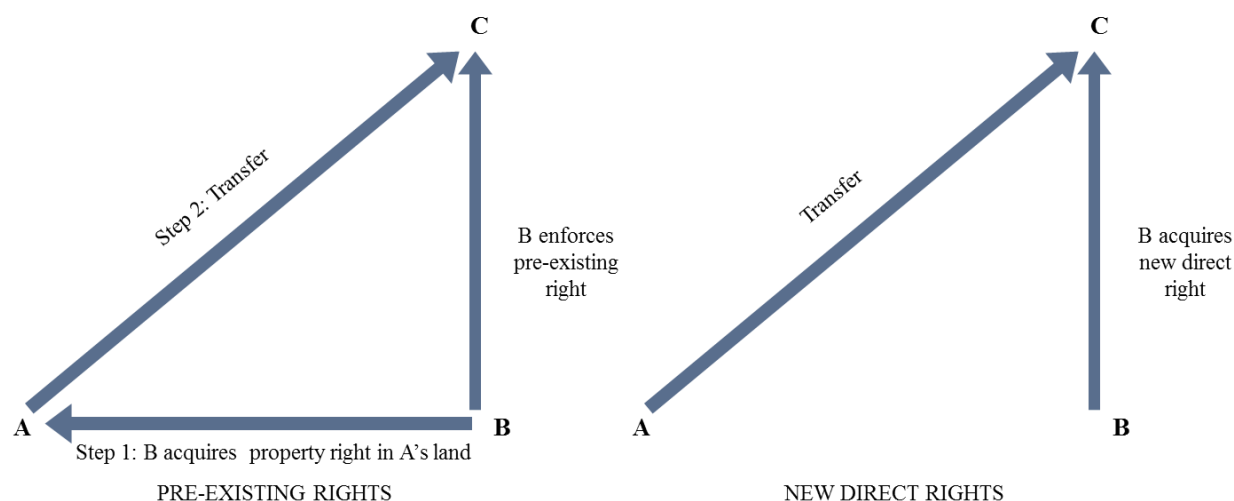


Figure 1 The priority triangle and the creation of new direct rights

It is important to emphasize that we are concerned only with the enforcement of pre-existing *property* rights held by B—that is, legal estates and interests in land, or equitable interests, in land. These are the only rights that are *prima facie* enforceable against a third party. We are not concerned with any personal rights that B has against A at the time of the transfer: B’s pre-existing personal rights are not enforceable against C.

As far as the priority triangle is concerned, some basic points apply in both unregistered and registered land: these are considered in Chapter 15. There are however some significant differences between the priority rules applying in unregistered as opposed to registered land. The unregistered land rules are considered in this chapter and those of registered land in Chapter 16. The practical significance of the unregistered land rules is diminishing, but they retain some importance. As we have seen in Chapter 8, all unregistered land is now subject to compulsory first registration on the occurrence of a triggering event. This includes the transfer (by sale or gift) of a legal estate, except the grant of a new legal lease of no more than seven years’ duration, or the transfer of an existing legal lease with seven years or less remaining.¹

The priority rules of unregistered land apply in two situations. Firstly, on a transfer of unregistered land that triggers compulsory first registration, title to the estate in question will be investigated through the unregistered land rules for the last time.² Secondly, the rules will continue to apply to unregistered land as regards transfers of an estate that do not trigger compulsory first registration: for example, the creation of a legal lease for seven years or less, or the transfer of an existing legal lease with seven years or less remaining, or the transfer of an equitable interest (such as an assignment of an existing beneficial interest under a trust).

2 INVESTIGATION OF TITLE

To ascertain the existence of pre-existing property rights, C will investigate A’s title to the land. The means of investigation is twofold. Firstly, C will investigate the documentary proof of A’s title. In Chapter 8, we saw the written formality requirements that apply to the creation and transfer of rights in land. In unregistered land, there is no central record of title. A’s documentary proof therefore consists of the bundle of deeds recording transactions carried out in relation to the land that have been executed to fulfil those formality requirements.

¹ Land Registration Act 2002, s 4.

² For consideration of the priority rules applying in the ‘twilight period’ between a disposition of unregistered land which triggers compulsory first registration and the registration itself, see Law Com No 380, *Updating the Land Registration Act 2002* (2018) Chapter 4 and the recommendations made there.

C does not need to investigate the full history of the title, but must establish a good root of title. The period of time that must be investigated to establish good root of title has gradually been decreased. At the time of the 1925 legislation, it was necessary to investigate from the first conveyance that had taken place at least thirty years ago. Section 23 of the Law of Property Act 1969 (LPA 1969) reduced this period to fifteen years.

Secondly, C should undertake a physical inspection of the land. As we will see, each of these means of investigation has a particular role in the application of priority rules.

3 THE TWO BASIC PRIORITY RULES

In unregistered land, two basic priority rules are applied. The key distinction is that between legal and equitable property rights. As for legal estates and interests, such rights will almost always bind C unless, for example, C can establish a defence such as those discussed in section 15.5.4 (based on B's consent) or section 15.5.5 (based on the lapse of time). As we will see, there is one type of legal interest that is treated differently: the enforcement of a puisne mortgage, a specific type of legal mortgage, is now subject to registration under the Land Charges Act 1972 (LCA 1972). C may have a defence against this type of mortgage if it has not been registered under that Act. Apart from this exception, pre-existing legal property rights held by B do not require further discussion, other than to point out that the existence of legal rights will generally be apparent from the title deeds, although this is not invariably the case.³

Equitable interests do however require discussion, as an important additional defence is generally available against such rights: B's pre-existing equitable interest does not bind C if C is a bona fide purchaser for value of a legal estate without notice of B's equitable right. The 'doctrine of notice' is an important part of this defence. A person who successfully invokes this defence is sometimes described as 'equity's darling'—that is, as beyond the reproach of courts of equity.

This general rule is subject to a significant exception. The enforcement of a number of equitable property rights is subject to registration under the 1972 Act. The defence of bona fide purchaser has no application in relation to these rights, the enforcement of which is determined instead by the rules provided by that Act.

Where equitable interests are concerned, it is also important to bear in mind the overreaching mechanism. That mechanism, which applies equally to unregistered and registered land, is discussed in Chapter 17. Overreaching enables C to take the land free from beneficial interests as long as certain conditions are fulfilled: in particular, C must pay any purchase money to a minimum of two trustees or a trust corporation. If the conditions for overreaching are met, then C has a defence against the enforcement of beneficial interests held by B. As we will see in Chapter 17, B's interests are removed from the land and attach to the proceeds of sale held by the trustees (A). If the conditions for overreaching are not fulfilled (for example, because there is only one trustee of the trust), then the enforcement of beneficial interests in unregistered land is determined by the doctrine of notice. Hence, C will be bound by B's beneficial interest unless C can invoke the defence of bona fide purchaser.

As a result of these exceptions, the defence of bona fide purchaser plays a residual, but significant, role. In *Shiloh Spinners Ltd v Harding*,⁴ Lord Wilberforce noted: '[T]here may well be rights, of an equitable character, outside the provisions as to registration and which are incapable of being overreached.' Such rights remain enforceable against C unless C can invoke the defence of bona fide purchaser.

4 THE DEFENCE OF BONA FIDE PURCHASER

The defence of bona fide purchaser is founded on equity's ideas of acting in good conscience. Equity would

³ For example, there may be no record of short leases that are exempt from statutory formalities for their creation (Law of Property Act 1925, s 54(2)) or of legal easements created by implied grant.

⁴ [1973] AC 691, [721].

enforce its property rights against C (a party acquiring a right from A) if C could not, in good conscience, seek to take free from them. In this respect, the defence represents an essentially ethical rule.⁵ But by the time of the 1925 legislation, the defence appeared too narrow: it did not give enough protection to C. As is illustrated below in the debate arising from *Kingsnorth Finance v Tizard*,⁶ its effect is to enforce rights against persons whose conduct it is difficult to call into question. As we will see, this is due, in particular, to the broad reach of constructive notice.

The effect of the defence, when successfully applied, is to provide the purchaser of a legal estate with an ‘absolute, unqualified, unanswerable defence’ against the enforcement of B’s equitable interest.⁷ B’s interest is not resurrected on a subsequent sale to a purchaser with notice.⁸ The defence therefore seems to reflect a value judgment about the relative worth of legal and equitable rights; security of legal transfers is assisted at the cost of equitable proprietary rights.

The legitimacy of this value judgment is assessed by Worthington.⁹ She considers the defence in the context of its impact on a beneficiary, B, following the transfer of legal title from A to C.

