Law Commission
Reforming the law

Updating the Land Registration Act 2002
Analysis of Responses

Law Com No 380 (Analysis of Responses)
23 January 2019

This document analyses the responses of consultees to the Law Commission's Consultation Paper, Updating the Land Registration Act 2002 (Law Com Consultation Paper No 227). This Analysis of Responses is designed to be read in conjunction with the Consultation Paper and the Law Commission's Report, Updating the Land Registration Act 2002 (Law Com No 380), available at https://www.lawcom.gov.uk/project/updating-the-land-registration-act-2002/.

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Chapter 1: Introduction

INTRODUCTION

1.1 This Analysis of Responses is published alongside the Law Commission's Report, Updating the Land Registration Act 2002. In the Analysis of Responses, we set out the consultation responses we received in response to the Consultation Paper.

1.2 Each chapter in the Analysis of Responses corresponds to the chapters in the Consultation Paper and Report. In each, we cite the number of consultees who responded to points raised in the chapter, and then set out each consultation question and outline the responses to it.

1.3 Where a consultee, instead of or in addition to responding to the individual questions in a chapter, provided a general discussion of the issues raised, these responses are reprinted in Appendix 1. We have also included in Appendix 2 any comments by consultees on issues which had not been discussed in the Consultation Paper.

1.4 We do not explain the law, the reasoning underlying our provisional proposals, or our conclusions in the Analysis of Responses. The Analysis simply sets out a thematic summary of consultation responses to the questions we posed in the Consultation Paper. The views that are therefore expressed within the Analysis of Responses are those of consultees, rather than those of the Law Commission.

1.5 For an explanation of the law, please refer to the Consultation Paper. For our conclusions and reasoning, including our comments and responses to the points that consultees raised, please refer to the Report.

1.6 It may also be useful to consider the Glossary at page xi of the Report for definitions of the terms used throughout this Analysis.

HOW WE HAVE TALLIED CONSULTATION RESPONSES

1.7 We have tallied the responses to each question asked in the Consultation Paper.[1] Where relevant, we have also divided responses into those that agreed with the provisional proposal, those that disagreed, and those that expressed other views.

1.8 In responding to each question, most consultees identified themselves as either agreeing, disagreeing, or expressing other views. However, sometimes consultees did not expressly indicate their agreement or not; in those cases, we did our best to categorise their responses based on their content.

1.9 When one consultee endorsed the response of another, for example by repeating what that consultee said in its response, we did not count the endorsement response as a separate response. This came up most frequently in relation to the London Property

[1] Excluding the few questions we asked about potential projects, which we considered as a part of the consultation on the Law Commission's 13th Programme of Law Reform. For more information about our 13th Programme, see https://www.lawcom.gov.uk/project/13th-programme-of-law-reform/.

Support Lawyers Group. The Group's response was submitted on behalf of a number of member law firms, and was endorsed in full by a number of other law firms. It was also endorsed in part by law firms who sent in their own consultation responses. When those firms simply endorsed the Group's response, without providing any further comment, we did not count that endorsement as a separate response. We thought this approach was sensible, to avoid the risk of double-counting responses. In taking this approach, we note that the Law Commission's policy decisions are based on a careful analysis of responses, rather than a "count" of the numbers of consultees who agree or disagree with a provisional proposal. The fact that a response was sent on behalf of, and was expressly endorsed by, a number of law firms, has been given due weight in our analysis.

1.10 In finalising this Analysis of Responses after the publication of the final Report, we have revisited the numbers of consultees who responded to individual questions that we had cited in the final Report. In some cases, we have revised those numbers to correct errors: in particular, we have revised the number of responses to questions in Chapters 3, 6, 9, 13, 14 and 18. Most frequently, we have amended numbers to include consultees who provided a general response to the chapter but who were not counted as responding to any specific question, when their general response did in fact address a specific question.

Chapter 2: Consultees

2.1 We are extremely grateful to all the individuals and organisations who responded to our Consultation Paper. Many consultees provided us with thorough and detailed responses. As we said in the Report, this is a complex area of law, and we have been greatly assisted by the expertise of those who engaged with us.

2.2 A full list of consultees can be found in Appendix 3 of the Report.

Chapter 3: Registrable estates

INTRODUCTION

3.1 32 consultees responded to the questions in Chapter 3 of the Consultation Paper.[1]

3.2 Consultees generally had not experienced problems arising from HM Land Registry's practice to keep the landlord's freehold title on the register following enlargement. The majority of consultees who responded were in favour of making the registration mines and minerals estates compulsory in specified circumstances, although only approximately half of consultees had experienced problems in practice in relation to unregistered mines and minerals. Most consultees agreed with our provisional proposal to require registration of discontinuous leases granted out of unregistered land, and our proposal not to decrease the length of lease that is registrable.

DUPLICATION OF FEES SIMPLE UPON ENLARGEMENT OF LEASEHOLD ESTATES

Consultation Question 1.

3.3 We invite consultees to share their experiences of Land Registry's new practice of allowing the landlord's freehold title to remain on the register following a lease enlargement under section 153 of the Law of Property Act 1925, and in particular any practical problems that have arisen out of this practice.[2]

3.4 19 consultees answered this question.[3]

3.5 Consultees largely did not have any experiences to share in relation to problems arising out of HM Land Registry's new practice or on lease enlargement more generally.

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1 Nigel Madeley; Hogan Lovells International LLP; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); The City of London Law Society Land Law Committee; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Professor Warren Barr and Professor Debra Morris; CMS Cameon McKenna LLP; Michael Hall; National Trust; The Bar Council; HM Land Registry; Graff & Redfern Solicitors; Cliff Campbell; Dr Lu Xu; Nottingham Law School; Dr Aruna Nair; Property Litigation Association; a confidential consultee.

2 Consultation Paper, para 3.14.

3 Nigel Madeley; Hogan Lovells International LLP; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); The City of London Law Society Land Law Committee; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; a confidential consultee.

Experience of problems in practice

3.6 The London Property Support Lawyers Group informed us that it had not had experience of any practical problems that have arisen out of HM Land Registry's practice as:

> Applications to enlarge leases are rare as long commercial leases usually include residual forfeiture provisions and obligations to pay service charge rent and insurance rent that would take the lease outside the qualifying conditions in section 153 Law of Property Act 1925.

3.7 The Group informed us that one of its member firms did have to consider the potential consequences of enlargement upon title to the sub-surface of a highway that ran through the leasehold / freehold title. The questions which arose included how the stopping-up procedure would operate, and how title would pass if the lease were enlarged and then the stopping-up process commenced.

3.8 The Chancery Bar Association stated that it had no experience of practical problems arising from HM Land Registry's new practice. The Society of Licensed Conveyancers considered that "it has not been a major issue in 30 years of conveyancing". Nigel Madeley stated that he had only once encountered an enlarged lease.

3.9 The Law Society stated that it has "not encountered or heard about any practical problems arising out of this new practice". It also noted that it was not aware of a prevalence of problems arising under the regime in the years before 2013.

Support for HM Land Registry's current practice

3.10 8 consultees were supportive of HM Land Registry's current practice, including Amy Goymour and Dr Charles Harpum QC (Hon).

3.11 The London Property Support Lawyers Group considered that HM Land Registry's current approach is the most logical:

> Given the uncertainty about the legal status of the landlord's freehold following enlargement, we appreciate that the Land Registry has to take a cautious view and therefore we consider it sensible for the Land Registry to leave the landlord's title on the register until the issue has been clarified in the courts.

3.12 The Chancery Bar Association considered that HM Land Registry should not revert to its previous practice, which in its view "left the effect of section 153(8) on the enforcement of covenants unclear" and was "also unsatisfactory". However, the Chancery Bar Association nonetheless doubted whether it "can really have been intended that following a lease enlargement under section 153 two fee simple estates should subsist in the same land". It considered that clarification of the effect of section 153 would be "desirable".

3.13 Mangala Murali considered that it is only ethical that a landlord's freehold title should remain on the register following lease enlargements.

3.14 Adrian Broomfield noted that whilst he has no practical experience of successfully enlarging a lease under section 153, "allowing the landlord's freehold title to remain on

the register with appropriate explanatory entries would seem eminently sensible and helpful for audit trail purposes." He did not anticipate that this practice would pose any particular difficulties. Rather, he saw it as analogous to how freeholds which have been escheated continue to remain on the register with appropriate entries added. He stated that there is even "some similarity between how inferior interests deriving out of a freehold which has escheated continue to subsist and the position of such interests on an enlargement".

3.15 Nigel Madeley also thought that HM Land Registry's current practice was "sensible".

3.16 In Dr Charles Harpum's opinion there is "in principle no objection" to retaining the original freehold title on the register, provided that "it is crystal clear from the registered title that an enlargement has taken place". In practice Dr Harpum has only seen a couple of matters involving section 153 and in neither instance was he satisfied that the requirements of section 153 were met. Rather, he indicated that a greater problem was the identity of the ownership of the freehold, citing an example in which in the lease was due to expire in 50 to 70 years and a developer wished to develop the land. Dr Harpum suggested this issue should be addressed by the Law Commission.

3.17 Dr Harpum also considered that HM Land Registry's practice is relevant for the purposes of escheat:

> If the new freehold estate created under LPA 1925, s 153, were to escheat, the escheat would presumably not be to the Crown (or in Cornwall/Lancashire to the relevant Duchy), but would be to the freeholder of the reversion on the long lease out of which the new freehold had been created under s 153. This is an additional reason why the original freehold title should be retained, with appropriate entries. Due to disclaimers on insolvency and the occurrence of land that, as a result of environmental liabilities, has a negative value, escheat is fairly common in practice.

Understanding of HM Land Registry's current practice

3.18 There were consultees who could see the logic in HM Land Registry's current approach given the perceived uncertainties surrounding section 153 but who did not necessarily agree with the direction taken.

3.19 The City of London Law Society Land Law Committee stated that it understood "the cautious view" taken by HM Land Registry in view of the uncertainty about the legal status of the landlord's freehold following enlargement. However, it also added that the concept of there being two freeholds in the same piece of land has met and continues to meet with consternation on the part of many practitioners and their clients and appears to undermine the very nature of a freehold being the ultimate form of ownership of land.

3.20 Similarly, the Law Society was of the opinion that it is understandable that HM Land Registry's action in ceasing to extinguish the freehold title in 2013 was justifiable owing to the uncertainty of the law on the subject. Nevertheless, it stated:

> Those aware of the change in HM Land Registry practice were surprised by it, as there seemed to be no vulnerability to redress of the former reversioners, nor indeed to human rights claims.

Support for HM Land Registry's previous practice

3.21 6 consultees objected to HM Land Registry's new practice. They were mainly concerned that having two freehold titles in existence at the same time could be problematic.

3.22 The Law Society expressed the view that it would prefer to return to HM Land Registry's previous practice, stating that it was "not aware of a prevalence of problems arising under the registration regime in the years before 2013". Although the Law Society had not encountered or heard about any practical problems arising out of the new practice, it was "intuitively concerned" that having two freehold titles to the same land may be confusing. Nevertheless, it noted that the current practice does have the advantage of recording who is able to enforce covenants under section 153(8) of the Law of Property Act 2002.

3.23 The Chartered Institute of Legal Executives could also see that the practice has the potential for confusion.

3.24 Burges Salmon LLP expressed concern in relation to the potential difficulties in any compulsory purchase scenario of how to divide compensation between the freeholders.

3.25 Howard Kennedy LLP stated that "the parallel existence of both freeholds would presumably make both of them of doubtful value", since it would be impossible to deal with or take possession of one freehold without presumably infringing on the other. It suggested that this may not matter in practice so long as the tenant takes care not to merge its leasehold title; it therefore stated that the effect of HM Land Registry's policy would be to deter tenants from exercising section 153.

3.26 Hogan Lovells International LLP informed us that it objected to this new practice when it was first introduced. Its view was that the new HM Land Registry policy on enlargement leaves many questions open, such as "what is the status of the other freehold title? Should it be closed? What reason does it serve to have it remaining?" The firm believed that the policy has the potential to be confusing and that it is too early to talk about practical problems.

3.27 The City of Westminster and Holborn Law Society's said that it is confusing to have two registered freehold titles to the same property, describing one as being "perhaps in rivalry as a shadow fee simple in exile". It noted that HM Land Registry's new practice is cautious in its approach "in contrast with the assumption regarding old rule 131". However, it doubted if references to a long lease being enlarged into "a" fee simple were bound to imply that the result is to have two fee simple absolute estates in the same property, "perhaps one fee simple absolute in possession itself having a phantom reversioner". The City of Westminster and Holborn Law Society stated that the practical approach is that the old fee simple absolute must be displaced by the fee simple acquired by enlargement, which would be subject to covenants and so on from the old one.

Other opinions

3.28 The City of London Law Society Land Law Committee took no firm view either way: it understood the "cautious view" taken by HM Land Registry, but noted that the practice is met with "consternation" from practitioners and their clients. It commented that it would be "interesting" to see whether lenders with security over the long lease would

be disconcerted by the presence of two freeholds following enlargement, although it considered that the impact on valuation would be "relatively insignificant".

3.29 The Society of Licensed Conveyancers thought that the law should be clarified as to the effect of section 153, stating that HM Land Registry should not be placed in the "invidious position of having to allow this".

3.30 Some consultees suggested ways in which HM Land Registry's current practice could be changed.

3.31 The Conveyancing Association proposed allow the enlarged leasehold interest a possessory freehold title for 10 years before closing the original freehold title and making the possessory freehold title absolute freehold. It considered that this would overcome the confusion or risk of fraud the current practice might create.

3.32 Two consultees thought that the freeholder's interest is or should be called something other than a freehold estate in land.

3.33 Everyman Legal suggested that the use of the phrase "residuary freehold" might be used to cover the remote possibility that the enlargement might at some point be undone and the old freehold would therefore spring back into life.

3.34 Christopher Jessel, in a detailed response,[4] ultimately concluded that the freeholder's interest, following enlargement, is an incorporeal estate in service, rather than an estate in land. He explained:

> The view of the draftsman of the Conveyancing Act 1881 (from which the Law of Property Act 1925 section 153 was consolidated), Edward Wolstenholme, is clear from his book where he compares the effect to the enlargement of a fee tail into a fee simple. A superior freehold would be … an incorporeal estate in service (like a lordship) not a corporeal estate in land.

3.35 Mr Jessel acknowledged that section 153 warrants a separate review outside of the scope of this project. He offered a number of suggestions for clarification. These are extracted in Appendix 1 as they extend beyond the scope of the consultation.

The continuation of positive covenants

3.36 A number of consultees commented on the use of long leaseholds as a method of ensuring that the burden of positive covenants runs with the land and are enforceable against successors in title.

3.37 Christopher Jessel stated that he suspected that HM Land Registry's practice of retaining former landlords' freeholds possibly relates "to the use of section 153(8) to continue to make the burden of positive covenants enforceable against successors in title to the former lessee". He speculated that the argument may be that, because covenants have to benefit land, the former landlord's interest must be registrable as land. Furthermore, he noted that whilst section 153(8) preserves certain terms including

[4] Outlined in full in Appendices 1 and 2.

covenants, it does not state who is entitled to enforce them; "saying it is subject to the same obligations does not indicate who can take the benefit".

3.38 However, Mr Jessel argued that it is evident from the enactment of subclause (9) that this should not be assumed. Instead it "may be intended to establish privity of estate between the former landlord and the new freeholder". Nevertheless, he stated that even if there is privity that by itself is not sufficient to allow successors in title to either party to take the benefit and burden:

> There is no scope for LPA 1925 sections 41 and 142 to apply as they refer to leases and the enlarged estate is no longer held under a lease. The common law rules developed in the sixteenth century which provide for an assignee of the term to be bound by the burden of covenants do not apply to freeholds.

3.39 Accordingly, he stated it is not evident that section 153(8) should be construed to extend to bind successors in title to the enlarging lessee and used a number of examples to demonstrate its application.

3.40 The Society of Licensed Conveyancers agreed that HM Land Registry's practice was of the result of the use of long leasehold as a device to make the burden of positive covenants run with freehold land. It suggested that the long-standing problem of positive covenants should be dealt with by the enactment of primary legislation rather than permitting there to be more than one freehold registered title of the same piece of land. It noted that whilst it may be technically possible for two freeholds to simultaneously exist, the practice would generate confusion for buyers and their conveyancers. It believed:

> The over-arching purpose of registered land viz to facilitate the efficient transfer of land by removing arcane technicalities should surely take precedence. The Land Registry should not be placed in the invidious position of having to allow this because technically it is possible.

3.41 The Conveyancing Association offered as a solution a register of covenantees It argued that this register would dramatically simplify covenants in England and Wales by enabling a landlord whose tenant's lease has been enlarged to maintain enforceable covenants, and further would permit a covenantor to serve notice on a covenantee for the removal of a covenant.

3.42 The Law Society observed that the number of old leases currently capable of enlargement must be few and far between. It noted that although 999-year leases are sometimes granted in flats or housing estate schemes to take advantage of enforceable positive covenants, the forms of lease in those cases do not admit of enlargement under section153 as they reserve a small rent having a monetary value. It also noted that grants of leases of up to 250 years are far more common and they do not qualify for enlargement. The Law Society acknowledged that if the Law Commission's recommendations in the report Making Land Work[5] in relation to positive covenants were adopted, those leasehold schemes would no longer be needed.

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5 Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327.

3.43 The Society commented that it would prefer to see an end to the new practice of retaining the reversioner's freehold title in the register following enlargement. Nevertheless, it accepted that given that section 153 (8) LPA 1925 keeps in force those covenants in the lease which relate to user and enjoyment, it may be useful to retain a title having the benefit of those covenants that makes reference to the other freehold title.

3.44 The City of Westminster and Holborn Law Society noted that although enlargement is supposedly a way of making the burden of positive covenants run with the land, there are other methods available such as reserving rights of re-entry or creating a nominal estate rentcharge which are more frequently used by covenantees. It explained:

> In the past we have seen use of enlargement by arrangement in various scenarios where it is not necessarily wanted to have the freehold by transfer. The assumption and practice was that the seller's freehold title would end by enlargement. Some owners were concerned to ensure that after a short time they would no longer be nominal owners perhaps with potential liabilities under statute, planning obligation, covenants limited to seisin, chancel repair etc, hence there could be a put option to transfer the freehold reversion if there was no enlargement after a set time. This was before the new practice of the Land Registry.
>
> There will be few instances where this academic problem really matters but, if there is an opportunity for land law reform, it would be desirable to remove the doubt. The covenantee can anyway still have the benefit of the positive covenant, if that is the concern. At the same time, it may be worth addressing subsection (8) as we wondered how an entry stating that the freehold title is subject to old trusts, equities and so on can really fit in with the system of registered conveyancing based on register entries, limited overriding interests and overreaching of trust interests.

The issue of subinfeudation

3.45 The London Property Support Lawyers Group raised the practice of subinfeudation, seeing this as support for the ability for the landlord's existing freehold title to remain following enlargement of the leasehold:

> In relation to the question of subinfeudation referred to in the consultation document, the Statute Quia Emptores prohibited subinfeudation by the tenant but did not prevent subinfeudation by the Crown who could still create new tenures at will or, indeed, grant licences to the tenant to do so. JMW Bean, The Decline of English Feudalism (Manchester: Manchester University Press 1968) suggests that the Crown initially granted licences liberally. Therefore, intrinsically, there is nothing within the Statute Quia Emptores that prohibits the creation of two freehold titles. The concept of there being concurrent titles of this nature is not, intrinsically, much different to the concept of commonhold title introduced by the Commonhold and Leasehold Reform Act 2002.

MINES AND MINERALS

Cautions against first registration of the surface title

Consultation Question 2.

3.46 We invite the views of consultees as to whether the law should be clarified so that it is possible for an owner of an estate in mines and minerals held apart from the surface to lodge a caution against first registration of the relevant surface title.[6]

3.47 21 consultees answered this question.[7]

3.48 Generally speaking, consultees were more or less evenly split as to whether it should be possible to lodge a caution in respect of mines and minerals held apart from the surface.

Support clarification to allow a caution against first registration

3.49 A number of consultees were in favour of expressly enabling the lodging of a caution against first registration by the owner of an estate in mines and minerals.[8]

3.50 Professor Warren Barr and Professor Debra Morris were of the opinion that "the benefit of clarity outweighs any concerns with barriers to conveyancing".

3.51 The National Trust stated that they would prefer for all mines and minerals to be substantively registered but failing that, they believed it would be useful for a caution to exist as this would mean "the surface owner on first registration would be in a position to debate the minerals ownership or at least proceed with its eyes open to the position".

3.52 In the opinion of the Law Society, there is a lack of understanding of the law relating to mines and minerals by practitioners who do not encounter those issues on a regular basis. They stated:

> There is little or no appreciation … that the presumption of subterranean strata being included in the surface title is capable of being rebutted post registration of the surface title; that there is no compulsory registration requirement for mines and minerals titles nor that the Land Registry does not make a note of a conditional mines and minerals title on the corresponding surface title.

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6 Consultation Paper, para 3.51.

7 Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; CMS Cameron McKenna LLP; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); The National Trust; Adrian Broomfield; Society of Licensed Conveyancers; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; a confidential consultee.

8 The following consultees, amongst others, were in support of clarification: Adrian Broomfield; Chancery Bar Association; Chartered Institute of Legal Executives and Mangala Murali.

3.53 As such, the Law Society considered that allowing an owner of mines and minerals to register a caution against first registration against the corresponding surface title(s) would have the benefit of raising awareness of the separation of mines and minerals from the surface title and the profile of mines and minerals law, and of avoiding any "unnecessary unpleasantness" between the owners of surface and mines and minerals titles.

3.54 The Bar Council tentatively agreed with the proposal. In their opinion the law should be made clear. They could see the benefit to a purchaser of knowing whether another person claims the mines and minerals under their land. However, the Bar Council stated they would leave it to others to comment on whether the proposal might cause problems for conveyancing in practice.

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

3.56 The Conveyancing Association thought that it should be possible to lodge a caution, but only where evidence of ownership is provided.

3.57 Christopher Jessel thought allowing the lodgement of cautions "would provide important information, particularly where there are no surface rights". He suggested that beneficiaries of an undivided share in mineral rights, and of derivative interests in such shares, should also be able to lodge a caution.

3.58 Christopher Jessel also commented on the reasons why a grant of mineral rights may not include express rights over the surface, and on how the LRA 2002 interacts with such rights. These comments are included in Appendices 1 and 2 below.

Oppose use of a caution against first registration

3.59 Dr Charles Harpum considered that if a person has a registerable estate it should be registered, rather than protected by caution, in line with the "objective...to achieve total registration". He explained that the register will become more useful if it becomes "more comprehensive".

3.60 Further, Dr Harpum took the view that if a person cannot prove his or her title to HM Land Registry on first registration, then he or she "should not be allowed to cast any doubt on the title of the surface owner by means of a caution". He noted that, in his experience, "surface landowners are very concerned about the issue of severed minerals".

3.61 More generally, Dr Harpum took the view that section 15(3) should be extended "to cover all cases where the estate could be registered with its own title", such as profits à prendre in gross.

3.62 Nigel Madeley queried the danger faced by a person who owns an estate in mines and minerals held apart from the surface (M) when the surface owner (S) applies for first registration. He viewed the situation as follows:

> The risk is either that the S applies to register title to the surface, but the deeds do not contain an appropriate reservation, or that there is a reservation but M thinks S will avoid disclosing the relevant deed. In the first situation, there is a doubt about M's title and so the caution is illegitimate. If the second, M will have a right to rectify because there will have been a mistake. If S tries to remove the minerals, M can apply for an injunction (if M is concerned about registering something, then he will also be concerned enough to watch activity on the land).

3.63 Burges Salmon LLP were opposed to the proposal on the grounds that it would likely lead to time consuming additional investigations being required when a caution is entered against the title to large areas of surface land, but those rights do not actually affect the surface. It stated that a caution would only be appropriate if an applicant can show that the mines and minerals title actually includes rights over the surface. Even in this situation, Burges Salmon LLP thought that it would be preferable for the applicant to register title to the mines and minerals themselves.

3.64 Everyman Legal questioned whether the entry of a caution "would do anything other than alarm surface owners unnecessarily and complicate the legal process". It considered that "some ability" to note whether mines and minerals have already been separated may be helpful. Everyman Legal also considered that any change should not disadvantage surface land owned by individuals in favour of mines and minerals owned by "well-resourced businesses".

3.65 CMS Cameron McKenna LLP was also concerned about cautions alarming surface title holders and impeding dealings. It considered that a mines and minerals owner who wants to protect his or her interest should register the interest "properly and fully".

3.66 Michael Hall considered that the lodgement of a caution in respect of mines and minerals with no powers over the surface is already prohibited under section 15(3), and that "if this is not clear, it should be made clear". He was of the opinion that the owner of such an estate who wishes to protect his interest should apply for first registration.

3.67 Michael Hall was concerned that cautions could be used to pressure surface owners into paying to release the "rights to win and work" where, in at least some cases, those rights may not in fact exist or be exercisable.

> Anyone can claim to be the owner of tin and copper mines and it is not easy to disprove such claims. Such "rights" to win and work are often stated to arise from enclosure awards, but such awards were only for the purpose of dividing and allotting the surface title and only preserved any existing rights of lords of the manor. Such rights are not generally exercisable without the consent of the owner of the surface title, and payment of compensation.

3.68 Further, Mr Hall took the view that "it would not be right to use this as an occasion to strengthen the feudal rights claimed by the successors of lords of the manor", and suggested feudal rights should be the subject of a separate Law Commission project.

3.69 The London Property Support Lawyers Group was against the proposal, as it would "allow the owner of a mines and minerals estate to register a caution to protect rights that may or may not exist". It described HM Land Registry's current practice as already "over-generous":

> Frequently a registered surface title will contain an entry which, on further investigation, has been entered in relation to an application to register a caution against first registration (often in relation to large areas of land). Either the Land Registry are taking an expedient step of simply registering it against all land in the area of the application so that it does not have to determine which land within the application is unregistered and which is registered, or the HM Land Registry believe that the application relates to registration of the mines and minerals themselves, rather than first registration of the surface title which would seem to be counter to the rule that a land owner cannot enter a caution against first registration in respect its own land.

3.70 It considered that this "blanket approach" creates additional time and expense, as practitioners are required to investigate cautions revealed on searches that, in fact, have no relevance at all to the registered title.

3.71 The London Property Support Lawyers Group's concern was that the proposal would "encourage applications to be made on the off chance that the ownership of mines and minerals may include rights over the surface title whether or not those rights exist". It was its view that if applicants should apply for first registration of mines and minerals, rather than to lodge a caution "which does not prove the existence of any rights". It thought cautions should only be lodged in respect of "specific rights over the unregistered surface titles".

> In addition, the blanket approach adopted by the Land Registry in registering cautions against first registration is creating additional time and expense. In one case, an index map search revealed a caution against first registration against a registered title. A copy of the caution was obtained which was accompanied by an A0 plan showing an area of land affected by the caution that covered half of a small city. On reading the entry in the caution, it stated specifically that it did not affect any registered titles within the area of the plan. It is time consuming enough to investigate actual mines and minerals rights without having to carry out additional searches that turn out to have no relevance at all to the registered title but which are still revealed on search results.

Other views expressed

3.72 HM Land Registry had no view either way, but noted that our proposal would have an impact on its resources: it would lead to an increase in applications for cautions, which would lead to more notices being served in relation to, and more delayed in completing, subsequent applications for first registration.

Compulsory triggers for first registration

Views of consultees

Consultation Question 3.

3.73 We invite the views of consultees as to whether the provisions of section 4 of the LRA 2002 should be amended so that compulsory first registration of an estate in mines and minerals is triggered where mines and minerals are separated from an unregistered legal estate, and where an unregistered estate in mines and minerals held apart from the surface is transferred.[9]

3.74 21 consultees answered this question.[10]

3.75 A clear majority of consultees to this question were in favour of amending section 4 of the LRA 2002 to make the separation of mines and minerals from an unregistered estate and the transfer of an unregistered estate in mines and minerals triggers for first registration.

Support additional triggers first registration

3.76 The most common reason given for supporting the change were transparency and completeness of the property register, together with the concomitant clarity it would provide to surface owners.

3.77 Burges Salmon LLP stated that it was "in favour of compulsory registration to clarify to surface owners the rights affecting them in relation to mines and minerals". It thought that compulsory registration would force applicants to investigate properly the nature of the rights they claimed in order to prove title to them.

3.78 The London Property Support Lawyers Group was in favour of compulsory registration of estates in mines and minerals because of "the complex nature of mines and minerals and the lack of transparency over their ownership". It thought that registration would "focus the mind of a person who claims to have the benefit of mines and minerals and prevent spurious claims being made". It also considered that it would enable surface owners to have "a clear appreciation of their land ownership and the rights that affect them".

3.79 The Law Society supported compulsory registration of mines and minerals in order to achieve comprehensive registration, and bringing to an end "two systems of conveyancing; one for registered and the other for registered titles". Further, it stated

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9 Consultation Paper, para 3.59.

10 Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; The National Trust; Adrian Broomfield; The Bar Council; HM Land Registry; Graff & Redfern Solicitors; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Cliff Campbell; the Society of Licensed Conveyancers; a confidential consultee.

that registration of mines and minerals "would also result in titles that are largely invisible and not understood, becoming visible and raise awareness of what they mean."

3.80 The Law Society also noted that for electronic conveyancing to be "viable and become the norm requires critical mass with all or almost all registerable interests being registered". To that end, it thought that estates in mines and minerals should be subject to compulsory registration, noting that the LRA 2002 "missed an opportunity" by limiting compulsory registration to surface land.

3.81 The Law Society observed that voluntary registration of estates in mines and minerals "often precedes a sale of mines and minerals title". It explained:

> Buyers of them now expect certainty as to what interest they are acquiring. Rather than relying on a subjective assessment of an old unregistered title, they and their funders want certainty as to whether the seller's title is sufficient to satisfy HM Land Registry that it is title absolute or falls short of the mark and is qualified. This in turn reflects on value.

On the basis of "market practice", the Law Society thought that expanding compulsory registration would be "an easy win resulting in a more comprehensive register".

3.82 Everyman Legal and the Chartered Institute of Legal Executives described the change as being "sensible". The National Trust also considered that it would be a useful change.

3.83 Michael Hall thought that subterranean land "should be treated in the same way" as surface land, and therefore it should not be excluded from the requirements of registration.

3.84 The Conveyancing Association agreed with compulsory registration in order to "provide certainty to a buyer or chargee".

3.85 The Bar Council agreed that the current law should be amended. It noted that whilst the requirement of compulsory registration may place a burden on those who inherit an estate in mines and minerals, it thought that such a burden is likely to be a modest one.

3.86 Christopher Jessel agreed in principle with compulsory registration, but outlined a number of potential practical difficulties with compulsory registration for mines and minerals.

(1) Mr Jessel observed that mines and minerals can exist in various ways: for example, title could comprise everything below the surface, everything up to a specified depth, a specified geological scheme, or a particular mineral that only occurs in specific stratum. He explained that, because of this, it may be difficult to identify the lateral extent of a seam or strata on an official plan. He noted that rule 25 of the Land Registration Rules 2003 requires details to be made available; his concern was that an applicant may not be able to do so without commissioning a potentially expensive geological survey.

(2) Mr Jessel explained that owners of mines and minerals may not want to register their rights once the minerals are removed, because they could be exposed to liability for the remaining void. The usual sanction for non-registration (title

becomes equitable) would not incentivise registration in these circumstances, and non-registration could disadvantage a surface owner or public body who wishes to identify and bring an action against the mineral owner.

(3) Mr Jessel commented that the current fee structure may not be suitable because the value of mines and minerals are difficult to ascertain, and could even be negative where title comprises a void.

(4) Mr Jessel noted that it will often be difficult to deduce a clear title to mines and minerals. As a result, first registration is likely to involve extra work for the HM Land Registry, and the applicant may find it difficult to satisfy the registrar of the title. He explained that this is particularly the case for certain transactions, such as gifts, assents and appointments of new trustees. He explained that in these cases, it may be impractical or not economically sensible for the parties to prove title to the mines and minerals to the satisfaction of HM Land Registry. Mr Jessel noted that it could be particularly problematic where mines and minerals fall within assents in general terms or including "sweeping up" clauses. These methods are used to ensure that the entirety of a person's property, whether or not its full extent is known, is included in a disposition, which may then unknowingly include an estate in mines and minerals

3.87 Mr Jessel made a number of suggestions for amendments to the law:

a. Compulsory registration should apply to a freehold disposition of the minerals on their own where minerals had previously been severed from the surface. Where there was no previous severance it should also apply to the mineral rights where there is a freehold disposition of the surface excepting the minerals and to a disposition of the minerals excepting the surface.

b. It should also be compulsory on grant of a lease of the minerals for over 7 years or an assignment of a mineral lease with more than 7 years to run. Sometimes a lease may demise (firstly) the minerals over a wide area and (secondly) a small area of surface for shafts or mine buildings or spoil heaps. Where the mineral rights extend outside the limits of the second demise that should be treated as separation.

c. A grant of a profit of minerals either in fee simple or for a term exceeding 7 years should also be completed by registration both by an entry on the surface title (if registered) and also by registering the profit with its own title.

d. On a release to the surface owner, where the rights will merge, a note can be entered on the surface title that the minerals are included. If the surface is not already registered, this should be a trigger for first registration.

e. Where someone has mineral rights but cannot identify the area affected or where it is not practicable or economically sensible to identify the extent of the mineral rights or to demonstrate a good title to the satisfaction of the Land Registry then the legal estate in those rights should not be lost. That would include an assent in general terms (as of "all other property of the testator") or where they are part of a larger estate vesting in a beneficiary or where they are included in a conveyance under a "sweeping up" clause. Either compulsory registration should not apply or, if it does, late applications should be permitted. Late application should apply to a person who can

demonstrate a claim to a legal estate in the minerals as beneficial owner or as trustee. Where the title to the legal estate is difficult to trace it should also apply to the owner of an absolute equitable beneficial interest (who would be entitled to call for the legal estate if the holders of that estate could be identified) and to persons who together have the right to appoint a trustee under the Trusts of Land and Appointment of Trustees Act 1996. Such applications should be permitted irrespective of any lapse of time since the minerals were the subject of a registrable devolution.

f. Where a claimant to mineral rights can show the location of the rights sufficient to identify the surface affected but cannot produce a clear title to the satisfaction of the land registry then it should be possible to protect priority by lodging a caution or, if the surface is registered, a notice. As indicated in my reply to 22.11 this should extend to beneficiaries under trusts.

g. LRR 2003, rule 25 should be modified so that if an applicant is not able to provide full details some form of registration can still be made.

3.88 In addition, Mr Jessel also made specific suggestions in relation to manorial mines and minerals rights.

3.89 Christopher Jessel provided a lengthy and useful response outlining aspects of the laws of mines and minerals more generally which is reproduced in Appendix 1.

Oppose amendments to trigger first registration

3.90 The Chancery Bar Association were opposed to any change in the law absent clear demonstration that the lack of compulsory registration was causing problems in practice. It did not consider any amendment of the current position as justified, particularly as in most cases only a qualified title will be registered.

3.91 Mangala Murali considered that with mines and minerals becoming increasingly rare, voluntary first registration should suffice.

3.92 Nigel Madeley thought that mines and minerals are a "good example of land registration highlighting issues that might sensibly remain dormant". He noted the risk of disputes arising from a requirement to register. In particular, we cautioned that full trials were likely to be required because the issues would be difficult and fact-sensitive. He stated:

> This would be likely to produce a dispute on every application – depending on how the general boundaries rule is applied. The process will be expensive and time-consuming. Is it worth it?

Mr Madeley was of the opinion the current law allows parties to "adopt a 'sleeping dogs' approach". In the cases in which someone does want to register, the person "is signalling that they are prepared to engage in a dispute".

3.93 Nigel Madeley also questioned how HM Land Registry would apply the general boundaries rule if registration were compulsory:

> Would it say that an estate is registered and that the boundary line at surface level is the sold off land in the conveyance that first reserved the mines and minerals? If that is correct, what does that add to the current general statement we see that mines and

> minerals are reserved out of a title? If the Registry tries to be more refined, it will end up creating an issue that might never exist. What and where are the relevant mineral seams … how deep do they go and at what point does title become the surface owner's (bearing in mind that *Bocardo*[11] *o*nly decided that the surface owner's title 'ran out' when it was physically useless to own the land).

3.94 Mr Madeley suggested that a comparison of the number of conveyancing dealings in which mines and minerals are reserved compared with the cases in which someone claims a right to them might be a better indicator of the most suitable course of action.

3.95 Cliff Campbell expressed the opinion that compulsory registration of mines and minerals on purported severance would not be a useful development, given the difficulties in adequately establishing title to estates in mines and minerals. He took the view that, in many cases:

> the grant of qualified title may well shed no further light on the true ownership of the mines and minerals. [Compulsory registration] would not therefore bring us any closer to achieving the goal of comprehensive registration of title, but would in many cases cause unnecessary and unwelcome work and expense.

3.96 Mr Campbell also disagreed that separation of mines and minerals from the surface land indicates that the minerals are likely to be exploited in some way. He commented that:

> in many cases ownership will routinely be reserved "for the future", "just in case", with no present or future intention whatsoever to actually exploit.

3.97 The City of Westminster and Holborn Law Society opposed the introduction of new triggers, concluding that "disadvantage outweighs the advantage to the extent that no such amendment should be made and that the provisions for voluntary registration are sufficient".

3.98 The City of Westminster and Holborn Law Society considered that compulsory registration could be problematic for certain types of dispositions, such as assents, gifts and reservations of the mines and minerals on grant of the surface title. In these cases, title might be difficult and costly to prove, but the mines and minerals may not be valuable. It thought that there was no "incentive" to register in these cases, and requiring registration would be "impracticable":

> It is no good having a trigger which may well not result in a registered title at all and then with the prospect that the gift or the exception becomes ineffective.

3.99 The Society provided further detail on the particular difficulties in proving title to mines and minerals, which is included in Appendix 1 because it extends into wider issues regarding the law of mines and minerals.

3.100 The City of Westminster and Holborn Law Society acknowledged that there is "a case for compulsory registration upon severance by a sale of only the mines and minerals",

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11 *Bocardo SA v Star Energy UK Onshore Ltd* [2010] YKSC 35, [2011] 1 AC 380.

but considered that voluntary registration would be likely in these circumstances anyway.

3.101 The City of Westminster and Holborn Law Society also noted that our proposal would have "resources implications" for HM Land Registry.

3.102 HM Land Registry did not support a development in the law along the lines set out in the Consultation Paper. It took the view that the "existing position is…based upon sound, practical considerations" and stated that it was unaware of any "obvious call for a change to this long-standing position".

3.103 HM Land Registry noted the law relating to mines and minerals is complex. Thus, it considered that compulsory registration would "be likely to cause significant issues" both for surface owners and those who deal with estates in mines and minerals. It thought it was "probable" that compulsory registration would "result in the generation of a large number of disputes with…little obvious benefit". It also noted that many owners of mines and minerals would continue to be registered with qualified title.

Expressed other opinions

3.104 Professor Warren Barr and Professor Debra Morris stated that the matter was better left to individuals with practical experience of the issues. They noted that there is always a benefit to clarity but that the practical concerns may outweigh it.

3.105 The Society of Licensed Conveyancers commented that the issue of ownership and registration of mines and minerals is complex and in practice often uncertain. It questioned whether in this situation the goal of a complete and accurate register of title should be pursued, explaining:

> There is I feel, a clear divide between what conveyancers for developers of land may wish to see, and what conveyancers of residential properties may hope for. Undoubtedly mineral rights beyond coal, gold, shale gas etc will become more valuable in the future. Accordingly, land owners given the opportunity of new Land Registry rules which facilitate the process of registration of mineral rights, more effectively and at a cheaper cost, will avail themselves of the opportunity. They may do so, even if they have no real intention or hope of future exploitation, where previously they would not have bothered, from a cost-benefit perspective.

3.106 In response to Consultation Questions 3 and 4 (below), Dr Charles Harpum stated, in principle, there is "much to be said" for the proposal that the freehold estate in mines and minerals should be required to be registered on a severance of mines and minerals by transfer. He acknowledged that there may be practical difficulties in the seller proving his or her title, but observed that:

> A person is unlikely to purchase such mines and minerals unless he/she is reasonably confident that the seller does indeed have such a title.

3.107 In Dr Harpum's view, the issues surrounding mines and minerals will remain intractable unless some positive step is taken. He made the suggestion for a provision that would, after a ten-year period, treat the owner of the surface land as the owner of unregistered

mines and minerals beneath it (in line with *Bocardo SA v Star Energy UK Onshore Ltd)*.[12]

3.108 Explaining his proposed provisions, Dr Harpum said it would give those who claimed the mines and minerals a ten-year period in which to register their rights. If they did not do so, and subsequently claimed to own the minerals, they would have to seek rectification of the register to record their rights and the registered proprietor would enjoy the protection given to a proprietor in physical possession under schedule 4 of the Land Registration Act 2002. Although this could give rise to claims against indemnity against HM Land Registry, Dr Harpum said a person seeking indemnity would have to "run the gauntlet" of LRA 2002, schedule 8, para 5(1)(b):

> There could even be a rebuttable statutory presumption that a person who failed to register mineral rights within the 10-year period was to be regarded as negligent for the purposes of para 5(1)(b) unless the contrary could be shown. In my experience, most persons who have mineral rights, have them on a large scale, and are well-heeled and well-advised.

3.109 In Dr Harpum's view, the suggestion is analogous to section 117 of the LRA 2002 and a proportionate response to the issue. He further did not believe it would fall foul of Article 1, Protocol 1 of the European Convention on Human Rights.

Experience of problems in practice

Consultation Question 4.

3.110 We invite consultees to share their experiences of the extent to which the lack of compulsory registration of estates in mines and minerals is causing problems in practice.[13]

3.111 15 consultees answered this question.[14]

3.112 The consultees who commented on this question were roughly evenly split between having and not having experienced problems in practice.

Lack of compulsory registration causing problems in practice

Invisibility of titles causing problems in practice

3.113 Whilst the Law Society stated that it could not refer to specific examples due to its confidentiality obligations, it explained the invisibility of mines and minerals titles

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12 [2010] UKSC 35, [2011] 1 AC 380.

13 Consultation Paper, para 3.60.

14 Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Cliff Campbell; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Howard Kennedy LLP; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

resulted in uncertainty and additional cost and delay. It highlighted the following areas of concern gathered from the experiences of its members.

(1) The lack of visibility of mines and minerals titles was having an adverse effect on the development of land. It stated that since *Bocardo SA v Star Energy*,[15] developers and their funders have become wary of the prospect of challenges by third parties alleging that ground investigations, subterranean services or foundations have resulted in a trespass on their mines and minerals title.

(2) With mines and minerals being largely unregistered, developers and their funders are tending to err on the side of caution when faced with a surface title that is silent on whether or not it includes mines and minerals. Developments are being put on hold whilst a comprehensive ground survey is undertaken in an attempt to identify whether or not there are any mines and minerals under the surface and an assessment made of the prospect of another party claiming ownership of them.

(3) If it becomes necessary to make an indemnity insurance claim, the resulting delay to a development is on average between 12 to 24 months whilst the parties try to reach a commercial settlement.

3.114 In addition, the Law Society saw no justification for HM Land Registry not noting on surface titles that mines and minerals are excluded when the registered title is qualified. It stated:

> For a surface owner or developer of the surface the only uncertainty over negotiating with a qualified title holder is whether someone else will come along with a stronger claim to displace that person. It leaves a cloud hanging over the finality of any negotiated settlement.

3.115 The Law Society shared the experience of "a knowledgeable mines and minerals solicitor" who had reported his experience of dealing with an application to register an absolute title in mines and minerals where HM Land Registry had previously registered a qualified title in respect of the same interest. The solicitor felt that HM Land Registry did not want to play any part in assessing whether or not the applicant had a superior claim, but rather leave it to the parties to resolve themselves and, in default of agreement, refer it to the First-tier Tribunal. In the end the solicitor reported that the parties came to a commercial settlement. The Society noted that had the applicant's mines and minerals title been the subject of compulsory registration when it last changed hands, this situation could have been avoided. It added that: "it is the invisibility of these titles which is behind many of the difficulties that conveyancers experience".

3.116 The Chartered Institute of Legal Executives was aware of a case where the development of an underground shopping centre was put on hold due to an issue with mines and minerals arising. It considered that, if the mines and minerals had been registered, the issue would have been known and capable of being dealt with prior to starting development works. It therefore considered compulsory registration "to be an excellent proposal for the rare occasions when it could matter".

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[15] [2010] UKSC 35, [2011] 1 AC 380.

3.117 Pinsent Masons LLP stated that it had acted on "a number of transactions for clients" relating to land earmarked for development, where the land was in an area with historical mines and minerals vested in a landed estate. It explained that investigating mines and minerals rights was a "costly and time-consuming exercise":

> The estate had registered some of its rights, but we suspected there may be more. On applying to Land Registry for copy documents, we found that the estate had commissioned research using both publicly-available information and information held in its own archive, and there were over 150 separate parcels of land in which the estate considered it had an interest. Not all of those interests had been registered – the estate appeared to be going through the process of registering them in stages. It was impossible to identify many of the parcels of land that were described by reference to plans from the late 1800s and early 1900s without commissioning plans experts to overlay them onto current Ordnance Survey plans – both a costly and time-consuming exercise.

3.118 Pinsent Masons LLP also suggested that HM Land Registry should more closely scrutinise applications to register mines and minerals before they are completed. This stance was based on the experiences of its clients:

> Even where mines and minerals had been substantively registered, they were only registered with qualified rather than title absolute. This caused further difficulties for the client who required certainty as to the risks involved in carrying out site surveys and ultimately construction work. Given that some interests were registered but others were not, and the fact that many of the historic records of mines and minerals rights are not publicly-accessible (being held in private collections or archives), we could not advise with certainty that there would be no infringement of rights.
>
> The fact that, even when registered, many of the interests covered vast swathes of land, and were not held with absolute title, created the impression that HM Land Registry had erred on the side of caution and registered without carrying out a detailed analysis of whether there was actually any interest to protect. It is extremely difficult for an owner, or prospective buyer, of land to assess its rights and potential liabilities in such circumstances, and ultimately to decide whether to proceed with development.

3.119 Pinsent Masons LLP considered that "compulsory registration would at least put third parties on notice of the existence of potential rights and the possibility of infringement", but felt that the threshold currently adopted by HM Land Registry for the registration of mines and minerals appeared to be too low.

Mines and minerals owners using uncertainty to their advantage

3.120 Adrian Broomfield stated that the lack of compulsory registration of estates in mines and minerals makes it difficult to identify the relevant parties and establish their interests for compensation purposes, citing large scale compulsory purchases as an example.

3.121 Mr Broomfield noted that the uncertainty around the extent of mineral ownerships also often enables purported mineral owners to be able to extract "ransom" payments from developers (for example, of windfarms or landfill sites) in order for the developer to be able to proceed with their project. He explained that the purported mineral owner may simply be bought off for "nuisance value", and that he or she may not even have a

legitimate mines and minerals interest. He considered that registration would make the picture much more clear-cut, and help curtail such behaviour.

3.122 The London Property Support Lawyers Group also experienced mines and minerals owners relying on the uncertainty and complexity of mines and minerals to extract ransom payments. It considered that compulsory registration could reduce these claims:

> A landowner faced with a person who claims title to unregistered mines and minerals may find it easier to compromise than to unravel what title and rights exist. An obligation to register title would make it easier for the parties to establish what title exists.

3.123 Burges Salmon LLP agreed that mines and minerals owners have the advantage of uncertainty as to the extent of their rights, which gives them an enhanced bargaining position when development of the surface is proposed. To illustrate, it gave the example of a renewable energy development where it is often uncertain whether the construction of a wind turbine would interfere with mines and minerals and consequently, the mineral owner is bought off, possibly unnecessarily.

No problems in practice

3.124 A similar number of consultees indicated that they had not experienced any difficulty, including Nigel Madeley and the Chancery Bar Association.

3.125 Everyman Legal did not have any practical experience of problems relating to the lack of compulsory registration of estates in mines and minerals. However, it noted that "the risk of minerals being reserved without the surface owner's knowledge" must be increasing as "deeds are disappearing".

3.126 Michael Hall also stated that he had no experience of problems due to lack of compulsory registration. However, he explained that he had encountered difficulties in a case where a registered estate in mines and minerals was not noted on the register of title of the surface land.

Other problems in practice relating to mines and minerals

3.127 Some consultees identified that they had experienced problems in practice relating to mines and minerals, but that these problems were not caused by the lack of compulsory registration.

3.128 The City of Westminster and Holborn Law Society said members had seen problems stemming from mines and minerals not having existing registered titles; however, the Society observed that the root of this issue is not the lack of compulsory registration, but rather, the difficulties of proving ownership of what is below the surface when there has been no recent relevant mining activity.

3.129 The City of Westminster and Holborn Law Society also found that first registrations of surface title are often silent about mines and minerals "even though the surface owner is aware of the position but it was not included in the extent of title deduced (or it was but it was not noticed)".

3.130 Christopher Jessel gave examples of his general experience relating to mines and minerals in practice, although these examples were unrelated to compulsory registration. These examples are set out in Appendix 1.

3.131 Cliff Campbell noted that much of the controversy in relation to mines and minerals arose in recent years due to the sunset date relating to the cessation of manorial rights as overriding interests. He commented on the anxiety caused as a result of notification to the surface owners regarding the placing of unilateral notices on their title or first registration of rights in mine and minerals, with many surface owners "unnecessarily" anticipating mining activity under their land. He describes this "deluge of applications" as a

> one-off event [that] will not be repeated, and now that normal service has been resumed, it would seem wise to avoid retrospective overreaction, and unnecessary tampering.[16]

3.132 Howard Kennedy LLP stated that they had experienced "several" problems in practice, although could not elaborate regarding the matters.

Notification of surface owners

Consultation Question 5.

3.133 We invite the views of consultees as to whether surface owners should be notified of an application to register title to the mines and minerals beneath their land, regardless of whether title is to be registered with qualified or absolute title.[17]

3.134 23 consultees answered this question.[18]

3.135 Approximately two thirds of consultees were in favour of notifying surface owners of an application to register the mines and minerals beneath their land regardless of whether it is registered with absolute or qualified title.

Support notification of surface owners

3.136 Many consultees simply agreed that notification should be given without giving further thoughts, including the Chartered Institute of Legal Executives, and Amy Goymour (who expressed a "mild preference").

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16 The remainder of his response has been extracted in Appendix 1.

17 Consultation Paper, para 3.67.

18 Nigel Madeley; Professor Warren Barr and Professor Debra Morris; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); The National Trust; The City of London Law Society Land Law Committee; Adrian Broomfield; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; The Law Society; Mangala Murali; Cliff Campbell; the Society of Licensed Conveyancers; a confidential consultee.

3.137 The National Trust stated that the change would be "useful", and Mangala Murali noted that it made "logical sense" to notify surface owners.

3.138 The Conveyancing Association agreed that surface owners should be notified, and added that it should be at the cost of the applicant.

3.139 The London Property Support Lawyers Group was strongly in favour of notification, describing it as "arguably the single most important issue arising out of the registration of mines and minerals", and the one creating the most problems in practice. It stated that notifying surface owners would "make the Land Registration system clearer and more transparent", a principle underpinning the LRA 2002.

3.140 The London Property Support Lawyers Group provided an example of a securitisation of a wind farm, to show how a transaction was negatively affected by current practice:

> A clear SIM search had been obtained at the outset of the transaction and pre-completion searches in relation to the surface title were clear. In order to obtain a title indemnity policy, a second SIM search was carried out. This revealed the existence of a new title number. On investigation, it transpired that an application had been made to register title to the mines and minerals under the wind farm. No record of this appeared on the day list to the surface title and no notice of the application had been given to the surface owner. Discovery of the new title was purely fortuitous and prevented the firm involved giving a certificate of title certifying that there were no third party interests in relation to the property, which would have been manifestly incorrect. Additional time and costs (and potential delays to completion) were incurred that could have been avoided had notice of the application been given to the surface owner.

3.141 The Group outlined the steps that firms are taking as a result of the current practice:

(1) Carrying out additional SIM searches before completion where mines and minerals may have an impact on a development or funding transaction.

(2) When providing certificates of title and reports on title, negotiating additional qualifications because conveyancers cannot certify that the title is free of any adverse Land Registry applications on the date that the certificate or report is given.

3.142 The London Property Support Lawyers Group explained that these steps add time and cost to transactions and also "doubles the workload" for the SIM searches team at Telford Land Registry. It went on to say that in conversations with Telford, members have noticed the additional workload that this is creating.

3.143 The London Property Support Lawyers Group also commented that there are inconsistencies in HM Land Registry's current practice. It saw no logical reason why applications resulting in qualified title should be treated differently to those for absolute title, as the "surface owner's use and occupation of the land is affected either way". Further, it used the analogy of lodging a notice in relation to manorial rights over mines and minerals, of which a surface owner will always be notified. It stated:

> we do not believe that it would be unreasonable to require them to do the same in relation to applications to register mines and minerals. This would be no more of a

large administrative task than that undertaken in relation to notifying surface owners of UN1 applications.

3.144 Pinsent Masons LLP endorsed the London Property Support Lawyers Group's response, adding that it "strongly believed" that surface owners should be notified. It further stated that it disagreed that notification would cause undue stress and confusion for "less sophisticated landowners". In its view:

> the vast majority of owners would rather be alerted to the issue at the time of the application, rather than learning about the registration and having to deal with it later when trying to re-mortgage or sell, when stress levels might already be high.

3.145 The City of London Law Society Land Law Committee also emphasised "the importance of the concerns raised by the London Property Support Lawyers Group's response, which cause real problems in practice". It stated that the practices means that "firms hav[e] to spend additional resources to carry out extra SIMs with a knock-on impact on HM Land Registry", and "there is greater uncertainty in relation to the certifying of title". Further, it considered that the title number to the estate in mines and minerals, whether a qualified or absolute title, should be referred to on the surface title.

3.146 Nigel Madeley was of the opinion that surface owners should be notified, because they could "very easily want to dispute the description" of reserved minerals.

3.147 Michael Hall agreed that surface owners should be notified, because they "are entitled to assume that their title includes all strata beneath the surface unless and until it has been proved otherwise".

3.148 Christopher Jessel agreed that surface owners should be notified, adding that "in many cases the surface owner will already be aware of the exception of the minerals, especially where there is an entry on the title". In these cases, he noted that giving notice is "sensible" to allow the surface owner to contact the mineral owner.

3.149 Where a surface owner is not already aware, Mr Jessel still thought that it is "probably better to risk raising concern rather than leave the surface owner in ignorance until [it] can delay or prejudice a sale".

3.150 Dr Charles Harpum agreed that surface owners should be notified. However, he also acknowledged the concerns about causing distress to surface owners. He considered that notification "follows logically from the common law presumption stated by Lord Hope in *Bocardo*"[19] that a surface owner owns mines and minerals under the surface, unless they have been alienated. He took the view that:

> If a person is asserting that the owner of the surface does not own the minerals, notwithstanding the common law presumption, the surface owner ought to be told of the application to register the minerals when it is made.

3.151 The Chancery Bar Association, who agreed with notification, recognised that there were quite strong arguments for and against notification:

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[19] [2010] UKSC 35, [2011] 1 AC 380.

> Experience of the worry, uncertainty and expense caused to surface owners by the recent mass registration of mineral rights during the "sunset period" suggests that this may in many cases outweigh any benefit resulting from such notification. On the other hand there is a serious risk that in the absence of notification a property owner may wish to carry out development or sell the property and not search the register and learn of the registration of mineral rights until an inconveniently late stage.

3.152 On balance, it considered that the risk justified imposing the requirement of notification, despite any inconvenience to surface owners.

3.153 The Law Society thought there is "no reason" for HM Land Registry to distinguish between absolute and qualified titles, and that it should be "obliged to notify surface owners…irrespective of whether [it] is a title absolute or a qualified title". It considered that either way, registration "has the effect of rebutting the presumption of law that the surface title includes mines and minerals".

Against notification of surface owners

3.154 Adrian Broomfield was against notifying surface owners of registration of mines and minerals with qualified title because it could cause stress and confusion for ordinary landowners. He stated that, in the course of his practice, he has experienced:

> numerous calls from angry and confused parties who perceive that something has been taken away from them which was actually never conveyed or belonged to them in the first place…and who struggle with the concept that it is like a layer cake with different parties potentially owning different layers of sponge and cream.

3.155 Similarly, Everyman Legal questioned the point of notifying surface owners. It thought notification would "simply alarm the surface owners to no effect", and asked what surface owners were "supposed to do in response" to the notification.

3.156 Professor Warren Barr and Professor Debra Morris thought that whilst there are strong reasons to support notification, in practice, it would not serve any useful purpose particularly with qualified titles.

3.157 HM Land Registry was "concerned about the lack of obvious benefit" of notifying surface numbers compared to the "potentially negative consequences that it is likely to have" for users of HM Land Registry.

3.158 HM Land Registry thought that notification was "likely to cause concern to a surface owner", who "at the very least…will incur expense in order to better understand the nature of the application and the interest that is likely to arise from it" through legal advice. It noted that the concept of qualified title is "not easily understood". It also added that surface owners may incur further expense if they were to object to the application to register the mines and minerals estate. In its experience, objections are likely to be groundless.

3.159 HM Land Registry explained that notices may also be interpreted as "a signal of an intention to work the mines and minerals", leading to requests for further information from HM Land Registry. These requests "take up a considerable amount of time", but HM Land Registry ultimately "cannot provide answers" to surface owners' questions.

3.160 HM Land Registry took the view that "the grant of qualified title cannot be said to prejudice the surface owner" since it will be subject to any superior title; if the surface owner has a better title, the qualified title will be subject to his or her title.

3.161 In a similar vein, Cliff Campbell thought that the detrimental consequences to surface owners would "vastly outweigh the supposed benefits". He stated that notification would "highly increase" the number of notices served, because "in most cases" owners are registered with qualified title.

3.162 In addition, Mr Campbell did not think there were any benefits to notification; surface owners will "rarely have enough evidence to pursue an objection", and that registration of mines and minerals "does not usually matter" to surface owners. In contrast, developers would undertake a "proper investigation" of any titles to mines and minerals regardless of notification.

3.163 The Society of Licensed Conveyancers commented that the potential of mines and minerals estates "are not currently an issue for residential conveyancers", describing the point as existing "behind a veil of ignorance on the part of buyers and their lawyers". It expressed concern that once registration and notification becomes mandatory, "then the veil will be torn away". It noted that this may have an impact on conveyancing and conveyancers:

> Residential home owners, even if they will never meaningfully be affected by the mineral rights, will quite correctly, demand of their conveyancers "why was I not informed about this before I purchased?" This will lead to the potential for service complaints, and negligence claims. Investigation and report upon mineral rights will then have to become standard practice for residential conveyancers, even if in the 'real World' their clients will never be affected. Whilst additional work for which residential conveyancers can charge a proper rate for the exercise of their professional, technical, expertise may be attractive, I fear the more likely outcome is additional work for which residential conveyancers receive no additional remuneration given the pressure on fees.

Expressed other views

3.164 The City of Westminster and Holborn Law Society believed surface owners should ideally be notified, but as that process may have resource implications, a pragmatic compromise may be to have notification where mines and minerals are said to be with rights affecting the surface land.

3.165 The Bar Council considered that there are "good practical reasons" for notifying surface owners of applications to register a qualified estate in mines and minerals, even if it would make "little practical difference in many or even most cases". It did not think that the "conceptual problems" referred to in the Consultation Paper, or the effect on those receiving notification, should be a concern. It suggested that stress to surface owners could be reduced if "notification could be accompanied by an appropriate leaflet explaining what has happened".

3.166 However, the Bar Council acknowledged that the "administrative burden on HM Land Registry could be large in some cases", and as a result was "unable to say" whether the perceived benefits outweighed the burdens.

DISCONTINUOUS LEASES

Compulsory registration

Consultation Question 6.

3.167 We provisionally propose that the requirement of registration should apply to the grant of a discontinuous lease out of a qualifying estate.

Do consultees agree?[20]

3.168 24 consultees answered this question:

(1) 21 agreed;[21]

(2) 2 disagreed;[22] and

(3) 1 expressed other views.[23]

In favour of compulsory registration

3.169 The proposal was described as "sensible" by the London Property Support Lawyers Group, Pinsent Masons LLP and Dr Charles Harpum.

3.170 The National Trust stated that it would be "helpful to have a public record" of these discontinuous leases, even though "the situation rarely affects [it]".

3.171 Nottingham Law School supported the proposals for the reasons given in the Consultation Paper.

3.172 The Law Society thought that compulsory registration of discontinuous leases would be "desirable in order to give a full picture of qualifying interests". It also thought that it would deal with the "anomaly" that the registration requirements for discontinuous leases differ depending on whether the reversion is registered or unregistered.

3.173 Everyman Legal agreed with the proposal, but noted that it would be "good to recognise that leases are meant to be flexible and registration always limits that".

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20 Consultation Paper, para 3.78.

21 Dr Lu Xu; Professor Warren Barr and Professor Debra Morris; Everyman Legal; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); National Trust; Nottingham Law School; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Michael Hall.

22 Nigel Madeley; The City of Westminster and Holborn Law Society.

23 Christopher Jessel.

Against compulsory registration

3.174 Nigel Madeley disagreed with the proposal to require the registration of discontinuous leases. He thought compulsory registration would be “possibly unwieldly” to register, and might cause clutter on the register. He stated that:

> Making it substantively registrable would potentially result in rather a large number of registrable leases, possibly unwieldy. Imagine buying a reversion to a dozen time-shares properties each of which has 25 tenants for 2 weeks a year.

3.175 Further, he thought that there could be an “analogy” between discontinuous leases and future leases, but distinguished them because, in his opinion, a tenant of a discontinuous lease “will be in actual occupation” outside of the term of possession. He noted that it would be “interesting” to “identify the tenant in the absence of their own furniture”.

3.176 Nigel Madeley also gave thought that, due to the “unusual nature” of a time-share lease, it would be “done professionally rather than informally and so it would be more likely to be noted than not”.

3.177 The City of Westminster and Holborn Law Society thought that there was "little point” to provide for the “small number of discontinuous leases granted out of unregistered land and which do not attract compulsory first registration”. It explained:

> Most likely the tenant is more interested in having possession at the relevant intervals, otherwise the lease itself could be registered voluntarily. The lease may still be in place when the reversion is registered but this should be known and might be disclosed.

3.178 The City of Westminster and Holborn Law Society also considered that many tenants would not expect to have to register their discontinuous lease. It explained that it is “not that uncommon” for premises to be let, for example, every Sunday for the next 12 months to an organisation for meetings or recreational purposes. In those circumstances, it suggested that the tenant “may have not bothered with legal assistance and would not expect to be obliged to register the lease”. It also questioned whether the tenant would be able to provide evidence of the landlord’s title, or at least a suitable plan that would meet HM Land Registry’s requirements.

Expressed other views

3.179 Christopher Jessel agreed with compulsory registration “provided that it is clear to the parties that is what they are doing”.

3.180 He had concerns, however, since “the nature of the transaction will not always be clear”. He gave the following example that he had come across in practice.

> a document for the use and occupation of consulting rooms where a doctor had exclusive possession (say) for 6 hours every Tuesday afternoon for several years

3.181 In cases similar to the example, he explained, “it can be difficult to distinguish a lease from a licence”. He concluded that due to this uncertainty, and that fact that many tenants will not take legal advice, that registration should not be compulsory.

Notices and discontinuous leases

Consultation Question 7.

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

Do consultees agree?[24]

3.183 23 consultees answered this question:

(1) 22 agreed;[25] and

(2) 1 disagreed[26]

Agreed with the proposal

3.184 This proposal was favoured by the overwhelming majority of consultees.

3.185 Dr Charles Harpum referred to the proposal as "sensible", and Professors Warren Barr and Debra Morris said the change "would make life easier for all concerned".

3.186 Nottingham Law School supported the proposal for the reasons given in the Consultation Paper.

3.187 The National Trust commented that it would be "helpful to have notice of such arrangements" on the register of title of the reversion, but noted that it was "rarely affected" by discontinuous leases.

Disagreed with the proposal

3.188 Mangala Murali disagreed with the proposal. She took the view that:

> As by their very nature they are discontinuous, notice of these types of leases should only be made where they are compulsorily registrable.

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[24] Consultation Paper, para 3.79.

[25] Dr Lu Xu; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); Nottingham Law School; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; National Trust; Michael Hall.

[26] Mangala Murali.

THE LENGTH OF LEASE WHICH IS REGISTRABLE

Consultation Question 8.

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

Do consultees agree?[27]

3.190 26 consultees answered this question:

(1) 19 agreed;[28]

(2) 4 disagreed;[29] and

(3) 3 expressed other views.[30]

Support for the proposal – no change for the minimum term

3.191 The reasons given by the consultees who agreed with the proposal and provided additional comments fell into four categories.

Additional administrative burden and cost

3.192 Several consultees considered that increasing the number of registrable leases would increase the administrative costs for the parties to the lease.

3.193 The Property Litigation Association contrasted the "lack of clear benefit" with the "increased administrative and financial burden on tenants, landlords and HM Land Registry". It considered that costs would be incurred due to "registration fees and the need to ensure that any plan…met HM Land Registry's requirements".

3.194 Christopher Jessel agreed, stating that "reducing the term would create unnecessary formalities".

3.195 The London Property Support Lawyers Group thought that reducing the minimum term would lead to "additional costs, time and aggravation for the landlord, the tenant and HM Land Registry". Graff & Redfern Solicitors also agreed with the proposal, stating that reducing the term would "undoubtedly create costly and unnecessary

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27 Consultation Paper, para 3.94.

28 Dr Lu Xu; Professor Warren Barr and Professor Debra Morris; Property Litigation Association; Nigel Madeley; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; National Trust; Adrian Broomfield; Howard Kennedy LLP; The Bar Council; HM Land Registry; Graff & Redfern Solicitors; Burges Salmon LLP; The Law Society; Mangala Murali; Michael Hall; a confidential consultee.

29 The Conveyancing Association; Dr Charles Harpum QC (Hon); Society of Licensed Conveyancers; Chartered Institute of Legal Executives.

30 Dr Aruna Nair; Amy Goymour; Everyman Legal.

administration for businesses". Similarly, Nigel Madeley considered that "the extra administration" would be "out of proportion to the expense involved in granting it".

3.196 The National Trust reported that it has many tenants on residential, commercial and agricultural short-term leases, and expressed the view that "the increased costs and administrative burdens of any changes would mainly fall to tenants".

3.197 Two consultees also noted that it would increase the administrative costs for HM Land Registry, as well as the parties involved. Burges Salmon LLP stated that reducing the minimum term "would increase costs and the administration burden of HM Land Registry and lawyers acting for both parties". The Law Society also noted that reducing the minimum term would "materially increase the administrative and cost burden of a large number of lease transactions." It did not consider that these costs were justified:

> The costs to the lessee in doing so are not justifiable in relation to short leases where there is little or no difficulty in identifying their existence. The burden on the Land Registry would not be warranted by any benefits which a reduction in the threshold would achieve.

The Law Society added that the "much increased prevalence" of leases granted for a term of 7 years or less undermined the view in the 2001 Report that the minimum term should be reduced.

Discoverability of short leases

3.198 Many consultees also thought that the registration was less useful because short leases, by their nature, are more easily discoverable by parties purchasing the reversion.

3.199 The National Trust thought that the administrative costs of registration were not justified because the "majority" of short leases were "likely to be occupational and therefore discoverable". Similarly, the Law Society thought that the costs of registration of short leases were not justifiable because "there is little or no difficulty in identifying their existence".

3.200 Nigel Madeley similarly stated "with shorter lease terms, the tenant is more likely to be in possession throughout the term and so be protected by actual occupation".

Clutter in the register

3.201 Another reason consultees agreed with our proposal was that they thought that increasing the number of registrable leases would clutter the register.

3.202 The Property Litigation Association explained that:

> Landlords of multi-tenanted properties often face difficulties in ensuring that leases are promptly cleared off the title following termination, due to the Land Registry's procedural and evidential requirements in connection with those applications.

3.203 It was concerned that the volume of such applications would be increased if the threshold were lowered.

3.204 Similarly, the National Trust said that if a tenant does not remove the entry at the end of the lease term, it falls to the landlord to remove it. It thought reducing the minimum term could "quickly lead to muddled and misleading registers that are littered with entries relating to expired leases". It noted that some of the National Trust's freeholds "cover vast areas of land" and could have "many short-term leases" that could be affected.

3.205 Burges Salmon LLP further noted that under the current law, "many tenants, represented or not, fail to remove entries relating to expired leases". It took the view that the problem would "only be exacerbated" if the minimum term was reduced.

3.206 The Law Society was "also conscious of the dangers of the landlord's registered title being burdened by notices relating to an increased number of leases, which will need to be removed once they have ended".

Lack of legal advice

3.207 Another common theme among consultees was that tenants who take shorter leases are less likely to take legal advice than tenants taking leases of seven years or more and therefore they would be less likely to comply with the requirements of registration.

3.208 Numerous consultees noted that tenants of short leases would not have legal advice: National Trust, Burges Salmon LLP, Christopher Jessel and the City of Westminster and Holborn Law Society.

3.209 The National Trust thought that, due to lack of legal advice, "tenants could therefore find it difficult to comply with registration requirements (or may take the risk of not registering)".

3.210 The City of Westminster and Holborn Law Society noted in particular that agricultural tenants may not have legal advice because "surveyors rather than lawyers may be involved in granting leases". In general, it took the view that:

> Most likely nobody would bother to register the lease even if the need for compulsory registration were known.

The Society noted that it had experienced cases where attempts to register longer leases had been abandoned because the plan was not up to HM Land Registry's standards.

Disagreed with the proposal

3.211 Four consultees disagreed with our proposal. They thought that the minimum term of registrable leases should be reduced.

3.212 The Society of Licensed Conveyancers thought that the change should be made due to "changes in the commercial world where business relationships become shorter and more transitory". It took the view that if the change were not made now, then it would "undoubtedly have to re-visited in the future". It also acknowledged that reform would increase administrative costs, but that it would lead to a "comprehensive register".

3.213 Similarly, the Chartered Institute of Legal Executives considered that "a shorter period is required" because of market trends. It took the view that:

> There is a trend in an uncertain economy to reduce the terms of commercial leases so the registers are not a true reflection of the title.

3.214 Dr Charles Harpum also thought that market trends justified reducing the minimum term. He highlighted that "one of the objectives of bringing shorter leases on to the register [under the LRA 2002] was to catch most business leases". Given that "the average length of business leases has been falling…since the enactment of the LRA 2002", in his view the "time has come for leases granted for more than 3-years to be made registrable". He did not think domestic lettings would be affected, explaining that they are "normally granted as Assured Shorthold Tenancies for a year at a time".

3.215 Dr Harpum noted that business leases "almost invariably continue longer than their contractual terms" as they are renewed, often "under the continuous provisions of Part II of the Landlord and Tenant Act 1954". He commented that "the process of renewing a business tenancy is a very considerably more onerous burden than the simple task of registering it".

3.216 Dr Harpum also thought that it would be "very helpful" if leases were noted against the reversion for the purposes of conveyancing, and the details could be "readily obtainable from the register".

3.217 The Conveyancing Association thought that registration would "reduce the threat of fraud" on the registered proprietor and chargee who had "not consented to the rental of the property". It envisaged how digital signatures would operate:

> This means that by utilising the Verify system it will reveal tenants who are not authorised to live in the UK. The entry should be updated at the renewal of the term of the tenancy.

3.218 The Association also thought that it should be possible for leases shorter than three years to be noted on the register.

3.219 However, the Conveyancing Association did not think these changes should be made until "digital signatures are available to enable this to be dealt with electronically" and to make the "costs to the parties minimal". It also thought that chargees should be notified on registration of short leases, who can "enforce their contractual terms with the registered proprietor at their own discretion".

Expressed other views

3.220 Three consultees expressed other views in response to this question.

3.221 Amy Goymour was "in principle…keen for more leases to appear on the register", and that it would "reduce some of the problems created by unregistered leases". However, she found it "hard to form a definitive view" without knowing the practical implications, such as the number of leases which would be affected.

3.222 Dr Aruna Nair thought that the Consultation Paper had focused on the impact of registration on landlords and tenants, rather than the costs and benefits of the current rules from the perspective of a purchaser of the freehold. She took the view that:

> The aims of total registration and transparency in the property market…are ultimately about benefiting purchasers rather than current owners of either the leasehold or the freehold.

3.223 Dr Aruna Nair suggested that we could amend the overriding interest provisions to limit protection for legal leases under schedule 3, paragraph 1, to leases for a term not exceeding 3 years. A lease for a term between 3 and 7 years could be created at law without registration, but its priority would only be protected as an overriding interest if the tenant was in actual occupation. As a result, tenants of such leases would be "incentivised to put a notice on the register".

3.224 In Dr Nair's view, this would "achieve the aim of transparency in the property market, without imposing new conveyancing burdens on the landlord or tenant". She thought that he suggestion would result in a reasonable burden being imposed on tenants, landlords and HM Land Registry:

> No burden would be imposed at the moment of creation of the lease because registration would not be a formality requirement. Registration of a notice would not be dispositive, attracting the guarantee of title / indemnity, and would therefore also impose fewer burdens on HM Land Registry and the landlord.

3.225 Dr Aruna Nair also commented that, under short leases, "tenants may not always be in discoverable actual occupation at the moment when the purchaser is making enquiries".

3.226 On the other hand, Everyman legal argued that the minimum term should be increased from seven years. It took the view that:

> Most business tenants do not regard their leases as a property interest but as a fairly liquid business asset. They do not want to pay land registry fees for the illusory benefit of an open and authoritative register no matter how much lawyers might like it.

3.227 Everyman Legal said that, in practice, it has had "a few clients who have simply refused to register their lease outright, while most pitch their lease term at just below the registration level". Everyman Legal also suggested that the prevalence of leases just below the minimum term would "reduce the tax intake from Stamp Duty Land Tax as short leases are less likely to be over the threshold" and would also increase costs to renew the lease, or remarket the property.

3.228 In relation to residential leases, Everyman Legal thought that "reducing registrable lease terms would not help the lettings market unless an exemption was made for leases at a market rate" because it thought that landlords should be encouraged to grant longer, rather than shorter, residential leases.

Chapter 4: First registration

INTRODUCTION

4.1 26 consultees responded to the questions in Chapter 4 of the Consultation Paper.[1]

4.2 Although only one consultee was able to provide specific evidence of the twilight period causing a problem in practice, many consultees nonetheless expressed a desire to see the law reformed.

4.3 Consultees offered a wide range of views as to the best method of protecting twilight period dispositions. Consultees were split between those who thought that the twilight period should be addressed under unregistered land rules and those who thought the registered land regime should accommodate the period.

4.4 Consultees' views on the type of legislative changes that might be needed to protect twilight period disponees varied from HM Land Registry's position that no change is necessary as the current law is "adequate", to suggestions for novel protective mechanisms.

4.5 Most consultees who answered the third question at paragraph 4.39 of the Consultation Paper supported wide availability of cautions against first registration. However, some consultees were concerned that enabling persons with a derivative interest under a trust to apply for a caution against first registration would undermine the land law principle of overreaching.

TWILIGHT PERIOD DISPOSITIONS

Consultation Question 9.

4.6 We invite consultees to provide evidence of difficulties they have encountered when undertaking conveyancing in the twilight period.[2]

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1 Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Taylor Wessing LLP; Adrian Broomfield; The Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Berkeley Group; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

2 Consultation Paper, para 4.34.

4.7 12 consultees provided a substantive response to this question.[3]

Evidence of practical problems with the twilight period

4.8 Only one consultee, Dr Charles Harpum QC (Hon), said that he had come across a twilight period problem in his practice. Dr Harpum said that he had "encountered this problem in practice just once", and that it occurred "shortly after the LRA 2002 came into force".

4.9 Although Nigel Madeley did not provide evidence of personal experience with twilight period difficulties, he was nonetheless of the opinion that the twilight period does cause problems in practice. He referred to the case of *Sainsbury's Supermarkets v Olympia Homes*,[4] which was discussed in the Consultation Paper, as proof that "when things go wrong, they go very wrong".

4.10 A number of consultees indicated in their responses that the twilight period has the potential to be problematic. The Society of Licensed Conveyancers did so by concentrating on the effect of the current legislation; they described "the impact of rule 38 upon section 14(3) Land Charges Act 1972" as "unfortunate". Others, including consultees who could not provide evidence that the twilight period has caused practical difficulties,[5] indicated concern for future problems by advocating for reform of this "anomalous"[6] area of law. The Bar Council thought that the case for reform was "demonstrated by the Consultation Paper".

