

Chapter 16

Question 1: What do you understand to be meant by a ‘registrable disposition of a registered estate for valuable consideration’? What is the significance of this category of transaction for determining questions of priority in registered land?

As noted in section 16.2, the concept of a registrable disposition of a registered estate for valuable consideration is of central significance to the operation of priority rules in registered land. The starting point, in s 28 of the LRA 2002, is that the Act does not alter how questions of priority are determined under the general law. However, this is subject to important exceptions contained in ss 29 and 30. Those sections identify a category of transactions which are brought out of the operation of the general law and are made subject to a specific regime of priority rules. The category of transaction referred to in s 29 is a registrable disposition of a registered estate for valuable consideration (while s 30 makes the same provision for registered charges). We have seen that this includes the transfer of a registered estate (freehold and leasehold) and the creation out of a registered estate of a new lease of more than seven years duration (a lease that would therefore become a registered estate). The requirement of valuable consideration excludes from this scheme of priorities transfers by gift, for nominal consideration and transfers arising as the result of adverse possession. Hence, the category is a significant one as it incorporates an ordinary sale and mortgage of land.

Question 2: To what extent do the priority rules in registered land implement the ‘mirror’ and ‘curtain’ principles?

The mirror and curtain principles were first introduced in section 3.2.5 and you find it useful to review the explanation of the principles contained in that chapter.

- The mirror principle is the proposition that the register constitutes an accurate reflection of facts material to the title. It is implemented by the provision of information on the register; and hindered by any respects in which information is kept off the register. Provision for the entry on the register of limitations on the proprietor’s owners’ powers and of the rights of third parties is consistent with the mirror principle. Hence, in answering this question you should review the scope and operation of these forms of entry on the register that we have considered in sections 16.3 and 16.5. The category of overriding interests – discussed in section 16.4 – presents the most significant impediment to the mirror principle. These interests do not appear on the register, but are necessarily binding against a purchaser.
- The curtain principle provides that a curtain is drawn across the register against any trusts. It is reflected, in particular, in s 33(a)(i) of the LRA 2002 – considered in section 16.3.2 – which prevents the entry on the register of notice of an interest under a trust of land. The curtain principle is not inherently inconsistent with the mirror principle as it is based on an assumption that the purchaser need not be concerned with the existence of beneficial interests as these interests may be overreached on a sale (by the overreaching mechanism discussed in detail in Chapter 17). However, where beneficial interests are not overreached (the mechanism requires capital money to be paid to two or more trustees and therefore does not apply to a single trustee trust) they may be enforceable against purchasers as overriding interests. Indeed, as seen in cases such as *Williams & Glyn’s Bank v Boland*, the category of overriding interests has played a key role in enforcing beneficial interests against purchasers and, in particular, mortgagees of land, where there is a single trustee trust.

Question 3: Compare and contrast the scope and effect of entry of a restriction and entry of a notice.

This question concerns the two forms of entry on the register, each of which has a different effect.

- Restrictions are closely connected to the “owners’ powers” – powers conferred on registered proprietors by s 23 of the LRA 2002. Under s 26 of the Act, a person dealing with the proprietor of an estate may assume that the proprietor’s owners’ powers are free from any limitations, except those entered on the register. A restriction is the form of entry on the register that limitations on owners’ powers take. A person who does not comply with a restriction (i) cannot obtain a registered title (and therefore cannot obtain legal title to

the land); (ii) does not benefit from the distinct priority rules afforded to a registrable disposition of a registered estate for valuable consideration (discussed in section 16.2 and the topic of Question 1); and (iii) does not benefit from protection against beneficial interests provided by the overreaching mechanism. Hence, for example, a purchaser or mortgagee of a registered estate who did not comply with a restriction could obtain only an equitable interest in the land which, under the general law of priorities (that in the case of competing equities, priority is determined by the order of creation) would be bound by all pre-existing legal and equitable interests in the land. See, generally, section 16.5.

- Entry of a notice tells a purchaser about a property right claimed by a third party. The effect of the entry is governed by s 32 of the LRA 2002. It ensures that if in fact the property right exists, then it will be enforceable against the purchaser. However, the entry of a notice does not operate as a guarantee that the property right claimed exists. See, generally, section 16.3.