Worthington, *Equity* (2nd edn, 2006, p 96)

Although the bona fide purchaser rule is commonly justified by the need to make (legal) transfers of property secure, this rationalization presupposes that legal ownership is the—pre-eminent property right [...]. In the face of this, it is sometimes suggested that the rule is not grounded in logic, but in the competitive jurisdictional politics that once existed between the Common Law and Chancery courts, and that Chancery was simple (but perhaps illogically) ceding jurisdiction to the Common Law courts. There is scope for logical justification, however. A trust presupposes that the beneficiary has left the trustee with all the incidents of title and the power (even if not the authority) to deal with the trust property. Given this, it may make sense to reassess the appropriate balance of risk between the beneficiary and an innocent third party, and sometimes (perhaps not always) favour the third party’s security of transaction over the beneficiary’s security of property. This forces the beneficiary, not the third party, to bear the risk of the defaulting trustee being unable to make the claims against him.

To invoke the defence, C must meet each of the composite elements.

4.1 ‘BONA FIDE’

C must act in good faith in the purchase. The requirement of good faith is closely related to an absence of notice, but it has been held to remain a distinct element.

⁵ Compare Battersby, ‘Informal Transactions in Land, Estoppel and Registration’ (1995) 58 MLR 637. For a full discussion of the defence and its history, see D Fox, ‘Purchase for Value Without Notice’ in P S Davies et al (eds) *Defences in Equity* (Hart, 2018).

⁶ [1986] 1 WLR 783.

⁷ *Pitcher v Rawlins* (1871–72) LR 7 Ch App 259, 269, per James LJ. Note that it is for C to establish the elements of the defence: see e.g. *re Nisbet and Potts Contract* [1906] 1 Ch 386, 404. This marks an important difference between the defence and the approach in third party undue influence cases such as *Royal Bank of Scotland v Etridge* [2002] AC 773 (see section 27.3.3) as in such cases it is for B to show that C, the mortgage lender, had sufficient notice that B’s consent to the mortgage was obtained improperly: on that point, see *Barclays Bank v Boulter* [1999] 1 WLR 1919 (HL).

⁸ *Wilkes v Spooner* [1911] 2 KB 473.

⁹ For discussion of the justifications of the defence, see too A Nair and I Samet, ‘What Can “Equity’s Darling” Tell Us About Equity?’ in D Klimchuk, I Samet, and H Smith (eds) *Philosophical Foundations of the Law of Equity* (OUP: Oxford, 2020).

Midland Bank Trust Co Ltd v Green [1981] AC 513, [1980] UKHL 7

Lord Wilberforce

My Lords, the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened upon his conscience and the composite expression was used to epitomise the circumstances in which equity would or rather would not do so. I think that it would generally be true to say that the words “in good faith” related to the existence of notice. Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice which assumed a statutory form in the Conveyancing Act 1882, section 3. But, and so far I would be willing to accompany the respondents, it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or that when notice came to be regulated by statute, the requirement of good faith became obsolete. Equity still retained its interest in and power over the purchaser’s conscience. The classic judgment of James L.J. in *Pilcher v. Rawlins* (1872) L.R. 7 Ch.App. 259, 269 is clear authority that it did: good faith there is stated as a separate test which may have to be passed even though absence of notice is proved. and there are references in cases subsequent to 1882 which confirm the proposition that honesty or bona fides remained something which might be inquired into (see *Berwick & Co. v. Price* [1905] 1 Ch. 632, 639; *Taylor v. London and County Banking Co.* [1901] 2 Ch. 231, 256; *Oliver v. Hinton* [1899] 2 Ch. 264, 273).

While it is clear from this statement that bona fides is a separate requirement from notice, it is difficult to pinpoint what it adds to the defence.

In *Grindal v Hooper*,¹⁰ the definition of a good faith purchaser arose for consideration in the context of a statute, rather than the defence of bona fide purchaser. Lord Wilberforce’s statement was interpreted to mean that ‘notice is an essential but not an exclusive aspect of good faith’. Hence, a purchaser with notice would necessarily act in bad faith in denying the enforceability of B’s rights, but an absence of notice does not guarantee that C acts in good faith in so doing. In *Serious Fraud Office v Litigation Capital Ltd*,¹¹ Foxton J went somewhat further, stating that it could only be a ‘rare case’ where an absence of good faith could prevent the purchaser of a legal estate without notice from asserting priority over a prior equitable interest, as ‘[t]he suggestion that the acquirer of a legal title for value without notice of a prior interest could nonetheless be subordinated to it as a sanction for bad behaviour would raise serious issues for the security of receipt in English commercial and property law, and might engage consideration of the purchaser’s rights under Article 1 Protocol 1 of the European Convention on Human Rights...I would hold (at a minimum) that any such lack of good faith would have to be directed to the holder of the prior equitable interest, and that it must be something which is directly relevant to the acquisition of the legal estate or the purchaser’s assertion of a superior title against the holder of the equitable interest.’

4.2 ‘PURCHASER FOR VALUE’

To be a purchaser, C must acquire the estate by an act of the parties, rather than by operation of law. Hence, for example, a person who acquires a legal estate through adverse possession (as discussed in Chapter 9) is not a ‘purchaser’.

The requirement of value precludes the defence being invoked where A transfers the land to C as a gift, whether during A’s lifetime or on A’s death. ‘Equity will not assist a volunteer’ and therefore the recipient of a gift

¹⁰ Unreported, judgment 6 December 1999.

¹¹ [2021] EWHC 1272 (Comm) at [132]-[136], considering both Lord Wilberforce’s analysis in *Green* and also that of the Court of Appeal in *Corbett v Halifax Building Society* [2002] EWCA Civ 1849, [2003] 1 WLR 964. The analysis of the bona fide purchaser defence was a general one, not limited to cases involving land.

is not placed in a better position than the donor. The defence can apply whether or not C provides adequate consideration, but the general equitable defence does seem to require that C has given more than merely nominal consideration.¹² In contrast, the statutory defence available under the Land Charges Act 1972 can apply even if only nominal consideration has been provided.¹³

4.3 'OF A LEGAL ESTATE'

The defence of bona fide purchaser is available only to purchasers of a legal estate—that is, a legal freehold or leasehold. If C purchases an equitable interest, such as an equitable lease or an existing beneficial interest, then C remains bound by all equitable interests affecting that interest.¹⁴

4.4 'WITHOUT NOTICE'

The most significant aspect of the defence is the requirement that C does not have notice of B's equitable proprietary right. Notice can take three forms: actual, constructive, and imputed.¹⁵

4.4.1 Actual notice

Actual notice refers to those matters of which C is actually aware. If C knows of B's property rights, then C has no defence against their enforceability. The means by which C obtained notice are generally irrelevant: in particular, it is not necessary that notice is obtained from A or B.

The contrary was suggested to be the case in *Barnhart v Greenshields*.¹⁶ In that case, it was held that 'a purchaser is not bound to attend to vague rumours to statements by mere strangers, but that a notice in order to be binding, must proceed from some person interested in the property'.¹⁷ While the irrelevance of rumours has not been doubted, a broader approach to the defence has been indicated.

Lloyd v Banks (1868) LR 3 Ch App 488

Lord Cairns LC

At 490–1

¹² See *Serious Fraud Office v Litigation Capital Ltd* [2021] EWHC 1272 (Comm) at [137]. As pointed out by Lord Wilberforce in *Midland Bank v Green* [1981] AC 513, 532, the mere fact that consideration is 'inadequate' or even 'grossly inadequate' does not make it nominal – Lord Wilberforce instead described nominal consideration as referring to 'a sum or consideration which can be mentioned as consideration but is not necessarily paid'.

¹³ See *Midland Bank v Green* [1981] AC 513, 532: see further section 5.6 below. Note there that, in any case, as C had in fact paid £500, the consideration was not nominal even though the land was valued at £40,000.

¹⁴ There are some exceptions: see e.g. *Serious Fraud Office v Litigation Capital Ltd* [2021] EWHC 1272 (Comm) at [139]–[142]. The most significant for our purposes is that, if C is a bona fide purchaser for value of an equitable interest, C can take free of B's pre-existing right if B's right is a 'mere equity' (such as e.g. the power to set aside a unconscionable transaction: see further section 6.5.2) rather than an equitable interest: see e.g. the statement of the law by Lord Westbury in *Phillips v Phillips* (1861) 4 De G F & J 208. For discussion of such mere equities, and their treatment under the Land Registration Act 2002, see sections 7.3.3.2 and 10.8.3.1. See too Cooper and Lees, 'Interests, Powers and Mere Equities in Modern Land Law' (2017) 37 OJLS 435.