Evidence that the twilight period is not causing practical difficulties

4.11 The London Property Support Lawyers Group stated that it had "not encountered any difficulties in practice". Pinsent Masons LLP also said it was not aware of any particular difficulties arising in practice. Likewise, the Law Society described twilight period difficulties as "esoteric". It reported that:

> The Society has no real evidence to assist in this regard but it is thought the examples of difficulties occurring in practice are few.

The Law Society added that it thought that "there is little awareness" among practitioners of the "traps" of the twilight period.

4.12 The Berkeley Group explained that the group does "often deal with back to back leasebacks", a type of disposition that we suggested in the Consultation Paper might be susceptible to twilight period problems. However, the Berkeley Group did not give any evidence that the twilight period has, in its experience, caused complications.

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3 Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Howard Kennedy LLP; Berkeley Group; Chartered Institute of Legal Executives; The Law Society; Taylor Wessing LLP.

4 [2005] EWHC 1235 (Ch), [2006] 1 P & CR 17.

5 London Property Support Lawyers Group; Pinsent Masons LLP; Howard Kennedy LLP; The Law Society.

6 The Law Society.

4.13 A number of reasons were given by consultees as to why the twilight period has not, in their experience, been causing issues in practice.

Amount of unregistered land

4.14 Michael Hall and Taylor Wessing LLP both suggested that twilight period disputes are unusual because of the substantially reduced area of land which remains unregistered.

Voluntary first registration

4.15 The City of Westminster and Holborn Law Society thought that difficulties may be avoided if voluntary first registration could be "arranged in advance of an intended dealing". This view was shared by the London Property Support Lawyers Group, who reported that:

> Lawyers who deal routinely with unregistered land are adopting a proactive approach and encouraging clients to use the voluntary first registration procedure to avoid future delays when a sale of the land takes place or an option or conditional contract is to be granted prior to the development of the land.

4.16 Michael Hall considered that the twilight period can be avoided where a party with stronger bargaining power requires the other party to register the land before the conveyance takes place. He wrote:

> As unregistered titles have become uncommon, and clients, particularly lenders, have become more risk averse, it is frequently the case that owners of unregistered land are required by buyers or mortgagees to register their title before proceeding with any transaction.

Workarounds

4.17 Consultees provided examples of various other "workarounds" that may be employed to mitigate or avoid twilight period problems.

4.18 Michael Hall pointed out that contractual undertakings can be used to encourage both prompt registration applications and notification of purchasers of third-party rights that affect the interest they have acquired:

> In practice the covenantee should require the covenantor to undertake to ensure the transfer is registered within a number of days and that notice is given to any purchaser of the existence of the covenant or other right or interest prior to any disposition occurring before completion of the registration.

4.19 The Law Society similarly suggested that conveyancers in multi-party transactions should "work around [twilight period] issues by relying on cross undertakings on completion whereby conveyancers agree with each other to submit timely and complete applications for first registration". The Law Society also noted that "registration of title within the time limit by the disponee" would be the "pragmatic solution" to most twilight period dispositions which occur in the same transaction as that which triggers compulsory first registration. However, twilight period dispositions which occur after compulsory first registration has been triggered are not, in the opinion of the Law Society, "susceptible to be righted" by this "pragmatic solution". The Law Society stated that the problems with twilight period dispositions "arise out of the transitional approach

from an unregistered to a registered land regime which is not comprehensive in dealing with them".

Problems once the application is made to HM Land Registry

4.20 Although the consultation questions focussed on the first part of the twilight period, several consultees used their responses to this question to provide evidence of issues arising from the latter part of the twilight period: the gap between the application for first registration being received by HM Land Registry and registration being completed.

4.21 Everyman Legal said that it experienced problems where "Land Registry raises queries on the title that is being registered" and where "Land Registry goes through a period of excess demand for its services", resulting in the gap lengthening. These factors had led to a delay on a "public project" that Everyman Legal is working on.

4.22 The problem of HM Land Registry delays was also considered in the responses of Michael Hall, Taylor Wessing LLP and the Berkeley Group. Michael Hall reported that the delays are "particularly acute in the registration of leases, where delays of six months or more can occur." In his opinion these delays have been caused by the "drastically reduced" staffing of HM Land Registry in 2009, and HM Land Registry's "strict approach" to dealing with multiple registrations of leases in the same building complex. Taylor Wessing LLP suggested that delays could be ameliorated by the "reintroduction of the expedition fee" which could "be of a reasonable amount to compensate Land Registry for prioritising the application".

4.23 Nigel Madeley questioned how the powers of a chargee, who has supplied the capital for the purchase of the land triggering first registration, operate where this interval is prolonged by delay. He asked:

> Can [the chargee] exercise its power of sale and effect a transfer of the registered estate to a buyer before completion of [the purchaser's] registration? If not, why not? [The chargee] has done all it can, including taking a charge by deed.

4.24 The London Property Support Lawyers Group was not, however, concerned about questions of priority arising in the gap between HM Land Registry receiving applications for first registration and registration taking place. It said that:

> What is important is that a title number has been allocated by the Land Registry so that priority searches can be made. Where the unregistered title has been deduced, a view can be taken on the matters to which the new registered title will be subject. Where there are complex unregistered titles or a local authority has an unregistered title, the unregistered owner will sometimes give a certificate of title to avoid a complex examination of the unregistered title having to be undertaken.

4.25 Michael Hall shared a similar sentiment:

> If an application for first registration is pending, and enquiries are made and title deduced including any deeds creating restrictive covenants, so it is unlikely that any dispute will arise as to the validity and enforceability of any such covenants.

4.26 HM Land Registry, in its response to Consultation Question 10, at paragraph 4.35 of the Consultation Paper, did not think the second part of the twilight period caused problems in practice. In its opinion:

> … there are potentially greater risks and problems that may arise during the period between exchange and completion of contracts than those that arise between completion and registration (because the timing of the application to Land Registry is largely within the control of the applicant and protection thereafter is afforded by the inclusion of the application on the day list).

Other issues raised

4.27 Michael Hall was concerned that "rule 38 of the Land Registration Rules 2003 is invalid as it is not within the powers granted by section 14 of the 2002 Act". In his opinion:

> The Act does not provide that rules may be made to define registered land as including unregistered land where a duty to register the title within two months has arisen.

4.28 The Chartered Institute of Legal Executives used its response to the twilight period questions to suggest that upon a sale of part of unregistered land, both parts should be required to be registered. It said that this proposal could attract wider support and would help further the "policy aim for 100% registration".

4.29 The London Property Support Lawyers Group said that an issue it is aware of is "the lack of experience of many lawyers with unregistered titles". The Society of Licensed Conveyancers in its response to Consultation Question 10 at paragraph 4.35 of the Consultation Paper, however, reported that the unregistered land rules found in the Land Charges Act 1972 are "familiar to conveyancers".

Consultation Question 10.

4.30 We invite the views of consultees as to the form of protection that should be provided in respect of dispositions that take place in the twilight period.[7]

4.31 20 consultees answered this question.[8]

Unregistered land regime

4.32 6 consultees favoured the determination of priority between twilight period dispositions by application of the unregistered land regime.[9]

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7 Consultation Paper, para 4.35.

8 Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Taylor Wessing LLP; The Society of Licensed Conveyancers; Howard Kennedy LLP; The Bar Council; Berkeley Group; Chartered Institute of Legal Executives; The Law Society; Mangala Murali; Amy Goymour; Dr Aruna Nair.

9 Michael Hall; The Society of Licensed Conveyancers; Nigel Madeley; Dr Aruna Nair; The Bar Council; Amy Goymour.

4.33 The Bar Council supported the application of unregistered land priority rules to all twilight period dispositions "whether arising under the same instrument as that triggering the first-registration requirement or under a later one". Its opinion was influenced by the fact that this solution "would require no new machinery to be created" and that "its mechanisms will already be familiar to conveyancers". In order to ensure that the unregistered land regime applies to twilight dispositions, the Bar Council noted that amendments to both section 14(3) of the Land Chares Act 1972 and rule 38 of the LRR 2003 would be required.

4.34 The Bar Council's sentiments were shared by the Society of Licensed Conveyancers, who wrote:

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

4.35 Dr Aruna Nair was similarly in favour of unregistered land principles governing the priority of twilight period dispositions; she stated that "in a situation where there is no title yet in existence for a purchaser to inspect, the policy of protecting reliance on the register can have no application".

4.36 Dr Nair was also concerned that a registered land solution, whereby priority would be determined after an application for first registration has been submitted to HM Land Registry, would fail to protect all interests. Dr Nair said that interests that are created in the twilight period "other than by express grant", such as resulting or constructive trusts, "will not be obvious to Land Registry" when the registrar examines the documentation supporting the first registration application in order to draw up a title. Dr Nair was clear that the creation of these implied interests "can happen after the disposition triggering compulsory registration", but may also "arise simultaneously with that disposition". She gave several examples of the implied interests arising simultaneously with the disposition triggering first registration:

> For example, A might contribute to B's purchase of the freehold, giving rise to a resulting trust in A's favour as soon as the title is vested in B; or B might procure a transfer of A's title to himself by fraudulent misrepresentation, giving rise to an immediate power to rescind the transaction vested in A; or B might obtain title from X using money misappropriated from A, giving A an immediate entitlement to B's title as the traceable product of A's money.

4.37 Dr Nair's ultimate concern was that the party applying for first registration may "have actual or constructive notice of the relevant fact… that Land Registry may not have access to and which would have made her liable if the land remained unregistered". In Dr Nair's opinion it would be "unjustifiable" for the implied interest holder to lose priority where the applicant for first registration "has failed to disclose the relevant facts to Land Registry and Land Registry could not be reasonably expected to discover them". Dr Nair did note that it might be possible for the implied interest holder to claim an overriding interest on the basis of actual occupation, but concluded that "the narrow actual occupation test is inappropriate in a situation where there is no register yet for the purchaser to inspect".

4.38 Dr Nair proposed a "new statutory framework" within the unregistered land regime.

(1) Expressly granted rights created within the same document as the disposition that triggers compulsory first registration would bind subsequent disponees on the basis "that any reasonable disponee would have discovered the interest by inspection of the title deeds".

(2) Rights created by operation of law "as a result of the same transaction that triggers compulsory first registration" should bind subsequent disponees unless they are "a bona fide purchaser for value of the registered estate without notice of the right".

(3) Expressly granted rights which are land charges and arise after compulsory first registration has been triggered, should only bind subsequent disponees if registered as a land charge prior to the registration of title of the disponee.

4.39 Nigel Madeley echoed Dr Nair's worries that any registered land solution would not provide adequate protection for twilight period disponees. He wrote:

> You suggest a workaround that B checks the registration to ensure that his interest is referred to, but applications get cancelled for failure to reply to requisitions and it is difficult for B to get real (as opposed to personal contractual) protection.

4.40 Amy Goymour had "no strong view" on how twilight period dispositions might be tackled; however, she could see a "theoretical argument" for treating land as unregistered up until the point of actual registration. Her suggestion encompassed both the first and second phases of "twilight period". Amy Goymour was mindful that "the fact that the timing of registration is backdated to the point of the application for registration might complicate this".

Application of the Land Charges Act 1972

4.41 Most consultees who supported an unregistered land solution to twilight period dispositions thought that such a solution should include the Land Charges Act 1972.

4.42 The Society of Licensed Conveyancers favoured the application of the Land Charges Act 1972. The Society of Licensed Conveyancers said that entry of a land charge creates "the appropriate notice", and observed that "the provisions of the LCA 1972 are familiar to conveyancers". Practitioner familiarity with unregistered land rules was also endorsed in the Bar Council's response, but was doubted in the response provided by the Law Society.

4.43 Nigel Madeley stated that he could see "no good reason" why a twilight period disponee "should not be able to register a land charge". Similarly, in his response to the consultation questions found at paragraphs 4.34 and 4.35 of the Consultation Paper, Michael Hall supported the entry of land charges, even for interests granted within the disposition that triggers first registration.

4.44 Dr Aruna Nair proposed that the express grant of a right amounting to a land charge under the Land Charges Act 1972, granted after a transaction which triggers compulsory registration should engage the Land Charges Act 1972. In her view, the default rules of unregistered conveyancing – the doctrine of notice – should apply to rights which arise by operation of law in the same document as that containing the disposition which triggers compulsory first registration. Dr Nair advocated the

enactment of legislation to make these changes which, from her perspective, "should be as close as possible to the unregistered land rules that would have governed priority in the absence of any duty to register".

Registered land regime

4.45 Six consultees expressed the view that priority protection of twilight period dispositions must be based in a registered land regime.[10]

4.46 Christopher Jessel supported our analysis at paragraph 4.22 of the Consultation Paper outlining a pragmatic approach to the treatment of twilight period dispositions which occur in the same instrument as the disposition triggering compulsory first registration. He said that this analysis "seems to cover the point" and recommended legislative change to enact it "if the position is doubtful". Christopher Jessel also thought that the registered land regime could accommodate twilight period dispositions which occur after the disposition triggering compulsory first registration. He wrote:

> In the scenario in para 4.25 [of the Consultation Paper], form FR1 box 12 requires the applicant to disclose all rights. C's covenant is such a right. If D fails to do so then he is in breach of duty under LRR 2003 r 28. In that case presumably a mistake has occurred and C will be entitled to rectification, provided of course that that is available to a covenantee against a person in possession.

4.47 The Chancery Bar Association said that it was "preferable" for registered land rules to apply to twilight period dispositions. One of the factors which influenced the Chancery Bar Association's position was that "the land charges regime, which operates by reference to the names of estate owners, is less satisfactory than the registered land regime, which operates by reference to the land". In addition, the Chancery Bar Association thought that "the disponee should be able to lodge a caution against first registration".

4.48 Both Pinsent Masons LLP and Dr Charles Harpum considered that it was "logical" for twilight period dispositions to be dealt with according to the registered land regime. Pinsent Masons LLP's view was adopted because twilight period dispositions are "destined to be registered after the registration of a disposition that has already taken place at the point at which the twilight period disposition is completed". Dr Harpum's reasoning was that "these transactions could not have been made if there had been no triggering disposition and as that compels compulsory first registration, the registered regime should apply". However, Pinsent Masons LLP conceded that it "will be difficult to devise a protective mechanism within that system that is both practical and proportionate". Dr Harpum also thought that a registered land solution could be practically challenging, but was not personally aware of any difficulties.

4.49 Howard Kennedy LLP commented that once first registration is triggered the unregistered land conveyancing regime should not apply, and that this position should be set out "more clearly" by the LRA 2002.

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[10] Christopher Jessel; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Howard Kennedy LLP; The Law Society.

4.50 The Law Society also submitted that the "form of protection which should be afforded to disponees in [the twilight period] should be based in the registered land regime". The Law Society justified its position on the basis that "practitioners would prefer to conduct the conveyancing transaction as though the first registration had been completed" as they would "prefer to follow the LRR 2003 than having to undertake Land Charge Searches against possible Estate Owners".

4.51 Mangala Murali suggested that a unilateral notice could be used to protect twilight period dispositions.

No clear view

4.52 HM Land Registry did not clearly express a view on what system should apply. However, it reported that its understanding of the law was that "until first registration the Land Charges regime applies where the interest is not created in the document that triggers registration". HM Land Registry was of the view that the "the current [legal] protection is adequate".

New protective mechanisms

4.53 Several consultees suggested introducing novel mechanisms for protecting the priority of twilight period dispositions.[11] The ideas put forward by consultees in this section would require changes, dependent on the views of the consultee, to either the registered or unregistered land conveyancing regimes.

4.54 Nigel Madeley posited that "one could introduce a system of co-application … so that an application could not be cancelled for not replying to a requisition when a further registration depends on it".

4.55 The Conveyancing Association suggested providing a new land charges search with priority which creates a form of notification to any subsequent dispone undertaking a land charges search in the same way as an official search with priority.

4.56 The City of Westminster and Holborn Law Society recommended that "a system for protective applications" be introduced; however, it noted that this proposal could have "resource implications for the Land Registry".

4.57 Pinsent Masons LLP mooted two new protective mechanisms in its response. First it suggested, and then rejected, "enabling a twilight disponee to secure protection through registering a caution against first registration". The caution that Pinsent Masons LLP had in mind would be different to existing cautions as it would be a caution with priority protection. This would be achieved through the disapplication of section 16(3) of the LRA 2002, and granting the cautioner the "opportunity to protect its caution against first registration by an official search with priority". Pinsent Masons LLP thought that such changes would be similar to those proposed in respect of unregistrable interests, as discussed in Chapter 6 of the Consultation Paper. Ultimately, Pinsent Masons LLP rejected this proposal, deeming it too "significant a change in the law" for the number of dispositions that it would affect.

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[11] Nigel Madeley; The City of Westminster and Holborn Law Society; The Conveyancing Association; Pinsent Masons LLP; The Law Society.

4.58 Instead, Pinsent Masons LLP proposed a solution whereby "*intending* disponees of unregistered land ... have a title number provisionally allocated to the land", thus enabling priority searches against that title. Pinsent Masons LLP was aware that this suggested change would result in a duplication of checks by the disponee (both of the Land Charges register and the provisional land register), but did not consider this duplication to be "unduly onerous" on the disponee. It suggested that "the existence of 'live' provisional titles would be revealed by searches of the index map as under the existing system". Pinsent Masons LLP further suggested that, if an application for first registration in relation to a provisional title was not received by HM Land Registry within a certain period of time, the title would be closed.

4.59 The Law Society suggested that a new device, called a "Pending Application Registration Notice", could be used to tackle twilight dispositions. This notice would "fall away once the transfer from A to B [triggering compulsory first registration] has been registered". The Law Society analysed the usefulness of such device for both twilight dispositions which occur in the same transaction as the disposition triggering compulsory first registration, and twilight dispositions which occur after compulsory first registration has been triggered. The Law Society could "foresee several issues" with the application of its proposal to the first species of twilight disposition (where A transfers land to B, who at the same time grants a restrictive covenant in favour of A's land, before selling the land to C):

> First, in most cases, there will be no further disposition after the A to B transfer, and so there is little risk to A. A knows if B fails to register the transfer within two months the disposition as regards the transfer will become void. Nevertheless, if such a notice was possible, practitioners would feel it is necessary to register such notices in all cases in order to avoid any claims in negligence. Second, where there has been such a further disposal, A might not know about it. So A would not know whether the restrictive covenants would need to be protected. Thirdly, as stated by the Commission in paragraph 4.19 [of the Consultation Paper], since B's title derives from the same instrument as A's restrictive covenant, B would need to deduce the transfer (and the restrictive convent) to C, and C would, therefore, have notice of the restrictive covenants.

4.60 However, the Law Society thought that a "Pending Application Registration Notice" would offer "useful" protection to twilight period dispositions which take place after compulsory first registration is triggered (where A transfers land to B, B enters into a restrictive covenant in favour of C's land, and then afterwards transfers the land to D). It wrote:

> This type of transaction … is less common, and having to register such "Pending application Registration Notice" less of a burden. It would also protect the practitioner advising C since he could register the "Pending application Registration Notice" in favour of C in circumstances where C is unaware of the anticipated disposal in favour of D.

4.61 The Law Society's response concluded with the suggestion that "'a caution against first registration' procedure could be utilised as a prerequisite for the protection of the land charge holder". It would "fall away on first registration of the dispositions incorporating the protection of the land charge holder duly entered on the register".

4.62 Conversely, Christopher Jessel was of the view that a "caution would be unlikely to help even if it did confer priority". He pointed out that "A may be unaware of B's intention to subsell to C" and that this is likely to be the case because "B will often be making a profit at A's expense and if … A had known C was interested A would have cut out B and sold direct to C at a higher price".

Other points

4.63 The Bar Council was in favour of reform of the law, "based on clear rules", in order to protect twilight period disponees. It said that protection should meet two objectives: "to protect the disponee of an interest during the twilight period and to allow a later transferee of the land to discover what rights in it have been created before the transfer".

4.64 Dr Charles Harpum explained that coverage of the twilight period was "fully discussed" when the LRA 2002 was "in preparation". He said that:

> The Land Registry lawyers did not want any special provisions in the Act, because they were concerned that, when there was a dealing which triggered compulsory registration, it should be registered as quickly as possible.

4.65 The Chartered Institute of Legal Executives and the Conveyancing Association considered that increasing the triggers for compulsory first registration could help to protect twilight period disponees. The Conveyancing Association suggested that triggers should be expanded so as to include "the creation of covenants, rights of way or easements" in order to "complete the Register".

4.66 Nigel Madeley was of the opinion that the twilight period could be resolved if it was provided that "legal title passes on legal completion".

PROTECTION OF DERIVATIVE INTERESTS

Consultation Question 11.

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

Do consultees agree?[12]

4.68 23 consultees answered this question:

(1) 19 agreed;[13]

[12] Consultation Paper, para 4.39.

[13] Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Michael Hall; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The

(2) 2 disagreed;[14] and

(3) 2 expressed other views.[15]

Existing HM Land Registry practice

4.69 A few consultees supported the provisional proposal because it reflects current HM Land Registry practice.[16] Professor Warren Barr and Professor Debra Morris put the point succinctly: "It makes sense to give a clear authority to mandate current Land Registry practice".

4.70 Although expressing other views, Nigel Madeley noted that:

> Pragmatically, one could say that it helps the Land Registry by allowing the person to give it a prompt to make sure that the restriction (or in my view a note) is put on the title.

4.71 The Law Society also supported the provisional policy as it would give persons with derivative interests under a trust the opportunity to register a Form A restriction upon the registration of the burdened title.

Beneficial interests under a trust

4.72 Several consultees analysed whether persons with a direct beneficial interest under a trust, as opposed to a derivative interest under a trust, should be able to apply for a caution against first registration of the legal estate to which the trust relates. Christopher Jessel surmised the difference as follows:

> If T1 and T2 hold the land in trust for A B and C and C assigns his share to D, then D will have a direct interest. If instead C declares a trust of his share then D will have a derivative interest.

4.73 Christopher Jessel noted that "it can be difficult to distinguish between a direct interest under a trust and a derivative interest", giving an example: "If C agrees to transfer his share but does not actually do so, or only does so orally, is D's interest direct or derivative?"

4.74 Dr Charles Harpum said that allowing a person with a beneficial interest to apply for a caution against first registration "is very sensible". He thought that section 15(1)(b) LRA 2002 already provides for this position, and confirmed that this was "certainly the intention" of the LRA 2002's draftsmen.

Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

[14] The City of Westminster and Holborn Law Society; Society of Licensed Conveyancers.

[15] Nigel Madeley; Everyman Legal.

[16] Professor Warren Barr and Professor Debra Morris; London Property Support Lawyers Group; and Pinsent Masons LLP.

4.75 Michael Hall also supported beneficial interest holders being able to apply for a caution against first registration. He suggested that the right to apply for entry of a caution against first registration could be "particularly important" in two contexts:

> The right to apply to register a caution against first registration could be important to protect the beneficial interest of a spouse or other close relative of the legal estate owner who may not be mentally capable or could have lost his title deeds and be unwilling or unable to instruct solicitors to apply for first registration of his title. It could be particularly important in a case where trespassers have threatened to apply to register a title by adverse possession knowing that the legal estate owner is not mentally capable and may not himself be physically present on the land.

4.76 Nigel Madeley, in contrast, was of the opinion that persons with a beneficial interest under a trust should not be able to apply for a caution against first registration. He explained that beneficial interests should be "evident from the deeds" and will bind purchasers unless they are overreached. Nigel Madeley considered that a beneficiary is either a "volunteer", or deliberately decided to be the beneficial, rather than legal, owner (often for tax purposes), so therefore did not warrant the greater protection of a legal owner. Nigel Madeley ultimately concluded that, given the ability "to register to protect home rights, the issue was "less than critical".

4.77 The Society of Licensed Conveyancers, who did not agree with the proposal, expressed concern about its impact on overreaching:

> This right further erodes the principle that registered conveyancing facilitates the transfer of land, as a simple transfer of the legal title, with equitable interests under trusts so far as possible not having to be the concern of conveyancers.

4.78 This sentiment was shared by the City of Westminster and Holborn Law Society who were additionally anxious about problems arising "where compulsory registration is on a sale overriding the beneficiary's equitable interest".

Other points

4.79 Everyman Legal supported the proposal in principle but was concerned about the implications of wide-scale uptake making the register "less clear".

4.80 Christopher Jessel suggested that there was overlap between this consultation question and the consultation question at paragraph 3.51 of the Consultation Paper, which asked whether it should be possible for an owner of an estate in mines and minerals held apart from the surface to lodge a caution against first registration against the surface title. He argued it should be possible for–

> the holder of a derivative interest in minerals in what was formerly an undivided share in land and is now an equitable interest under a trust of land to lodge a caution not only against the minerals themselves but also against the title.

4.81 Amy Goymour said that she would have liked the Consultation Paper to discuss the positive use of notices to protect derivative interests under trusts. She queried:

Can, for example, a chargee with a charge over a beneficial trust interest, protect their interest by way of a notice, or is such an interest ‘excluded’ from such protection by s 33 LRA 2002?

Chapter 5: The powers of the registered proprietor

INTRODUCTION

5.1 36 consultees responded to the questions and issues raised in Chapter 5 of the Consultation Paper.[1]

5.2 The vast majority of consultees who responded expressed agreement with our two provisional proposals. At the same time, however, they raised questions about the extent and consequences of our proposals.

5.3 Chapter 5 of the Consultation Paper also briefly considered the registration gap, although we did not ask any questions about it. Nevertheless, several consultees made commented on the registration gap.

WHO IS ENTITLED TO BE REGISTERED AS THE PROPRIETOR

Consultation Question 12.

5.4 We provisionally propose that express provision should be made in the LRA 2002 that a person who has a transfer or grant of a registrable estate or charge in his or her favour is "entitled to be registered as the proprietor" of that estate or charge.

Do consultees agree?[2]

5.5 26 consultees answered this question:

(1) 22 agreed;[3] and

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1 Professor Graham Battersby; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Mark; Michael Hall; Everyman Legal; The City of Westminster and Holborn Law Society; Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Society of Legal Scholars; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Dr Tola Amodu; Adrian Broomfield; The Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; Council of Mortgage Lenders; The Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; Amy Goymour; Berkeley Group; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Professor Simon Gardner. Four consultees responded not to our questions in this chapter but to our discussion of the registration gap at 5.67 onwards in the Consultation Paper, only: CMS Cameron McKenna; Taylor Wessing LLP; City of London Law Society Land Law Committee Professor Julian Farrand QC (Hon).

2 Consultation Paper, para 5.30.

3 Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; The City of Westminster and Holborn Law Society; Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Dr Aruna Nair; Council of Mortgage Lenders; The Bar Council; Berwin Leighton Paisner

(2) 4 expressed other views.[4]

5.6 A clear majority of consultees agreed with this proposal. Whilst there was no outright disagreement, several consultees expressed other views.

Agreed with the proposal

5.7 Many consultees were in favour of the proposal because it would increase clarity and remove doubt.

5.8 Elizabeth Derrington said that the clarification seemed appropriate, whilst Professors Warren Barr and Debra Morris of the University of Liverpool noted that such a change would bring "useful clarity to what may already have been intended with the wording of the relevant sub-sections".

5.9 The Berkeley Group stated that the delay between completion and registration could be resolved by increasing HM Land Registry's resources, but noted that, in the interim, workarounds have been devised to cover this gap. Nevertheless, the Group welcomed the proposal, particularly in respect of sub-sales and leasebacks.

5.10 The Council of Mortgage Lenders also agreed with the proposal. It noted that a formal registration requirement in relation to section 24 would "render the current mortgage process difficult, if not unworkable". However, the Council of Mortgage Lenders stated that it did do not have any evidence that the current wording of the LRA 2002 was causing problems in practice.

5.11 The London Property Support Lawyers Group welcomed clarity "as to what has to be done for someone to be entitled to be registered as proprietor for the purposes of section 24 of the Land Registration Act 2002". It noted that acquisition financing and sub-sales are very common so an express provision would be of practical use. With regards to the pre-2002 provisions, the Group observed that a disposition or charge in a person's favour was sufficient under the Land Registration Act 1925 for a person to dispose of or charge their land, and it was not aware of any reason or intention for this to have changed under the 2002 Act.

5.12 Pinsent Masons LLP, who endorsed the London Property Support Lawyers Group's response, added:

> It should be made clear that a person's entitlement to be registered as the proprietor for these purposes is triggered by the completion of the transfer or grant itself, and not the additional fact of having submitted a duly completed application to register that transfer or grant.

5.13 Dr Charles Harpum QC (Hon) stated that he was "slightly surprised that there was thought to be doubt about this" and confirmed that what is suggested in the present proposal is "certainly what had been intended in the LRA 2002" as such, Dr Harpum strongly supported it.

LLP; Amy Goymour; Berkeley Group; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

[4] Michael Hall; Chancery Bar Association; The Society of Licensed Conveyancers; HM Land Registry.

5.14 The Law Society agreed with the proposal stating that it was desirable to remove doubt. The Society stated that:

> The conflicting judicial decisions on the subject make the change proposed necessary. The rights of parties, if any, against the registered party in case of wrongful exercise of the powers are not compromised by the proposed changes.

5.15 Berwin Leighton Paisner LLP considered that our proposal represents the way in which the courts have already regarded the situation.[5] It considered that a clear express provision would remove any potential problems in cases of a simultaneous transfer and mortgage, or a simultaneous transfer and sub-transfer in separate documents.

Extent of the proposal

5.16 Nigel Madeley strongly supported the proposal. It was his view that a person should have a legal estate pending registration. He stated:

> The concept of 'owner's powers' is, to me, something by which the left hand gives back some (but not quite all) of what the right has – unnecessarily – taken away.
>
> …
>
> It is an artificial device made necessary only by another artificial device of depriving a buyer of legal title so as to impose the system of registered land.

5.17 Similarly, Berwin Leighton Paisner LLP explained that it understood the proposal to mean that a transferee of a registered charge would be able to enforce without waiting for the transfer to be registered, thus reversing the decision in *Skelwith (Leisure) Ltd v Armstrong*.[6] Therefore, Berwin Leighton Paisner LLP stated that it would seem to follow that section 114 of the Law of Property Act 1925 (concerning the transfer of charge that also operates to transfer the secured debt and all other security for it) would apply immediately after the transfer. The firm considered that there seems to be no reason why section 114 should not apply to registered land. However, it thought that it should be clarified.

5.18 However, Berwin Leighton Paisner LLP commented that if –

> an unregistered disponee is capable of enjoying all the benefits of being registered, this could result in a trend towards all registrable dispositions being protected by notices rather than by substantive registration.

5.19 In order to deter this possibility, it suggested registrable dispositions not lodged for registration within two months should be void:

> In the case of compulsory first registration, LRA 2002 section 7 provides that failure to apply for registration within two months renders the disposition void (although it is

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5 See *Bank of Scotland v King* [2007] EWHC 2747 (Ch), at 68, *Pritchard & Anor v Fineland Investments Ltd* [2012] EWHC 4193 (Ch) at 29, and *Ford-Camber Ltd v Deanminster Ltd* [2007] EWCA (Civ) 458, at 8, 46 and 55.

6 [2016] Ch 345. We consider this point in more detail, and make a recommendation on the point of chargee's powers, in Chapter 19 of the Report: see Recommendation 46.

possible to revive it by late registration). Perhaps an even simpler answer to the concern in paragraph 5.82 [of the Consultation Paper] is to provide that an equivalent provision should apply to registrable dispositions, requiring an application to register being lodged within two months.

5.20 Alternatively, Berwin Leighton Paisner LLP suggested that a disponee could only be considered a person entitled to be registered after lodging his or her application for registration with HM Land Registry.

Application to persons other than disponees

5.21 The Law Society requested that the Law Commission consider further whether any such provision should also include the death or bankruptcy of a sole registered proprietor, as the extended right allows the personal representative or trustee in bankruptcy to exercise owner's powers without having to apply to be the registered proprietor.

5.22 Relying on *Saunders v Vautier*,[7] Christopher Jessel suggested that "a person who is entitled to demand a transfer in his or her favour, notably a beneficiary absolutely entitled in equity" should amount to a person entitled to be registered for the purposes of owner's powers. He also suggested that persons entitled to appoint new trustees under Part II of the Trusts of Land and Appointment of Trustees Act 1996 should also qualify, noting that "this may also apply to the position under [the Trusts of Land and Appointment of Trustees Act] 1996 s 6(2) and [the Settled Land Act] 1925 s 17". He explained:

> I have experience of a case where the trust had come to an end but the trustees wished to retain nominal title to and control of the land and were reluctant to execute a conveyance in favour of the beneficiary who was my firm's client; it was not then in a compulsory area but if the issue arose now it would be helpful to be able to demonstrate to the Land Registry that the beneficiary was absolutely entitled and ask for her title to be registered.

5.23 Amy Goymour agreed with our proposal in principle, however, she had two queries: 1) whether, rather than "transfer", the word "disposition" would fit better within the existing language of the LRA 2002 and 2) whether the proposal applied to disponees of unregistered land. On the latter point, she commented that "the proposal, the proposal might impact on the discussion – at para 4.35 [of the Consultation Paper] – about the twilight zone".

Expressed other views

5.24 Consultees who did not agree with the proposal expressed concern about the application of the proposal in the context of fraudulent or otherwise invalid transfers.

5.25 Michael Hall argued that entitlement should only follow a valid disposition:

> Surely this should depend on whether the transfer or other grant or charge is valid – it should not benefit from the effect of registration if it is in fact unregistered. The

[7] 49 ER 282, (1841) 4 Beav 115.

transfer may be a forgery, or there may be an unpaid seller's lien affecting the property. The transferee should not in that case be deemed to be the legal owner.

The exception to *nemo dat* that already exists whereby the effect of registration is that the registered proprietor has owners powers even if he is a fraudster, should not be extended to cases where unregistered transfers are relied upon.

5.26 The Chancery Bar Association agreed that if there is serious doubt, the powers of a disponee prior to registration of the disposition should be clarified. However, the Association thought the proposed definition of the words "entitled to be registered as the proprietor" unsatisfactory for a number of reasons, stating:

> It is an odd use of language to say that a person is entitled to be registered if, for example, there is a restriction requiring the consent of X to registration.
>
> The words "transfer or grant" in the proposal presumably mean a valid transfer or grant eg, not a forgery. However, other proposals, in particular those under [para] 22.13 [of the Consultation Paper, in relation to the scope of owner's powers], assume that even the disponee under a forged disposition has the owner's powers. There appears to be some inconsistency here.
>
> We do not think that the answer to the problem created by the concurrence of powers in the registered proprietor and the disponee given in para 5.65 of the Paper is satisfactory. The problem should be addressed in the land registration legislation not left for solution through trust law.
>
> We are unclear what the position is in the sub-sale scenario if, as will frequently be the case, the first disposition is never registered. If that disposition is invalid is it validated by the registration of a subsequent disposition made by the disponee?

5.27 The Association concluded by stating that in its view all that is needed is a statutory recognition of the concept of "feeding the estoppel"; if a subsequent disposition is registered, that should validate preceding dispositions. The Association suggested that our proposal in Consultation Question 13, (at paragraph 5.63 of the Consultation Paper) may achieve this and make this proposal in Consultation Question 12 unnecessary in any event.

5.28 Another concern raised by consultees was in relation to the drafting of any necessary legislation.

5.29 The Society of Licensed Conveyancers warned:

> The problem with making this express rather than implied under the current wording of section 24(b) is that unless the language is comprehensive it may have inadvertent effects and create even more problems.

5.30 HM Land Registry considered that the proposal itself would likely reflect the current law. Similarly, however, it believed that if the proposal was taken forward it would need careful consideration and drafting before being brought into law. HM Land Registry offered the following example to illustrate its concern:

A is the registered proprietor and there is a restriction to the effect that "no transfer is to be registered without the consent of B". A transfers to C, but B will not consent. C charges the property to D. Land Registry would be concerned if the effect of the proposal is that D's charge can be registered even though C will never be registered as proprietor.

THE SCOPE OF OWNER'S POWERS

Consultation Question 13.

5.31 We provisionally propose that, for the purpose of preventing the title of a disponee being questioned, the exercise of owner's powers of disposition by both registered proprietors and persons entitled to be registered as the proprietor should not be limited by:

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

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

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

Do consultees agree?[8]

5.32 30 consultees answered this question:

(1) 20 agreed;[9]

(2) 4 disagreed;[10] and

(3) 6 expressed other views.[11]

Agreed

5.33 Most consultees agreed that reform is necessary to clarify the law.

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8 Consultation Paper, para 5.63.

9 Professor Graham Battersby; Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; The Society of Licensed Conveyancers; Howard Kennedy LLP; The Bar Council; HM Land Registry; Berkeley Group; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

10 Michael Hall; Society of Legal Scholars; Dr Aruna Nair; Michael Mark.

11 Christopher Jessel; Chancery Bar Association; Dr Tola Amodu; Berwin Leighton Paisner LLP; Amy Goymour; Professor Simon Gardner.

5.34 For example, Dr Charles Harpum strongly supported the proposal and expressed disappointment in finding that the owner's powers provisions have been misunderstood. Similarly, the Bar Council was in support of the proposal, agreeing that the owner's powers provisions have generated a significant amount of litigation. Therefore, the Council considered the proposed clarification valuable and essential to promoting the objectives of the LRA 2002. Professors Warren Barr and Debra Morris were convinced by the arguments expressed in paragraph 5.62 of the Consultation Paper.

5.35 Many consultees directed comments at either uncertainty about the application of *nemo dat* or limitations on trustees' powers of disposition

Nemo dat

5.36 Dr Charles Harpum thought that the Commission's 2001 Report[12] made it clear that "a person who is entitled to be registered should be able to make any dispositions of a registered estate in the same way as if he/she were already registered".

5.37 The Society of Licensed Conveyancers agreed with the necessity for reform if there is any uncertainty:

> If judicial interpretation around the extent to which *nemo dat* applies to something as basic as the buyer's ability to create a purchase mortgage is causing uncertainty, then it must be resolved as soon as possible to confirm that they have full powers as though they had already been registered as proprietor.

5.38 The London Property Support Lawyers Group agreed the law is currently unclear whether owner's powers supersede nemo dat or whether *nemo dat* limits the exercise of owner's powers and therefore, that clarity was needed. It agreed that *nemo dat* should not limit owner's powers, as a person entitled to be the registered proprietor should have the same powers to make dispositions as the registered proprietor in order to protect disponees.

5.39 The Law Society agreed that the common law principle of *nemo dat* should not limit owner's powers and with the conclusion reached in paragraph 5.51 of the Consultation Paper. The Berkeley Group also agreed with the proposals and thought that the conclusion reached in paragraph 5.52 of the Consultation Paper, regarding the power of a disponee to grant a legal lease, was of particular importance given the delays experienced with registrations.

Limitations on trustees' powers of disposition

5.40 Pointing to the Commission's 2001 Report,[13] Dr Charles Harpum agreed that –

> Purchasers should not be concerned with whether trustees, who are registered proprietors, may be acting in breach of trust. No inquiry should be necessary. If a purchaser is privy to that breach of trust, he or she may find themselves liable in equity after the disposition on the basis of liability for knowing receipt. But none of this should go to the issue of the validity of the disposition.

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12 Law Com 271.

13 Law Com 271.

5.41 The Society of Licensed Conveyancers agreed that disponees must be protected from limitations on trustees:

> To do otherwise opens up to enquiry as to what are the trustees powers, is there evidence of limitation, and the unwelcome circumstance of conveyancers involved in the interpretation of trust documents and trustee powers.

5.42 The London Property Support Lawyers Group also agreed that the purpose of section 26 is to protect disponees from limitations that are not reflected on the register or imposed by the Act.

5.43 Professor Graham Battersby noted that this issue arose from the "so-called Ferris and Battersby effect" discussed at paragraph 5.59 of the Consultation Paper. He stated that "if there is any danger that we might be correct, it is a defect which certainly needs to be cured". Although Professor Battersby understood that section 26 of the Land Registration Act 2002 has provided the remedy, he agreed that the drafting of section 26(1) creates difficulties and the decision in *HSBC Bank plc v Dyche*[14] casts doubt on that proposition. He therefore agreed that it is essential the matter be finally put beyond doubt.

5.44 Nigel Madeley agreed that limits on trustees' powers should not filter down to disponees. In his view, those beneficiaries choose or accept that their title subsists behind a trust, so should, he argued, find their principal protection to be of a personal nature against the trustees they have chosen.

Other points

5.45 Everyman Legal agreed in principle with the proposals, however, they questioned what would happen if a seller purported to sell something he did not own (a point made by a number of consultees who disagreed with the proposal). Everyman Legal also questioned whether the application of proposal to situations of adverse possession.

5.46 Professor Graham Battersby identified another issue:

> A somewhat analogous point arises under the Law of Property (Joint Tenants) Act 1964, which excludes registered land from its curative provisions. This overlooks the possibility that, after severance, there is another undivided share which could rank as a Boland overriding interest. Section 26 certainly did not solve that problem: see Cooke, p 55, n 9, and I suggest that a remedy should be provided in the update.

Disagreed

5.47 Consultees who disagreed raised a number of concerns with the proposal.

The continuing role of nemo dat within the LRA 2002

5.48 The Society of Legal Scholars agreed that the judicial interpretation in the case of *Scott v Southern Pacific Mortgages*[15] requires action. However, the SLS was concerned that

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14 *HSBC Bank Plc v Dyche* [2009] EWHC 2954 (Ch).

15 *Scott v Southern Pacific Mortgages Ltd* [2010] EWHC 2991 (Ch).

our proposal would entirely eliminate the principle of *nemo dat* from the LRA 2002. It explained that *nemo dat* remains important for the scheme within the LRA 2002:

> We think that *nemo dat* has continuing residual relevance to the structure of the LRA 2002, and that abolishing *nemo dat* in the manner proposed … would have undesirable effects wider than those that are targeted by the CP proposals. In particular, the logic of *nemo dat* arguably underpins two fundamental rules of the registration system:
>
> - that interests granted earlier in time take priority over interests granted later in time. The difference between section 28 and section 29 depends on this rule;
>
> - that a void disposition is ineffective to confer rights. The difference between section 27 LRA and section 58 depends on this rule.
>
> *Nemo dat* represents a background assumption for registration system. It is the starting point for resolving the questions of priority and title. The statutory adjustments, such as the priority promise in section 29 and the vesting guarantee in section 58, are merely specific exceptions to *nemo dat*. These statutory exceptions are qualified in certain circumstances. For instance, section 29 is qualified by overriding interests and section 58 is in a sense qualified by the availability of rectification. Where these qualifications apply, *nemo dat* continues to have relevance. It is therefore important to ensure *nemo dat* is not indiscriminately removed, as would occur under the CP proposal. To do so might have adverse implications for the priority promise and the vesting guarantee.
>
> Priority and nemo dat:
>
> > The CP proposals envisage the continued operation of section 28. But section 28 is wholly negative in its terms. It states only that registration is irrelevant to priority (unless section 29 applies). What currently governs priority is the common law doctrine that first in time prevails.
> >
> > It is apparent from case law that the first in time rule is a consequence of *nemo dat*. See *Philips v Philips,* Lord Westbury: "he can grant to the purchaser that which he has, namely, the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. *Hence* grantees and incumbrancers claiming in equity take and are ranked according to the date of their securities."
> >
> > *Nemo dat* is therefore the underlying principle governing priorities in the registration system. It is excluded in favour of a registered disponee for value by section 29, but it is not excluded in other cases. So, for example, it continues to apply when title is acquired by donees. Under the CP proposal to eliminate *nemo dat* from section 24, it is at least arguable that the position of donees would no longer be governed by *nemo dat* and they would implicitly take free from unregistered interests. That would conflict with the current operation of section 28.
>
> Section 58, section 27 and nemo dat:

The CP proposals envisage that in the A-B-C scenario, rectification will continue to be available against C. C's registration will be mistaken because the title of B, the registered proprietor, could be challenged on the ground of mistake.

Under the CP proposal to eliminate *nemo dat* from section 24, so that the title of a recipient from a registered proprietor cannot be questioned by virtue of *nemo dat*, then it is arguable that there is no basis for holding that the entry of C was a mistake. *Nemo dat* currently feeds into the concept of mistake and, if repealed in accordance with the CP proposal, it would be unclear on what basis it could be said that C's title was rectifiable. That would conflict with the current operation of rectification against C.

5.49 To ensure that *nemo dat* could continue to operate with the LRA 2002 generally, the Society of Legal Scholars proposal a more limited solution:

> The preferable route to reform would be to reverse *Scott* directly. Our proposal is that a person entitled to be registered proprietor should be entitled to exercise exactly the same powers *as if he were already registered proprietor of the registered estate*.
>
> Where registration is effective in passing legal title under section 27, this means that a disponee from such a person will gain legal title because of his consent and compliance with formality. Under our proposal, such disponees would only be bound by interests that bound the previous registered proprietor and against which they have no defence by section 29.
>
> On the other hand, where registration is not effective in passing legal title under section 27 because consent is missing or flawed, but is instead effective only by virtue of section 58. Under our proposal, a disponee would be potentially susceptible to rectification according to the terms of sched 4.
>
> Our proposal would achieve the desired result of allowing the equitable owner to grant legal rights in the period between completion and registration. That is a limited exception to *nemo dat* and one which is familiar from elsewhere in the law. At the same time our proposal would not disrupt the provisions on priorities and mistaken registrations.
>
> Meanwhile, the Ferris & Battersby effect which concerns overreaching should be addressed separately through reforms to the LPA 1925 rather than the LRA 2002. A purchaser who complies with section 27 LPA should not have to worry about further limitations on the powers of the trustee whether the land is registered or unregistered.

5.50 Dr Aruna Nair also expressed concern about the unintended consequences of having such a broad definition of owner's powers, citing the reasons set out in the Society of Legal Scholars response.

Application to persons entitled to be registered

5.51 Michael Mark disagreed with the proposal on the basis that it failed to consider limitations on the powers of the person entitled to be registered as the proprietor. He explained that the disposition to the person entitled to be registered itself could impose limitations, stating that "if A sells to B, it can happen that B acquires the property subject to restrictions which did not apply to A. B may acquire the property on trust or subject

to a charge." As Mr Mark explained, such limitations would not be registered until B's title is registered. In his view, it would be wrong for the LRA 2002 to allow the person entitled to be registered, B, "to dispose of the property free from those trusts or that charge prior to registration": doing so "would leave the beneficiaries or chargee with only personal remedies without having had the normal opportunities to protect themselves".

5.52 Similarly, Michael Hall was of the opinion that persons entitled to be registered should register themselves as proprietor before dealing with a property. He said:

> The Land Registry cannot be expected to guarantee the title of people who rely on unregistered dispositions which may be forgeries or subject to unpaid vendor's liens.

Expressed other views

5.53 Consultees who expressed other views raised a variety of concerns and questions with the proposals.

Application to persons entitled to be registered as the proprietor

5.54 Christopher Jessel pointed out that a disponee who has dealt with a person entitled to be registered cannot rely on the register to identify limitations:

> If a person who is entitled to be registered wishes to deal with the property without being registered then that person will have to be able to demonstrate that entitlement to the purchaser as an equitable title, for instance by producing an executed transfer which has paid SDLT or by demonstrating the existence, terms and termination of a trust.

5.55 The Chancery Bar Association questioned the proposal in respect of the exclusion of nemo dat, on the basis that it should not apply to the period prior to registration:

> Since the word "registered" does not appear before "disponee" in the second line it is assumed that the proposal is not limited to questioning the title of a registered proprietor. Does it therefore mean that the entitlement of a disponee to be registered cannot be challenged? Does it mean that a purchaser from a disponee cannot object to the vendor's title on the ground that the transfer to the vendor is forged or otherwise invalid?

Beneficial interests and overreaching

5.56 Christopher Jessel suggested that there might be some circumstances in which a disponee should be bound by limitations on the trustees' powers of disposition:

> As to the Ferris and Battersby effect, the problem is the standard one between two innocent parties, the beneficiaries who have lost out because of the trustees' actions and the purchaser for value. Equity resolved this by providing that a bona fide purchaser of the legal estate for value without notice would take priority. Bona fides are difficult to incorporate within a system of land registration. It may be possible to provide that the disponee's title may only be questioned if it can be shown that there was or ought to have been notice that the trustees were acting beyond their powers.

5.57 The Chancery Bar Association questioned the meaning of the phrases "preventing the title of a disponee being questioned" and "should not be limited by". It raised concerns about the proposal in the context of the recent case by the Court of Appeal, *Mortgage Express v Lambert*,[16] on the point of the relationship between owner's powers and the doctrine of overreaching:

> The Court of Appeal expressed strong support for the view that the existing LRA 2002 section 26(3) prevents a person in actual occupation from asserting an equitable interest against a disponee (or a successor) if that would involve impugning the disponee's title although it appears to us that it did not base its decision on that ground.
>
> We are concerned about the situation, which was not that in the Mortgage Express case, where the relevant interest of the occupier is known to the disponee. Paragraph 4.11 of the pre-2002 Act Law Commission Report contemplates that the existing section 26(3) does not prevent knowing receipt claims giving rise to financial remedies being made provided that they do not involve questioning the title of a disponee or a successor. There seems to us to be some inconsistency in the concept that knowing receipt claims may be made, possibly against a chain of recipients, without this involving the questioning of the title of the recipients. In addition it seems to us that the second sub-paragraph of the proposal may impose a wider restriction on such claims than the existing section 26(3) does.
>
> We suggest that more consideration needs to be given to the rights of the holder of an equitable interest, particularly one in actual occupation, against a disponee (and his successors) who have actual notice of a breach of trust.

5.58 The Chancery Bar Association questioned whether the proposal deems a disposition to be valid when it is not:

> If this means that a disposition is deemed to be valid for all purposes it is very far-reaching and in our view, and … unacceptable. Does the reference to the powers not being limited by limitations imposed by equity mean that the fact that a disposition made in breach of trust is deemed not to have been so made? Further, does the reference to "other legislation" mean that a disposition is deemed to be valid notwithstanding that it would be invalid or be liable to be set aside under other legislation (and which might undercut the policy of such other legislation)?

5.59 Professor Simon Gardner commented on the "two-trustee rule", whereby, the purchase monies must be paid to more than one trustee in order to overreach a beneficial interest. He noted that in the absence of an appropriate restriction on the register, section 26 will operate to mean that a disposition by and payment of the purchase price to only one trustee will in fact, overreach the beneficial interest thereby reversing the court's decision in *Williams & Glyn's Bank Ltd v Boland*.[17]

> Everyone seems clear that the possibility cannot be allowed to be true (and para 13.53 of the consultation paper assumes it is not), but there seems to be less consensus or certainty about why or how, in terms of s 26's wording, it is not.

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16 [2016] EWCA Civ 555, [2017] Ch 93.

17 *Williams & Glyn's Bank Ltd v Boland* [1980] 2 All ER 408.

I suggest that coverage of this in the ensuing report would be helpful, therefore.

Incidentally, the point also bears on the position taken in para 1.20, that overreaching lies outside the scope of this project. As regards overreaching where money is paid to two or more trustees, that is of course correct. But if overreaching in effect occurs, by virtue of s 26, additionally where there is only one trustee, it is less correct.

5.60 Berwin Leighton Paisner LLP commented that it may also be desirable to declare that new provisions are without prejudice to the disponor's personal liability towards persons who suffer loss as a result of the disposition.

Concurrency of powers

5.61 Christopher Jessel also commented on the discussion (at paragraphs 5.64 and 5.65 of the Consultation Paper) of the concurrency of powers, meaning that both the registered proprietor and person entitled to be registered can exercise owner's powers. He said "it is not clear that the exercise ought to be by both", giving examples:

> Where a beneficiary is entitled as against the trustees, the function of the trusteeship has ended and they hold the land as nominees with a duty to transfer it to the beneficiary. Equity should look on that as done which ought to be done. A person who is entitled to be registered, for whatever reason, has rights to the land not just a right that the trustees shall act properly. There may be a human rights issue here because land to which a beneficial owner is entitled is part of his or her possessions and if the trust is executed the trustee ought to have no standing to interfere with those possessions (notwithstanding *Webb v Webb* Case C-294/92 [1994] QB 696).
>
> There are other instances where the apparent owner, whose name is on the register of title, ought not to be able to make a disposition. Thus a person under incapacity can not dispose of a legal estate. This includes a minor even if he or she happens to be registered and also a person who has become mentally disabled but may be able to sign his or her name. In such cases there may not be anyone else who is entitled to be registered. A bankrupt should not be able to dispose between becoming bankrupt and the entry by the trustee in bankruptcy of a notice of the bankruptcy. Likewise the directors of a company which has been struck off (this can happen without their knowledge) and been dissolved purport to execute documents but should not do so. To some extent these can be (and are) overcome by a suitable entry on the register but there may be period before any entry can be made.

Mechanism or substance

5.62 Dr Tola Amodu commented that the proposals appear to be consistent "if, and only if" the process of land registration is viewed as a procedural mechanism for securing efficiency and effectiveness in land transactions, and in so doing, giving priority to the protection of disponees. It was Dr Amodu's opinion that the internal coherence of the registration system should not rest or be dependent upon common law principles.

5.63 Berwin Leighton Paisner LLP similarly suggested that clarification that the LRA 2002 is a self-contained code of law which is capable of overriding the general law, and possibly also spelling out the extent to which the Law of Property Act 1925 does or does not apply to registered land.

Other points

5.64 The Chancery Bar Association made a few discrete points:

> If this provision is to be included we think the words "or contract" should be inserted.
>
> Is the phrase "imposed under the LRA 2002" intended to refer simply to procedural requirements under the Act or to substantive limitations on powers? If it is intended to refer to substantive limitations we do not know what provisions of the Act are affected by it.
>
> We assume that this proposal is subject to the alteration/rectification provisions in schedule 4.

5.65 Berwin Leighton Paisner LLP commented that it presumed that "dispositions will remain subject the rules of insolvency law about undervalues, voidable preferences and the like".

5.66 Amy Goymour did not come to a firm conclusion on the proposal. She stated:

> As to proposal (1), I am not sure that such express clarification is required, except to make it clear that *Scott* on this point was an incorrect interpretation of the law. If someone is deemed to have owner's powers upon becoming 'entitled to be registered', then it has always seemed clear to me that this entitles them to deal with the *legal* estate: by definition, this is something they do not yet have. Aside from clarifying the incorrectness of *Scott*, I cannot see what additional purpose would be served by an express provision stating that owner's powers override the nemo dat principle – and indeed, I wonder whether such an express provision might cause confusion: there is no intention, for example, that overriding interests be compromised by a disposition by an owner exercising owner's powers. Thus, it seems unhelpful, and potentially misleading, to state that nemo dat is irrelevant. As to proposal (2), I would be concerned by a statement that sought to entrench Parliament's sovereignty by purporting to state that owner's powers overcome any limitations imposed by (past or future) legislation. Proposal (3) seems fine, and seems to merely reflect the current state of ss 23-26.

THE REGISTRATION GAP

5.67 Although we did not ask a specific question in relation to the registration gap as part of the consultation, our discussion of it in the Consultation Paper prompted a number of consultees to share their views on the matter with us.

Legal rather than operational problems

5.68 London Property Support Lawyers Group disagreed with the analysis that the issues that arise during the registration gap are practical ones caused by operational limitations, rather than legal ones. The Group explained:

> The registration gap issues are legal ones that are being exacerbated (not caused) by operational issues at the Land Registry where it can take upwards of 6 months or more for complex transactions to be registered. The root of the issue is that under section 27 of the Land Registration Act 2002, a person is not the legal owner of the

property until completion of registration. Upon completion, they are then taken to have been the legal owner from the date that the application to register the disposition was entered onto the day list.

5.69 Taylor Wessing LLP agreed that the registration gap "is caused because the disposition takes effect in equity only and not at law, pending registration". The Berkeley Group also disagreed that "these uncertainties have been created by purely an operational problem".

5.70 Similarly, the City of London Law Society Land Law Committee explained that, although operation problems exacerbate the position, the registration gap "is a legal issue". It suggested that the Law Commission "re-consider section 27 of the Land Registration Act 2002, by which a person is not the legal owner of the property until registration is completed".

5.71 In his consultation response, Professor Julian Farrand QC (Hon) described the registration gap as "a crack in the mirror of title".

Problems that can arise during the registration gap

5.72 The City of London Law Society Land Law Committee said that the registration gap causes problems in practice. Taylor Wessing LLP agreed, explaining that the registration gap causes problems in "commercial situations where formal notices need to be served such as section 25 notices, and break rights in leases need to be exercised. It also causes an issue with forfeiture."

5.73 Nigel Madeley explained that the registration gap causes problems, which was known at the time of the LRA 2002, referring to the case of *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd.*[18] Absent reform, he suggested that it might be necessary for all registrable dispositions to include a clause appointing the seller to take actions on behalf of the buyer.

5.74 Mr Madeley also suggested that the registration gap poses problems for the passing of the benefit of covenants that are not landlord and tenant covenants, which require the successor in title to have a legal estate. He further suggested that section 27, by not vesting legal title until registration, offends the principle that two forms of ownership (legal and beneficial) cannot exist without "an appropriate disposition by the owner"; in this case, the owner has "disposed of his entire legal and beneficial interest (in that he has put the legal title out of his hands)."

5.75 The Berkeley Group also said that problems arise in practice:

> We do experience practical problems with the registration gap, particularly with assignee landlords or indeed new landlords where, say, a new intervening investment lease has been granted between the occupational leases and the original developer/ landlord. The most common scenario for us relates to who is the landlord for the purpose of making rent demands: In respect of s 3 (6) of the [Landlord and Tenant (Covenants) Act] 1995 tenants covenants are not enforceable by reason of the assignment/new lease being unregistered. This causes us particular issues in respect

[18] [2001] Ch 733, [2000] 2 WLR 566.

of suing for rent or service charge arrears or taking forfeiture action, and indeed who we state is the landlord for making demands as various related legislation, eg the [Landlord and Tenant Act] 1985 and 1987, refer just to the landlord. Failure to comply is often a criminal offence or non-compliance will prevent the recovery of rent. The normal practice is that rent authority letters are issued by the new landlord immediately after completion, although with the registration gap various contractual "plug ins" have to be devised if, for example, proceedings have to be issued in the interim. Legislation devised to clarify and strengthen the law surrounding residential leases therefore often in operation is confusing because of the mismatch with the LRA 2002. These are not simply practical problems and ideally there should be a solution which clarifies the law (and all related legislation) for the benefit of both the landlord and the tenant. I am therefore disappointed by the Commission's response in para 5.74.

5.76 CMS Cameron McKenna disagreed that the "the profession has devised practical ways of dealing with the operational issues that are well understood by those operating them". In its view, problems with the registration gap will increase, particular if operation pressures on HM Land Registry increase. It suggested that legal reform might be necessary in order to address these concerns.

5.77 The London Property Support Lawyers Group detailed limitations in the operational solutions that are used:

> Although some drafting can be included in documents to assist with the issues arising from the registration gap (for example stating that the tenant's right to break a lease comes to an end on the date of the deed of transfer to avoid the particular issue in the *Brown & Root*[19] case), this is not always possible and does not address specific issues in relation to leases, many of which were drafted before the consequences of the registration gap were fully appreciated. One example of where practical issues arise is in relation to serving section 25 notices to determine a tenancy protected by the Landlord and Tenant Act 1954. Landlord A sells property to Landlord B. Landlord B proposes to redevelop and wishes to serve section 25 notices relying on the re-development ground. Assume that the best, or depending on the length of time taken to register, the only, time to serve those notices is during the registration gap. Landlord B could take an authority/power of attorney to serve notices in the name of Landlord A during the gap, but if Landlord A does not have any intention to develop, the validity of the notice must be in doubt. Landlord B can only serve a notice in its own name once registered, so you get a timing problem that is not capable of being easily resolved.
>
> Another example is where a lease contains a tenant's break clause that comes to an end on the first assignment of the lease (*Brown & Root*). The lease is assigned and the original tenant agrees with the assignee not to exercise the break clause. During the registration gap, the original tenant nonetheless exercises the break clause and the landlord accepts the notice. Does the fact that the original tenant served the notice in breach of a contractual obligation to the assignee affect the validity of the notice between the landlord and the original tenant? Again, even if procedures are put in

[19] [2001] Ch 733, [2000] 2 WLR 566.

place to mitigate the effect of the registration gap, they are not always able to cover every eventuality.

Suggestions

5.78 Nigel Madeley expressed his view that the registration gap should be closed "by giving disponees a legal title on notification of legal completion (by which I mean dating the documents and handing over money) to the Land Registry". Mr Madeley explained that closing the registration gap would allow owner's powers to be abolished or significantly limited.

5.79 Mr Madeley suggests that legal title should be passed on completion of the disposition, on the basis that the purchaser has paid for the property in full, and his or her legal rights should not depend on "bureaucratic steps". He explained his view for how legal title could be passed on completion with the land registration scheme:

> In principle, all this can happen on legal completion:
>
> > 1) Buyer pays the price.
> >
> > 2) Seller authorises the buyer to communicate with the Land Registry.
> >
> > 3) Buyer informs the Land Registry of the dealing with evidence of the authorisation.
> >
> > 4) Buyer is entered on the register and is the legal owner.
>
> What is missing is obtaining the Land Registry's satisfaction to the disposition. But that can be dealt with. The Land Registry just notes these stages on the register:
>
> > A) Notice of dealing given – the buyer is the legal owner but has not demonstrated title to the Land Registry.
> >
> > B) Land Registry has received the Buyer's demonstration of title.
> >
> > C) The Registry has made requisitions on the Buyer's demonstration of title – copies of the requisitions can be posted on the title.
> >
> > D) The Buyer's title has been demonstrated to the Registry's satisfaction.
>
> In this way, any person who wants to deal with the new legal owner (i.e. the buyer) can see exactly what is going on and can deal with the owner with eyes open (and if dealing before stage D can decide on what contractual protection they want from the buyer or its seller). The Registry is protected because it can withhold the title guarantee until stage D. The former buyer is protected because having paid the full price he has a legal title. The registration gap is no more – the buyer is the legal owner, as he should be.

5.80 Taylor Wessing LLP suggested that an expedition fee could be of assistance.

Chapter 6: General and special rules of priority

INTRODUCTION

6.1 38 consultees responded to the questions in Chapter 6 of the Consultation Paper.[1]

6.2 Some consultees pointed out that the questions in this chapter were largely dependent on one another; so that most questions flowed from the principal proposal in Consultation Question 14, at paragraph 6.30 of the Consultation Paper. Such consultees helpfully proceeded to answer the remaining questions even where they disagreed with the principal proposal itself, on the assumption that the principal proposal was in fact adopted.

A NEW PRIORITY RULE FOR UNREGISTRABLE INTERESTS

Consultation Question 14.

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

Do consultees agree?[2]

6.4 33 consultees answered this question:

(1) 19 agreed;[3]

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1 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Pinsent Masons LLP; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; The Bar Council; Dr Lu Xu; Chancery Bar Association; Nigel Madeley; Michael Mark; Nottingham Law School; Dr Aruna Nair; Elizabeth Derrington; Taylor Wessing LLP; Martin Wood; Dr Charles Harpum QC (Hon); Dr Tola Amodu; Society of Legal Scholars; Cliff Campbell; Professor Graham Battersby; HM Land Registry; Berwin Leighton Paisner LLP; Graff & Redfern Solicitors; Amy Goymour; The Berkeley Group; The Chartered Institute of Legal Executives; Burges Salmon LLP; a confidential consultee; The Law Society; Mangala Murali.

2 Consultation Paper, para 6.30

3 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; The Bar Council; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; and Professor Graham Battersby.

(2) 6 disagreed;[4] and

(3) 8 expressed other views.[5]

Agreed with the proposal

6.5 The Law Society could not see a logical reason why unregistrable interests should be treated differently from registrable dispositions. It was concerned that "many conveyancers will believe (wrongly) that noting an unregistrable interest such as an estate contract or option on the register gives that interest priority over any unregistered rights" and that this was a "potential trap for conveyancers and their clients". The Society thought that in order to achieve a "fairer position", unregistrable interests should be treated in the same way as registrable dispositions in terms of being subject only to the interests set out in section 29(2) of the LRA 2002.

6.6 Berwin Leighton Paisner LLP was enthusiastic about the new system of priorities, commenting that "the existing situation is somewhat complicated and uncertain". While acknowledging the effect of the proposal on informally created interests, it thought that "on balance" the proposal (which it characterised as a requirement for registration) "will provide much more certainty and will probably reduce the amount of litigation". It was of the view that the proposed new system has the potential to solve many of the difficulties of competing interests at the time of a land transaction which have produced so much litigation over the last two decades:

> Whether the competing land interests are legal estates (to be protected by substantive registration) or unregistrable interests (to be protected by registration of a notice), priority will depend on the date on which the protective registration occurs. The official priority search procedure will apply to both. In practice, this should mean that the parties will become aware of each other's competing interest well before any conflicting transaction is completed. Consequently, neither transaction would proceed to completion until its priority with the other interest had been resolved.

6.7 However, Berwin Leighton Paisner LLP raised concerns regarding the impact of the case *Scott v Southern Pacific Mortgages* Ltd [2014] UKSC 52:

> A very important issue has arisen recently in relation to interests granted before completion by contractual purchasers, and interests deriving from them.
>
> In *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52 it was held that it is not possible for a contractual purchaser to create an unregistrable interest in land until it has completed its purchase, because it does not have a proprietary interest in the land. The Scott decision inadvertently undermines the type of transaction mentioned above involving valuable contracts (recognised in the Consultation Paper at paragraphs 6.14, 6.15, 6.17 and 6.26). On closer analysis, the reasoning behind the Scott decision is questionable (a separate note on this is attached). Interests granted before completion by contractual purchasers, and interests deriving from them should

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4 Dr Lu Xu; Chancery Bar Association; Graff & Redfern Solicitors; Martin Wood; Dr Charles Harpum QC (Hon); and Cliff Campbell.

5 Nigel Madeley; Michael Mark; Nottingham Law School; Dr Aruna Nair; HM Land Registry; Dr Tola Amodu; the Society of Legal Scholars; and Amy Goymour.

all be capable of being protected by registration of a Notice. This would provide a much clearer basis for the protection for such interests, and would restore the position which was thought by many to exist before the Scott decision. For example, the definition of "estate contract" in section 2(4)(iv) of the Land Charges Act 1972, reads: "… 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…". If the Scott decision means that such contracts cannot be protected by Notice then, under section 14 of the 1972, they are capable of being protected by registration as a land charge under the 1972 Act, even though they relate to registered land. Clearly that is not how the system was intended to work.

In order to provide totally clear protection for such interests, it might be necessary to suspend overriding interest status from occupiers' interests granted by contractual purchasers for a short period at the time a registrable disposition takes place. Such an occupier will need to make a search and then register a Notice of the interest if it is to be protected. Perhaps one way to achieve this would be to add an additional section 29(5) to LRA 2002 along the following lines:

"Subsection 2(a)(ii) does not apply to an interest affecting an estate or charge during the period beginning 28 days before and ending 28 days after the date of a registrable disposition to a person where the interest was granted, or was purported to be granted, by that person".

Alternatively, as has been suggested by some, all estate contracts should no longer be capable of being protected as overriding interests.

The proposed new system has the potential to solve this problem… .

6.8 Professor Graham Battersby thought that the arguments culminating in paragraphs 6.29 and 6.30 of the Consultation Paper were "well made", and supported them.

6.9 Howard Kennedy LLP believed that the proposal addressed "a serious issue of which developer clients may not be aware".

6.10 The Bar Council thought that the change "would promote certainty for those acquiring minor interests in registered land without any unfairness to the existing holders of such rights".

6.11 Not all consultees who agreed with the proposal did so wholeheartedly. Professor Warren Barr and Professor Debra Morris, while agreeing with the proposal and describing it as desirable, thought that it would "make the sections on the effects of dispositions on priority even more complex than they already are".

6.12 The London Property Support Lawyers Group agreed "with reservations", commenting that the proposal may have "some unexpected consequences":

For example, take the securitisation of a large portfolio of public houses. It has become market practice not to transfer the legal title to the pubs to the issuer. Instead, the transaction rests on agreement to transfer with completion deferred until the happening of specified events. As there are likely to be many hundreds of pubs, no notice of that agreement is registered against the individual titles. The agreement is

therefore vulnerable to subsequent registrable dispositions which are registered. This risk is explained in the offering circular issued in connection with the securitisation. Under the new proposal, the agreement could also lose priority to subsequent unregistrable interests which are noted. On balance, we do not think this is a reason to change the proposal. It will just be an extra risk factor which practitioners will have to analyse and take into account when dealing with transactions such as this where, for practical reasons, steps are not taken to protect an unregistrable interest.

6.13 The Society of Licensed Conveyancers agreed that the current protections are inadequate and can work unfairly, but thought that "passing through the gateway of a complete record of legal and equitable rights" eroded "the simplicity of a legal title registered land conveyancing process".

6.14 The National Trust agreed with the proposal provided it was accompanied by the proposal at paragraph 6.71, such that it was possible to make an official search with priority in relation to the application to note the unregistrable interest.

Disagreed with the proposal

6.15 Dr Lu Xu disagreed with the proposal, thinking that it would be a fundamental change to the effects of land registration, and that the discussion leading up to the proposal did not consider in full the impact of such change. He drew a comparison with the Scottish model of protection of real rights in land, "commonly known as the 'race to the register'". Dr Xu explained that the Scottish system takes account of the mental status or knowledge of the participants in the race, and gave an example:

> Registered proprietor A, grants an option to purchase the land to B. Three days later the option is still not protected by B's solicitors for whatever reason. C, a competitor to B, approaches A and offer a much higher price for another option to purchase it, in full knowledge of B's interest. A grants it, C protects it immediately before B comes around to protect the earlier option. Now C wins the race to the register. But he raced while committing a foul, in that he did it with the clear knowledge and purpose of defeating B's proprietary interest. Under Scots law, C's victory is "off-side" and will be voidable at the instance of B. What would be English law's position if the proposed reform goes ahead? Would it be 100% positivism, registration-means-everything, to the complete disregard of parties' knowledge and intention (ie the *Midland Bank v Green*[6] approach …)?

6.16 Dr Xu thought that the distinction between registrable dispositions and unregistrable interests was useful and principled, and that the proposal "takes the change in this regard too lightly". The Chancery Bar Association expressed similar views, describing the proposal as "a major step".

6.17 Cliff Campbell argued that the register is a register of legal estates, "not a register of the enormous miscellany of third party interests which affect them", and that contractual remedies are adequate "without trying to turn the register into something which it is not":

> Treating notices otherwise could have far reaching, unintended consequences, which you touch on only briefly with limited examples. There may be others. … Unscrupulous

[6] [1981] AC 513.

registered proprietors aware of the absence of notice might grant encumbrances for the sole purpose of defeating earlier rights they are aware of. Is this really a road we want to go down?

The equitable first in time rule of priority developed because this was considered by the courts to be the best solution. It is proposed to replace that rule with one whereby priority depends on when a search or application was lodged at Land Registry. If the only real reason for doing this is a perceived but non-existent need for additional protection for developers' options then it ought best not be pursued.

6.18 Martin Wood disagreed with the proposal, arguing that changes should not be made "unless the case for doing so is compelling". He considered that the practical effect of the proposed change would be minimal, as conveyancers would normally protect interests on the register to ensure their priority against a subsequent registrable disposition, but that

> the change would, however, for priority purposes treat these interests as if they were registrable and require the extension of the priority search procedure to them, thus increasing the administrative workload and cost of registration for minimal practical effect.

6.19 Dr Charles Harpum QC (Hon) echoed the comments of other consultees that this proposal "would obviously be a very fundamental change to the existing priority rules", but thought that "it does have to be considered now that the anticipated system of electronic conveyance will not happen". He considered that the arguments were "finely balanced", but:

> on the basis that a positive case has to be made for changing the law, particularly where there is change as fundamental as this, that case has not been made so to convince me and I therefore do not support the proposal.

6.20 Dr Harpum thought that if (contrary to his view) the proposal were to be accepted, it should only apply to noted unregistrable interests that are made for valuable consideration (as set out in paragraph 6.38 of the Consultation Paper).

Expressed other views

6.21 Amy Goymour agreed with the aims of this proposal, and thought that it produced "a desirable change", although raised a number of queries and points of concern which are further discussed below.

6.22 HM Land Registry was concerned about the effect of this proposal and how it might work in practice. It emphasised that the proposal "represents a fundamental change to the way in which interests are protected in the register".

> In addition to the issues set out in the responses that follow, Land Registry is, in particular, concerned that:
>
> It is not always clear what it would mean to say that an interest protected by a notice is "subject only to the interests set out in section 29(2)". For example, a restrictive covenant against using the land for any purpose other than a public house may be noted first in time, and a pre-existing restrictive covenant against using the land for

anything other than a residential property noted afterwards. The provisional proposal would mean that the first noted covenant would have priority, but, as between the owners who benefit from those covenants, the two are not mutually exclusive, despite that being the effect on the land itself. We are not certain that it is always meaningful to speak in terms of unregistered interests having priority over and being subject to one another and we question whether the proposal may have unintended consequences.

Land Registry is also concerned that the proposal would result in conveyancers having to investigate the order in which interests are noted in the register (which is not necessarily the order in which caseworkers add the entries).

6.23 Nigel Madeley was of the view that:

> The register will never – and should never – be the only story, for there will always be deserving informal interests. And the idea of 'minimal inspections' is most disturbing. Owning land is not the same as owning shares in a company.

6.24 Michael Mark queried whether section 29 was compatible with the European Convention on Human Rights:

> There is a question as to how section 29 and schedule 3 to the 2002 Act ought to be construed and given effect to insofar as they purport to remove previously acquired property rights bearing in mind article 1 of Protocol 1 of ECHR, which I considered without deciding, in *Davies v John Wood Property Ltd* [2010] REF/2008/528, paragraphs 44-46. This also raises the question of the protection of possessory rights … where the person with those rights does not even appreciate that he does not have a legal title.

6.25 The Society of Legal Scholars supported the reconsideration of the conditions which confer priority on later acquirers, but pointed out that:

> The terms of section 29 currently require the earlier rightholder's interest to be protected at the time of the 'disposition' to the later acquirer. That will need to be amended to accommodate the CP proposal, in order to ensure that the time by which the earlier rightholder's interest must be protected will make sense under the new scheme.

6.26 Nottingham Law School reported that this proposal had "caused some controversy" and that it was unable to record a consensus response. Arguments in favour of the proposal included that it would "bring interests onto the register, which was a desirable effect; and increase certainty for purchasers, which is always a desirable aim". Arguments against the proposal included that there was little evidence provided to suggest that there was a serious problem in need of addressing, and that:

> the recommendations might enable the sort of sharp practice condoned by *Midland Bank v Green*:[7] and that this would be undesirable, as it did not advance the principle of protecting the good faith participant in the land market (as it enabled a participant who entered the market in collusion with a grantor of an interest who wished to destroy

[7] [1981] AC 513.

the earlier grant without compensation). Nottingham Law School concluded that the proposal raised serious issues that merited further consideration.

6.27 Dr Aruna Nair sought confirmation that the aim of the proposal was to plug unregistrable interests into the rule requiring a purchase for value under section 29(1), such that the requirement for valuable consideration would still be applicable for the priority-postponing rule to take effect.[8]

Broad issues raised

6.28 Beyond the specific proposal, many consultees raised broader issues linked to this question and the chapter including analysing the specific circumstances in which our new priority rule would apply.

The case of *A2 Dominion Homes Ltd v Prince Evans*

6.29 Several consultees discussed the impact of the case *A2 Dominion Homes Ltd v Prince Evans Solicitors* on the analysis of priorities.

6.30 Berwin Leighton Paisner LLP asked whether the new system would provide that when a transfer or lease is granted in pursuance of a prior contract, the priority status of the prior contract should apply equally to the transfer or lease, as was held in *A2 Dominion Homes Ltd v Prince Evans Solicitors*.[9]

6.31 The Law Society noted that the case was not discussed in the Consultation Paper and queried whether it would impact on the analysis of priorities. The Law Society provided a summary of the case for consideration and offered analysis of the decision.

The role of notices

6.32 Two consultees emphasised what they saw as the effect of the proposal on the existing role of notices within the land registration system.

6.33 Cliff Campbell thought that notices are designed to protect the priority of a third-party interest as against a registrable disposition, not as against another third-party interest.

6.34 Amy Goymour noted that the proposal fundamentally changes the role of notices:

> Traditionally, they have been used … to protect [the priority of the holder of an] existing interest, [party X], … against future disponees (… party B). The CP's proposals make use of notices in a completely different context: allowing the later disponee (B) to potentially gain priority against X. I am not against this change in the role of notices, but I think this sea-change in notices' function should not go unnoticed and must be acknowledged.

The relationship between the proposal and overriding interests

6.35 Two consultees analysed the relationship between the proposal and the existence of overriding interests.

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8 This is dealt with at Law Com No 227, para 6.38.

9 [2015] EWHC 2490 Ch.