Question 4: How useful are the constitutionalist and absolutist views of the meaning of ‘actual occupation’ in determining the scope of Sch 3, para 2, of the LRA 2002?

Paragraph 2 of schedule 3 of the LRA 2002 includes in the category of overriding interests property rights held by persons in occupation of the land. This category is considered in section 16.4.2. The definition of occupation is significant in determining the scope of this category of overriding interests. The constitutionalist and absolutist views were identified by Hayton in the extract contained in section 16.4.2.7. The absolutist view holds that a person is bound by the rights of every person in occupation, regardless of how difficult it is to ascertain their presence. The constitutionalist view is that occupation should be interpreted in light of traditional conveyancing principles; particularly the unregistered land concept of constructive notice which is based on reasonable enquiries (and is discussed in section 4.4.2 of the online chapter on Unregistered Land and Priorities). Which view is adopted becomes significant in cases of marginal occupation which may not be discoverable by a purchaser. Under the LRA 1925, property rights held by persons in actual occupation of the land were protected as overriding interests under s 70(1)(g). In *Williams & Glyn’s Bank v Boland*, the House of Lords could be said to have adopted an absolutist approach. However, the Court of Appeal in *Lloyds Bank plc v Rosset* could be said to have preferred a constitutionalist view (the actual occupation point in that case did not need to be considered by the House of Lords, as it found that in any case Mrs Rosset had no beneficial interest in the property). The LRA 2002 does not explicitly adopt either approach, but limits the scope of protection afforded to those in occupation by a reasonable inspection qualification. The scope of this is considered in section 16.4.2.2. The insertion of the qualification necessarily means that an absolutist approach is rejected. However, the qualification is not an endorsement of the constitutionalist view as in recommending its adoption the Law Commission disavowed the relevance of concepts derived from the doctrine of notice.

However, the usefulness of this dichotomy may be questioned in light of more recent, post-LRA 2002 decisions in which (as Bogusz argues) the courts appear to be developing a third, hybrid approach – i.e. one which considers ‘extraneous factors in addition to the factual position and create[s] a “third way” of determining actual occupation.’ Thus, in *Link Lending v Bustard*, Mummery LJ listed the ‘intentions and wishes ... and personal circumstances’ as amongst the factors relevant to finding actual occupation; these elements formed a key part of the *ratio* in determining that Ms Bustard had an overriding interest as against Link Lending in that case. Nonetheless, as Bogusz also points out, this ‘third way’ may risk “occupation creep” ... [such that third parties might be] bound by an interest which, factually, may not have been unequivocally established nor anticipated.’ Hence, Bevan (in his article extracted in section 16.4.2.9) favours a return to a ‘objective, traditional, fact-led’ approach which focusses on objective facts observable by third parties – which arguably brings us back to one or other of the approaches to actual occupation identified by Hayton, summarised above.

Question 5: Assess the advantages and disadvantages of responding to fraud or other wrongdoing in a disposition of land to C by:

- (i) Preventing C from invoking statutory defences against B’s property rights;
- and
- (ii) Relying on the creation of new direct rights.

To answer this question, you should review section 16.6. There, we have considered how the law should respond where a disposition of land to C is tainted by fraud or other wrongdoing which does not, however, affect the validity of a transaction. In such circumstances, few would argue that C should still be able to rely on ss 29 and 30 of the LRA 2002 to obtain priority over B's pre-existing property rights. However, which of these two responses should be adopted has proved far more contentious.

- Advantages of (a): this retains the scope of liability within land law principles and enables liability to be developed in a manner consistent with those principles; it secures the enforcement of B's property right against the 'wrongdoer'; to the extent that wrongdoing is likely to constitute bad faith, it retains an ethical element in the system of registration.
- Disadvantages of (a): there is no scope for qualifying the effect of ss 29 and 30 of the LRA 2002 – the legitimate approach is to apply the clear terms of those provisions and look towards liability under the general law; ethical concerns are based on old notions of the doctrine of notice which have no place in registration of title; this approach is contrary to the policy of the LRA 2002 as stated by the Law Commission (in the extracts from their work in section 16.6).
- Advantages of (b): Land Law does not exist in a vacuum and this approach acknowledges the significance of the application of the general law; this approach accords with the Law Commission's policy (as stated in the extracts from their work in section 16.6).
- Disadvantages of (b): the boundary lines between asserting *new* and *pre-existing* rights may not, in practice, be clear or settled in all cases; reliance on general principles risks decisions that run directly counter to the policy of Land Law statutes, for example if new direct rights were imposed on the basis of notice; there is no established jurisprudence applying the general law to land, particularly where new direct rights involve the imposition of personal liability; for B, new direct rights, particularly those that impose only personal liability on C may be considerably less attractive than retention of their existing property right.