¹⁵ The general rule is that the presence or absence of notice is tested at the point when C acquires the legal estate, at latest: see *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch 91 [88].

¹⁶ (1853) 9 Moo PCC 18.

¹⁷ *Ibid*, 36, per The Rt Hon T Pemberton Leigh.

I do not think it would be consistent with the principles upon which this Court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee, without express notice from the incumbrancer, be fixed with knowledge of an incumbrance upon the fund of which he is the trustee so as to give the incumbrancer the same benefit which he would have had if he had himself given notice to the trustee. It must depend upon the facts of the case; but I am quite prepared to say that I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice—but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust.

4.4.2 Constructive notice

If C does not have actual notice of B's rights because of a failure to make reasonable inquiries, then C will be fixed with constructive notice and be precluded from invoking the defence. The Law of Property Act 1925 (LPA 1925) provides a statutory explanation of the scope of constructive notice.¹⁸

Law of Property Act 1925, s 199

(1) A purchaser shall not be prejudicially affected by notice of—

[. . .]

(ii) any other instrument or matter or any fact or thing unless—

(a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him;

[. . .]

Howell explains the rationale for this form of notice.

Howell, 'The Doctrine of Notice: An Historical Perspective' [1997] Conv 431, 432

It is constructive notice which has caused and continues to cause the most difficulty. The principle upon which it is based is eminently reasonable. If a purchaser is affected only by matters of which he actually knows, he will take care to ensure that he is without that knowledge. Since this could clearly lead to injustice, equity was prepared in certain circumstances to treat the purchaser as having knowledge which he did not in fact have. In order to satisfy the courts of equity, the purchaser was expected to inspect both the land itself and the documents of title to a standard of enquiry set by the courts, and that standard could be very high [. . .] In general, however, the courts were concerned to confine constructive notice within the scope of those inspections and enquiries which it was reasonable to make, and not to put an over-stringent burden of enquiry on the purchaser.

Inevitably, what constitutes 'reasonable' inquiries has provided a fertile ground for litigation. In particular, this has centred on the protection afforded to those in occupation.

It is well established that B's occupation is sufficient to fix C with constructive notice of B's rights.¹⁹ To

¹⁸ For a useful discussion of the general principles relating to constructive notice, see Lord Neuberger MR in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2012] Ch 453 (CA) [106]-[109] and Lord Clarke in *Papadimitriou v Credit Agricole Corpn* [2015] 1 WLR 4265 (PC) [17]-[20].

¹⁹ See *Barnhart v Greenshields* (1853) 9 Moo PCC 18; *Hunt v Luck* [1902] 1 Ch 428. See too *Rock Ferry Waterfront Trust v Pennistone Holdings Ltd* [2020] EWHC 3007 (Ch) at [60] – note that an appeal is pending in that case.

have this effect, however, the fact of B's occupation must be ascertainable on reasonable enquiries. This gives rise to two issues: what constitutes occupation and what constitutes reasonable enquiries.

As discussed in Chapter 16, occupation is relevant to determining priorities in registered, as well as unregistered, land. In registered land, in *William & Glyn's Bank v Boland*,²⁰ the House of Lords interpreted 'occupation' broadly. In particular, it was held that there is no requirement that occupation must be inconsistent with the title offered by A. In taking this approach, the House of Lords declined to follow case law from unregistered land, including the following case, which signals a narrower definition of 'occupation'.

Caunce v Caunce [1969] 1 WLR 286, HC

Facts: Mr Caunce was the sole legal owner of a matrimonial home, which he held on trust for himself and his wife, who had paid towards the cost of the purchase. Mr Caunce used the home as security for loans and became bankrupt. Mrs Caunce argued that the banks had constructive notice of her beneficial interest, because she was in occupation.

Stamp J

At 393–4

In my judgment, where the vendor or mortgagor is himself in possession and occupation of the property, the purchaser or the mortgagee is not affected with notice of the equitable interests of any other person who may be resident there, and whose presence is wholly consistent with the title offered. If you buy with vacant possession on completion and you know, or find out, that the vendor is himself in possession and occupation of the property, you are, in my judgment, by reason of your failure to make further inquiries on the premises, no more fixed with notice of the equitable interest of the vendor's wife who is living there with him than you would be affected with notice of the equitable interest of any other person who might also be resident on the premises, e.g., the vendor's father, his "Uncle Harry" or his "Aunt Matilda," any of whom, be it observed, might have contributed towards the purchase of the property. The reason is that the vendor being in possession, the presence of his wife or guest or lodger implies nothing to negative the title offered. It is otherwise if the vendor is not in occupation and you find another party whose presence demands an explanation and whose presence you ignore at your peril.

Caunce v Caunce has never been overruled. Its effect, if applied, is that where A is in occupation of the land, C is not fixed with constructive notice of property rights held by other persons in occupation whose presence is not inconsistent with A's title. In particular, this includes A's spouse.

As a matter of policy, the decision is unsatisfactory. It means that the level of protection afforded to a person's property rights is dependent on his or her relationship to A. At a broad level, it runs counter to the increasing recognition of the likelihood of co-ownership of the home. The practical effect of developing the doctrines of trust through which co-ownership may be established (discussed in Chapter 16) is weakened if due protection of those rights is denied simply on the basis of the parties' relationship. Therefore, it may be expected that, should the scope of occupation arise again in unregistered land, the court would prefer the wide approach taken in *Boland* and further discussed in section 16.4.2.7.

The court considered the need for C's occupation to be ascertainable on reasonable inquiries in the following case.

²⁰ [1981] AC 487.

Kingsnorth Finance Co Ltd v Tizard [1986] 1 WLR 783, HC

Facts: Mr Tizard held legal title to his house on trust for himself and his wife. Following the breakdown of their marriage, Mrs Tizard had stopped living in the home, while Mr Tizard had remained there with the couple's son and daughter. Most of Mrs Tizard's clothes remained in the house, which she visited every day to care for the children. Mrs Tizard slept at the house on the frequent occasions when her husband was away. Unknown to her, Mr Tizard used the house as security for a loan, the proceeds of which he used to emigrate with their son. The facts came to light when the loan was not repaid. The court held that Mrs Tizard was in occupation. Prior to the grant of the loan, an agent (Mr Marshall) had visited the house to undertake a valuation. The inspection had taken place on a Sunday afternoon, at a time arranged by Mr Tizard, who ensured that his wife took the children out for the day. Mr Marshall saw evidence of occupation by the children, but not of Mrs Tizard. Mr Tizard told Mr Marshall that he was separated from his wife, although he had described himself as single on his application form. The issue arose of whether Kingsnorth Finance had constructive notice of Mrs Tizard's beneficial interest.

Judge John Finlay QC

At 794–5

I return to the submissions made by Mr. Romer and Mr. Wigmore. Mr. Romer's submission is that as Mrs. Tizard was in fact in occupation, that circumstance itself fixed the plaintiffs with notice of such rights as she had; to the contrary is the submission made by Mr. Wigmore that, in the case of unregistered land, it is only where the purchaser or mortgagee finds the claimant to an equitable interest in occupation that he has notice.

I accept Mr. Wigmore's submission but subject to a significant qualification: if the purchaser or mortgagee carries out such inspections "as ought reasonably to be made" and does not either find the claimant in occupation or find evidence of that occupation reasonably sufficient to give notice of the occupation, then I am not persuaded that the purchaser or mortgagee is in such circumstances (and in the absence, which is not the case here, of other circumstances) fixed with notice of the claimant's rights. One of the circumstances, however, is that such inspection is made "as ought reasonably to be made."

Here Mr. Marshall carried out his inspection on a Sunday afternoon at a time arranged with Mr. Tizard. If the only purpose of such an inspection were to ascertain the physical state of the property, the time at which the inspection is made and whether or not that time is one agreed in advance with the vendor or mortgagor appears to me to be immaterial. Where, however, the object of the inspection (or one of the objects) is to ascertain who is in occupation, I cannot see that an inspection at a time pre-arranged with the vendor will necessarily attain that object. Such a pre-arranged inspection may achieve no more than an inquiry of the vendor or mortgagor and his answer to it. In the case of residential property an appointment for inspection will, in most cases, be essential so far as inspection of the interior is concerned. How then is a purchaser or mortgagee to carry out such inspection "as ought reasonably to have been made" for the purpose of determining whether the possession and occupation of the property accords with the title offered? What is such an inspection "as ought reasonably to be made" must, I think, depend on all the circumstances. In the circumstances of the present case I am not satisfied that the pre-arranged inspection on a Sunday afternoon fell within the category of "such inspections which ought reasonably to have been made," the words in section 199 of the Law of Property Act 1925 which I have already read. The plaintiffs not having established that they made such an inspection, the conclusion that I have reached by another route is, in my view, fortified. It follows that the plaintiffs' claim for possession fails.