6.36 Nigel Madeley queried the circumstances in which a person taking an unregistrable interest could in practice be subject to an overriding interest under section 29(2):

> Would it be right to say that the proposal would protect mainly 1) a person in actual occupation with an un-noted unregistrable interest and 2) someone who had acquired an easement (that was actively used) by prescription?

6.37 Dr Lu Xu observed that the current registrable dispositions implicitly require a reasonably careful inspection at the time of disposition, or else the registered proprietor would risk being bound by an interest under paragraph 2 of schedule 3 to the LRA 2002, and enquired whether the same requirement would be expected for the grantee of an unregistrable interest, such as a restrictive covenant.

6.38 In Dr Xu's view, registrable dispositions "would normally force a resolution between the registered proprietor and the interest-holding occupant almost immediately". For example, in the case of a current occupier holding an unrecorded option to purchase:

> on the transfer of the property, the new registered proprietor would immediately notice a problem because that person is likely to be staying in the house he just bought. However, a current occupier, A, holding an unrecorded option to purchase the property within three years, on the grant of another option to purchase the same property to B, may not lead to any immediate conflict between the parties. There is no reason why B should necessarily discover the existence of A.

6.39 Dr Xu then continued the example to query what would happen if (even assuming B immediately protects his option with notice), six months later A then leaves the property.

> A's option remains unrecorded. But is it binding on B, even if B never knew of A? (And it is entirely feasible that A did not know B either, unless A keeps checking the registered title every three months.) Given the fact that A was in actual occupation at the time of the creation (or recording) of the interest in favour of B? One year later B exercises the option to purchase and becomes the registered proprietor. Another six months on, A comes back to exercise the option, discovering B for the first time now as the registered proprietor. Under current law B's registration would have postponed A's unrecorded option as A was not in actual occupation at the time of disposition to B (otherwise B would have known immediately). But what would be the position if the law is to be reformed as suggested in the Consultation Paper?

6.40 In Dr Xu's view, the Consultation Paper focused on the opportunities of the proposal to postpone unprotected interests (at both the point of entering a notice to protect the option, and the registration of the subsequent resulting disposition), but did not consider the other side of this argument, which is that there are "two opportunities to claim overriding interests at those crucial stages". He thought that:

> "unregistrable interests" are much more difficult to assess in the light of the current regime of actual occupation in comparison to the current batch of "registrable dispositions". In my example, how should A or B prove or disapprove A's status of actual occupation and whether it would have been obvious on a reasonably careful inspection, some 18-month before any sign of problem?

Interests to which the proposal applies

6.41 A number of consultees examined the effect of the proposal in relation to particular types of unregistrable interest.

6.42 Berwin Leighton Paisner LLP wondered whether because the range of unregistrable interests is so wide, it might be difficult to specify what rights are capable of registration.

6.43 Similarly, HM Land Registry pointed out that–

> there are a large number of unregistrable interests and the class of unregistrable interests is not closed (for example, the Court of Appeal has concluded that the there is a right to seek alteration of a register where there exists a mistake).[10] Many of those interests are unlikely to be obvious to a person who is not legally trained, and, even if they are, it might not be obvious at what point an interest had "crystallised" such that it could be the subject of an application. In such cases, a person may not think to protect an interest until such time that there has arisen a dispute. The proposal would make any such interests subject to later interests that were the subject of entries in the register whether or not that resulted in a "just" outcome.

6.44 Berwin Leighton Paisner LLP queried whether the new system would apply to unregistrable interests in registered charges, as well as unregistrable interests in registered estates.

6.45 Nigel Madeley thought that it was "probably reasonable" to expect a person acquiring a commercial interest in land to register it, but that "the position is more difficult for other interests", while acknowledging that "distinguishing between the two is hard". He concluded:

> I might need some persuading to support the proposal if the result would be that non-commercial unregistered interests were at risk as compared to registered commercial interests and would only have priority if registered.
>
> As between competing commercial interests, your suggestion makes sense.

The effect of the proposal on land options

6.46 The Consultation Paper emphasised that the proposal would benefit those taking an option over land. Consultees were divided on the merits of this argument.

6.47 The Law Society thought that "more needs to be done to protect commercial options of long duration where perhaps a considerable amount of money has been spent". Berwin Leighton Paisner LLP similarly reported that many transactions relating to land involve large sums of money being advanced on the strength of option contracts or purchase contracts.

6.48 Nigel Madeley suggested that conditional contracts were more prevalent than options, and that:

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[10] A point on which we make a recommendation, in the Report, para 13.32.

> Options tend to be longer term affairs than conditional contracts, and are used for land that might find its way into the local plan in a number of years (perhaps after infrastructure improvements).

6.49 He also thought that the option problem might not be as severe as the Consultation Paper suggested:

> The planning position is at the developer's risk in that if it spends the money on a planning application but does not exercise the option, that is its loss – and the priority issue is irrelevant. The developer is only potentially affected if it spends the money and exercises the option. In that case the land value will have been considerably enhanced – if it isn't the whole deal has badly mis-fired.

6.50 Both Cliff Campbell and Nigel Madeley thought that the contractual rights available to the grantee of an option were an adequate remedy. Nigel Madeley explained:

> The sale contract that results from the exercise of the option will refer to the state of the register at the date of the option contract, and if anything appears on the register that was not evident at the date of the option contract, the developer will be entitled to raise a requisition and, if it cannot be removed, complete with an abatement of the price. The developer will also get a covenant from the owner not to create any incumbrances over the property without the developer's consent. The interesting point is how, if at all, to protect that – should it be a personal obligation or have protection as a property interest?

6.51 Cliff Campbell similarly argued that:

> If sellers are in breach of contract due to being unable to show good title due [to] having created a third-party interest, developers have the same contractual remedies as everybody else. …
>
> The equitable first in time rule of priority developed because this was considered by the courts to be the best solution. It is proposed to replace that rule with one whereby priority depends on when a search or application was lodged at Land Registry. If the only real reason for doing this is a perceived but non-existent need for additional protection for developers' options then it ought best not be pursued.

The treatment of unregistrable leases

6.52 Amy Goymour queried how the proposal interacted with section 29(4) of the LRA 2002, which applies the special priority rule in section 29 to the grant of an unregistrable lease:

> Under s 29(4), currently a tenant of up to seven years is deemed to get the benefit of s 29, if the lease is unregistrable within s 27.

6.53 Ms Goymour pointed out that, even though leases over three years are protectable (although not registrable) by entry of a notice, a tenant of a five year lease can benefit from section 29 (via s 29(4)) even though such a tenant has not (but could have) protected its interest with a notice on the register. She argued that it would be consistent with the proposal to allow tenants of leases of between three and seven years the protection of section 29 only where they have protected their lease via a notice.

Interests which arise informally or by operation of law

6.54 Berwin Leighton Paisner LLP observed that unregistrable interests often arise under informal arrangements or (unknowingly) by operation of law. It suggested that informal interests would continue to be protected in most cases by way of overriding interest. However, it asked whether valuable consideration, a requirement in section 29, would be required in relation to unregistrable interests granted informally, commenting that simple payments of money are less likely to be involved in those situations.

6.55 The Chancery Bar Association similarly remarked that:

> Many equitable interests are created informally eg rights arising under constructive trusts or by way of equitable estoppel, in circumstances where protection by registration would not ordinarily be contemplated and we do not consider that the priority of such rights should be governed by the timing of registration.

6.56 Dr Aruna Nair also considered the effect of the proposal on interests arising by operation of law:

> There are more situations where equitable interests arise by operation of law than is the case with legal interests. There is room for clarification, therefore, as to whether only consensually created rights could acquire the benefit of the priority-postponing rule by being noted on the register. If rights arising by operation of law could postpone the priority of earlier interests, it would be necessary to extend the meaning of 'valuable consideration' to cover losses or gains sustained outside the context of a consensual bargain. For example, suppose a claimant notes that an equity by estoppel has arisen in her favour, and this equity arose because the claimant had incurred financial detriment. Would this detriment count as consideration so that the claimant would gain priority over any pre-existing unregistered equities for this reason?

6.57 Dr Charles Harpum was also concerned that the proposal would "prejudicially affect certain interests which in reality will not be protected by an entry in the register". He gave the example of the interest of a person with an equity by estoppel, where that person's interest is not protected as an overriding interest by actual occupation:

> While such an interest is of course already vulnerable to a registered disposition for valuable consideration, I am concerned that its vulnerability should not be increased.

The effect of the proposal on beneficial interests under a trust

6.58 Amy Goymour, referring to paragraph 1.21 of the Consultation Paper, urged us to consider whether beneficiaries of a trust should be able to protect their interests on the register by way of a notice, describing the fact that the Consultation Paper did not address this point as "a missed opportunity". She was concerned about the proposal's impact on trust beneficiaries, given that such a beneficiary (even a beneficiary who acquires an interest for valuable consideration) cannot benefit from the proposal as no notice may be entered on the register in relation to an interest under a trust. She queried whether this was fair, and wondered whether there should be a mechanism, akin to that available to tenants of unregistrable leases under section 29(4), for deeming the holders of such interests to obtain the protection of section 29:

> It seems as though the fundamental guiding principle beyond your reform proposal is that all those who (a) pay valuable consideration; (b) rely on the register; and (c) do all they can within the machinery of the LRA 2002 to protect/register their right, should benefit from s 29. This reasoning explains the protection currently afford by s 29(4) to short leaseholders who deserve s 29's protection, but who otherwise would not trigger s 29 owing to their interest being unregistrable within s 27, and explains why option-holders should benefit under your reform proposals once they have entered an interest on the register. In line with this guiding principle, it is arguable that those who acquire trust interests for valuable consideration should be similarly protected by s 29.

6.59 Similar points were made by the Society of Legal Scholars.

6.60 Amy Goymour further pointed out that the discussion of trust interests in the Consultation Paper focused on the risk of the beneficiary of a trust having their interest postponed to a subsequent unregistrable interest which is noted on the register. She argued that the paper did not consider whether a person being granted a trust interest should be able to take advantage of the proposal in order to defeat a prior right.

6.61 Dr Tola Amodu thought that the issue of trust interests (other than those created expressly) "remains problematic and it may be logical to consider whether a different system could be devised for protection in these circumstances". Dr Amodu wondered whether–

> This may, however be more appropriately dealt with when revisiting the impact of co-ownership. The arising situation is not so much one of the protection of the ultimate disponee, here but instead the interplay between trust principles and priority (which I think is something different and arguably an extension – warranted or otherwise of overreaching – see Jackson's idea of the "overreaching effect" (2006)).[11] This may be acceptable in instances of options but what of other (previously) unregistrable interests?

6.62 The Nottingham Law School was divided in its views of the effect of the proposal on beneficial interests under trusts. Some members of the School thought that problems of rights under trusts of land would often be avoided by their protection as overriding interests. However, others were of the view:

> that the position of the interest under a trust for land could be prejudiced in a way that was unprincipled by the recommendations. [Paragraph 6.42] seems to suggest the grant of an estate contract should grant priority over interests under a trust for land. It is not obvious that an estate contract could grant priority only if the conditions for overreaching would be met with upon completion. This throws up an undesirable tension between priority gained through the notice and the provisions governing overreaching if the estate contract is granted by a sole registered proprietor.
>
> As the Consultation Paper notes (6.40) a restriction will not give priority – so this type of interest may be subject to the consequences of the reform but will not benefit from them.

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11 See N Jackson, "Overreaching in Registered Land Law" (2006) 69 *Modern Law Review* 214.

> Only the common presence of occupation and therefore protection as overriding interests save the recommendations from very serious flaws in this regard – but leave the justice of the situation to be determined by the accident of occupation.

Equitable charges

6.63 Dr Charles Harpum thought that a practical problem with the current law was that

> nowadays, any second charge over property other than a further charge from the first mortgage lender will, in practice, have to be protected as an equitable and not as a legal charge. This is because the first lender will invariably take a covenant from the mortgagor that requires the first lender's consent to the registration of any subsequent registrable disposition by the mortgagor. That covenant will be protected by a restriction. First lenders do not in practice consent to the registration of a second charge, which is therefore protected by a notice and, accordingly, only takes effect in equity. While that notice protects the second chargee against any subsequent registered disposition, it gives no protection against a prior interest that is not a registrable disposition and has not been protected by a notice in the register – which could include a prior equitable charge. The only protection that the second lender can obtain is by means of a warranty from the borrower. A personal warranty is not worth much.

Charging orders and other statutory charges

6.64 The Chancery Bar Association thought that if the proposal was adopted, special provision should be made for charging orders and other statutory charges. It saw no reason why these should obtain priority over equitable interests previously created simply by virtue of having been registered. It pointed out that such charges are a non-consensual means of enforcement and, unlike other equitable charges, there will normally have been no transaction entered into in reliance on the contents of the register.

6.65 Cliff Campbell pointed out that the proposal could also have negative consequences for holders of charging orders in certain circumstances:

> a creditor under a charging order, who may be an amateur litigant not familiar with land registration, might effectively lose their interest on registration of a notice protecting a later charging order.

The difference in the treatment of legal and equitable interests

6.66 A number of consultees flagged up the effect of the proposal on the classification of interests as either legal or equitable. Several consultees[12] noted that the interests which can currently take advantage of section 29 (being interests under registrable dispositions, and unregistrable leases) currently comprise only interests which would be capable of existing at law.

6.67 The Chancery Bar Association pointed out that land registration is concerned with the registration of legal estates, and the equitable interests binding on the owners of such estates. It commented that "to date it has not been concerned with the relative rights of

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[12] Amy Goymour; Society of Legal Scholars; Dr Lu Xu.

owners of equitable interests and on balance we consider that this should remain the case".

6.68 However, Amy Goymour and the Society of Legal Scholars thought that it seemed arbitrary to perpetuate, for no good reason, the law/equity divide in the registration context. Amy Goymour thought that

> There is no good reason that someone who acquires an interest which has historically only existed in equity (eg a restrictive covenant) should not avail of section 29 when he has done all he can to bring it onto the register.

6.69 Dr Lu Xu noted that:

> The distinction between law and equity is of course of little formal significance in land registration. It may even be argued that land registration targets this distinction as it causes much of the illogicality or difficulty in unregistered land. Nevertheless, these interests are legal because historically and practically they are much more pronounced and obvious in a way that some of these "unregistrable interests", or equitable interests are not.

6.70 Dr Aruna Nair raised the impact of the proposal on legal interests whose priority is not otherwise protected:

> Under the proposal, implied and prescriptive easements, which are not within the scope of sch 3 para 3, may lose priority to equitable interests that are noted on the register. This is a significant inversion of the normal approach to priority in English law, allowing a later equitable interest to defeat a pre-existing legal one. I assume that this does not matter, as the CP argument is built on the assumption that the law/equity distinction does not matter anymore for registered land, but it does mean that the proposal goes beyond simply regulating priorities between equities; there is also potential to weaken the scope of unregistered legal interests.

Alternative options for reform

6.71 Two consultees thought that the aim of this proposal could be achieved in a different way.

6.72 Amy Goymour pointed out that an alternative option for reform would be to amend the list of registrable interests in section 2 of the LRA 2002. She acknowledged that this would change the status of interests such as estate contracts into legal interests, but thought that the result, in terms of priority, would be the same. She noted that the main difference would be that, if registrable and registered, these interests would then get the state guarantee of title.

6.73 HM Land Registry provided a similar but narrower proposal. It inferred that the driver for reform had arisen from stakeholders who wish to protect interests that fall into the definition of C(iv) land charges (in the unregistered land system) against other interests that fall into that category and other unregistrable interests. It wondered whether a more principled, and legally consistent approach, would be to make provision for that limited class of interests to be classified as "registrable dispositions". Doing so would mean that where such interests were granted for valuable consideration and registered, they would be subject only to the interests set out in section 29. While acknowledging that

its approach had not been fully tested in the time available, HM Land Registry was of the view that it appeared to fit better with the "grammar" of the LRA 2002 and had less scope for unintended (and potentially unjust) consequences.

APPLICATION OF A NEW PRIORITY RULE

Consultation Question 15.

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

Do consultees agree?[13]

6.75 27 consultees answered this question:

(1) 18 agreed;[14]

(2) 3 disagreed;[15] and

(3) 6 expressed other views.[16]

Agreed

6.76 The Society of Licensed Conveyancers agreed with the proposal, since "otherwise you are promoting a position where conveyancing does not need to be done properly, or a dual process which might have unintended consequences".

6.77 Howard Kennedy LLP advanced similar reasons:

> If the law requires full registration formalities for a type of transaction, which confers certain benefits to the disponee, what is the point of allowing those benefits to be conferred if such registration requirements are not complied with? The result would be that most charges would not in fact be properly registered but simply noted, their validity would not be guaranteed and the registration system would be undermined.

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13 Consultation Paper, para 6.36.

14 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Dr Charles Harpum QC (Hon).

15 Chancery Bar Association; Berwin Leighton Paisner LLP; Martin Wood.

16 Nigel Madeley; Christopher Jessel; London Property Support Lawyers Group; Pinsent Masons LLP; Dr Aruna Nair; The Bar Council.

6.78 The Chartered Institute of Legal Executives (CILEx) agreed, but commented that "if e-conveyancing does take place then a statutory registration of the contract to buy can be made as part of the exchange process".

6.79 The National Trust agreed with the proposal on the assumption that the holders of all registerable dispositions can make an official search with priority in relation to their applications to register their dispositions.

The argument of an equitable chargee who can circumvent overreaching

6.80 Several consultees were convinced by the argument at paragraphs 6.34 to 6.35 of the Consultation Paper which gave as an example the noting of an equitable mortgage granted by a single registered proprietor holding the property on trust, which would then be able to take priority over the interests of beneficiaries despite overreaching not having occurred. For example, the Law Society thought that

> The legislation is clear as to what the registrable disponee needs to do to protect their position; what is required is achievable and realistic and we see no reason to change the law on this issue. The fact that there may be defects in the formalities of the interest's creation, or that there may be a restriction preventing registration of the disposition, does not justify changing the law. The prospective disponee will usually be aware of the restriction before being contractually bound and can either choose not to proceed if concerned, or to seek to deal with the restriction via the documentation.

Agreed although disagreed with the proposal in Consultation Question 14

6.81 Some consultees who did not agree with our proposal in Consultation Question 14 (at paragraph 6.30 of the Consultation Paper) nonetheless went on to consider the position if that proposal was adopted. Both HM Land Registry and Dr Charles Harpum stated that they would support the proposal at paragraph 6.36 if the more general proposal for a special priority rule was adopted.

Disagreed

6.82 Martin Wood objected to depriving equitable chargees "of the choice of this inferior means of protection".

6.83 Berwin Leighton Paisner LLP suggested that there might be situations in which a disponee would prefer to register the disposition, but is unable to do so because of something outside its control (such as delays in obtaining the consent required by a restriction on the title). In such a situation, Berwin Leighton Paisner LLP argued that it would be preferable if a registrable disposition which (for whatever reason) is not completed by substantive registration could nevertheless benefit from the enhanced priority protection under section 29. In order to discourage intentional use of such notices, Berwin Leighton Paisner LLP made two suggestions.

(1) Registrable dispositions which are not lodged for registration within two months could be treated in the same way as dispositions which induce compulsory first registration.

(2) Alternatively, a disponee under a registrable disposition who has not lodged the application for registration should be excluded from being a person "entitled to

be registered" for the purposes of owner's powers in the LRA 2002 (in sections 23 to 26).

6.84 Berwin Leighton Paisner also made proposals about the powers of chargees, both legal and equitable chargees. It argued in favour of equitable mortgagees being able to be protected by notice. It said that –

> It would be wrong for the Land Registration system not to cater at all for equitable mortgages. But it does not follow that equitable mortgages should have the same benefits as legal mortgages in all respects; that might well lead to legal mortgages becoming redundant.

6.85 The Chancery Bar Association questioned the proposal by referring to the entry of a notice to obtain priority over subsequent interests (as opposed to prior interests):

> This proposal lacks logic if the proposal in [Consultation Question 14] above is implemented. If an equitable charge can obtain priority over subsequent interest by noting it on the register why should not the holder of a legal charge be able to do the same. The lack of logic in this proposal suggests that the proposal in [Question 14] above is flawed.

Expressed other views

6.86 Dr Aruna Nair queried how the two proposals at paragraphs 6.30 and 6.36 of the Consultation Paper worked together where a disposition was structured as a sale contract followed by a transfer:

> For example, suppose X has an unregistered equitable interest in land. P then contracts to buy the land, and registers his estate contract; at this moment, X's priority is lost to P's estate contract. Then completion takes place and P fails to complete the disposition by registration. Does P's estate contract still exist, and bind X, or does X get his priority back, on the basis that P now has an interest under a disposition that would have been registrable if all proper formalities had been observed?
>
> It is possible to argue that P has two different equitable interests in this scenario – the estate contract, which exists until completion and is then terminated and replaced by a different equitable interest after completion but before registration – but this seems like a doubtful analysis of the current law.

6.87 The London Property Support Lawyers Group referred to the example at paragraph 6.35 of the Consultation Paper of a mortgagee circumventing the overreaching mechanism and securing priority for the mortgage over a beneficial interest arising under a trust where there was only one trustee. It agreed that this outcome was undesirable.

6.88 The London Property Support Lawyers Group went on to explain what it described as a common situation where a mortgage has been taken over a number of properties, perhaps with limited or even no due diligence. When the time comes to register the charge, there are found to be restrictions on the title to some of the properties requiring a third party's consent to the registration of a disposition. LPSLG recounted that obtaining that third party's consent can be time consuming and difficult. In those

circumstances, it is common to register a notice against the titles to protect the priority of the charge while seeking the relevant third party's consent.

6.89 The London Property Support Lawyers Group noted that the proposal at paragraph 6.36 would leave the chargee in much the same position as at present – they could register a notice which would preserve priority over subsequent dispositions but leave them subject to prior unregisterable interests (at least until the charge itself is substantively registered). But it continued:

> we question the logic of leaving [the chargee] in a worse position than somebody registering a notice to protect an interest which is not capable of substantive registration.

6.90 It observed that most unregistrable interests can be protected by notice, and commented that the problem in the case of the trust example arises because beneficiaries cannot protect their interest by notice. It agreed that beneficiaries should not be given an additional means of protecting their interest, because of the curtain principle.[17] It suggested a possible solution:

> the form of restriction put on the register of title where there is a trust could be changed to prevent the registration of a notice which would give priority to a third party over a beneficiary's interest. However, at present, a restriction can only refer to dispositions of the registered title and not to the registration of notices on the title. Whilst we understand the reasoning behind this, perhaps a limited exception could be made in relation to trust restrictions to provide the protection required.

6.91 The Bar Council also saw "the force" in the example given at paragraph 6.35 of the Consultation Paper. It suggested that the best solution was to specifically exclude such cases from the protection offered. It thought that this could be achieved in a number of different ways, although did not elaborate.

6.92 The Bar Council also thought that one way of extending protection without providing an incentive for disponees under registrable dispositions not to complete their dispositions by registration might be–

> for Land Registry to refuse to enter a notice protecting an interest under a disposition of a kind that is prima facie registrable unless the applicant can provide appropriate justification for not completing the disposition by registration under section 27.

6.93 Nigel Madeley queried whether the effect of the proposal was that a person taking a (potentially) legal easement could not protect it by a notice (as opposed to registering it). He highlighted that the distinction between an easement which is capable of existing only in equity, and one which is capable of existing at law, is not always obvious and may be easy to get wrong. He gave the example of the grant of a right of way until adoption, or the grant of a right to lay a drain subject to "lift and shift" provisions. He thought that it would be "rather untoward" if a person who lodged a notice to protect this sort of easement ended up without priority against unregistered interests. He argued that

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[17] For an explanation of the curtain principle, see Law Com 227, para 2.18.

Anyone reading the register can see that the grantee has protected his interest – why should a person challenging the registration get the windfall of acquiring the land free from the easement when they knew perfectly well that it was there.

6.94 Christopher Jessel was concerned that a person taking a registrable disposition may be unable to satisfy HM Land Registry that registration should be completed for reasons beyond the applicant's control:

> For example there might be a dispute with HMRC over SDLT so that there is a lengthy delay in submitting all the relevant documentation, perhaps beyond that available under successive searches protecting priority. It should nevertheless be possible to protect a legitimate but unproved interest by notice. I suggest that the Land Registry be given discretion to permit a notice to be entered in a suitable case, perhaps for a limited time.

Consultation Question 16.

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

Do consultees agree?[18]

6.96 26 consultees answered this question:

(1) 17 agreed;[19]

(2) 4 disagreed;[20] and

(3) 5 expressed other views.[21]

Agreed

6.97 The Law Society thought that

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18 Consultation Paper, para 6.37.

19 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; National Trust; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; HM Land Registry; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Dr Charles Harpum QC (Hon).

20 Christopher Jessel; Chancery Bar Association; Berwin Leighton Paisner LLP; Martin Wood.

21 Nigel Madeley; Michael Hall; London Property Support Lawyers Group; The Bar Council; Amy Goymour.

it is within that person's control to ensure compliance with those formalities and prior interests should not be unfairly prejudiced by effectively ignoring such non-compliance.

6.98 Howard Kennedy LLP re-iterated that "if we have registration requirements they should be complied with otherwise the system breaks down". Professor Warren Barr and Professor Debra Morris agreed, holding that "to do otherwise would be to defeat the purpose of a system of title registration".

6.99 The National Trust agreed with the proposal on the assumption that the holders of all registerable dispositions can make an official search with priority in relation to their applications to register their dispositions.

Agreed even though disagreed with the proposal in Question 14

6.100 Both HM Land Registry and Dr Charles Harpum stated that they would support this proposal if the proposal in Question 1 was adopted, despite not themselves being in favour of the more general proposal to create a new priority rule.

Disagreed

6.101 Martin Wood explained that there are situations in which registration cannot be obtained:

> For example, purchaser A completes on a transfer, lodges the transfer for registration only to find that, unbeknown to A, a restriction has been entered on the register that he is for the time being at least unable to comply with. This sort of thing can happen if at the time the transfer application is lodged it is not protected by a priority search. In such circumstances it is entirely legitimate and desirable that A should be able to protect the transfer by a notice. I can see no legitimate reason for depriving A of this protection.

6.102 Christopher Jessel thought that justice would distinguish between cases where the failure to observe the formalities is the fault of the disponee, and those where it was the fault of the disponor, although commented that this distinction may be difficult to draw in practice. He commented that the defect in formalities would usually be remedied by a further deed, and that where full title guarantee had been given the disponor will be under an implied covenant for further assurance under the Law of Property (Miscellaneous Provisions) Act 1994. He argued that pending the completion of such further assurance the disponee should be able to protect the rights by notice.

6.103 Christopher Jessel commented:

> The person is presumably entitled in equity to the interest so the issue is whether a bona fide purchaser of the legal estate is (or should be) without notice where notice is given by registration. On the one hand there should be no get out for sloppy conveyancing and the register does not take notice of trusts. On the other the law should protect established rights and there may be a human rights aspect under [Article 1 of Protocol 1 of the ECHR].

6.104 Christopher Jessel also raised the issue of a two-stage transaction (comprising a contract followed by a transfer).[22]

> A person may take (and note on the register of title) a contract to acquire the interest and then later seek to complete the contract by a transfer or lease or other document which may be invalid through no fault of the disponee. For instance the disponor may not execute the deed correctly or a company may purport to act through people who are not authorised. In such case the disponee needs protection. An incomplete lease may operate in equity as a contract to grant a lease or take effect as an equitable lease.[23] .

6.105 Christopher Jessel wondered whether the proposal was "inconsistent with the logic underlying the suggestion that a person who is entitled to be registered should have the powers of a registered proprietor" although appreciated that "where there is a defect of form there is no entitlement".

6.106 The Chancery Bar Association also thought that the reason a transaction did not meet the formality requirements was important, and focused on this issue in the context of equitable charges:

> A charge may be equitable because it was intended to create a legal charge but it was done in writing rather than by deed. It may be deliberately created as an equitable charge only. We are unclear whether this proposal is intended only to equitable charges of the first kind or to both kinds. If it is intended to apply in both cases it makes considerable inroads into the proposal in [Consultation Question 14] above. If it is intended to apply only in the first case we can see neither logic nor fairness in the distinction.

Other

6.107 Like some of those who expressed themselves as disagreeing with this proposal, Michael Hall was concerned about its effect. He gave an example:

> A legal charge has been taken as security for a loan and the chargee has failed to obtain the written consent of the first mortgagee and there is a restriction registered stating that no disposition by the registered proprietor is to be registered without the consent of the first mortgagee. If the second mortgagee is unable to note his interest a third mortgagee could gain priority by obtaining the consent of the first mortgagee. This would be unfair. The purpose of the notice is to secure priority against subsequent interests. The notice could not secure priority against prior interests as suggested in paragraph 6.35. The mortgage would not have the effect of overreaching as against the beneficiary of the trust who still has a prior interest. However the beneficiaries of the trust may have benefited from the loan and it may have been taken with their consent or for their benefit. The beneficiaries would only be entitled to assert their prior equitable claim against the mortgagee in a case where the trustee had in

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22 This issue was also raised by Dr Aruna Nair in response to Consultation Question 15 at paragraph 6.36 of the Consultation Paper.

23 Citing the Law of Property Act 1925, ss 66 and 152 and *Walsh v Lonsdale* (1882) 21 Ch D 9.

fact acted in breach of trust. The beneficiary would have only an equitable claim and could not take advantage of the lack of a second trustee to defraud the mortgagee.

6.108 The Bar Council saw the force in the argument that "the availability of special protection of unregistrable or unregistered registrable interests should not provide an incentive to avoid completing a transaction by registration or, worse still, not complying with the required formalities for that kind of interest". However, it was "not convinced that outweighs the need to protect those who inadvertently take interests without complying with the necessary formalities". It thought that paragraphs 6.16 to 6.28 of the Consultation Paper made out a "compelling case" for allowing unregistrable interests to be protected against prior interests, but went on to say:

> That case is no less compelling for those who have innocently failed to comply with formalities requirements. In such cases the parties are likely to have met some minimum standard for formalities (eg having an agreement that complies with Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989) and, necessarily, the disponee's interest will merit the protection of equity. It seems hard to justify giving less protection to such persons.

6.109 Similar comments were made by the London Property Support Lawyers Group:

> Failure to comply with the proper formalities means that only an equitable interest would arise when a legal interest was intended. We question the logic of not giving a notice registered to protect that unintended equitable interest the same priority advantage as a notice registered to protect some other equitable interest.

6.110 Amy Goymour stated that she "probably" agreed, but was "not completely sure in the absence of further detail". She also considered the separate opportunities for priority protection conferred by a two-stage transaction:

> Take, for example, the sale of a fee simple from A to B. X has an unprotected equitable easement over the land, which A created in X's favour prior to A's sale to B. The aim here is for A to transfer the fee simple to B. This will normally take place via (a) the creation of a sale contract; then (b) conveyance by deed; and then (c) registration. At point (a), your proposals suggest that the creation of an estate contract – not being a registrable disposition – can be protected by way of a notice on the Register, and would trigger the rule in s 29. However, if the parties had reached step (b), and B put a notice on the Register to protect his (necessarily at this stage) equitable fee simple, without fully registering, he would not avail of s 29. This conclusion, at first glance, looks odd. The more flimsy earlier interest created by step (a) is capable of attracting the protection of s 29 by the placing of a notice on the register, whereas the more substantial interest created at step (b) cannot attract s 29 by the mere placing of a notice: full substantive registration is required. On balance, however, despite creating seemingly odd results, your proposal seems justified: the difference between steps (a) and (b) is that at step (a), B is not permitted to register his interest, because it is not registrable; at point (b), it is registrable, and so B should be expected to do all he can (ie fully register his interest) in order to attract s 29.

Consultation Question 17.

6.111 Do consultees believe that home rights should be excluded from the effects of our proposal that noting an interest (such as a sale contract) on the register should secure priority against prior unregistered rights (which would otherwise include home rights)?[24]

6.112 23 consultees answered this question:

(1) 12 thought that home rights should be excluded;[25]

(2) 7 thought that home rights should not be excluded;[26] and

(3) 4 expressed other views.[27]

In favour of the exclusion of home rights from the effects of the proposal

6.113 Many consultees who thought that home rights should be excluded from the proposal in Consultation Question 14 believed that this was necessary in order to protect vulnerable individuals,[28] and/or on the basis that home rights are in a special category meriting special protection.[29] For example, Andrew Broomfield argued that persons with the benefit of home rights may not be aware of their ability, or need, to protect their interests – particularly where a person has a disability (perhaps as a result of mental capacity).

6.114 Consultees also thought that if home rights were not excluded, this could undermine the statutory scheme of protection for those rights.[30]

6.115 Adrian Broomfield thought that buyers and mortgagees would be protected by raising appropriate enquiries about other occupiers apart from the seller. From the perspective of the person with the benefit of the home rights, however, Dr Aruna Nair described the conveyancing practice of making enquiries about non-owning adult occupiers as "inadequate, as it does not address the possibility of failures to meet these standards and/or fraud on the part of the registered proprietor (assuming an innocent purchaser)".

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24 Consultation Paper, para 6.49.

25 Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; The Conveyancing Association; Chancery Bar Association; Adrian Broomfield; The Bar Council; Chartered Institute of Legal Executives; Mangala Murali; Dr Tola Amodu; Dr Aruna Nair; Howard Kennedy LLP.

26 Property Litigation Association; The City of Westminster and Holborn Law Society; The Law Society; Martin Wood; Berwin Leighton Paisner LLP; Professor Graham Battersby; Society of Licensed Conveyancers.

27 Michael Hall; Dr Charles Harpum QC (Hon); Amy Goymour; Nigel Madeley.

28 Elizabeth Derrington; The Conveyancing Association.

29 Mangala Murali; Elizabeth Derrington.

30 Dr Tola Amodu; Chancery Bar Association.

6.116 Professor Warren Barr and Professor Debra Morris believed that it was now easier to gain a beneficial interest in the home, so that home rights are likely to become less significant in the future.

6.117 Howard Kennedy LLP thought that buyers should note their contract where home rights were a possibility.

Against the exclusion of home rights from the effects of the proposal

6.118 Of the consultees who were against the exclusion of home rights from the proposal, some did so on the ground that it would produce a simpler system. Berwin Leighton Paisner LLP thought it would be consistent for home rights to receive exactly the same treatment as other unregistrable interests; Martin Wood was of the view that excluding home rights would be a complication for which he was not convinced there is a compelling case; and the Property Litigation Association also cited consistency as the reason for its response.

6.119 Both the Law Society and the Society of Licensed Conveyancers thought that holders of home rights should not be able to sign a contract confirming that they will vacate the property and then be able to secure priority over the buyer under that contract by noting home rights on the register. The Society of Licensed Conveyancers noted that this would "lead to a position of conveyancers always noting the contract on the register where enquiry reveals a third-party occupier".

6.120 The City of Westminster and Holborn Law Society also thought that home rights should not be excluded, commenting that the existence of adult occupiers would in practice be investigated prior to the contract for sale.

6.121 Professor Graham Battersby was "convinced" that the proposal in Consultation Question 14 should also apply to home rights, and thought that the problems created by the present law were demonstrated by the "cautionary tale" in the case of *Wroth v Tyler* [1974] Ch 30:

> It seems clear to me that the law would be greatly improved by your proposal: [the buyers] could protect their estate contract by promptly entering a notice on the register, and [the spouse of the registered proprietor]'s subsequent notice would be too late. That seems to accord with the policy of the legislation. I think also that it is correct to say that under present conveyancing practice another occupant will be required to sign the contract for sale, or, it may be added, to sign a post-Boland disclaimer.

Expressed other views

6.122 A number of consultees did not express a definitive view either in favour of or against the exclusion of home rights from the effect of the general proposal to create a special priority rule, in Consultation Question 14. Often the issues raised by these consultees echoed the themes raised by those quoted above.

6.123 For example, Michael Hall thought that if a spouse has joined in the sale and has agreed to release his or her home rights, he or she should be bound by that.

6.124 Nigel Madeley also cited *Wroth v Tyler* and commented that "in the circumstances of that case the non-owner would be better off moving house than having a bankrupt spouse, which required them to move house anyway but with much less money".

6.125 Dr Charles Harpum expressed no preference one way or another. He thought that the exclusion of home rights would be "slightly messy and leads to more complex law, but it may have little practical consequence".

6.126 Amy Goymour stated that she had not formed a conclusive view, but that her provisional view was that

> there seems little justification in singling out home rights from other rights. Home rights are vulnerable currently under s 29 as against those who currently trigger s 29's special priority rules (ie registered disponees). If your reform proposal is to add to the number of dispositions that trigger s 29 – on the basis that it is irrational to distinguish between different types of disposition between A and B – then arguably the protection offered by s 29 should be equal to all those who trigger s 29, regardless of the nature of X's prior interest. If home rights are considered too vulnerable, it would seem better to review their lack of overriding status, rather than to carve out exceptions to the application of s 29.

Consultation Question 18.

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

Do consultees agree?

If consultees disagree, please state what period of time consultees consider should be allowed in order for holders of existing rights to note them on the register, before the rights become vulnerable to subsequent interests.[31]

6.128 26 consultees answered this question:

(1) 22 agreed;[32]

(2) 3 disagreed;[33] and

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31 Consultation Paper, para 6.54.

32 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Burges Salmon LLP; The Law Society; Mangala Murali; Dr Charles Harpum QC (Hon); a confidential consultee; Martin Wood.

33 The Conveyancing Association; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives.

(3) 1 expressed other views.[34]

Agreed

6.129 The Society of Licensed Conveyancers agreed with the proposal on the basis that holders of such interests would be "in no worse position than applied before the amendment".

6.130 The London Property Support Lawyers Group and Howard Kennedy LLP agreed that the existing position should be retained. Howard Kennedy LLP commented that:

> this sounds complex enough but in fact is probably simpler in practice and fairer to the people who would otherwise be required to take action.

6.131 Pinsent Masons LLP also argued that the existing position should remain for unregistrable interests created pre-reform. However, rather than focusing on whether such interests should be vulnerable to later interests, it considered the position from the perspective of whether the holder of a pre-reform interest should be able to take advantage of the new regime:

> We do not believe that it would be appropriate for the proposed change of law to allow an opportunity for the holders of interests created under the old regime to secure the advantages of the new regime, whether by registering a notice for the first time, or by registering a fresh notice where one had been registered at the time the interest was created.
>
> In other words, we consider that the date of creation of the unregistrable interest - rather than date of registration of the notice in respect of it - should determine which regime applies.

6.132 The Law Society drew an analogy with the provisions in relation to interests with overriding status under the LRA 2002, which it described as "unduly complex":

> The time limited nature of some of them was problematic with a rash of notices being entered on the register in relation to chancel repair liability and manorial rights in the run up to 13 October 2013. These notices were extremely disconcerting to the registered proprietors and may well not have been noted if the overriding status had not been time limited.

6.133 The Law Society questioned whether it would always be clear when the unregistrable interest was created, whether pre- or post-reform.

6.134 Dr Charles Harpum and Martin Wood, who did not support the proposal in Consultation Question 14, both stated that they would support this proposal in the event that the more general proposal was adopted. However, Martin Wood commented that:

> such a mixed regime would be another complication that would hardly increase the accessibility of the land registration system. Far better to leave well enough alone.

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[34] HM Land Registry.

Disagreed

6.135 Three consultees disagreed, and argued that the general proposal in Consultation Question 14 should also apply to unregistrable interests created pre-reform.

6.136 CILEx considered "it is vital that the register is accurate and up to date".

6.137 Berwin Leighton Paisner LLP noted that many transactions relating to land involve large sums of money being advanced on the strength of option contracts or purchase contracts, and argued that:

> The risk of a property being affected by pre-reform unregistrable interests is a potential deterrent to participating in transactions which involve such contracts. It would therefore be preferable for the new regime to apply also to existing unregistrable interests. This will also, ultimately, achieve much greater simplicity.

6.138 These consultees suggested varying periods of time in which pre-reform interests should be protected, ranging from one year (Chartered Institute of Legal Executives), two years (Berwin Leighton Paisner LLP) to up to six years (The Conveyancing Association).

Expressed other views

6.139 HM Land Registry expressed concerns about having "a dual system" for notices:

> Maintaining a dual system is likely to cause complications and risk for Land Registry and its customers. Land Registry's strong preference is to avoid any system whereby apparently similar notices have significantly different legal effects depending upon (presumably) the date that they are noted as having been entered in the register. Land Registry is also concerned that, if the provisional proposal at paragraph 6.30 is taken forward then, on the date that an unregistrable interest becomes capable of being afforded priority by noting, there will be a "race to note" those interests that are not protected by existing notices.

APPLICATION OF RECTIFICAITON AND INDEMNITY

Consultation Question 19.

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

Do consultees agree?[35]

6.141 31 consultees answered this question:

[35] Consultation Paper, para 6.57.

(1) 29 agreed;[36]

(2) 1 disagreed;[37] and

(3) 1 expressed other views.[38]

Agreed

6.142 A number of consultees who agreed with this proposal did so because they felt it followed from a system of land registration which is underpinned by a state guarantee of title.[39]

6.143 The Law Society expressed this view:

> In view of the Law Commission's proposals to apply similar priority rules to unregistrable interests as to registrable dispositions, there is no reason why the indemnity treatment should be different. While this may result in a greater call on Land Registry's indemnity fund, it is important that there is entitlement to an indemnity to show the value of being able to rely on the register. After all, the primacy of the register underpins land registration law.

6.144 Professor Warren Barr and Professor Debra Morris also noted that the proposal would increase costs, but thought that it was "important in the interests of fairness (as the owner has no other method to protect their interest and entered it, unaware of the mistake)".

6.145 Similarly, The Bar Council considered that:

> the availability of the indemnity is essential in these circumstances. While the increased burden on Land Registry's indemnity fund is acknowledged, this is simply the cost of operating a fair system of land registration. As the reach of the registration system is extended, so must the indemnity be.

6.146 Amy Goymour commented that the proposal seemed "sensible", and was in line with what schedule 8 to the LRA 2002 currently envisages.

6.147 Michael Mark went further and argued that:

> In broad terms anybody who, without fault, loses a property right (including, on the basis of recent decisions of ECHR certain legitimate expectations that such a right will

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36 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; a confidential consultee; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Berwin Leighton Paisner LLP; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Society of Legal Scholars; Dr Charles Harpum QC (Hon).

37 Martin Wood.

38 HM Land Registry.

39 As well as the consultees whose views are expressed in the paragraphs immediately below, Nigel Madeley was also of this view.

be acquired – see my notes on adverse possession below) because of statutory or subordinate legislation, should be entitled to compensation.

6.148 Elizabeth Derrington thought that the proposal seemed reasonable and "should help promote customer confidence in the registration system".

6.149 The National Trust also agreed:

> A holder of an unregistrable interest which has been noted on the register, whose priority is adversely affected by alteration of the register to correct a mistake, should be able to apply for an indemnity from the Land Registry. The National Trust believes that the holder of an unregistrable interest over an unregistered estate which has been registered as a Land Charge whose priority is lost by failure to note the unregistrable interest on first registration should also be able to apply for an indemnity from the Land Registry.

6.150 Berwin Leighton Paisner LLP explained its position by reference to an example:

> If an interest is protected on the Register by a Notice ("N1"), but the Registry cancels N1 by mistake, and another party then registers a Notice ("N2") to protect an interest to which it is entitled, then:
>
> If the Register is altered to restore N1 ahead of N2, then the party who registered N2 ought (in principle) to be entitled to an indemnity. We therefore agree with the proposal.
>
> But if the Register is altered to restore N1 behind N2, then presumably it is the party who registered N1 who ought (in principle) to be entitled to an indemnity, and the party who registered N2 would not need to be indemnified.
>
> In either case, quantifying the amount of the indemnity may be difficult, especially if it all depends on the outcome of events in the future.

6.151 Although Dr Charles Harpum agreed with the proposal, he did so on the basis that it would not "preclude a statutory reversal" of the case *MacLeod v Gold Harp Properties Limited*:[40]

> My assumption is that the intention of the principle at paras 6.57/22.19 is to cover alterations in the register which are not rectification as defined by LRA 2002, Schedule 4, para 1. Where there is rectification, the matter is obviously already covered by LRA 2002 Schedule 8, para 1(1)(a). While I strongly advocate the reversal of the ratio of Gold Harp, I also support the proposal at paras 6.57/22.19.

Disagreed

6.152 Martin Wood commented that "the proposal would amount to introducing an element of state guarantee for these interests". In his opinion, "the scope of the guarantee should not be enlarged in this way".

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[40] [2014] EWCA Civ 1084, [2015] 1 WLR 1249.

Expressed other views

6.153 HM Land Registry expressed concern that the proposal would require the payment of indemnity "where the 'mistake' is not of Land Registry's making, or, indeed, within its knowledge". HM Land Registry said that it "would expect the circumstances in which indemnity is payable to be limited to those in which its own legal or administrative error has caused the loss of priority".

EVIDENCE OF PROBLEMS IN PRACTICE

Consultation Question 20.

6.154 We invite consultees to submit examples of situations in which the holder of an unregistrable interest has suffered loss as a result of the discovery of a prior unregistrable interest with priority.[41]

6.155 11 consultees answered this question.[42]

6.156 The majority of the consultees who answered the questions in chapter 6 of the Consultation Paper did not have any examples to provide in response to the question at paragraph 6.59.[43]

6.157 The Law Society stated that it was not able to provide any real life examples, but

> the obvious example is a developer who has noted a valuable option agreement to buy land, only to find that an earlier unregistrable covenant is noted after the option has been noted, but before the disposition pursuant to the option has taken place. The covenant will prevent the development and the developer has potentially wasted huge amounts of money, for example, in relation to working up planning. There may be contractual rights against the grantor of the option, but inevitably the developer will suffer irrecoverable losses.

6.158 Berwin Leighton Paisner LLP thought that:

> This type of situation can be expected to occur fairly frequently in relation to competing interests such as purchase contracts, liens, equitable mortgages, and rights to rectification and other mere equities. The law reports contain examples.[44]

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41 Consultation Paper, para 6.59.

42 The Law Society; Chartered Institute of Legal Executives; Berwin Leighton Paisner LLP; Property Litigation Association; Michael Hall; London Property Support Lawyers Group; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Howard Kennedy LLP; The Bar Council; and the Berkeley Group.

43 Chartered Institute of Legal Executives; Property Litigation Association; Michael Hall; Pinsent Masons LLP; The Bar Council.

44 Citing *Halifax Plc v Omar* [2002] EWCA Civ 121, [2002] 2 P & CR 26; and *Bank of Scotland Plc v Joseph* [2014] EWCA Civ 28, [2014] 1 P & CR 18.

The frequency should reduce significantly if the proposal in para 6.30 [at Consultation Question 14] is adopted.

6.159 The London Property Support Lawyers Group stated that it did not have any direct examples of loss being suffered. But it suggested that such a situation could arise:

> Assume that a developer takes an option to acquire land and there is a prior unprotected equitable interest (for example an equitable mortgage created by a debenture that has not been registered at the Land Registry). If the debenture holder exercises their rights under the charge, then the developer suffers loss as the debenture holder may be able to sell free from it.

6.160 Dr Charles Harpum also had no examples to give, but suggested that the problem could arise in the context of second charges which can only take effect in equity rather than law as a result of a restriction on the register preventing registration of a charge without the consent of the first chargee.

6.161 The Berkeley Group offered a different view from the consultees above, noting that its solicitors did not believe that the issues discussed in this chapter of the Consultation Paper were an issue in practice.

IMPACT OF PROPOSAL

Consultation Question 21.

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

Do consultees agree?[45]

6.163 23 consultees answered this question:

(1) 14 agreed;[46]

(2) 5 disagreed;[47] and

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45 Consultation Paper, para 6.63.

46 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Adrian Broomfield; Dr Aruna Nair; The Bar Council; Chartered Institute of Legal Executives; Burges Salmon LLP; Martin Wood; Berwin Leighton Paisner LLP.

47 Society of Licensed Conveyancers; Howard Kennedy LLP; HM Land Registry; The Law Society; Dr Tola Amodu.

(3) 4 expressed other views.[48]

Agreed

6.164 Nigel Madeley agreed with what was said in the Consultation Paper about current practice. He went on:

> the periods between exchange and completion are shorter than they used to be – I'd guess that a couple of weeks is the norm. Added to that the parties tend to be in direct contact with each other and will normally get a feel if something is wrong. The buyer will also be taking other risks if he does not inspect the property 1) immediately before exchange and 2) on completion to check that vacant possession is being given.

6.165 Martin Wood also agreed with the statement at paragraph 6.60 of the Consultation Paper that, in practice, conveyancers would normally protect interests on the register to ensure their priority against a subsequent registrable disposition. As a result, he thought that "the practical effect of the proposed change will therefore be minimal", but on that basis suggested that there was no compelling reason for the proposed changes.

6.166 The London Property Support Lawyers Group pointed out that:

> if the official search is extended to cover applications to note an unregistrable interest the number of official searches that will be carried out will increase significantly – probably by a far greater number than the number of outline applications presently carried out.

6.167 Howard Kennedy LLP, who disagreed with this question, echoed this sentiment about the impact on the number of priority searches.

6.168 The Chartered Institute of Legal Executives pointed out that "if e-conveyancing does take place then a statutory registration of the contract to buy can be made as part of the exchange process".

Disagreed

6.169 Some stakeholders, including representative professional bodies such as the Law Society and the Society of Licensed Conveyancers, as well as HM Land Registry, thought that we had incorrectly assessed the impact of our proposals on conveyancing practice.

6.170 The Law Society explained that:

> Having highlighted the current flaws and proposed a solution, the Law Commission's proposal is in our view likely to encourage more solicitors to protect unregistrable interests with a notice.

6.171 I thought that while this–

> may to a small degree increase the burden on those entering into relevant transactions, it is a comparatively small price to pay to ensure proper protection of the

[48] The Conveyancing Association; Chancery Bar Association; Mangala Murali; Dr Charles Harpum QC (Hon).

relevant interest. Such an extra burden should not be a reason for the Law Commission not to proceed with this proposal.

6.172 The Society of Licensed Conveyancers thought that it would become standard practice to notify estate contracts where there were "third party occupier spouse rights".

6.173 Dr Tola Amodu commented that the proposal appeared to have the potential effect of increasing the number of entries on the register, and asked whether (given the incentive of priority) this would result in a proliferation of entries.

6.174 HM Land Registry also disagreed, outlining its view that the proposal was "highly likely to lead to an increase in applications (both substantive and for official searches)". It explained that under the proposal –

> conveyancers are more likely to consider themselves at risk of being negligent if a notice is not entered", in part because the new rule would bring the issue to the fore, but also because priority can be lost not only on a disposition – which a conveyancer may consider to be a very low risk bearing in mind the parties and his or her client's interest (for example where there is an unconditional purchase contract with a completion date that is in the near future) – but also to any other unregistrable interest that arises before completion that would otherwise not have priority (whether or not in favour of a third party and whether or not arising out of a consensual arrangement with the registered proprietor of the land).

6.175 This view was shared by Howard Kennedy LLP, who argued that

> If a solicitor could have entered a notice to protect the contract but didn't and the client suffers loss as a result there could be a negligence claim. The changes could increase work for residential practices, in particular because courts don't seem to differentiate between types of transaction when deciding on the standard of care required.

6.176 To address this, Howard Kennedy LLP queried whether it would be possible to exclude "unconditional contracts with contractual completion dates no more than 20 working days from exchange of contracts" from the new priority rule proposed in Consultation Question 14.

6.177 HM Land Registry also noted that:

> In addition, if the Law Commission were to conclude that, as a consequence of responses made to the question at paragraph 6.54, there should be a period of time during which those who have the benefit of unregistrable interests can apply to note those interests or risk losing priority to interests that would not ordinarily have priority then there will inevitably be more applications because that is the only way in which such interests can be protected (we note Land Registry's experience in respect of interests that ceased to override in 2013). The number of any such applications, and the effect upon Land Registry and its customers, is, we think, extremely difficult to gauge.

Expressed other views

6.178 A few consultees, including Dr Charles Harpum, expressed the view that it was not possible to answer this question. Mangala Murali described the question as

"speculative", and the Conveyancing Association thought there was insufficient data to say.

6.179 Dr Harpum commented that:

> My experience arising out of LRA 2002 is that some things that were thought likely to have only marginal consequences did not in fact have such a limited effect. For example, on the basis of the Land Registry's experience, it was not thought that there would be many case of opposed applications for registration coming to a hearing. What actually happened was quite different.

6.180 The Chancery Bar Association expressed themselves as "unsure":

> There may be a significant increase in the number of estate contracts, which are not commonly protected at present, being protected by a notice. If there is evidence from consultees that this is likely to be the case this would be a further argument against the proposal in [Consultation Question 14].

PRIORITY SEARCHES

Consultation Question 22.

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

Do consultees agree?[49]

6.182 30 consultees answered this question:

(1) 26 agreed;[50] and

(2) 4 disagreed[51]

Agreed

6.183 Consultees who agreed with this proposal largely did so because they thought it flowed from the principal proposal in Consultation Question 14 above. The Law Society thought it was a "a logical extension to match the extension of the section 29 protection to

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49 Consultation Paper, para 6.71.

50 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Everyman Legal; Michael Hall; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Taylor Wessing LLP; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Society of Legal Scholars; Martin Wood; Dr Charles Harpum QC (Hon); Amy Goymour.

51 The City of Westminster and Holborn Law Society; HM Land Registry; Mangala Murali; The Berkeley Group.

unregistrable interests",[52] Pinsent Masons LLP described it as "a necessary corollary" of the principal proposal for the new priority rule, and the Society of Licensed Conveyancers thought that it was "logical to have a consistent process".

6.184 Nigel Madeley focused on the types of interest which could benefit from a priority search under this proposal:

> Options, conditional contracts and agreements for leases can be large and expensively put-together documents. There is no obvious reason to make their registration precarious, especially if a significant option fee is payable (and not returnable).

6.185 Berwin Leighton Paisner LLP agreed, stating that the priority search would be "a valuable means of achieving protection" for contracts like options or purchase contracts. It added:

> Presumably, a priority search to protect an imminent notice registration will be revealed in a later priority search to protect a registrable disposition, and vice versa.

6.186 Two consultees who did not agree with our principal proposal at paragraph 6.30 of the Consultation Paper, nonetheless went on to consider the position if that proposal was adopted. Both Martin Wood and Dr Charles Harpum stated that they would support the proposal at paragraph 6.71 if the principal proposal was adopted.

Disagreed

6.187 Mangala Murali thought that official searches with priority "pertain more to registered titles and should be left intact to avoid confusion".

6.188 The Berkeley Group was resistant to buyers being able to lodge priority searches in order to enable protection of estate contracts:

> Our experience is that estate contracts are protected by unilateral notices, particularly by overseas buyers or for off-plot sales. If priority searches were permissible, on our large sites this could prompt hundreds of such applications where many sales are being completed on the same day. With the delays being experienced in securing registrations, solicitors increasingly have to rely on priority searches, where they can, or by inspection of the Day Lists as up-to date OCEs are rarely available. This is an acute problem particularly for a residential development site, where hundreds of applications could be pending at any one time, so it effectively means one can never view the up-to-date title for a number of years until all sales have been completed and registered.
>
> If the Commission is minded to still make its recommendation, then the application forms should have stringent requirements as to the information provided, so it is clear as to the details and the nature of each application.

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[52] Similar views were expressed by Professor Warren Barr and Professor Debra Morris, and the Society of Legal Scholars.

6.189 HM Land Registry referred to its alternative proposal to that at paragraph 6.30, of making provision for estate contracts to be classed as registrable dispositions:

> If an approach based upon classifying a limited number of interests as registrable dispositions is adopted then it would enable the existing machinery of official searches to be adapted to include those interests.
>
> However, if the provisional proposal at paragraph 6.30 is taken forward then Land Registry would suggest that the manner in which an official search in respect of an unregistrable interest is undertaken be a subject for rules. Land Registry is concerned about the potential complexity of ensuring that the interest covered by a notice (which may contain little detail about the nature of an interest) is the interest that was protected by an official search, and also the broad – in both nature and number – range of interests that might be protectable. As a consequence, the forms and procedures to undertake an official search are likely to need to be considered in detail before they are implemented and then adapted over time.

6.190 The City of Westminster and Holborn Law Society thought that allowing priority searches for unregistrable interests "would have resource implications for the Land Registry and conveyancers in excess of any benefit generally".

Other issues raised in response to this question

6.191 Amy Goymour queried the application of the proposal to existing section 29(4) of the LRA 2002:

> where B relies on s 29(4), can he rely on a priority search under the current law? Should he be able to do so? A problem is that the priority search provides protection for 30 days up to the date of applying for registration (or by extension for a notice, under the new proposals). By definition, those relying on s 29(4) do not apply for anything to go on the Register, so it would be hard to know whether the lessee has acted in time to qualify for the priority search's protection (save for perhaps calculating the time of reliance as when the lease was granted?). (I have noted that later in the CP, there is discussion of the use of priority searches against a competing short lease, but not a discussion of priority searches used by tenants of short leases.)

Consultation Question 23.

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

Do consultees agree?[53]

[53] Consultation Paper, para 6.79.

6.193 28 consultees answered this question:

(1) 26 agreed;[54]

(2) 1 disagreed;[55] and

(3) 1 expressed other views.[56]

Agreed

6.194 The Law Society thought that provided the ancillary applications are specified on the application form for the priority search, it is clear to third parties that there is an ancillary application protected by the search and that further investigations may be required. It was of the view that "the current inadequate protection offered by the outline application in this regard emphasises the need to implement the proposal".

6.195 Pinsent Masons LLP believed that the proposal was:

> eminently sensible and potentially very useful in the sort of situations cited at paragraphs 6.74 to 6.76 of the consultation. It would reflect what an objective bystander might reasonably assume could be achieved under the current system.

6.196 The Society of Licensed Conveyancers agreed with the proposal but warned that the search application must contain sufficient detail not only to flag the existence of an ancillary application but also explain its purpose and effect.

6.197 Professor Warren Barr and Professor Debra Morris did not consider that the changes required to forms should constitute a barrier to the proposal.

6.198 Nigel Madeley quoted paragraph 6.76 of the Consultation Paper, which explained that although stakeholders have raised the issue with us in the context of a charge, the same difficulty could arise in relation to a transfer which contains an agreement by the parties for the entry of a restriction on the relevant title in order to protect obligations set out in that transfer. He continued:

> I have taken the view that if the parties to a transfer agree to enter the restriction, anyone else who is 'parasitic' on that document (the usual case is a mortgagee) cannot get 'ahead of' the restriction, because the transfer on which the charge is parasitic contains the restriction. The chargee cannot be better off than the transferee. It would be perverse if the mortgagee could somehow take free from a restriction that is part of the deal by which he is taking the charge and to which the transferee is subject.

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54 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Everyman Legal; Michael Hall; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Berwin Leighton Paisner LLP; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Dr Charles Harpum QC (Hon).

55 The City of Westminster and Holborn Law Society.

56 HM Land Registry.

Added to that, a restriction does not confer priority, so logically the rules of priority cannot apply to it. On that basis a priority search to register the restriction is not only unnecessary but wrong in logic.

6.199 Dr Charles Harpum supported this proposal if, and only if, the principal proposal in Consultation Question 14 was adopted.

Disagreed

6.200 The City of Westminster and Holborn Law Society disagreed with the proposal. It thought that "any such system should be limited. The existing system has focus on a likely mortgage on a purchase".

Expressed other views

6.201 HM Land Registry explained that it understood and agreed with the intention that lies behind this proposal. However, it did not feel able to support it without greater detail about its implementation:

> In particular, Land Registry is concerned about the possible impact the proposal would have upon Land Registry's operations and systems and the extent of the changes that our customers would have to make. For instance:
>
> > It is not clear what changes would be necessary to forms, or Land Registry's customer facing electronic systems (Portal / Business Gateway), or its internal casework management and other systems, or to systems used by its customers.
> >
> > Land Registry would have concerns if the proposal impacted adversely on the automation of the processing of official searches (for example, Land Registry would not want to jeopardise the very efficient automatic processing of OS1s).
> >
> > Land Registry would be concerned if there were to be a necessity to lodge additional forms, or if there were to be greater potential for mistakes to be made by customers, or by Land Registry in their processing.
> >
> > If the effect of the proposal was to be that each ancillary application in a document had to be identified and accounted for then it is likely that it would prevent, or hamper the automation of registration services, which would be unacceptable from Land Registry's perspective.

Chapter 7: Valuable consideration

INTRODUCTION

7.1 32 consultees responded to the questions in Chapter 7 of the Consultation Paper.[1]

7.2 The vast majority of consultees were in favour of retaining the requirement of valuable consideration in section 29 of the LRA 2002. Most consultees were however in favour of clarifying its meaning. The majority of consultees agreed that the exclusion of "nominal consideration in money" should be removed from the definition of valuable consideration in the LRA 2002. Consultees also generally agreed with our proposals in relation to the treatment of reverse premiums and land with negative value. Consultees were more divided as to whether a peppercorn should amount to valuable consideration and so attract the priority protection in section 29.

7.3 Consultees also general agreed that clarifications of the meaning of valuable consideration should apply to the whole of the LRA 2002; the exception was in relation to section 86, which several consultees thought should be treated exceptionally.

GENERAL COMMENTS

7.4 Dr Charles Harpum QC (hon) made some introductory comments to this Chapter, which were separate from his responses to the individual questions posed.

7.5 Dr Harpum noted firstly that the issue of what constitutes "valuable consideration" was considered and consulted upon in our 1998 Consultation Paper.[2] In discussion, the Law Commission and HM Land Registry followed the provisions of LRA 1925, sections 20 and 23, except that it was proposed that marriage consideration should be abandoned as a form of valuable consideration. That proposal was "unanimously accepted" on consultation. He explained that Law Commission and HM Land Registry were of the view that the meaning of "valuable consideration" should be any consideration that was not a nominal consideration; with the meaning of both "valuable consideration" and "nominal consideration" taken as having been definitively settled by Lord Wilberforce in *Midland Bank Trust Co Ltd v Green*.[3] Valuable consideration was understood to be "an advantage conferred or a detriment suffered", and so reverse premiums and a transfer of land with a negative value would appear to fall squarely within that definition. Dr Harpum noted that according to Lord Wilberforce, nominal

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1 Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Society of Legal Scholars; Pinsent Masons LLP; Dr Charles Harpum QC (Hon) QC (hon); Dr Tola Amodu; National Trust; Nottingham Law School; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; Amy Goymour; a confidential consultee; Berkeley Group; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Christopher Jessel.

2 Para 3.42 and following.

3 [1981] AC 513.

consideration was a sum or consideration which can be mentioned but not necessarily paid.

7.6 With the guidance from Lord Wilberforce's judgement, Dr Harpum considered it is open to parties to make their own choices:

> If parties want to be sure that a consideration is nominal they can specify a peppercorn. If they want to make it clear that a disposition is made for valuable consideration it is not very difficult for them to do so. If the parties want to be sure that a transfer is for valuable consideration, they should specify a figure about which there can be no doubt.

7.7 Dr Harpum noted that the figure specified may change as the value of money falls. However, he considered that, at present, £50 is not a consideration which is mentioned but is not paid; "it is paid and it is unquestionably valuable consideration".

7.8 Dr Harpum commented that cases in which there is an issue about whether the consideration is nominal or valuable are likely to be few in number (I am not aware of any cases on the point under LRA 2002). Dr Harpum considered that there is little difficulty in regarding £1 as nominal consideration and noted that it is expressly so treated in at least one statute: the Inheritance Tax 1984, section 186A(1). He noted that there is also case law to the same effect, recent examples being *Hamilton v Hamilton*[4] and *Purewal v Countrywide Residential Lettings Ltd*.[5] He therefore questioned where the uncertainty lies.

7.9 Lastly Dr Harpum noted that the fact that a transfer recites that a sum of money has been received does not prevent evidence being adduced to show that it was never paid and this is something on which, in his experience, cases have turned.

SHOULD THE REQUIREMENT OF VALUABLE CONSIDERATION IN SECTION 29 BE RETAINED AND CLARIFIED?

Consultation Question 24.

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

Do consultees agree?[6]

7.11 The question contained two sub-questions: should the requirement of valuable consideration be retained, and should it be clarified.

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4 [2016] EWHC 1132 (Ch), at [191] (Henderson J).

5 [2016] 4 WLR 31, at [6] (Patten LJ).

6 Consultation Paper, para 7.68.

7.12 31 consultees responded to our provisional proposal that the requirement of valuable consideration should be retained:

(1) 28 agreed that the requirement should be retained;[7]

(2) 1 disagreed and suggested that the requirement should be abolished;[8] and

(3) 2 expressed other views as they were unsure whether retention is justified.[9]

7.13 31 consultees considered our provisional proposal that the requirement of valuable consideration should be clarified:

(1) 24 agreed;[10]

(2) 1 disagreed;[11] and

(3) 5 expressed other views.[12]

Agreed with both proposals

7.14 An overwhelming majority of consultees agreed with both proposals (in other words, agreed the requirement of valuable consideration should both be retained and be clarified). The need for clarity was a theme that was continued in responses to a number of the proposals in this chapter.

7.15 Professor Warren Barr and Professor Debra Morris did not consider that there was any compelling reason to remove the long-standing requirement of valuable consideration. However, they stated that the clarification of any rule is always desirable, as long as the change itself does not cause confusion.

7.16 The Chartered Institute of Legal Executives supported the proposal but questioned what would happen in the case that a person is given a property as a gift and then mortgages it, because if a priority search was done in the borrower's name it would not have

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7 Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Tola Amodu; Nottingham Law School; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; Mangala Murali; Berkeley Group; Dr Charles Harpum QC (Hon) QC (hon); the National Trust, HM Land Registry.

8 Christopher Jessel.

9 The Law Society; Society of Legal Scholars.

10 Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Tola Amodu; Nottingham Law School; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; Mangala Murali; Berkeley Group.

11 Christopher Jessel.

12 Dr Charles Harpum QC (Hon); National Trust; HM Land Registry; The Law Society; Society of Legal Scholars.

priority. CILEx questioned whether a lender would be protected in such circumstances and, if not, whether they should be.

7.17 Nottingham Law School was of the view that the valuable consideration requirement in section 29 represents the survival of an important element of the priority scheme:

> It is of course an indication that the system of title registration is set up to protect the interests of good faith participants in the land market. It is not set up to permit those who have not provided valuable consideration to destroy the interests of prior holders of interests in the land.

7.18 The Law School felt that although the phrase 'valuable consideration' has suffered from some "emptying out of its content" it retains some purpose, and any development to expand its content would be beneficial, rather than to restrict its content yet further.

7.19 Some consultees made comments in their responses to this question that went beyond the proposal itself and touch upon other points that had been discussed in the Consultation Paper.

7.20 Amy Goymour stated that whilst she agreed with our proposal, she felt that this chapter of the Consultation Paper dealt with "rather too many" overlapping issues which need to be extricated from one another.

7.21 Nigel Madeley agreed with our proposal, but highlighted a "clash of concepts" between his understanding of peppercorn consideration and the one put forward in the Consultation Paper. Mr Madeley also noted that he agreed with our commentary on *Johnsey Estates Ltd v Lewis & Manley (Engineering) Ltd*[13] and *Westminster City Council v Duke of Westminster*,[14] namely that it cannot be argued that that £1 is nominal but £5 or £10, or even £100, is not. He also agreed with our remarks about gifts and bargains.

7.22 In relation to what constitutes valuable consideration, Mr Madeley argued that, if clarity is desired, you must either "revert to the contract test or draw some other clear line". However, did not know what that line could be other than market value, taking all things into account, and with the burden of proof being on the person who is arguing that a disposition was not for market value.

7.23 Mr Madeley was also of the view that extending section 29 to include acquisition by gift "doesn't feel right" referring to the "deep-seated distinction" between gifts and purchases for value in English land law. He considered that if a person has an interest in land but hasn't registered it, a person who acquires the land for free has "no moral case" to override the individual who has failed to register; "it feels like a windfall". Mr Madeley was not convinced that it is always reasonable to expect a person to register rights, especially in a non-commercial context.

7.24 Dr Aruna Nair stated that section 29 of the LRA 2002 has the effect of weakening the vested rights of individuals, and whilst this can be justified as against a purchaser who

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13 (1987) 54 P & CR 296 (CA).

14 [1991] 4 All ER 136.

has relied on the register, the argument is weaker in respect of protecting rights vested in favour of a donee. Dr Nair was unconvinced by the argument that such rights should be at risk because their holders have not chosen to register them (when they should have done so because there is a system of title registration) unconvincing, and said it would only be true if the ends of the title registration system are defeated by a failure to register. She did not believe this is the case, however, provided purchasers remain protected against such an unregistered right.

7.25 Dr Nair also provided an explanation of her interpretation of the purpose behind the section 29 rule. She argued that the priority postponing rule can be justified in utilitarian terms, for example, as a mechanism for producing efficiency in the property market by lowering information costs when parties are bargaining to acquire or transfer land. Therefore, if this is the justification for the rule within the scheme of the title registration system, gifts and other transactions that do not have the form of bargains are not within the scope of this justification as they are not market transactions. These transactions are sometimes unilateral decisions made by the landowner, which do not require the recipient to do or decide anything before acquiring title (as is the case with inheritance). As such, the concept of information costs is irrelevant:

> Efficiency in allocation of the land is not impaired by the risk that the donee will be bound by rights she did not know about (as there is no cost/benefit decision for the donee to make in a case where she is receiving rights gratuitously, even where she is actually a participant in that decision).

7.26 Alternatively, Dr Nair suggested that the existence of section 29 can be explained as protection against detrimental reliance on the register; having been promised a complete and accurate record of the state of the title to the land, a purchaser is entitled to make decisions based on and only on the information found on the register. She stated that this justification does not apply to a donee, since, first, the donee will not have suffered any detriment and, secondly, the donee may not be making any decision at all in reliance on the register (as in the case of inheritance).

7.27 In light of the above, Dr Nair felt there is “no good reason” for postponing the priority of pre-existing rights in favour of a mere donee. She agreed with our view that any such change would represent a major overhaul of the existing law, and also, that it would be an unprincipled change, inconsistent with the aims of the title registration system “whether understood in terms of efficiency or in terms of rights-protection”.

Disagreed with both proposals

7.28 Christopher Jessel disagreed with our proposal stating that the logic for not protecting equitable interests where there was no valuable consideration was that equity did not assist a volunteer:

> The justification was that someone who received property without consideration should simply accept what he got, subject to any rights which affected it, and should not look a gift horse in the mouth.

7.29 By contrast, Mr Jessel argued, a purchaser for value was not to be bound by equitable rights he had no means of discovering. At the time these rules were developed, titles were, in general, confidential (not normally being deduced until after contracts were

exchanged) and often subject to complex family arrangements. Therefore, where an irremovable incumbrance was disclosed on the title, the purchaser could normally raise a requisition and claim a right of rescission.

7.30 Mr Jessel stated that much of this logic is now obsolete, and the effect of section 29 of the LRA 2002 (and its predecessors) has been to modify the rules for the purposes of registration of title. He considered that whilst the rule may still have some justification in the case of inheritance, where it is arguable that the recipient should simply take whatever the testator had and therefore be subject to all rights which would have bound the testator, it is no longer suitable in other contexts.

7.31 In relation to registered titles which are open to public inspection, Mr Jessel stated that the justification for the former rule has gone and priority should depend on the order of registration not whether consideration has been given.

7.32 Additionally, Mr Jessel considered that there is also the problem that a right may revive. He gave the following example:

> Suppose a legal easement is granted over unregistered land but is overlooked on first registration because there was no indorsement on the title deeds. Following first registration it will be an overriding interest under schedule 1 paragraph 3 but if it is not obvious then under schedule 3 paragraph 3 following a disposition for value, if it is not known to the disponee and has not been exercised for a year it will not bind the disponee. If the disposition was not for value, such as inheritance, it will still bind. If the disponee for value later transfers by gift, or dies and someone inherits, then the right may once again bind the donee/devisee.

7.33 He argued that, as the rights of the dominant owner will depend on the accident of how the servient land last changed hands, it would seem to be irrelevant and possibly unjust that whether the land was given or sold by one owner to another should affect the rights of third parties who have no knowledge of the disposition and no influence over its form.

7.34 Mr Jessel considered that instances of inter-company transfers of the kind mentioned at paragraph 7.61 of the Consultation Paper will rarely occur, as there will often be some payment or indemnity by one member of the group to another. The disposition will thus normally count as a disposition for value as the courts would not pierce the corporate veil. While he recognised that an inter-company transfer might be seen as a way of avoiding some onerous obligation that is not on the register, Mr Jessel stated that this will most often be in the context of insolvency and so parties who suffer loss may have other remedies outside of land law.

7.35 More generally, Mr Jessel stated that the various points made in Chapter 7 of the Consultation Paper suggest that the concept of valuable consideration causes more difficulties than it resolves. In relation to the discussion at paragraph 8.46 of the difficulty of requiring an applicant for a unilateral notice to provide evidence that a disposition was not for valuable consideration, he suggests that the law could be simplified if the whole concept of valuable consideration were to be scrapped so that there were no distinction between a bargain and a gift inter vivos.

7.36 He went on to say that the issue is how far third parties should be protected when the principal practical problem may be potential fraud or insolvency. Mr Jessel considered

that such situations "would seem to be covered by the existing law", and as it is so easy to structure a transaction as a disposition for value in order to defeat third party rights, "the requirement of value would seem to add little". Taking the example given in paragraph 7.58, he questioned why the person who paid a significant amount failed to register and the "somewhat unusual" circumstance of the registered proprietor (who is presumably no longer the beneficial owner) subsequently granting a gratuitous restrictive covenant.

7.37 Mr Jessel stated that the reason the rule applies to equitable rights and not legal ones is a historical hangover from the origin of equitable rights in Chancery jurisdiction. He argued that, if the issue were being considered afresh, it is likely that proprietary incorporeal equitable rights such as restrictive covenants and options would be regarded in a similar way to legal rights such as easements and profits and be subject to similar rules.

7.38 Mr Jessel concluded by stating that perhaps it is still not too late to equate the treatment of equitable rights with legal ones and, if this is done, two modifications could be made to the LRA 2002:

(1) There could be a requirement of good faith that the disposition was not intended to avoid third party rights. The same could apply to inter-company dispositions although bad faith may be more difficult to establish for a company. There could be a rebuttable presumption that any transaction was made in good faith so the onus would be on the person challenging the transaction to establish the lack of it.

(2) The rule in section 29 could be retained in cases of inheritance, where it is arguable that a devisee should step into the shoes of the testator.

Agreed with retention but expressed other views regarding clarification

7.39 There were a number of consultees who agree that the requirement of valuable consideration in section 29 should be retained but who neither agreed nor disagreed that the requirement should be clarified and who chose to make other comments.

7.40 Dr Harpum agreed that the requirement of valuable consideration should be retained. However, he did not think that the term needs to be clarified in light of *Midland Bank Trust Co Ltd v Green*,[15] "which gave the highest judicial guidance as to its meaning". He said there are also other cases which provide guidance.

7.41 Dr Harpum considered that our proposals do not do much to clarify the matter, and are "more likely to confuse than to illuminate". He noted that the present law has been in place for 90 years and has given rise to "little, if any, litigation", and that *Midland Bank* itself was a decision concerning the transfer of unregistered land.

7.42 HM Land Registry also agreed that the requirement for valuable consideration should be retained. However, it urged that any reform in this area should be considered with

[15] [1981] AC 513.

great care as it recognised that this is a "difficult area of law".[16] HM Land Registry stated that it saw arguments both for and against the clarification of what valuable consideration means for the purposes of the LRA 2002:

> On the one hand, it is arguable that there is no need for clarification because it is a concept that is well used in other statutes (for example, the Adoption and Children Act 2002 and Factors Act 1889), and any clarification may cause more problems than it solves (including the possibility of calling into question the effect of transactions preceding any reform).
>
> On the other hand we recognise that "valuable consideration" carries with it little certainty under the current law. For example, it cannot be easily determined whether a disposition in consideration of (i) a peppercorn, (ii) a payment which is never made and never intended to be made, or (iii) a very small payment (such as £10), is "valuable consideration" for the purposes of the LRA 2002.

7.43 The National Trust partially agreed with our proposal. It argued that gifts of land of conservation or heritage interest to conservation organisations, like the National Trust, which intend to hold such land for public benefit indefinitely should come within the protection afforded by section 29. It considered that in such instances, the benefit to the public should be deemed to be consideration.

Expressed other views regarding both proposals

7.44 Two consultees expressed other views about both the retention and the clarification of the requirement for valuable consideration.

7.45 The Law Society stated that whilst it could see "the logic and some merits of what is proposed", it also saw disadvantages of retaining the requirement of valuable consideration, and felt that the Law Commission should give further consideration to these disadvantages.