Question 6: What action should the holder of the following property rights in registered land take? In what circumstances will a purchaser of the land have a defence against the enforcement of these rights?

- (a) A beneficial interest under a trust;**
- (b) A legal lease created for five years;**
- (c) A legal easement arising from an implied grant;**
- (d) An equitable easement; [NEW]**
- (d) A restrictive covenant.**

The purpose of this question is to test your understanding of the operation of priority rules in registered land. It requires knowledge of the rules discussed throughout Chapter 16 and requires you to consider their consequences both from the perspective of people with proprietary rights in land and purchasers of registered land. It is assumed that C buys the land under a registrable disposition of a registered estate for valuable consideration and therefore enjoys the protection contained in s 29 of the LRA 2002.

- (a) As we have seen, beneficial interests cannot be entered on the register. This is consistent with the curtain principle. The holder of a beneficial interest should however enter a restriction on the register preventing the proprietor from dealing with the land unless any purchase money is paid to a minimum of two trustees or a trust corporation, under s 43. Indeed, under s 44(1), the Registrar is obliged to enter a restriction to this effect when two or more persons are proprietors of an estate. C will then need to comply with the terms of the restriction if he or she is to register as the new holder of the registered title. Payment of any purchase money to a minimum of two trustees or a trust corporation is one of the requirements of the overreaching defence (see Chapter 17) and so the restriction in a sense assists C, by allowing C to take advantage of that defence. Note that even if overreaching does not occur, C will still be able to rely on the lack of registration defence (as B's right cannot be protected by the entry of a notice on the register) unless B is in actual occupation at the relevant time.
- (b) The holder of a legal lease of five years duration benefits from dual protection: the lease may be protected by entry of notice on the register under s 33 of the LRA 2002 and is otherwise protected as an overriding

interest within paragraph 1 of schedule 3 of the LRA 2002. As a result, C will not have a defence against the enforcement of such a lease.

- (c) Legal easements arising from an implied grant are protected as overriding interests under paragraph 3 of schedule 3 of the LRA 2002. However, this is only where the purchaser has actual knowledge of the existence of the easement or the easement is obvious on a reasonably careful inspection of the land. An easement of this type may also be protected by the entry of a notice on the register. Hence, a purchaser will have a defence against a legal easement arising from an implied grant where: (i) the easement has not been protected by entry of a notice; and (ii) the easement is not protected as an overriding interest as it does not meet the conditions in paragraph 3 of schedule 3. The circumstances in which legal easements arise from implied grant are considered in section 22.3.2.
- (d) Equitable easements will bind purchasers only if (i) protected by entry on the register, or (ii) as overriding interests under schedule 3, para 2 LRA 2002 where actual occupation is established – note that paragraph 3 of schedule 3 applies only to *legal* easements. However, in *Chaudhary v Yavuz*, Lloyd LJ rejected B's argument that he was in actual occupation of land over which he had an equitable easement, principally on the basis that B's exercise of his easement amounted to 'use, not occupation' of the servient land (you should compare, however, McFarlane's argument noted in section 16.4.2.1). As such, it seems that, unless B's equitable easement has been protected by entry of a notice, C will be able to rely on the lack of registration defence against its enforcement.
- (e) Restrictive covenants affecting freehold titles should be protected by the entry of a notice. Assuming that B is not in actual occupation of the land, C will then have a defence against the enforcement of a restrictive covenant where it is not protected by a notice on the register. S 33 of the LRA 2002 specifically excludes leasehold covenants from such registration: they are subject to their own scheme of enforcement, which is discussed in Chapter 21.