Grateful acknowledgement is made to the Incorporated Council of Law Reporting for allowing permission to display the material from *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783.

Jackson notes that *Tizard* takes a broad approach to determining when occupation is apparent. On her analysis, there were two routes to the finding of constructive notice: in the following extract, she refers to 'latent' and

'patent' defects in A's title. Latent defects are those ascertainable on inquiry; patent defects are those that would be disclosed on a reasonable inspection of the land.²¹

Jackson, 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 LQR 660, 673–4

There were two grounds for the decision. First, under the "latent" aspect of constructive notice he [Judge Finlay] held that inquiries would have revealed the presence of an interest that encumbered Kingsnorth's title. Secondly, under the "patent" aspect of the doctrine, it was held that Kingsnorth had not made a reasonable inspection of the land. In relation to the latter, Judge Finlay observed that sufficient evidence of occupation was required before a purchaser would be bound by an equitable co-ownership right. Under s.199, occupiers' rights are protected to the extent that their occupation is patent, i.e. apparent on a reasonable inspection. That occupation then puts a purchaser on inquiry as to the possible existence of an adverse claim. A purchaser will take free from the interest of the occupier only if the purchaser could not establish that there was insufficient evidence of occupation [. . .] By definition therefore, if Mrs Tizard's minimal constructive occupation would be considered to be apparent, the apparenacy requirement itself imposes a high standard of inspection on purchasers.

Thompson criticizes Judge Finlay's focus on whether Kingsnorth Finance had notice of Mrs Tizard's occupation. He notes that the issue under the bona fide purchaser defence is whether the company had notice of Mrs Tizard's beneficial interest, not of her occupation. This is in contrast to the position in registered land. There, as we will see in section 16.4.2, the rights of persons in occupation are protected as 'overriding interests'. Statutory regulation of this category of interest is centred on the issue of occupation as the trigger for protecting B's rights.²²

Once it is accepted that occupation confers constructive notice, however, some focus on determining when B is in occupation appears logical and necessary. The key question for the scope of constructive notice is whether the court has struck the right balance in its interpretation of what constitutes reasonable inquiries. This is the case whether those inquiries are focussed towards discovering B's rights, or B's occupation. On this crucial issue, Thompson questions Judge Finlay's suggestion (in the extract from his judgment above) that a single inspection at a prearranged time is insufficient when the object is to ascertain who is in occupation.

Thompson, 'The Purchaser as Private Detective' [1986] Conv 283, 286

With respect, this seems to go too far. Suppose Mr. Marshall had asked where the mother of the children was and had been told either that she was dead or that she had left years ago and her present whereabouts, or even whether she was still alive, was unknown. What then is he supposed to do? Clearly, an inspection of the property should take place. If the mortgagor says this can take place at the weekend, can it really be supposed that the mortgagee's agent must insist on calling at an alternative, unannounced time to check whether the mortgagor is lying? Similarly must he insist upon rifling through drawers and cupboards, inevitably causing offence? It is submitted that such behaviour goes far beyond what are reasonable inquiries.

It is suggested that the onus on a purchaser of unregistered land is not this heavy. It is necessary that the vendor should be asked whether he shares the house with anyone else. Additionally he should be asked if he either is or was married. If the answers reveal the existence of anybody, then inquiries where possible should be made of that person. Further, an inspection of the property should be carried out. If such an inspection gives no cause to suspect adverse rights then, pace Judge Finlay, even if this inspection was performed at a time arranged with the vendor, the purchaser should be held to have done all that is required

²¹ Jackson, 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 LQR 660, 672–3.

²² Thompson, 'The Purchaser as Private Detective' [1986] Conv 283. Overriding interests are discussed in Chapter 14.

of him by section 199 of the Law of Property Act 1925. For the purchaser to insist on doing more carries the inevitable implication that he suspects the vendor of deceit. Such demands should not be considered to be within the scope of reasonable inquiries.

Ultimately, it must be recalled that the requirement is to make *reasonable* inquiries.²³ What this entails must be dependent on the facts. In a case such as *Tizard*, in which a prearranged inspection brings to light irregularities, it may be reasonable to expect that these are followed up.

Where B is in occupation as a tenant, his or her occupation does not give C constructive notice of the rights of the landlord. Farwell J explained the position at first instance in the following case—a judgment that was upheld by the Court of Appeal²⁴ and remains authoritative.

Hunt v Luck [1901] 1 Ch 45

Facts: A solicitor transferred property to the defendant as security for a mortgage. The property consisted of a number of homes let out to tenants. Prior to the transfer, the defendant had been informed by the tenants that their rent was paid to a local estate agent, but did not make further inquiries to ascertain on whose behalf the rent was collected. The plaintiff argued that the defendant had constructive notice that the property was held on her behalf.

Farwell J

At 48–9

The plaintiff's contention, therefore, is that it was the duty of the mortgagees to direct their agent (1.) to inquire of the tenants, not merely whether they claimed any and what interest in their holdings, but also who was the person to whom their rents were paid; and (2.) having ascertained to whom the rents were paid, to inquire of the recipient on whose behalf those rents were received.

Now, in my opinion on the authorities as they stand, it is not the duty of a purchaser to ask the tenants to whom they pay their rents. The fact that a tenant is in occupation is notice of his own rights, but is not notice of the rights of the persons through whom he claims.

The matter is different if the purchaser has actual notice that rent is being paid to a person whose receipt is inconsistent with the vendor's title. In such circumstances, the purchaser has constructive notice of the recipient's property rights.²⁵

4.4.3 Imputed notice

This category concerns notice obtained by agents acting on C's behalf.²⁶ If C's agent—for example, C's solicitor—has notice of B's rights, whether actual or constructive, then the agent's notice is imputed to C.

²³ Note that if it can be shown that reasonable inquiries would not have led to C's discovering B's right, then C can be protected even if C did not in fact make such inquiries: see e.g. Lord Sumption in *Papadimitriou v Credit Agricole Corpn* [2015] 1 WLR 4265 (PC) [33]: '[W]e are in the realm of property rights, and are not concerned with an actionable duty to investigate. The doctrine of constructive notice does not exist to punish those who fail to carry out reasonable enquiries, regardless of what those enquiries would have revealed.'

²⁴ [1902] 1 Ch 428.

²⁵ [1901] 1 Ch 45, [51].

²⁶ For further consideration of the nature of imputed notice, see Nield, 'Imputed Notice' [2000] Conv 196.

Like constructive notice, a statutory explanation of the scope of imputed notice is provided by s 199 of the LPA 1925.

Law of Property Act 1925, s 199

(1) A purchaser shall not be prejudicially affected by notice of—

[...]

(ii) any other instrument or matter or any fact or thing unless—

[...]

(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Tizard illustrates the operation of imputed notice. In that case, as we have seen, Mr Marshall undertook an inspection of the property. He was considered to have been acting as an agent for Kingsnorth Finance and therefore information that he obtained, that Mr Tizard was separated from his wife, was imputed to Kingsnorth Finance. It was on the basis of this imputed knowledge that Judge Finlay considered that Kingsnorth Finance should have made further inquiries.²⁷

5 THE LAND CHARGES ACT 1972

A system for the registration of a limited number of interests in unregistered land was provided by the Land Charges Act 1925 (LCA 1925). The idea of registering land charges was not new, but had previously been confined to ‘*somewhat unusual charges which a purchaser might fail to discover in an ordinary investigation of title*’.²⁸ The 1925 Act extended the operation of registration to ‘*numerous everyday transactions*’.²⁹ That Act was replaced by the LCA 1972.

At first sight, it seems paradoxical to speak of *registration* in relation to *unregistered* land. It is important, therefore, to understand the limited scope of land charges registration and how this scheme differs from the system of registered land.

The 1972 Act provides for a number of equitable interests, and one legal interest, to be recorded on a register against the name of the holder of the legal estate. Registered land, as we have seen in Chapter 3, requires the registration of legal estates in land. Each estate is given a title number, with the name of the holder of the legal estate, and the holders of certain other legal and equitable interests in the land, recorded against that title number. Hence land charges registration is a system for the registration of *interests* in unregistered land against the *name* of the holder of the legal title; registered land provides for the registration of *legal estates* against a unique *title number*.