7.46 The Society considered that the problem highlighted in paragraph 7.9 of the Consultation Paper (that a disposition that is not made for valuable consideration cannot be the subject of a priority search) is a real one "of which many practitioners may be unaware". Some will be aware that if a disposition is not made for valuable consideration, it is not capable of being the subject of a priority search. However, the Society was concerned that some may be confused into thinking that such a disposition is protected because they have received an official priority search certificate from HM Land Registry. There is little that HM Land Registry can currently do about this, because it will not necessarily be able to tell whether valuable consideration has genuinely been given for a disposition. However, the implications for the applicant are potentially serious, because the search does not protect the disposition.

7.47 The Society therefore considered it "sensible" for the Law Commission to consider proposals to seek to remove this potential trap.

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[16] HM Land Registry reiterated its call for caution in its responses to the further questions posed in this chapter. However, we only include HM Land Registry's responses to these further questions where it has made further comments in addition to its call for caution.

7.48 In concluding, the Society stated that it did not believe that the valuable consideration requirement should be removed, just that the Law Commission should give further consideration to the implications, positive or negative, of making such a change.

7.49 The Society of Legal Scholars said that, in discussing the issues raised in Chapter 7 of the Consultation Paper, it was unable to reach a consensus on the answer:

> Views ranged across the entire spectrum. Some contributors supported the protection of donees on the basis that reliance on the register was the dominant factor. Some contributors suggested that only those who pay substantial consideration should be protected in order to limit the threat to static security and on the basis that only the payment of substantial consideration would be a significant moral factor in favour of purchasers.

7.50 In light of that range of views, the Society of Legal Scholars did not otherwise substantially respond to our Consultation Paper proposals in this chapter.

Comments regarding other options for reform

7.51 Some consultees made suggestions for reform that went beyond those put forward in the Consultation Paper.

7.52 Nigel Madeley said that if land dealings are governed by contract law, then adequacy is irrelevant and what matters is whether the parties have struck a bargain; "a peppercorn consideration is evidence of a bargain and must therefore be accepted as sufficient consideration". However, he noted that this might not be sufficient as land attracts its own principles: "a simple transfer without a prior contract lies in grant, not contract, so how can contractual rules apply to it?".

7.53 Mr Madeley questioned whether, when drawing the line on the adequacy of consideration, adding the word "valuable" is sufficient. He did not consider that a peppercorn constitutes valuable consideration. He stated that if a peppercorn does constitute valuable consideration, it would be hard to think of any consideration at all that would not be "valuable".

7.54 The Society of Licensed Conveyancers stated that, whilst it agreed that the requirement of valuable consideration should be retained, issues around clarification might merely create new problems. It considered that the use of terms such as "gift", "bargain" or "gratuitous" disposition would in turn lead to litigation to define these terms.

SHOULD THE DEFINITION OF "VALUABLE CONSIDERATION" EXCLUDE NOMINAL CONSIDERATION?

Consultation Question 25.

7.55 We provisionally propose that the definition of valuable consideration in section 132 of the LRA 2002 be amended so that "a nominal consideration in money" is no longer excluded from the definition of valuable consideration.

Do consultees agree?[17]

7.56 28 consultees answered this question:

(1) 23 agreed;[18]

(2) 4 disagreed;[19] and

(3) 1 expressed other views.[20]

Agreed

7.57 Professor Barr and Professor Morris agreed with our reasoning in paragraph 7.47 of the Consultation Paper.

7.58 Berkeley Group believed that section 132 of the LRA 2002 is often forgotten in respect of making priority searches, and so clarity would be welcomed. Similarly, the National Trust agreed on the basis that the proposal will bring clarity to the law.

7.59 Howard Kennedy LLP considered that if the requirement of valuable consideration is retained on the understanding that it applies to "bargains", the additional qualification in section 132 "which is of uncertain meaning itself" should be dispensed with.

7.60 The London Property Support Lawyers Group stated that it could "see the logic", in the light of the decision in *Halifax plc v Curry Popeck*,[21] that where consideration is stated and not paid this may mean the concept of consideration is "meaningless". However, the Group noted that in the commercial sphere (for example in the insolvency context)

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17 Consultation Paper, para 7.69.

18 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Tola Amodu; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Berkeley Group.

19 Michael Mark; Dr Charles Harpum QC (Hon); The Bar Council; Mangala Murali.

20 HM Land Registry

21 [2008] EWHC 1692 (Ch), [2009] 1 P & CR DG3.

it is not uncommon that consideration of £1 or a peppercorn is stated but not paid; as such "it would be of concern if this fact rendered section 29 protection nugatory".

7.61 Pinsent Masons LLP endorsed the London Property Support Lawyers Group's response, but added that to avoid uncertainty, it would also favour an express provision to the effect that any monetary consideration or, if preferred, any monetary consideration of eg £1 or above, constitutes valuable consideration for the purposes of the Act.

7.62 The Society agreed with our comment in paragraph 7.46 about the difficulty of where to draw the line as to what constitutes nominal consideration. For that reason, it agreed with our position in paragraph 7.47, that the exclusion of 'nominal consideration in money' from the definition of valuable consideration in section 132 no longer serves a useful purpose.

7.63 The Society noted in relation to our comments in paragraph 7.48, that a court can find that no 'valuable consideration' has been provided where consideration is specified in transaction documents but nothing changes hands, and that the example given in paragraph 7.49 is a fraud case. However, it stated that there may be many lawful transactions, such as intra-group transfers "where a valuable consideration of thousands if not millions of pounds" is specified in the document, but "nothing changes hands" because it is intra-group (although there may be changes to book entries). The Society stated that it would not want such transactions to be regarded as lacking valuable consideration:

> If they were seen in that way, how could one tell, on looking at a document which contained such a substantial consideration, that it was not for a valuable consideration.

7.64 In relation to our discussion of nominal consideration in money at paragraph 7.38 onwards, the Law Society raised the difficulties of obtaining an order for specific performance if the contract lacks adequate consideration, stemming from the principle that "equity will not assist a volunteer".

7.65 Christopher Jessel referred to his response to the proposal at paragraph 7.68 and stated that if we decided to retain the requirement for valuable consideration contrary to his views, a possible approach to the definition of "nominal consideration in money" could be found at section 153(1)(b) and (4) of the Law of Property Act 1925. Mr Jessel noted that the reference to one pound was not contained in the 1881 Act but was introduced into the 1925 Act, "although its value then was much more than it is now".

Disagreed

7.66 Those consultees who disagreed with our proposal provided the following comments.

7.67 Michael Mark disagreed with paragraph 7.69 of the Consultation Paper, stating that he had encountered several cases where property had –

> been transferred between family members or companies in a group in circumstances in which no real consideration has passed and in some cases the objective has been to override interests not noted on the register.

7.68 Mr Mark said he would prefer for valuable consideration to be defined along the following lines: "consideration passing on a bona fide arm's length transaction for value". Referring to subsequent proposals in this chapter, he added that where an interest has a negative value, whether a reverse premium is paid or not, one of the questions that needs to be asked is whether that transaction had as an objective the negating of a known property interest.

7.69 Dr Harpum did not agree with the proposal in light of the guidance in *Midland Bank Trust Co Ltd v Green*[22] and other case law. He explained that under section 205(1)(xxi) of the Law of Property Act 1925, the definition of "purchaser" also includes a similar definition of "valuable consideration" but it does not include "nominal consideration". Dr Harpum noted that the same is true in many other Acts such as the Administration of Estates Act 1925, section 55(1)(xviii), and the Inheritance Tax Act 1984, section 272. He therefore questioned why this is it a problem unique to registered land.

7.70 In an additional comment not directed specifically at this proposal, Dr Harpum noted that according to Lord Wilberforce, nominal consideration was a sum or consideration "which can be mentioned but not necessarily paid". With that guidance, Dr Harpum considered that it is open to the parties to make their own choices and if parties want to be sure that a consideration is nominal, they can specify a peppercorn.

7.71 The Bar Council disagreed on the basis that the policy behind section 29 LRA 2002 is to offer priority to the interest of the transferee of a registered estate who has acquired it for valuable consideration; it excludes from such priority the interest of a donee of the registered estate. In so doing, the Bar Council considered that the section strikes the right balance between the interests of transferees of registered estates and others with interests in those estates:

> The value of excluding "a nominal consideration in money" from the definition of valuable consideration for the purpose of section 29 is that it allows a distinction to be drawn between those instances where real value has changed hands (whether or not equivalent to the value of the estate transferred) from those where the transaction is in substance a gift even though some small consideration may be payable.

7.72 The Council noted that any rule which provides "this desirable flexibility" will always generate borderline cases. It recognised that there is no obvious point where valuable consideration ceases to be nominal, however, it considered that this will be a matter of fact in every case "to be decided by reference to the amount of the consideration, the value of the interest transferred and the other material circumstances". The Council argued that the approach taken in *Halifax plc v Curry Popeck*[23] is only likely to be available in cases of fraud and so does not replace the valuable flexibility in the current statutory formulation.

7.73 Lastly, the Bar Council said that sales of assets by insolvency office-holders should not generate difficulties in practice, as usually other consideration will be given where assets are sold for £1 or some other nominal amount.

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22 [1981] AC 513.

23 [2008] EWHC 1692 (Ch), [2009] 1 P & CR DG3.

7.74 Mangala Murali believed that "valuable consideration" should refer to "considerations that involve fairly substantial sums of money". Whilst she did not recommend a limit, Ms Murali stated that she would not support a nominal consideration being considered valuable consideration for the purpose of the LRA 2002.

Expressed other views

7.75 HM Land Registry neither agreed nor disagreed with Consultation Question 25 and referred back to the response it provided in relation to Question 24. In addition, it stated that whilst it understands the intention behind this proposal, it believes that the amendment of the definition of valuable consideration as set out in the Consultation Paper risks causing disputes where a party argues that the payment of, for example, £1 is nevertheless sufficient because a nominal consideration was formerly excluded, but was not at the time of the transaction.

REVERSE PREMIUMS

Consultation Question 26.

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

Do consultees agree? If consultees disagree, we invite consultees to share any examples of transactions for which no form of consideration is given other than the reverse premium.[24]

7.77 24 consultees answered this question:

(1) 18 agreed;[25]

(2) 2 disagreed;[26] and

(3) 4 expressed other views.[27]

Agreed

7.78 The majority of consultees who agreed with this proposal did so without providing any further comment. Only the Society of Licensed Conveyancers stated that a reverse premium could be given as an example of what is acceptable as valuable consideration.

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24 Consultation Paper, para 7.70.

25 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; Chancery Bar Association; Dr Charles Harpum QC (Hon); National Trust; Nottingham Law School; Adrian Broomfield; Society of Licensed Conveyancers; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Mangala Murali.

26 Pinsent Masons LLP; Howard Kennedy LLP.

27 Nigel Madeley; London Property Support Lawyers Group; Burges Salmon LLP; The Law Society.

7.79 In a general comment not directed at this proposal, Dr Harpum stated that valuable consideration was an advantage conferred or a detriment suffered and reverse premiums and a transfer of land with a negative value would "appear to fall squarely within that definition".

Disagreed

7.80 Pinsent Masons LLP disagreed with the question, endorsing the London Property Support Lawyers Group's response and the surrender example cited in it (contained in the "expressed other views" section below). In addition, the firm was not convinced that the proposal not to make special provision for reverse premiums is consistent with Consultation Question 27 below (that a disposition of an interest with a negative value is automatically to be treated as made for valuable consideration).

7.81 In practice, Pinsent Masons LLP stated, the only indication HM Land Registry staff might have as to the negative value of the interest (and therefore whether the disposition is protected by a priority search) is the fact that a reverse premium has been paid:

> To provide for the former to satisfy the test but not the latter would seem to introduce an unwarranted degree of complexity and uncertainty.

7.82 Likewise Howard Kennedy LLP disagreed with the proposal and restated a part of the London Property Support Lawyers Group's response, providing "it is important to make it clear that a reverse premium counts as valuable consideration".

Expressed other views

7.83 A range of comments were made by those consultees who did not identify as either agreeing or disagreeing with our proposal.

7.84 Nigel Madeley suggested that an assignment of a new lease by an assignor who is not obliged to give an AGA may be a transaction for which no form of consideration is given other than the reverse premium.

7.85 The London Property Support Lawyers Group said there were differences of opinion in relation to this proposal:

> Some of us believe that a reverse premium cannot be consideration for the disposition and that the LRA 2002 should not make special provision for this.
>
> Others believe that it is important to make it clear that a reverse premium counts as valuable consideration as, without this, there will always be a question mark over whether a transaction involving payment of a reverse premium includes any other valuable consideration that brings the transaction within section 29 of the LRA 2002.

7.86 The Group gave the example of a surrender of a lease where the tenant pays a reverse premium:

> if the landlord formally releases the tenant from past, present and future breaches of the terms of the lease, it could be argued that this is valuable consideration

7.87 However, the Group questioned whether it would even be necessary to have to consider this point, and added that if the transfer or deed of surrender is silent on the question of a release of the tenant's obligations, there is yet more uncertainty.

7.88 Lastly, the Group added that HM Land Registry treats a reverse premium as consideration for a disposition when calculating the fee payable for registering that disposition.

7.89 Burges Salmon LLP felt that to avoid confusion it should be clarified whether or not a reverse premium counts as consideration, especially if it is treated as such for the calculation of HM Land Registry's registration fee.

7.90 The Law Society was of the view that our proposal required further consideration. First, in relation to the discussion on reverse premiums in paragraph 7.15 onwards, the Society suggested that we did not address the question of whether a reverse premium is valuable consideration and instead argued that it is not a practical problem because there is usually consideration moving from the disponee. The Society argued that it would be more worthwhile if we "answered more directly" the question of whether a reverse premium is valuable consideration.

7.91 The Society questioned whether, despite a reverse premium not meeting the orthodox definition of consideration in terms of contract law, there could be a separate test of what is 'valuable consideration' for the purposes of the LRA. In situations where, for example, payment of a reverse premium is used to encourage the disponee to take on a property that is onerous because it is over-rented, or to allow a surrender of a rack-rent lease to take place, or to encourage a tenant to take a new lease, the Society stated that the payments made do have a value to the payer because of what they achieve: no longer paying a rent greater than the market rent, or no longer having to comply with the lease covenants, or having the benefit of a new tenant. Consequently, it argued that we may wish to consider whether reverse premiums should be treated as valuable consideration within a new definition for land registration purposes:

> That would then potentially enable a priority search to be used to protect the payer of the reverse premium. If that was permitted, one could envisage priority searches being used for the benefit of both disponor and disponee on the same transaction depending on its terms.

7.92 In relation to our call for examples of transactions for which no form of consideration is given other than a reverse premium, the Law Society suggested that one example might be a transfer by way of surrender of a registered lease:

> The lease may have little or no value because of the tenant's covenants and the tenant is paying the landlord to take it off its hands. Although perhaps unlikely, there may be no release of past and present lease breaches, nor any other obligations on landlord and tenant in the transfer. So the only consideration (apart from the fact that the transfer is a deed) is the reverse premium and it may be that protection by a priority search would be helpful.

Other comments

7.93 Consultees, in responding to other question, made comments which touched on similar themes.

7.94 In response to Consultation Question 24 (the proposal that the requirement of valuable consideration should be retained, but should be clarified), the City of Westminster and Holborn Law Society stated that "it is worth making explicit that an indemnity covenant and in the case of a lease the acceptance of tenant's covenants represent valuable consideration".

7.95 Also in relation to Consultation Question 24 and indemnity covenants, Nigel Madeley said that whilst he agreed indemnity covenants are valuable consideration, not all assignors of leases will be giving an authorised guarantee agreement, and not all freehold transfers involve personal covenants. He argued that it therefore cannot be assumed that an indemnity covenant will provide consideration "it will be a happy accident if it does".

7.96 Responding to Consultation Question 27 below, the Law Society stated that it agreed that where an interest has a negative value, a disposition of that interest is to be regarded as being made for valuable consideration for the purposes of section 29 of the LRA 2002. In terms of our analysis of whether indemnity covenants constitute valuable consideration, the Society agreed with our conclusions at paragraph 7.26 that they do and that, therefore, no change is required to the LRA 2002 in that regard.

7.97 Also in relation to Consultation Question 27, the City of Westminster and Holborn Law Society stated that priority protection should apply where the person acquiring is giving valuable consideration "even by way of indemnity covenant or acceptance of covenants".

AN INTEREST IN LAND WITH NEGATIVE VALUE

Consultation Question 27.

7.98 We provisionally propose that where an interest has a negative value, a disposition of that interest is to be regarded as being made for valuable consideration for the purposes of section 29 of the LRA 2002.

Do consultees agree?[28]

7.99 25 consultees answered this question:

(1) 21 agreed;[29]

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[28] Consultation Paper, para 7.71.

[29] Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; Michael Hall; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar

(2) 3 disagreed;[30] and

(3) 1 expressed other views.[31]

Agreed

7.100 The overwhelming majority of consultees agreed with this proposal.

7.101 Professor Barr and Professor Morris considered that our proposal makes sense "within the statutory framework".

7.102 The Bar Council agreed "if it will also have a negative value in the hands of the disponee due to disponee assuming liabilities arising from the ownership of that interest".

7.103 HM Land Registry agreed with our provisional proposal; however, it stated that it would like to clarify whether our proposal would only be relevant where there is a dispute as to priority. HM Land Registry stated that it would be "concerned" if it were to be expected to routinely investigate whether an interest has a negative value.

7.104 Christopher Jessel agreed with our proposal and made the following comments in relation to transactions of land that has a negative value:

> Where a liquidator or trustee in bankruptcy disclaims onerous property that may sometimes be because the property, for instance contaminated land, has a negative value. If it is a freehold it will escheat (although a chargee will retain a power of sale) (see my reply to para 22.119). The escheat is not itself a disposition as it extinguishes the estate but a subsequent transfer by the Crown will be since the creation of a new freehold by infeudation (or, in the case of the Royal Duchies, subinfeudation) is by virtue of LRA 2002 part 7 treated as similar to a grant of an inferior estate, comparable to the grant of a lease. Where land has a negative value it may be possible to dispose of it to a local authority or some other entity, for example to treat contamination. There may be no money consideration for the disposition and perhaps no express covenant for indemnity or otherwise.

7.105 Pinsent Masons LLP, while agreeing with the proposal, reiterated its comments in their response to Consultation Question 25 not to make specific provision for reverse premiums. It argued that there should be express provision for both reverse premiums and negative value to ensure consistency.

7.106 As part of his response to Consultation Question 24, Nigel Madeley stated that he agreed with our stance in the Consultation Paper in relation to contaminated land that negative value is unlikely to be the only form of consideration given by a transferee in a transaction:

Association; Pinsent Masons LLP; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

30 The City of Westminster and Holborn Law Society; Nottingham Law School; Dr Charles Harpum QC (Hon).

31 Dr Lu Xu.

> The seller would not be paying the buyer to take on the land without getting an indemnity or the benefit of insurance or a remediation agreement in return.

Disagreed

7.107 Dr Harpum was not convinced that the proposal is necessary, as a conveyance of land which has negative value involves the incurrence of a detriment by the transferee. He suggested that it would be better to "spell out" the meaning of 'valuable consideration' by codifying what Lord Wilberforce said if something did indeed need to be done, and that the same could be done for nominal consideration eg "a token sum of money or the giving of a peppercorn that the parties do not anticipate will be paid or made". However, Dr Harpum stated that he would prefer that nothing be done.

7.108 The Nottingham Law School said that whilst it agreed that there is no need for special provisions for reverse premiums (our proposal at paragraph 7.70, in Consultation Question 26), it was unconvinced that reverse premiums satisfy the requirement of valuable consideration per se "although the detrimental assumption of enforceable duties with respect to the land will do so". The School therefore concluded that it did not support our recommendation at paragraph 7.71 as worded in the Consultation Paper:

> Although we think it might be sound in principle if enforceable duties in respect of the land were imposed upon the disposition, however, there seems little need for any statutory provision to declare the same.

Expressed other views

7.109 Dr Lu Xu neither agreed or disagreed with our proposal and felt that "some clarification" is needed regarding the meaning "negative value" in addition to the example of contaminated land. To illustrate, he questioned whether an estate burdened with negative equity in the form of a mortgage loan larger than its market value was an estate of "negative value" and whether, in that case, any donee of such an estate be seen as having given valuable consideration.

A PEPPERCORN

Consultation Question 28.

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

If consultees agree that clarification would be beneficial, we invite consultees' views as to whether a peppercorn should engage the protection of section 29 of the LRA 2002.[32]

[32] Consultation Paper, para 7.72.

7.111 22 consultees answered this question.[33]

7.112 Varying views were put forward by consultees in response to this question. 10 consultees said that peppercorns could amount to valuable consideration (although not all of those consultees agreed that the LRA 2002 should expressly address this issue). However, some other consultees said that, although peppercorns do not amount to valuable consideration, dispositions for a peppercorn should nonetheless attract the protection of section 29.

7.113 Consultees responses are divided according to whether they supported or opposed the protection of section 29 being engaged by payment of a peppercorn. Several consultees linked the issue of whether a peppercorn could be valuable consideration with the issue (of whether a nominal consideration in money could be valuable consideration. Overall, there was marginally more support for a peppercorn engaging the protection of section 29 LRA 2002 than not.

A peppercorn should engage section 29

7.114 The Society of Licensed Conveyancers considered that a peppercorn should be enough "where it is indicative that the parties themselves consider this to be a valuable bargain". However, it suggested that there may need to be limitations as to when a peppercorn constitutes valuable consideration (for example, only where the parties are dealing with each other at arm's length) so as not to facilitate a fraudulent enterprise.

7.115 Similarly, Dr Nair argued that if any consideration is stipulated before a transaction goes ahead, the transaction "is effectively a mutual bargain and not a gift: the transaction is likely to have some commercial purpose". As such, she felt that the parties should be entitled to rely on the information in the register in their decision-making and that the protection in section 29 should apply.

7.116 The Chancery Bar Association stated that it had no experience of a form of disposition for which a peppercorn is the only consideration; however, it considered that if such dispositions are made they should logically engage the protection of section 29 of the LRA 2002, "like dispositions for a nominal consideration in money".

7.117 The London Property Support Lawyers Group did not have any direct examples to share either, but noted that on the grant of a sub-station lease, for example, there is usually only nominal consideration and the utility company would expect to obtain priority for the registration of its lease whether or not the consideration was a peppercorn, nominal or valuable.

7.118 The Berkeley Group also noted that intra-group dispositions in particular are often made for £1, and that leases often stipulate a peppercorn rent, although it noted that for the latter, the tenant will enter covenants with the landlord. The group noted that such

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33 Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; Michael Hall; City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); National Trust; Nottingham Law School; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Berkeley Group.

transactions are often part of a wider arrangement with third party financiers or investors.

7.119 Adrian Broomfield believed both a peppercorn and a low-value consideration of, for example, £1 should enjoy the benefit of section 29. He noted that these forms of consideration are often used where the transaction is by deed which, being under seal, do not require consideration but often specify some consideration in order to avoid any question of their validity. Mr Broomfield said that consideration of a peppercorn of £1 might be used, for example, to facilitate a mining operation or landfill and related royalty payments, or might be used in relation to leases and leasebacks for the purpose of VAT recharging and recovery.

7.120 The Chartered Institute of Legal Executives said that, if the requirement of valuable consideration is dispensed with, section 29 should be engaged not only by transactions for a peppercorn but also by other non-monetary considerations such as a lemon meringue pie or a red rose.

7.121 Michael Hall considered that whilst a peppercorn is not valuable consideration it should be treated the same as a nominal consideration in money and therefore, should engage the protection of section 29.

7.122 Howard Kennedy LLP noted that on the grant of a substation lease, for example, there is usually only nominal consideration. It noted that the utility company would expect to obtain priority for the registration of its lease whether or not the consideration was a peppercorn. The firm stated that it had recently seen a transfer for a peppercorn as part of a settlement agreement; as such, it felt that it should be clarified that these transactions do have the benefit of section 29 "if the concept of valuable consideration is to be kept".

A peppercorn should not engage section 29

7.123 Dr Harpum believed that it should be "common knowledge to any lawyer" that a peppercorn is not valuable consideration and that it is the paradigm case of nominal consideration, and it should not be necessary to say so. Dr Harpum argued "most emphatically" that the consideration of a peppercorn does not engage the protection of section 29 and he strongly supported the present definitions "which are in line with the other property acts which define valuable consideration", namely the Law of Property Act 1925 and the Administration of Estates Act 1925.

7.124 Nigel Madeley (in his remarks on this proposal and on Consultation Question 24) did not agree that a peppercorn should constitute "valuable" consideration within the meaning of section 29. Nigel Madeley said that if a peppercorn were to be regarded as "valuable", the word would have lost its meaning. He noted that the promise of a peppercorn is indicative of a bargain and that a peppercorn can constitute consideration for the purposes of contract law. If a peppercorn could engage section 29, Mr Madeley suggested that "the legislation would be saying: the parties have addressed the issue of consideration by saying a peppercorn and that's good enough for section 29".

7.125 But Mr Madeley noted that the point of section 29 "is to decide who has priority over certain events" and that land law "attracts its own principles". He said that if a gift should not give priority than neither should a transfer for a peppercorn (or an ounce of saffron).

He suggested that "the law should ask 'has something of value changed hands' and not 'have the parties been seen to address the issue of bargain'".

7.126 The City of Westminster and Holborn Law Society considered that a peppercorn is not valuable and is mentioned only as a matter of form (as references to natural love and affection used to be). It noted that dispositions for a peppercorn often involve some other additional consideration which is of value, such as an indemnity covenant.

7.127 Pinsent Masons LLP argued that the LRA 2002 should expressly provide that any monetary consideration (or monetary consideration of more than, for example, £1) engages section 29. It said that, if this were to be done, then clarification regarding peppercorns would not be required. Any dispositions that might otherwise have been structured using a peppercorn could be structured using £1 or some other minimum amount specified as constituting valuable consideration instead. Pinsent Masons LLP did not anticipate any adverse tax or other consequences resulting from such a change.

7.128 The Bar Council commented that it was not aware of any need for the status of a peppercorn consideration to be clarified. It said that, if the only consideration for a transfer is a peppercorn (which is merely nominal), it would be "logical" for the protection of section 29 not to be engaged.

Expressed other views

7.129 The National Trust did not express any view on whether a peppercorn consideration can engage section 29, but merely said that the issue does not need to be clarified.

7.130 Christopher Jessel stated that if it is decided to keep a distinction between transactions with and without consideration then much will depend on the form of the transaction. It would be right to respect the intention of the parties to structure the transaction as a deal with peppercorn consideration and not as a gift. He noted that such transactions are usually decided on the basis of advice received by a private client, corporate or tax department of a firm on issues such as tax, trust law, inheritance and family relations, commenting that "land registration issues will rarely be a deciding factor and may not even be considered".

7.131 Mr Jessel separately noted that gifts to charities are often structured as deals. He said that he once acted in relation to a lease to an environmental charity at an annual rent of one flower, although he noted that the covenants in that lease may also have constituted consideration.

7.132 Mr Jessel was also concerned that any amended legislation could not refer specifically to peppercorns, but that it might be difficult to draft legislation that, for example, excluded nominal consideration but did not exclude reduced but still substantive consideration

7.133 Nottingham Law School felt it was "not obvious that removal of all doubt as to the meaning of valuable consideration would be a good thing". The School noted that the primary aim of the system of land registration is to protect the interests of good faith participants – both purchasers and holders of interests in the land. For these good faith participants, the School considered that the requirement of valuable consideration poses no problems of uncertainty, as it will clearly be met.

7.134 The Law Society agreed that clarification is required but noted that it had concerns not about peppercorns but about the protection of parties in cases where there is no consideration other than the disposition being made by deed. Nevertheless, the Society noted that a peppercorn is an anachronism that does not in practice comprise any consideration. Therefore, to the extent that the protection of section 29 requires valuable consideration, it believed that a peppercorn should not engage that protection.

7.135 In relation to intra-group transfers, the Society considered that whilst the transaction may perhaps have a peppercorn but no other consideration, it is difficult to see why the peppercorn is needed since usually the document used will be a deed, which will of itself provide the consideration. The Society said it did not see why such a document should not be capable of being protected by section 29:

> The fact that the transaction is between companies in the same group and, therefore, section 29 protection may be perceived to be less necessary, does not mean that the transaction should not be capable of protection under that section. There may be corporate benefits, not taking the form of a consideration, which may warrant protection.

7.136 The Society questioned why, in principle, such transactions should not benefit from protection simply because there is no consideration, valuable or otherwise.

7.137 Burges Salmon LLP felt that clarification would be beneficial overall, although the firm considered that if a peppercorn engaged the protection of section 29 it would be difficult to see why another transaction for no valuable consideration should not also do so.

FURTHER CLARIFICATION

Consultation Question 29.

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

Please explain in each case whether it is believed that the disposition should be included within, or excluded from, the priority protection of section 29.[34]

7.139 11 consultees answered this question.[35]

7.140 Amy Goymour considered that there are many overlapping issues that need to be reviewed without providing any further response to Consultation Question 29.

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[34] Consultation Paper, para 7.73.

[35] Professor Warren Barr and Professor Debra Morris; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Pinsent Masons LLP; National Trust; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

7.141 The Bar Council and the National Trust both responded to say that there are no such situations as far as they are aware.

7.142 The Chartered Institute of Legal Executives reiterated its previous response in which it suggested that the section 29 provisions should include other “non-monetary” considerations if nominal consideration is dispensed with.

7.143 Christopher Jessel stated that he had been involved in the lease of a building in disrepair to a conservation charity with limited repairing obligations. He observed that in such situations, where a lease is purely gratuitous with the minimum of covenants, it may be unclear if it is to be (or should be) regarded as being for consideration.

7.144 Mr Jessel explained that where a charity is taking a gift of land it would not normally be appropriate to ask the sort of detailed preliminary enquiries that a purchaser for value would; nevertheless, the charity would need at least as much protection from unknown rights as a purchaser. He noted that, although as a general rule charities cannot refuse to accept gifts (subject to section106(2)(b) of the Charities Act 2011), a prudent charity will not wish to take on land which may be subject to a burden, or unusable because of an onerous (but undisclosed) restrictive covenant. In such cases, he argued, the charity should not be bound by rights of which it was not aware.

7.145 In a family context Mr Jessel stated that he had been involved with gifts of the freehold of a landed estate, but which reserved sporting rights or rights to timber to the donor. He noted that, although occasionally the effect of the reservation was to impose some burdens on the donee, the parties would normally regard the arrangement as a gift.

7.146 The City of Westminster and Holborn Law Society noted that land may be transferred for no valuable consideration in compliance with a deed by way of planning obligation, but said there is no need for priority protection as the obligation is a local land charge.

7.147 The London Property Support Lawyers Group questioned how a transfer between an outgoing and incoming trustee or security trustee would be treated for the purposes of section 29 and section 30 under our Consultation Paper proposals. In relation to the Group’s comments, Pinsent Masons LLP said the firm assumed it is not proposed that the priority provisions should apply in such cases. Conversely, Burges Salmon LLP said that transfer between old and new trustees should attract the priority protection of section 29.

7.148 The Law Society commented that it agreed with the comment in paragraph 7.61 of the Consultation Paper that the language of “gift” is not well-suited to describe many of the situations in which interests in property are transferred, especially in a commercial context, and that the use of "gift" provides no greater certainty than the term "valuable consideration". Consequently, the Society supported our view in paragraph 7.63 of the Consultation Paper not to recast the valuable consideration requirement in terms of whether or not a disposition is by way of gift. The Society noted that it was also broadly supportive of our distinction between a "bargain" with some commercial gain, which generally will attract section 29 protection, and something truly gratuitous, which will not.

UNREGISTRABLE INTERESTS

Consultation Question 30.

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

Do consultees agree?[36]

7.150 23 consultees answered this question:

(1) 21 agreed;[37] and

(2) 2 expressed other views.[38]

Agreed

7.151 The Bar Council agreed with our proposal for the sake of consistency, a point also emphasised by Professor Barr and Professor Morris who stated that consistency is important "so that there is parity of treatment between registrable and unregistrable interests".

7.152 Pinsent Masons LLP stated that it saw "no policy or practical reason" to distinguish between the requirement for valuable consideration in relation to registrable dispositions and unregistrable interests.

7.153 The Chancery Bar Association considered our proposal to be "logical" if the proposals in paragraph 6.30 of the Consultation Paper are also implemented. However, it considered that the proposal raises a practical issue similar to the one the Association raised in relation to Consultation Question 26 above. HM Land Registry staff processing an application to register a notice will not be able to verify whether the unregistrable interest was entered granted for valuable consideration and therefore whether it is protected by a priority search that has been made and can be processed or whether completion of the application must be deferred until the priority period of the search expires.

7.154 The Association questioned whether the application form would require the applicant to certify whether valuable consideration had been given for the unregistrable interest. It noted that, in making this comment, it was assuming that a two-tier notice system will

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36 Consultation Paper, para 7.75.

37 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

38 Dr Charles Harpum QC (Hon); HM Land Registry.

be retained, which it strongly supported in response to Chapter 9 of the Consultation Paper.

7.155 The Law Society considered that our proposals for reform of the requirement for valuable consideration under section 29, to the extent that it agreed with them, should apply both to registrable dispositions and unregistrable interests, which are noted on the register. The Society saw no logical reason to distinguish between registrable dispositions and unregistrable interests in that regard.

Expressed other views

7.156 Dr Harpum stated that, if contrary to his views as previously expressed, the Law Commission still considers it necessary to redefine the meaning of 'valuable consideration', then it should apply as suggested by Consultation Question 30.

7.157 HM Land Registry referred back to its responses to Consultation Questions 24 and 14 in Chapter 6. Those responses broadly stated that HM Land Registry had concerns how our proposals might work in practice and that any reform in this area should be considered with great care.

SECTION 30 OF THE LRA 2002

Consultation Question 31.

7.158 We invite consultees' views as to whether any amendments are necessary to the definition of "valuable consideration" as it applies to section 30 of the LRA 2002.[39]

7.159 17 consultees answered this question.[40]

7.160 11 consultees specifically considered whether section 30 should be treated differently to section 29 and, of those, 9 consultees expressly agreed that it should not. No consultee expressed a clear view that an amendment to the definition of "valuable consideration" should not apply to section 30 as well as section 29.

7.161 Michael Hall, Professor Barr and Professor Morris, Burges Salmon LLP and the City of Westminster and Holborn Law Society all emphasised the importance of consistency between sections 29 and 30.

7.162 Dr Xu and the London Property Support Lawyers Group also agreed, noting that amendment would be necessary for consistency between the two provisions. Dr Xu stated it would be "sensible" to maintain such consistency across clearly comparable sections of the LRA 2002.

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39 Consultation Paper, para 7.78.

40 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; The Bar Council; HM Land Registry; Burges Salmon LLP; The Law Society; Mangala Murali.

7.163 Pinsent Masons LLP commented that it saw no policy or practical reason for different definitions to apply as between sections 29 and 30.

7.164 Phrasing its response in the opposite way to the above consultees but to the same effect, the Law Society stated that it did not believe that any amendments are necessary to the definition of valuable consideration as it applies to section 30, and that the meaning of valuable consideration in sections 29 and 30 should be the same.

7.165 Several consultees were of the view that no amendment to section 30 is needed.[41] These consultees were implicitly agreeing that the sections 29 and 30 should remain consistent.

7.166 Other consultees provided more substantial comments which are described below.

7.167 Dr Harpum said he found it “strange” that there might be different definitions of “valuable consideration” in two successive sections of an Act that are similarly worded. He felt that rather than leading to clarity, any such difference would cause confusion. However, he reiterated his view that the definition of valuable consideration should not be amended.

7.168 Christopher Jessel stated that sometimes a charge may be cancelled when the debt is simply written off because the debtor has no means to pay. He suggested that in these circumstances as the application involves a cancellation and not a transfer of the charge, it will be treated as not being for consideration. Similarly, if the charge is instead transferred without payment to a nominee of the registered proprietor, that will not be for consideration.

7.169 Nigel Madeley was of the view that different issues arise in this situation. He considered that a registered charge might change hands following a disposal of debt in the secondary market or on restructuring. In his estimation disposing of a registered charge will almost inevitably be either a commercial transaction (in which case consideration will be readily observable) or a gift. As such, Mr Madeley "tentatively” suggested that there is less need for the concept of valuable consideration in this context, and therefore less to worry about.

7.170 Mangala Murali reiterated her response to Consultation Question 25 in which she stated that valuable consideration must refer to reasonably substantial sums of money.

[41] Everyman Legal; Adrian Broomfield; The Bar Council; Chancery Bar Association.

SECTION 86 OF THE LRA 2002

Consultation Question 32.

7.171 We invite consultees' views as to whether any difficulties would arise if the proposed amendments to the meaning of valuable consideration were also to apply for the purposes of section 86 of the LRA 2002 (bankruptcy of the registered proprietor).[42]

7.172 13 consultees answered this question.[43]

7.173 A number of consultees identified that our valuable consideration proposals could potentially have an adverse effect on the 'good faith' and 'for value' requirements of the LRA 2002's bankruptcy provisions. Responses below are split between those who felt the amendments should apply to section 86, those who thought they should not, and those who expressed other views.

The proposed amendments should also apply to section 86

7.174 Only a few consultees actively supported the proposed amendments applying to section 86.

7.175 Professor Barr and Professor Morris stated that they did not have sufficient experience of the operation of the bankruptcy provisions in practice to provide a certain response, but in principle felt that an amended definition of "valuable consideration" should also apply to section 86.

7.176 The City of Westminster and Holborn Law Society said it had no view, save that it would be best to have consistency.

7.177 The Bar Council and Adrian Broomfield said they could not think of any difficulties specific to section 86. However, the Bar Council noted that their view was subject to what it said in relation to Consultation Question 25, namely that the value of excluding "a nominal consideration in money" from the definition of valuation consideration for the purpose of section 29 is that it allows a distinction to be drawn between those instances where real value has changed hands from those where the transaction is in substance a gift even though some small consideration may be payable.

The proposed amendments should not apply

7.178 Michael Hall noted that section 86 deals with a particular situation where the registered proprietor has been adjudged bankrupt but there is no bankruptcy restriction on the register (for example, because the bankruptcy restriction has been removed under

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42 Consultation Paper, para 7.81.

43 Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Michael Hall; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); Adrian Broomfield; Howard Kennedy LLP; The Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; The Law Society.

section 283A of the Insolvency Act 1986). He argued that the requirement for valuable consideration is not important:

> It does not require that the transaction should not be at an undervalue, and a nominal consideration in money would count as valuable consideration, in any event.

7.179 The London Property Support Lawyers Group opposed the amendments applying across the board, stating that section 86 is a "special case". The Group contended that any such change would also create a mismatch with section 342(2) of the Insolvency Act 1986, which imposes both a good faith and for value requirement. Howard Kennedy LLP endorsed the Group's response, adding that the Law Commission should ensure that there is a carve out so that the LRA 2002 doesn't differ from the Insolvency Act 1986 on this subject.

7.180 The Law Society agreed that amending the valuable consideration requirements should not have an adverse effect on section 86 for the reasons specified in paragraph 7.80 of the Consultation Paper.

7.181 Berwin Leighton Paisner LLP considered that the concept of "transactions at an undervalue" under insolvency legislation is "materially different" from the concept of valuable consideration for land registration purposes. In the firm's view the insolvency legislation provisions enabling insolvency officers and others to obtain court orders to set aside voidable transactions should continue to apply to registered land.

7.182 The Chancery Bar Association simply stated that it did not think the proposed amendments should apply to section 86.

Expressed other views

7.183 Dr Harpum considered that it would be sensible to reflect on the fact that section 86(5) of the LRA 2002 was drafted against the background of section 284(4) of the Insolvency Act 1986 and must harmonise with it. He noted that section 86(5) refers to "value", but that he could not find a definition of "value" in the relevant part of the Insolvency Act 1986, nor any relevant case law on the sub-section.

7.184 HM Land Registry again referred back to its response to Consultation Question 24 that any amendments should be made with great care. More particularly, HM Land Registry noted that paragraph 11.42 of our 2001 Report explained that section 86(5) was based, in part, on the model laid down in section 284(4) of the Insolvency Act 1986. HM Land Registry questioned whether, if the provision in the LRA 2002 were to be changed, it would be more appropriate to do so through changes to the insolvency regime.

7.185 Nigel Madeley stated that he would "pass" on responding to this question except to say that the bankrupt's estate (and therefore creditors) have quite a high claim and it "should not be lightly overridden by a disposal that has elements of dubiousness".

PARAGRAPH 5 OF SCHEDULE 8 TO THE LRA 2002

Consultation Question 33.

7.186 We believe that our proposals to clarify the meaning of "valuable consideration" for the purposes of section 29 can be applied equally to the meaning of that phrase in paragraph 5 of schedule 8 to the LRA 2002 (indemnity).

Do consultees agree?[44]

7.187 22 consultees answered this question:

(1) 19 agreed;[45] and

(2) 1 disagreed;[46] and

(3) 2 expressed other views.[47]

7.188 Some of the consultees to this question pointed out that we had mistakenly referred to schedule 10 rather than schedule 8 in our Consultation Paper. However, this error did not affect the substance of our proposal or the responses received.

Agreed

7.189 The majority of consultees who agreed did not provide any additional comments. The comments we did receive are accounted for below.

7.190 Professor Barr and Professor Morris felt that having a single definition of valuable consideration across the whole of the LRA statutory scheme would be "sensible".

7.191 The Law Society believed that the proposals to clarify the meaning of valuable consideration for the purposes of section 29 can be applied equally to the meaning of that phrase in paragraph 5 of schedule 8 to LRA 2002 for the reasons specified in paragraph 7.82 of the Consultation Paper.

Disagreed

7.192 Dr Tola Amodu said it was debateable whether the proposed amendment to the definition of "valuable consideration" should apply to paragraph 5(3) of schedule 8. She

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44 Consultation Paper, para 7.83.

45 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; National Trust; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

46 Dr Tola Amodu.

47 Society of Licensed Conveyancers; HM Land Registry.

said that “those paying a nominal amount would not presumably be subject to the indemnity limitations” (although this may affect the amount of indemnity claimed).

Expressed other views

7.193 The Society of Licensed Conveyancers noted that giving valuable consideration need not amount to paying market value. It said that the “saving grace” is section 86(5)(b) which requires that a disponee had acted in good faith. This comment may have been intended as a partial response to Consultation Question 32. The Society concluded by pointing out that the use of valuable consideration would normally indicate a lawyer’s involvement, and so claim may be available against the solicitor rather than a claim for an indemnity against HM Land Registry.

Chapter 8: Priorities under section 29: postponement of interests, and the protection of unregisterable leases

INTRODUCTION

8.1 30 consultees responded to the questions in Chapter 8 of the Consultation Paper.[1]

8.2 The majority of consultees agreed with the provisional proposal in respect of former overriding interests. Fewer consultees responded to our call for evidence about the use of unilateral notices to protect interests more generally that have been postponed, and those who responded did not provide evidence of significant problems in practice. However, in responding to both questions, many consultees raised concerns about chancel repair liability.

8.3 Consultees also did not provide evidence of problems in practice arising from the operation of section 29(4) of the LRA 2002.

PROVISIONAL PROPOSAL: FORMER OVERRIDING INTERESTS

Consultation Question 34.

8.4 We provisionally propose that where a person applies for a unilateral notice in respect of an interest which was formerly overriding until 12 October 2013, and the title indicates that there has been a registered disposition of the title since that date, the applicant should be required to give reasons why the interest still binds the title. The notice will only be entered if the reasons given are not groundless.

Do consultees agree?[2]

8.5 30 consultees answered this question:

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1 Louis Farrington; Martin Wood; Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Society of Legal Scholars; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); National Trust; City of London Law Society Land Law Committee; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

2 Consultation Paper, para 8.48.

(1) 22 agreed;[3]

(2) 2 disagreed;[4] and

(3) 6 expressed other views.[5]

Agreed

8.6 The majority of consultees who responded to this question simply indicated that they supported the proposal without providing much in the way of additional comment.

8.7 Our proposals were described as "sensible" by some consultees[6] and the Society of Legal Scholars said the proposal struck an "acceptable balance" between the desire to process applications expeditiously and the desire to prevent the register being cluttered with notices "purporting to protect interests that do not in fact bind the estate". Adrian Broomfield commented that the proposal would "whittle down" applications for unilateral notices to only those with some realistic prospect of success.

8.8 Burges Salmon LLP reiterated a point raised in the Consultation Paper, that the proposal may deter speculative applications. The Conveyancing Association considered that this area has proven to be "ripe for exploitation"; accordingly, in its view, "anyone attempting to register an interest should be required to provide evidence of their acquisition of the interest".

8.9 HM Land Registry supported the proposal. However, it cautioned that, if it is taken forward, thought will need to be given as to how to implement it in such a way so as not to require HM Land Registry to consider every application in detail to determine whether it is still relevant to the title and not groundless.

8.10 The Chartered Institute of Legal Executives also stated that it agreed with the proposal but in its view, such applications should not be allowed once a transfer for value has taken place.

Disagreed

8.11 Two consultees disagree with the proposal.

8.12 The Bar Council was "unconvinced" by the proposal, so disagreed with the proposal.

8.13 The Council suggested that if there is a problem in practice, then it is likely to be a relatively short-term problem. It suggested that any prejudice to registered proprietors

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3 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Society of Legal Scholars; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; HM Land Registry; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; Mangala Murali.

4 Michael Hall; Bar Council.

5 Louis Farrington; Martin Wood; Christopher Jessel; City of London Law Society Land Law Committee; Berwin Leighton Paisner LLP; The Law Society.

6 Professor Warren Barr and Professor Debra Morris; Dr Charles Harpum QC (Hon).

is more appropriately addressed by existing procedures and the potential for a claim under section 77 of the LRA 2002.

8.14 Michael Hall disagreed with the proposal. He stated that although no evidence is required to support a unilateral notice, if an application is clearly groundless HM Land Registry should be entitled to reject it. Furthermore, he said the law needs to be changed so that, at the very least, an objector to a unilateral notice should be entitled to require the applicant to produce compelling evidence of his claim before HM Land Registry decides whether to accept it. If the applicant wishes to persist with the application, the onus should be on the applicant to satisfy the Land Registration Tribunal of the validity of its claim.

Other views

8.15 Several consultees did not agree or disagree with the proposal, expressing other views.

8.16 For example, the Law Society[7] stated that it saw merit in the proposal and that where a title indicates that there has been a registered disposition of the property since 12 October 2013, an applicant should be required to give reasons why the interest still binds the title and a notice will only be entered if the reasons given are not groundless.

Comments

8.17 Whether agreeing, disagreeing or expressing other views, consultee's comments focused on several themes.

The term "postpone"

8.18 A number of consultees commented on our discussion in the Consultation Paper of the use of the word "postpone".

8.19 Martin Wood was of the opinion that the issues that have arisen are a consequence of "unnecessary semantic changes" brought about by the LRA 2002.

8.20 Howard Kennedy LLP stated it is still unclear whether "postponing" in section 29 means that an interest has been wiped out or whether it can still be revived. The firm considered that our proposal means it will still be sensible to carry out chancel repair searches and therefore, an opportunity to finalise this issue is being missed.

8.21 Dr Charles Harpum QC (Hon) noted that the use of the postponement terminology had its origins in the priority search provisions that existed at the time the 2002 Act was created.[8] The language was considered accurate because the interest having priority might not defeat the unregistered right permanently "even though in many cases it would". Dr Harpum noted that had never been particularly satisfied with the wording and with the benefit of hindsight, he would have preferred to see a provision which made it clear that a purchaser for valuable consideration under a registrable disposition took free of an unprotected interest. However, he concluded that as a matter of interpretation,

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7 Originally in response to in response to question 8.49.

8 Citing the Land Registration (Official Searches) Rules 1993, r 6 (1993 SI No 3276).

this subsection has its intended effect as the key words are "postponing to the interest under the disposition".

8.22 Nigel Madeley considered that the question of defining what it means to postpone is reminiscent of restrictive covenants in the case of *Wilkes v Spooner*.[9] He gave the following example:

> Say land is worth £100 but only £75 if subject to a restrictive covenant. Person B acquires the land from person A free from the restrictive covenant (by being equity's darling) and pays £100 for it. It is clearly wrong for B to be bound by the covenant on any dealing to C because he paid £100 and, even if C knows about the covenant, it shouldn't bind C because that would prejudice the value of the land in B's hands and cause C only to pay B £75. If C pays the £100, he must also be entitled to protect that value….

8.23 Mr Madeley noted that in this situation the covenant is not extinguished, but it is effectively valueless; therefore, the courts have not needed to decide on a distinction between extinction and lifelessness. After considering whether the above analysis was dependant on B having paid full market value, Mr Madeley concluded that B could sell the land free from the covenant even without paying full market value for the property. As such, he questioned whether the concept of postponement actually works or whether a disposition for valuable consideration simply wipes out the earlier unprotected interest.

8.24 Mr Madeley was unconvinced by our statement at paragraph 8.31 of the Consultation Paper that it is uncontroversial that an interest postponed to the registered estate by virtue of section 29 will no longer "affect" that estate and so will no longer be capable of protection by a notice. He considered that it is dependent on what is meant by "postpone", stating:

> I would have thought that the estate [is] a continuing thing, and one has successive proprietors of an estate. A postponed interest binds the estate but not a particular proprietor of that estate who has paid valuable consideration for the disposition. The interest is postponed to the disposition, not to the estate.
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> …
>
> The interest must have affected the estate before the disposition for valuable consideration, and for the word 'postpone' to have its usual meaning, the interest must surely "affect" the estate afterwards, with the exception only of the proprietor to whom the relevant disposition for value has caused the interest to be postponed.

8.25 Berwin Leighton Paisner LLP[10] noted that some have suggested that the use of the word "postponing" in section 29 was not entirely appropriate. The firm stated that if the intention was that such interests should never be capable of revival, then the position would be similar to the position in unregistered conveyancing: an interest which is

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9 *Wilkes v Spooner* [1911] 2 KB 473.

10 Given in response to the question at para 8.49 of the Consultation Paper.

defeated on a disposal to a purchaser for value in good faith without notice does not revive if the land is acquired by a purchaser who does have notice.

8.26 Christopher Jessel neither agreed nor disagreed with the proposal. He argued that our statement (in paragraph 8.31 of the Consultation Paper) that an interest postponed by section 29 no longer affects the estate was an oversimplification. Mr Jessel gave two examples of cases in which he explained that a postponed interest continues to affect the estate:

(1) The grant of a lease for 10 years: the lessee will take free of the interest, but the freeholder will still be affected. Once the lease expires, the right will be enforceable against the freeholder in possession, provided there was no disposition of the freehold in the interim.

(2) A franchise (an interest under schedule 3, paragraph 10 LRA 2002), a type of former overriding interest: the owner of a franchise (such as a ferry over a river) can apply to register it with its own title, under section 3(1)(c) LRA 2002, as an affecting franchise at any time. Mr Jessel stated that it would therefore not seem relevant that there had not been a notice entered under rule 35 of the Land Registration Rules 2003 on the servient title (such as the river bed) before 13 October 2013. In such cases, Mr Jessel considered that if the servient title is already registered when the franchise is first registered, the franchise can be noted on the servient title. If the franchise is registered first, then it will be noted on the servient land when that is first registered.

Chancel repair liability

8.27 As we noted in the Consultation Paper, the abolition of chancel repair liability is out of scope of this project, which is focused on land registration law.[11] Nevertheless, due to the nature of the discussion in this chapter, consultees made comments specifically on chancel repair liability.

8.28 The Society of Licensed Conveyancers agreed with our proposal, adding that chancel repair rights should not be allowed to be revived by the serving of a unilateral notice.

8.29 Everyman Legal agreed with the proposal, and commented that parochial church councils should have a good reason for trying to enforce chancel repair liability. It was of the view that very few clergy and parochial church councils find chancel repair liability as anything other than a hindrance, and would happily see it abolished.

8.30 Louis Farrington neither agreed nor disagreed with our proposal, but stated that the LRA 2002 should be amended to clarify the position in relation to chancel repair liability. He noted that the assumption that an individual who purchases property after 13 October 2013 would only be bound by chancel repair liability if notice of the liability was registered before that date or there was reference to liability in the unregistered title deeds has been challenged. Furthermore, he noted that HM Land Registry has

[11] Para 1.19.

suggested[12] there may be ongoing liability, which creates "considerable uncertainty" and "arguably runs against the expectations of the objectives of the Land Registration Act 2002". He explained:

> According to Landnet 38 HM Land Registry may register a notice for chancel repair liability after the 13 October 2013 which may create an ongoing liability it seems although they concede that this notice would not make a claimed interest valid and it can always be cancelled on application (form UN4) and by either agreement or by a Tribunal under section 73 Land Registration Act 2002.

8.31 Mr Farringdon noted that, in contrast, legal advice issued in 2007 from the Legal Advisory Commission of the General Synod and the Church of England was that a chancel repair liability would not be enforceable after 13 October 2013 if no notice had been registered and a sale occurred after this date.

8.32 However, Mr Farringdon noted that there is some doubt as to whether chancel repair liability constitutes an interest that affects a registered estate for the purpose of section 132(3) (b) LRA 2002:

> If it were to be decided that it was not an interest affecting a registered estate then it may not constitute an overriding interest and the liability may potentially continue to affect indefinitely. I would suggest the Land Registration Act 2002 should be amended to clarify this point.

8.33 The City of London Law Society Land Law Committee, which neither agreed nor disagreed with the proposal, suggested that the proposal might not address the issue of chancel repair liability. The Committee commented that HM Land Registry may conclude that the reasons for noting a chancel repair liability are not groundless, because of uncertainties in the law, meaning a notice may be entered in any case. The Committee therefore suggested that we should reconsider the standard of "not groundless" as an element of the test for entering a notice.

8.34 Michael Hall disagreed with our proposal on the ground that the changes would apply to chancel repair liability. He noted that assurances were given in Parliament – both when the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003[13] was made, and again in the debate in the Grand Committee of the House of Lords on 14 January 2015 – that chancel repair liability has been dealt with by ensuring that all such liability affecting property must be noted on the register by 13 October 2013 in order to bind purchasers. Mr Hall commented that it appears that despite these assurances, HM Land Registry is continuing to register unilateral notices of chancel repair liability against the titles of properties after they are sold.

8.35 Based on the current law, Mr Hall argued that HM Land Registry should enter such a notice unless the applicant proves to its satisfaction that there is a chancel repair liability affecting the property. He suggested that the 2002 Act should be amended to make it clear that no purchaser of property after 12 October 2013 is affected by chancel repair

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12 HM Land Registry, Landnet 38 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324701/Landnet-38.pdf last accessed 5 May 2017.

13 SI 2003 No 2431.

liability unless a notice of the liability was entered on the register prior to the purchase. However, Mr Hall argued that it is doubtful whether notices of chancel repair liability should be registered at all, as:

> Chancel repair liability does not come within the definition of an interest in land– it does not affect the land of the lay rector and is only a right to claim money from him under the Chancel Repairs Act 1932. It is not a charge on the land, and so is not within the definition of an interest in land in section 2(a)(v) of the 2002 Act … and it is not within the definition of a charge in section 132 of the Act. The judiciary have repeatedly stated that CRL is not a charge on land... .[14]

8.36 Pinsent Masons LLP[15] disagreed that chancel repair liability issues arise from any ambiguity as to the legal status of chancel repair liability as a former overriding interest itself. In its view, issues arise from the perception of the liability as a result of HM Land Registry's practice of continuing to register notices.

The burden of proof

8.37 The Society of Legal Scholars noted that under the current law, HM Land Registry does not inquire into the validity and priority of rights when a unilateral notice is lodged, and the applicant need produce no supporting evidence. The SLS additionally noted that HM Land Registry does not inquire into whether a registered disposition has been for value. The SLS considered that the burden of proof that an unprotected interest has had its priority postponed under section 29 should be borne by the proprietor and not the rightholder. However, in order to reduce the risk of "an unwarranted and significant blot on title", the SLS agreed that steps should be taken to filter applications for the entry of unilateral notices in circumstances when the right lodged may have lost priority.

8.38 The London Property Support Lawyers Group agreed with the proposal in principle. It noted that the proposal would require HM Land Registry to make a judgement in each case as to whether the reasons given by the applicant are groundless. It was the Group's view that interests which are no longer binding should not be capable of being noted on the register. The Group suggested that one solution may be for an applicant, when making an application, to certify that the application does not relate to an interest whose overriding status has been lost following a disposition for value made after 12 October 2013.

8.39 Pinsent Masons LLP endorsed the basic premise of the London Property Support Lawyers Group response, namely that interests no longer capable of binding should not be noted on the register. However, the firm noted that the solution put forward by the LPSLG was considered and dismissed at paragraph 8.46 of the Consultation Paper on the basis that it would involve a reversal of the burden of proof as to whether a given disposition had been made for valuable consideration, agreeing that it would put the application procedure "at odds with the general regime for the protection of third party rights under the Act". Furthermore, it suspected that such a change could cause

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[14] See, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2001) 81 P&CR 14; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, and also *Chivers & Son Ltd v Air Ministry* [1955] 1 Ch 585 per Wynn-Parry J.

[15] Originally in a response to para 9.117 of the Consultation Paper.

confusion and mistakes, in particular if the definition of valuable consideration were amended as discussed in Chapter 7 of the Consultation Paper.

8.40 Amy Goymour agreed with our proposal "on balance". She characterised this area of reform as a genuine dilemma: on the one hand, wanting HM Land Registry to be able to deal with applications as swiftly as possible without engaging in "fraught legal matters"; and on the other, it appearing to be "anathema to the idea of a perfect register" to have notices which protect interests that do not in fact bind the land "cluttering" the register. She suggested that one solution might be to make it more obvious on the register whether an interest has been postponed, for example, by making the amount of valuable consideration paid by disponees obvious from the register.

8.41 The Bar Council, disagreed with the proposal, explaining:

> It has the effect of shifting the burden of proving that section 29 has not operated to the party seeking to register the notice. The applicant thus loses his opportunity to put the disponee under the registered disposition to proof that it has operated. Other points

8.42 Berwin Leighton Paisner LLP considered that our proposal would amount to an exception to the basic rule that an application to register a notice only needs to describe the "nature" of the interest. Nevertheless, the firm suggested that if exceptions to that basic rule are going to be permitted, the following further exceptions might be helpful:

> 1. If the right claimed by the beneficiary was granted in a document, then details of the date of the document and the name of the grantor should be required;
>
> 2. If the right claimed by the beneficiary is one which has already been overreached, that fact should be stated and perhaps the notice placed on the register should also mention this limitation on the beneficiary's right.
>
> 3. If the right claimed by the beneficiary is one which ceased to be an overriding interest on 13 October 2013, that fact should be stated, as proposed in paragraph 8.48.

8.43 The City of London Law Society Land Law Committee neither agreed nor disagreed with the proposal. The Committee said that current unilateral notice process provides a "fairly flexible" method to protect agreements relating to land and since the agreement itself does not need to be sent to HM Land Registry, this can be helpful if it contains confidential provisions. The Committee also expressed concern that our proposal to require the provision of reasons might make the unilateral notice process less useful:

> If evidence in relation to confidential agreements which of itself may be confidential will be required in future, the Committee questions what Land Registry would do to protect the evidence from disclosure in view of the requirement for public disclosure (subject to limited exceptions) of information held by Land Registry.

8.44 However, the Committee did note that there is some merit in requiring applicants to provide reasons, as it may prevent the sort of situation that occurred when chancel repair and manorial rights ceased to have overriding status at the end of 12 October 2013.

8.45 The City of London Law Society Land Law Committee queried whether our proposal,, insofar as relevant, related to section 30 as well. However, one problem in the Committee's view, was that as a result of section 30(1), the purchaser of a loan portfolio may take subject to an unregistered lease which did not bind the original mortgagee. For example, if mortgagor granted a legal mortgage which was protected by registration and a restriction in the ordinary way, however, the mortgagor then granted a six-year lease without the mortgagee's consent.

8.46 The Committee noted the generally accepted view in such situations is that the mortgagee is not bound and can sell free of the unauthorised lease[16] Alternatively, if the mortgagee sells the mortgage to a new lender (under section 114 of the Law of Property Act 1925), the new lender will stand in the mortgagee's shoes and have all their powers, including the power to sell, free from the lease. The Committee explained its interpretation of the LRA 1925 as aligned with this Law of Property Act 19925 provision, so that under section 34(4) of the LRA 1925, the proprietor of a registered charge sold free of any inferior interests but subject to everything affecting the title at the time of registration of the charge. However, it exampled that under section 30(1) LRA Act 2002, the new lender is bound by anything registered by notice or any overriding interest at the time of registration of the transfer. It therefore concluded that the question is whether the new lender will be bound by the unauthorised lease, even though the original mortgagee had no knowledge of it and it is not on the title. The Committee noted that there is no equivalent to section 29(4)[17] in section 30 and it struck the Committee that this issue might merit similar consideration.

CALL FOR EVIDENCE

Consultation Question 35.

8.47 We invite consultees to provide evidence of the extent to which applications are being made for unilateral notices in registered titles where there has been an intervening disposition which engaged section 29, resulting in the postponement of the interest which is the subject of the notice to the interest under the intervening disposition.[18]

8.48 10 consultees answered this question.[19]

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16 Citing *Lever Finance v Needlemans' Trustee* [1956] Ch 375; [1956] 3 WLR 72, [1956] 2 All ER 378.

17 Subsection 29(4) deems a lease to be registered by providing "Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition, this section has effect as if- (a) the grant involved such a disposition; and (b) the disposition were registered at the time of the grant".

18 Consultation Paper, para 8.49.

19 Everyman Legal; Michael Hall; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); Adrian Broomfield; Bar Council; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives; The Law Society.

Evidence of problems

8.49 A number of consultees responded to say they were not aware of any such cases and had no evidence to share.[20]

8.50 The Chartered Institute of Legal Executives commented that whilst it had no specific examples, they were aware of such situations arising from the various articles and comments it had seen.

8.51 Similarly, Dr Charles Harpum noted that although the issue has been debated, he had not personally dealt with any such cases. However, he stated that the issue has arisen in cases handled by solicitors for who he has acted or provided talks. Dr Harpum shared that those solicitors had raised the issue with him in "rather indignant terms" and it was chancel repair liability that had caused the most concern because of the sums that can be required from a lay rector to pay for repairs to a pre-Reformation church have the potential to be huge. He noted that the profession feels let down because section 117 LRA 2002 was intended to solve the problem of chancel repair liability as a "conveyancing trap" by making its existence apparent on the registered title and if it was not on the registered title after 13 October 2013, it was assumed that a purchaser for valuable consideration would take the land free of it. Dr Harpum considered that this "is how it should be".

8.52 The respondent on behalf of Everyman Legal commented that as an ex-ecclesiastical lawyer he thought the chances of many such unilateral notices being imposed at this stage were low.

Other comments

8.53 The following consultees did not provide any examples; however, they had other views to share.

8.54 The London Property Support Lawyers Group referred to a passage from *Ruoff and Roper,* which states:

> A registrable disposition of a registered estate for valuable consideration, when completed by registration, takes effect subject to interests which are protected by a notice in the register and overriding interests.1 Making an official search with priority can get round the problem of third party interests being noted in the register in the period up to registration: this is done by deferring dealing with the third party's application for entry of the notice until the end of the purchaser's priority period.2 During this time, the purchaser's application should have been made. But an official search does not give the purchaser priority over an interest which is an overriding interest. Such an interest is instantly binding, without there having to be any application for an entry in the register to protect it: there is nothing to defer.[21] The Group said that this statement is "undoubtedly" correct, but it can also create issues where an overriding interest comes into being between the date of a priority search and the registration of a transaction protected by that search. The Group gave the example of a bank taking security. In the example, the bank carries out a search which

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20 Michael Hall; Chancery Bar Association; Bar Council; Adrian Broomfield.

21 *Ruoff & Roper*, para 30.014.

returns clear, but before the charge is completed the owner grants an unregistrable lease, which includes an option for the tenant to buy the freehold, and the tenant takes up occupation. The charge is subsequently completed and a registered and, at a later date, the lease and the option to purchase in the lease are noted on the title. In this situation, the Group stated that both the option and lease in this situation are likely to be overriding interests, since it is occupation at the date of disposition which is relevant. The Group questioned how a bank or purchaser is supposed to prevent this in practice. The Group suggested the Law Commission should consider the following questions.

(1) Whether occupation should protect an option which ought to be protected by notice? The London Property Support Lawyers Group did not think it should, especially if the proposals in Chapter 7 of the Consultation Paper are enacted;

(2) If a lease is not within paragraph 1 of schedule 3, should occupation make it an overriding interest under paragraph 2? The Group thought that if the lease was registrable and registered at the same time as the option, the lease itself would also be an overriding interest and so have priority over the charge, because the only exclusion of leasehold estates from paragraph 2 of schedule 3 to the LRA 2002 relates to reversionary leases (para 2(d)).

(3) Should a priority search afford protection to the holder of the search in relation to overriding interests that come into being during the priority period?

(4) In relation to overriding interests that lose their overriding status following a disposition for value, should a priority search afford protection to the holder of the search in relation to an application made to protect by notice such an overriding interest received during the priority period?

8.55 Berwin Leighton Paisner LLP stated that if it is possible to register a notice in respect of an interest which has been postponed on the grounds that it might revive in the future, it would desirable for the wording of the notice to mention this limitation. Otherwise, it said, the notice could become a serious obstacle to the registered proprietor's ability to deal with the land.

8.56 The Law Society was supportive of the proposal but commented that it raised a number of questions, namely, the fear that a property owner may become burdened by chancel repair liability, which it stated is an issue that has caused considerable practical concern amongst conveyancers, lenders and purchasers. The Society explained that the case of *Aston Cantlow v Wallbank*[22] increased awareness of the possibility of a property being burdened by chancel repair liability; and due to the inaccurate national records of which properties are affected and the ambiguous nature of some search products, there is an understandable, possibly excessive propensity to put insurance in place to cover off the risk. The Society stated that it was hoped that with such liability ceasing to be an interest with overriding status from 13 October 2013, the concerns around purchasers for valuable consideration being subject to the liability would disappear. However, that has not happened. Two main concerns were highlighted:

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22 *Wallbank v Aston Cantlow* [2003] UKHL 37, [2003] 3 WLR 283.

(1) First, a not insignificant number of unilateral notices were entered on registered titles to protect chancel repair liability in the run up to 13 October 2013.

(2) Second, the demand from lenders and purchasers for insurance against chancel repair liability has continued post 2013. The Society explained that this appears to be because some commentators regard such liability as something akin to council tax, which binds the property owner for the time that they are the owner, and has nothing to do with whether the liability is protected on the relevant registered title. The consequence of this demand for insurance is delay and cost and this presents a very real administrative burden on transactions.

8.57 The Law Society expressed support for the abolition of chancel repair liability, but recognised that taking such action is beyond the scope of this project. However, it wondered whether HM Land Registry could declining to enter a notice on the basis that the interest no longer relates to land. The Society also wondered if there was anything the Law Commission could do to mitigate the adverse impact of chancel liability, perhaps by amending the criteria for use a notice.

8.58 Despite supporting our proposal, the Society felt that we did not go far enough. The Society was concerned that if a parochial church council applies to enter a notice, providing reasons it believes the interest still binds the title, it will be difficult for anyone to determine if those reasons groundless because of uncertainties in the law and as a result, the current concerns around chancel repair liability will be perpetuated. The Society therefore suggested that we reconsider the basis of which a notice can be entered.

8.59 The Law Society also stated that we should consider the possibility of HM Land Registry requiring specific evidence to show that chancel repair liability affects the particular registered title before the liability can be noted. It suggested that this could be done by way of extra evidence provided to support the application for entry itself.

8.60 Lastly, the Law Society noted that the concerns it expressed also apply to manorial rights but to a lesser degree. More generally, the Society believed there would be considerable support for a Law Commission project to consider the future of chancel repair liability in view of the problems it continues to cause on many residential and commercial property transactions.

PRIORITY OF UNREGISTRABLE LEASES

Consultation Question 36.

8.61 We invite consultees to provide evidence of the extent to which section 29(4) has operated to confer priority on an unregistrable lease over an interest which is protected by a priority search.[23]

[23] Consultation Paper, para 8.65.

8.62 15 consultees answered this question.[24]

8.63 The majority of consultees responded simply to say that they did not have any evidence to offer.[25] Amongst those consultees who made additional comments, there were none who had experienced this problem in practice. Notably, consultees' discussions did not go beyond the example given in the Consultation Paper, of a registered charge versus a registered lease, despite the likelihood that this question of priority is relevant relation to other dispositions.

8.64 Although HM Land Registry and the City of Westminster Law Society did not have any evidence to offer, they commented that clarification of the law would be preferable; however h HM Land Registry only suggested that clarification would be desirable if problems are being experienced in practice.

8.65 Given the structure of land registration legislation, the Bar Council considered that it might be expected that registration of a disposition within the priority period would enable a disponee to obtain priority in section 29(4) situations as well. It observed that *Redstone Mortgages*,[26] *Southern Pacific*[27] and other cases demonstrate that priority searches are, and probably should be, obtained by any intended registered chargee. However, the Council noted that the facts in some of the "sale and rent back" cases demonstrate that this does not always happen, and conveyancers who fail to carry out such searches may find themselves liable.

8.66 On the other hand, the Bar Council expressed "cautious agreement" with our analysis in paragraphs 8.61 and 8.62 of the Consultation Paper: firstly, that the lease in question will often be granted relatively informally; and secondly, even if it were possible for the tenant of such a lease to obtain priority protection, because of the type of transaction, they would not be expected to do so. In its view, appropriate pre-contract inquiries should be raised of both the seller and occupiers, in order to ensure priority applies in relation to other interests. In the Council's view, "such enquiries ought not to be onerous in practice".

8.67 In addition, the Council noted that a mortgagee is likely to encounter difficulty in practice only if the lease extends beyond the time the mortgagor defaults, or if the lease is given statutory protection. The Council explained that, in many buy-to-let situations, an assured shorthold tenancy may be permitted by the terms of the mortgage.

8.68 Lastly, the Bar Council observed that the 'sale and rent back' transactions are now regulated by the Financial Conduct Authority. In its view, the regulation should to

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24 Nigel Madeley; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Howard Kennedy LLP; Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; Amy Goymour; Society of Legal Scholars; Chartered Institute of Legal Executives; The Law Society.

25 London Property Support Lawyers Group; Chancery Bar Association; Chartered Institute of Legal Executives; Adrian Broomfield; Howard Kennedy LLP; Pinsent Masons LLP.

26 *Redstone Mortgages Plc v Welch* [2009] 3 EGLR 71, [2009] 36 EG 98.

27 *Scott v Southern Pacific Mortgages Ltd* [2012] EWCA Civ 17; [2012] 1 WLR 1521.

address the iniquities in these particular situations. Accordingly, care is needed in assessing the relevance of these cases in terms of considering law reform.

8.69 Amy Goymour's considered the two scenarios discussed at paragraphs 8.55 and 8.61 of the Consultation Paper. In her view, there are two issues to consider: firstly, what is the desired outcome; and secondly, how to achieve that outcome. Ms Goymour agreed that the outcomes outlined in the Consultation Paper (for the charge to have priority in scenario 1 and the lease to have priority in scenario 2) were sensible and she was inclined to agree with our proposal. However, Ms Goymour commented that reaching the solution is difficult because "any solution seems to work for one scenario, and not the other". For example, deeming A's short lease to be registered for the purpose of the priority search means that the creation of the lease would have no impact against X in scenario 1 because X is immune from register entries (including deemed register entries). However, the same analysis would work against the lessee in scenario 2.

8.70 Ms Goymour argued that any problem might be reduced if section 29(4) only applied to leases which cannot be protected by a notice, that is, leases of three years or less. She explained her reasoning: interests which can be protected by a notice should only trigger section 29 when they are in fact protected by a notice in the register.

8.71 The Society of Legal Scholars expressed agreement with the concerns outlined in the Consultation Paper. Similarly to Amy Goymour, it believed that an unregistrable lease should take priority over a subsequently granted interest, despite that subsequent interest having been protected before the grant of the lease by a priority search. The Society proposed that this subordination of the priority search rule to the rule protecting unregistrable leases should be made clear by amendment to the legislation.

8.72 The Law Society did not believe that significant, if any, problems in practice have been caused by section 29(4) operating to confer priority on an unregistrable lease over an interest which is protected by priority search. It commented that paragraphs 8.54 onwards of the Consultation Paper would suggest that any unfairness would fall on the tenant under the unregistrable lease, in circumstances where the lease was entered into before the mortgage but both were entered into within the priority period protecting the mortgage. The Society noted the concerns highlighted in paragraph 8.55 of the Consultation Paper and the court's concern in *Scott v Southern Pacific Mortgages Ltd*,[28] but it considered that in reality the majority of mortgages will be protected by a priority search; provided that the priority search is made before the unregistrable lease is entered into, in the Law Society's view, the lease will be postponed to the mortgage protected by the search. The Society questioned whether any changes were required in view of the infrequency with which this issue has arisen before the courts and "the reality that in most situations the unregistrable lease will not have priority, because of the priority search protecting the mortgage".

8.73 Dr Charles Harpum considered the mismatch between sections 29(4) and 72 of the LRA 2002 important. He noted that the provisions of section 29(4) were not new at the time of their creation, but replicated section 19(2) of the LRA 1925. Furthermore, the priority given to the grant of a lease as an overriding interest was consulted on by the Law

[28] [2012] EWCA Civ 17, [2012] 1 WLR 1521.

Commission in 1998 and no change in the law was recommended.[29] Dr Harpum said he was not aware of any problems subsequently raised in relation to the provision.

8.74 Dr Harpum stated that because registration takes effect from the receipt by HM Land Registry of an application to register a disposition, there is only a problem if the sequence of events is along the following lines:

(1) Monday: A makes a transfer on sale to B and B executes a charge in favour of their lender M.

(2) Tuesday: B applies to HM Land Registry to register the transfer of the freehold.

(3) Wednesday: HM Land Registry receives B's application.

(4) Thursday: B grants a seven-year lease of the property to C.

(5) Friday: M submits its charge to be registered to HM Land Registry which is revived the following Monday.

8.75 Dr Harpum noted that he did not know how much of a problem the above situation presents in practice. However, he suggested that it might be tackled in the following ways.

(a) Where a priority search is still in force when the unregistrable lease is granted, the lease is, for the purposes of section 29, taken to be granted on the expiry of that priority search.

(b) Alternatively, where section 29(4) states that the unregistrable lease is made "out of a registered estate", it should only have the priority effect given by the subsection from the time when the grantor of the lease was registered as proprietor. If, therefore, the lease was granted by X to Y after a transfer of the freehold to X, but before X had submitted that transfer to LR for registration, Y's lease would only have the priority conferred by section 29(4) once the transfer had been registered.

8.76 Berwin Leighton Paisner LLP noted that in the case of *Scott v Southern Pacific*[30] the section 29(4) argument only failed in the Court of Appeal because the lease-back was for more than seven years. The firm considered that Mrs Scott might have won if the lease-back had been for less than seven years.

8.77 Nigel Madeley stated that he had not come across this issue in practice. However, he questioned whether there remortgages present an issue if the money advanced by the new mortgagee is repaying the discharged mortgagee and second mortgagee acquires by subrogation the priority that the first mortgagee had.

8.78 Mr Madeley considered that the problem considered in the Consultation Paper arises because the tenant of an unregistrable lease would not usually carry out a priority search. Mr Madeley stated that presumably the same arises for any interest that could arise during the priority period. He gave as an example an easement acquired by

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29 Land Registration for the 21st Century: A Consultative Document (1998) Law Com No 254, para 7.35.

30 [2012] EWCA Civ 17, [2012] 1 WLR 1521.

prescription when the 20 years expires after the search, but before creation of the charge; the person acquiring the interest has no reason to know about the mortgagee's priority search. He commented that mortgagees do not inspect property except by their valuation surveyor and, arguably, if a tenant is in actual occupation at the date of creation of the charge, and the mortgagee does not inspect, then the tenant takes priority.

8.79 Mr Madeley considered that a decision to protect the priority of a mortgagee as an innocent party when it had not inspected the property would amount to a policy decision to protect secured lenders despite "abbreviated due diligence". A mortgagee has the opportunity to protect itself in inspection, borrower's covenants and the loan to value ratio, all of which should be assessed on a customer-by-customer basis. A tenant has no equivalent. Therefore, in his view, legal logic supports the tenant's priority.

Chapter 9: protection of third party rights on the register part I: notices

INTRODUCTION

9.1 36 consultees responded to the questions in Chapter 9 of the Consultation Paper, and one consultee provided general comments.[1]

9.2 Most consultees agreed with the provisional proposals, supporting reform. However, many consultees disagreed with the time periods that were suggested in the provisional proposals or disagreed with having a two-stage objection process, and consultees expressed mixed views about changing the names of the existing types of notice and about the identification of beneficiaries of agreed notices.