5.1 THE SCOPE OF THE LAND CHARGES ACT 1972

The interests registrable as land charges are listed in s 2 of the LCA 1972 in six classes: Classes A–F, with Classes C and D further subdivided. The most important land charges are those contained in Classes C(i) and C(iv), D(ii) and D(iii), and F. These are discussed below. Other classes cover various statutory and equitable financial obligations connected to land, including equitable mortgages (Class C(iii)) and statutory charges securing

²⁷ [1986] 1 WLR 783, [794].

²⁸ *Megarry and Wade’s The Law of Real Property* (6th edn, ed Harpum, 2000), [5–086]. This paragraph is referred to in [8–062] of the seventh edition, but is not repeated in the text.

²⁹ *Ibid.*

payment of tax (Class D(i)).

Land Charges Act 1972, s 2

(1) If a charge on or obligation affecting land falls into one of the classes described in this section, it may be registered in the register of land charges as a land charge of that class.

[...]

(4) A Class C land charge is any of the following (not being a local land charge), namely—

(i) a puisne mortgage;

[...]

(iv) an estate contract;

and for this purpose—

(i) a puisne mortgage is a legal mortgage which is not protected by a deposit of documents relating to the legal estate affected;

[...]

(iv) an estate contract is a contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption or any other like right.

(5) A Class D land charge is any of the following (not being a local land charge), namely—

[...]

(ii) a restrictive covenant;

(iii) an equitable easement;

and for this purpose—

[...]

(ii) a restrictive covenant is a covenant or agreement (other than a covenant or agreement between a lessor and a lessee) restrictive of the user of land and entered into on or after 1st January 1926;

(iii) an equitable easement is an easement, right or privilege over or affecting land created or arising on or after 1st January 1926, and being merely an equitable interest.

[...]

(7) A Class F land charge is a charge affecting any land by virtue of the Part IV of the Family Law Act 1996

The Class C(i) land charge, the puisne mortgage, is notable as the only legal interest registrable as a land charge and (as has been noted above) the only exception to the general priority rule that a purchaser of unregistered land is necessarily bound by legal interests. In unregistered land, the first legal mortgagee generally holds title deeds—hence registration is aimed at second and subsequent legal mortgages.

The estate contract in Class C(iv) has a broad application. Its scope may be sufficiently broad to cover all cases in which there is a specifically enforceable contract for the creation or transfer of legal estates and interests³⁰ in land that would attract the application of the doctrine of anticipation discussed in section 8.4.1. It includes contracts for sale of a freehold, for the creation and assignment of a lease, and contracts to create a mortgage. It also includes a contract to create an easement,³¹ although an equitable easement arising from the

³⁰ Although defined in the Land Charges Act 1972, s 2(4)(iv), as concerned with ‘legal estates’, s 17 provides for that expression to be given the same meaning as in the Law of Property Act 1925. ‘Legal estates’ is defined broadly in the 1925 Act, s 1(4), as ‘*estates, interests, and charges which under this section are authorised to subsist or to be conveyed or created at law*’. See Battersby (1995) p 646.

³¹ *Ibid.*

contract could be registered as a Class D(iii) land charge.

An estate contract arises in the ordinary course of a conveyance of a legal estate in unregistered land as soon as there is a specifically enforceable contract (see section 8.4.3). Registration may not be usual where the period of time between contract and conveyance is short. This leaves the purchaser vulnerable to loss of his or her property right, although it does not affect contractual remedies. For example, if A contracts to sell land to B and, in breach of contract, sells to C (who has offered a higher price), B's estate contract is not enforceable against C unless registered, but A remains liable for damages for breach of contract.

Class D(iii) covers only equitable easements; legal easements are governed by the general priority rule that legal rights bind all third parties who acquire rights from A. The existence of legal easements should be apparent from the title deeds if expressly created, but, as we will see in section 22.3.2, legal easements may also arise through an implied grant. The existence of such easements may be no more or less apparent on an inspection of the land than equitable easements. Hence the different treatment of these is not necessarily logical. The scope of Class D(iii) has been subject to debate. In *ER Ives Investment Ltd v High*,³² Lord Denning MR suggested that it included only those easements that would have been categorized as legal before the 1925 legislation and became equitable as a result of the changes introduced by those Acts. This is an artificially narrow interpretation.³³ In *Shiloh Spinners Ltd v Harding*,³⁴ Lord Wilberforce said that it 'should be given its plain prima facie meaning'.

Equitable easements and restrictive covenants (in Classes D(ii) and D(iii)) are registrable only if created after the LCA 1925 came into force. The enforceability of those that pre-date the introduction of registration of land charges remains determined by the doctrine of notice. This limitation on the scope of Classes D(ii) and D(iii) is significant, because easements and restrictive covenants constitute some of the most important and enduring third-party rights, the creation of which was already common prior to 1925. Class F concerns statutory rights of occupation conferred on certain spouses and civil partners who do not own legal title to their home. The scope of these occupation rights is considered in Chapter 16. The need to register has been described as a 'severe restriction' on the protection afforded by these statutory rights.³⁵ Registration is unlikely to be undertaken through lack of knowledge or advice, or where the claimant is 'still living at home in peace with her husband'.³⁶ Notwithstanding, registration can be used as a potent weapon. In *Wroth v Tyler*,³⁷ the vendor's wife objected to her husband's plan to sell their house and relocate the family. She registered a Class F land charge between contract and conveyance, thus preventing her husband from completing the sale with vacant possession and leaving him liable for damages for breach of contract. On the facts, it was apparent that the consequence of such liability would be the bankruptcy of the husband and, through that, the loss of the home. Despite this, the wife refused the opportunity to cancel the land charge to enable the sale to go ahead.

5.2 THE EFFECT OF REGISTRATION AND NON-REGISTRATION

The effect of registration is given in clear and unequivocal terms in s 198 of the LPA 1925.

Law of Property Act 1925, s 198

(1) The registration of any instrument or matter [in any register kept under the Land Charges Act 1972 or any local land charges register], shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of

³² [1967] 2 QB 379.

³³ Battersby (1995).

³⁴ [1973] AC 691, [721].

³⁵ *Williams & Glyn's Bank v Boland* [1979] Ch 312, 328, per Lord Denning MR.

³⁶ *Ibid.*

³⁷ [1974] Ch 30.

registration or other prescribed date and so long as the registration continues in force.

[...]

The effect of a failure to register is provided in s 4 of the LCA 1972. The general effect of non-registration is to provide a purchaser with a defence of lack of registration—the defence that we introduced in section 3.3.3. Minor differences arise as regards when a purchaser can invoke the defence, depending on the class of registrable land charge.

Land Charges Act 1972, s 4

[...]

(5) A land charge of Class B and a land charge of Class C (other than an estate contract) created or arising on or after 1st January 1926 shall be void as against a purchaser of the land charged with it, or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase.

(6) An estate contract and a land charge of Class D created or entered into on or after 1st January 1926 shall be void as against a purchaser for money or money's worth [or, in the case of a HM Revenue and Customs charge, a purchaser within the meaning of the Capital Transfer Tax Act 1984] of a legal estate in the land charged with it, unless the land charge is registered in the appropriate register before the completion of the purchase.

The effect of non-registration of land charges in Classes C(iv) and D therefore differs in two respects from non-registration of all other classes. Firstly, unregistered land charges in Classes C(iv) and D are void only against purchasers for money or money's worth. In the absence of a specific requirement, land charges in other classes are void for non-registration against purchasers for 'valuable consideration', within the general definition of 'purchaser' in s 17 of the 1972 Act. The practical difference between these is that marriage consideration constitutes value, but is not money or money's worth.

Secondly, unregistered land charges in Classes C(iv) and D are void only against purchasers of a legal estate. Unregistered land charges in other classes are void against purchasers of any interest in the land, which would include equitable interests.

As we will see below, there is no scope in these provisions to superimpose the doctrine of notice. Where B holds a property right that is registrable as a land charge and has not been registered, the statutory protection conferred by s 4 of the LCA 1972 provides the purchaser with a complete defence against the enforcement of B's property right.

5.3 THE MECHANICS OF REGISTRATION

The register maintained under the LCA 1972 is names-based.

Land Charges Act 1972, s 3

(1) A land charge shall be registered in the name of the estate owner whose estate is intended to be affected.

[...]