PROPOSALS TO AMEND THE UNILATERAL NOTICE SYSTEM

General comments

9.3 Cliff Campbell said it seemed to him more fair and balanced for notice to be served first and to expire without objection before a summary notice entry is made. He considered it desirable aim to avoid creating a fait accompli situation for the registered proprietor. Further he was concerned that any amended procedure would result in the inappropriate conflation of administrative and judicial roles of HM Land Registry. Rather he stated it would be better to refer the application to the Tribunal as quickly as possible, so it can order disclosure of evidence at the soonest possible stage.

Retention of a dual-notice system: full and summary notices

Consultation Question 37.

9.4 We provisionally propose that it should be possible to protect a right by one of two kinds of notice: a full notice and a summary notice.

Do consultees agree?[2]

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1 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Hogan Lovells LLP; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Land Registration Division Judges; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); National Trust; Cabot Credit Management; Adrian Broomfield; Society of Licensed Conveyancers; Nationwide Building Society; Howard Kennedy LLP; Dr Aruna Nair; Council of Mortgage Lenders; The Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; Amy Goymour; a confidential consultee; Berkeley Group; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Taylor Wessing LLP. Cliff Campbell provided general comments.

2 Consultation Paper, para 9.116.

9.5 32 consultees answered this question:

(1) 25 agreed;[3]

(2) 2 disagreed;[4] and

(3) 5 expressed other views.[5]

Agreed

9.6 A clear majority of consultees agreed with our proposal to retain the two-notice system. There was also some discussion amongst consultees about the relevance of confidentiality to commercial agreement and there were some diverging views in relation to the proposed name change.

9.7 The Property Litigation Association considered it important that a system exists whereby a third-party interest can be protected quickly and easily by entry of a notice on the registered title. It felt that the two-tier system was a sensible structure to adopt on that basis that as "it is in the nature" of interests protected by notice to be contentious, so the system should distinguish between potentially contentious matters and those which are accepted by the parties involved or have been judged to be binding.

9.8 The Property Litigation Association also agreed that the terms "agreed notice" and "unilateral notice" can be misleading and therefore considered the proposed change of terminology appropriate.

9.9 Professor Warren Barr and Professor Debra Morris also considered that there is benefit that a change in nomenclature would provide. They stated that anything which has the potential to simplify dealings with registered title is to be welcomed.

9.10 The Bar Council said that, subject to the rest of its comments in this chapter, there should still be two kinds of notice, one of which can be applied for by one party alone in a summary way.

9.11 Berwin Leighton Paisner LLP generally agreed with our proposal and with the proposed changed in terminology. Burges Salmon LLP also agreed, "provided that the other suggested reforms are adopted to give clarity of the nature of the interest to which the applicants claim relates".

9.12 Martin Wood stated that he "entirely agreed" that option 2A (outlined in the Consultation Paper), which he considered essentially the caution procedure, is the right choice. He

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3 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Pinsent Masons LLP; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Land Registration Division Judges; Taylor Wessing LLP.

4 HM Land Registry; Dr Charles Harpum QC (Hon).

5 Everyman Legal; Chancery Bar Association; Amy Goymour; Council of Mortgage Lenders; Hogan Lovells LLP.

agreed with our assessment in paragraph 9.88 of the Consultation Paper that the end result of option 2B is much the same, whilst being “a good deal messier”.

9.13 Elizabeth Derrington, an independent complaints reviewer for HM Land Registry, said that from the cases she has investigated, that registered proprietors can “find it very alarming” to be informed that notices have been entered on their titles, especially without advance warning and without an opportunity to object. She also stated that the technical language used in in the information sheets sent by HM Land Registry to property owners “can be more confusing than helpful”, specifically the fact that an “agreed notice” does not need to be agreed. As such, thought that the proposed new terminology should reduce the likelihood of confusion in future. Ms Derrington also considered that HM Land Registry’s practice guidance could be amended to help reassure registered proprietors about their position after the entry of a unilateral notice and, when informing a registered proprietor of the entry of a notice, HM Land Registry could provide a copy of the cancellation application form.

9.14 Ms considered that registered proprietors should be notified of notices entered on their titles and should have the opportunity to challenge them, “whether or not they have consented to the entries”. She also agreed that when a notice is challenged, requiring the beneficiary to produce evidence to support the claim will have the potential to assist proprietors affected and to reduce the number of disputes that have to be referred to the Tribunal.

Disagreed with the proposed change of names

9.15 Some consultees agreed with our proposal to retain a two-tier notice, but objected to the proposed change in terminology.

9.16 Martin Wood said that whilst he agreed he could see no compelling reason for changing the names to “full” and “summary”. In his view, this change would likely cause confusion without bringing any benefit.

9.17 The City of Westminster and Holborn Law Society appeared to disagree about any confusion with the existing names, commented that there is “a plain distinction in most cases”. Hogan Lovells LLP did not support the change in terminology as the current names are both “intuitive” and “well established”.

9.18 Dr Charles Harpum QC (Hon) did not agree “if and in so far as it means changing the names of the existing types of notice”. Dr Harpum considered that the reform proposals made in Chapter 9 were “very modest” and a non-substantive change would cause confusion. He anticipated “numerous queries” about the inter-relationship between the existing types of notice and commented on the necessity for substantial transitional provisions.

9.19 Nigel Madeley considered that the proposed new names for notices might have become "wrapped up” in the confidentially debate and as a result are not as descriptive as they could be. He suggested alternative names: “interim” and “final” or “binding”. An “interim” notice suggests that the issue of validity is undecided, but with a “final” notice it is. Mr Madeley argued that a “summary” notice “suggests a shortened (but still accurate) version of what is ‘full’”, so fails to get across the point that one can be challenged but the other cannot.

9.20 Mr Madeley also suggested that our arguments for publicity are skewed. In his view, the land registration situation is not comparable to the publicity around ownership of companies. He commented that before 2003 cautions were used to protect estate contracts in preference to the "better" notice purely for confidentiality reasons, and therefore considered that we should equate a caution to a unilateral notice and preserve the dual-notice system.

Concerns about confidentiality

9.21 A number of consultees, mainly solicitor's firms or bodies representing firms involved in commercial conveyancing, commented on the need for notices to be able to protect confidentiality in transaction.

9.22 The London Property Support Lawyers Group agreed with the retention of a dual-notice system, primarily because it is the "most straightforward" method of preserving the priority of a third-party interest without sensitive or confidential information appearing on the register. It cautioned that if there was a move to a single notice system in which an applicant had to provide more information than currently required, the reforms must allow for the information provided to be kept confidential using the "exempt information document" procedures. The Group also agreed with the change in terminology to 'full notice' and 'summary notice'.

9.23 Taylor Wessing LLP supported a two-tier notice system. However, in terms of confidentiality, the firm did not want information in the case of a summary notice to have to be revealed on the register. The firm considered a mechanism to keep financial information off the register "essential", otherwise confidential information, such as sensitive public company share price information, could not be protected, explaining that stock exchange rules could be jeopardised. The firm thought that this would support, for instance, the ability to register an option by way of notice.

9.24 Howard Kennedy LLP agreed with the proposed change of terminology. In relation to the model system used, it suggested that it would be simpler to go back to the old one-tier notice system, which was referred to as option 1 in the Consultation Paper.[6] However, the firm stated that clients "probably prefer" that entries can be made without disclosing the full details of the transaction. It stated that in practice option 2A (which allows an applicant to make an entry on the register without producing evidence, but imposes greater evidential obligations in the event that the registered proprietor objects) presents greater hurdles for an applicant to overcome to retain their notice, and enables the registered proprietor to see evidence of the claim before deciding to take their objection further. The firm therefore agreed with our proposal and otherwise endorsed the London Property Support Lawyers Group response.

9.25 Pinsent Masons LLP strongly agreed that a two-tier system of notices should be retained, in order to enable the protection of rights "without the disclosure of sensitive or confidential information". The firm cautioned that the "exempt information document" procedure would not provide a sufficiently robust mechanism to protect confidentiality in a single-notice system:

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6 See para 9.65.

> Apart from being unwieldy, there is no guarantee that an application will be accepted, or (if it is accepted) that the unredacted document might nevertheless have to be disclosed eg following a request under the Freedom of Information Act 2000.

9.26 The firm also believed that the register should state whether a notice is an agreed (or full) or unilateral (or summary) notice, noting that unilateral notices are identifiable as such on the face of the register whilst agreed notices are not:

> If a notice is not a unilateral notice, it is not possible to tell from the face of an individual register whether the notice was entered as the result of an application for an agreed notice (on form AN1), or as a result of some other application, for example an application to register the interest to which the notice relates as a disposition on form AP1, or as result of the interest being disclosed as a (then) overriding interest on form DI in connection with the registration of a separate disposition.

9.27 Pinsent Masons LLP stated that this distinction can be important in practice, for example, when determining whether expressly granted easements noted on the register have been completed by registration as dispositions (on form AP1) and therefore take effect at law, or have been protected by agreed notice (on form AN1) and remain equitable easements. It argued that the current "confusing and cumbersome" procedure for determining the status of such easements "would be ameliorated, at least to a degree" if agreed notices were identified as such on the register. Pinsent Masons LLP acknowledged that the requirement for registration of easements would apply to fewer easements if the proposals in Chapter 16 are implemented. Nevertheless, it explained that the distinction would remain important in checking the status of easements granted ancillary to leases or leases granted in registrable leases.

9.28 The Society of Licensed Conveyancers, in a response made in relation to questions at paragraphs 9.116, 9.117, 9.118, 9.119 and 9.121 of our Consultation Paper, stated that the problems we discussed are arising as a result of the unilateral notice procedure being used by default to keep information confidential. The Society suggested that the proposed reforms were "limited", such that a registered proprietor would still have "no idea what they are objecting to". Therefore, unsophisticated individuals may still be able to be "bullied" by the procedure.

9.29 The Society of Licenced Conveyancers explained its view that the requirement for commercial sensitivity is skewing the issue. It argued that if both parties use the summary notice procedure, having agreed in advance to keep commercially sensitive information off the register, then this should be noted as part of the initial application. Conversely, if the parties have not agreed to keep the information off the register, all the information must be disclosed at an earlier stage so that an informed decision can be made as disclosure after objection "does not help unsophisticated registered proprietors".

Disagreed

9.30 HM Land Registry disagreed with our proposal. However, it acknowledged the existence of concerns with the current system of notices and more particularly unilateral notices. It said that the main concern was the potential for unilateral notices to result in disputes despite:

• little or no evidence of the interest to which the notice relates needing to have been submitted to HM Land Registry (and therefore available to the affected party) as part of the beneficiary's application; and

• the fact that an application for cancellation of a unilateral notice, however ill-founded, must be sent to the Tribunal where a grounded objection is received (because there is no requirement that an applicant must show they have an "arguable case" for the removal of the unilateral notice).

9.31 HM Land Registry was concerned that our proposal is "unnecessarily complex" and that working with it is likely to prove time-consuming and cumbersome for the parties involved. As such, if the proposal is taken forward, HM Land Registry cautioned that it may create problems "at least as great" as those experienced with the current system. HM Land Registry therefore suggested maintaining the current regime which "has the benefit of being well established".

9.32 Alternatively, HM Land Registry questioned whether there were simpler alternatives to our proposal. One possibility it considered was to retain only agreed notices, for which applicants must supply supporting evidence under rule 81(1)(b) of the LRR 2003. In respect of our concerns that it should be possible for a notice to be entered swiftly, HM Land Registry argued that it is "very difficult" to see that getting together the evidence should cause any delay as a notice usually protects an interest created by a single document, for example, a section 106 (or planning) agreement, a sale contract or an option agreement. HM Land Registry expressed its view that a single notice regime would result in a more transparent register where interests claimed are supported by evidence.

9.33 In response to our concern that an evidence-based single notice application system would make it difficult for parties to keep the details of the protected interest confidential, HM Land Registry questioned whether a second possibility is to retain only agreed notices and amend rule 81 of the LRR 2003 so that evidence would not have to accompany applications in the cases where they are made with the registered proprietor's consent.

9.34 In addition, HM Land Registry disagreed with the proposal to change the nomenclature applicable to notices, stating that the names are now common in the conveyancing profession. Furthermore, it disagreed with the proposed names, stating that they suggest that one (the "full notice") is superior to the other (the "summary notice").

Expressed other views

9.35 Everyman Legal, expressing other views, did not think the name change would make a difference. It explained that solicitors would still need to explain to a client what a full notice was as opposed to a summary notice. The firm also considered the use of the term 'summary' archaic and as going against the trend to modernise legal language.

9.36 Amy Goymour had no comment save that she did not mind the nomenclature in the current law.

9.37 The Council of Mortgage Lenders explained that lenders occasionally use unilateral notices to protect their interests, for example, if a conveyancer fails to register the

charge. The Council's members did not consider that there are any major issues with the current process and, therefore, did not see cause for changing the current procedures. However, should the proposal go ahead, the Council said it preferred option 2A as set out in the Consultation Paper, which included adapting the procedure for unilateral notices.[7]

9.38 The Chancery Bar Association agreed that there should be two kinds of notice; however, in its view, the division between the two should be based on whether the lodging of the notice is hostile or consensual, rather than based on the nature of the information registered. The Association considered that although the current nomenclature can be said to be a misleading, it is well understood and "reflects the essential division between consensual and hostile notices". As such, it saw no reason for the proposed change of names.

No need for evidence on application

Consultation Question 38.

9.39 We provisionally propose that an application for a summary notice should not need to be accompanied by any evidence to support the interest claimed.

Do consultees agree?[8]

9.40 27 consultees answered this question:

(1) 23 agreed;[9]

(2) 3 disagreed;[10] and

(3) 1 expressed other views.[11]

Agreed

9.41 Again the majority of consultees agreed with our proposal.

9.42 Professor Warren Barr and Professor Debra Morris thought that the proposal followed from the summary nature of the notice and the nature of what it seeks to protect.

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7 See para 9.92.

8 Consultation Paper, para 9.117.

9 Martin Wood; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); National Trust; Adrian Broomfield; Nationwide Building Society; Dr Aruna Nair; The Bar Council; Berwin Leighton Paisner LLP; Burges Salmon LLP; The Law Society; Mangala Murali; Land Registration Division Judges.

10 Property Litigation Association; The Conveyancing Association; Chartered Institute of Legal Executives

11 HM Land Registry

9.43 Everyman Legal considered that our proposal would preserve the need to act promptly on occasions.

9.44 Christopher Jessel agreed with the proposal, but added that the application form should include a statement along the lines of "I am in possession of sufficient evidence to support the right to be protected by the notice and I undertake to provide that evidence on request by the Land Registry". Mr Jessel said that including an undertaking to produce evidence would encourage openness at an early stage.

9.45 The London Property Support Lawyers Group agreed subject to two conditions, namely that the reforms to the application procedure for unilateral notices to protect former overriding interests outlined in Chapter 8 and the cancellation procedure outlined in Option 2A[12] are both adopted. Accordingly, a registered proprietor can obtain detailed evidence of the nature of a beneficiary's claim to a unilateral notice at an early stage. These observations were endorsed by Pinsent Masons LLP, who also commented on the proposal in relation to chancel repair liability.

9.46 Nationwide Building Society agreed with the proposal. It explained that it currently uses the unilateral notice procedure where, for example, a panel solicitor has failed to register a charge, commenting that in this scenario it is important that the application can be completed as quickly as possible.

9.47 Berwin Leighton Paisner LLP stated that at present, boxes 11 and 12 on Form UN1 only require the "nature of the beneficiary's interest" to be set out; therefore, a claim expressed in vague terms might be capable of satisfying this requirement. The firm considered that it would desirable if slightly more explicit details were required, especially as some of the proposals in the Consultation Paper are likely to result in an increase in the use of notices.

9.48 In response to the discussion in paragraph 9.71 of the Consultation Paper, discussing the risk of the register becoming cluttered with uncertain and potentially invalid entries, Berwin Leighton Paisner LLP suggested that this risk might be lessened by the following changes to Form UN1:

1. If the right claimed by the beneficiary was granted in a document, then details of the date of the document and the name of the grantor should be required;

2. If the right claimed by the beneficiary is one which has already been overreached (and the notice is intended to protect the right if it ever revived, as described in response 22.35), that fact should be stated. Perhaps the notice to be placed on the register should also mention this limitation on the beneficiary's right.

3. If the right claimed by the beneficiary is one which ceased to be an overriding interest on 13 October 2013, that fact should be stated [referring to the proposal in paragraph 8.48 of the Consultation Paper].

9.49 Berwin Leighton Paisner LLP noted that the warning about wrongful claims at the end of Form UN1 only mentions the criminal offence of fraud. It suggested that for

[12] See Consultation Paper, para 9.92.

consistency, there should also be a warning about the liability for damages in tort for breach of statutory duty under section 77.[13]

9.50 Nigel Madeley's agreement with our proposal was "marginal"; however, he thought that the benefit of the doubt must fall to protect those who need to register a notice in an emergency.

Disagreed

9.51 The Property Litigation Association disagreed with this proposal, stating that it had difficulty with the idea that sensitive or commercial information needs to be kept off the register. The Association argued that the entry of a summary notice is a potentially hostile act which can be used tactically to intimidate a registered proprietor. It commented that significant distress was caused to numerous individual property owners by the registration of bulk unilateral notices as the transitional period during which former overriding interests ceased to be overriding approached.

9.52 Further, the Property Litigation Association argued that since the introduction of unilateral notices, most practitioners have dealt with scenarios where unilateral notices were registered against commercial property with a view to extracting a ransom payment for their withdrawal. It stated that without detailed information being available, it is very difficult to advise a client and considered that it is "not unreasonable" to ask notice beneficiary of an interest to set out the basis on which they are entitled to apply for a unilateral notice.

9.53 The Conveyancing Association considered that no one should be able to apply for registration of any interest without providing evidence of their right to that interest. It allowed that although the evidence does not need to be validated, it should be produced.

9.54 The Chartered Institute of Legal Executives disagreed with the proposal. In its view, evidence should be supplied with the application to avoid the registered proprietor having a period of uncertainty, and to avoid spurious claims. CILEx considered that although the beneficiary is entitled to apply for a notice, he or she should be required to provide evidence initially, so that HM Land Registry can make a decision as to whether the notice is entered at all.

Expressed other views

9.55 HM Land Registry neither agreed nor disagreed with our proposal and instead, referred back to the response to Consultation Question 37, at paragraph 9.116 of the Consultation Paper.

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[13] See Consultation Paper, paras 9.21, 9.30 and 9.32.

Amendments to the procedure to object to an application to cancel

Consultation Question 39.

9.56 We provisionally propose that, if a registered proprietor applies to cancel a summary notice, the beneficiary of the summary notice will be required to make an initial response within 15 business days (subject to an extension of up to a maximum of 30 business days). The response must demonstrate a case for the retention of the notice which is not groundless.

Do consultees agree?[14]

9.57 26 consultees answered this question:

(1) 20 agreed;[15]

(2) 3 disagreed;[16] and

(3) 3 expressed other views.[17]

Agreed

9.58 Elizabeth Derrington agreed that it is "desirable" that the registered proprietor be informed of a summary (or unilateral) notice whether or not he or she has agreed to it. She also considered that the right to challenge a summary notice should be retained.

9.59 Everyman Legal agreed, suggesting that "in 95% of cases" the beneficiary, if challenged, "should be able to demonstrate a prima facie case without both parties having to resort to a dispute procedure".

9.60 Pinsent Masons LLP agreed with the proposal for a two-stage objection process. The firm noted that the London Property Support Lawyers Group's response (contained under the 'disagree' heading) suggested reducing the initial objection period below 15 business days. Pinsent Masons LLP, however, warned against reducing this period until arrangements for searching the register for unilateral notices by name of beneficiary can be improved in order so that those with the benefit of large numbers of unilateral notices can easily keep their address for service up to date on all of them. Otherwise:

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14 Consultation Paper, para 9.118.

15 Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; National Trust; Adrian Broomfield; Nationwide Building Society; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Burges Salmon LLP; Mangala Murali; Land Registration Division Judges.

16 Christopher Jessel; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives.

17 Property Litigation Association; Dr Charles Harpum QC (Hon); HM Land Registry.

Applicants may have to rely on postal redirection services for an interim period pending all the entries being identified and the addresses updated, which can delay receipt.

9.61 Howard Kennedy LLP agreed with the proposed two-stage objection procedure. Quoting the London Property Support Lawyers Group, it noted that having a short initial objection stage gives the registered proprietor a means of removing a unilateral notice from its title in situations where the beneficiary of the notice does not object or respond to the cancellation application or has no grounds to object.

9.62 Nigel Madeley's agreement was again marginal. He noted that in general, he has been wary of the time limits since *Baxter v Mannion*;[18] he stated that a beneficiary has little excuse for failing to respond, but only if the proprietor objects immediately which they do not always do.

Agreed but feel the proposed limit is too long or short

9.63 Some consultees agreed in principle that there should be a time limit, but considered that the timescale proposed in the Consultation Paper was either too long or too short.

9.64 The London Property Support Lawyers Group said it agreed with the proposed two-stage objection procedure. It stated that having a short initial objection stage gives the registered proprietor a means of removing a unilateral notice from his or her title in situations where the beneficiary of the notice does not object or respond to the cancellation application or has no grounds to object. However, it considered that the proposed period of 15 business days would be too long. Assuming a beneficiary has a genuine claim, it suggested that he or she should be able to respond quickly at the first stage. Additionally, the Group noted that the Consultation Paper did not specifically state what evidence the beneficiary would need to provide; if it were similar to that required under the current system (evidence to demonstrate that the notice is not 'groundless'), this was low threshold for the beneficiary to cross in order to preserve the right to object. Therefore, the Group proposed a time limit of 10 business days, with the ability to request an extension with good reason, provided the extension did not extend the overall time limit for objection.

9.65 Conversely, Adrian Broomfield thought that the maximum time extension should not be limited to 30 business days. He explained that there may be cases where more time is required to fully substantiate a claim (for example, where manorial mineral interests or chancel repair liability requires more research to establish the precise extent of the land affected). Mr Broomfield argued that the registrar should have the ability to grant a further discretionary time extension as is appropriate in the circumstances of the individual case.

Disagreed because the proposed limit is too long or short

9.66 Similarly, there were also consultees who disagreed with our proposal on the basis that the time limit put forward in the Consultation Paper was, in their view, too long or too short.

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18 [2011] EWCA Civ 120, [2011] 1 WLR 1594.

9.67 Berwin Leighton Paisner LLP suggested that the period for the initial response should be 10 business days, or possibly even less. The firm stated that in most cases where the entry of a notice comes as a surprise to the registered proprietor, an application to cancel can be expected to be made quickly; in those circumstances, it should be a simple matter for the beneficiary to show that the claim is not "groundless". Additionally, the firm stated that if the period is capable of extension on the basis of rule 86 of the LRR 2003, the period of the extension should not exceed 20 business days, so that the entire two-stage objection procedure could not last for longer than 30 business days in all.

9.68 The Chartered Institute of Legal Executives thought the proposed period was too long and would create uncertainty for the registered proprietor. It argued a 10-business-day period should suffice, and that an extension should not be possible as a matter of course.

9.69 In contrast, Christopher Jessel thought that 15 business days was too short because, apart from absences on business or holiday, there may be a need to take advice in order to draft even an outline case. He therefore suggested an initial 30 business days with the power to extend.

Expressed other views

9.70 Consultees who did not agree or disagree with our proposal made the following comments.

9.71 The Property Litigation Association stated that the "procedural stage" discussed in paragraph 9.118 would be unnecessary if the approach it advocated (in response to the Consultation Question 38) is adopted. It suggested that those who claim to be entitled to enter a unilateral / summary notice should set out the basis on which they are entitled to do so. If the proposal in the Consultation Paper is adopted, then the Association would advocate for the objection procedure to be compressed into a single stage, whereby the beneficiary must produce evidence to satisfy the registrar of the validity of the interest claimed. It explained:

> Where someone puts in a summary notice, the basis on which they are doing so will be known to the applicant. Therefore, requiring a notice within a maximum of 10 days is not unreasonable.

9.72 Dr Charles Harpum (in his response to Consultation Questions 39 and 40) accepted that he appreciated that it is sometimes the case that a unilateral notice has to be registered quickly because of the particular circumstances. However, he stated that a person who claims an interest in property should be in a position to provide evidence of his or her claim at the time of entry of the notice or shortly afterwards. It was Dr Harpum's view that, if the beneficiary of the notice does not have the requisite evidence at this time, he or she should not be registering a notice and does not have reasonable grounds to apply.

9.73 Dr Harpum argued that the two distinct stages proposed in the Consultation Paper should be omitted. Instead, he made the following proposal:

If a registered proprietor applies to cancel a unilateral (summary) notice, the beneficiary of the unilateral notice will be required to respond within 15 business days (subject to an extension of up to a maximum of 30 business days). That response must include evidence to satisfy the registrar of the validity of the interest claimed.

9.74 Dr Harpum stated that the telescoped procedure he suggested provides the sort of timescale that is required in practice, and also provides a way of abandoning the test of whether the objection is or is not groundless.

9.75 In relation to the threshold that must be met, Dr Harpum inferred that "validity of the interest claimed" means that the beneficiary of the notice must show that he or she does have the interest claimed. He said that it would be "going too far" to say that the beneficiary has to prove on the balance of probabilities that he or she has the interest claimed.

9.76 HM Land Registry did not provide any comment other than to refer back to the response to Consultation Question 37, above.

Consultation Question 40.

9.77 We provisionally propose that, in the event that the beneficiary submits an initial response objecting to cancellation of the notice, the beneficiary must produce evidence to satisfy the registrar of the validity of the interest claimed. Evidence must be provided within a maximum of 40 business days of the original notification of the application to cancel.

Do consultees agree?[19]

9.78 27 consultees answered this question:

(1) 13 agreed;[20]

(2) 4 disagreed;[21] and

(3) 10 expressed other views.[22]

9.79 Our proposal did not receive support from a majority consultees. Many consultees who disagreed with the length of the maximum time limit proposed in the Consultation Paper

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19 Consultation Paper, para 9.119.

20 Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Hall; The Conveyancing Association; Christopher Jessel; Adrian Broomfield; Nationwide Building Society; Dr Aruna Nair; The Bar Council; The Law Society; Mangala Murali.

21 Property Litigation Association; Chancery Bar Association; Chartered Institute of Legal Executives; Land Registration Division Judges.

22 Martin Wood; Everyman Legal; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Pinsent Masons LLP; National Trust; HM Land Registry; Berwin Leighton Paisner LLP; Burges Salmon LLP; Council of Mortgage Lenders.

expressed their views variously as agreement with a caveat, outright disagreement and by expressing other views.

Agreed

9.80 Nationwide Building Society agreed with our proposal in principle, stating that a beneficiary of a notice should be capable of providing the necessary evidence. In its view, the proposal would enable applications with no real claim to be "flushed out" at an early stage.

9.81 The Law Society also agreed but considered that there should be provision to allow an extension to the time limit if there is due cause.

9.82 The Bar Council also agreed, subject to its answer to Consultation Question 41

Agreed but thought that the proposed limit is too long

9.83 Nigel Madeley expressed agreement but stated that 40 business days was "rather long", given the initial 15- or 30-day period. He questioned to what extent there might be a benefit in looking at a summary hearing Tribunal procedure, questioning whether a case should even go to the Tribunal if the dispute is about a point of law. Mr Madeley suggested that if the Chief Land Registrar has the confidence of the public, is not privatised and is assisted by leading counsel, it may be possible for a legal dispute to be dealt with speedily 'in-house', so that the Tribunal only receives disputes of fact or mixed law and fact.

9.84 Mr Madeley went on to ask, whatever the maximum time period, what would be done about a *Baxter v Mannion*[23] type situation where the beneficiary has a perfectly valid claim but has failed to follow the procedure correctly. Mr Madeley suggested that the judgement in *Baxter* was the right result and as such, a person should not lose their legal rights as a result of making procedural errors.

Agree but thought that the proposed limit is too short

9.85 Christopher Jessel proposed that there should be power to extend the period of 40 days because it might be difficult for the beneficiary to assembly quickly evidence to a standard "to satisfy the registrar": I

> t may be necessary to carry out research into manorial documents and to engage a specialist … many notices will raise difficult issues of law or fact or involve historical research so the process must allow time for this.

Mr Jessel noted this proposal may slow transactions, but a landowner will usually have been notified of the claimed right either on first registration (if made by caution) or when it was made (if by notice) and will have had a chance to challenge it then.

9.86 Adrian Broomfield stated that the beneficiary should not be required to make out his or her claim in full in a 40-business-day period. Mr Broomfield explained that there may be cases where more time is required to establish the claim in full; in his view, a claim should not be prejudiced because of an arbitrary time limit. He argued that the registrar

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[23] [2011] EWCA Civ 120, [2011] 1 WLR 1594.

should have a discretion to extend the period if the individual case requires it in the interests of fairness and justice.

Disagreed

9.87 The Chancery Bar Association agreed that a beneficiary should be required to provide evidence in support of the interest claimed at this stage: the evidence may cause the registered proprietor to accept the validity of the notice at an early stage and avoid the need for a reference to the First-tier Tribunal. However, the Association strongly disagreed that a beneficiary should have to satisfy the registrar that it is "more likely than not that the interest claimed exists". It argued that it would be "wholly inappropriate" to give the registrar the power to decide whether, for example, a claim to an interest based on a proprietary estoppel is more likely than not to succeed, especially as the principle underlying the creation of the adjudicator in 2000 was that the registrar should no longer decide questions of this kind. The Association argued that the jurisdiction of the registrar should be limited to determining whether the beneficiary's claim to an interest is groundless.

9.88 The Chancery Bar Association considered that requiring the beneficiary to satisfy the registrar that the interest probably exists is wrong in principle. In its view, it wouldplace an excessive evidential burden on the parties at an early stage, and would lead to a number of judicial reviews.

9.89 The Land Registration Division Judges responded to this chapter is "in general terms". They explained that it is accepted that at present an agreed notice can be entered on the register where the registrar is satisfied that the applicant is entitled to it, even without the agreement of the registered proprietor, pursuant to section 34(3)(c) of the LRA 2002. But, so far as they are aware, this does not happen when there is opposition to the entry. Accordingly, the Land Registration Division Judges thought that it was unrealistic to suggest that summary notices might be entered following examination of the evidence by the registrar in circumstances where opposition to the notice has been made known. They said:

> For the registrar to make a determination in those circumstances runs counter to the principle that disputes between customers should be referred to the First-tier Tribunal; it is likely to be unwelcome to the registrar as things stand; and it is wholly inappropriate in the context of a privatised Land Registry. It would also be burdensome to customers as their only recourse following such a determination would be to judicial review proceedings …. Alternatively a registered proprietor faced with an application for a notice might apply to the court for a declaration in anticipation of an adverse decision by the registrar; this would be stressful and expensive, and would increase the burden on the courts.

9.90 On the other hand, the Land Registration Division Judges said they see the virtue of a system in which the applicant for a notice has to provide some evidence of his or her entitlement before the registered proprietor decides whether to pursue the objection as far as the Tribunal. They suspected that this happens in most cases "as it is in the applicant's interest to provide information and to avoid the costs risk of the Tribunal proceedings". They wondered whether our proposals had been skewed by some of the more troubling instances of the entry of restrictions to protect manorial rights.

9.91 The judges therefore disagreed with the proposal, stating that if there is an objection which is not groundless, and if the reasons given for the entry of the restriction are not groundless, then the matter should be referred to the Tribunal.

Disagreed because the proposed limit is too long

9.92 The Property Litigation Association referred back to its response to Consultation Question 40, repeating that the time period is too long. The firm argued that often, removal of unilateral notices is contentious as the registered proprietor objected to the initial registration. It said:

> In such cases 40 business days is excessive, particularly if you compare the time periods for filing defences under the civil procedure rules which is up to 28 days.

9.93 The Chartered Institute of Legal Executives also thought that the proposed period is too long and would create uncertainty for the registered proprietor, saying that "a 10 business day period should suffice and an extension should not be a matter of course".

Expressed other views

9.94 Martin Wood expressed other views. He suggested that the beneficiary should be required to produce evidence to pass the groundless test so as to avoid summary cancellation of the unilateral notice. The evidence need not unequivocally satisfy the registrar of the validity of the claim. Comparing it to the cautions regime under the LRA 1925, he explained:

> There were many cases of contested cautions, and no doubt the same applies to unilateral notices, where the arguments and evidence produced fell between those two extremes and showed an arguable case that neither justified summary cancellation nor met the unequivocally satisfied test, and so, in the absence of an agreed settlement, required judicial resolution.

9.95 Everyman Legal questioned the need for two stages, asking why this proposal could not be combined with the one at Consultation Question 39.

Neither agreed nor disagreed but felt the time limit was too long

9.96 The London Property Support Lawyers Group agreed with a two-stage objection procedure, however, the Group believed that the overall time limit of 40 business days (8 weeks) should be reduced. It noted that a beneficiary with a genuine claim to a notice should already have evidence of this to hand or should be able to gather evidence relatively quickly. It therefore suggested that a maximum period of 30 business days (6 weeks) for the entire two stage objection procedure would be adequate.

9.97 Pinsent Masons LLP agreed with the London Property Support Lawyers Group response that the maximum period from the original notification of the application to cancel should be 30 business days.

9.98 Berwin Leighton Paisner LLP considered that a period of 40 business days before the registered proprietor can "find out exactly what is being claimed" is "much too long", especially if the notice is registered at a critical time such as when the registered proprietor has already contracted to sell to land. The firm noted that the existence of the

notice will probably cause the registered proprietor to be in breach of the sale contract unless the notice can be removed quickly.

9.99 Berwin Leighton Paisner LLP restated its suggestion of a maximum period of 30 business days (or preferably even less) for the entire two-stage objection procedure. Alternatively, if the proposal for a new priority rule in Chapter 6 is taken forward, it might be possible for the parties to protect their transactions against bogus notices during critical times, by registering their own notices and making their own priority searches.

9.100 Burges Salmon LLP also stated that 40 business days "is a long time". It would prefer a shorter time period of 30 business days with an option to apply to the registrar, or agree with the registered proprietor, for an extension of time if justification is provided.

9.101 HM Land Registry again referred to their response to the proposal in Consultation Question 37. In addition, HM Land Registry highlighted the following points in the case that this proposal is taken forward:

- there is the practical point that a beneficiary who realises he or she will miss the deadline (or who has missed the deadline) may simply lodge a further application;

- the drafting would have to be considered carefully; for example, what might happen in circumstances where evidence was produced immediately prior to the deadline that did not "satisfy the registrar", but provided an "arguable case" that an interest existed; and

- the lengths of time that the Law Commission is considering for various deadlines are … unnecessarily long and, as well as having the potential to delay for long periods the completion of applications, may not balance appropriately the interests of registered proprietors and the beneficiaries of interests.

Neither agreed not disagreed but felt the time limit was too short

9.102 The City of Westminster and Holborn Law Society agreed in principle with our proposal, but considered that a fixed 40 business days limit is inflexible, giving an example of where HM Land Registry is satisfied that a response without detail could take up to the first 30 business days.

9.103 The National Trust also agreed in principle, but stated that 40 days may not provide the beneficiary of a notice with enough time to prepare sufficient evidence. It suggested including an option for the parties to agree or for the registrar, if satisfied, to give a further extension where reasonably necessary. In addition, the National Trust suggested that suitable provision should be made for the beneficiary of the notice and/or the registered proprietor to refer the decision of the registrar to the First-tier Tribunal for review if either party is not satisfied with the registrar's decision.

Other comments

9.104 In a separate comment, Dr Charles Harpum suggested that it is worth exploring whether there is some intermediate point between the beneficiary of a notice "(1) having to show the validity of the interest and (2) merely having to show that the objection is not groundless". He noted that the "real prospect of success" test, which is employed in the Civil Procedure Rules at rule 52.3 is one possible test, but it may not be the only one.

9.105 Dr Harpum argued that the issue is whether the beneficiary of a notice has an interest that justifies the entry of that notice. Therefore, what should be required is evidence that the beneficiary does have an interest and the basis for the beneficiary's claim. He stated that it should be evidence that satisfies the registrar that there is a genuine issue to be determined between the parties and this matter is something that a registrar should be able to decide, as he or she sees applications to register interests every day.

Application to existing unilateral notices

Consultation Question 41.

9.106 We provisionally propose that where an application is made to cancel a unilateral notice following implementation of our reforms, the beneficiary of that notice should (following an objection to cancellation) be required to produce evidence to satisfy the registrar of the validity of the interest claimed.

Do consultees agree?[24]

9.107 27 consultees answered this question:

(1) 22 agreed;[25]

(2) 3 disagreed;[26] and

(3) 2 expressed other views.[27]

Agreed

9.108 The Property Litigation Association agreed stating that having one single cancellation procedure for new summary notices and existing unilateral notices would be desirable if evidence is not to be required initially for new summary notices.

9.109 The London Property Support Lawyers Group commented that having a single cancellation procedure for new and existing unilateral notices would be the simplest approach.

9.110 Pinsent Masons LLP saw "no policy reason" for restricting the new procedure to objections to the cancellation of unilateral notices registered after the change of law.

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24 Consultation Paper, para 9.121.

25 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Pinsent Masons LLP; National Trust; Adrian Broomfield; Nationwide Building Society; Dr Aruna Nair; Berwin Leighton Paisner LLP; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Dr Charles Harpum QC (Hon).

26 Chancery Bar Association; The Bar Council; Land Registration Division Judges.

27 Christopher Jessel; HM Land Registry.

The firm considered that a two-tier system would be unnecessarily confusing and might lead to mistakes.

9.111 Berwin Leighton Paisner LLP agreed with our statement at 9.113 of the Consultation Paper, proposing that the beneficiary should be required to satisfy the registrar of the validity of the interest claimed, rather than for the objection to be shown to be groundless. The firm argued that if the registered proprietor does not know exactly what is being claimed, it will be difficult to give any specific grounds in the objection in the first place.

9.112 Professor Warren Barr and Professor Debra Morris agreed stating that it is at this point that there is a need for validity.

9.113 The Conveyancing Association said, as previously stated, that the beneficiary of a notice should have to evidence their interest to HM Land Registry prior to the registration of a unilateral notice; HM Land Registry should not have to validate the right, but simply see some evidence that there is a right or interest capable of protection.

9.114 Adrian Broomfield agreed on the basis that it would show a claim is legitimate and not wholly groundless. However, he argued that the period to establish the validity of the interest claimed should be flexible, "reflecting the varying nature of such interests and time input required to collate the requisite evidence".

9.115 Dr Charles Harpum regarded it as obvious that the new procedure should apply to existing unilateral notices and argued that if unilateral notices were not renamed, a provision of this kind would not be needed.

Disagreed

9.116 The Chancery Bar Association referred back to its comments to the proposal in Consultation Question 40 (at paragraph 9.119 of the Consultation Paper) where it argued that it is "wrong in principle" to require the beneficiary to satisfy the registrar that the interest probably and places an excessive evidential burden on the parties at an early stage.

9.117 The Bar Council also considered that our proposal presents too high a hurdle for the applicant for the reasons set out at paragraph 9.112 of the Consultation Paper. The Council stated that while in many cases it is likely to be reasonably clear whether a claimed interest is valid or not from the evidence presented at this stage, in other cases it will not be. In these cases, the applicant would unfairly be left unprotected while the claimed right is established in the courts. It went on to say that the registrar should again consider whether the fleshed out claim to the right is groundless, and the notice should be maintained if it is not. Accordingly, "the parties will then be able to attempt to settle any dispute or to resolve it through the Tribunal".

9.118 The Land Registration Division Judges disagreed, stating that the beneficiary should be required to satisfy the registrar only that the objection to cancellation is not groundless, and then the current referral procedure should continue.

Expressed other views

9.119 Christopher Jessel referred back to his response to Consultation Question 39, stating that it would be better to ensure the evidence was available at the outset. He noted that the suggestion in paragraph 9.110 of the Consultation Paper is that only if the evidence is so lacking that the claim to the benefit of a notice is groundless will the registrar cancel the notice and so, if there are some arguable grounds, however weak, the notice will stand. He argued that whatever the standard of satisfaction, this will involve the registrar having to determine some issues in order to be satisfied or not and any genuine dispute will be referred to the Tribunal so it is not clear what effect satisfying the registrar will have.

9.120 Mr Jessel stated that a time limit is also needed here if, as is likely, many of the applications relate to manorial rights and chancel repairs as it may be difficult to produce the evidence of a valid claim. Mr Jessel considered that as most these notices will have been on the register since before 13 October 2013, there should be no urgency in removing them. He suggested the beneficiary should be allowed an initial 40 business days, but with power to extend that should be readily exercised.

9.121 HM Land Registry again referred back to its comments responding to Consultation Questions 37 and 40 above. However, HM Land Registry also stated that if the Commission's overarching proposal to reform the notice regime is taken forward, then it agreed that there is merit in requiring the beneficiary of an existing unilateral notice to have to produce evidence of the interest claimed where an application is made to cancel it.

WHO MAY APPLY FOR CANCELLATION OF A UNILATERAL NOTICE

Consultation Question 42.

9.122 We provisionally propose that it should be clarified that an insolvency practitioner appointed in respect of an insolvent registered proprietor is able to apply to cancel a unilateral notice on behalf of the registered proprietor.

Do consultees agree?[28]

9.123 24 consultees answered this question, all of whom agreed..[29]

9.124 Although all the consultees who responded agreed, the majority of consultees did not provide any further information beyond indicating their agreement.

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28 Consultation Paper, para 9.141.

29 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

9.125 The Property Litigation Association agreed provided that appropriate evidence of appointment of the insolvency practitioner is lodged with the application for cancellation. Similarly, the London Property Support Lawyers Group agreed provided the usual evidence of appointment of the insolvency practitioner is lodged with the application for cancellation. HM Land Registry also agreed with the proposal, provided appropriate evidence is lodged with the application that the insolvency practitioner has been validly appointed and can act on the registered proprietor's behalf in making the application.

9.126 Berwin Leighton Paisner LLP agreed, and explained that the same should apply to receivers appointed under mortgages who may not always be insolvency practitioners.

9.127 The Chartered Institute of Legal Executives agreed. However, it explained that notices are not being removed, causing delay and costs. It therefore suggested that the Law Commission add a requirement that when a bankrupt is discharged, the person who lodged the notice must remove it within 10 working days, and, if they fail to do so, HM Land Registry should remove it.

Consultation Question 43.

9.128 We provisionally propose that it should be clarified that attorneys acting under a power of attorney may apply to cancel a unilateral notice on behalf of a registered proprietor who is the donor of the power.

Do consultees agree?[30]

9.129 25 consultees answered this question:

(1) 24 agreed;[31] and

(2) 1 expressed other views.[32]

9.130 This proposal received almost unanimous support from consultees and as with the previous proposal, consultees who provided comments referred to the need for satisfactory evidence of appointment to be provided with any application.

Agreed

9.131 The Property Litigation Association agreed, provided that appropriate evidence of the attorney's appointment and scope of powers is lodged with the application for

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30 Consultation Paper, para 9.142.

31 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Dr Charles Harpum QC (Hon); Adrian Broomfield; Society of Licensed Conveyancers; Dr Aruna Nair; The Bar Council; Berwin Leighton Paisner LLP; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali; Berkeley Group.

32 HM Land Registry.

cancellation. The same point was made by the London Property Support Lawyers Group and Burges Salmon LLP.

9.132 The Chartered Institute of Legal Executives agreed and added that Deputies under a Court of Protection order should be included as well.

9.133 Dr Charles Harpum considered that our proposal "must be the law already".

9.134 The Berkeley Group agreed with our proposal, but thought that clarity should be given as to whether an attorney can sign for a beneficiary. The Group explained that this is a common workaround for parties to contractually agree that upon, for example, the termination of an agreement, the registered proprietor may take steps to cancel the notice acting as the buyer's attorney if the buyer fails to remove such notice on termination of the agreement within a specified period.

Other

9.135 HM Land Registry stated that it "broadly speaking" agreed with the proposal. However, it thought that the proposal must be dependent upon the nature and scope of the power granted to the attorney.

Consultation Question 44.

9.136 We invite consultees to share with us other situations in which they believe the persons who can make applications to Land Registry are unnecessarily limited.[33]

9.137 11 consultees answered this question.[34]

9.138 The response to this question was limited in terms of numbers of consultees. Some consultees stated simply that they had no examples to give.[35] The Law Society stated that it did not consider any further provisions necessary.

9.139 Christopher Jessel put forward that a person entitled to be registered, such as an executor, should be able to apply to cancel a unilateral notice. The Chartered Institute of Legal Executives suggested that beneficiaries under a trust should be able to apply, and Mangala Murali suggested that personal representatives should be able to apply.

9.140 The City of Westminster and Holborn Law Society said that it had no view on situations other than cancellation of a unilateral notice. It noted that where there are joint proprietors, there can be circumstances where one proprietor is unavailable or unable

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33 Consultation Paper, para 9.144.

34 Property Litigation Association; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Pinsent Masons LLP; The Bar Council; Chartered Institute of Legal Executives; The Law Society; Mangala Murali; Howard Kennedy LLP.

35 Property Litigation Association, London Property Support Lawyers Group; Pinsent Masons LLP; Howard Kennedy LLP.

to join in an application quickly or at all and, therefore, some flexibility would be desirable.

9.141 The Bar Council also put forward the argument for allowing one of a number of joint proprietors of an estate, or persons who are jointly entitled to an interest in an estate, to make applications on behalf of all of them, commenting that the others may be incapable or unwilling to join in the application. The Bar Council recognised, however, that problems could arise in practice if the joint owners each act unilaterally.

9.142 Michael Hall thought that there is a problem with the "restricted interpretation" which HM Land Registry applies to section 36 of the Trustee Act 1925: he said that it rejects applications for registration of deeds of appointment of new trustees, where the registered proprietor is unwilling to act, or incapable of acting, as a trustee. Compared with the unregistered system, which allowed deeds of appointment to be executed and accepted as valid, Mr Hall stated that HM Land Registry's current procedure necessitates applications to the High Court Chancery Division for the appointment of a new trustee. He suggested that jurisdiction could be granted to Tribunal to appoint a new trustee in such cases, which should be "cheaper, quicker and more convenient" than using the High Court.

IDENTIFICATION OF BENEFICIARIES OF AGREED NOTICES

Consultation Question 45.

9.143 We invite consultees' views on what benefits would accrue if an agreed notice could identify the beneficiary of that notice, in a similar way to the entries made in relation to a unilateral notice? Would there be any disadvantages to identifying the beneficiary of an agreed notice in this way?[36]

9.144 23 consultees answered this question.[37]

9.145 Consultees put forward a number of different advantages they considered would result if the beneficiary was identified on an agreed notice. Some consultees also explained perceived disadvantages, as well as raising other issues, such as removing old entries off the title register.

Advantages

9.146 The City of Westminster and Holborn Law Society considered that it would be "helpful" to have provision for possible identification of the beneficiary "where this is considered

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36 Consultation Paper, para 9.153.

37 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); National Trust; Adrian Broomfield; Howard Kennedy LLP; The Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives; The Law Society; Mangala Murali; Cabot Credit Management; Council of Mortgage Lenders; Berkeley Group; Martin Wood.

to be practicable in the circumstances". The Society did not think that there would be any disadvantages in doing so.

9.147 Adrian Broomfield suggested that identifying the beneficiary of an agreed notice would assist conveyancers in identifying appropriate parties to approach in relation to any entries on the register, to facilitate dealings with property. He added that it would promote accountability and transparency.

9.148 The Chartered Institute of Legal Executives similarly noted that it would make subsequent negotiations to have the notice removed easier. It also saw no disadvantages.

9.149 Michael Hall stated that the beneficiary of an agreed notice should be identified on the register in the same way as the beneficiary of a unilateral notice. He argued that although a notice may be "agreed", there is still the possibility that the notice protects an interest that did not actually exist or no longer exists. As such, he stated, it should be possible to serve notice of an application to cancel on the beneficiary of an agreed notice, to require the beneficiary to justify the notice's continuance.

9.150 The National Trust agreed with identifying the beneficiary of an agreed notice, noting that the proposal supports the aim of providing clarity on the register and that all interests in land should be apparent from the entries in the title registers. The National Trust suggested that the proposal should be extended to allow the land with the benefit of the subject matter of an agreed notice to also be noted, stating that this would be "particularly useful" in the context of restrictive covenants:

> Were the land or the person/organisation benefiting from the restrictive covenant noted on the burdened title it would make it easier for the registered proprietor of the burdened land to establish who or what land had the benefit of the restrictive covenant and make it easier for the person/organisation with the benefit to enforce the restrictive covenant. This proposal would also make it easier to establish whether the restrictive covenants had been extinguished by coming into the same ownership as the benefitting land.

9.151 The Law Society noted that, whilst agreed notices cannot be cancelled, there will be situations in which the interest a notice protects is no longer relevant or in existence. It argued that, if the beneficiary's details are listed, parties to transactions will be encouraged to liaise with the beneficiary to remove such a notice, "thus keeping the register more up to date".

9.152 Howard Kennedy LLP said the "main advantage" of identifying the beneficiary of an agreed notice on the register would be to assist a registered proprietor or a person investigating title to trace the beneficiary of the notice. The firm added that there should be a mandatory requirement that changes should be notified.

9.153 The Bar Council noted that the "obvious benefit" would be that the beneficiary, or at least a potential beneficiary, could be easily identified, even if this is only provided a starting point. It could see "no significant disadvantage" in allowing the beneficiaries of agreed notices to be identified, other than the potential for a proprietor making an incorrect assumption that the stated beneficiary was still the beneficiary or was the only beneficiary.

9.154 In relation to Consultation Questions 45 and 46 (at paragraphs 9.153 and 9.154 of the Consultation Paper), the Council of Mortgage Lenders explained an issue that can arise. It said outlined a case where a loan book is sold, a number of the loans in the book are only protected by agreed notices, because the lender was unable to get the charge registered due to the restriction of a prior lender. The CML explained that in such cases, HM Land Registry will not amend the beneficiary of the agreed notice to show the transfer of the loan book. This makes it extremely difficult for the lender to exercise its power of sale, which it is entitled to do under the deed. The CML therefore stated that it would support a change which allowed identification of the beneficiary of an agreed notice "which in turn would enable updating of the details should the beneficiary change". It suggested that this change would make the position of the new beneficiary more secure.

9.155 Cabot Credit Management Group also noted that it had encountered "great problems" with regard to having its interests noted on the register, in circumstances where the Group had purchased portfolios of second mortgages with charges secured by way of an agreed notice. It explained that in these circumstances the Group would want its interest noted on the register; however, it has been unable to find a way to do this within the current land registration rules. The Group stated that it has explored noting its interest in a variety of ways:

a) Altering the Agreed Notice to give Cabot Credit Management's details rather than the original chargeholder: the Group has been advised by HM Land Registry "that there is no provision in the Land Registry Rules to amend agreed notices".

b) Entering a unilateral notice which notes Cabot Credit Management's interest: the Group has been advised by HM Land Registry "that this could not be noted on the official copy of title while the agreed notice in favour of the original chargeholder remains as there cannot be two entries relating to the same security". HM Land Registry also advised the Group "that the original chargeholder's agreed notice cannot simply be removed and a unilateral notice entered noting Cabot Credit Management's interest as the original agreed notice cannot be cancelled while the charge is still in existence", citing rule 87 of the LRR 2003.

c) Entering an agreed notice which notes Cabot Credit Management's interest: the Group reported that it received the same response as in relation to the unilateral notice at b) above.

d) Registration of a Deed of Variation which varies the charge to reflect that Cabot Credit Management is now the chargeholder: the Group has been advised by HM Land Registry "that the deed of variation could not be treated as a variation of the noted interest capable of being the subject of notice on the register".

9.156 Cabot Credit Management stated that, because its portfolios can encompass thousands of titles, it would not be practical or possible to obtain the consent of all prior chargeholders and chargees on each account so that the charge itself could be registered. In any case, there would be the issue of the charge already being noted on the register by way of an agreed notice. The Group considered that it is "clearly unsatisfactory" for all parties to have an agreed notice remaining in the register with details of previous chargeholders and no indication that these charges have been assigned.

9.157 Cabot Credit Management also noted that in cases where the original chargeholder is winding down its operations, if a mortgagee is selling its property the only information available on the register will be the details of that original chargeholder who will no longer exist. The Group noted that although it will have sent, at least, a notice of assignment to the mortgagee, many mortgagees do not recall the notice when selling the property and their conveyancers simply rely on the information on the register.

9.158 The Group stated that in its view it would assist all parties for provision to be made within the land registration rules for an assignee of a charge to be noted on the register of title, and for agreed notices to be updated such that the original chargeholder's details can be removed and any new chargeholder's details inserted in their place. In addition, it considered that such an entry should retain the entry date of the original chargeholder so that priority is not lost on assignment. In summary the Cabot Credit Management Group considered:

> There are clear benefits in identifying the beneficiary of the notice. That would mean that, upon assignment, the assignee of a charge could be registered in the same way as an assignee of a charge protected by way of a unilateral notice can be registered. This would keep the Land Register up to date and accurate, which can only be a positive step.

9.159 On balance, HM Land Registry supported the inclusion of details of a beneficiary where an agreed notice is entered in the register. However, it also suggested that in circumstances where notification is to be served, HM Land Registry should not be under any greater obligation than to service notice on the beneficiary at the address noted in the register, and, that where HM Land Registry is satisfied that an interest has come to an end, no notice should need to be served.

9.160 HM Land Registry also stated that in the event that this proposal becomes law, it should be recognised that the change will inevitably require greater HM Land Registry resource, for example, in handling applications to update details, and will result in HM Land Registry incurring costs in making changes to internal systems and processes.

9.161 The Chancery Bar Association simply noted that it could see no reason why the beneficiary of an agreed notice should not be able to be identified on the register.

9.162 Everyman Legal questioned why a beneficiary should not be identified, given that the aim of a notice is for the beneficiary to be contacted in the appropriate circumstances; as Everyman Legal commented, "you can't do that if you not know who it is".

Disadvantages

9.163 Martin Wood noted that such a change would represent "a radical departure" from the existing scheme and would require procedures for registering a change of beneficiary. He pointed out that paragraphs 9.149 to 9.151 of the Consultation Paper identify some of the serious practical difficulties with the idea, and argued that having a piecemeal situation "in which some notices named the beneficiary and others not seems inherently undesirable".

9.164 Professor Warren Barr and Professor Debra Morris did not see much force in this proposal and considered that there was more of a reason to identify the beneficiary of

a unilateral notice. They considered that the change would create an anomaly for pre- and post-reform change as noted in paragraph 9.150 of the Consultation Paper.

9.165 Berwin Leighton Paisner LLP thought that the change was "probably unnecessary" because the details of the original beneficiary ought to be evident from the documents filed in support of the agreed notice. The firm added that it understood that there is no intention to require the register to record changes of beneficiaries (unlike changes of registered proprietors).

9.166 The Berkeley Group did not see any advantage in identifying the beneficiary of an agreed notice "as the registered proprietor will know who the beneficiary is as it consents to the making of the application". It did, however, consider that cross-referring title numbers would be advantageous.

Other

9.167 Some consultees considered that there are both advantages and disadvantages to identifying the beneficiary of an agreed notice.

9.168 The Property Litigation Association suggested, as an advantage, that it would assist a registered proprietor or a person investigating title to trace the beneficiary of the notice. However, the Association stated that consideration needs to be given to the consequences of a failure by the beneficiary to update the register, questioning whether the benefit of the notice be lost. As a disadvantage, the Property Litigation Association considered that the proposed change would complicate the agreed notice procedure, "creating another procedural layer and additional work for registered proprietors, conveyancers and Land Registry".

9.169 The London Property Support Lawyers Group made similar points. It identified that the main advantage would be to assist a registered proprietor or a person investigating title to trace the beneficiary of the notice. However, the Group stated that there would be no guarantee that this information would be kept up to date unless it was a mandatory requirement, which it would not support. Additionally, the Group highlighted that an agreed notice gives details of the interest protected and often a copy of the original supporting document, and for that reason, in many cases there is already a means for the beneficiary to be traced.

9.170 The London Property Support Lawyers Group stated that the disadvantage would be to complicate the agreed notice procedure and bring it closer to unilateral notices, potentially increasing the possibility of confusion between the two. It also noted that the change would create another procedural layer and additional work for registered proprietors, conveyancers and HM Land Registry.

9.171 Nigel Madeley stated that thought should be given to distinguishing between categories of notice, "so that notices that protect transmissible property rights are clearly marked as such". He noted that this would reflect the unregistered land regime in that it would be possible to tell what type of interest in land was protected, for example, by a form D(ii) or C(iv) entry.

9.172 Mr Madeley considered that for a "property notice", the important thing is to identify the property, and not the owner from time to time; once the proprietor of the burdened land

knows what land benefits, he or she can inspect it and track down the benefitting owners or occupants. For personal notices, for example, a notice protecting a long-term contract where the proprietor is insolvent, Mr Madeley argued that the insolvency practitioner or attorney will need to find the beneficiary to get the notice removed; therefore, for this type of interest, noting the beneficiary will be helpful.

9.173 Christopher Jessel considered it correct that, where a right can be assigned on its own (as distinct from one annexed to land), the owner of the right should be ascertainable without difficulty. Mr Jessel stated that it follows that when the rights to the interest protected by the notice are not annexed to specified land, then there should be a formal procedure to cover assignment of the benefit, so that the owner of the interest is always identified on the affected title. He suggested, as the sanction for failure to register any change, that the right should be unenforceable until it is registered; alternatively, it should be unenforceable until six months after it is registered, to prevent last-minute registrations. These sanctions would apply even if the assignment was as a result of the operation of the law (for example, on grant of probate), as opposed to by agreement between the parties.

9.174 Christopher Jessel also considered that where the benefit of a notice is annexed to an identifiable area of land, then the land itself should be identified instead of the person having the benefit. In cases where covenants do not benefit land and instead benefit a local authority or charities (such as the National Trust), in the public interest, Mr Jessel stated that the institution having the benefit should be identified.

9.175 Mangala Murali noted that the benefits that accrue could be similar to those under "service of unilateral notices". However, she was of the view that the two types of notice exist concurrently for a reason; therefore, the differences must be kept intact. She explained that "the agreed notice system should not be borrowing features from the unilateral system".

9.176 Dr Charles Harpum was unsure of the aims of this proposal. He noted that there is a good reason why the beneficiary of a unilateral notice should be recorded in the register. He added that had the system of electronic conveyancing in LRA 2002 been implemented, the benefit of estate contracts and other such rights would have been transmissible on the face of the register.

Consultation Question 46.

9.177 If consultees support identifying the beneficiary of an agreed notice on the register, should this be mandatory or optional?[38]

[38] Consultation Paper, para 9.154.

9.178 19 consultees answered this question.[39]

Mandatory

9.179 A number of consultees indicated that they supported mandatory identification without providing any further comments.[40] Howard Kennedy LLP referred back to its previous response to Consultation Question 45.

9.180 The City of Westminster and Holborn Law Society reiterated its previous response, stating that it would be "helpful" to have provision for the possible identification of a beneficiary where it is considered to be practicable in the circumstances, and that it did not anticipate any disadvantages in so doing.

9.181 HM Land Registry's view was that the identification of a beneficiary should be mandatory if our policy is taken forward.

9.182 The Chartered Institute of Legal Executives supported mandatory identification on the basis that "if you claim something you should be open and transparent as to who is making the claim".

9.183 The Law Society stated that, for the reasons given in its response to Consultation Question 45, identifying the beneficiary would encourage parties to liaise for removal of the notice, thus keeping the register more up to date. In its view, therefore, noting should be mandatory. However, the Society considered that there could be a provision to exclude the identifying information if there were specific reasons, similar to the exempt information regime.

9.184 The Conveyancing Association supported mandatory identification provided that there was "the usual ability to have the register redacted where the beneficiary might require anonymity for privacy protection", citing for example, if the beneficiary was a celebrity.

9.185 Cabot Credit Management Group considered that if identification was optional then the problems that currently exist would not be resolved if the original chargeholder had elected not to identify the beneficiary on the register.

9.186 Nigel Madeley considered that mandatory identification is appropriate for "non-transmissible (personal) notices" and "irrelevant for transmissible (property) notices".

Optional

9.187 A number of consultees indicated that they supported optional identification without proving any further comments.[41]

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39 Property Litigation Association; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Adrian Broomfield; Howard Kennedy LLP; The Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives; The Law Society; Mangala Murali; Council of Mortgage Lenders; Cabot Credit Management Group; and Nigel Madeley.

40 Everyman Legal; Christopher Jessel; Adrian Broomfield.

41 The Bar Council; Mangala Murali; Chancery Bar Association.

9.188 Michael Hall thought that it should not be compulsory for existing agreed notices to be changed to include details of the beneficiaries. He considered that a beneficiary of an agreed notice should not be identified without his or her consent, and to do so would breach the Data Protection Act. However, Mr Hall thought it would be reasonable to change the rules so that in future any applicant for registration of an agreed notice must agree to his identity being disclosed on the register, unless there is a valid reason for him or her to refuse to allow this.

9.189 The London Property Support Lawyers Group referred to its previous response to Consultation Question 45 in which it stated that it would not support a mandatory requirement to keep information relating to the beneficiary of a notice up to date.

Other

9.190 The Property Litigation Association stated that the potential advantages of such a policy would be maximised if it was mandatory; however, it was conscious that this would also maximise the disadvantages.

9.191 The Council of Mortgage Lenders did not have a strong view on whether the requirement should be mandatory or optional "as long as the ability existed for the Land Registry to update the Register under either framework". It did not think that there were likely to be particular sensitivity around identifying the beneficiary in the circumstances it described in relation to loan books.

9.192 Berwin Leighton Paisner LLP did not consider this issue relevant for the reasons set out in its response to Consultation Question 45. The firm considered any identification provisions "probably unnecessary" as details of the original beneficiary should be evident from the documents filed in support of the agreed notice.

Chapter 10: Protection of third party rights on the register part II: restrictions

INTRODUCTION

10.1 31 consultees responded to the questions in Chapter 10 of the Consultation Paper.[1]

10.2 The majority of consultees agreed that it should continue to be possible to protect a contractual obligation by means of a restriction. However, in doing so, they raised ongoing concerns about the use of restrictions in a variety of contexts.

10.3 Consultees also supported the provisional proposals in relation to derivative interests under trusts, in particular, that it should continue to be possible to enter restrictions in Form K in relation to charging orders over beneficial interests. However, several consultees also expressed concern about the level of protection a Form K restriction offers.

PROTECTION OF CONTRACTUAL OBLIGATIONS BY A RESTRICTION

Consultation Question 47.

10.4 We have provisionally formed the view that it should continue to be possible to protect contractual obligations by means of a restriction.

Do consultees agree?[2]

10.5 29 consultees answered this question:

(1) 21 agreed;[3]

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1 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Dr Nicholas Roberts; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Professor Dermot Cahill and Dr John Gwilym Owen; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Taylor Wessing LLP; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; Council of Mortgage Lenders; The Bar Council; HM Land Registry; Amy Goymour; a confidential consultee; Berkeley Group; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

2 Consultation Paper, para 10.25.

3 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Dr Nicholas Roberts; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); Taylor Wessing LLP; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Dr Aruna Nair; Council of Mortgage Lenders; The Bar Council; a confidential consultee; Berkeley Group; Chartered Institute of Legal Executives; Mangala Murali.

(2) 2 disagreed;[4] and

(3) 6 expressed other views.[5]

10.6 A clear majority of consultees agreed with the proposal. However, the responses of consultees, whether agreeing or not, suggested much of this agreement was heavily qualified.

10.7 To illustrate, Professor Warren Barr and Professor Debra Morris expressed general agreement with the Law Commission's provisional view stating that there "seems little reason to abandon the current system", despite there being some minor issues in its operation. They noted:

> Restrictions protecting against breaches of loan agreements, protecting options and ensuring compliance with lease covenants all have their place at present and we have no strong feelings about the retention of the system.

10.8 However, Professor Warren Barr and Professor Debra Morris went on to say that if the mechanisms of imposing and complying with restrictions cannot be made more user friendly and if the rules surrounding positive covenants are amended to allow such covenants to run with the land, they would "be happy to see the role of restrictions in this area come to an end".

10.9 In their responses, consultees came back to a few themes. We have grouped responses under different headings below. All consultees have expressed agreement with the Law Commission's proposal except where stated otherwise.

The purpose of land registration

10.10 A number of consultees raised the issue of the purpose of the register and, in particular, whether restrictions should rightly be used to protect and enforce non-proprietary interests. This issue is closely linked to the question of positive covenants discussed below.

10.11 Dr Nicholas Roberts stated that in principle it would seem right for a land registry to only record property interests. However, he noted that HM Land Registry long ago accepted it would be useful to practitioners for fencing covenants to be noted and later, for indemnity covenants also to be noted on the register. In his opinion, some flexibility in this area seemed appropriate.

10.12 Similarly, the Chancery Bar Association accepted that restrictions are useful as a mechanism in dealing with positive covenants such as overage provisions, but stated it is "illogical" that a land registration system should be used to protect non-proprietary interests in this way:

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4 Nigel Madeley; Christopher Jessel.

5 Michael Hall; Professor Dermot Cahill and Dr John Gwilym Owen; HM Land Registry; Amy Goymour; Burges Salmon LLP; The Law Society.

It effectively enables the party who has imposed the restriction, by refusing to consent to registration of a disposition unless his claim to accepted, to enforce a purely contractual right as if it were proprietary.

10.13 The London Property Support Lawyers Group qualified its support of allowing protection of contractual obligations by means of restriction because:

> A case can be made for saying it is not the function of a land registration system to protect pure matters of contract (still less the role of the Land Registry to police such matters).

10.14 Nigel Madeley observed that it might be that restrictions were originally intended to protect legal due process and not a commercial interest such as overage. He explained:

> Insofar as it is clear from the buyer's title that the Land Registry has not received evidence of a restriction being satisfied, then the buyer's title is at risk and a successor is on notice. The position is different if the restriction protects a commercial interest because the seller will have been paid and the beneficiary of the restriction unpaid.

10.15 Mr Madeley therefore questioned why restrictions can be used to prevent legal title from passing on completion if they were not intended to protect commercial interests.

Elevating the status of non-proprietary rights: distinguishing between contractual and proprietary interests

10.16 Nigel Madeley expressed strong disagreement with the proposal, arguing that it represented a "conceptual confusion" and that "a contractual obligation is simply not an interest in land". Mr Madeley described restrictions as a "curious beast having no counterpart in unregistered land and therefore infringing the mirror principle". He stated that the concept also offends the principle of not creating new interests in land "such as elevating a mere contract into an interest in land". He argued:

> The protection of an overage contract is not contemplated by the legislation, only by the Land Registry practice guide, and yet appears to be accepted by the courts (albeit obiter and at first instance by Peter Smith J) as a legitimate device. Very arguably, it is not.

10.17 Mr Madeley noted that, in his view, some rights such as licences to occupy are more deserving of land registration protection than, for example, an overage contract. However, it was his view that if contractual rights are protected, then the work of those judges and commentators who have considered those rights and concluded why they are not interests in land will have been in vain.

10.18 If the use of a restriction to secure positive obligations is considered to be legitimate, in Mr Madeley's view this should be enabled through express reform to the law of land obligations, and not "by the back door" using a legal device "not conceived for that purpose". He stated this would not be an orderly development of the law and "isn't helped by the fact that in practice restrictions are poorly used and sometimes simply disregarded".

10.19 HM Land Registry, neither agreeing nor disagreeing with the proposal, questioned whether restrictions are giving those with their benefit too great a degree of control.

10.20 Amy Goymour, who identified as expressing other views in her response, opined that it was appropriate for restrictions to protect contractual rights that are also recognised as proprietary rights under the general law. However, she said that protecting purely contractual rights raised concerns. In her view, the use of a restriction to prevent a disposition indirectly protects the relevant contractual right, and thereby operates in effect to raise the status of that contractual right to the functional equivalent of a property right. This increased prevalence of property rights, in her view, "inevitably" reduces the ease with which land can be conveyed and therefore, such a step should only be taken with proper consideration of the economic consequences.

The fettering of property owners land rights

10.21 Other consultees were also concerned about the effect of restrictions on an owner's ability to dispose of property freely.

10.22 Christopher Jessel, who disagreed with our proposal, argued that there is a "major theoretical difficulty" with having any restriction on the disposal of freehold land, which he felt has not been the subject of sufficient discussion:

> Quia Emptores 1290 conferred unrestricted freedom to dispose of land held in fee simple: "from henceforth it shall be lawful to every Freeman to sell at his own pleasure his Lands and Tenements, or part of them". This has become a common law rule of freedom of alienation. In *Oldham BC v Attorney General* [1993] Ch 210 at 218 Dillon LJ referred to the power to sell as "a general power at common law". Any restriction interferes with this.

10.23 Mr Jessel noted that there are statutory exceptions for trusts of land, for charity land and that there are other specific controls under housing legislation. Mr Jessel noted that restrictions are expressed to allow disposition either with the consent of the beneficiary of the restriction or the registrar, so they do not appear absolute prohibitions; nevertheless, he thought it still offends the principle that the owner of a legal estate should be free to alienate it. Apart from the specific instances authorised by Parliament, it is in his opinion unclear how far other restrictions are valid and, in particular, how far private persons can restrict freedom of alienation by a private agreement. Mr Jessel concluded:

> This is not possible for unregistered land and it seems unlikely that such a fundamental principle of English property law could have been overturned for registered land by a side wind in a Land Registration Act. In any case, even if there is a justifiable case for a restriction on dispositions of freeholds, the policy should be the subject of a full analysis and consultation by the Law Commission rather than being simply assumed.

10.24 As noted above, Nigel Madeley expressed similar concerns. He questioned whether restrictions are so important that they alone can prevent a buyer from acquiring legal title on legal completion.

10.25 Burges Salmon LLP, which was neither in agreement or disagreement with the proposal, stated that it is questionable whether cluttering up titles with restrictions is desirable given:

> The additional administrative burden for subsequent transactions not triggering the payment and problems when restrictions are carried over unintentionally on sales of part.

However, the firm concluded that restrictions are the "most effective way" of securing such overage payments.

The use of restrictions to enforce positive covenants

10.26 Several consultees based their support for the current use of restrictions to protect contractual obligations on the fact that under the laws of England and Wales positive covenants do not run with freehold land and negative covenants may not be restrictive covenants (and therefore not bind successors in title) where there is no land that benefits from the covenant.[6] In some cases, this support was based on a pragmatic reaction to the law as it stands. As the London Property Support Lawyers Group pointed out, the use of restrictions in this manner "can be a very cumbersome sticking plaster"; in the Group's view, it would be preferable to remedy these issues completely.

10.27 Similarly, Dr Nicholas Roberts broadly agreed it should be possible to protect contractual obligations by means of a restriction as:

> The use of restrictions to protect positive covenants seems to provide a useful way of plugging an acknowledged lacuna in the law.

10.28 Dr Roberts recognised that people may question why an estate rentcharge is not used in these situations but went on to note that it is "no doubt more straightforward" to be able to sue on a deed than to address the comparatively unfamiliar area of the enforcement of rentcharges. Therefore, it was his view that until the Law Commission's proposals in Making Land Work: Easements, Covenants and Profits à Prendre ("Law Com 327")[7] are enacted, the status quo is satisfactory.

10.29 The Property Litigation Association agreed with the proposal but advised that its response might be different if the law of covenants is reformed such that it becomes possible to have positive covenants binding land, as proposed by Law Com 327.[8] The Association viewed the use of restrictions to facilitate the re-assumption of positive obligations by disponees of registered land as "indispensable"; therefore, it concluded that, as long as positive covenants remain purely personal, restrictions are a useful protection.

10.30 The National Trust agreed, giving two examples of where restrictions are "a neat and cost-effective mechanism" for ensuring that conservation charities are able to ensure that the types of arrangement they enter into are honoured:

(1) Many conservation charities are given property by way of a donation or legacy that is not of significant conservation or heritage value but is intended to be sold, so the consideration can be used for conservation work. Charities are obliged to

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6 Eg, London Property Support Lawyers Group.

7 (2011) Law Com No 327.

8 See Law Com No 327.

obtain the best value for such property, which may include negotiating overage provisions. Compliance with overage provisions is assured by a restriction.

(2) Conservation charities, including the National Trust, may also rely on a restriction to ensure that successors enter into a deed of covenant to comply with positive or negative covenants such as a building scheme.

10.31 The Trust explained that, without restrictions, in many instances it would be much more difficult for beneficiaries to ensure compliance with these arrangements.

10.32 Burges Salmon LLP did not expressly agree with the Law Commission's proposal. It observed that pending implementation of law reform to allow positive covenants to bind successors in title, estate service charge arrangements between freehold owners would be difficult to arrange without restrictions, as restrictions are used to secure obligations to pay overage.

Overage

10.33 A number of consultees made remarks about the use of restrictions to protect overage agreements in particular.

10.34 As noted above, Nigel Madeley (who disagreed with the proposal) said that protecting overage agreements is arguably not a legitimate use of restrictions.

10.35 Although questioning the use of land registration system to protect non-proprietary interests, the Chancery Bar Association accepted that restrictions are useful as a mechanism to protect positive covenants, specifically identifying overage provisions. Burges Salmon LLP also said that restrictions are commonly and effectively used for overage agreements.

10.36 Similarly, as explained above, the National Trust explained conservation charities' reliance on restrictions to protect overage agreements in situations in which they are selling donated property without a conservation or heritage value.

10.37 The Berkeley Group believed that restrictions are "very useful". It supported the Commission's provisional view that these should continue to be available to protect contractual arrangements, explaining that restrictions are frequently used "to ensure prior owners extract overage payments". It explained that, without the use of restrictions to protect overage agreements, a charge or bond would have to be made, interfering with the conveyancing process or entailing unnecessary expense, respectively.

The use of restrictions to protect obligations in registered leases

10.38 Consultees put forward several differing views in relation to the use of restrictions to enforce leasehold provisions. A number of consultees also raised concerns in relation to areas of leasehold law that we considered as a separate project for our 13th Programme of law reform and therefore, they are not detailed here.

10.39 Dr Nicholas Roberts took the view that if a registered lease does require a licence to assign, then there would appear to be no objection in principle to using a restriction to ensure compliance. Dr Roberts accepted that in such situations the tenant may assign the property anyway and risk forfeiture. However, in practice he believed it more likely

that a tenant who felt their landlord was unreasonably withholding consent would apply for a declaration under section 53 of the Landlord and Tenant Act 1954. Although he thought that the point had not so far arisen in litigation, he commented that it would be perverse if HM Land Registry required compliance with the restriction despite the declaration.

10.40 Dr Roberts went on to state that the Consultation Paper did not appear to acknowledge a problem that was the subject of an article he authored,[9] namely that direct deeds of covenant with management companies are unnecessary by virtue of section 12 Landlord and Tenants (Covenants) Act 1995. Furthermore, in relation to "compliance with the terms of the lease", as discussed in paragraph 10.15 of the Consultation Paper, he argues in the article that:

> A requirement in a post-1995 lease to enter into a covenant with either a landlord or a management company will always be redundant (if it merely requires the assignee to comply with the terms of the lease so long as the term is vested in him) and – by virtue of s 25 of the 1995 Act - pro tanto void if it purports to require an assignee to assume liability for any longer period (typically, the remainder of the term).

10.41 Dr Roberts concluded by stating that it seems objectionable for restrictions to be used to bolster provisions which are either "a legal nullity or … downright misleading". He also said that unnecessarily complicate the conveyancing process, because "it will generally be cheaper and more straightforward to comply than to challenge".

10.42 The Society of Licensed Conveyancers agreed with the proposal. However, it stated that because HM Land Registry regulates the use of restrictions, it must be enabled to take action to curb excessive use. It noted that restrictions are currently being used by management companies as a "blunt instrument to prevent registration", with some even going so far as to withhold letters of consent where the incoming tenant has failed to pay service charge or ground rent.

10.43 The Society's view was that whilst it is not for HM Land Registry to intervene in the issue of excessive administration fees, it was not realistic to expect conveyancers to apply for restrictions to be disapplied on each occasion, or go to court for a declaration of unreasonable behaviour. Therefore, the Society of Licensed Conveyancers thought that restrictions should be limited to conveyancing issues, specifically whether notices have been served and deeds of covenant entered into, and argued that restrictions should not be allowed to extend to payment of administration fees to management companies.

10.44 Michael Hall did not indicate agreement or disagreement with the proposal, but stated that restrictions are often misused by landlords who benefit from estate rentcharges to force property owners to pay "extraordinarily high" fees to issue certificates of compliance. He was of the opinion that there should be a mechanism for challenging such fees through a tribunal similar to the Leasehold Valuation Tribunal, which is now part of the First-tier Tribunal.