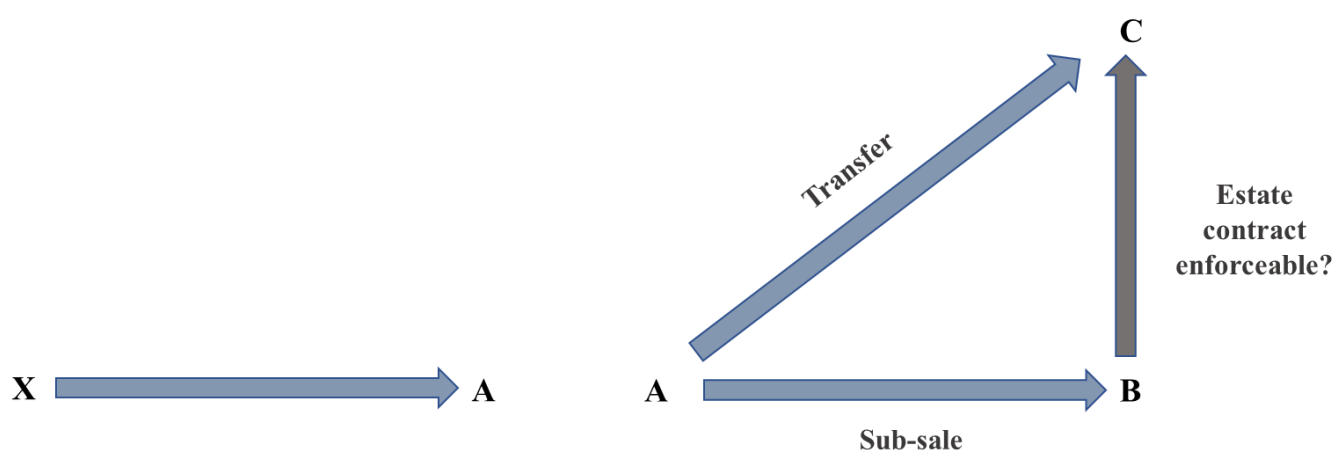
B registers his or her land charge against the name of the holder of the legal estate at the time of registration. The purchaser, C, searches the register against the names of all holders of the legal estate within the period of inspection necessary to establish a good root of title. The successful operation of the register is therefore dependent on B registering and C searching against the correct name. The correct name is the name of the estate owner, as disclosed by the conveyancing documents;³⁸ this is the name available to the purchaser when

³⁸ *Standard Property Investment plc v British Plastics Federation* (1987) 53 P & CR 25.

investigating title.

The need to register against the name of the holder of the legal estate gives rise to a particular difficulty on a sub-sale. In *Barrett v Hilton Developments*,³⁹ A contracted to buy land from X. Before the purchase was completed, A subcontracted to sell the land to B, who registered a Class C(iv) land charge against A's name. A subsequently acquired legal title, but sold the land to C (Figure 2).

Figure 2 *Barrett v Hilton Developments*



B's registration against A's name was ineffective, because A was not the holder of the legal estate at the time of the registration. The Court of Appeal acknowledged the practical difficulties for B, who may have no means of knowing that A did not hold legal title—but the Court considered that that s 3(1) of the 1972 Act was not susceptible to a construction that would validate registration against anyone other than the current holder of legal title.

The purchaser is entitled to see the title deeds only once the contract for sale has been entered, although, in practice, they may be produced beforehand. The title deeds enable the purchaser to ascertain the names against which a search of the land charges register should be carried out, and it is usual conveyancing practice to search the register in the period between contract and completion. This means that C generally investigates title only after he or she has become contractually bound to purchase the land. The vendor will, however, have contracted to give good title free from undisclosed third party interests; hence, if good title is not shown, or undisclosed interests are discovered, then contractual remedies, including rescission, would be available to the purchaser. Provisions in the contract to the contrary are void.⁴⁰

5.4 SEARCHING THE LAND CHARGES REGISTER

A purchaser may search the land charges register personally or requisition an official search.⁴¹ An official search carries two significant advantages. Firstly, the certificate of search is deemed conclusive.

Land Charges Act 1972, s 10

[...]

(4) In favour of a purchaser or an intending purchaser, as against persons interested under or in respect of

³⁹ (1975) 29 P & CR 300.

⁴⁰ Law of Property Act 1969, s 24.

⁴¹ Land Charges Act 1972, ss 9 and 10.

matters or documents entries of which are required or allowed as aforesaid, the certificate, according to its tenor, shall be conclusive, affirmatively or negatively, as the case may be.

Hence, a correctly registered charge that is not revealed on the certificate of an official search is unenforceable against the purchaser. In such a case, the Registrar would be liable in negligence to the holder of the land charge.⁴²

The second advantage of an official search is that it confers on the purchaser, for a limited 'priority period', protection against new charges registered between the time of search and completion of the conveyance.

Land Charges Act 1972, s 11

[. . .]

(5) Where a purchaser has obtained a certificate under section 10 above, any entry which is made in the register after the date of the certificate and before the completion of the purchase, and is not made pursuant to a priority notice entered on the register on or before the date of the certificate, shall not affect the purchaser if the purchase is completed before the expiration of the relevant number of days after the date of the certificate.

(6) The relevant number of days is—

(a) for the purposes of subsections [. . .] (5) above, fifteen;

[. . .]

or such other number as may be prescribed; but in reckoning the relevant number of days for any of the purposes of this section any days when the registry is not open to the public shall be excluded.

Land charges registered pursuant to a 'priority notice' are excluded from the protection afforded to purchasers during the priority period. Such land charges arise where notice of intent to register has been given to the Registrar prior to the creation of the land charge.

5.5 PROBLEMS WITH A NAMES-BASED REGISTER

The system of land charges registration is undermined by two flaws: firstly, it is susceptible to human error in registration and search; secondly, there is an inherent and unavoidable risk of registered charges being hidden behind a good root of title.

5.5.1 Errors in search and registration

As we have noted, land charges should be registered and searches made under the name of the holder of the legal estate as provided on the title deeds. Like any database, variations and misspellings of names will not be recognized. An official search against the correct name provides a purchaser with a defence against interests registered under an incorrect name. In *Diligent Finance Co Ltd v Alleyne*,⁴³ Mrs Alleyne registered her statutory rights of occupation as a Class F land charge against her husband as 'Erskine Allyene'. This was not revealed when Diligent Finance, prior to the grant of a mortgage, requisitioned an official search against 'Erskine Owen Alleyne', the name used on the conveyancing documents. The official search protected Diligent Finance against Mrs Alleyne's Class F land charge. Conversely, an official search against an incorrect name would offer no protection

⁴² By analogy with *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223. In that case, a local authority was held vicariously liable for the negligence of its clerk in issuing an incorrect local land charges search certificate.

⁴³ (1972) 23 P & CR 346.

against a properly registered land charge:⁴⁴ the certificate of an official search is only conclusive in relation to the names searched. In rare cases, errors occur at both stages of registration and search.

***Oak Co-operative Building Society v Blackburn* [1968] Ch 730, CA**

Facts: Mr Blackburn granted an estate contract over his house to B. The estate contract was registered as a Class C(iv) land charge under the name 'Frank David Blackburn', Frank being the name by which Mr Blackburn was known. In fact, however, his correct name (used on the title deeds) was 'Francis David Blackburn'. Subsequently, Mr Blackburn used his house as security for a mortgage from the building society. An official search was requisitioned against the name 'Francis Davis Blackburn'; the building society's solicitor, a 'Mr Davis', apparently transposing his own name onto the search request. The certificate of official search showed a nil return and the mortgage was granted.

Russell LJ

At 743

We have come to the conclusion that the registration on this occasion ought not to be regarded as a nullity simply because the formal name of Blackburn was Francis and not Frank, and notwithstanding that Frank as a name is not merely an abbreviation or version of Francis but also a name in its own right, as are also for example Harry and Willie. We are not led to this conclusion by the fact that initials would seem to suffice for registration of a *lis pendens*: see *Dunn v. Chapman*—at least under the then legislation and rules: for presumably a request for search under a full name having the same initials should throw up all entries under those initials. We take a broader view that so far as possible the system should be made to work in favour of those who seek to make use of it in a sensible and practical way. If a proposing purchaser here had requested a search in the correct full names he would have got a clean certificate and a clear title under section 17 (3) of the Land Charges Act, 1925, and would have suffered no harm from the fact that the registration was not in such names: and a person registering who is not in a position to satisfy himself what are the correct full names runs that risk. But if there be registration in what may be fairly described as a version of the full names of the vendor, albeit not a version which is bound to be discovered on a search in the correct full names, we would not hold it a nullity against someone who does not search at all, or who (as here) searches in the wrong name.