10.45 Mr Hall suggested a restriction may simply require that no transfer is to be registered without notice having been given to the owner of the estate rentcharge. This, he stated,

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9 N Roberts, "Unnecessary Complications" (2015) 165 *New Law Journal* 12.

should not entitle the rentcharge owner to extract large fees, and would mean that HM Land Registry would be more willing to reject restrictions that are unreasonable in imposing unnecessary requirements or that are out of date.

10.46 Christopher Jessel, who disagreed with the Law Commission's proposal, drew comparison between failure to comply with a restriction in disposing of freehold and leasehold properties:

> The comparable situation for leaseholds is that even if the lease contains a prohibition on assignment, an assignment is effective to transfer the legal estate. The landlord has the remedy of forfeiture but retains the right to waive the breach.

10.47 Returning to his discussion of freedom of alienation, Mr Jessel acknowledged that it is unclear how far the common law rule of freedom of alienation applies to leases. In his view, freedom of alienation of land should be encouraged:

> Many freehold restrictions are not designed to prohibit dispositions as such but protect other rights, notably positive covenants, which … should be protected in a different way.

10.48 The Law Society, which did not clearly agree or disagree with the proposal, described the use of restrictions as "vital" in transactions involving shared ownership leases. For example, the Homes and Community Agency requires landlords to use a model form of shared ownership lease which contains a restriction to ensure compliance with pre-emption provisions standard in such leases. The restriction protects the right of the landlord in a shared ownership lease on a disposal by the leaseholder to:

(1) Dispose of the property to a nominated person (invariably someone on the landlord's waiting list for accommodation);

(2) Surrender the property to the landlord, which again might be to house someone on the landlord's waiting list.

10.49 The Society noted that such properties are often constructed using funds obtained by way of housing grant, or planning obligations under section 106 of the Town and Country Planning Act 1990; therefore, it is imperative that the landlord exercises close control over dispositions. In the Law Society's view, the use of restrictions is a very effective tool to achieve this.

10.50 The Berkeley Group explained that "restrictions are frequently used to secure purchaser's assignees' covenant for the benefit of the landlord and manager on assignment of an apartment lease or on underletting by the tenant". The Berkeley Group stated that failure to provide a necessary deed of covenant may cause management issues if an assignee fails to pay its share of estate management costs or to observe the estate covenants imposed for all tenants' mutual benefit. Therefore, it viewed restrictions as an essential reminder or check that ensures immediate observance and overcomes privity of estate limitations where it involves a manager or an undertenant.

Mortgages

10.51 The Council of Mortgage Lenders also agreed with the Law Commission's view that it should be possible to protect contractual obligations by means of a restriction. It

observed that first charge lenders will commonly enter restrictions to ensure they are aware of and consent to any second charges. In its view, this is an "important protection" as it allows the lender to assess whether there is a risk of the chargor being unable to continue to meet their obligations prior to consenting to any second charge.

10.52 In contrast, Christopher Jessel was of the view that there is also a policy issue on mortgages. The whole point of a mortgage as a real security is that it binds the land into whoever's hands it comes. Accordingly, in Mr Jessel's view, there seems no good reason for the law to allow a chargee to have the power to prevent a mortgagor granting further security or disposing of the land.

Review and reform of the standard forms of restriction

10.53 A number of consultees were supportive of the existence of restrictions, but were unhappy with aspects of the current standard form restrictions.

10.54 Taylor Wessing LLP expressed its support for retention of the concept of the restrictions as a "useful device" for ensuring the observation of obligations. However, it reported that it had found it difficult to agree non-standard restrictions with HM Land Registry.

10.55 The London Property Support Lawyers Group noted that restrictions, and how they operate under the land registration rules, can cause real problems in practice. Standard form restrictions, it argued, often do not match the underlying contract which they protect and, therefore, additional contractual protections are necessary to ensure that the restriction can be made to work. It described this as "a trap for the unwary (poorly advised)", which "can hinder the alienability of land".

10.56 However, the London Property Support Lawyers Group went on to state that changes in the forms of permitted (and standard form) restrictions can make them difficult or sometimes impossible to operate. For that reason, the Group believed it would be "helpful if a review of restrictions took the provisions of the rules into account".

10.57 The London Property Support Lawyers Group noted that at present, if a restriction is registered, it is not possible to vary or extend the restriction, even by agreement. There should therefore be a mechanism that allows existing restrictions to be varied by agreement between the registered proprietor and the person with benefit of the restriction.

10.58 The Chancery Bar Association suggested that the appropriate form of restriction to protect a contractual right should identify the relevant contractual right or at least the contract under which it arises. Furthermore, it should be to the effect that no disposition should be registered unless either the beneficiary of the restriction has consented or a set days' notice of the application for registration has been given to him or her. This, the Association concluded, would enable the beneficiary to take proceedings for enforcement of his or her contractual rights, for example, applying for an injunction. The Association thought that this is the most protection which should be given to purely contractual rights.

10.59 In contrast to the above responses, te Law Society appeared satisfied with the current standard form restrictions, confirming that it generally supports their use so a disponee

"knows what has to be done in order for the restriction to be complied with and the disposition registered at Land Registry".

Compliance with restrictions

10.60 In addition to making proposals for amendments to standard forms of restriction, some consultees made recommendations regarding compliance with restrictions.

10.61 An issue raised by the Berkeley Group was that whilst restrictions are often required to be noted in leases, the details of the beneficiary are not updated, for example, to reflect the current landlord. It argued that simple changes in HM Land Registry's administrative procedures could solve this problem, for example, if the restriction was linked to the landlord's registered title and/or only generic references to the landlord were permitted in the restriction registerable on the title.

10.62 The Berkeley Group noted that adopting standard form restrictions has already assisted in this respect. However, it suggested further adaptations and more stringent compliance. It put forward a number of suggestions aimed at ensuring that HM Land Registry and disponees can be certain of what is required.

(1) An application form could require that the applicant certify that the person whose certification or consent is required can perform that role and that there is a procedure in the absence of being able to perform that role, for example a solicitor certifying compliance.

(2) Where the restriction is for a finite period, there could be a requirement for a procedure to remove the restriction.

(3) It could be a requirement to supply the relevant extract of the underlying agreement with the mechanics for compliance and its removal, or to certify that they have been contained in the underlying agreement.

(4) The relevant extract could be required to be supplied, with confidential information redacted, to evidence the procedure.

10.63 Additionally, the Group stated that the sentiment at a recent roundtable meeting was that HM Land Registry forms are not sophisticated enough. It also suggested that they could, for example, require the applicant to state if a restriction should be "pulled down" to any lower titles.

10.64 The Chartered Institute of Legal Executives agreed with the proposal "provided that there is some method of overriding". The example it gave was of a freehold property against which is noted a requirement for consent to be supplied by a company that deals with estate maintenance. CILEx stated that when notice is served and there is a request for a certificate which it is not forthcoming or takes months, it extends the registration gap. CILEx suggested that in such circumstances the applicant's legal representative should be able to certify, after a period of three weeks, that the terms relating to the certificate have been complied with. HM Land Registry would then accept that certification and the legal representative would indemnify HM Land Registry if they had misstated the position.

The use of restrictions to overreach beneficial interests

10.65 Nigel Madeley, who disagreed with the proposal, queried the use of restrictions more widely than just whether they should be used to protect contractual obligations. He disputed their use even for more traditional purposes such as securing overreaching:

> If the Registrar knows that the land is held on trust, just put a note on the register to that effect and refer to the need to appoint a 2nd trustee. If a disponee ignores the note and does not ensure that the 2nd trustee is appointed, he has bought land subject to a beneficial interest – surely that is his look-out; all the information was right there in front of him.

10.66 Conversely, Professor Dermot Cahill and Dr John Gwilym Owen (who did not express agreement or disagreement with the proposal) argued for "better restrictions as a means of regulating the doctrine of overreaching". Together, they viewed the concept of overreaching as worth preserving and argued that better forms of restriction should be considered to preserve overreaching. As an alternative, they proposed "the registration of trusts and for the curtain principle to be breached".

10.67 The Professors explained that their proposals were made against a backdrop of growing evidence to suggest there should be more transparency in business dealings, which could be brought about by the registration of beneficial interests on the register in registered land transactions. They explained:

> This would not only promote legal certainty and align UK practices with more modern trends, but it would also serve the added goal of promoting transparency in line with other areas such as money laundering; combatting use of charitable vehicles for use in terrorist financing; transparency in public tendering etc.

10.68 Amy Goymour made a general comment in relation to the use of restrictions to protect trust interests, which she felt required further consideration:

> There are big questions to be asked as to the extent to which it is desirable – economically or otherwise – for trust beneficiaries to have a mechanism whereby they can protect their rights in their home … other than by being in discoverable occupation.

10.69 Ms Goymour argued that it is not obvious either legally, or as a matter of policy, that consent restrictions should only be available where the express terms of the trust impose consent conditions. She went on to note that obtaining consent is an implied duty on trustees under the Trusts of Land and Appointment of Trustees Act 1996 and asked whether this might justify the entering of a consent restriction. She questions why, as a matter of policy, express trusts should be treated differently from implied trusts.

Consultation Question 48.

10.70 We invite the views of consultees as to whether there are any particular type of contractual obligation which should not be capable of protection by way of a restriction. If so, please explain why these obligations should be treated differently from other contractual obligations.[10]

10.71 13 consultees answered this question.[11]

10.72 Of the consultees who answered this question, the National Trust and HM Land Registry simply to referred back to their previous response to Consultation Question 47.

10.73 A number of consultees simply responded that they had no opinion or could provide no further information.[12] Similarly, the Chartered Institute of Legal Executives did not have any individual examples to share, but noted that the system is open to abuse and exploitation of the consumer.

10.74 The other consultees who responded did not raise among them any consistent themes.

10.75 Howard Kennedy LLP did not think that certain types of contractual obligation should be excluded from protection by restriction. Although it thought the use of prescribed forms should be encouraged, ultimately it thought that there should be greater freedom to draft bespoke restrictions.

10.76 Dr Charles Harpum QC (Hon) expressed that he very much hoped there would be no attempt to bar the protection of particular types of contractual arrangement by restriction as it would likely lead to incoherence and confusion.

10.77 The Law Society stated that subject to its previous response, there may be certain types of contractual obligation which should not be capable of protection by way of a restriction, but they understood the need to have a consistent policy position.

10.78 The Council of Mortgage Lenders did not think there was a strong argument to carve out any particular type of contractual obligation from being capable of protection by restriction.

10.79 Nigel Madeley expressed the view that no contractual obligations should be capable of protection by restriction, and failing that, as few of them as possible should be protectable. He explained that that there is no logical demarcation between categories

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10 Consultation Paper, para 10.29.

11 Property Litigation Association; Nigel Madeley; Michael Hall; Christopher Jessel; London Property Support Lawyers Group; Dr Charles Harpum QC (Hon); National Trust; Howard Kennedy LLP; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

12 Professors Barr and Morris; Everyman Legal; The City of Westminster and Holborn Law Society; Chancery Bar Association; Adrian Broomfield; and Amy Goymour

of protected and non-protected contract. As an example, he considered how to distinguish between an overage contract and a trading concession:

> The latter has more of a connection with the land than the former, and yet the former is (said to be) protected and no-one suggests that the latter should be.

He expressed a concern that "contracts that protect money are going to be 'restriction-able' and those that protect people are not".

10.80 Mr Madeley wondered whether "contracts relating to land" could be one way to make the distinction. He explained that a contract "relates to land" when it is necessary for one of the parties to own or occupy property in order to perform the contract. He considered a number of "difficult" issues using the idea of a contract which relates to land, namely options and agreements for lease.

10.81 However, Mr Madeley stated these issues are not resolved by making the personal into property by the use of a registered land device. The argument in favour of allowing a restriction to protect a contract relating to land according to Mr Madeley is that the parties are in effect reminded to novate the contract. However, he argued that this is not the function of registered land. He believes that more persuasive argument is that the contract is not an interest in land and so should not be on the register. In his view:

> Of all the things that the real property lawyer ought to be alive to, it's the distinction between property and contract.

10.82 The Bar Council identified a lessee's covenant not to assign or underlet without the lessor's consent, which is not to be unreasonably withheld or refused, as one candidate for a type of contractual obligation that should not be protected by a restriction. The Council explained that if a lessor's consent is unreasonably withheld or refused, the lessee is free to assign or underlet and need not apply to court for a declaration that it was unreasonable. Therefore, the Bar Council thought it was desirable to have the option of continuing with a transaction and leaving the lessor to challenge it.

10.83 Burges Salmon LLP stated that unlawful or illegal contractual obligations should not be capable of protection.

10.84 This view was echoed by the London Property Support Lawyers Group, who stated that a restriction should not be allowed to protect an illegal contract, particularly a contract illegal under consumer protection legislation. It clarified that any consent to the entry of a restriction in these circumstances should be of no effect. In the Group's view, it is scant protection that a proprietor may go to court to have the restriction lifted when the difficulties which may have arisen in the meantime (from an inability to sell or charge the land) could be substantial and not capable of easy remedy within the land registration system.

10.85 Michael Hall suggested that contractual obligations which are impractical to perform should not be capable of protection. He noted that HM Land Registry has the power to modify or disapply a restriction, which it exercises where the restriction is inappropriate for any reason. He gave examples of such restrictions:

(1) where a restriction requires a certificate from a named company that no longer has an interest in the land in relation to which a rentcharge was payable;

(2) where a company has ceased to function or has been placed in liquidation and is failing to respond to correspondence or

(3) where a company is imposing exorbitant charges.

10.86 Mr Hall noted that Practice Guide 19[13] clearly describes how HM Land Registry exercises its discretion in such cases, and suggests that this practice could be made law.

10.87 The London Property Support Lawyers Group argued that a restriction to protect against unlawfulness, where that unlawfulness would be a breach of contract, should not be within the discretion of the registrar under section 42(1). It was the Group's view that if the registered proprietor is party to a contract, that contract should be capable of protection by a restriction but only with the consent of the registered proprietor. The Group argued that the need for such consent might avoid some of the problems highlighted in relation to leases and charges, and also appears right in principle.

10.88 Also in relation to section 42(1), the Property Litigation Association thought that the registrar's discretion to enter a restriction to prevent an unlawful dealing with a lease should be circumscribed in some way. They quoted the London Property Support Lawyers Group's response, stating:

> The parties to the lease should consent to such a restriction: it should not be for the registrar to determine the parties' choice of enforcement mechanism(s).

10.89 Christopher Jessel turned the question around and considered the issue instead as being whether, in light of the policy of the law, any particular control on alienation of land should be upheld. He stated:

> Restrictions should only be used where necessary and as a result of a policy decision by Parliament in statute.

10.90 He commented on the use of restrictions in a trust context and in charity land. Other than in these contexts, in his view, restrictions imposed for purely private purposes should be abolished as fettering freedom of alienation: registered land should be no different from unregistered land.

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[13] See HM Land Registry, *Practice Guide 19: notices, restrictions and the protection of third-party interests in the register* (June 2018).

DERIVATIVE INTERESTS UNDER TRUSTS

Consultation Question 49.

10.91 We provisionally propose:

(1) That it should continue to be possible to enter restrictions in Form K in relation to charging orders over beneficial interests; but

(2) That the ability to enter restrictions should not be extended to holders of other derivative interests under trusts.

Do consultees agree?[14]

10.92 24 consultees answered this question:

(1) 21 agreed;[15]

(2) 2 disagreed;[16] and

(3) 1 expressed other views.[17]

10.93 A clear majority of consultees agreed with our proposal. However, a number of consultees asserted that Form K restrictions insufficiently protect the interests of holders of charging orders over beneficial interests.

Agree

10.94 The Property Litigation Association saw no reason for change.

10.95 The Society of Licensed Conveyancers considered any extension would be a "retrograde step" and severely damaging to the curtain principle of keeping equitable interests off the title.

10.96 Everyman Legal commented that it was surely "the beneficiary whose interests should be protected".

10.97 The Bar Council agreed with both parts of the proposal and referred to their response below in relation to their views on Form K.

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14 Consultation Paper, para 10.41.

15 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

16 Christopher Jessel; Chancery Bar Association.

17 HM Land Registry.

10.98 Howard Kennedy LLP commented that chargees of charging orders against beneficial interests have a lower level of security than they probably expect; However, the principle was that overreaching should not be prevented.

10.99 Nigel Madeley agreed on the basis that the Form K restriction is very limited and in a sense is not a restriction, and therefore would not affect proposals for reform. In relation to part (2) of the question, he questioned why a chargee should be entitled to any more:

> The creditor has lent unsecured (and doubtless charged a rate of interest accordingly) and the debtor's asset is the beneficial interest. Were the property owned by people living together but not sharing finances, there is no reason for the creditor to have anything that inhibits the other owner's ability to dispose of the property. Merely jointly owning property is not consent to one's co-owner doing anything that adversely affects the legal estate.

10.100 In contrast to Nigel Madeley, Dr Charles Harpum expressed qualified agreement on the basis that reform is necessary to make the Form K restriction effective. He suggested that the restriction should ensure that the person with the charging order receives prior notification of the disposition and can therefore put into place arrangements to ensure that he or she receives a proper proportion of the proceeds of sale.

Disagree

10.101 Two consultees disagreed, but for opposing reasons.

10.102 In relation to point (1), Christopher Jessel stated that in the instance of charging orders over beneficial interest it is hard to see why an applicant for registration should be obliged to ensure that notice has been served on a creditor or a person who is a beneficiary but was not on the title.

10.103 Mr Jessel went on to comment that the protection appears weak, especially where the trustees of the legal estate are the debtor and a spouse, as by the time the purchaser applies to register the transfer, the sellers may have dissipated the funds. However, Mr Jessel noted that while section 42(2) says the beneficiary of a charging order is treated as having a right or claim in relation to the property, it is the purpose of a restriction to restrict dispositions, whereas the holder of a charging order just wants its money and not an interest in a property which has been sold.

10.104 Mr Jessel also noted that although the beneficial interest so protected will often be an absolute right in possession to a share in the proceeds of sale belonging to tenants in common, that may not always be the case. He gave the example of a trust to person A for life (perhaps a surviving spouse), remainder to B and C (perhaps the children), where there could be a charging order over either A's life interests or the vested reversionary interests of B or C.

10.105 In relation to derivative interests, Mr Jessel was of the opinion that it is sufficient for a single trust restriction in general terms to appear on the register to alert a purchaser that a trust exists, and it is not necessary to make it clear a sub-trust exists. For example, some substantial settlements may have a large number of separate funds, each with its

own sub-trusts and he argues the register should not be cluttered up with references to them.

10.106 However, for the same reason Mr Jessel argued that a person with a derivative interest should be entitled to lodge a caution for unregistered land,[18] and where a normal trust restriction has not been entered on the register, a holder of a derivative interest should be entitled to enter a standard restriction to indicate that the estate is subject to a trust of some sort. For instance, where the registered proprietors were holding the estate in trust for themselves as beneficial joint tenants, and one created a sub-trust thus severing the joint tenancy. The beneficiary under the sub-trust should be entitled to apply for the entry of a trustee restriction.

10.107 The Chancery Bar Association was of the opinion that there is no justification for maintaining a distinction between changing orders and other derivative interests under trusts. They stated that it is "illogical that restrictions can be used to protect purely contractual but not proprietary rights of this kind". Accordingly, it was their view that charging orders and other derivative interests under trusts should be dealt with in the same way.

10.108 The Association was also of the opinion that the restriction in Form K is unsatisfactory because it simply gives notice after the event that the derivative interest has been overreached. If such an interest is to be effectively protected, the Association considered that the appropriate form of restriction would be similar to that one proposed by them in relation to contractual rights in its response to Consultation Question 47:

> The beneficiary should be given an opportunity, before the disposition is registered, to protect his position by applying for an injunction.

Expressed other views

10.109 HM Land Registry stated that it "broadly" agreed with the proposal. However, it suggested that applications for Form K restrictions in respect of charging orders be excluded from the requirement to notify under section 45 of the LRA 2002. Its reasoning was that, because a charging order being a court order, the possible valid grounds for an objection are extremely limited. This in turn leads to there being few grounded objections and in those cases, if its suggestion was taken forward, an application could be made to remove the restriction from the register.

10.110 Although not specifically responding to this question, Dr Charles Harpum argued that paragraph 10.38 of the Consultation Paper had missed the point. He stated that section 42(1)(b) of the LRA 2002 provides the registrar may enter a restriction in the register if it appears to him that it is necessary or desirable to do so:

> For the purpose of securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached.

10.111 The concept of overreaching, he observed, balances the need for trustees to be able to sell land and confer a good title on a purchaser, with the protection for beneficiaries

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[18] See Christopher Jessel's response to Consultation Question 11, at paragraph 4.39 of the Consultation Paper.

that payment to two trustees carries with it. However, Dr Harpum viewed Form K restrictions as locking the stable door after the horse has bolted. The person with the charging order only finds out about the sale after it has occurred, by which time the monies have been paid over and perhaps paid away so as to be irrecoverable.

10.112 Rather than a Form K restriction, Dr Harpum advised that the required notification should precede the disposition, perhaps by two weeks. This would enable the person with the benefit of the charging order to put a mechanism in place to ensure that they receive their share of the proceeds:

> I do not understand how that represents a "'stranglehold' on the legal estate" and circumvents overreaching.

10.113 Dr Harpum concluded by urging that consideration be given to Form K as "the profession has long despaired of it".

Consultation Question 50.

10.114 We provisionally propose that it should be made clear that a court may order the entry of a restriction to protect a charging order relating to an interest under a trust, but that such a restriction must be in Form K.

Do consultees agree?[19]

10.115 24 consultees answered this question:

(1) 20 agreed;[20]

(2) 2 disagreed;[21] and

(3) 2 expressed other views.[22]

Agree

10.116 The majority of consultees simply indicated that they agreed with the proposal and did not provide any further comment. We have included the remarks of all those consultees who said something further below. Again, some consultees remarked on the level of protection provided by a Form K restriction.

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19 Consultation Paper, para 10.52.

20 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Pinsent Masons LLP; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

21 Christopher Jessel; Dr Charles Harpum QC (Hon).

22 Chancery Bar Association; HM Land Registry.

10.117 The Society of Licensed Conveyancers noted that what we are proposing already happens when the courts exercise this power.

10.118 The Law Society agreed on the basis of the argument set out in paragraph 10.43 of the Consultation Paper, that otherwise any other form of restriction might give such a beneficiary under a trust a right they were not entitled to under the trust. In the Society's view the right of overreaching needs to be maintained; otherwise, beneficiaries might seek to delay transactions and disponees would need to be concerned with the rights of beneficiaries, rather than focusing on transaction with the legal owners and the entries on the register.

10.119 The Bar Council agreed that the situation should be clarified, but thought that serious consideration should be given to allowing a restriction that offers the charging-order creditor greater protection than Form K. The Bar Council recognised however that there are arguments either way in this regard. It stated that Form K is adequate to inform charging-order creditors that the charged beneficial interest is about to be overreached, in order so that theycan make their claim to the proceeds of sale. However, the Council said that this is inadequate protection of the creditors' interests:

> The context is necessarily one where the debtor and creditor have been engaged in hostile litigation and the judgment has gone unsatisfied. The creditor may be concerned that the debtor will try to avoid paying the judgment debt.

10.120 The Council observed that there are two particular risks for the creditor:

(1) The debtor may dispose of the proceeds of sale before accounting to the creditor; and

(2) If the debt is greater than the value to be realised by the sale, the debtor may dispose of the interest at an undervalue, particularly in a collusive sale to a connected party.

The Bar Council comment that a creditor with a charging order over the legal estate, whose charging order is protected by a notice, is protected from these risks. The fact that the charging order will not lose priority to a disponee unless discharged means that the creditor can secure payment through the conveyancing process and, if the debt exceeds the consideration, he or she can refuse to provide the necessary discharge. It stated that Form K stands in contrast, since it offers no protection at all against these risks:

> It may be true that charging-order creditors may have other remedies in these cases but these will involve them in further litigation and bring further uncertainty and legal expenditure that may never be recovered. This seems unfair.

10.121 The Bar Council stated that there are "variety of means" by which the charging-order creditor's interests could be protected in these cases:

> One example is a restriction in similar form to Form AA, which is used to protect property subject to a freezing injunction. This allows a disposition to be registered only with the consent of the party who obtained the injunction or with the consent of the court.

The Bar Council argued that this form of restriction would allow a charging-order creditor to have enough control over the transaction to ensure that it receives the proceeds of sale of the charged share in the property, while also allowing a trustee of the land to apply to court for an order permitting the sale on the proposed terms if the creditor were behaving unreasonably (under section 14 of the Trusts of Land and Appointment of Trustees Act 1996):

> Although this is anomalous, and provides the creditor with a partial "stranglehold" over the registered estate, it might be thought a reasonable solution to this practical problem.

10.122 However, the Bar Council recognised that the reasonableness of this solution depends on the charging-order creditor behaving reasonably. It accepted that there is the potential for unfairness if the creditor behaves unreasonably, "particularly if the party intending to sell cannot afford to go to court for an order permitting the sale".

Disagree

10.123 Christopher Jessel disagreed for the reasons he gave to Consultation Question 49.

10.124 Dr Charles Harpum strongly expressed his disagreement, stating that it is well known in practice that Form K is "utterly useless". Dr Harpum stated that he would not agree to the proposal "unless and until" Form K has been rewritten to provide the person who has a charging order over a beneficial interest with adequate prior notification of the disposition that will cause the purchase monies to arise.

Expressed other views

10.125 The Chancery Bar Association agreed with part (1) of the proposal, but:

> For the reason given under [Consultation Question 49] the restriction should not be in Form K but should in the form suggested there.

10.126 HM Land Registry "broadly" supported the provisional proposal. However, it noted that for the proposal to be workable the provision would need to make clear how HM Land Registry should deal with orders that nevertheless provide for the entry of restrictions in other forms, including non-standard forms:

> For example, where there is a charging order made relating to an interest under a trust, it may need for the statute to provide that any order made for a restriction in a form other than Form K to be treated by the registrar as if it was in that form.

10.127 HM Land Registry suggested that it might be necessary to limit the requirement of the registrar to treat the restriction as being Form K –

> to those circumstances where the Court does not indicate expressly that it has consciously directed a different form of restriction be entered.

Chapter 11: Overriding interests

INTRODUCTION

11.1 29 consultees responded to the questions in Chapter 11 of the Consultation Paper.[1]

11.2 The majority of consultees agreed that estate contract should continue to be able to be protected as an overriding interest if the beneficiary is in actual occupation. Nearly all consultees who responded also agreed that, in determining whether an interest is "unregistered", it is the burdened title that is relevant. Conversely, consultees expressed mixed views about whether section 29(3) should be retained.

PROTECTION OF ESTATE CONTRACTS BASED ON ACTUAL OCCUPATION

Consultation Question 51.

11.3 We believe that it should continue to be possible for an estate contract to be protected as an overriding interest where the beneficiary of the contract is in actual occupation.

Do consultees agree?[2]

11.4 28 consultees answered this question:

(1) 18 agreed;[3]

(2) 7 disagreed;[4] and

(3) 2 expressed other views.[5]

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1 Martin Wood; Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Cliff Campbell; Chancery Bar Association; Society of Legal Scholars; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); National Trust; City of London Law Society Land Law Committee; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

2 Consultation Paper, para 11.30.

3 Martin Wood; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; Chancery Bar Association; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Berwin Leighton Paisner LLP; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; The Law Society; Mangala Murali.

4 Professor Warren Barr and Professor Debra Morris; The Conveyancing Association; London Property Support Lawyers Group; Dr Charles Harpum QC (Hon); National Trust; Burges Salmon LLP; City of London Law Society Land Law Committee.

5 Pinsent Masons LLP; HM Land Registry.

Agreed

11.5 Nigel Madeley stated that the issue concerns mainly tenants, who may have options to purchase and "rights to rectification"; conversely, the contracting purchaser "will rarely be in occupation". In his view, overriding interests are not, in principle, problematic:

> There will always be interests in land that can arise informally, and any sane buyer (except perhaps a trader buying at auction who knowingly accepts the risk) will inspect a property he wants to buy, and it is reasonable for a seller to expect a buyer to do so.

In commenting on the necessity for overriding interests, he highlighted the importance of the law reflecting the reality of human behaviour, "because humans [will not] redesign themselves for systems".

11.6 Similarly, the Law Society stated that purchasers should make enquiries of the seller to identify any such interests.

11.7 Howard Kennedy LLP said that to change the current position would "change the practice in residential conveyancing for no particular benefit". It explained that early completion can result in purchasers losing priority, and that overriding status following actual occupation is "a useful safeguard for them".

11.8 Berwin Leighton Paisner LLP also agreed. However, it stated that changing the law so that all estate contracts are no longer capable of being protected as overriding interests is an alternative solution to the problems created by the judgment in Scott v Southern Pacific Mortgages Ltd [2014] UKSC 52, discussed in relation Consultation Question 14, at paragraph 6.30 of the Consultation Paper.

Disagreed

11.9 In contrast, Professor Warren Barr and Professor Debra Morris stated that the rule should "never have been allowed to exist"; the express protection available under the statute (a notice) should be used instead. In their view, this protection "brings parity with the system" in respect of unregistered land (in that the interest will not bind unless it is protected), and "promotes the sanctity of the registration scheme and enhances the mirror principle". On this basis, they distinguished between expressly created interests such as estate contracts, and informally created interests such as beneficial interests under a trust, "where the trigger of actual occupation rightly has a role to play".

11.10 The Conveyancing Association stated that for "certainty and completeness of the register", expressly created and substantially registerable rights should be registered, and not be overriding interests. It added that:

> Informally obtained rights of occupation plus actual occupation should still be classed overriding interests to protect the vulnerable.

11.11 Similarly, the London Property Support Lawyers Group stated that there seems "nothing unreasonable" in expecting beneficiaries of an estate contract who are in occupation "to protect their interest on the register by way of a notice". In its view, there will always be interests which would be unreasonable for the occupier to register, including informally created rights under a constructive trust or by estoppel. The beneficiaries of such rights

"may not even be aware of their existence", and requiring registration would defeat the recognition of their status". However, it suggested that other such interests should be registered:

> Surely we should be striving to narrow the class of interests that override and so where a right displays the characteristics of an estate contract, is it not more appropriate to require the right to be protected by way of notice on the register of title?

11.12 The London Property Support Lawyers Group said that, as electronic conveyancing has not developed and the registration gap remains, bona fide purchasers and mortgagees continues to be at risk of overriding interests, whilst actual occupation continues to be relevant at the date of registration. In its view, it "places a heavy burden on purchasers and mortgagees" to require them to inspect the property and make inquiries of occupiers. It said that direct inquiries of occupiers are never made in commercial transactions, and that it is "impossible to make an inspection that would discover such interests at the date of the disposition". In modern practice, enquiries and site inspections "have been carried out prior to completion of the transaction and are not repeated prior to registration". Even where the occupation is "obvious", there may be nothing to alter the purchaser of the need to make further enquiries.

11.13 The Group continued that that "this concept of notice does not sit well with the integrity of the register". Although it is necessary to balance the right of purchasers to rely on the register against the rights of those in occupation, estate contracts are express and documented. The Group asked "why shouldn't occupiers with the benefit of an estate contract be subject to the rigours of registration of a notice". Finally, although a notice may be cancelled, "this is a well understood concept and the beneficiary…is given ample opportunity to assert the validity of its interest" before it will be cancelled.

11.14 London Property Support Lawyers Group further stated (in response to Consultation Question 35 in Chapter 8, at paragraph 8.49 of the Consultation Paper) that occupation should not protect an option which ought to be protected by a notice, "especially if the proposals in Chapter 7 are enacted".

11.15 Similarly, Christopher Jessel stated that an expressly created estate contract, which will normally be in writing under the Law of Property (Miscellaneous Provisions) Act 1989 and where it would need to be registered if the beneficiary is not in occupation, "ought to be registered or noted". In his view, if not, the register would not be as complete as it should be, particularly where the beneficiary goes in and out of occupation. He distinguished between occupation and possession, in that:

> …a beneficiary who allows a son or daughter to occupy a house on temporary licence but retains possession…may lose the right depending on whether it matures while the possessor is in occupation.

11.16 Mr Jessel also explained that an estate contract created by express contract or deed is usually accompanied by legal advice, which could easily extend to the need to protect the interest by registration.

11.17 However, Mr Jessel provide an example of another type of interest. He explained that it is "common practice" for the owner of a landed estate to agree with an employee that he or she continue to occupy an estate cottage, rent-free, for the rest of his or her life

upon retirement. Citing *Binions v Evans*,[6] Mr Jessel said that this may create a tenancy for life, which would subsist under a trust of land. Mr Jessel explained that, although such rights are expressly created, the parties may not be aware of the nature of the right, having been created in correspondence or in a contract of employment. He noted that it may be relevant to the issue of who remains in the former matrimonial home where the occupier divorces. Mr Jessel said that, strictly, a trust restriction should be inserted against the title; however, it "may be rare for that to be imposed simply by virtue of the occupation right". Notwithstanding this, "a rural estate may sometimes be vested in trustees in any case".

11.18 The National Trust stated that it places "too extensive an obligation" on recipients of a registrable interest "to obtain information from occupiers who may not be willing to cooperate". It added that it is "inconsistent with the aim of land registration to be as complete a record as possible". It commented that both parties to an estate contract are likely to receive legal advice. In the National Trust's view, as it will also be "obvious when such an interest has been created", it is "both practical and reasonable" to expect the beneficiary of an estate contract to register his or her interest.

11.19 Dr Charles Harpum QC (Hon) stated that as the model of electronic conveyancing visualised in the 2001 Report, Land Registration for the Twenty-First Century: A Conveyancing Revolution,[7] is not going to be implemented, "it is appropriate to follow the model of easements and require the protection of estate contracts by notice".

11.20 Burges Salmon LLP stated that, in the commercial sector, there is often no contract with a fixed completion date, so that it is not practicable to inspect the property for occupation at the actual date of the disposition. As someone entering into an estate contract will "normally take legal advice", it is not unreasonable to require registration of a unilateral notice. Finally, registration is also "consistent with the aim of the Land Registry being as complete a record as possible".

11.21 The City of London Law Society Land Law Committee stated that beneficiaries of estate contracts "should not be able to rely on their actual occupation to protect the contract as an overriding interest". It explained that it is sympathetic to the policy of reducing the number of overriding interests and "emphasising the primacy of the register", which "is consistent with and promotes electronic/digital conveyancing".

Other

11.22 Pinsent Masons LLP stated that estate contracts should cease to be protected as an overriding interest only if the proposals in Chapter 6 of the Consultation Paper are implemented. In its view, this would be "in line with the objective of the Act to make the register as comprehensive as possible". Alternatively, if the Chapter 6 proposals are not implemented, "the current position should remain".

11.23 Although HM Land Registry stated that it agreed with the proposal, it noted its "alternative suggestion made to the proposal at paragraph 6.30", Consultation Question

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6 [1972] Ch 359.

7 (2001) Law Com No 271.

14.[8] In its view, if that alternative is taken forward, there would be merit in considering whether unregistered estate contracts should be capable of being protected as overriding interests.

THE MEANING OF "UNREGISTERED INTEREST"

Consultation Question 52.

11.24 We believe that the fact that the benefit of an interest has been registered should not preclude that interest from being an "unregistered interest" (and so overriding) for the purposes of schedules 1 and 3 to the LRA 2002.

Do consultees agree?[9]

11.25 25 consultees answered this question:

(1) 24 agreed;[10] and

(2) 1 disagreed.[11]

Agreed

11.26 Martin Wood argued that it is clear that the fact of registration does not preclude an interested from being an "unregistered interest" for the purposes of schedules 1 and 3. In his view, "unregistered" in this context must mean not entered on the register of the title to the burdened land, rather than the register as a whole. If this is not the case, "the scheme simply doesn't work, and it is inconceivable that a court would find otherwise".

11.27 Similarly, Dr Charles Harpum stated that "[t]his must surely be the law already", commenting that he was surprised that this is in any doubt. He said the registration contemplated by section 29 "must plainly be the registration of the burden of an interest against the burdened title".

11.28 Howard Kennedy LLP also agreed, stating that not all interests have a benefiting title, such as a short lease. In order to bind, the burden of such interests should be shown on the burdened title, and "[i]f it happens to be registered elsewhere that should not affect its overriding status".

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8 Namely, to classify such interests as "registrable dispositions", so that they are subject only to the interests listed in section 29.

9 Consultation Paper, para 11.41.

10 Martin Wood; Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); National Trust; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Society of Legal Scholars.

11 Mangala Murali.

11.29 The Law Society stated that they agreed with the proposal, highlighting that section 132 makes no provision for registration of benefit, but also does not refer specifically to the registration of the burden.

11.30 Christopher Jessel also stated that he agreed, in particular because "the way the benefit is registered may not be the same as the way the burden takes effect in law". He gave the example of a prescriptive right of way:

> It can happen, for instance with a prescriptive right of way, that an entry of the benefit is made on the dominant title at the request of the dominant owner and possibly at a time when the servient title is not registered. Subsequently on first registration of the servient title a different entry is made on that title, perhaps following the completion of form D1 where the servient owner admits the existence of some form of right but less than that claimed by the dominant owner. For instance the dominant owner may claim a right for all vehicles for any residential purpose while the servient owner may recognise a right for private motor cars for one dwelling. Indeed, if the servient owner does not know the dominant owner's title number or may not know the location of the dominant land, the Land Registry may not pick up any cross reference on the first registration of the servient land. It may be that if the matter ever came to court, the judge might take a different view of the right from either of the parties. It may therefore be unclear just what right has the benefit of registration.

11.31 Mr Jessel also suggested that it should be obligatory to register conservation covenants with the land registry. Although the Law Commission report, Conservation Covenants,[12] recommended that they should be entered on the local land charges register, and would therefore qualify as overriding interests under schedules 1 and 3, paragraph 6, in Mr Jessel's view, "there would still be an advantage in their details being entered on the title register, while not losing their overriding status".

11.32 Professor Warren Barr and Professor Debra Morris stated that they agreed, adding that "use of a caution in these circumstances is artificial".

11.33 The London Property Support Lawyers Group and Pinsent Masons LLP simply stated that they agreed with the proposal, for the reasons given in the Consultation Paper.

11.34 The Conveyancing Association stated that whilst they agree, in the example quoted in the Consultation Paper, the creation of an easement should trigger first registration of both the dominant and servient land "to provide certainty and complete the register".

11.35 Amy Goymour agreed "in principle", but was "concerned about using the term 'registered' too broadly". She distinguished between interests on the register, "which attract the State guarantee of title", and interests which are merely noted, "which do not". She queried whether it would be more "appropriate" to adopt a different terminology for the latter type of register entry, such as "noted" or "recorded".

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[12] (2014) Law Com No 349.

Disagree

11.36 Mangala Murali stated that an interest must lose its overriding status once it has been registered, suggesting that "differentiating the benefits of an interest from the interest itself can get very confusing".

SECTION 29(3)

Consultation Question 53.

11.37 We invite consultees' views as to whether section 29(3) of the LRA 2002 serves a useful purpose and should be retained.[13]

11.38 21 consultees answered this question.[14]

11.39 There was an even split amongst consultees between those who felt section 29(3) served a useful purpose and should be retained and those who felt it would be better repealed.

In support of section 29(3)

11.40 Professor Warren Barr and Professor Debra Morris stated that "in the interests of working within the statutory scheme" section 29(3) should remain. In their view, there "must be an incentive to engage with the notice procedures", rather than relying on the "more obdurate" actual occupation rules to protect interests.

11.41 Michael Hall stated that section 29(3) "serves a useful purpose and should be retained". In his view, however, where it is shown clearly that a notice has been removed by mistake, or as a result of a fraudulent, a negligent or another improper application, then the innocent beneficiary of the notice should be entitled to an indemnity. Conversely, if the beneficiary is responsible for the removal of the notice, then their overriding interest should no longer be protected.

11.42 The London Property Support Lawyers Group referred to section 29(3) as "an important provision" which "encourages overriding interests to be brought onto the register". It stated that the provision provides the incentive for the beneficiary of a notice to respond to an application to cancel it, which would not exist if the overriding status of the interest revived after the renewal of the notice. Further, it would be "sensible" for all interests once protected by a notice to be "to be treated in the same way". The Group concluded that, as the "whole registration system relies on the premise that the number of 'unregistered interests that override' should be kept to a minimum", the overriding status of an interest should not revive after it has been brought onto the register.

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13 Consultation Paper, para 11.54.

14 Martin Wood; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); National Trust; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Cliff Campbell; The Society of Legal Scholars.

11.43 The Chancery Bar Association stated that section 29(3) serves a useful purpose in that it:

> prevents a beneficiary of a notice who has removed it at the instance of a registered proprietor from subsequently seeking to assert the previously protected interest against a purchaser.

11.44 Dr Charles Harpum (generally responding to all the questions about section 29(3)) stated that section 29(3) serves a useful "double function". First, the provision promotes the original objectives outlined in the 2001 Report,[15] in particular the "mirror principle", which seeks to limit as far as possible the number of interests in land that may be overriding even though they are not reflected by an entry on the register. Secondly, Dr Harpum stated that "the provision does not cause injustice". He explained this point with the following illustration. Where a purchaser examines a historic copy of the register and notes that a particular overriding interest had been noted on the register but has now been removed, the purchaser may be confident, relying on section 29(3), that the interest will no longer be overriding. If the interest has been removed from the register by mistake, the beneficiary of the interest may obtain an indemnity payment from HM Land Registry. Without section 29(3), the purchaser may be bound by the overriding interest despite its removal from the register, but will not be entitled to an indemnity.[16]

11.45 Dr Harpum commented:

> [This] is an argument that works both ways. If [HM Land Registry] removes an entry in the register by mistake, why should LR be excused from paying indemnity just because the right was at some stage an overriding interest? There is no good answer to that question.

11.46 The Chartered Institute of Legal Executives considered that there are arguments both for and against retention of section 29(3). It expressed the view that, in general, it is desirable that overriding interests should only be removed from the register if no longer of an overriding nature and so "any attempt to make them overriding again seems incorrect".

11.47 The National Trust, Burges Salmon LLP and the Law Society all thought that section 29(3) should be retained. Burges Salmon LLP considered that the provisions "should be retained to promote certainty", while the Law Society found the arguments for retention to be "evenly balanced" and so advocated "retaining the status quo".

Against section 29(3)

11.48 Martin Wood saw section 29(3) as "an example of adherence to theoretical purity" that fails to serve "any useful practical purpose". Likewise, Nigel Madeley wrote that the provision appears to be "formalism for its own sake", lacking any pragmatic basis. Both consultees agreed that the provision can lead to injustice in a situation such as the one described at paragraph 11.50 of the Consultation Paper. Moreover, both consultees were of the view that the counterargument in paragraph 11.51 of the Consultation Paper is not compelling. Martin Wood pointed out that, where the beneficiary has taken the

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15 Law Com No 271.

16 Citing the *Chowood* principle, from *Re Chowood's Registered Land* [1933] Ch 574.

time to enter a unilateral notice, he or she would be likely to object to an application for cancellation and Nigel Madeley suggested that anyone "astute enough to seek the cancellation of the UN1 would also seek a release from the right".

11.49 Dr Aruna Nair likewise agreed that the argument in paragraph 11.50 of the Consultation Paper is more compelling than the argument in paragraph 11.51. Dr Nair further argued:

> It is reasonable for a purchaser notified of the existence of a right, by a notice on the register, to obtain a proper release from the beneficiary of the right itself. A purchaser who does not take these steps, and who finds that the right is overriding, is in the same position as any other purchaser bound by an overriding interest…

11.50 Cliff Campbell expressed similar views to Dr Nair, noting that "if notice of an obvious right of way is removed [due to an administrative error by HM Land Registry], the dominant owner might lose their right on a later purchase notwithstanding it having been clearly apparent on inspection". Likewise, the Conveyancing Association suggested that "occupiers in actual occupation with an overriding interest should retain the overriding interest whether or not that interest is registered".

11.51 Both Everyman Legal and the City of Westminster and Holborn Law Society described section 29(3) as a potential "trap" for the unwary. Everyman Legal said the provision was "of no practical benefit". The City of Westminster and Holborn Law Society pointed out that the provision may trip up an applicant for a notice who wishes to avoid contentious proceedings at that stage and so does not oppose cancellation of the notice on the assumption that their interest will retain its pre-application overriding status.

11.52 HM Land Registry said that it:

> would prefer for section 29(3) to be revoked. Where the issue may be relevant it requires consideration of the full history of a title and the provision increases unnecessarily the potential for indemnity claims based only upon an historic entry having been made in the register.

11.53 The Society of Legal Scholars was concerned that the status of an overriding interest that has been protected by a notice subsequently removed from the register is unclear. It supported repeal.

11.54 The Bar Council stated that he did not have strong views one way or another, but "on balance would favour its repeal". Christopher Jessel also supported repeal.

Other views

11.55 Amy Goymour expressed no strong opinion either way. But Ms Goymour pointed out that section 29(3) "creates an incentive not to remove interests from the register, which is an arguably desirable ambition". She suggested that the provision should only be repealed if other mechanisms are put in place "to render it difficult to remove register entries for subsisting interests".

Consultation Question 54.

11.56 We invite consultees to provide examples of situations where section 29(3) has either created a problem in practice, or conversely performed a useful function.[17]

11.57 6 consultees answered this question.[18]

11.58 The majority of consultees indicated that they were not aware of any situations in practice where the application of section 29(3) has been either a help or hindrance.

11.59 The Bar Council was able to give one example. As a result of poor practice by conveyancers and HM Land Registry in registering a notice under the Land Registration Act 1925, it was unclear whether a particular right had been successfully protected. The Bar Council said:

> The existence of s 29(3) had the result that the beneficiary might have been forced to defend the applicability of the notice, even if it believed that it did not protect the right in question (which would, instead, have been an overriding interest), in order to avoid the risk of losing any protection for that right. Had the beneficiary not been in receipt of legal advice, it could well have been caught out.

11.60 Christopher Jessel suggested that, in some cases, section 27(3) can cause the register to become cluttered and can lead to unnecessary work. Mr Jessel wrote that, in his experience, on the first registration of a substantial estate, the title deeds can reveal multiple easements – for example, easements relating to old pipes – many of which have become obsolete. If the land is registered with multiple titles, and it is unclear to which titles the easements relate, HM Land Registry may note every easement against every title. Because of concerns with section 27(3) and loss of priority, it can then be difficult to get the notices of the easements removed, even where they are clearly unrelated to a particular title.

Consultation Question 55.

11.61 We invite consultees' views as to whether any transitional provisions are necessary in the event of the abolition of section 29(3).[19]

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17 Consultation Paper, para 11.55.

18 Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; The Bar Council; The Law Society.

19 Consultation Paper, para 11.57.

11.62 10 consultees answered this question.[20]

11.63 A slim majority of consultees were of the view that transitional provisions are not necessary in the event of the abolition of section 29(3).

There is a need for transitional provisions

11.64 Michael Hall, the Conveyancing Association and the Chartered Institute for Legal Executives all stated that transitional provisions would be desirable. Michael Hall, in particular, noted that such provisions are necessary "to ensure that the change in the law does not have retrospective effect".

11.65 Pinsent Masons LLP made a similar point, suggesting that it would be "inequitable" if an interest that had previously lost overriding status pursuant to section 29(3) were to be resurrected. Pinsent Masons LLP gave the following reasons:

> Where the removal of the interest had occurred by mistake through no fault of the beneficiary, then the beneficiary would be able to apply for rectification or an indemnity (as appropriate) in the usual way. Where, for example, an interest protected by unilateral notice had been removed as a result of the beneficiary's failure to respond to an application to cancel that notice, it seems to us that allowing the beneficiary to assert its rights against a subsequent purchaser following the change of law would give the beneficiary an unwarranted windfall.

There is no need for transitional provisions

11.66 Everyman Legal and the Bar Council thought that there would be little need for transitional provisions. Another four consultees agreed, but had differing views on what effect the repeal of section 29(3) would have if there were no transitional provisions.

11.67 Martin Wood wrote that it would make sense for the rules at the time of the relevant disposition to apply. Dr Aruna Nair expressed the same view but also noted that section 29(3) does not operate to destroy an interest in land when it is removed from the register. Dr Nair comments that "it is only at the moment of disposition that the priority-postponing effect of section 29 takes effect".

11.68 Christopher Jessel and the City of Westminster and Holborn Law Society disagreed with this view. The City of Westminster and Holborn Law Society wrote that transitional provisions are not necessary "as regards right that have already lost protection" and that proposed change in the law should apply to existing notices which have not already been cancelled. Christopher Jessel stated that:

> in the case suggested [at paragraph 11.56 of the Consultation Paper], the rights of the parties would be governed by the law in force at the time the restriction was removed so that s 29(3) would apply. So long as it does, the effect is to extinguish the right. Repeal would not revive the right.

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[20] Martin Wood; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; Pinsent Masons LLP; Dr Aruna Nair; The Bar Council; Chartered Institute of Legal Executives. Additionally, several other consultees responded to say this was not required because they were not in favour of the abolition of section 29(3).

Chapter 12: Lease variations and registration

INTRODUCTION

12.1 23 consultees responded to the questions in Chapter 12 of the Consultation Paper.[1]

12.2 The majority of consultees were in favour of permitting the recording of a non-dispositive lease variations on the register, but were not in favour of permitting the recording of documents ancillary to a lease.

12.3 A question was also asked to gauge responses in relation to a potential 13th Programme project on commercial leaseholds. Responses to this question were considered as part of our consultation on the 13th Programme of Law Reform.

GENERAL COMMENTS

12.4 A number of general comments were made by consultees.

12.5 Nigel Madeley queried whether the grant of an easement is a surrender and re-grant. He stated that, "if it is, then the easement is part of the lease and so falls within [the] proposal that it need not be separately registered". He added that "many people" might regard adding an easement to a lease as "merely varying it", giving the example of a landlord giving his or her tenant permission to open a hole in the wall for the extraction of air from the kitchen. For pragmatic reasons, Mr Madeley stated that he was "inclined" to see the adding of an easement as a "variation of the lease such that the added easement should take its character from the lease".

12.6 Dr Charles Harpum QC (Hon) stated that paragraph 12.21 of the Consultation Paper is "clearly correct" and reflects the view he has "always taken". Dr Harpum added that the issue "did cause some interest in the period immediately following the coming into force of the LRA 2002".

12.7 The Conveyancing Association suggested a new trigger for registration:

> Any variation of the lease should also trigger first registration of the Lessor or Lessee's unregistered title to provide certainty and to complete the Register.

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[1] Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Dr Nicholas Roberts; Everyman Legal; Michael Hall; City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); National Trust; Taylor Wessing LLP; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

RECORDING OF NON-DISPOSITIVE LEASE VARIATIONS

Consultation Question 56.

12.8 We provisionally propose that express provision should be made to permit the recording of a variation of a lease on either the landlord's registered title, or the tenant's registered title, or both.

Do consultees agree?[2]

12.9 22 consultees answered this question:

(1) 19 agreed;[3] and

(2) 3 expressed other views.[4]

Agreed

12.10 Many consultees who agreed expressed support for either voluntary or mandatory recording of a lease variation.

In favour of mandatory recording

12.11 The Chartered Institute of Legal Executives stated that it was in favour of mandatory recording "against both titles [so as] to have a complete register".

In favour of voluntary recording

12.12 The London Property Support Lawyers Group stated that it was in favour of voluntary recording, which is "in line with the main objective of the LRA 2002 and would ensure that variations are noted in a consistent way". It stated that the mechanism should "make it clear that recording a lease variation is not necessary", except where "expressly required in order for a disposition effected by the variation to operate at law under the LRA 2002, or in order to preserve the priority of the interest".

12.13 Similarly, Burges Salmon LLP was in favour of the proposal:

> Save that registration should be voluntary except where necessary for a disposition effected by the variation (eg the grant or termination of an easement) to be effective at law.

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2 Consultation Paper, para 12.40.

3 Professor Warren Barr and Professor Debra Morris; Dr Nicholas Roberts; Michael Hall; a confidential consultee; City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); National Trust; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

4 Nigel Madeley; Everyman Legal; Christopher Jessel.

12.14 The National Trust also agreed with voluntary recording. In its view, it would provide the flexibility for the landlord and tenant to decide "which variations warrant registration", based on their "nature and complexity", and would result in the register "recording a fuller picture of the leasehold interest". It also welcomed the proposal for a "clearer mechanism" because it would "ensure consistency of approach".

12.15 The Law Society similarly agreed, stating that "while there may be no requirement to register the lease variation", the parties may do so "if they so wish". It also agreed with the rejection of the option of making the registration of all lease variations compulsory. It stated that if the lease is not registrable, then as a "general rule", a deed of variation of the lease should not need to be registered either, "subject to the exceptions highlighted by the Law Commission and our comments on those exceptions". The Law Society also commented that it was "aware of inconsistencies between the Landlord and Tenant (Covenants) Act 1995 and the LRA 2002", stating that "the Law Commission's proposal helps to reduce the inconsistencies".

12.16 The Bar Council simply answered "yes, provided it is voluntary".

Did not express a preference as to manner of recording

12.17 Professor Warren Barr and Professor Debra Morris did not express a preference as to the manner of recording, but stated that the proposal "clarifies existing practice". Similarly, Dr Nicholas Roberts stated that "the suggestion that there should be a clear basis for the optional recording of variations…would seem sensible".

12.18 Dr Charles Harpum stated that he supports the proposal, for the reasons given in the Consultation Paper, and that "in practice it already happens".

12.19 Adrian Broomfield also stated that he agreed, preferably where both interests are registered.

Expressed other views

12.20 In contrast, Nigel Madeley stated that this issue has troubled him for some time. He stated that the "odd habit" of varying leases in documents such as licences for alterations and rent deposit deeds, "even if the latter functions purely as a contract and does not transmit landlord or tenant covenants", "can have rather unexpected implications for guarantors". If it were also to mean that many licences for alterations would be capable of being noted on the register, he stated that that would risk the register "getting out of hand".

12.21 Mr Madeley referred to the "dual nature of a lease…as property and contract", and stated that as we do not know the extent of this principle (citing for an example *Reichman v Beveridge*[5]), "we may not be able to resolve" the issue. Based on his understanding of leasehold covenants as a "contractual incident to that estate", Mr Madeley said that "a true variation of the estate is then only a change in the area let or the term", and "not to the covenants". In his view, to register a variation in the covenants is arguably "to misunderstand what is property and what is contract".

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5 [2006] EWCA Civ 1659, [2007] Bus LR 412.

12.22 Notwithstanding this, Mr Madeley stated that "some do apply to register variations to leases", although in his view "this isn't on a thought-through basis, but rather [a] 'this is an important change, better register it'" mentality. He questioned whether there is a benefit to voluntary registration: voluntary registration "might suggest that all variations have been registered, when they might not have been". Therefore, the proposal would not mean that the buyer would not have to examine "everything else to see whether the lease had been varied elsewhere (including by contracts as well as deeds)". He concluded by stating that "if someone answers 'yes' to this and 'no' to the next, I am not sure what their logic is".

12.23 Everyman Legal stated that "Land Registration has the effect of turning a lease from a flexible asset to an onerous burden". It stated that "informal variations are happening all the time", and that trying to get parties to vary in writing can be an "uphill struggle". On this basis, it suggested that "it is really only long leases with a capital value that happily fit the registration ethos". Allowing short-term leases to be used as a "living breathing document without running the risk of falling foul of technicalities must be encouraged".

12.24 In contrast, Christopher Jessel stated that registration should be required if the variation is made by deed. He explained that it was a policy decision to require a copy of the lease to be supplied under rule 24 of the LRR 2003 when it is registered. He stated that "if the lease is varied the original copy will have become inaccurate and obsolete". In theory, if this were otherwise:

> The parties could agree a lease with one set of terms and a few days later have a deed of variation with a completely different set of terms which would be concealed from the public.

12.25 He stated that all such express variations should therefore be registrable and if not registered, "neither landlord nor tenant should be able to enforce the benefit of the variation".

12.26 Mr Jessel also made a number of comments to the points in paragraph 12.33 of the Consultation Paper.

(1) "There is a possible conflict between this policy in the [Landlord and Tenant (Covenants) Act 1995] (it was not the main one, which was relieving former tenants from privity of contract) and that of the open register. I suggest the open register is more important".

(2) "The requirement should apply only to registrable leases".

(3) "I accept that informal variations may occur and therefore this should only apply to those made by deed".

(4) "It would be possible to modify Schs 1 and 3 para 2 to provide that a tenant in occupation can not claim the benefit of an unregistered variation by deed.".

(5) "If the parties are using a deed, the extra cost of registering is minor. If it is felt this is a burden on holders of leases of 7 years, the requirement could be applied only to longer ones, such as 14 years".

12.27 Mr Jessel concluded by stating that where a variation takes place "by estoppel or waiver or otherwise informally", then there should be "no immediate obligation to register because the parties will often not be aware that the lease has been varied". In this case, "registration should be voluntary" and provision should be made for notice to be served on any other parties to the lease "in case they do not agree that the estoppel or waiver has occurred".

RECORDING OF DOCUMENTS ANCILLARY TO A LEASE

Consultation Question 57.

12.28 We invite the views of consultees as to whether express provision should be made to permit the recording of any other documents which are ancillary to a lease on either the landlord's registered title, or the tenant's registered title, or both.[6]

12.29 20 consultees answered this question.[7]

12.30 The majority of consultees were against the recording of ancillary documents on the register.

In favour of recording ancillary documents

12.31 Everyman Legal stated that "it would certainly be beneficial to allow supplemental documents to be registered". It explained that it was recently involved in a lease enfranchisement case which almost collapsed as the licence to assign was not registrable and could not be identified, but in theory prevented the lease extension application being made.

12.32 Christopher Jessel was also in favour of recording other documents, "provided they have a permanent effect following a disposition of the legal estate". He stated that most licences to assign are personal and would not therefore need to be recorded; conversely a licence for alterations can have a "long-term effect" such as an expensive reinstatement obligation or a provision that while the landlord continues to repair the original structure the tenant will repair a built extension. A licence to vary the use may be "personal or permanent" and recording of it should depend on its "effect", "in particular whether it is to be binding on successors to the contracting parties". He stated that if made by deed, such a document should be compulsorily registrable so that "the current terms of the lease are available for public inspection".

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6 Consultation Paper, para 12.44.

7 Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Dr Nicholas Roberts; Everyman Legal; Michael Hall; City of Westminster and Holborn Law Society; They Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); National Trust; Taylor Wessing LLP; Adrian Broomfield; Dr Aruna Nair; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; Burges Salmon; The Law Society.

12.33 Mr Jessel also stated that "there should be a reference on the landlord's title that variation has occurred", and that "the variation should primarily be on the tenant's title to tie up with the text of the lease as varied".

12.34 Adrian Broomfield stated that he is in favour, but "only if such documents are more than merely consents, and are a composite document".

12.35 Dr Aruna Nair stated that she was in favour, and that "the benefit to the purchaser outweighs the problem of 'cluttering'" the register. In her view, since these duties bind purchasers of the lease or reversion automatically, "there is a case for making that information available on an inspection of the register itself".

12.36 The Chartered Institute of Legal Executives suggested that it "should be mandatory to have a complete register".

12.37 The Chancery Bar Association stated simply that it agreed with the proposal.

12.38 Although the Bar Council was in favour, it did "not see a strong need for this". In its view, these materials should be revealed by the "ordinary conveyancing process". Nevertheless, it thought that registration is desirable, providing HM Land Registry has sufficient resources to deal with it.

Against recording ancillary documents

12.39 In contrast, Professor Warren Barr and Professor Debra Morris jointly stated that recording other documents would "unduly clutter the register". Such documents are important for the landlord and the tenant, "but do not impact on the land registration system requirements". Dr Charles Harpum was also against the proposal, "because of the problem of cluttering the register".

12.40 This view was also shared by the London Property Support Lawyers Group. The Group stated that a licence to assign is likely to result in an application to register the assignment, and any variations would fall within the ambit of voluntary registration. It was concerned about clutter to the register:

> Whilst it would seem to support the goal of the register being a complete and accurate record of the state of title to the register additional documents would unnecessarily clutter up the titles creating a burden on the expiry of the lease and likely leading to a bigger clean up job on the sale of a reversion.

12.41 Similarly, the National Trust stated that although the proposal may result in the register being "a more accurate record of the leasehold interest", it could result in "cluttered titles (especially where there are multiple leases affecting a landlord's title) which contain outdated entries that are difficult to remove" when the documents lose relevance. In the National Trust's experience, such documents are often valid for a short period of time, and do not need registering in order to make them binding on successors. Further, many are speculative, in that they do not guarantee that work has/will be carried out, nor that the lease will be assigned.

12.42 Taylor Wessing LLP stated that the rule that lease variations are not required to be registered if they do not touch and concern the land should continue to operate. In its view, "only variations which affect the demise and the term should be registered".

Allowing documents such as licences to assign, licences for alterations, and rent review memoranda to be registered would "clutter up the register" and "cause time delays at Land Registry in terms of registration". In this situation, remedies for failure to produce these between seller and buyer would have to remain contractual remedies between the parties.

12.43 Nigel Madeley stated that he is also against the suggestion, for the reasons discussed in the Consultation Paper and for those that he gave. He queried what one would expect to see on the register to document a landlord's permission to an assignment. Mr Madeley stated that the lawyers' licence to assign is "not the 'consent' as contemplated by the Landlord and Tenant Act 1988", and "will almost never be given on time (2-3 weeks)". In his experience, the consent is often in email form, and marked "subject to licence", and stating that it is given "in principle". He concluded that recording other documents would "end up in a bit of a mess". If, for example, the email were registered, given that the consent will usually be conditional, to what extent and how can the conditions also be registered? Further, he questioned, "would one require both consent and licence to be registered"?

12.44 In Dr Nicholas Roberts' view, permitting the recording of the sorts of documents described "would not seem appropriate", given that practitioners accept that enquiry needs to be made about such documents in the pre-contract stage, and that HM Land Registry will not hold details of documents of this nature.

12.45 Michael Hall stated that "only confusion" would be likely to follow from the recording of some documents but not others. In his view, if it became "good practice" to register all such documents, the burden on practitioners and HM Land Registry "would be greatly increased and it would become negligent not to do so". He said that this would result in "a great deal of unnecessary work and expense for all concerned".

12.46 Similarly, the City of Westminster and Holborn Law Society stated that the recording of ancillary documents would have "resource implications for the Land Registry beyond any obvious benefit".

12.47 HM Land Registry stated that it is "not a document repository and, in its view, should not become one". Although it "can see the merit in permitting the registration of variations to leases", there are "numerous other documents and correspondence between landlords and tenants that pass under the provisions of a lease". It stated that a requirement or option to "store" such documents and correspondence in the register would have negative consequences:

> [It would] result in costs for customers (in making applications to "store" the document and in retrieving copies thereof) and for Land Registry as well as increasing unnecessarily the number of entries in the register which will need to be considered when there is a proposed dealing with the land.

12.48 The Law Society was "against making express provision to permit the recording of any other documents" which are ancillary to the lease on the landlord or tenant's title, or both. In its view, the danger of allowing the recording of such documents is to "clutter up the register and add to the administrative burden and costs". It referred to the fact that the register is not a complete record of all relevant documents, "despite aspirations to the contrary", and stated that there "appears little logic to increase administration, but

still not achieve a reliable record of all relevant documents". The Society added that if the licence to alter or other document includes a variation to the lease, then this can be "dealt with under the Law Commission's other proposals in relation to lease variations".

12.49 Burges Salmon LLP stated that "no particular purpose would be served" by the recording of ancillary documents, which is not off-set by the "disadvantage of multiple entries need to be removed on the expiry of the lease, or more likely long after expiry". Moreover, in its view, recording would make the provision of the necessary evidence to support the closure of the leasehold title "even more onerous".

Expressed other views

12.50 The Conveyancing Association, which did not express a clear view on the consultation question, stated that:

> Overall the law could be simplified so that neither the burden nor benefit of rights or covenant are enforceable by or against someone who no longer has a registered or overriding interest in the land unless expressly stated so to do in the devolutionary document. Similarly, any purchaser buying land will acquire the benefit or burden of the rights and covenants contained in the title unless expressly excluded against successors in title e.g. personal rights or covenants.

PROBLEMS WITH THE LANDLORD AND TENANTS (COVENANTS) ACT 1995

Consultation Question 58.

12.51 We invite the views of consultees on the severity and extent of problems with the Landlord and Tenant (Covenants) Act 1995. We invite consultees to provide evidence in support of their views.[8]

12.52 This question was asked to gauge responses in relation to a potential 13th Programme project on commercial leaseholds. We indicated that responses to this question would not be taken forward as part of the LRA 2002 project but instead would be reviewed for inclusion in any future project on the Landlord and Tenant Act 1995.

12.53 All relevant responses were considered as part of our assessment of issues for inclusion in the Law Commission's 13th Programme of Law Reform.

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8 Consultation Paper, para 12.48.

Chapter 13: Alteration and rectification of the register

INTRODUCTION

13.1 42 consultees responded to the questions in Chapter 13 of the Consultation Paper.[1]

13.2 The majority of consultees who responded agreed with our provisional proposals about the principles that should govern decisions about the rectification of the register. Most agreed with our proposal to reverse the decision in *Malory*[2] insofar as it implies that the right to rectification may be an overriding interest. Most agreed that rectification should be able to restore the priority that a derivative interest has lost as the result of a mistake, and agreed with our proposals about rectification in relation to derivative interests omitted on first registration. There was general support for our proposal that cases of double registration should be resolved by an application for rectification and not through an application based on adverse possession. Consultees also largely agreed that rectification should be retrospective, with few having experienced problems in practice arising from the decision in *Gold Harp*.[3] However, consultees were more split in their support for our proposal to prevent mortgagees from opposing rectification of the register that would result in removing a mortgagee's charge, and our proposal to introduce a ten-year longstop on rectification of mistakes in the register.

MALORY AND THE "RIGHT" TO RECTIFICATION

Consultation Question 59.

13.3 We provisionally propose that the ability of a person to seek alteration or rectification of the register to correct a mistake should not be capable of being an overriding interest pursuant to paragraph 2 of schedule 3 to the LRA 2002.

Do consultees agree?[4]

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1 Louis Farrington; Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Oliver Price; Christopher Jessel; London Property Support Lawyers Group; Cliff Campbell; Chancery Bar Association; Society of Legal Scholars; Pinsent Masons LLP; Dr Charles Hapum QC (hon); Dr Tola Amodu; Dr Simon Cooper; National Trust; Nottingham Law School; City of London Law Society Land Law Committee; Adrian Broomfield; Society of Licensed Conveyancers; Nationwide Building Society; Howard Kennedy LLP; Dr Aruna Nair; Council of Mortgage Lenders; The Bar Council; HM Land Registry; British Bankers' Association; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Professor Simon Gardner; Burges Salmon LLP; The Law Society; Mangala Murali; Professor Julian Farrand QC (Hon).

2 *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216.

3 *MacLeod v Gold Harp Properties Limited* [2014] EWCA Civ 1084, [2015] 1 WLR 1249.

4 Consultation Paper, para 13.87.

13.4 29 consultees answered this question:

(1) 21 agreed;[5]

(2) 1 disagreed;[6] and

(3) 7 expressed other views.[7]

Agreed

13.5 Elizabeth Derrington, the Independent Complaints Reviewer for HM Land Registry, stated that alteration and rectification of the register is one of the areas which most often gives rise to confusion and misunderstanding of HM Land Registry's role, and unrealistic expectations as to what HM Land Registry can do to resolve problems. She noted that in her experience, it is difficult for HM Land Registry to explain clearly to customers the difference between rectification and alteration of the register and the reason why the distinction is crucial to a claim for indemnity.

13.6 Ms Derrington noted an additional problem with the current law: the fact that even if HM Land Registry is satisfied that a mistake has been made and wishes to use its power to correct it, it only makes practical sense for it to use this power if it knows that there will be no objection from any of the registered proprietors affected. She explained that if a correction is proposed by HM Land Registry the statutory disputes procedure does not apply and so there is no mechanism for dealing with any dispute. As a result, if HM Land Registry has decided that there is a mistake that needs to be corrected, but this is not agreed by all those affected, it will ask the customer who has spotted the mistake to make an application for alteration, simply to ensure there is access to the disputes procedure. Ms Derrington stated that customers find it difficult to understand why, when HM Land Registry has already agreed that there is a mistake that needs to be corrected, they should have to go to the trouble of making an application themselves.

13.7 The Property Litigation Association supported our proposal. The Association considered that, as a successful claim that a mistake is an overriding interest has the result that the "losing" party cannot claim an indemnity from HM Land Registry, in the interests of fairness it makes sense to prevent a mistake qualifying as an overriding interest so that the losing party can claim an indemnity.

13.8 The London Property Support Lawyers Group supported our proposal provided that the LRR 2003 are amended to make it easier for an alleged fraud victim to register a unilateral notice in a hurry, so as to protect his or her interests while a problem is being investigated and before litigation is practicable. The Group considered that as only

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5 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Dr Aruna Nair; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Mangala Murali.

6 Michael Mark.

7 Martin Wood; Nigel Madeley; Everyman Legal; Dr Simon Cooper; Amy Goymour; Society of Legal Scholars; Nottingham Law School.

proprietary interests can be protected by a notice, if the right to seek rectification is no longer to be proprietary a suitable alternative must be available.

13.9 The Law Society stated that it agreed, provided that the right to rectification remains a proprietary right capable of being protected by a unilateral notice as suggested in paragraph 13.85 of the Consultation Paper, or some alternative method of protection is created.

13.10 The Chancery Bar Association agreed that the second ground for the decision in *Malory*[8] should also be reversed as proposed. The Association considered the outcome illogical since schedule 4 to LRA 2002 "is clearly intended to provide a comprehensive code governing rectification and alteration of the register". However, the Association considered that, in addition to reversing the second ground, it would be essential for detailed consideration to be given to certain factors which led to that decision. The Chancery Bar Association stated:

> (1) The logic of schedule 3 to LRA 2002 is that "actual occupation" should [be] protected. If this proposal is implemented the position of [the] true owner who is in actual occupation when there is a mistaken change in the register will depend on whether the registered proprietor is in "possession" at a future date (according to *Fitzwilliam*[9] the date of trial) and whether he is at fault. In many cases the true owner may well fail to obtain rectification and be left with an often protracted claim to an indemnity. We doubt the justice of this and consider that (a) it should be specifically provided that the actual occupation of the true owner at the time of the mistake is relevant to the question whether "it would be unjust not to rectify the register" and (b) more generally there should be a list of other factors which are relevant to that question.
>
> (2) It is unclear what the position is in the "twilight" period between the mistaken registration and its correction by alteration/rectification. If the true owner is in occupation is he liable to the registered proprietor for mesne profits for trespass throughout this period? Also, can the newly registered proprietor demolish buildings with impunity, or be prevented from doing so, even though he knows of the true owner's claim or is party to a fraud? It is also unclear whether and to what extent rectification is backdated in this context. We consider that, contrary to what was suggested in *Fitzwilliam*, rectification should be backdated to the date of the application to rectify and not take effect only at the date of trial. This would shorten the twilight period but not eliminate it. The only way of dealing with the position in the twilight period fairly would in our view be to give the court a discretion with regard to payment of mesne profits during the period.
>
> (3) We are unclear whether it is envisaged that, if there is rectification in a case where the true owner was in actual occupation at the time of the mistake, the incorrectly registered proprietor should be entitled to an indemnity. It was held in *Swift* that he is and we assume that the position will remain the same. It seems odd to us that a registered proprietor should be entitled to an indemnity in these circumstances simply because the transfer to him is a forgery and he has suffered no loss through reliance

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8 *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216.

9 *Fitzwiliam v Richall Holdings Services Ltd* [2013] EWHC 86 (Ch), [2013] 1 P & CR 19.

on the incorrect registration. However, we recognise that the principle underlying the indemnity scheme does not necessarily require the claimant to prove loss.

13.11 Dr Charles Harpum QC (hon) considered that if the right to seek rectification could be an overriding interest, it must follow that it could also be noted in the register and that, if it is not noted and not protected as an overriding interest, it would not bind a purchaser for valuable consideration of the land to which the claim relates. He argued that stated in this way, it becomes clear that the idea that the right to seek rectification can be an overriding interest is "nonsense". Dr Harpum noted that the right to seek alteration or rectification of the register is a statutory right that is engaged when the conditions set out in schedule 4 to the LRA 1001 are met. The statutory right is not qualified in any way in schedule 4 by reference to rules of priority. Dr Harpum therefore agreed with our proposal commenting that, in his view, it must represent the present law.

13.12 The Society of Licensed Conveyancers similarly considered that it is not necessary for the right to seek alteration or rectification to be an overriding interest, as the statutory mechanism in schedule 4 provides an answer.

13.13 Dr Aruna Nair agreed that, as stated in the Consultation Paper, alteration and rectification claims should be resolved within the framework of schedule 4 only. She considered that on the Consultation Paper's analysis of the ABC scenario, there is no reason why C should escape from the consequences of a mistake by the operation of section 29 of the LRA 2002. She was also of the view that there is no reason why C should not be indemnified if there is a mistake and rectification is ordered. Therefore, the analysis of the right to rectify as an overriding interest is inappropriate.

13.14 Dr Nair considered that there is an argument that the claim to seek an alteration of the register must, analytically, be an equitable interest or a mere equity. This is because it is a power to obtain a legal title, and such powers, wherever they arise in the law, always behave in the same way. She said this would be true if the analysis of, for example, Mcfarlane and Stevens[10] were accepted and if so, it may be helpful if any such common law doctrine – automatically generating equitable rights whenever a legal right is affected by some duty or liability in favour of someone else – were expressly excluded from operating in the context of section 58 of the LRA 2002.

13.15 Professor Warren Barr and Professor Debra Morris said that the right to seek rectification "is, in our view, not a proprietary interest which is capable of protection in this way".

13.16 The Bar Council agreed with our proposal, stating that if this was not the case, arbitrary results might follow that would be hard to justify as a matter of principle.

13.17 HM Land Registry believed our proposal to be correct, but said that it was not clear if this was to be achieved by changing the nature of the right or simply its effect under schedule 3. It questioned whether the proprietary nature would be retained so as to allow a party to enter a notice to protect the right to alter. HM Land Registry considered that our proposal is to change the right's effect under schedule 3 only in view of the

[10] B Mcfarlane and R Stevens, "The Nature of Equitable Property" [2010] *The Journal of Equity* 4, 1.

Court of Appeal's decision, so that it can be protected by notice. However, it felt that our proposal needs clarification.

13.18 Mangala Murali agreed, "especially in light of the fact that there is an increasing awareness [of the need] to keep the register open and transparent". She considered that attempting to create more overriding interests runs contrary to existing principles.

13.19 Christopher Jessel felt that it is not clear that the right of rectification is not proprietary. He argued that it is capable of being transmitted on death and, in principle, should be assignable in other circumstances like any chose in action, along with the right to the property if necessary. Additionally, he stated that although the remedy is to some extent discretionary, that discretion must be exercised judicially in accordance with recognised rules. Overall, Mr Jessel agreed that, in the AB or ABC scenarios, the fact that A is in possession should not by itself attract the protection of paragraph 2 of schedule 3 and A's rights should be governed by a distinct code.

Disagreed

13.20 Michael Mark disagreed with the proposal in Consultation Question 59and referred to his attached submissions. These submissions did not address the status of the right or ability to seek rectification.

Expressed other views

13.21 Martin Wood said he was "somewhat nervous" about this proposal which he considered, despite what is said at paragraph 13.88 of the Consultation Paper, to weaken the pre-eminence given in English law to the person in possession. He stated that since the concern is about the entitlement to indemnity not rectification, it would best be addressed by amending the indemnity provisions along the lines of paragraph 1(2)(b) of schedule 8.

13.22 Everyman Legal stated that if there is a claim for rectification in process, it would be useful for it to be noted briefly on the register and "this would be better than being an overriding interest".

13.23 Nigel Madeley was not convinced by the proposal in Consultation Question 59 and made a number of points in response.

(1) First, Mr Madeley agreed that the matter under consideration cannot be compared with unregistered land as section 58 has fundamentally altered the position.

(2) Secondly, he considered that if the property in question is the registered proprietor's home, that is the person whose rights should be protected. He suggested that if a party involved only has a financial interest, indemnity will suffice and a mortgagee should only ever be compensated by money. However, he noted that the law might be "too blunt an instrument" to make this distinction, and "the need for clarity and predictability may militate against it".

(3) Thirdly, Mr Madeley noted that the law of registered land, and the LRA 2002 in particular, has developed more towards dynamic security, in contrast with the Scottish land registration system.

(4) Fourthly, Mr Madeley stated that *Malory* created "all sorts of problems". He considered that the reference to "legal estate" in section 58 created the opportunity for the court to go wrong in the eyes of the Act's drafters and questioned whether the rectification and indemnity provisions are sufficiently clear.

(5) Lastly, Mr Madeley felt that our assertion that A's right is not a property right was unpersuasive. He argued that a property right does not need to be marketable or transmissible for it to exist, giving the examples of a joint interest in a property and a life interest respectively.