Section 17 of the LCA 1925 is now replaced by the provisions for official searches in s 10 of the LCA 1972. The outcome of the case would have been the same if the building society had undertaken a personal search against the correct name. Russell LJ commented, obiter, that the courts would not protect a personal searcher 'from his folly'.⁴⁵

It is apparent from the decisions in *Oak Co-Operative Building Society v Blackburn* and *Diligent Finance Co Ltd v Alleyne* that registration of a land charge against an incorrect version of a name is not wholly ineffective. The land charge will still be enforceable against a purchaser who does not search, who searches personally, or who requisitions an official search against an incorrect name. A defence against the enforcement of an incorrectly registered land charge is available only to a purchaser who requisitions an official search against the correct name.

5.5.2 Registered charges hidden behind good root of title

As we have noted, good root of title is established by investigating title back to the first conveyance that is at

⁴⁴ See too *Horrill v Cooper* (2000) 80 P & CR D16 (CA), where an official search was not effective as the relevant land had not been adequately described in the application. As a result, C was bound by a restrictive covenant which has been registered as a Class D(ii) charge, even though it had not been revealed by the official search.

⁴⁵ [1968] Ch 730, [744].

least fifteen years old. The purchaser therefore receives title deeds relating to that period, from which he or she should requisition an official search against the names of the holders of legal estates. This will not reveal land charges registered against the names of those who held legal title at an earlier time: such land charges are hidden behind the good root of title. Notwithstanding, by the force of s 198 of the LPA 1925, a purchaser has no defence against the enforcement of the land charge.

This problem was inherent in the provision for land charges to be registered against the name of the holder of the legal estate. It was bound to arise as soon as the register had subsisted for a period longer than that constituted by good root of title. The matter was investigated by the Roxburgh Committee, which conceded that the problem was insoluble.

Report of the Committee on Land Charges (Cmd 9825, 1956, [22])

We are the inheritors of a transitory system which was bound to disclose this defect after 30 years of transition [the period of good root of title at the time of the LCA 1925] and it seems too late to disclaim our inheritance [...]. The only policy which we can recommend is to press on as quickly as may be with the extension of the system of compulsory registration of title.

The creation of such an inherently flawed system undoubtedly gives cause for concern.

Wade, 'Land Charges Registration Reviewed' [1956] CLJ 216, 216

If the inventions of one generation of legislators fail to justify themselves, the next generation should be able to amend them, at any rate where the difficulties are purely technical and there are no questions of policy. But Lord Birkenhead and Sir Benjamin Cherry appear to have succeeded in creating the conveyancing equivalent of a Frankenstein's monster, which with the passing years would become not only more dangerous but also more difficult to kill.

A pragmatic solution is provided by s 25 of the LPA 1969, which provides for financial compensation for the purchaser.

5.6 LAND CHARGES REGISTRATION AND THE DOCTRINE OF NOTICE

The statutory protection against unregistered land charges afforded to a purchaser leaves no room for the operation of the doctrine of notice. If A sells land to C, who has actual notice of B's registrable, but unregistered land charge, then B's property right is void against C as long as C meets the criteria of purchaser within s 4 of the LCA 1972. C's statutory protection confers an absolute defence against B.

This prompted the following criticism.

Wade, 'Land Charge Registration Reviewed' [1956] CLJ 216, 227

The policy of 1925 was to abandon the equitable principle of notice in favour of a mechanical principle of registration. This was a shift from a moral to an a-moral basis. Its justification was that the doctrines of constructive and imputed notice had been over-refined "to such an extent that it had become dangerous to employ in a purchase a solicitor of good practice and reputation." But those difficulties could be avoided without the defiance of ethics which occurs when a purchaser with *actual* notice is allowed to disregard a third party's rights.

The matter was put to the test in *Midland Bank Trust Co Ltd v Green*,⁴⁶ which concerned an option to purchase (a Class C(iv) land charge) granted to Geoffrey Green by his father, Walter. Geoffrey did not register his option as a land charge and, aware of this fact, Walter colluded with his wife, Evelyne, to defeat Geoffrey's option. In order to do so, Walter conveyed the land, which had a market value of £40,000, to Evelyne for £500. Despite Evelyne's actual notice of Geoffrey's option, the House of Lords held that she had a defence against its enforcement because of Geoffrey's non-registration. Against this conclusion, it was argued that Evelyne could not benefit from the statutory protection against unregistered land charges, because she was not a purchaser in good faith.

As we have noted above, the House of Lords acknowledged notice of a right precluded a purchaser from acting in good faith. But the definition of purchaser provided in the LCA 1925 (and the LCA 1972) excludes a requirement of good faith. This is in contrast to the definitions given in the other statutes in the 1925 property legislation.

Was this omission deliberate?

***Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1980] UKHL 7**

Lord Wilberforce

At 530

My Lords, I recognise that the inquiring mind may put the question: why should there be an omission of the requirement of good faith in this particular context? I do not think there should be much doubt about the answer. Addition of a requirement that the purchaser should be in good faith would bring with it the necessity of inquiring into the purchaser's motives and state of mind. The present case is a good example of the difficulties which would exist. If the position was simply that the purchaser had notice of the option, and decided nevertheless to buy the land, relying on the absence of notification, nobody could contend that she would be lacking in good faith. She would merely be taking advantage of a situation, which the law has provided, and the addition of a profit motive could not create an absence of good faith. But suppose, and this is the respondents' argument, the purchaser's motive is to defeat the option, does this make any difference? Any advantage to oneself seems necessarily to involve a disadvantage for another: to make the validity of the purchase depend upon which aspect of the transaction was prevalent in the purchaser's mind seems to create distinctions equally difficult to analyse in law as to establish in fact: avarice and malice may be distinct sins, but in human conduct they are liable to be intertwined. The problem becomes even more acute if one supposes a mixture of motives. Suppose—and this may not be far from the truth—that the purchaser's motives were in part to take the farm from Geoffrey, and in part to distribute it between Geoffrey and his brothers and sisters, but not at all to obtain any benefit for herself, is this acting in "good faith" or not? Should family feeling be denied a protection afforded to simple greed? To eliminate the necessity for inquiries of this kind may well have been part of the legislative intention. Certainly there is here no argument for departing—violently—from the wording of the Act.

In the judgment of the House of Lords, therefore, the omission of a requirement of good faith purchase was deliberate. The underlying fault lay in the failure to register Geoffrey's estate contract as a land charge. As may often be the case, the fault was that of the solicitor: Geoffrey's solicitor had already accepted liability pending the outcome of the case.⁴⁷ A separate action, for the tort of conspiracy, lay against Geoffrey's parents.⁴⁸

Commenting on *Green* and, more generally, on the move away from the doctrine of notice, Megarry and Wade echo Wade's earlier criticism.⁴⁹

⁴⁶ [1981] AC 513.

⁴⁷ Noted by Lord Wilberforce [1981] AC 513, [526]. The existence of a cause of action in negligence was established in *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1978] Ch 384.

⁴⁸ *Midland Bank Trust Co Ltd v Green (No 3)* [1982] 2 WLR 1.

⁴⁹ The paragraph extracted is omitted from subsequent editions.

Megarry and Wade's *The Law of Real Property* (6th edn, ed Harpum, 2000, [5–120])

For centuries the courts had developed a policy based upon good faith and fair dealing under the doctrine of notice, the reasons for which were primarily ethical. Its refinements having grown too great for practical convenience, they were largely swept away [by the legislation in 1925 and since then] in favour of a mechanical system from which the ethical element was eliminated. Convenience was bought at the price of injustice in cases where the owners of registrable interests did not realise that they should register them (their solicitors usually making the omission) and so suffered loss. To allow the defeat of a prior interest by a later transaction is a failure on the part of the law, and a natural reluctance to enforce it has sometimes tempted judges to resist the policy of the legislation, clear-cut though it is [. . .] The House of Lords [in *Green*] has now reasserted the stark policy of 1925, unethical and uncompromising but clear and simple, at least for those who are aware of it.

It seems open to question whether the disparity between the doctrine of notice and land charges registration is as clear-cut as these authors suggest. Lord Wilberforce's discussion of the possible mixed motives at play in *Green* give at least some cause for caution in classifying the outcome dictated by the land charges mechanism as amoral or unethical. It is far from apparent that Lord Wilberforce viewed the outcome to which he was led in this way.

Gray and Gray suggest that the House of Lords' decision reflects a particular view of the function of property law.⁵⁰

Gray and Gray, *Elements of Land Law* (4th edn, 2004)

At [12.116]

[. . .] The dominant ideology of modern property law places a clear emphasis upon the simple mechanics of contract and transfer, leaving the morality of exchange largely unquestioned. On this view, the principal purpose of the law of property is to provide clarity and procedural efficiency in the combined operation of bargain and disposition. In many ways the law of property implicitly assumes a world of assertive individualism in which all are presumed to be equal, self-determining and competent to protect their own self-interest. Land transactions therefore have no particularly significant moral dimension. There is, however, another perspective according to which the ultimate business of the law of property is, quite inescapably, the administration of distributive justice. In this context there is no such thing as moral neutrality. The priorities which we allow to govern the law of property simply reflect the moral sensitivity of an entire legal culture [. . .]

At [12.296]

The decision of the House of Lords in *Midland Bank Trust Co Ltd v Green* is entirely consistent with the amoral approach to economic relations which infuses the market concept of property. The ruling confirmed the traditional inclination of the property lawyer to trade off justice in return for enhanced security and stability in commercial transactions [. . .]

The simple mechanisms favoured by property law extend beyond the LCA 1972 to the operation of overreaching as a means of protecting purchasers against the enforcement of beneficial interests under a trust. However desirable the ethical underpinnings of the bona fide purchaser defence are, it is too uncertain a means of resolving the question of priorities. The common theme underlying criticisms of the decision in *Green* by Megarry and Wade, and Gray and Gray, is their perception of the relationship between certainty and justice. The authors do not see these as diametrically opposed, but certainty is seen as necessarily detracting from justice. The relationship between these concepts is undoubtedly complex and the extent to which the case law reflects

⁵⁰ The paragraphs extracted are omitted from the 5th edition (2009).

those authors' views remains open to debate.

5.7 FRAUDULENT TRANSACTIONS

In *Green*, the House of Lords considered that Evelyn Green did not act fraudulently by seeking to rely on her statutory rights.⁵¹ The decision leaves open the position where there is, in fact, fraud in the transaction.⁵² Where a purchaser seeks to invoke a statutory defence against the enforcement of a pre-existing property right in circumstances amounting to fraud or other wrongdoing, two courses of action may be taken: firstly, the purchaser may be denied the statutory defence; or secondly, B may obtain new direct rights against C. These new direct rights may involve the imposition of personal liability on C towards B, or the creation of a new property right in B's favour.

The appropriate response to fraud and other wrongdoing is of equal significance where the statutory defence concerns an unregistered land charge under the LCA 1972, or one of the defences provided in registered land by the Land Registration Act 2002 (LRA 2002). The issue is therefore discussed in Chapter 16.6.

5.8 CLAIMS TO ALTERNATIVE PROPERTY RIGHTS

In two notable cases, claimants whose land charges have been void against a purchaser for non-registration have sought to establish the existence of other property rights that, not being registrable, bind the purchaser as a purchaser with notice. The defence of lack of registration provides the purchaser with protection only against B's unregistered land charges; it does not protect a purchaser against two categories of rights: firstly, B's pre-existing rights that are not registrable as land charges and therefore remain governed by the doctrine of notice; secondly, new direct rights claimed by B.

As a matter of general law, where alternative claims are available, the claimant is entitled to choose the cause of action that is most favourable to him or herself. Complex questions may, however, arise as regards the relationship between the different property rights concerned.

In *Lloyds Bank plc v Carrick*,⁵³ B entered a specifically enforceable contract to buy a home from her brother-in-law (A). B moved into the home, but, unknown to her, A subsequently used the property as security for a loan obtained from C. B had not registered her contract as a Class C(iv) land charge and therefore it was void against C. The Court of Appeal held that the existence of the estate contract precluded B from claiming other property interests under a trust or estoppel, which may have been binding on C, as purchasers with notice, because B was in occupation. The objection to these alternative claims lay in the fact that their source and origin was the contract that was void for non-registration.

In *ER Ives Investment Ltd v High*,⁵⁴ A assured B of a right of way across A's land, in return for which B did not object to a trespass caused by the foundations of flats constructed by A. B did not register a land charge and A subsequently sold the land to C. Danckwerts and Winn LJ accepted that B had an equitable easement that was registrable as a land charge and which was void for non-registration. But they held that B had also acquired rights through estoppel that were not registrable and bound C as purchasers with notice.⁵⁵

In light of *Carrick*, the decision is open to the criticism that the source and origin of B's claim lay in the same facts that had generated the equitable easement. Lord Denning MR considered that B's equitable easement fell outside the classes of registrable land charge and itself bound C as purchasers with notice—but to reach this

⁵¹ [1981] AC 513, [531].

⁵² Gray and Gray, *Elements of Land Law* (4th edn, 2004), [12.296] (the point is not repeated in the 5th edition).

⁵³ [1996] 4 All ER 630.

⁵⁴ [1967] 2 QB 379.

⁵⁵ See further, Battersby, 'Informal Transactions in Land, Estoppel and Registration' (1995) 58 MLR 637 for an analysis based on the principle of mutual benefit and burden.

conclusion requires an -artificially restrictive interpretation of the scope of registrable land charges.⁵⁶ It is difficult to avoid the conclusion that the Court of Appeal in *Ives v High* (unlike the Court of Appeal in *Carrick* and the House of Lords in *Green*) was not prepared to accept the outcome in a hard case to uphold the policy of land charges registration. Lord Denning noted that a decision against B would perpetrate the 'grossest injustice'.⁵⁷

6 CONCLUSION

Where A transfers unregistered land to C, or creates a mortgage in C's favour, pre-existing property rights held by B will bind C unless C has a defence against the enforcement of those rights. The key distinction is between legal and equitable rights held by B: C generally has no defence against the enforcement of legal rights held by B.

One exception to this rule arises in relation to the puisne mortgage, which is registrable as a Class C(i) land charge. C has the defence of lack of registration against the enforcement of a puisne mortgage in the following circumstances:⁵⁸

- the mortgage has not been registered as a land charge;
- the mortgage has been registered against an incorrect name and C has requisitioned an official search against the correct name.

C has a defence against the enforcement of equitable rights held by B in the following circumstances.

- B's equitable right is registrable as a land charge and either:
 - has not been registered; or
 - has been registered against an incorrect name and C has requisitioned an official search against the correct name;⁵⁹
- B's equitable right remains governed by the doctrine of notice and C is a bona fide purchaser for value without notice. Equitable rights within this category include, in particular:
 - beneficial interests under a trust—the defence of bona fide purchaser need be invoked only in relation to trusts with one trustee; where there are two or more trustees, the beneficial interests will be overreached on a sale under the mechanism discussed in Chapter 17;
 - an inchoate equity arising under a claim to proprietary estoppel;⁶⁰
 - equitable easements and restrictive covenants created prior to 1 January 1926 and therefore falling outside the application of the LCA 1972.

QUESTIONS

1. What do you understand by the defence of 'bona fide purchaser'? In what circumstances is this defence relevant to determining priority questions in unregistered land?
2. What difficulties arise from the use of a names-based register for the registration of land charges under the Land Charges Act 1972?
3. What do you consider to be the advantages and disadvantages of the 1972 Act as a means of

⁵⁶ Compare the discussion of the scope of Class C(iv) and D(iii) at section 5.1 above. The equitable easement in the case in fact appears to be registrable as a Class C(iv) or D(iii) land charge. See further Battersby (1995).

⁵⁷ [1967] 2 QB 379, [396].

⁵⁸ B must be a purchaser for value within the Land Charges Act 1972, s 4(5).

⁵⁹ In both cases, subject to B meeting the requirements of the Land Charges Act 1972, s 4(5) or (6), depending on the class of land charge concerned.

⁶⁰ *ER Ives Investment Ltd v High* [1967] 2 QB 379. Proprietary estoppel is discussed in Chapter 10.

determining priority questions compared with the defence of bona fide purchaser?

4. In what circumstances will the following pre-existing property rights held by C bind B, a purchaser of unregistered land?
- a. A beneficial interest, assuming that B purchased the land from a single trustee.
 - b. A beneficial interest, assuming that B purchased the land from two trustees.
 - c. A legal mortgage.
 - d. An equitable easement created in 1930.
 - e. A restrictive covenant created in 1900.

FURTHER READING

Battersby, 'Informal Transactions in Land, Estoppel and Registration' (1995) 58 MLR 637

Howell, 'The Doctrine of Notice: An Historical Perspective' [1997] Conv 431

Nair and Samet, 'What "Equity's Darling" Can Tell Us About Equity' in D Klimchuk, I Samet, and H Smith (eds) *Philosophical Foundations of the Law of Equity* (Oxford: OUP, 2020)

Thompson, '*Midland Bank Trust Co Ltd v Green* (1980): Maintaining the Integrity of Registration Systems' in *Landmark Cases in Land Law* (ed Gravells, Oxford: Hart Publishing, 2013)

Wade, 'Land Charges Registration Reviewed' [1956] CLJ 216