13.24 Dr Simon Cooper felt that the current rules concerning the reach of rectification are unsatisfactory and in need of clarification. He noted that at the time the LRA 2002 was enacted, the reach of rectification was constrained by the owner's powers provisions. He said that this practice has now ended, and in its wake case law has emerged "which treats the issue in various different, conflicting ways". In some cases it is treated as being governed exclusively by schedule 4 which imposes no explicit restrictions on its reach. In other cases, rectification is seen as involving a "right to rectify", which as a mere equity constitutes an equitable proprietary right under section 116 of the LRA 2002 and which is then governed by the special priority rules of sections 29 and 30.

13.25 Dr Cooper was of the opinion that our proposal, which would prevent the right to rectify from being an overriding interest, does not go far enough, describing it as "only piecemeal exclusion". He felt that the underlying question of the reach of rectification as against third parties is left unanswered and considered that a better solution would be to answer the underlying question by declaring "explicitly and exclusively" which of the approaches to this right in the case law is correct. This, he argued, would have the advantage of preventing questions arising whether the right to rectify was an "interest" capable of being protected by notice on the register and of eliminating any doubts as to whether the title of a successor to a mistaken title could be rectified. Dr Cooper noted that this is important because the matter is not beyond argument since the decision in *Roberto Mac*[11] by the First-tier Tribunal is not binding, and the decision in *Gold Harp*[12] by the Court of Appeal is restricted to derivative interests (the priority guarantee) and not proprietorship cases (the title guarantee).

13.26 Dr Cooper additionally commented on our view expressed in the Consultation Paper that the right to rectify is not proprietary. He said that our view that such a right is cannot be sold or devised by will is "erroneous"; its transmissibility is demonstrated by *Rossetti Ltd v Thresher Wines Acquisitions*.[13] Secondly, transmissibility is neither a necessary nor sufficient condition for 'proprietary' quality. Thirdly, the Consultation Paper later indicates (at paragraph 13.100(2)) that the right to rectify can be passed to successors. He argued that our error illustrates the difficulty of slotting the right to rectify into the existing categories and illustrates the need for clarification of the answer to the underlying question of the reach of the power to rectify.

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11 *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] EWLandRA 2009_1459, [2011] EGLR 123.

12 *MacLeod v Gold Harp Properties Limited* [2014] EWCA Civ 1084, [2015] 1 WLR 1249.

13 [2009] EWLandRA 2008_0633

13.27 Regarding reasons for excluding the right to rectify from the category of overriding interests, Dr Cooper commented on the reason given at paragraph 13.63: that it would be "unrealistic" for a purchaser to make inquiries of A (the mistakenly de-registered proprietor who was in discoverable actual occupation) on the ground that the purchaser believed he had been dealing with A and would be expecting to find A there. Dr Cooper considered that this "may or may not be the case" depending on the manner in which the identity fraud had been perpetrated. For example, if on the facts of *Swift 1st v Chief Land Registrar*,[14] Swift 1st (the purchaser) has sent an inspection agent to speak to any occupiers at the home of the registered proprietor, then this would have immediately brought the identity fraud to light. He stated that the actual occupation rule can sometimes serve to warn occupiers of prospective acquirers, as well as warning prospective acquirers of occupiers. Therefore, Dr Cooper said that the factual scenario in *Swift 1st* is not a reason for suggesting that making inquiry of actual occupiers is entirely pointless or for excluding the right to seek rectification from the category of overriding interests.

13.28 Dr Cooper also considered that a policy decision needs to be taken as to whether the reach of rectification should be constrained by the occurrence of a registered disposition for value. He stated that if there is a fear of forgery in favour of a proprietor who promptly sells, thus denying rectification where it is needed, then this would justify rejecting such a constraint on the reach of rectification.

13.29 Dr Cooper added that, if there are to be no constraints on the reach of rectification, then this needs to be made clear by excluding the operation of the other statutory rules from operating upon the right to rectify. Dr Cooper proposed that could be done through an avoidance-of-doubt clause stating that the claim of a person to rectification should not be treated as an interest for the purpose of sections 28, 29 and 30 or as a mere equity within section 116.

13.30 Lastly, Dr Cooper noted that there is a potential problem with the decision in *Collings v Lee*.[15] He considered that the decision is ambiguous and noted that it has incurred criticism. Dr Cooper argued that there is a danger of it being taken as authority for the retention of a beneficial interest under a trust imposed in fraud cases in circumstances that are not covered by in *Swift 1st*'s rejection of the *Malory* 1 argument. He stated that it is "undesirable" for that view to be perpetuated and an explicit new provision could preclude recognition of the possible interest running alongside the claim to rectification.

13.31 Amy Goymour broadly agreed with the gist of the proposal. However, she also questioned whether our proposal goes far enough. Ms Goymour stated that by "merely specifying" that the right to seek alteration cannot override, the proposal will not remove the proprietary status of such rights. As a result, the law might remain unclear in an AB scenario: where A acquires a (proprietary) right to seek alteration against B, any alteration that follows flows out of A's persisting right to seek alteration, and is not caused by the alteration itself – thereby leaving open the possibility that B could be denied an indemnity. She noted that B can overcome this argument where there is a forgery under paragraph 1(2)(b) of schedule 8, but arguably not where B's mistaken

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14 [2015] EWCA Civ 330, [2015] Ch. 602

15 [2001] 2 All ER 332.

registration is caused by some other defect in the disposition, for example, an invalid exercise of power of attorney.

THE POSITION OF MORTGAGEES

Consultation Question 60.

13.32 We provisionally propose that a chargee who has been registered by mistake, or the chargee of a registered proprietor who has been registered by mistake, should not be able to oppose rectification of the register so as to correct that mistake by removing its charge.

Do consultees agree?[16]

13.33 31 consultees answered this question:

(1) 18 agreed;[17]

(2) 7 disagreed;[18] and

(3) 6 expressed other views.[19]

Agreed

13.34 The Property Litigation Association said that it agreed that a chargee's interest is purely financial and it should not, therefore, be able to prevent rectification. Its remedy should lie in seeking an indemnity.

13.35 Similarly, the Society of Licensed Conveyancers agreed on the basis that a mortgagee's interest in the land is financial and will not be in occupation. Everyman Legal also agreed, asking why the charge should have an entitlement (to retain the charge) in these circumstances.

13.36 Professor Barr and Professor Morris agreed, stating that "mistake should wag the registration dog, not the other way around".

13.37 Nigel Madeley agreed that a mortgagee, whose interest is purely financial, should rely on indemnity, and that requiring a mortgagee to take as much care as everyone else in

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16 Consultation Paper, para 13.95.

17 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; Chancery Bar Association; Adrian Broomfield; Society of Licensed Conveyancers; Dr Aruna Nair; The Bar Council; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Dr Simon Cooper; Society of Legal Scholars.

18 Martin Wood; London Property Support Lawyers Group; Nottingham Law School; City of London Law Society Land Law Committee; Burges Salmon LLP; The Law Society; the Council of Mortgage Lenders.

19 Michael Mark; Michael Hall; Christopher Jessel; Dr Charles Harpum QC (Hon); Nationwide Building Society; HM Land Registry.

the chain to qualify for that indemnity "must be reasonable". He argued that a mortgagee is as easily able to verify identity as a solicitor and should not be allowed to pass the buck and retain no risk in that respect.

13.38 The Chancery Bar Association said it was inclined to agree with our proposal on balance, but it had three comments arising out of the discussions of this topic in the Consultation Paper.

(1) Firstly, the Association noted that the interests of many registered freehold proprietors are purely financial in the sense that they can be adequately compensated by an indemnity following rectification. It considered that the adequacy of an indemnity should be expressed to be a factor relevant to the decision whether to rectify.

(2) Secondly, it considered that this proposal should not apply where the proprietor who is or would be obtaining the benefit of the rectification has been fraudulent.

(3) Lastly, the Association noted that it was stated in the Consultation Paper that the effect of section 131(2) of LRA 2002 is that a mortgagee cannot ever be in possession for purposes of section 131(1). The Association felt that this implied that the effect of section 131(2) is that the first-mentioned person is in possession to the exclusion of the second-mentioned person and it was unsure whether that interpretation is correct. However, if it is, the Association observed that a tenant under a long lease can never be in possession and will never be able to rely on the provisions of schedule 4 paragraphs 3(2) or 6(2). It argued that this cannot be intended and that our position must be clarified.

13.39 Dr Nair noted that there is no proposal in the Consultation Paper to make specific provision for the ABC scenario where C is not a mortgagee. She said that, for the reasons given by the Society of Legal Scholars in its response to the Consultation Paper, she did not think the availability of rectification against C is completely clear on existing authorities. As such, Dr Nair considered that there should be an express statutory provision to this effect. She agreed that where C is a mortgagee, C should not be able to oppose rectification in either scenario.

13.40 The Bar Council agreed, adding that it considered there is potential for unfairness in the way that section 131(2) of the LRA 2002 would operate if a mortgagee in possession had let the property under a short lease. In that case, the lessee's landlord would be the mortgagee and the lessee's possession would be deemed to be the mortgagee's possession. The Council stated that if under the proposal, the mortgagee would not be entitled to oppose the application for rectification, then that could be unfair on the lessee who would lose its right to possession of the property. However, the Council thought that unfairness might be cured if the proposal applied only to those situations in which a mortgagee is not in possession under the rules in section 131(2).

13.41 Amy Goymour agreed with the proposal but noted that even if the charge is left in place, A (in the AB scenario) could arguably obtain an indemnity and use that indemnity to pay off and discharge the charge. For that reason she questioned whether the change is really needed.

13.42 Dr Cooper said that he supported the proposal. He made two further points. First, in the vast majority of mortgages, the security, so the interest of the mortgagee, is financial only. However, Dr Cooper also invited us to explicitly address the point that some mortgages are designed to support the performance of obligations of a non-financial nature. Mortgagees under these agreements would be prejudiced by our proposals, insofar as they would have no forum in which to argue that they ought to remain on the register.

13.43 Secondly, Dr Cooper argued that there may be a difficulty with quantifying indemnity for a mortgagee. For example, if a mortgagee has a valid contractual entitlement to repayment, and the rectification merely has the effect of diminishing the security, there will be a problem of quantifying that loss. He considered that in such situations, the indemnity payment will have to factor in the likelihood of repayment by the mortgagor, and if this calculation is incorrect, it may leave the mortgagee out of pocket. Dr Cooper felt our policy should address this issue explicitly.

Disagreed

13.44 Martin Wood did not agree, considering it "far better" to leave the decision to the courts on the basis of the circumstances before it. He noted that rectification would normally follow according to the usual application of the rectification provisions in any case, and so he could not see any virtue in making this special provision for charges.

13.45 Nottingham Law School opposed our proposal on the basis that it would prevent a mortgagee defending a rectification claim by relying either on "fraudulent conduct by the applicant for rectification, or a failure by the applicant to take sufficient care to avoid fraud". It said that awarding a mortgagee an indemnity without considering evidence of fraud or lack of care "seems to risk undermining the prophylactic effects of the legislation". It thought the reasons given in support of the proposal were "slight and speculative".

13.46 Nottingham Law School also said that the proposal (wrongly) assumes that all mortgagees' interests are purely financial. It explained that, alternatively, the obligation may not be quantified, and therefore unsuitable for compensation through indemnity. It gave an example of an innocent mortgagee taking a charge to secure overage which remains unascertainable at the time the mistake is realised.

13.47 Burges Salmon LLP disagreed on the basis that chargees should have the same rights as other stakeholders.

13.48 The Law Society said that it was not persuaded by our arguments as "there may be cases where the mortgagee's interest is in reality more than merely securing money". It was also concerned about the effect of our proposal in combination with the provisional proposal in Chapter 14 to limit a mortgagee's right to an indemnity. The Society said that it was not convinced that registered chargees should have lesser rights than registered owners, and that mortgagees might possibly be able to establish exceptional circumstances for why their charges should be preserved.

Expressed other views

13.49 Martin Wood said that if the right to seek rectification ceases to be an overriding interest (in line with the proposal in Consultation Question 59), the proposal in Consultation

Question 60 would at least preserve the position of the person in possession, subject to a limited exception.

13.50 Dr Harpum commented that under the LRA 2002, the concept of the proprietor in possession is used as shield rather than a sword. He understood our proposal as follows: if A was a proprietor in physical possession as explained in section 131 of the LRA 2002, A would be able to use that status as a sword to recover possession. He questioned whether this is really needed. He argued that if A seeks rectification in the circumstances set out paragraph 13.109 of the Consultation Paper, B and C will not be able to defend that claim on the basis that he or she is a proprietor in possession within paragraphs 3 and 6 of schedule 4 to the LRA 2002. As such, the court or registrar must order rectification under paragraph 3(3) or 6(3). Dr Harpum could therefore not see why the provisional proposal is needed. He suspected that it came about as a consequence of the issue of double registration considered at paragraph 13.128 onwards.

13.51 Christopher Jessel agreed that "in most cases the chargee's interest will be solely financial and as a general rule it should not be able to be heard". But Mr Jessel thought that the registrar or the Tribunal should have the power to permit a mortgagee to oppose rectification. He gave three examples where consent might be granted:

(1) the terms of the charge may include a legitimate collateral advantage which it may be important to preserve;

(2) it may be right for the mortgage to remain in a family case where property has been mistakenly registered in the name of the wrong family member; and

(3) in the ABC scenario, it may be proper for the chargee (C) to be able to argue that rectification should not be granted against B if, for example, "B is mentally disabled and cannot instruct counsel himself or herself" (especially where the chargee is a family member, or a friend or charity assisting B).

13.52 HM Land Registry agreed with our proposal "in principle", but said that a chargee should be able to object until it is proven that there has indeed been a mistake on the register. After the mistake is proved, HM Land Registry agreed that a mortgagee should no longer be able to oppose rectification.

13.53 Similarly, Michael Mark said that a mortgagee should be able to dispute, for example, an allegation that the charge was a forgery. He also noted that some mistakes (such as an error in the registered name of the chargee) would not affect the validity of the charge.

Responses which depended on whether the proposals in Chapter 14 concerning lenders were pursued

13.54 A number of responses to Consultation Question 60 were informed by the questions asked in Chapter 14 of the Consultation Paper, concerning the mortgagee entitlement to the indemnity fund.

13.55 The Conveyancing Association agreed with our proposal in Consultation Question 60, but subject to the chargee being able to claim indemnity.

13.56 The London Property Support Lawyers Group did not agree with the proposal, particularly if, "as suggested in Chapter 14", mortgagees' ability to obtain an indemnity may be limited. The Group considered that "mortgagees ought to have the same rights as other stakeholders" and that any attempt to "water down" the protection of mortgagees would have an adverse effect on the lending market. It anticipated that the proposed change would give rise to additional costs for borrowers, as lenders would seek to protect themselves against risk, for example, by insisting on new title insurance policies that are not currently required.

13.57 The Group said that if there are exceptional circumstances where it would be right not to rectify in A's favour so as to remove a charge, then the charge should not be removed. In relation to the concern expressed in paragraph 13.94 of the Consultation Paper about chargees prolonging litigation by arguing that such circumstances exist, the Group felt that mortgagees can be deterred from relying on meritless arguments through applications for summary judgment and cost penalties.

13.58 Nationwide Building Society stated that whilst it "did not have a particular issue with this proposal in principle", it felt that if a mortgagee were to have its charge removed in an attempt to correct a mistake, the mortgagee must be entitled to make a claim for an indemnity. Nationwide would not support a proposal that left mortgage lenders with no recourse where there is a mistake on the register.

PROTECTION FOR FORMER PROPRIETORS WHO ARE IN POSSESSION

Consultation Question 61.

13.59 We provisionally propose that where the proprietor of a registered estate has been removed or omitted from the register by mistake, the proprietor should be restored to the register if he or she is in possession of the land, save in exceptional circumstances.

Do consultees agree?[20]

13.60 30 consultees answered this question:

(1) 27 agreed;[21]

[20] Consultation Paper, para 13.109.

[21] Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Simon Cooper; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; The Bar Council; HM Land Registry; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Martin Wood; Nottingham Law School; Council of Mortgage Lenders.

(2) 1 disagreed;[22] and

(3) 2 expressed other views.[23]

Agreed

13.61 The majority of consultees supported our proposal without providing further comment. A number of consultees confirmed that they agreed for the reasons set out in the Consultation Paper, mainly citing paragraph 13.106.

13.62 Retaining the primacy of the individual in occupation was supported by the Property Litigation Association and the Society of Licenced Conveyancers. Everyman Legal considered that the aim should be, as far as possible, to put the parties back in the position they should have been in but for the mistake.

13.63 Professor Barr and Professor Morris were of the view that this proposal was about "justice being seen to be done". They stated that mistake should not defeat someone both entitled to an interest bar the mistake, and entitled to possession on the basis of owning that interest.

13.64 The Chancery Bar Association agreed, but considered that actual occupation at the time of the mistake, rather than possession, should be sufficient to protect the true owner.

13.65 HM Land Registry also agreed but noted from a counter-fraud perspective that this should only be the case if the proprietor in possession was not involved in the fraud. If it is demonstrated that the individual acquired the land through a fraudulent transaction in which he or she involved, it should be seen as an exceptional circumstance.

13.66 Nottingham Law School said that our proposals regarding proprietors and former proprietors in possession presupposed that the (former) proprietor in possession is innocent of fraud or lack of proper care. It supported our proposal but only subject to our including an express "requirement of non-culpability on the part of the applicant for rectification".

13.67 Martin Wood said that or proposal would "preserve the position of the person I possession", particularly if our proposal in Consultation Question 59 were to be pursued.

Disagreed

13.68 Dr Nair disagreed, stating that she would prefer a rule that the new registered proprietor is only able to prevent rectification when she herself has taken possession, unless the circumstances are exceptional. She argued that this proposal would address cases where neither party is in possession of the land. In such a scenario, the case for the original registered proprietor to regain ownership of the land is stronger as it was originally their land and the new registered proprietor will not yet have taken a non-financial stake as they will not yet have taken possession.

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22 Dr Aruna Nair.

23 Dr Charles Harpum QC (Hon); Amy Goymour.

Expressed other views

13.69 Dr Harpum commented that under the LRA 2002, the concept of the proprietor in possession is used as shield rather than a sword. He understood our proposal as follows: if A was a proprietor in physical possession as explained in section 131 LRA 2002, A would be able to use that status as a sword to recover possession. He questioned whether this is really needed. He argued that if A seeks rectification in the circumstances set out paragraph 13.109 of the Consultation Paper, B and C will not be able to defend that claim on the basis that he or she is a proprietor in possession within Schedule 4, paragraphs 3 and 6 LRA 2002. As such, the court or registrar must order rectification under paragraph 3(3) or 6(3). Dr Harpum could therefore not see why our provision is needed. He suspected that it came about as a consequence of the issue of double registration considered at paragraph 13.128 onwards.

13.70 Amy Goymour broadly agreed with the gist of our proposal, but felt that some aspects of our policy would benefit from being clarified. She asked how we would deal with a situation where A has lived in the property for five years and B or C have been in possession for 1 month. Ms Goymour noted that that our proposals would seem to leave B or C as the presumptive owner, implying that this may not be appropriate outcome.

PROTECTION FOR SUCCESSORS IN TITLE TO THE FORMER PROPRIETOR

Consultation Question 62.

13.71 We provisionally propose that a successor in title to that proprietor should be restored to the register if he or she took over possession of the land, save where there are exceptional circumstances.

Do consultees agree?[24]

13.72 29 consultees answered this question:

(1) 24 agreed;[25] and

(2) 5 expressed other views.[26]

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[24] Consultation Paper, para 13.110.

[25] Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Dr Simon Cooper; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; The Bar Council; HM Land Registry; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Nottingham Law School.

[26] Nigel Madeley; Christopher Jessel; Dr Aruna Nair; Amy Goymour; Charles Harpum QC (hon)

Agreed

13.73 The majority of consultees supported our proposal without providing further comment. A number of consultees confirmed that they agreed for the reasons set out in the Consultation Paper, mainly citing paragraph 13.107.

13.74 Professor Barr and Professor Morris, Everyman Legal and the Society of Licensed Conveyancers referred back to their previous comments in support of retaining the primacy of the person in occupation.

13.75 The Property Litigation Association understood that the successors in title to whom we were referring were executors or personal representatives of a deceased proprietor's estate and, accordingly, agreed with the proposal. It stated that their position should be no different to the former proprietor's position had he or she still been alive.

13.76 The Conveyancing Association felt that this proposal is "vital" to prevent conveyancers from having to establish the legality of previous dispositions.

13.77 The Bar Council agreed but said consideration should be given to providing this protection only to involuntary transferees of the former proprietor.

13.78 Nottingham Law School and Martin Wood gave the same responses as they gave to Consultation Question 61.

Expressed other views

13.79 Nigel Madeley expressed other views both in relation to Consultation Question 62 and in relation to Consultation Question 63 (below). However, his substantive comments concerns only Consultation Question 63.

13.80 Christopher Jessel argued that the concept of a "successor in title" is not straightforward in land registration. He said that a person qualified as the proprietor of an estate by virtue of being registered, not by virtue of being a successor to an earlier proprietor. The position is different from unregistered land where the title depends on evidence that the owner of the legal estate has acquired, by purchase, inheritance or otherwise, the estate which belonged to an earlier owner. With registered land, a person who is, for example, the only child of a former registered proprietor who died intestate, may have a right to possession of the land but is not a successor in title in the sense in which that expression is used for unregistered land. Strictly the same is true for a person who has the benefit of a transfer from a former proprietor. The rights of the registered proprietor derive from section 11(2) of the LRA 2002, not from any relationship with any former proprietor.

13.81 Mr Jessel therefore considered that "successor" would have to be specifically defined, "probably by reference to the claimant having acquired the right which a former proprietor would have had to claim rectification". He noted that there is a question as to whether this right can simply be inherited or acquired by operation of law, and whether it can be bought and sold. He also felt that the proposal should apply to a successor entitled to possession who does not intend personally to move in, such as family inheriting under a will. Whilst the heirs may not themselves wish to take possession, they should still be entitled to rectification as they may want to make other arrangements for the land.

13.82 Dr Nair considered that successors in title to a former registered proprietor should be entitled to claim rectification on the same terms as the former proprietor, subject to the longstop. As such, the claim should be available whether or not they have taken over possession, provided that the new registered proprietor has not taken possession. She noted that this may be particularly important in an inheritance context, where the beneficiaries may not be in possession during the administration of the estate.

13.83 Amy Goymour broadly agreed, but referred back to her response to Consultation Question 61 where she stated that some aspects of our policy need further explanation.

THE NATURE, TIMING AND DURATION OF POSSESSION

Consultation Question 63.

13.84 We provisionally propose that:

(1) The protection afforded to the proprietor of a registered estate who has been removed or omitted from the register by mistake should not be confined to when he or she is personally in possession, but should apply where a proprietor would be considered a proprietor in possession within section 131 of the LRA 2002.

(2) The protection afforded to the proprietor of a registered estate who has been removed or omitted from the register by mistake should not be confined to situations where his or her possession of the land has been continuous, as long as he or she is the proprietor in possession when schedule 4 is applied.

Do consultees agree?[27]

13.85 29 consultees answered this question:

(1) 25 agreed;[28] and

(2) 4 expressed other views.[29]

Agreed

13.86 The majority of consultees supported our proposal without providing further comment. A number of consultees confirmed that they agreed for the reasons set out in the

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27 Consultation Paper, para 13.114.

28 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Simon Cooper; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; The Bar Council; HM Land Registry; Amy Goymour; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Nottingham Law School.

29 Nigel Madeley; Michael Mark; Dr Charles Harpum QC (Hon); Dr Aruna Nair.

Consultation Papers for the reasons given in paragraphs 13.112 and 13.113 respectively.

13.87 Professor Barr and Professor Morris agreed stating that our proposal is "the fairest approach".

13.88 The Property Litigation Association agreed, stating that a former proprietor should be treated in the same way as the new registered proprietor, who is permitted to deal with their property as they wish, including by creating derivative interests from which they receive a rent. For that reason, such arrangements by the former proprietor should not prejudice their right to be restored to the register. As regards limb (2) of Consultation Question 63, the Association said it could not foresee many situations where a registered proprietor will not be in continuous possession. It argued that even if a registered proprietor is not receiving rents continuously or is not in continuous occupation, it does not mean that they are not in possession. The Association concluded that, if our proposal is directed at a situation where the premises are not let out on a continuous basis or the registered proprietor is not in occupation continuously, then it agreed with the proposal.

13.89 The Society of Licensed Conveyancers agreed, stating that "in possession means in possession", otherwise there may be arguments as how much "actual possession" is needed to qualify.

13.90 The National Trust agreed with limb (1), noting that large areas of its inalienable land are occupied by tenants and licensees on behalf of the National Trust. In respect of limb (2), the National Trust agreed as there are often void periods between tenancies or licences during which the National Trust's inalienable land remains unoccupied for a time. Additionally, it noted that, given the nature of the land it owns (often large estates of coastal land, agricultural land, woodland, commons and country estates with limited management), there will often be few acts evidencing occupation and which may be many years apart (for example, maintenance of boundary features).

13.91 Christopher Jessel considered in relation to section 131 that a landlord or trustee "obviously has an interest in rectification". He added that a licensor probably also has an interest, although it would depend on the circumstances of the licence. In relation to mortgagees, he said that (although in most cases a mortgagee in possession is likely to only have a financial interest to exercise the power of sale) there may be exceptions and in rare cases foreclosure can be available. With regards to limb (2) and successors who are not in possession, but are entitled to it, he referred back to this response to Consultation Question 62.

13.92 The Chancery Bar Association stated that its agreement to limb (1) was subject to its response to paragraph 13.95 regarding section 131(2), namely, that it was unsure as to whether our interpretation of the provision in the Consultation Paper was correct. With regard to the second proposal, the Association considered that the meaning of the phrase "when schedule 4 is applied" needs to be clarified. It suggested that the appropriate date is the date of the application to rectify, although it noted that this still leaves problems in relation to the twilight period.

13.93 HM Land Registry agreed with our proposal, but also felt it was necessary to make clear what is meant by when "schedule 4 is applied". HM Land Registry questioned whether

it is intended that the relevant date should be the one on which an application for alteration is received by the registrar or the date an application is made to the court or some other date.

Expressed other views

13.94 Nigel Madeley thought that the answer to Consultation Question 63 is difficult. He asked whether our proposal presupposes that C is innocent. He gave the example where A, an absent owner, is defrauded by B (for example in collusion with a tenant) and B transfers the property to C (a non-individual who charges it to D, so that B and the tenant take the proceeds). C might be in possession, but has no good claim to deprive A of the property. Mr Madeley argues that a fraudster may easily take this approach. He also questioned whether we were trying to draw a distinction between natural and non-natural persons by referring to those who have been "personally in possession".

13.95 In respect of mistaken double registration, Mr Madeley considered that if there are two genuinely innocent parties (B and C), then the law can only favour the stronger underlying claim, which will usually be B's claim, as the person to whom the land was first conveyed, unless B has not been in possession for a long enough time.

13.96 Dr Nair, in line with her previous responses, considered that the possession of the new registered proprietor is what ought to matter. She stated that if the possession of the new registered proprietor is discontinuous, this should not matter, provided that he or she is in possession when schedule 4 is applied, and possession should be interpreted in the light of section 131.

13.97 Dr Harpum, echoing his response to the earlier questions in the chapter, said that he considers the matters raised by Consultation Question 63 already to be covered by the existing law.

THE TEN-YEAR LONGSTOP (CURRENT PROPRIETOR IN POSSESSION)

Consultation Question 64.

13.98 We provisionally propose that the register should not be rectified in order to correct a mistake so as to prejudice the registered proprietor who is in possession of the land without that proprietor's consent, except where:

(1) the registered proprietor caused or contributed to the mistake by fraud or lack of proper care or;

(2) less than 10 years have passed since the original mistake and it would be unjust not to rectify the register.

Do consultees agree?[30]

[30] Consultation Paper, para 13.120.

13.99 30 consultees answered this question:

(1) 20 agreed;[31]

(2) 3 disagreed;[32] and

(3) 7 expressed other views.[33]

13.100 However, Christopher Jessel, who ticked "other", expressly disagreed with the longstop proposed in Consultation Question 64.

Agreed

13.101 The majority of consultees who supported our proposal did so without providing further comment. A number of consultees confirmed that they agreed for the reasons given in paragraphs 13.117 and 13.119 of the Consultation Paper respectively.

13.102 The Property Litigation Association agreed with our proposal, stating that if the new owner is in possession, the balance of convenience will have changed.

13.103 The Conveyancing Association agreed but felt that HM Land Registry should be required to serve notice upon all registered proprietors at their recorded correspondence address upon receipt of an official search with priority. The Association considered that this would help identify a potential fraud or mistake prior to registration being completed. It added that if official search applications were amended to indicate the nature of the planned transaction, then notice could be served on any party whose interest would be removed from the title (such as registered chargees) and anyone objecting to the transaction would need to contact HM Land Registry within a designated notice period.

13.104 Burges Salmon LLP agreed but considered that special provisions may be needed for particular entities to obtain rectification in other circumstances on public policy grounds. For example, this special provision might apply to entitles holding land for specific public purposes or benefit.

13.105 Some consultees agreed in principle with our proposal, but were unsatisfied with the longstop period suggested in the Consultation Paper.

13.106 Nigel Madeley reiterated that in his opinion, 12 years would be a more natural period for the longstop. Similarly, Adrian Broomfield said he was "not sure" why a ten-year longstop was being proposed as it would "make more sense" to align it to the basic limitation period of 12 years.

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31 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Dr Simon Cooper; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; a confidential consultee; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

32 Martin Wood, Michael Mark; HM Land Registry.

33 Christopher Jessel; Dr Charles Harpum QC (Hon); National Trust; Nottingham Law School; Adrian Broomfield; Amy Goymour; Council of Mortgage Lenders.

13.107 The Chancery Bar Association agreed subject to the following three points.

(1) The longstop should be a period of 12 years, as this is "the normal period for acquisition of title by adverse possession" and would be more logical than ten years.

(2) Possession should be determined as at the date of the application to rectify.

(3) The test of whether it would be unjust not rectify should be amended as it is currently unsatisfactory. The Association noted that judicial approach has been generally restrictive and its application is very hard to predict. As such, it considered that some statutory guidance should be provided.

13.108 The Chartered Institute of Legal Executives suggested that other timescales should be considered to tie in with the Limitation Act 1980.

Disagreed

13.109 Martin Wood disagreed with the longstop in principle. He asked:

> What does the rule amount to anyway? Merely taking away the power to effect rectification where it would be unjust not to rectify. This seems perverse. One can picture the scene in court. "This is plainly a case where justice requires that the register be rectified. However, because more than ten years have passed since the mistake was made in the register, I am debarred from ordering rectification; an order I would have made without hesitation had less than ten years passed."

13.110 HM Land Registry considered that the longstop is likely to cause more issues than it will resolve. It stated that whilst "finality" sounds good in principle, in practice the longstop is unlikely to affect many cases and, where it does, it would appear to add an unnecessary layer of legislative complexity both in the context of fraud and double registration. Additionally, HM Land Registry noted that the proposal "does not seem to address any pressing concerns", saying that as far as it could see, this is "a solution without a problem".

13.111 HM Land Registry also gave further specific reasons given for not supporting the longstop:

(1) Its application is likely to be arbitrary.

(2) A ten-year period is not very long. Even though the longstop does not apply when A has remained in possession, there might be legitimate reasons for A not being in possession on the date that the test is applied. HM Land Registry questioned whether it is right that A is deprived of the prospect of alteration through no fault of his or her own.

(3) The proposal appears to favour indefeasibility over the integrity of the register.

(4) It appears strange to create a situation in which it might be deemed "unjust not to rectify" but in which rectification is unavailable because the longstop has expired. The longstop would then act as an impediment to achieving justice.

(5) HM Land Registry was concerned that preventing parties from recovering their property (and limiting them to an indemnity) might be incompatible with the European Convention on Human Rights.

(6) The proposal would result in a loss of flexibility for HM Land Registry and the relevant parties in settling indemnity claims where the longstop applies.

(7) HM Land Registry asked how final the title position would be in reality as the proposal is qualified where there has been fraud or lack of proper care. It questioned what would amount to a "lack of proper care" for the purposes of the provision.

Expressed other views

13.112 Amy Goymour broadly agreed, but reiterated her point made in relation to Consultation Question 61 that some aspects of our policy, such as the rationale for introducing a longstop and why it is intended only to apply to rectification and not indemnity, would benefit from being clarified.

13.113 Christopher Jessel neither agreed nor disagreed with our proposal. In relation to limb (1) he considered that, in determining whether fraud or lack of proper care caused or contributed to the mistake, much may depend on the justice of the case. He argued that if the mistake occurred due to a genuine confusion which was not the fault of either party, then A, whose rights are prior, should not be deprived of the property (even if compensated) simply because someone has moved into possession; moreover that person should not have a veto just because they have taken possession. He added that this is especially the case if section 131 applies, and the registered proprietor is not physically in occupation. Mr Jessel's view was that the general law, "especially as it applies to commercial premises or open country", should not be distorted by concerns specific to residential property. He suggested the words "or justice requires" should be added to the formulation in limb (1).

13.114 In relation to limb (2) Mr Jessel disagreed with the proposed time limit, referring back to his response to Consultation Question 66 below.

13.115 Dr Harpum considered that our proposal simply amends paragraphs 3(2)(b) and 6(2)(b) of schedule 4 to the LRA 2002 and imposes a ten-year limitation on bringing a rectification claim in those circumstances. In relation to the questions at paragraphs 13.120 to 13.126 of the Consultation Paper, Dr Harpum stated that, in his understanding there would be one exception to the rule that no claim for rectification of the register may be brought more than 10 years after the mistake occurred, which is illustrated by the following facts:

> A is a proprietor in possession. A's title is by fraud transferred to B by means of a transfer forged by B. B is registered as proprietor. A is oblivious of this fact. B does nothing for ten years and A never discovers what has happened. After ten years B applies to be registered. He will fail because he has caused the mistake by fraud and therefore the ten-year period does not apply. The same should be true if B came to be registered due to negligence that he had either caused or contributed to.

13.116 Dr Harpum stated that assuming the above is not "watered down" by our proposal at in Consultation Question 66 below, he would support the three proposals in Consultation Questions 64 to 66.

13.117 The National Trust said that whilst it understood the desirability of certainty, there are some circumstances in which there are more important considerations. It argued that in these circumstances, stewardship of land for the public benefit, and in particular for conservation purposes, is more important than certainty. The National Trust suggested that:

> Where land has been held by a conservation organisation for conservation purposes (such as an endangered natural habitat or a building or monument of special, historic interest), that should automatically be classified as a circumstance in which it would be "just" to rectify the register to reinstate the conservation organisation as the registered proprietor.

13.118 The National Trust argued that this would tie in with the Law Commission's position on conservation covenants, which "specifically identified covenants held for the benefit of conservation as being of specific merit and worthy of additional protection" by acknowledging that compensation cannot be an adequate remedy:

> Land held for conservation purposes should be treated differently to other land because of the inherent value of the specific land in question and because conservation organisations which protect and enhance such land are acting in the public interest.

13.119 In cases where land has been declared inalienable by the National Trust, by virtue of section 21 of the National Trust Act 1907, the Trust suggested that such land should automatically be classified as land held by a conservation organisation for conservation purposes and therefore a situation in which it would be "just" to rectify the register to reinstate the National Trust as the registered proprietor. The Trust explained that once land has been declared inalienable, it cannot divest itself of the land, and nor can the land be compulsorily purchased against the National Trust's will without parliamentary intervention.

13.120 Lastly, the Trust added that it has concerns about the proposed ten-year longstop and referred to its response to Consultation Question 65 below.

13.121 Nottingham Law School said that the practical problem that the longstop addresses is not well evidenced, and it is not clear that reform is required on this point. But if a longstop is to be introduced, the School suggested that a 12-year period would be more appropriate than a ten-year one.

THE TEN-YEAR LONGSTOP (NO ONE IN POSSESSION)

Consultation Question 65.

13.122 We provisionally propose that after ten years from the mistaken removal of the former registered proprietor from the register, the register should not be rectified to correct the mistake so as to prejudice the new registered proprietor even where that proprietor is not in possession of the land. Exceptions should be provided only for where the new registered proprietor consents to the rectification or where he or she caused or contributed to the mistake by fraud or lack of proper care.

Do consultees agree?[34]

13.123 28 consultees answered this question:

(1) 14 agreed;[35]

(2) 5 disagreed;[36] and

(3) 9 expressed other views.[37]

Agreed

13.124 The City of Westminster and Holborn Law Society agreed on the basis that the former proprietor (A) has not remained in possession, as per our previous proposals. Similarly, the Bar Council agreed on the assumption that the longstop would not apply if the former proprietor is in possession of the land.

13.125 The Conveyancing Association agreed but considered that the proprietor should be able to claim the indemnity for loss suffered.

13.126 London Property Support Lawyers Group agreed for the reasons stated in paragraph 13.122 of the Consultation Paper.

13.127 Dr Harpum's response to Consultation Question 65 was the same as his response to Consultation Question 64 (set out above).

13.128 Burges Salmon LLP felt that exceptions made need to be made in the case of applications for rectification in favour of particular entities on public policy grounds.

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34 Consultation Paper, para 13.123.

35 Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Dr Charles Harpum QC (Hon); Howard Kennedy LLP; The Bar Council; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

36 Martin Wood; Michael Mark; Christopher Jessel, National Trust; Adrian Broomfield.

37 Property Litigation Association; Everyman Legal; Chancery Bar Association; Dr Simon Cooper; Nottingham Law School; Society of Licensed Conveyancers; Dr Aruna Nair; HM Land Registry; Amy Goymour.

13.129 The Law Society agreed but questioned why ten years was chosen. The Chartered Institute of Legal Executives said other timescales should be considered to tie in with the Limitation Act 1980.

Disagreed

13.130 Martin Wood disagreed that the rules should change after ten years and questioned what would happen with a double registration where neither party is in possession.

13.131 Adrian Broomfield felt it would be preferable for the longstop period to run from the date of mistaken removal from the register or the date of knowledge of the mistake as applicable, as in other cases of limitation.

13.132 Christopher Jessel reiterated that the longstop may run counter to the interests of justice in particular cases. He argued that the time limit should be extended to cover incapacity, such as minority or mental disability, and situations where A neither knew nor had a reasonable means of discovering the mistake (for example, a landlord where the lease of the property runs (or would have run) for over ten years from the mistake on the register).

13.133 The National Trust reiterated that whilst it understands the desirability of certainty, it considers that stewardship of land for public benefit, and in particular for conservation purposes, is more important. The Trust was concerned with any kind of longstop date, particularly in relation to its inalienable land or any other land held for conservation purposes, for the reasons set out in its response to Consultation Question 64 above. If a longstop date were to be introduced, the National Trust proposed that there should be an exception where land is held for conservation purposes, and that the test for this should be automatically satisfied where land has been declared inalienable.

Expressed other views

13.134 The Property Litigation Association stated that it understood the need for certainty where neither the former proprietor nor the new proprietor was in possession of the premises. However, it did not think that the same considerations apply in these cases as apply where the new proprietor is in possession. It suggested that a longer longstop period should apply where neither the former nor the new proprietor is in possession.

13.135 The Society of Licensed Conveyancers considered that if neither party is in possession, then there is no logical reason to favour B or C rather than A after ten years. As such, the proposal appeared to it to be arbitrary.

13.136 Everyman Legal questioned whether ten years is long enough for issues to come to light.

13.137 The Chancery Bar Association, assuming that this proposal is intended to be subject to the proposal in Consultation Question 61 and would not apply where the former proprietor is in possession, agreed that there should be a longstop period. However, it noted that there will be cases where the former proprietor does not learn of the mistake until long after the event and in such cases, the interests of justice might favour rectification. It considered that:

(1) The cut-off period should be twelve years, and

(2) Consideration should be given to the feasibility of extending the period where, although the new proprietor has not contributed to the mistake, he or she has concealed it after becoming aware of it.

13.138 Dr Cooper agreed with the main body of the proposal for the reasons given in the Consultation Paper; however, he did not agree that the longstop should be subject to an exception for lack of proper care. He argued that after ten years there will be problems in proving factual issues as well as over mixed questions of law and fact (for example, whether conduct amounted to a lack of proper care according to the standards current at the time that the mistake occurred). Dr Cooper noted that these are "precisely the reasons" limitation periods are imposed and our proposals would make those issues relevant where the general law of limitation would be eliminating them. He noted that the same point could be made of the fraud exception, yet here there are obviously distinct concerns over ensuring that fraudsters do not benefit from fraud.

13.139 Dr Nair was not sure that the retention of the "lack of proper care" element would provide the necessary finality. It appeared to her likely that there would be a temptation to litigate this point. She suggested that if the objective is certainty after the ten-year period, then arguably the longstop should apply except in a case where the registered proprietor has caused or contributed to the mistake by his own fraud.

13.140 Amy Goymour "possibly agreed" with our proposal, but stated that the proposal does not take account of the possibility that A did not take possession the land, but instead had development plans and had spent a lot of money on planning fees and architect plans:

> Here, even though A has not possessed the land, A has probably relied on the 'title promise' and has invested in the land on the basis of that promise.

13.141 HM Land Registry referred to its comments in respect of the provisional proposal in Consultation Question 67 below.

THE PERIOD OF THE LONGSTOP

Consultation Question 66.

13.142 We provisionally propose that the period of time after which the register becomes final should be ten years.

Do consultees agree?[38]

13.143 29 consultees answered this question:

[38] Consultation Paper, para 13.126.

(1) 15 agreed;[39]

(2) 4 disagreed;[40] and

(3) 10 expressed other views.[41]

Agreed

13.144 Nigel Madeley and the Law Society agreed with the longstop but were unsure that ten years is the right period. Nigel Madeley suggested the period should instead be 12 years.

13.145 Professor Barr and Professor Morris felt it would make sense to tie this proposal to the same period as is required for adverse possession.

13.146 Dr Cooper agreed but invited us to consider whether ten years is "unnecessarily long" in cases where B or C has taken possession. He argued that a "very much shorter" period of continuous possession by B or C should be enough to serve the dual purposes of warning the de-registered proprietor of a rival claim and of establishing a sufficiently settled existence that ought to be protected.

13.147 The London Property Support Lawyers Group agreed for the reasons stated in paragraphs 13.124 to 13.125 of the Consultation Paper.

13.148 Amy Goymour was "broadly happy" with the proposal. However, in line with her previous response, she thought that consideration should be given to the length of time it takes to get planning and other permissions to develop land, as these may prevent physical possession.

Disagreed

13.149 The Bar Council disagreed on the basis that it would prefer for the period to be 12 years, on the basis that the limitation period for bringing an action for possession of land is widely known. However, it recognised that there is no principled reason why the periods should be the same.

13.150 Christopher Jessel noted that property owners do not constantly check with HM Land Registry to see if they are still registered. As such, it could be a long time before a mistake comes to light, especially if there are no obvious practical consequences.

13.151 Mr Jessel considered the analogies with the Limitation Act 1980 and schedule 6 to the LRA 2002 misleading, as those provisions turn on practical issues of actual possession. He stated that even if there is to be a time limit, it should be extended, as it is under

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39 Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Dr Simon Cooper; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; Amy Goymour; The Law Society.

40 Christopher Jessel; National Trust; The Bar Council; HM Land Registry.

41 Property Litigation Association; Everyman Legal; Chancery Bar Association; Nottingham Law School; Chartered Institute of Legal Executives; Burges Salmon LLP; Martin Wood; Cliff Campbell; Society of Legal Scholars; Council of Mortgage Lenders.

section 28 of the Limitation Act 1980 where a person has a disability, and schedule 1 paragraph 9 where a right has not come into possession. For example, the registered proprietor may be holding on behalf of a minor or may be mentally incapable of managing his or her affairs (citing LRA 2002, schedule 6, paragraph 8(2)). Mr Jessel noted that claims for equitable relief are not subject to limits such as the longstop, stating that justice may also require other reasons for extension.

13.152 Mr Jessel stated that presumably if litigation, including a rectification application, was still pending at the expiry of the ten years, the limit would not apply as a result of paragraph 3 of schedule 6 to the LRA 2002.

13.153 The National Trust reiterated the concerns it expressed with the longstop in response to Consultation Questions 64 and 65. In case that a longstop were to be adopted, the National Trust stated that, in its experience, ten years would not be long enough, "as it often takes decades for issues to become apparent". The Trust explained that it owns many vast, remote estates, where there will only be very occasional acts of maintenance or occupation, and it would be possible for a third-party occupier to go unnoticed for some time, "perhaps even decades".

13.154 HM Land Registry considered that a longstop would, in practical terms, create more issues than it resolves and add a layer of unnecessary complexity.

Expressed other views

13.155 Property Litigation Association agreed with our proposal but did not think the longstop should apply if the former registered proprietor remains in possession of the premises. It said that its understanding of our proposals was that the longstop would not apply in such cases.

13.156 Everyman Legal and the Chancery Bar Association both referred back to their previous responses to Consultation Questions 64 and 65.

13.157 The Society of Legal Scholars was generally supportive of our proposal and made the same points as Dr Cooper, set out above.

13.158 The Chartered Institute of Legal Executives considered that the Limitation Act 1980 is familiar, and suggested it may make sense to have continuity between the Act and the longstop.

13.159 Burges Salmon LLP agreed in principle with the idea of a longstop, but reiterated that exceptions may need to be made on public policy grounds in the case of applications by particular entities.

13.160 Nottingham Law School said that the ten-year period seems "arbitrary". It said that, by analogy with the limitation period for claims involving land, the period of the longstop should be 12 years.

13.161 Cliff Campbell suggested that the "imposition of hard and fast rules such as a ten-year deadline" is "unhelpful". He suggested that the longstop might be an obstacle to negotiation and that the law should give parties flexibility to arrive at a solution.

13.162 The Council of Mortgage Lenders said that it did not have any strong views as to the introduction and length of a longstop period, provided that indemnity is still available.

DOUBLE REGISTRATION

Consultation Question 67.

13.163 We provisionally propose the following:

> Cases of double registration should be resolved through the application of our proposals in respect of indefeasibility. Therefore, in a case of double registration, a claim to adverse possession should not be possible.
>
> Where as a result of the operation of the longstop a double registration remains on the register, the party who does not benefit from the longstop should have their title amended accordingly to remove the double registration. The party whose title is amended in such circumstances should be entitled to an indemnity.
>
> Do consultees agree?[42]

13.164 28 consultees answered this question:

(1) 21 agreed;[43]

(2) 2 disagreed;[44] and

(3) 5 expressed other views.[45]

Agreed

13.165 The London Property Support Lawyers Group agreed for the reasons set out in the Consultation Paper.

13.166 The Chartered Institute of Legal Executives considered the proposal sensible, "as otherwise a claim for adverse possession can be defeated too easily".

13.167 The Society of Licensed Conveyancers agreed, stating that an innocent party should not lose the right to an indemnity due to operation of the longstop.

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42 Consultation Paper, para 13.151.

43 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); Dr Simon Cooper; Nottingham Law School; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

44 Martin Wood; HM Land Registry.

45 Nigel Madeley; Christopher Jessel; National Trust; Amy Goymour; Oliver Price.

13.168 The Chancery Bar Association agreed subject to the comments it had made to the Consultation Questions 64 to 66 above.

13.169 The Property Litigation Association agreed, noting that this proposal follows current case law. The Association stated that in the same way that a claim premised on the right to rectification being an overriding interest should be prevented, a claim for adverse possession must also be prevented – "this creates fairness to the losing party".

13.170 Dr Cooper agreed with both limbs of our proposal in Consultation Question 67, but subject to one reservation in relation to the second limb. He noted that in a case of double registration, there is currently a power to alter only the entry which is mistaken. However, he suggested, there may be occasions when the fairer outcome, or the more convenient outcome, would be to alter that entry which is not mistaken.

13.171 Dr Cooper considered that the problem with rectification is that, once the mistaken title is identified, it becomes effectively non-discretionary as the registration system cannot allow two conflicting titles to exist on the register at the same time. He stated that this problem is exacerbated by the fact that both proprietors will have relied on the register and have believed they had effective registrations. Dr Cooper noted that currently, rectification is only available in respect of the title that was entered by mistake, "which involves tracking down which of two earlier dealings purported to transfer more than was possible". This, he notes, is often an "ancient pre-registration conveyance". He argued that to decide registered land disputes by reference to a chain of unregistered titles is to rely on a "wholly irrelevant matter" and to deny any relevance to the matters which ought to count: namely, the discretionary factors that are usually taken into account in rectification proceedings such as whether a part has adapted or invested in the land, whether the land forms an integral part of a greater estate, and so on.

13.172 On the assumption that the longstop should be introduced, Nottingham Law School said that it supported our proposal regarding double registration.

13.173 Burges Salmon LLP agreed with both limbs of the proposal but, for the second limb, its approval was qualified subject to its previous comments in relation there being discretion to extend or disapply the longstop when dealing with particular entities.

13.174 Dr Harpum said that our solution to the issue of double registration was a fair one and that he supported it.

Disagreed

13.175 Martin Wood did not agree with either limb of the proposal. In relation to (1) he felt that allowing a claim to adverse possession would enable a convenient and fair outcome in cases of double registration. In relation to limb (2) he did not agree with the longstop proposals. Furthermore, he argued, to implement our proposal would require there to be a power to remove land from a title even though it was correctly included in it and there was no mistake.

13.176 HM Land Registry, in relation to the first limb, agreed that cases of double registration should be resolved by the operation of the provisions of alteration, rectification and

indemnity. However, it considered that the court in *Parshall v Hackney*[46] failed to acknowledge that, in the circumstances, the LRA 2002 applied, not the LRA 1925, and that adverse possession rights were preserved via the transitional provisions in schedule 12:

> Had it not been for the registrar's mistake in including the land in A's title, A would have defeated B's title through adverse possession.

13.177 Therefore, HM Land Registry considered the court's interpretation of the discretion that it would be unjust not to rectify incorrect, and that it should be reversed.

13.178 HM Land Registry noted that the proposed longstop reverses the outcome of *Parshall v Hackney* in cases that are confined to the facts of that case. But it was of the view that the proposal does not go far enough:

> It seems unjust that, as a result of a mistake in registering a registered proprietor who had acquired title through adverse possession (either pre- or post-2002 Act), a registered proprietor is deprived of being able to claim that he or she had acquired title through adverse possession. If an application is made by the true owner (whose title would have been defeated by the registered proprietor's adverse possession) within ten years of the mistaken double registration it seems that rectification would still be awarded.

13.179 HM Land Registry additionally noted that whilst we acknowledged in paragraphs 13.144 and 13.145 of the Consultation Paper that interpretation of "unjust" in *Parshall* is a potential source of unfairness, we went on to imply that this is acceptable as, after ten years, B's or C's title would be indefeasible provided there has been no fraud or lack of proper care. This, HM Land Registry stated, supports its concern in relation to the longstop being both arbitrary and favouring indefeasibility over integrity.

13.180 In summary, HM Land Registry said, in the case of a double registration, it believed the decision in *Parshall* was wrong. It gave the following reasons:

(1) "It misapplied the law under the LA1925 – it should have applied the new law, that is the LRA 2002 and, in particular, schedule 12".

(2) "It misinterpreted the law of adverse possession when it relates to a registered proprietor".

(3) "It misapplied the protection for the registered proprietor in possession (under either the 1925 Act or the 2002 Act). We do not believe that it can be right that, because of a mistake by the registrar, a registered proprietor who would otherwise be able to establish that he had title to the land by virtue of having defeated the true owner's title by adverse possession, is deprived of that claim".

13.181 HM Land Registry did not, however, think that it would be appropriate to solve *Parshall* with the longstop. It queried why the longstop should protect the registered proprietor in possession in such a case. In HM Land Registry's view, the legislation, as drafted, was meant to achieve the opposite outcome to *Parshall*, regardless of the age of the

[46] [2013] EWCA Civ 240, [2013] Ch 568.

mistake, whether five, ten, or 25 years old. It was HM Land Registry's view that *Parshall* needs to be addressed somehow:

> Registration as registered proprietor by mistake should not, we believe, deprive a person of the ability to rely on adverse possession (including, we think, with provision being made for adverse possession to operate effectively under Schedule 6 where there is a double registration). Indeed, it appears unjust to deprive a person of a claim that he would have had but for a mistake made by the body charged with registering land.

13.182 HM Land Registry also stated that it is arguable, and in its view correct, that indemnity should not be available in that situation. If a person has acquired title through adverse possession, the true owner would not have suffered any loss. However, under the proposals it seems the true owner might, in certain circumstances, be entitled to an indemnity.

13.183 Regarding the second limb of our proposal, HM Land Registry stated that it did not seem fair that where neither A nor B is in possession (but A is the true owner), after ten years, B's title becomes indefeasible subject only to the exceptions in cases of fraud or lack of proper care:

> Here the fact of registration seems to be trumping natural justice. B has no connection with the land except a red line on an incorrect plan; A at least has the deeds and historic ownership. This, we believe, demonstrates that the longstop proposal may lead to arbitrary outcomes, favours indefeasibility over integrity and has potential Human Rights Act implications. We do not think it can be appropriate to force the true owner to accept monetary compensation in this situation, where he or she has lost title through no fault of his or her own.

13.184 Finally, HM Land Registry noted that a further issue arises with the longstop proposal; it questioned whether there would be still be a mistake if A's title were to remain open for a further ten years.

Expressed other views

13.185 The National Trust agreed wholly with the first limb of Consultation Question 67, but only agreed to the second limb subject to the concerns it previously raised in relation to protecting land held for conservation purposes and the proposed longstop.

13.186 Nigel Madeley considered the divergence between the academic and judicial interpretations of basic registered land concepts "interesting". He said:

> If we believe the register, the court is right in *Parshall v Hackney* that no 31 couldn't be in adverse possession, but if we believe the deeds, no 31 never owned the land unless they had acquired it by adverse possession.

13.187 Mr Madeley said that no 31's title always remains liable to challenge until the current position is reformed by the introduction of a longstop date. However, he noted that at least under the system of unregistered conveyancing, the deeds would be likely to provide information; and the buyer of no 31 would have checked the boundaries against the title "which would start effectively with the sale by the common seller and which would contain a plan of the sale of no 29". He noted that possession of the title deeds

might make an owner of land feel more secure than the fact that his or her title is registered and that scrupulous practitioners currently need to investigate the root of title and insure themselves in case the register does not provide a title guarantee.

13.188 Christopher Jessel agreed with the first limb of our proposal (in relation to adverse possession) but not with the second limb (in relation to the longstop). Regarding the first limb he noted that the way the law of adverse possession works is not by creating a prescriptive right to the land. Rather, it works simply by extinguishing the right of the paper owner to bring proceedings for possession. Therefore, he stated, in the case of double registration it is arguable that one registered proprietor who has failed to assert rights to the land should lose them. However, Mr Jessel noted that the policy of the reforms in the LRA 2002 was to give the registered proprietor a chance to assert title in the two-year period after the adverse possession application is made, irrespective of how long the squatter has been in possession. He therefore agreed that a claim that one title has been extinguished by adverse possession should not be available in cases of double registration.

13.189 In relation to the second limb of our proposal, Mr Jessel argued that A "ought to be able to assert the good title". He suggested, by analogy with the adverse possession rules in schedule 6, that there should possibly be a procedure to allow A to claim the estate under the general law within a two-year period after the double registration has come to light:

> Even if B or C is in possession, in principle A's better title should be preferred, although justice may require they should have some claim for instance if A has stood by and not objected to B or C behaving as owner.

13.190 In relation to paragraph 13.146 of the Consultation Paper, Mr Jessel noted that we said where neither A nor B nor C is in possession, then after ten years B or C's title will become indefeasible. Mr Jessel considered that if no one is in possession of the land, this "seems wrong" and A's title should be preferred:

> B or C should only gain the land over A's title under the general law if they have been in possession.

13.191 In any case, Mr Jessel commented that it is to be hoped that HM Land Registry procedures and the use of digital mapping will prevent double registration of freeholds from occurring where land is divided horizontally into separate titles of the surface as in *Parshall v Hackney*. However, he could see scope for error where land is divided vertically, for blocks of flats or for minerals, or where the extent of a leasehold demise is described in words and cannot be clearly defined on a plan.

13.192 Amy Goymour considered, there are obvious parallels between our discussion of double registration and the law of adverse possession, and it would be good to see those parallels examined. She stated that the effect of the longstop is that A might lose title or the right to seek alteration, in favour of B or C after ten years, which "to an extent" bears some resemblance to the acquisition and loss of title by adverse possession. However, she noted that there is a major difference in that, with adverse possession, no indemnity is payable. Ms Goymour considered that the reasons behind this discrepancy require further explanation.

13.193 She stated that there is a particular pinch point where a dispute concerns land at a boundary which is double-registered. She asked whether it can be justified that indemnity is available to the losing party in such a case, whereas, if the land is not double registered and the adverse possession provisions apply, the loser will receive no indemnity.

13.194 Ms Goymour was also "slightly concerned" about how our proposal would operate, as section 58 does not guarantee the position of boundaries that have not yet been 'determined'. As a result, she questioned, how can there be a "mistake" on the register if the register never promised to be accurate at the boundary. Additionally, she asked why an indemnity should be payable if no title promise has been made as to the precise boundary location.

13.195 Arguably, Ms Goymour stated, it is better to use the adverse possession rules where boundaries are still undetermined. Ms Goymour stated that she raised this possibility, not because she had a strong view as to the proper way forward, but "merely to point out that deciding on the proper way forward has real consequences". She explained that the difference in result could be stark for A: if the adverse possession rules apply no indemnity would be payable, but if the alteration rules apply, it might be.

13.196 She accepted that the use of adverse possession rules in cases of double-registration is itself wrought with problems. However, Ms Goymour was of the view that these problems can be overcome. She identified the following difficulties and solutions:

(1) *Parshall* has decided that one cannot be in adverse possession if one has a registered title. Ms Goymour's response was that 'adversity' is a relative concept. A squatter could be in adverse possession against a superior registered title, even if the squatter himself has a, necessarily inferior, registered title.

(2) There is question as to whether a squatter can apply for registered title under schedule 6 if he or she already has a registered title. Ms Goymour's response was that it is possible for the squatter, if registered with an inferior fee simple, to apply to be registered as the proprietor of the superior fee simple via schedule 6.

13.197 Separately, Amy Goymour revisited a point she has made in response to various chapters of the Consultation Paper; she is not convinced that it is impossible or incorrect for a single piece of land to have two registered titles in existence at the same time. She argued that two registered freeholds can coexist on the register in respect of the same land, one being superior to the other. As such, she suggested that it should be considered what outcome is desired for A's registered freehold when the longstop is implemented. Ms Goymour considered that to extinguish A's freehold would be "problematic", given that A's title is still on the register and is deemed to exist under section 58 of the LRA 2002. Alternatively, she suggested it could be subverted in priority to B's or C's registered freehold. If so, Ms Goymour explained that A's registered freehold would not be on the register by virtue of a "mistake", saying that "it is rightly there, but its priority is now subverted".

13.198 Ms Goymour considered that paragraph 13.149 of the Consultation Paper also raised "difficult questions" as to the meaning of mistake. She considered that in our example, HM Land Registry has correctly registered A, and questioned whether the operation of the longstop could render A's registration a mistake on the register. She stated that if

the longstop retrospectively extinguishes A's title, so that A is treated as never having owned the relevant land, then arguably HM Land Registry did make a mistake in registering A. If, on the other hand, the effect is merely prospectively to extinguish A's entitlement to the land, Ms Goymour said it is "hard to see" how HM Land Registry can have made a mistake when it registered A's title. As a result, B or C cannot seek rectification, and can only apply for alteration for which no indemnity would be payable to A.

13.199 Oliver Price "wholeheartedly" agreed with the first limb of our proposal, but not with the second limb. He suggested that the approach to unjustness in *Parshall* – that the owners of No 31 had taken the benefit of a mistake by HM Land Registry, that the owners of No 29 were not at fault, and so that it would be unjust not to rectify the register – was right and "reflects and underlines principles for land registration".

13.200 In relation to the second limb of our proposal, Mr Price noted that difficult issues of fact may arise in establishing who has been in possession of the relevant land for ten years and so litigation may well be required. He said that, in relation "to parking or perhaps to the placement of goods", there would be disputes about what "possession" means. He further suggested:

> It seems to me that the proposals provide opportunity for both parties to benefit from the mistake of HM Land Registry: the party regarded by the Court of Appeal as wrongly benefitting from a mistake to have the land and then the other party in that case to receive money by virtue of an indemnity. To put it another way, there is effectively a double recovery against HM Land Registry in circumstances where the party who ought to benefit from the mistake only has the land. A rule could then be put in place to render the party who had wrongly benefited from the mistake only to be entitled to nominal damages.

13.201 Mr Price concluded that although he could agree with the first limb of the proposal, in respect of the second limb he could not agree, suggesting "that the law ought to be left as decided by the Court of Appeal".

DERIVATIVE INTERESTS AND SECTION 29

Consultation Question 68.

13.202 We provisionally propose that section 29 should be subject to schedule 4. This means that where, through a mistake, a derivative interest has been omitted or removed from the register, the holder of the interest should be able to apply for alteration or rectification of the register to have the priority of the interest over the registered proprietor restored. The outcome of the application should be determined by the same principles that apply when the application for alteration or rectification relates to the title to the estate, including the operation of the longstop.

Do consultees agree?[47]

13.203 27 consultees answered this question:

(1) 21 agreed;[48] and

(2) 6 expressed other views.[49]

Agreed

13.204 The London Property Support Lawyers Group agreed for the reasons stated in paragraphs 13.160 and 13.162 of the Consultation Paper.

13.205 The Property Litigation Association said that it "makes sense" for the same principles to apply to all applications to rectify the register for mistake.

13.206 The Chancery Bar Association considered that in order to provide for an indemnity in all appropriate cases it will be necessary to amend the definition of rectification in paragraph 11(2)(b) of schedule 8 to the LRA 2002, since it will need to cover cases where the title of registered proprietor is not prejudiced but the holder of a derivative interest is.

13.207 Nottingham Law School supported the proposal in Consultation Question 68. It supported the conclusion reached in paragraph 13.162 of the Consultation Paper, saying that "the approach to priority taken by the Court in *MacLeod v Gold Harp Properties Limited*[50] is correct in principle". It suggested that if a longstop is introduced

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47 Consultation Paper, para 13.169.

48 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Nottingham Law School; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

49 Martin Wood; Nigel Madeley; Dr Charles Harpum QC (Hon); Dr Simon Cooper; National Trust; HM Land Registry.

50 [2014] EWCA Civ 1084, [2015] 1 WLR 1249.

then consistency required that it should also apply in relation to rectification in relation to derivative interests. However, the School said that it remained of the view that the case for a longstop had not been convincingly made.

13.208 The Society of Licensed Conveyancers agreed that the same principles should apply "where disposition is the trigger-event rather than the mistake-event".

13.209 In relation to paragraph 13.165 of the Consultation Paper, Amy Goymour questioned whether B's possession ought to be relevant when the interest at stake is inherently non-possessory. For example, if A had an easement, should B's possession be relevant to whether or not A can obtain rectification? Aside from this query, Amy Goymour agreed with the proposal.

13.210 Burges Salmon LLP agreed, subject to the firm's previous comments in relation to particular entities in response to Consultation Questions 64 and 66.

13.211 Christopher Jessel expressed support for our proposal. He discussed how an easement may be overlooked on first registration and how its priority on a further disposition of the land would depend on its status (legal or equitable) and the date on which it was granted.

13.212 Christopher Jessel was not convinced, however, that the longstop is "appropriate for derivative rights". He pointed out that there is no set period of disuse after which an easement will cease to exist and "the law of abandonment is notoriously difficult to apply". An easement may only be needed at infrequent intervals. Furthermore, a restrictive covenant may only become relevant if it is breached. Mr Jessel continued:

> Suppose a covenant was imposed in 1980 and has by mistake been left off the title on a subsequent first registration: the beneficiary may not become aware of the need for rectification until the landowner wishes to start building and where the covenant is for amenity, say to protect a view, money may be no satisfaction.
>
> Suppose a sale of land reserves various easements (rights of way and to lay services) for the benefit of future development of retained land. On first registration the easements will be entered on the initial title of the buyer but say, when five years later the buyer begins a program of house sales, HM Land Registry issues a new edition of the register on which (as a result of a mistake) the easements are not entered. Forty years later the owner of the dominant land wishes to develop part of it. What the dominant owner needs for development of the retained land is the benefit of the easements not compensation from the indemnity fund.

Expressed other views

13.213 Three consultees who expressed other views – Martin Wood, National Trust and HM Land Registry – expressly agreed with our proposal that section 29 should be subject to schedule 4, but disagreed with or had concerns about the longstop. Both Martin Wood and HM Land Registry said they agreed with our proposal except for the application of the longstop. HM Land Registry said that, in its view, "*Gold Harp* is correct both as to the effect of schedule 4 upon section 58 and on section 29".The National Trust agreed with our proposal but subject to the concerns it had raised in its answers to Consultation Questions 64 to 68 about the longstop in relation to land held for conservation purposes.

13.214 Nigel Madeley commented that our policy "appears to be a shift towards dynamic security" and questioned whether it was appropriate:

> The holder of the derivative interest (X in your example at paragraph 13.165) has a right that existed before the disposition to B. In unregistered conveyancing, X's right as a legal easement would bind B and a restrictive covenant registered as a D(ii) would also do so. The innocent holder of the existing right is preferred to the later disponee.
>
> But with registered land, unlike with rectification and disposals, B is more likely to be in possession and so X more likely to be deprived of his pre-existing right.

13.215 Dr Cooper agreed with the principle that the priority rule in section 29 should be subject to schedule 4. However, he considered that making a specific rule to that effect is not the best approach, and "an example of creating fragmented rules operating in isolation without reference to the principles pervading the Act".

13.216 Dr Cooper noted that the Consultation Paper expressed the desire to avoid elaborating on the concept of a mistake because this could only be done by setting up fact-specific instances. But Dr Cooper claimed that this is exactly what we are doing with our proposal in Consultation Question 68. Dr Cooper argued that the preferable approach would be to define the concept of mistake by reference to its constituent principles. As an alternative, the approach could be to define the reach of rectification in a similar manner to the former section 82(2) of the LRA 1925.

13.217 Dr Harpum had "considerable sympathy" with the thinking behind our proposals but, he considered that they rest on a false premise that there is a "priority issue" in relation to the operation of schedule 4. Dr Harpum said that "issues of priority are completely irrelevant to the issue of rectification". He continued:

> The right to seek rectification is triggered in the circumstances provided for in schedule 4 to the LRA 2002. The grounds upon which a claim for alteration or rectification can be resisted are also set out in schedule 4. Issues of priority are not mentioned in the schedule, though the fact that the land against which the claim is made may have passed might perhaps in some circumstances, where paragraphs 3(3) or 6(3) of schedule 4 apply, amount to exceptional circumstances that would justify a refusal of rectification. It is clear from paragraph 8 of schedule 4 that rectification can extend to derivative interests.

POSTPONING THE COMMENCEMENT OF THE LONGSTOP WHERE DERIVATIVE INTERESTS ARE LOST

Consultation Question 69.

13.218 We provisionally propose that, where the application for alteration or rectification relates to a derivative interest, the ten-year longstop on alteration of the register should run from the time that, as a result of the mistake, the holder of the derivative interest lost priority, not from the time of the mistake.

Do consultees agree?[51]

13.219 27 consultees answered this question:

(1) 19 agreed;[52]

(2) 6 disagreed;[53] and

(3) 2 expressed other views.[54]

Agreed

13.220 The Property Litigation Association agreed, noting that as the loss arises from a loss of priority it makes sense that time should run from that point.

13.221 Professor Barr and Professor Morris said there was no strong reason to treat derivative interests differently for these purposes.

13.222 The London Property Support Lawyers Group and Dr Cooper agreed for the reasons set out in the Consultation Paper.

13.223 Burges Salmon LLP's agreed subject to its earlier comments about modifying the longstop in connection with particular entities.

13.224 The Law Society agreed but again questioned why ten years was chosen as the longstop date.

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51 Consultation Paper, para 13.170.

52 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Dr Simon Cooper; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

53 Martin Wood; Christopher Jessel; National Trust; Nottingham Law School; HM Land Registry; Dr Charles Harpum QC (Hon).

54 Nigel Madeley; Chancery Bar Association.

Disagreed

13.225 Martin Wood disagreed on the basis that he was against the introduction of a longstop. The National Trust also disagreed on the basis that it had concerns "with any longstop date".

13.226 HM Land Registry reiterated that its view was that the longstop creates an "unnecessary tier of complexity in an area of the legislation which is already problematic enough".

13.227 Dr Harpum said that, as issues of priority should be irrelevant to the application of schedule 4, then logically the ten-year period should apply from the date of the mistake.

13.228 Christopher Jessel considered that time should run from the date the holder became aware of the mistake or, with reasonable diligence, should have become aware. He commented that "an incorporeal right is not like possession of land", explaining that a mistaken failure to enter an easement or a restrictive covenant on the register may not come to light for a long time. For example, a covenant against erecting a new building on land will not become relevant until the landowner wants to build, and it may only be then that the owner of the land having the benefit of the covenant becomes aware that the covenant has not been entered on the servient title.

13.229 Similarly, Nottingham Law School suggested that the longstop should commence when the error on the register become discoverable, not from when (due to the error) the derivative interest was first prejudiced. Where, due to a mistake, a derivative interest has not been registered, it is at risk of being postponed if there should be a disposition of the burdened estate. The School said that such a disposition "realises this risk in law, but does not bring the error to the attention of the holder of the benefit of the covenant per se".

13.230 Nottingham Law School made an alternative suggestion: "if the analogy with Limitation were taken seriously (it is rejected by the Consultation Paper) then the problem is obvious – time should not run until the challenge to title can be discovered". It suggested that time should run from the date of discovery even where that time precedes the disposition that postpones the interest. The School reiterated that the time period of the longstop (if it were to be introduced) should be 12 years by analogy with the Limitation Act 1980.

Expressed other views

13.231 Nigel Madeley considered that the position is "more difficult than with dispositions". He questioned whether, if X owns an easement and is exercising it happily before and after the mistaken removal from the register, this is equivalent to an estate owner's possession. He noted that if it were an equitable easement such as a right of way pending adoption, it could not be an overriding interest and X would lose it. Mr Madeley also noted that a restrictive covenant isn't "exercised", and as long as B is not in breach of the covenant, X has no cause to be concerned. He considered it would be odd for X to lose his rights. Mr Madeley noted that he was more troubled by the long top date in this context.

13.232 The Chancery Bar Association stated that its points made in response to the Consultation Question 65 equally here.

DERIVATIVE INTERESTS AND SECTION 11

Consultation Question 70.

13.233 We provisionally propose that section 11 should be subject to schedule 4. This means that where, through a mistake, a derivative interest has been omitted from the register, the holder of the interest should be able to apply for alteration or rectification of the register to have the priority of the interest over the registered proprietor restored. The outcome of the application should be determined by the same principles that apply when the application for alteration or rectification relates to the title to the estate, including the operation of the longstop.

Do consultees agree?[55]

13.234 25 consultees answered this question:

(1) 19 agreed;[56] and

(2) 6 expressed other views.[57]

13.235 With one exception, all consultees who responded to Consultation Question 70 repeated, summarised or relied upon their responses to Consultation Question 68.

13.236 The exception was Nigel Madeley, who expressed other views. Nigel Madeley discussed our example in paragraph 13.172 of the Consultation Paper. He argued that the beneficiary of a restrictive covenant has done nothing wrong, and there is no reason not to rectify the register in his or her favour. Mr Madeley considered the fact that that the beneficiary might lose his or her property right after ten years when the covenant is being observed "makes no sense".

13.237 Mr Madeley agreed that the position regarding easements is different. He considered that if an easement is not being used then Y (the dominant owner) "is not in the easement equivalent of possession", and so it is C, who has bought the land not easily being able to discover Y's easement, who will benefit.

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55 Consultation Paper, para 13.180.

56 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

57 Martin Wood; Nigel Madeley; Christopher Jessel; Dr Charles Harpum QC (Hon); Dr Simon Cooper; National Trust.

A FIRST REGISTERED PROPRIETOR'S ENTITLEMENT TO AN INDEMNITY

Consultation Question 71.

13.238 We provisionally propose that where a first registered proprietor was bound by an interest through the operation of priority rules in unregistered land, but obtains priority over the interest on registration as a result of section 11, no indemnity should be payable on rectification of the register to include the interest at a time when the estate is still vested in the first registered proprietor.

Do consultees agree?[58]

13.239 28 consultees answered this question:

(1) 24 agreed;[59]

(2) 3 disagreed;[60] and

(3) 1 expressed other views.[61]

Agreed

13.240 The London Property Support Lawyers Group agreed for the reasons stated in the Consultation Paper.

13.241 Pinsent Masons LLP also agreed for the reasons at paragraph 13.178 of the Consultation Paper. However, the firm believed that our proposal should be extended so that no indemnity is payable while the estate is vested in a donee of the first registered proprietor as well as when vested in the first registered proprietor itself.

13.242 The Society of Licensed Conveyancers agreed, on the basis that there should be "no windfall indemnity". Similarly, the Property Litigation Association agreed "as otherwise the first registered proprietor could receive a windfall which they should not be entitled to".

13.243 Professor Barr and Professor Morris considered that this proposal follows on from their easier responses on this issue and so "it would be anomalous to have a different approach here".

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58 Consultation Paper, para 13.181.

59 Martin Wood; Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

60 Dr Charles Harpum QC (Hon); Dr Simon Cooper; Society of Legal Scholars.

61 Amy Goymour.

13.244 Christopher Jessel considered that our proposal is "already reflected for easements" by the distinction between schedule 1, paragraph 3, and schedule 3, paragraph 3. He stated that as first registration is often voluntary, so there is no change in ownership, an owner should not be able to become free of an incumbrance simply by being registered.

13.245 HM Land Registry agreed with the proposal; however, it noted that there may be a risk that B may attempt to avoid the outcome by selling to C who would be able to claim indemnity (noting that B and C could be related, for example, a nominee company, or might have come to an agreement that any indemnity would be shared). It therefore wondered whether a better approach would be to make a simple provision that establishes how to calculate the loss in such cases.

Disagreed

13.246 Dr Harpum's concern in relation to this policy arose out of the fact that, on a transaction that triggers first registration, the rules of unregistered conveyancing operate:

> Thus, on a conveyance of a parcel of unregistered land, Blackacre [the purchaser], takes it subject to a restrictive covenant because that covenant was protected by means of a land charge in the Land Charges Register. On first registration, that restrictive covenant is not noted against the title to Blackacre and [the beneficiary of the covenant] applies to have the register altered to record the burden of his or her covenant. The question is whether [the purchaser] is entitled to an indemnity in those circumstances.

13.247 Dr Harpum claimed that under the present law, the purchaser is not entitled to indemnity, as there is entitlement to an indemnity only when the register is rectified, but not when it is merely altered. Dr Harpum explained that under paragraph 1 of schedule 4 to the LRA 2002, rectification is an alteration which involves the correction of a mistake and prejudicially affects the title of a registered proprietor. As the purchaser was subject to the restrictive covenants when they purchased Blackacre, they are not prejudicially affected by the alteration of the register, because it simply restores the position to what it was when the land was first acquired. Consequently, Dr Harpum considered the proposal at paragraph 13.181 unnecessary "as the matter is already covered by the present law".

13.248 Dr Cooper and the Society of Legal Scholars disagreed with our proposal claiming that there were flaws in the reasoning in the Consultation Paper.

13.249 Dr Cooper argued that the Consultation Paper is not consistent in its treatment of windfalls. He stated that the award of indemnity to the first registered proprietor is said in the Consultation Paper to be a 'windfall'; however, the proposal indicates that any rectification proceedings against the first registered proprietor would be discretionary, and so the court might conceivably decline to order rectification and allow the first registered proprietor to retain the registered estate with the benefit of priority over an omitted interest. Dr Cooper noted that this would confer on the first registered proprietor "greater wealth than he had immediately before first registration", commenting that this is a windfall in a sense, just as obtaining indemnity would be, except this windfall is in land rather than money. In Dr Cooper's view, "the reasoning behind the 'windfall' is equally applicable to rectification".

13.250 Secondly, Dr Cooper considered that the proposal would lead to "unsatisfactory effects". He argued that to retain discretionary rectification, while removing indemnity, would encourage the first registered proprietor to sell the land as soon as he or she discovered the omission of the derivative interest from the register. This would enable him or her to keep the full proceeds of sale, which could not be clawed back by HM Land Registry (assuming that the omission was not attributable to his or her fraud or lack of proper care).

13.251 Thirdly, Dr Cooper stated that, in exercising the judicial discretion in rectification cases, the availability of indemnity is frequently adverted to as a relevant factor. Therefore, if indemnity is to be unavailable to the first registered proprietor, that fact may distort the exercise of discretion in his favour when the rectification claim is being determined.

13.252 Fourthly, in the course of previous land registration reforms, Dr Cooper noted that it was understood that the first registered proprietor, having paid the registration fee, should be entitled to take advantage of the state guarantee of title just as much as any later registered proprietors. He considered that if this is no longer the understanding, the change should be explicitly justified.

13.253 Fifthly, Dr Cooper felt the negative term 'windfall' was inappropriate here. He explained that the award of indemnity exists to "serve the policy of protecting the first registered proprietor's reliance on the register". He stated that the land registration system currently protects those who rely on the register for the purpose of checking their own title after they have become registered. This, Dr Cooper argues, is clear from the rules of schedule 4 which make no distinction between mistakes in the register prior to acquisition and any other mistakes on the register.

13.254 Dr Cooper therefore considered that our proposal poses "a significant policy change", the desirability of which is not adequately addressed by concentrating exclusively on the issue of "windfall". He stated that the proposal requires fuller consideration of the circumstances in which and in whose favour the register ought to be treated as reliable. To understand the policy change, Dr Cooper said, it is necessary to consider the aims of registration. He noted that it is "beyond question" that the registration system was motivated by the aim of facilitating conveyancing and making titles more certain. This, he noted, was achieved by making the register reliable in favour of prospective purchasers. However, the registration system currently embodies a policy which goes far beyond protecting the expectations of prospective purchasers. Dr Cooper argued that the current system makes the register reliable in other circumstances and not only in favour of prospective purchasers, but also proprietors who have already acquired the land and become registered as owner:

> Dr Cooper said that the current system therefore embodies a policy of protecting reliance by proprietors on their own register, commenting that this policy will be removed by the proposal in the case of first registered proprietors.

13.255 To illustrate, Dr Cooper gave the following example:

> A prudent proprietor may turn to the register to confirm the details of his own title. There might be good reason, such as checking details of the parcel and absence of restrictive covenants before making expenditure on development work. If it later transpires that the register contained a mistake, then the registered proprietor is

entitled to oppose any adverse rectification claim, or to claim indemnity if he loses the rectification proceedings. His reliance on the register is therefore protected.

13.256 Dr Cooper stated that indemnity in these circumstances will be withheld under our proposal. The register would therefore "cease to be reliable in the eyes of the proprietor" who checks the register for details of his or her own title. Dr Cooper noted that if the register cannot be relied upon to give an accurate picture of the state of title, then prospective development and investment would be discouraged because of the possibility of wasting efforts on land that may have to be restored to another. This potential consequence is something he felt needed further consideration.

13.257 In Dr Cooper's view this proposal cannot be pursued in isolation as it would "change the current policy regarding the protection of one's reliance on one's own register". He said that while it only does so in the very narrow case of indemnity at first registration, the same type of reliance could occur equally for registered proprietors outside the case of first registration. For example:

> A second registered proprietor might have bought registered land burdened by an easement protected by notice; shortly after becoming proprietor, the easement is deleted by HM Land Registry mistake. Many years later, the proprietor checks the register to confirm his title in advance of planned development and relies on the clear register.

13.258 Dr Cooper argued that there is no basis for distinguishing the position of this second registered proprietor from the position of the first registered proprietor in the Consultation Paper example. Both proprietors might have forgotten the state of title at the time of acquisition, and both might have relied on the clear register. If the proposal is to be taken forward, Dr Cooper suggested, it requires full and explicit consideration of whether there is ever any justification for retaining the policy of protecting reliance on the registration of one's own title.

13.259 Dr Cooper noted that there are many circumstances in which the policy of protecting a proprietor's reliance on the registration of his own title after acquisition appears unmeritorious. As an example, he gave the decision in *Totton & Eling Borough Council v Caunter*,[62] which held that changing of the register to give effect to a successful appeal was rectification, which presumably would trigger entitlement to indemnity. This decision, Dr Cooper considered, effectively implies that there currently exists a policy of protecting one's potential reliance on one's own registered title even at a time when one knows it is in dispute and liable to be challenged on appeal. Dr Cooper argues that this appears to be inappropriate in light of the fact that the claimant probably did not actually view the register between the first instance judgment and the appeal, and even if he had done so he is unlikely to have actually placed faith in it when he knew there was an outstanding appeal. It is these issues of factual reliance, Dr Cooper said, that are the key to understanding why the indemnity might be perceived as a windfall. If the proposed reform is to be pursued further, it is the issue of actual or potential reliance which must be addressed.

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62 [2008] EWHC 3630 (Ch).

Expressed other views

13.260 Amy Goymour said that she had "not formed a view on this" proposal. She stated that arguably the 'priority promise' in section 11 leads the first registered proprietor to believe they are free from certain rights that would otherwise be binding on them under the rules on unregistered conveyancing. Ms Goymour was not yet convinced that the first registered proprietor should be denied an indemnity if a rectification is made that thwarts that priority promise. However, she could also see the strength of our 'windfall' argument.

FORMER OVERRIDING INTERESTS

Consultation Question 72.

13.261 We provisionally propose that alteration or rectification of the register should not be possible in respect of an interest that ceased to be overriding on 13 October 2013, where first registration or a registered disposition of the affected estate takes place on or after that date. An exception should be made, however, where on first registration HM Land Registry omitted a notice in relation to that interest that should have been entered under rule 35 of the LRR 2003, or overlooked a caution against registration.

Do consultees agree?[63]

13.262 29 consultees answered this question:

(1) 22 agreed;[64]

(2) 2 disagreed;[65] and

(3) 5 expressed other views.[66]

Agreed

13.263 The London Property Support Lawyers Group and Nottingham Law School agreed for the reasons set out in the Consultation Paper.

13.264 Professor Barr and Professor Morris agreed as this seemed the "most equitable" outcome in these particular circumstances.

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63 Consultation Paper, para 13.188.

64 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; a confidential consultee; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); Nottingham Law School; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

65 Martin Wood; Adrian Broomfield.

66 Louis Farrington; Michael Hall; Christopher Jessel; Dr Simon Cooper; National Trust.

13.265 The Society of Licensed Conveyancers agreed as to do otherwise would give "a second bite of the cherry" when the LRA 2002 already gave the holder of the interest a ten-year period to register it.

13.266 The Conveyancing Association agreed. The Association also said that the title of any subsequent purchaser in good faith for value who bought after the mistake without notice of the interest should not be rectified, and HM Land Registry should grant the indemnity to the interest holder.

13.267 Dr Harpum considered this situation will not arise very often "if at all"; however, he supported the proposal.

13.268 Howard Kennedy LLP agreed but questioned why the entry of unilateral notices should be allowed to protect such interests.

Disagreed

13.269 Martin Wood disagreed on the basis that "if the interest was omitted because of a mistake, rectification should be possible".

13.270 Adrian Broomfield was not in support of the proposal as a party may not be immediately aware that it has the benefit of such an interest: "it depends how conversant a client is with its own portfolio".

Expressed other views

13.271 Louis Farrington suggested that the LRA 2002 should be amended to clarify the position in relation to chancel repair liability. Mr Farrington stated that one of the primary objectives of the LRA 2002 was to "create a register which definitively outlines any interests affecting land and to narrow, abolish and phase out some interests after ten years." He explained that chancel repair liability lost its overriding status after 13 October 2013 by virtue of the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 and it was assumed that purchasers of properties after 13 October 2013 would only be bound by a chancel repair liability if a notice of the liability was lodged by a Parochial Church Council and registered at HM Land Registry before 13 October 2013, or where there is reference to a liability in the title deeds of unregistered land.

13.272 Mr Farrington explained that this assumption has been challenged and there are additionally some doubts as to whether or not chancel repair liability constitutes an interest that affects a registered estate for the purpose of section 132(3)(b) of the LRA 2002. Mr Farrington stated that if it were to be decided that chancel repair liability was not an interest affecting a registered estate, then it may not constitute an overriding interest and the liability may potentially continue to affect the estate indefinitely. As such, he proposed that the LRA 2002 should be amended to clarify this point.

13.273 Michael Hall considered that the proposed exception regarding the omission of a notice which should have been entered under rule 35 is not appropriate, as rule 35 provides that interests which appeared to the registrar on his examination of the title to burden the land should be noted. Mr Hall was of the view that if the registrar did not enter a note of the burden on the register at the time of first registration, this was because the existence of the alleged interest was not apparent to the registrar. As such, Mr Hall

could not see how it could be argued that, under rule 35, the registrar should be required to take another look at the title to see if he made a mistake the first time.

13.274 In respect of interests such as chancel repair liability, which Mr Hall considered not really to be interests in land at all, he noted that the LRA 2002 (Transitional Provisions) (No 2) Order 2003 was supposed to provide certainty that no such rights would bind a buyer if not registered or the subject of a caution against first registration at the time of the purchase. Mr Hall stated that it "cannot be argued" that chancel repair liability and other former overriding interests remain disclosable as overriding interests under rule 28 of the LRR 2003, and said that Form FR1 does not require former overriding interests to be disclosed.

13.275 Christopher Jessel considered that, on first registration, our proposal should only apply where a former overriding interest ceased to bind on a disposition in good faith to a disponee without notice. In particular, Mr Jessel felt that our proposal should not apply on voluntary first registration by a former unregistered owner; because the interest would have bound the land when unregistered, it should not be possible to defeat the former overriding interests simply by the accident of an owner's decision voluntarily to register title. Equally, Mr Jessel argued, our proposal should not apply where the disponee was (or ought to have been) aware of the existence of the right whether it was disclosed in Form FR1 or D1 or not.

13.276 Dr Cooper agreed with our proposal in principle but he again considered that to make a specific rule to that effect is not the best approach. Dr Cooper reiterated his criticism of our justification for not defining "mistake" as set out in previous responses.

13.277 The National Trust said it would support our proposal, provided that the indemnity provides adequate compensation to the registered proprietor, for example, covering the costs of any chancel repair liability whenever it arose in the future and not just the fall in the value of the land.

SHOULD RECTIFICATION BE RETROSPECTIVE?

Consultation Question 73.

13.278 We provisionally propose that in the case of competing derivative interests, rectification should operate retrospectively.

Do consultees agree?[67]

13.279 28 consultees answered this question:

[67] Consultation Paper, para 13.196.

(1) 26 agreed;[68] and

(2) 2 disagreed;[69]

Agreed

13.280 The Property Litigation Association, Nottingham Law School and Dr Cooper agreed for the reasons set out in the Consultation Paper.

13.281 The London Property Support Lawyers Group agreed assuming that the rules to decide who gets their interest reinstated and who gets an indemnity would still contain some in-built flexibility and fact-sensitivity, as discussed in the Consultation Paper.

13.282 The Society of Licensed Conveyancers agreed with retrospective rectification in line with *MacLeod v Gold Harp Properties Limited*[70] as the decision "appears to have been accepted".

13.283 The Chancery Bar Association considered that, although the interpretation of the LRA 2002 in *Gold Harp* may not be that intended by the authors of the Act, it should be affirmed. However, the Association considered that there remain two problems to be addressed. It stated:

(1) "If rectification, as held in *Gold Harp*, results in the relevant interest having priority over past transactions but only "for the future", when does the future begin? We consider that it should begin when the application for rectification is and should certainly not depend, as suggested in *Fitzwilliam*, on which procedure for rectification is followed".

(2) "There remain the problems of the parties' rights during [the period after the mistake but before the register is rectified]. Is the true owner who obtains rectification in due course liable for mesne profits for trespass during this period and can the wrongly registered new proprietor destroy or damage the property with impunity during this period? These problems could be neatly solved only by making rectification wholly retrospective. If the "compromise" solution in Gold Harp is affirmed, we consider it to be imperative that the court should be given discretion to provide just remedies in respect of events and transactions occurring during the period between the mistake and the application to rectify".

13.284 The Association considered that the problems outlined above would be even worse if the decision in *Gold Harp* were reversed and rectification were not retrospective at all.

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68 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Simon Cooper; National Trust; Nottingham Law School; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

69 Martin Wood; Dr Charles Harpum QC (Hon).

70 [2014] EWCA Civ 1084, [2015] 1 WLR 1249.

13.285 Similarly, the Bar Council agreed but felt that consideration should be given to how to deal with any difficulties that may arise out of what the parties have done in the period between the making of the mistake and the rectification. If changes have been made to the property in that period, or its condition has been allowed to deteriorate, there is the potential for a dispute between the owners of the two interests. At the moment there is nothing to provide the answer to the question of whether one is liable to the other for such matters. The Council also considered it possible that circumstances might occur which would give rise in equity to an estoppel, and it suggested that any final proposals should cater for this possibility (which could be through the application of the "exceptional circumstances" exception).

13.286 The Law Society agreed that rectification should operate retrospectively unless there are exceptional circumstances justifying the preservation or prioritisation of intervening derivative interests. In the Society's view, "it is not always possible to achieve a just result by the application of rigid rules".

13.287 Amy Goymour supported our proposal but made a number of points.

(1) Regarding paragraph 13.189 of the Consultation Paper, she stated that whilst our discussion of retrospectivity and prospectivity in relation to rectification and derivative interests makes sense generally, the same issue surely arises in relation to "title disputes" as well (for example, in the well-known ABC scenario). Ms Goymour considered that here there is also a need to know whether A's interest, if restored to the register, is restored with full retrospective effect.

(2) Regarding the same paragraph, Ms Goymour agreed that, if there had been a mistake, X's interest would have had priority over Y's. But she suggested that we had made a mistake where we commented (in parentheses) that Y would be entitled to an indemnity in such circumstances.

(3) Ms Goymour agreed that X's interest should have priority over Y's interest when X's right is restored to the register. However, she considered that some clarity is required on the issue of how, mechanically, this retrospective change works – especially for the operation of the trespass tort. She questioned whether the change is fully retrospective, such that X is treated as always having had a right binding on Y (such that if Y had been using the property in the meantime, X could sue him in trespass), or whether the "retrospective change" would only operate prospectively from the moment of rectification, for the purpose of trespass claims (meaning that Y is entitled to possession of the property unless and until the register is rectified), as was the approach adopted in *Gold Harp*. Ms Goymour suggested that there are two separate issues about retrospectivity that need to be addressed:

(a) whether X should obtain priority over Y's interest via rectification (what one might call "retrospectivity for the purpose of future priority"); and

(b) whether retrospectivity should operate in full in the sense that for all purposes, X's right is treated as being on the register with priority, throughout.

Amy Goymour considered that, as a matter of policy, (a) seems preferable, and attracted the support of Lord Justice Underhill in *Gold Harp*. But as a matter of legal logic, she found it hard to accept retrospectivity for the purpose of priority and not to accept it for the purpose of trespass.

Disagreed

13.288 Although Martin Wood considered that it should not be automatic that rectification will operate retrospectively, he thought that the courts and tribunal should have power to order that it shall.

13.289 Dr Harpum strongly opposed the proposal. He explained that the reason the Law Commission and HM Land Registry decided that rectification should be prospective only was two-fold.

(1) First, it was the way in which the courts had, whether rightly or wrongly, interpreted the equivalent provisions of the LRA 1925. The intention behind paragraph 8 of schedule 4 to the LRA 2002 was to put this interpretation on a statutory footing. Dr Harpum disagreed with our comment at paragraph 13.194 of the Consultation Paper that it is difficult to understand what paragraph 8 of schedule 4 is intended to do if retrospective rectification is not permitted.

(2) Secondly, it was consistent with the strong emphasis on the mirror principle set out in paragraph 1.5 of our 2001 Report, which guided much of the policy of the LRA 2002. That passage was as follows:

> The fundamental objective of the Bill is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land online, with the absolute minimum of additional inquiries and inspections.

13.290 Dr Harpum noted that although electronic conveyancing in the form visualised in the LRA 2002 will not now happen, the principle does in fact reflect the reality of everyday conveyancing; the register is treated as the title and is always relied upon. As such, he considered overriding interests “frankly obnoxious” because they are not on the registered title and detract from it as well as adding to transaction costs. Dr Harpum stated that the provisions on rectification are designed to give primary protection to the proprietor in possession. It is “a necessary evil to deal with mistakes” and becomes far more damaging if it can be retrospective, because registered dispositions may have taken place on the basis of, and in reliance upon, the register as it then stood.

13.291 Dr Harpum was unsure why we should now be “endorsing a case [*Gold Harp*] that damages one of the key principles of LRA 2002”, namely that of the register as the mirror of title and a document that can be relied upon. He felt that we did not explain why “a weakening of the principle of indefeasibility is justifiable”.

CALL FOR EVIDENCE OF PROBLEMS CAUSED BY GOLD HARP

Consultation Question 74.

13.292 We invite consultees to share with us any practical difficulties that consultees have experienced following the decision in *Gold Harp*.[71]

13.293 14 consultees answered this question.[72]

13.294 A number of consultees simply informed us that they were not aware of any examples of practical difficulties or had not experienced any themselves.[73] The City of Westminster and Holborn Law Society said there was "no obvious unfairness of outcome" but clarification of the law is desirable.

13.295 The London Property Support Lawyers Group referred to a different case, *EMI Group Limited v O&H Q1 Limited*,[74] as one that illustrates some of the issues that can arise. The court held that an assignment of a lease by the tenant to its guarantor was void. The Group noted that this assignment should have been registered at HM Land Registry, although this was not clear from the facts of the case or discussed in the judgment. In addition, an underlease had been granted and the Group said that, if the underlease itself had been registered and a charge granted over it, the complexities of unravelling the consequences of the void assignment would have been considerable. Questions were raised as to the status of a proprietor who has been registered at HM Land Registry when the assignment of the lease is void and the status of an undertenant from the assignee who had no power to grant the underlease.

13.296 The Group added that if there had been further assignment from the guarantor to a third party who had not realised that the original assignment was void, the same issues would arise.

13.297 Burges Salmon LLP, also referring to the *EMI Group* decision, noted that the consequences of a disposition being declared void cause "considerable concern" for those registered as proprietor under subsequent dispositions made in good faith following the void assignment.

13.298 Nigel Madeley referred back to his comments to a proposal in Chapter 12, in Consultation Question 58.

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71 Consultation Paper, para 13.197.

72 Property Litigation Association; Nigel Madeley; Michael Hall; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Nottingham Law School; The Bar Council; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; City of London Law Society Land Law Committee; Dr Charles Harpum QC (Hon).

73 Property Litigation Association; Michael Hall; Chancery Bar Association; The Bar Council; Chartered Institute of Legal Executives; Law Society; Pinsent Masons LLP; Nottingham Law School

74 [2016] EWHC 529 (Ch).

13.299 Finally, Dr Harpum suggested that the decision in *Gold Harp* is already giving rise to practical problems. He gave an example in which HM Land Registry fails accurately to enter a restriction on the powers of a registered proprietor X, by which the consent of Y is required to certain dispositions by X. X then enters into a transaction in favour of Z (such as a charge) that should have required Y's consent, but on which, because of HM Land Registry's mistake, there is no restriction. Dr Harpum suggested that, if it is possible to rectify the register retrospectively, Y may be able to require the determination of Z's interest. Dr Harpum said that such an outcome is contrary to another principle of the LRA 2002: the owner's powers provisions in LRA 2002, sections 26(1) and (3), on which Z is entitled to rely.

13.300 Dr Harpum did not know how this conflict would be resolved. He was aware of one such incident in practice and was of the view that more would occur. Dr Harpum argued that if rectification could not be retrospective, there would be no problem:

> It was the plain intention of LRA 2002 that Z should prevail and there should be no doubt about Z's title. The register could be rectified against X's title and that would prevent further dispositions in future by X without Y's consent.

Chapter 14: Indemnity

INTRODUCTION

14.1 44 consultees responded to the questions in Chapter 14 of the Consultation Paper.[1]

14.2 Most consultees were against imposing a cap on indemnity; as a consequence, most did not comment on the sum at which any cap should be set. Consultees expressed mixed views about whether conveyancers should be required to make a declaration that they have taken specific steps to satisfy themselves that documents relating to an application to HM Land Registry are genuine. Consultees expressed mixed, but generally negative, views about the introduction of a general statutory tort to take reasonable care in relation to applications to HM Land Registry. Perhaps because many consultees reported issues in relation to the verification of identity, consultees were more receptive to a specific statutory duty in relation to identity, but expressed concern that the scope of the suggested duty is clear. Most consultees also expressed some support for HM Land Registry to have enhanced powers in respect of identity verification.

14.3 Fewer consultees responded to the call for evidence about the significance of the indemnity scheme in lending decisions. However, most consultees did not agree that mortgagees' entitlement to an indemnity should be limited to cases where a mortgage was granted on the basis of a mistake in the register, or where the mortgagee had complied with a statutory duty to take reasonable care. In particular, consultees generally did not support treating mortgagees differently from other participants in the conveyancing process.

14.4 Although most consultees did not provide evidence of problems in practice regarding the limitation period applicable to indemnity claims, a significant majority supported our proposals to clarify when the limitation period begins to run. The majority of consultees also agreed with our provisional proposal in relation to the limitation period governing the registrar's rights of recourse, and our provisional proposal in relation to valuation of an estate for the purposes of indemnity.

14.5 A number of consultees also made general comments on the issues raised in Chapter 14 of the Consultation Paper. These comments are extracted in Appendix 1.

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[1] Martin Wood; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; CMS Cameron McKenna LLP; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Oliver Price; Christopher Jessel; London Property Support Lawyers Group; Glenn Pearce; Cliff Campbell; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Dr Tola Amodu; Dr Simon Cooper; Taylor Wessing LLP; National Trust; Nottingham Law School; City of London Law Society (Financial Law Committee); City of London Law Society (Land Law Committee); Adrian Broomfield; Society of Licensed Conveyancers; Nationwide Building Society; Howard Kennedy LLP; Dr Aruna Nair; Council of Mortgage Lenders; The Bar Council; Building Societies' Association; HM Land Registry; Graff & Redfern Solicitors; Council for Licensed Conveyancers; British Bankers' Association; Amy Goymour; Berkeley Group; Chartered Institute of Legal Executives; Burges Salmon LLP; a confidential consultee; The Law Society; Glenn Pearce.

A CAP ON INDEMNITY

Consultation Question 75.

14.6 We invite consultees' views as to whether there should be a cap on the indemnity that can be paid to a claimant following rectification of the register (or where rectification is available but is not ordered), except where the mistake that leads to rectification is attributable to fault by Land Registry.[2]

14.7 32 consultees answered the question.[3] The vast majority of consultees were against imposing a cap on indemnity.

In favour of a cap on indemnity

14.8 Dr Lu Xu was in favour of the introduction of a cap on indemnity, citing it as the "most effective" incentive for parties to be more vigilant against the rising risk of fraud.

14.9 Dr Simon Cooper felt a cap would be acceptable if it were set at an appropriate level.

14.10 The Society of Licensed Conveyancers considered that the cap could be fixed by the transaction value recorded on the register at the time of purchase, and owners could then take a decision whether or not to insure themselves against loss above this value. In the Society's view, this approach would encourage registered proprietors, supported by HM Land Registry initiatives, to take appropriate action to prevent fraudulent dispositions.

Against a cap on indemnity

14.11 HM Land Registry stated that it did not consider that there should be such a cap, without further comment. Adrian Broomfield also opposed a cap without further comment. Dr Aruna Nair disagreed with a cap for the reasons given in the Consultation Paper at paragraph 14.59.

14.12 Professor Warren Barr and Professor Debra Morris were against a cap on indemnity in principle. They considered that while there is a difference between a right to rectification and a right to an indemnity, the right to an indemnity should not be diluted and is part of the state guarantee of title.

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2 Consultation Paper, para 14.60.

3 Martin Wood; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Lu Xu; Nigel Madeley; Everyman Legal; CMS Cameron McKenna LLP; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Dr Simon Cooper; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Nationwide Building Society; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Nottingham Law School; the City of London Law Society (Land Law Committee); the Council of Mortgage Lenders; the Building Societies' Association; the Council for Licensed Conveyancers; the Berkeley Group.

14.13 Nigel Madeley was concerned that our proposal "misses the point that users have been compelled to deal with registered land". Mr Madeley considered that the risk of fraud is inherent in a system of land registration that operates an open register and encourages electronic dealings, as well as a market shift to bulk, remote conveyancing services.

14.14 Mr Madeley considered that there is more justification in increasing fees than in capping indemnity. He suggested that if HM Land Registry can identify a pattern to the types of fraudulent transaction for which it is paying, then it can do a "degree of fine-tuning its fees" to make them into a quasi-premium. Alternatively, Mr Madeley suggested reinsuring a portion of the risk, which could allow for periodic fee adjustments to reflect the amount paid in premiums.

14.15 Another solution Nigel Madeley recommended was the voluntary de-registration of titles to reduce HM Land Registry's risk. For example, home-owners and buy-to-let owners who do not intend to trade their properties could de-register to gain better security and, if need be, re-register just before selling. Overall, however, Mr Madeley questioned whether HM Land Registry does make conveyancing "easier, cheaper and quicker" by replacing deeds as the primary source of information about a title.

14.16 The London Property Support Lawyers Group did not consider that there should be a cap on the indemnity paid in the circumstances described in the consultation question. It contended that the resulting limited title guarantee for high value transactions would amount to "a defect in title" and the risk would need to be covered by insurance in the open market. This, the Group argued, would result in:

(1) a more fragmented conveyancing process;

(2) increased expense through insurance premiums and additional legal advice;

(3) a slower conveyancing process through the involvement of insurers and their legal advisers; and

(4) increased complexity (for example, in a case involving an onward sale by the insured or where there is rectification in favour of the insured).

14.17 The Group considered that the purpose served by indemnity could not be replicated through reliance on private insurance, and in particular not without a significant risk to security of title and public trust and confidence in the property market. In addition, it thought that there would a loss of economic efficiency and an adverse impact on conveyancing transactions. It therefore recommended that we discuss the impact of our proposals with indemnity insurers as they "would ultimately be asked to cover any gap between the capped indemnity and the loss suffered by the claimant", and "may not be willing to insure such losses or only do so for a substantial premium".

14.18 The London Property Support Lawyers Group also stated that it is "important to note that registration of title is mandatory". Therefore, a person has no choice but to place their title onto a public register that "opens the possibility of identity theft and the risk of registration fraud". It considered that the indemnity system "needs to take this into account and not be watered down".

14.19 Pinsent Masons LLP opposed the introduction of an indemnity cap based on the London Property Support Lawyers Group's response. The firm added that a change so fundamental a benefit of a system to which property owners have been both forced (through compulsory registration) and encouraged (through voluntarily registration) to subscribe would "strike many as disingenuous", quite apart from the potentially adverse effects on the property market and wider economy outlined in the Consultation Paper.

14.20 Burges Salmon LLP also referred to the mandatory nature of registration in its response. The firm considered that there would always be an inherent risk of identity theft when such information is made publicly available, describing this as "an inevitable disadvantage of the open register". The firm considered that attempting to place part of the risk directly on those purchasing, letting or lending on high value properties would increase conveyancing costs and delay transactions whilst insurance was sought or advisers argued over which party should take the risk. It added that there "should be no assumption" that insurance would in practice be available without obtaining confirmation from the Association of British Insurers or an appropriate industry body.

14.21 The Law Society considered that the "basic principle" should be that the indemnity fund compensates the injured party for his or her loss. It stated that mistakes fall in to one of three categories. A mistake may be –

(1) attributable to fault by HM Land Registry;

(2) a consequence of an earlier fraud; or

(3) a consequence of a completed application that in some way involves fraud.

14.22 The Society saw no reason to differentiate between these types of mistake in setting the level of compensation available. In its view, doing so would be unfair and would only serve to undermine public confidence in the integrity of the register. The Society considered that the underlying issue with mistakes of types (2) and (3) is how to tackle fraud effectively. In the Law Society's view, all that a limitation on indemnity achieves is "to shift some of the burden from one party to another"; it does not address the problem "other than perhaps serving as a stick to 'encourage' the recipient of the burden to be more vigilant".

14.23 The Society also argued that the greater opportunity for fraud on the register is one of the consequences of dematerialisation:

> The removal of a physical token, for example, a Land or Charge Certificate, means that anyone with access to a computer has the opportunity to create a fraudulent transaction which can often be very hard to distinguish from a genuine online transaction.

14.24 The Society suggested that the major stakeholders – including the Government, HM Land Registry, and conveyancers and lenders – work together to try to eliminate the openings for fraudsters, "rather than working independently and each pointing the finger at the others".

14.25 Everyman Legal felt that a cap could lead to "a lot of arguments" about whether the error was wholly or partly HM Land Registry's fault. The firm questioned whether it

would be preferable for HM Land Registry to pay the victim out and then take action against the person at fault.

14.26 CMS Cameron McKenna LLP considered that a cap on liability would do "fundamental harm to the commercial real estate market in England". The firm noted that jurisdictions compete to be able to demonstrate security and reliability of title, and the state backed guarantee is a fundamental part of the attraction of the market in this country.

14.27 Michael Hall said there does not seem to be any good reason to impose a cap, as the amounts paid out by way of indemnity are consistently under £10 million per year, which is "well within the surplus generated by the Land Registry in fees". He noted, however, that there are measures that could be taken to reduce fraud, such as requiring photographic evidence of identity to be filed and stored for future comparison.

14.28 The Conveyancing Association felt a cap is unnecessary as the cost of the indemnity is currently adequately covered by the fee order, "which should continue to be adjusted to reflect any increases in indemnity contributions necessary".

14.29 The Chancery Bar Association did not consider that there should be such a cap. The Association explained that the principle underlying land registration is that the scheme is "run on behalf of the State for providing certainty in relation to land title with insurance, funded by fees, for compensation for any errors". It could therefore see "no logical basis" for limiting the amount of compensation payable.

14.30 The Association also considered that the proposed exception for mistakes attributable to HM Land Registry could give rise to "difficult issues of fact and law", which would be the subject of litigation. Referring to points it made in response to Consultation Question 59 in Chapter 13, the Association stated that part of the problem is caused by the fact that, if a forged disposition is registered, the new proprietor will be entitled to an indemnity if the register is rectified even though neither the new proprietor nor anyone else has relied on a mistake in the register.

14.31 The Chancery Bar Association favoured making entitlement to indemnity "essentially tort-based". Indemnity would be available for loss caused by reliance on a mistake in the register; indemnity would not be premised on the fact that the HM Land Registry warrants that the register is accurate. It noted that this approach is adopted in the proposal in Consultation Question 83 below (relating to mortgagees) and stated that the approach should apply more generally.

14.32 Nationwide Building Society noted that, as the Consultation Paper provided, any cap would need to be at a sufficiently high level to ensure that most claims were met. The Building Society considered, therefore, that there would not appear to be "any additional benefits in terms of liability reduction". However, it thought that after a cap had been introduced, even if it were sufficiently high at the point of implementation, there would be concern that the cap would then be capable of being reduced in the future. Coupled with the Government's consultation on privatisation of HM Land Registry, the potential for reducing the cap gave rise to concerns, which Nationwide thought should be considered.

14.33 The Bar Council felt that a cap on indemnity "would breach the fundamental structure of the land registration system". Furthermore, the Council said that it may not be

possible to replace the protection currently afforded by the uncapped indemnity with private insurance. It explained that, even if satisfactory insurance were available, "it is only likely to be taken out when someone acquires a registered estate, and then only if that person can afford it". In practice, a large number of proprietors would be likely to be uninsured, particularly those who are most at risk of fraud, such as the elderly.

14.34 The Bar Council went on to say that if a cap were imposed on indemnity, it would have to be considered whether the alteration and rectification provisions need to be changed:

> Instinctively, whether a party will be fully compensated in the event of a rectification will affect the justice of whether it should be ordered in the first place. While the question of whether one party is insured or not would not usually affect the outcome of litigation between them and someone else, it is hard to ignore the fact that some people may not have been in a position to insure themselves against property fraud.

14.35 The Chartered Institute of Legal Executives believed a cap on indemnity would create potential unfairness, stating that discrepancies such as an increase in land value may not be covered and the consumer may not notice and put in place any top-up cover.

14.36 The City of Westminster and Holborn Law Society stated that, in principle, a cap might be set at so high a level that it is only ever relevant to extremely high-value deals. In such cases, the relevant party should be in a position to make commercial arrangements, in line with what might be appropriate for share dealings and the like. Overall, however, the Society suggested it would be better not to have a cap "so as to retain public confidence in the system of land registration". It considered that public confidence is especially important if a move to introduce electronic conveyancing is being pursued. The Society noted that nowhere in the Consultation Paper was it proposed to reintroduce any form of documentary evidence of title in addition to entries on the register, which it said would "substantially reduce the opportunity of fraudsters to deal with registered land interests".

14.37 Amy Goymour said she would err on the side of not imposing a cap. She stated that deciding the level at which any cap would be imposed would necessarily involve making "arbitrary distinctions".

14.38 Nottingham Law School said that a cap on indemnity would be "arbitrary and unprincipled" and would "undermine title guarantee". The School also expressed concern that proposal cap would undermine some of our proposals in Chapter 13, such as permitting rectification against C in the ABC scenario.

14.39 The City of London Law Society Land Law Committee opposed any cap on or "watering down" of indemnity, stating that private insurance would not be an adequate substitute and a cap might lead to a public loss of confidence in the register. It also rejected any implication that "an indemnity should be denied to a potential claimant whose conveyancer has acted in breach of such a duty and who would instead have to rely on a course of action against the conveyancer". It said that it is an important element of the indemnity scheme that an indemnity is available as a first resort.

14.40 The Council of Mortgage Lenders said that conveyancing transactions which go wrong causes losses in the millions of pounds and that its members "already experience

difficulty when seeking to reply on professional indemnity insurance". It therefore opposed the proposed cap on indemnity.

14.41 The Building Societies Association said that the amount of indemnity paid "should accurately reflect the loss caused by a mistake in the register" and that this "is a vital element of the security provided by the scheme". It also raised a concern that, if HM Land Registry were to be privatised, it might seem to have the cap reduced in future, which might lead to lenders pulling out of higher value transactions.

14.42 The Council for Licensed Conveyancers said that indemnity should not be capped as there would be a risk that compensation would not be awarded for deserving cases, resulting in unnecessary distress and hardship. It suggested that, if a cap were to be introduced, "there would need to be circumstances in which the cap could be set aside". It also agreed that indemnity should be reduced where there is contributory negligence by the claimant or the claimant's agents and expressed agreement with our comments on the guarantee of title in paragraph 14.1 of the Consultation Paper.

14.43 The Berkeley Group said that a cap "would risk undermining the principle of the title protection of the land registration system". It was particularly concerned about the prospects of a cap in the context of the Government's proposals for privatising HM Land Registry.

Other views

14.44 Elizabeth Derrington explained that indemnity is very important to HM Land Registry's customers, as it is the "tangible demonstration" of the guarantee of title. However, she noted that the distinction between rectification (for which indemnity is payable) and an alteration (for which it is not) can be subtle and difficult for customers to grasp.

14.45 Ms Derrington considered that the operation of the indemnity scheme would come under particular scrutiny in the context of the Government's (then) plans to privatise HM Land Registry. She noted that it would not be appropriate for the new owner of HM Land Registry to continue to bear the burden of indemnity payments resulting from no fault of its own as HM Land Registry currently does. On the other hand, if the Government continued to underwrite all indemnity payments, she considered there would be "limited incentive" for the new operator to maintain the accuracy and integrity of the register and to avoid mistakes.

14.46 Overall, Ms Derrington was of the view that, if a cap were to be imposed, it would be necessary to set it at a high level "to avoid damaging customer confidence".

14.47 The National Trust was concerned about the implications of any cap for conservation organisations. It explained that the land owned by many conservation organisations, such as the National Trust, is often very valuable, "not only from a cultural and conservation perspective but also in monetary terms". It stated that although financial compensation is "often unlikely" to make up for the loss of the land or an interest in land, it does enable conservation organisations either to try to reacquire the lost land or interest in land or to use the funds for other conservation work and to acquire and care for new properties.

14.48 In relation to our discussion as to whether private insurance could cover the "gap" left by a cap on indemnity, the National Trust explained that conservation organisations are often given land as a gift and so could not reduce the purchase price by the costs of the insurance policy premium. Therefore, they would be left with the "tough decision" whether to obtain private insurance using funds which would otherwise be available to carry out conservation work, or take the risk that they become entitled to the indemnity but are denied full recovery by the cap.

THE APPROPRIATE LEVEL FOR A CAP ON INDEMNITY

Consultation Question 76.

14.49 We invite consultees' views as to the level at which any cap should be set.[4]

14.50 16 consultees answered this question.[5]

14.51 The majority of consultees thought there should be no cap and did not suggest any specific sum.

There should be no cap

14.52 Many consultees responded to Consultation Question 76 by reiterating that they did not agree there should be a cap[6] or by referring to their previous responses to Consultation Question 75.[7] However, some made additional comments.

14.53 Burges Salmon LLP did not consider a cap to be "desirable". It reiterated its view that it would be better to increase registration fees for higher value properties to create a fund to meet any claims.

14.54 The London Property Support Lawyers Group also reiterated its opposition to a cap. It said that, if increased indemnity payments require additional funding, the most straightforward solution would be to increase fees on the registration of high value interests in land. However, it noted that HM Land Registry *Annual Report and Accounts 2014/15* appears to indicate that HM Land Registry's current net surplus income is more than sufficient to meet the current level of indemnity payments made.

14.55 The Chancery Bar Association repeated that it did not support a cap. However, it provided that, if there were to be one, it should be at level which "excludes almost all

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4 Consultation Paper, para 14.61.

5 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Dr Simon Cooper; National Trust; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Nottingham Law School.

6 Everyman Legal; Chartered Institute of Legal Executives; The Conveyancing Association; The Law Society.

7 National Trust; HM Land Registry; Amy Goymour; Professor Warren Barr and Professor Debra Morris.

residential properties" since it would not be acceptable for purchasers of such properties to have to insure against the risk of registration errors.

14.56 Similarly, the Bar Council opposed a cap but said that, if there were to be one, it should be set at a level above the value of most residential properties in the country, including in London and South-East of England, "as it would be unreasonable to expect homeowners to insure against fraud". The Council said it recognised that a cap at that level may not make a material difference to the cost of providing the indemnity.

Level of cap

14.57 The City of Westminster and Holborn Law Society proposed a cap of "perhaps £100,000,000 if applicable".

14.58 Dr Lu Xu stated that the level of the cap would "not need to cover most dispositions of land in full". While the existence of an indemnity fund is a matter of principle, Dr Xu considered that the operation and percentage of coverage should be a business decision that any sensible insurer would make. He gave the following example:

> There could be a blanket cap of £1 million (level 1) for all registered titles. This would cover most residential properties but some estates would exceed that. The proprietor on registration of such estates may opt to pay a premium (in increased registration fee for example) for level 2 cap of, say, £5 million. Commercial properties may even exceed that so they could be covered of up to £10 or 20 million (level 3).

14.59 Regarding his example, Dr Lu Xu stated that HM Land Registry would never be liable for more than level 3 cap because, if any company is dealing with land of such value, the company should be primarily responsible for and vigilant against problems such as fraud, "rather than expecting HM Land Registry to exhaust an entire year's worth of income on the potential problems over one parcel of land".

14.60 Dr Simon Cooper considered that if the cap is not to be limited to cases which are defined by reference to particular types of holdings, where a proprietor is likely to be able to manage the risk by other means, then the cap must be set at an extremely high level "that is beyond all standard transactions".

DECLARATION OF STEPS TAKEN TO VERIFY DOCUMENTS

Consultation Question 77.

14.61 We invite consultees' views as to whether conveyancers should be required to make a declaration on Land Registry's forms to the effect that they have taken sufficient steps to satisfy themselves that documents relating to the application are genuine.[8]

[8] Consultation Paper, para 14.72.

14.62 27 consultees answered the question.[9]

In favour of conveyancers' declarations

14.63 10 consultees were in favour of requiring conveyancers to make a declaration that they had taken sufficient steps to assess the validity of the documents relating to an application.[10]

14.64 Martin Wood considered that the proposal would "help to focus minds". Professor Warren Barr and Professor Debra Morris thought that conveyancers should do their job with all due diligence "as part of a paid, commercial service".

14.65 Dr Aruna Nair agreed, stating that the proposal would confine liability "to those who already owe a responsibility to their clients", and would exclude individuals who are not conveyancers from being held to a professional standard of care.

14.66 Elizabeth Derrington agreed it was "appropriate" to build incentives to take appropriate care into the indemnity scheme. She considered it "reasonable" to require conveyancers to certify that they have taken sufficient steps to check that the documents relating to an application are genuine.

14.67 Nationwide Building Society also supported the general principle of incentivising best practice to prevent and detect fraud. It noted that the suggestion would be in addition to the existing statutory and professional requirements; therefore, care would be needed to ensure that any additional requirements work alongside the existing requirements.

14.68 HM Land Registry believed that the suggested change "would improve the situation". It thought that conveyancers should make the proposed declaration, especially where a fraudster forges a discharge. It explained that significant payments have been made in this context in the last few years and a wrongly made declaration would assist HM Land Registry when it seeks to exercise its rights of recourse if an application is found to be fraudulent.

14.69 The Conveyancing Association agreed that conveyancers should be required to make the declaration as regards the documents for registration within their control, such as transfers and mortgage deeds. But it disagreed that a declaration should be required in respect of documents being provided to conveyancers by third parties, such as a discharge of a charge or unregistered title documents.

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9 Martin Wood; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Everyman Legal; CMS Cameron McKenna LLP; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Simon Cooper; Adrian Broomfield; Society of Licensed Conveyancers; Nationwide Building Society; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Taylor Wessing LLP; Nottingham Law School; the Council for Licensed Conveyancers; the Berkeley Group.

10 The Bar Council; Martin Wood, Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; the Conveyancing Association; Nationwide Building Society; HM Land Registry; the Chancery Bar Association; Amy Goymour; Dr Aruna Nair.

14.70 The Chancery Bar Association stated that it agreed in principle, but was not entirely happy with the wording of Consultation Question 77. It was unclear to the Association whether it is intended (a) that a conveyancer should warrant that they have taken sufficient steps, or (b) that they should declare that they have taken reasonable care. The Association stated that if (b) is correct, as it believed it to be and agreed that it should be, it should be clarified.

14.71 Amy Goymour said she would "probably support" the aims underlying the suggestion in the question; however, she noted that because she is not in practice she felt insufficiently experienced to understand the impacts of increasing the burdens on conveyancers in this way.

Against conveyancers' declarations

14.72 7 consultees argued against the imposition of further obligations on conveyancers.[11]

14.73 CMS Cameron McKenna LLP stated that without clarity as to what constitutes "sufficient steps" to verify the genuineness of documents, it would resist being required to make any declaration that such steps had been taken. The firm stated that as a conveyancer, it was "strongly opposed" to the creation of a statutory tort imposing a duty of care in respect of verifying identity.

14.74 Pinsent Masons LLP did not believe that conveyancers should be required to make the proposed declaration. It noted that the concept of whether a document is "genuine" is "amorphous" and potentially extends to matters "outside the knowledge and control of the conveyancer" who will be submitting the application to HM Land Registry. Referring to the example given in paragraph 14.64 of the Consultation Paper, the firm questioned exactly what steps the conveyancer submitting the deed of discharge could or should take in order to ensure validity of the deed if the fraudster has impersonated an actual solicitor:

> Would checking at the Law Society whether a solicitor of that name was registered as practising at the firm from which the deed appeared to have been sent suffice? Or should the conveyancer contact that solicitor to check that s/he does, in fact, act for the lender and had actually sent the deed of discharge (and, if so, that s/he was satisfied that the deed had, in fact, been executed by the lender – this second step would go beyond what Land Registry forms AP1, DS2 and FR1 currently require).

14.75 Pinsent Masons LLP explained that in the absence of any reason to doubt that the deed of discharge had been sent by a genuine firm acting for the lender, the rules of professional conduct would prevent the conveyancer from contacting the lender itself to check that the deed had been executed by it. Therefore, a conveyancer could not ordinarily be expected to do that. It concluded that this problem underlines the need for additional anti-fraud measures to be "specific and realistic" as proposed by the London Property Support Lawyers Group.

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[11] CMA Cameron McKenna LLP; London Property Support Lawyers Group; Pinsent Masons LLP; Chartered Institute of Legal Executives; Burges Salmon LLP; Adrian Broomfield; the Berkeley Group.

14.76 The Chartered Institute of Legal Executives put forward several reasons for rejecting the proposal:

(1) Conveyancers are not trained to spot fraudulent documents and they currently have enough difficulty with identity documents, in particular "genuine fraudulent documents".

(2) Often there are no documents that conveyancers see, for example, with electronic discharges. However, CILEx noted that our proposal was concerned more with paper discharges on Form DS1. It said that if our proposal were limited so that it applied where only a DS1 had been sent containing a statement that the applicant's conveyancer had checked the lender's conveyancer's status on "Find a Solicitor" and had confirmed the conveyancer acted for the lender and carried out any necessary identity checks, then that "would be acceptable". The firm stated that it considered it important to define "exactly what is needed to avoid being liable".

(3) There may be issues when the use of electronic signatures is adopted. CLIEx explained that its understanding of the proposed electronic signatures model is that a conveyancer will not be involved other than in creating a document. HM Land Registry will then send messages to the signatory, who will use the Verify system to identify themselves.

14.77 CILEx considered that this may be an opportunity to consider "radical solutions" to fraud and identification, when verification is done, by whom and at what cost. It proposed the following scenarios for consideration:

Scenario 1 – If Property Alert becomes compulsory, it would be possible to have a pre-sale search done by both the sale and purchase lawyers (to ensure no issue if one of the lawyers was not legitimate) and that would send a warning alert to a registered user. Whilst not infallible, this system would assist and be easy to use. The mere fact that this system is in place may assist in fraud prevention. HM Land Registry would need to be more proactive in promoting the Property Alert service.

Scenario 2 – When e-signatures come in, this will assist as HM Land Registry will in effect verify the documents and signatures and the person signing. Verification will occur as a two-stage process and use the Verify Service. This, combined with the approach in scenario 1, should solve most of the relevant issues and mean that our proposals are not needed. However, there would still be the potential for fraud.

Scenario 3 – This is the more radical but potentially the most effective. HM Land Registry have staff who are trained in spotting false documents. Lawyers, estate agents and lenders do not. If buyers and sellers were required to send their ID to HM Land Registry to be checked and verified and have ID checks via Verify *and* the estate agent certified that the photo ID was a true likeness, then fraudulent ID could be spotted early in the process. Land Registry could then issue a certificate which the buyer's and the seller's solicitors would send in with the AP1 and which lenders could also use.

14.78 CILEx considered that scenarios 1 and 2 as set out above could be incorporated into the scenario 3 solution. It stated that HM Land Registry could charge for this identity

verification service, which would have advantages beyond fraud prevention on the basis that –

(1) as matters stand, lawyers, estate agents and lenders all duplicate the same procedures which costs money and time;

(2) the consumer would only need to send the identity documents once;

(3) trained staff would look at the documents and validate them; and

(4) the system would have no weakest link whereas, at the moment, if a lawyer or agent is not diligent things can slip through.

14.79 Burges Salmon LLP considered that, in practice, few conveyancers could make the proposed declaration except where all documents were executed in their presence by individuals personally known to them. As such, the firm felt our proposal is "hardly ever going to be practicable". The firm argued that conveyancers should not be asked to undertake responsibility for matters outside their control. Further, in its view, the measures necessary to ensure sufficient control would severely impact on the speed and cost of transactions carried out by reputable practitioners:

> The disreputable will simply sign whatever declaration is required and no doubt will have insufficient assets or insurance to cover the loss when documents are shown to have been forged or their client a fraudster.

14.80 The London Property Support Lawyers Group said that conveyancers should not be required to make the proposed declaration. It considered the suggestion in Consultation Question 77, and the following suggestion in Consultation Question 78, to be "too broad and unquantifiable". While the Group agreed that additional measures are needed to help tackle fraud, it considered that measures should be "specific and realistic". The suggestions underlying the questions "go too far" in seeking to increase the responsibilities and duties of care of conveyancers. It also considered that the question goes "much further than is necessary" to deal with the problems sought to be dealt with in the Consultation Paper. In relation to the declaration, the firm made the following comments:

(1) Its scope is unascertainable. Conveyancers would have no clear idea of what compliance with it would entail and it would be a recipe for disputes and litigation.

(2) It potentially covers matters that are likely to be outside the control of the conveyancer making it and this would not be acceptable to the conveyancer or to their firm. Documents executed overseas would be particularly problematic. By analogy with undertakings, many firms instruct their fee earners that they should never give an undertaking to do something that is outside their control.

(3) Such an unspecific declaration and the potential liability under it would be likely to result in increased solicitors' indemnity insurance premiums and a more protracted due diligence process, as many conveyancers who are not clear as to the precise scope of their obligations will err on the side of caution.

14.81 Adrian Broomfield disagreed with the proposal on the basis that the content of the declaration is "sometimes almost impossible to establish" as the documents a conveyancer is relying on may be copies for which access to the original is "difficult if not impossible" (for example, where title documents are copies of inclosure acts and awards or held records or archives).

14.82 The Berkeley Group opposed our proposal but did not provide reasons for its disagreement. It noted, however, that solicitors already carry out identity checks to comply with money laundering regulations.

Other views

14.83 Nigel Madeley considered that our consultation question pays insufficient attention to the role played by estoppel in the validity of executed documents, as well as confuses what duty is owed and to whom. He stated that solicitors do not owe a duty to the other side in respect of documents their own clients sign, unless a duty is expressly assumed. However, it will be part of a solicitor's retainer to check documents executed by the other side. Mr Madeley argued that even if the idea is to say that the solicitor is not accepting greater responsibility than they already have, consultants and their professional indemnity insurers do not like being liable to more than one person.

14.84 Mr Madeley added that it is possible that a solicitor's liability to a client under a retainer and to HM Land Registry in tort might be different. For example, if a client demands a rush job and accepts that corners might be cut, this gives the solicitor difficulties in accepting the retainer.

14.85 Mr Madeley argued that most documents are relied on under estoppel rather than on the basis that they have been signed by the right people. Solicitors will be concerned about whether a document "looks right", because the doctrine of estoppel will not apply if it is apparent on the face of the document that it wasn't properly executed. Solicitors will not however take steps specifically to see if a particular person actually signed the document unless the document is such that this step is required, as it is, for example, with a personal guarantee or execution by a non-trading corporation. He said that HM Land Registry is equally able to see if a document "looks right", and therefore is at no disadvantage compared with the applicant practitioner: HM Land Registry will not have checked the signatory's passports and other documents, but neither will the applicant practitioner because the documents will have come from the other side (from the disponor).

14.86 Therefore, Mr Madeley considered that our proposal might give HM Land Registry "more than the solicitor's own client" and, if that is intended, it might take the liability beyond the solicitors' professional indemnity insurance and so make it "pointless". He stated that if HM Land Registry "wants more", it needs to say precisely what it requires, with no fall back on the common law, and do so in a manner that enables solicitors to make it clear that it is a HM Land Registry requirement and, however inconvenient the client might find it, they must comply.

14.87 Everyman Legal thought that the suggestion underlying the question "sounds very woolly". It stated that conveyancers already "go through hoops trying to check things which in the past would never have been questioned". Many documents are entirely out of a conveyancer's control; moreover, conveyancers are "not document analysts". The

firm also questioned what is meant by “sufficient steps”. It said that clients, especially in the corporate sector, already “get annoyed at what they see as intrusive questioning to get a transaction started” and they will not take kindly to lawyers wanting evidence that documents have been validly executed.

14.88 Michael Hall stated that normally on a sale the buyer’s solicitor must rely on the seller’s solicitor to ensure that the person who executed the transfer was entitled to do so and, in cases of fraud, the solicitors are not likely to be culpable in failing to detect any forged or fraudulently obtained documents. He said that by shifting liability to solicitors in this way, HM Land Registry would oblige buyers to purchase private indemnity insurance, which would be much more expensive than the insurance element of HM Land Registry’s fees. He argued that it is more efficient for HM Land Registry to continue to provide the indemnity and, if necessary, its fees can be increased to cover the cost.

14.89 Mr Hall proposed that another solution might be to have an identity card scheme for registered proprietors in England and Wales. He considered there is “no good reason” why this should not be the case and suggested the information could be used as follows:

> The seller’s solicitor would obtain a photograph of the seller and certify his identity on a form which would be sent to HM Land Registry. The buyer’s solicitor would also supply a certified photograph of the buyer which could be checked on any subsequent dealing with the property. Fingerprints could also be taken and used as seals, or blood or saliva samples, so that the DNA could then be checked.

14.90 The City of Westminster and Holborn Law Society said that the wording of the question (requiring “sufficient steps” rather than “reasonable care”) “suggests that in all cases some sort of step is needed such as to consider the document and the context in which it has been produced”. It commented:

> Conveyancers should do this to see if there is something giving reasonable cause to suspect that the document may not be genuine. In most cases there is nothing on the face of it to give reason for suspicion and conveyancers would take no further step in this regard. Where there is cause for suspicion about the document or the context in which it has been produced, then some investigation is needed to allay the suspicion.

14.91 The Society said that requiring a statement seems “a gimmick similar to the idea that solicitors on taking on a matter should promise to do a good job", which might give rise to unrealistic expectations. The Society also commented the proposal raises a question about what would constitute sufficient steps.

14.92 The Society considered that the “evident purpose” of the proposal is to enable HM Land Registry to recover economic loss for negligent misstatement, and this could be done by way of an explicit statutory duty. The Society argued that the way the proposal is currently worded might be interpreted as suggesting that conveyancers must prove that a document is not a forgery, as distinct from there being no reasonable cause to suspect that it is not a genuine document. However, it argued, some conveyancers may feel that there are no further reasonable steps open to them to prove that there is no forgery, for example, in cases where the document in question has not been executed in the conveyancer’s presence. Therefore, the declaration would present difficulty in relation to historic documents being submitted for a first registration.

14.93 Therefore, rather than a declaration, the City of Westminster and Holborn Law Society felt that it might be worthwhile for application forms to remind conveyancers of what is expected. However, it observed that a current difficulty is knowing what steps are reasonable in the circumstances at any particular time. It considered that our question "will not help to show how to combat modern technology that makes forgery hard to spot in traditional conveyancing practice".

14.94 The Law Society also questioned what constitutes "sufficient steps". It considered that part of the problem is the lack of an agreed verification process. Leaving the verification process vague gives flexibility, the Law Society explained, but in practice it has resulted in different interpretations, "not only between practitioners of the various professions involved in conveyancing but also between the major stakeholders". It concluded that this lack of certainty over the detail of process creates opportunities for fraudsters.

14.95 Dr Simon Cooper considered that our proposal might have merit when applied to the verification of identity, but would need further attention if applied more widely.

14.96 First, Dr Cooper argued the extent of the declaration needs to be clarified and in particular, where we refer to the "validity of the document", what aspects of validity are in issue. Dr Cooper asked whether the declaration would merely concern (checks on) the identity of the person signing the document, or whether further aspects of validity are in issue, "such as whether a purported deed is properly executed as a deed or whether a purported grant of easement passes the requirements for a valid easement".

14.97 Secondly, Dr Cooper stated that the proposed criterion ("sufficient ... to satisfy" the conveyancer) appears to be "an entirely subjective assessment of the conveyancer's mental state". He considered that there is a strong argument that the conveyancer's duty ought to be set at an objective standard of "reasonable steps" or alternatively, of steps prescribed in professional guidance. Dr Cooper said he would "strongly support" a proactive or pre-emptive duty on conveyancers to take reasonable steps to verify that a person signing or making application matches the description of the person entitled. However, he did not consider that the proactive or pre-emptive duty should extend "to any matters beyond identity verification" for three reasons:

(1) It is exceptionally difficult to identify any routine, cost-effective inquiries that conveyancers could pursue in order to detect other matters that might affect validity, such as fraud, undue influence, or misrepresentation.

(2) Regarding matters of formal or substantial validity which might be apparent from the face of the document, there is a difficulty in striking the right balance between the respective responsibilities of HM Land Registry and the conveyancer. Dr Cooper noted that HM Land Registry "is still expected to play a part in ensuring that defective applications are not registered". In cases where both HM Land Registry and a conveyancer has contributed to the loss, it would be "extremely difficult to unravel whether the conveyancer's proposed written confirmation had been broken due to the combination of contributing factors".

(3) Lastly, there has been "some judicial indication" that a conveyancer ought to take some responsibility in verifying the accuracy of representations of fact made in an application, such as one contained in Form AP1. Dr Cooper explained that, although a conveyancer is not "under an obligation to cross-examine his client

before accepting what he was told", given the nature of a client's story it may occasionally be that a conveyancer "ought to explore it in more detail".[12] If a conveyancer does not do so, he or she will have failed to demonstrate proper care.

14.98 Dr Cooper noted that the above solutions do not rule out alternative formulae which would require a conveyancer only to declare any suspicions that come to their attention, rather than take proactive steps to inquire into matters in respect of which no suspicion existed. He proposed that this could be achieved by requiring the conveyancer to confirm merely that he or she has no subjective belief or suspicion that the transaction is affected by the invalidity issues mentioned above. In issuing that confirmation, the conveyancer would not impliedly warrant that they have any inquiries into those issues.

14.99 The Society of Licensed Conveyancers provided the following combined answer to Consultation Questions 77, 78, 79 and 80. It stated that property fraud and cybercrime affecting conveyancing transactions are not so prevalent and that attempts to encourage conveyancers to 'do better' are misguided. However, the Society said that it is "not for lack of a statutory tort" that conveyancers fail, but from "insufficient and inadequate tools" to do the job:

> Many conveyancers work remotely, and never see their clients face to face. In a technology assisted world of online conveyancing transactions and registrations, they should not be penalised for working in this way.

14.100 It considered that if property fraud and cybercrime are to be curbed, then all parties – "clients, lawyers, lenders and HM Land Registry" – need to work better together and to be given the tools to do more. The Society argued that the usual identity evidence of original passports and utility bills "often prove inadequate" given the ease of obtaining stolen copies or creating passable forgeries. It noted that the "simple, but effective" method of comparing the registered proprietor's signature on the original mortgage document within the charge certificate is no longer available following dematerialisation. However, it suggested that if HM Land Registry held onto original transfers, mortgage documents, and the identity evidence of buyers in a digital format, this would provide "very useful evidence" for lawyers to determine the true owners of the property in subsequent sales.

14.101 Taylor Wessing LLP said that if the suggestion in the question were to be implemented, the duty to carry out the relevant varication should fall on both the seller's and the buyer's legal representatives. The firm stated that "the fraud that occurs is often at the seller end and not at the buyer end even though it is the buyer who makes the application for registration".

14.102 Nottingham Law School said that it supported "the idea of a declaration", but felt that "the duty should be on the client [the mortgagee or purchaser] although the performance will usually be by the legal service provider". The School suggested that personal liability on the part of the legal service provider "seems to add little beyond access to the

[12] Dr Cooper cited *Balevents Ltd v Sartori* [2014] EWHC 1164 at [174].

professional insurance fund" and referenced its general discussion of indemnity reprinted in Appendix 1.

14.103 The Council for Licensed Conveyancers said that our question should be considered further in the context of the regulatory burden already imposed on conveyancers and of "the wider use of verification declarations".

THE INTRODUCTION OF A STATUTORY TORT

Consultation Question 78.

14.104 We invite consultees' views on the following issues.

(1) Should there be a general statutory tort imposing a duty to take reasonable care in respect of the granting of deeds intended to be registered and applications made to Land Registry, as a supplement to the existing statutory rights of recourse?

(2) Should any statutory tort be imposed on all those who grant deeds intended to be registered and make applications to Land Registry, or are there any categories of person (for example individuals) who should be excluded?

(3) Other than confining a statutory tort to a duty to take reasonable care, are there any exclusions or restrictions that should apply to the scope of the tort?[13]

14.105 25 consultees answered this question.[14]

In favour of the imposition of a statutory duty

14.106 The Chancery Bar Association agreed that there should be a statutory tort as the question suggested. However, the Association had some additional comments in relation to the question. First, the Association considered that the duty should be to act in good faith as well as to take reasonable care. Secondly, it did not consider that any category of person should be excluded from this duty. Thirdly, the Association did not consider that there should be any exclusions or restrictions affecting the scope of the tort beyond those applicable to torts generally. Fourthly, it argued that consideration should be given to imposing a similar duty on those who submit deeds and applications to HM Land Registry. The Association saw "no reason in principle" why the proposed statutory duty should not be extended in this way, although it recognised that there are strong arguments against it, such as problems of professional privilege or the risk of a

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13 Consultation Paper, para 14.80.

14 Martin Wood; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Simon Cooper; Adrian Broomfield; Nationwide Building Society; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Taylor Wessing LLP; Nottingham Law School; the City of London Law Society (Land Law Committee); the Building Societies' Association; the Council for Licensed Conveyancers.

flood of claims by one party against another party's lawyers. Lastly, and on a related matter, the Association believed that section 77 of the LRA 2002 (which it said causes many problems) should be amended as follows:

(1) the test of not exercising rights "without reasonable cause" should be replaced, in line with the proposed new tort, with a duty to act in good faith and with the exercise of reasonable care;

(2) the duty should be extended to the making of applications to the registrar; and

(3) it should be made clear that the damages recoverable for breach of the duty are in accordance with usual tort measures.

14.107 HM Land Registry responded to the three limbs of Consultation Question 78 as follows:

(1) HM Land Registry agreed with the first limb, noting that registrars need to rely upon the validity of the documents presented to them and that any document sent to HM Land Registry should be correct and genuine, and the relevant checks and care should be taken to ensure that is the case. HM Land Registry stated that it considers this an important support for its existing rights of recourse.

(2) HM Land Registry's view was that anyone who carries out the activities described in the second limb should be subject to the suggested duty. It explained that most applications are lodged by conveyancers who, HM Land Registry believes, will be best placed to check the validity of the documentation including the identity of their clients. Furthermore, in the case of a conveyancer, the relevant duty should be a duty to take reasonable care.

(3) Regarding the third limb, HM Land Registry said that, in the case of a non-conveyancer, the duty should be confined to cases in which deeds are executed or applications made with an intent to defraud or create a mistake in the register. It also noted the new duty should be an addition to the provision in section 124(1) of the LRA 2002.

14.108 The City of Westminster and Holborn Law Society responded to the three limbs of the question as follows:

(1) It expressed support for a duty to take reasonable care regarding the coming into existence of new deeds intended to be registered and the associated applications to HM Land Registry, provided that there are practical criteria as to what reasonable care is expected. The Society considered that care would most likely to relate to verifying identity. It said that although a minority of conveyancers who are themselves involved in fraud or simply reckless may not change their ways. However, most conveyancers could enhance protective measures and conscientious firms "will tend to over-comply". The Society additionally noted that if a conveyancer has carried out a proper verification of identity for their client and there is nothing which reasonably gives rise to suspicion, he or she "cannot sensibly proceed on the supposition that everything the client says may well be lies".

(2) The Society considered that unless clients are themselves fraudulent or reckless, then doubtless they will expect conveyancers to ensure that clients are not exposed to this liability and so it will be for conveyancers to ensure that reasonable care is taken. The Society did not see that particular categories of person should be excluded apart from persons affected by mental disability.

(3) Lastly, the Society considered the scope should be limited to what is reasonable for conveyancers or others involved to do. It should not extend to "what theoretical steps are considered by others to be possible" but which would not be reasonable conveyancing practice, such as handwriting analysis. Additionally, the extent of which investigations might be made should also be subject to practical considerations, for instance if relevant previous conveyancers are retired or dead.

14.109 Amy Goymour was generally in favour of the duties suggested in the question. However, she said that her views were tentative as, not being in practice, she was "insufficiently familiar with the potential impact of the proposed statutory duty of care on conveyancers".

14.110 The Council for Licensed Conveyancers agreed that HM Land Registry "should have a direct right of action" against those who fail to take reasonable care in granting deeds intended to be registered or in making applications to HM Land Registry where loss results (subject to principles of mitigation and remoteness). It suggested that the new statutory duty should not be restricted to a duty of care in relation to identity, "on the basis that this would be included within the wider statutory duty".

Against the imposition of a statutory duty

14.111 Professor Warren Barr and Professor Debra Morris thought that these changes would be "likely to add as much confusion and concerns as it solves". They considered that the declaration suggested in Consultation Question 77 may be enough to change behaviour and so did not think the importation of a discrete duty of care was needed.

14.112 The Conveyancing Association did not consider a statutory tort necessary due to the existing regulations and obligations on conveyancers, such as the duty to identify their clients and act in their best interests.

14.113 Adrian Broomfield similarly argued that this duty should already be part of the solicitor's retainer in relation to his or her client, though he noted this will not necessarily help the registrar. Mr Broomfield said that he could not think of any justifiable exceptions or exclusions to which the duty of reasonable care should be subject.

14.114 The London Property Support Lawyers Group considered that there should not be a new general statutory tort along the lines described as it would be "far too wide" and "go much further than is necessary" to deal the relevant issues under the current law. It noted that there are already existing rights of recourse against conveyancers who do not take proper care, including the statutory rights to recover indemnity payments in paragraph 10 of schedule 8 to the LRA 2002. Furthermore, it noted that case law is also extending the duty of care owed by conveyancers (for example, in *Purrunsing v A'Court*

& Co (a firm)[15]). It stated that existing rights coupled with the more specific solutions suggested in Chapter 14 of the Consultation Paper seem to be preferable to the sledgehammer approach of a new general statutory tort.

14.115 The Group also strongly disagreed with the implication that an indemnity should be denied to a potential claimant whose conveyancer has acted in breach of such a duty and who would instead need to rely on a claim against their conveyancer. It argued that this is contrary to a key principle of the current indemnity scheme, that an indemnity is available as a first resort, and the Group considered that this key feature should be retained whatever proposal is adopted.

14.116 Dr Aruna Nair stated that there should not be a statutory tort of this kind. She argued that a person who grants a deed should not come under a duty of care to HM Land Registry other than the ordinary duty to avoid actual misstatements as "it would be too burdensome to impose a broader duty of this kind on all applicants", and the consequences for the availability of the indemnity would be "unfortunate". Dr Nair said that in order for the register to be reliable, indemnity should be available "as a default" where a person suffers loss by reason of mistakes in the register. Cases where HM Land Registry does not have to indemnify a person who has suffered loss should be limited to situations of fraud or gross negligence. The common law duty of care, and rights of statutory recourse, should be a matter between HM Land Registry and the wrongdoing conveyancer: "it should not affect the immediate availability of the indemnity in favour of the individual".

14.117 The Bar Council had "serious reservations" about our question. It anticipated that HM Land Registry's position would be adequately protected in most cases by the statutory tort underlying Consultation Question 79 below. The Bar Council did not understand what a duty to take care "in respect of the granting of deeds" would amount to, nor what mischief it is directed at. It considered that there is no reason why grantors of deeds should be subject to any duty to HM Land Registry when dealing with their own property, and if the role of the duty of care is to provide a right of action against those who forge deeds, "then it should expressly say so". It said:

> The duty of the conveyancer would in the ordinary case amount to a duty to take reasonable care to verify that grantor of the deed is the person who is entitled to deal with that property: that is adequately provided for in the proposal below. We are concerned that an unnecessarily wide statutory duty could lead to unintended consequences.

14.118 The Council also had "deep reservations" about the right to an indemnity being limited where the claimant has a right of action against his or her conveyancer. It argued that the "great advantage" of the indemnity scheme is that it is "simple and risk-free in its application". However, this will not be the case if the claimant must embark on what may be "difficult and protracted" litigation against his or her conveyancer in order to achieve full compensation.

14.119 The Chartered Institute of Legal Executives did not think there should be a general statutory tort. But it said that if a new tort is introduced, the standard of care required

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15 [2016] EWHC 789 (Ch).

should be specified. It suggested that Form AP1 could be amended to provide that each party must be represented by a different lawyer and that each lawyer must have been identified on 'Find a Solicitor' or elsewhere as stipulated. Furthermore, the lawyers could be required to confirm they have identification for their client. CILEx also noted that we did not appear to have taken HM Land Registry's trial e-signature process into account.

14.120 In relation to the other elements of Consultation Question 78, CILEx stated that "there should be no exemptions" and "reasonable care should be defined as above".

14.121 Burges Salmon LLP disagreed with the first limb of the question. In relation to the second and third limbs, the firm said it did not consider such a statutory tort appropriate. It stated that the system of registration of title is underpinned by the state guarantee and therefore, that recourse in the first instance is to the state, not to the conveyancing professional who may or may not be able to meet the claims if they are proven.

14.122 The Law Society responded to the first and third limbs to say that if the intention of the proposal was to give HM Land Registry the ability to pursue the actual culprit then the Society could see merit in this. However, it cautioned against creating a general duty of care extending to everyone else. Additionally, it noted that for the suggestion underlying the question to be acceptable and workable, it would require HM Land Registry to be specific as to its requirements rather than to talk in aspirational terms such as "reasonable care", otherwise the Society would not be in favour.

14.123 In relation to the second limb, the Law Society did not agree that a fraudster who "acts for himself or holds himself out as a conveyancer" should be able to escape.

14.124 Dr Simon Cooper did not agree with the first limb of the question. He noted that the current guarantee system operates on the basis of the indemnity fund having "unfathomably deep pockets, spreading losses extremely widely over all property transaction participants, and low centralised costs of its administration". Introducing a statutory tort would, in Dr Cooper's view, disrupt the efficiency of that system as the statutory tort would be far broader than the current rights of recourse and would require costly litigation to test the boundaries of the tort in "an endless variety of highly diverse fact scenarios". He argued:

> Expanding the ways in which the indemnity fund can shift a loss from the fund to an outsider could cause a serious increase in the cost to society and a serious increase in the cost of the administration of the guarantee system. It should be resisted.

14.125 In relation to the second limb, Dr Cooper was of the view that the statutory tort should not be imposed. However, if the proposal for a statutory tort were to be pursued, he considered it should be restricted. By referring to a reasonableness standard, he noted, the statutory tort would presuppose that the person involved had familiarity with the standards required in registered conveyancing. It should therefore apply only to those who should be expected to commit the resources to obtaining that familiarity – such as those who provide conveyancing services in a business capacity, which would, by definition, exclude lay persons.

14.126 Nottingham Law School said that it did not support the creation of new statutory torts and preferred an approach based upon "prudential duties", as explained in its general discussion of indemnity reprinted in Appendix 1. However, the School said that it would

support the introduction of "a statutory declaration of standards of conduct that would satisfy the demand of due care". Absence of due care could be taken into account in considering whether to rectify the register, whether to pay an indemnity and how much to pay. The proposed statutory declaration would also require that reasonable steps had been taken to ensure that all documents submitted were genuine and that the identity of the parties had been confirmed.

14.127 The City of London Law Society Land Law Committee suggested that, rather than introducing a new statutory tort, we should introduce extra statutory rights of recourse in relation to breaches of identity requirements. But the Committee said that "the conveyancer should only have a liability where the identity requirements relate to the conveyancer's own client".

Other comments

14.128 Nationwide Building Society said it would support steps being taken to look at ways in which identity fraud can be further prevented, including a collaborative approach between HM Land Registry, lenders and conveyancers to help detect identity fraud. It noted that any new requirements would need to work alongside the existing requirements.

14.129 Nigel Madeley questioned who would be bound by the "duty to take reasonable care in respect of the granting of deeds". Secondly, he said that suggestions underlying the Consultation Paper questions would place a significant burden for identity checks on solicitors "solely because they submit the application to the registry". He questioned why other industry players, such as banks and estate agents, were excluded. He commented that if online agents take over from local agents, "no-one will see the client". Mr Madeley queried whether the online system is safer and brings more benefits than one based on personal contact.

14.130 In response to both Consultation Questions 78 and 79, the Building Societies' Association asked us to consider the degree to which our proposals overlap with existing professional duties on conveyancers. It said that it broadly supported strengthening the powers of HM Land Registry but was unsure that this would add anything to the current professional and regulatory duties on conveyancers to check identity.

Concerns as to the extent of the duty

14.131 Michael Hall felt it was unclear in what circumstances it is envisaged that a conveyancer would be liable for the statutory tort. He noted that if HM Land Registry required transfers and charges to be executed in the presence of a solicitor, a solicitor who signed as a witness on a transfer or charge without having actually witnessed the signing or taking reasonable steps to check the identity of the signatory would be liable under the existing law. However, Mr Hall questioned whether it is not reasonable to assume that a client is honest and that a deed, which has been returned to the solicitor signed and apparently witnessed by a responsible adult who has given his or her name and address and occupation, is genuine.

14.132 Mr Hall stated that if additional requirements are to be imposed to reduce the possibility of fraud this should be done explicitly, as creating an unnecessary and unclear statutory tort will only cause confusion. He also considered it "wrong in principle" to exempt clients

from liability and to impose the liability on their solicitors when the client may be acting fraudulently and the solicitor is innocent of any wrongdoing.

14.133 Taylor Wessing LLP said that there is "great concern" about what steps conveyancers will be required to take. The firm said that "an obligation to take reasonable steps could leave too much open to question"; rather "there ought to be a definitive list". The firm was also concerned in general about "rolling the indemnity back at the conveyancer", as the professional indemnity insurance of high street solicitors may not be sufficient to cover the risk.

Limitations of the duty

14.134 Martin Wood said that he would "prefer a specific duty relating to identity", as this "focuses on the real problem".

14.135 In contrast, Everyman Legal questioned the necessity of such a tort if it would only apply in the case of fraud.

14.136 Christopher Jessel also felt it was unclear why the tort should be specific to deeds. He noted that, although paragraph 14.64 of the Consultation Paper refers to the discharge of a mortgage and although Form DS1 is a deed, section 107 of the Law of Property Act 1925 only requires a receipt in writing. Similarly, he stated, whatever the position for Form AS1, section 36(3) and (4) of the Administration of Estates Act 1925 only require an assent to be in writing and these will be relevant to first registrations.

A SPECIFIC STATUTORY DUTY CONCERNING THE VERIFICATION OF IDENTITY

Consultation Question 79.

14.137 We invite consultees' views on whether, as an alternative to a general statutory tort, there should be a specific statutory tort imposing a duty of care in respect of verifying identity.[16]

14.138 22 consultees answered this question.[17]

Support for a duty limited to identity-checks

14.139 A number of consultees were supportive of a duty of care limited to the verification of identity.[18] The Law Society commented that this narrower version of the duty would be "easier as to the specifics" to implement than the first limb of Consultation Question 78.

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16 Consultation Paper, para 14.85.

17 Martin Wood; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; CMS Cameron McKenna LLP; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Dr Simon Cooper; Adrian Broomfield; Nationwide Building Society; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Nottingham Law School; the Building Societies' Association.

18 Martin Wood; Dr Simon Cooper; Nationwide Building Society; The Bar Counsel; Law Society.

14.140 Dr Simon Cooper felt that the proposal would "encourage care in a specific and controlled way", noting that similar requirements are already familiar to conveyancers through client due diligence obligations.

14.141 Nationwide Building Society were supportive provided that any new arrangements worked alongside existing requirements.

Support for a wider duty

14.142 Amy Goymour was, on balance, in favour of a general statutory tort (as outlined in Consultation Question 78), rather than a specific identity-check-related tort.

14.143 Nottingham Law School supported a duty in relation to identity checks as part of a wider duty as set out in its response to Consultation Question 78.

Opposition to a duty limited to identity-checks

14.144 Professor Warren Barr and Professor Debra Morris reiterated that such a change would be "likely to add as much confusion … as it solves". They also considered that the declaration in Consultation Question 77 may be enough to change behaviour.

14.145 Dr Aruna Nair disagreed on the basis that the availability of indemnity should be protected.

14.146 Adrian Broomfield felt that the verification of identity was "cumbersome enough already" under the anti-money laundering regulations and other, similar requirements. In his view, any change would "inevitably just push up costs".

14.147 Burges Salmon LLP was opposed, but said that, if the identity requirements were rationalised, provision could be made "to impose responsibility for loss resulting from a conveyancer's failure to comply with those identity requirements in respect of their client".

14.148 Everyman Legal was concerned that enhanced identity check requirements might "render some classes of people … unable to take part in commerce", citing as an example older people with neither passports nor driving licences.

14.149 CMS Cameron McKenna LLP said it would resist being required to make any declaration that sufficient steps had been taken without clarity about what "sufficient steps" to verify the genuineness of documents would be. Generally, as a firm engaged in conveyancing, CMS Cameron McKenna said it was "strongly opposed" to the creation of a statutory tort imposing a duty of care in respect of verifying identity.

Other comments

14.150 Nigel Madeley generally considered that the only way in which documents could be safely signed would be to –

> collect all participants from their home addresses in a Black Maria, checking their passports and utility bills, and so on, on entry and only letting them out to sign the documents, which they would have to do together.

14.151 Mr Madeley questioned who would be under the duty in relation to verifying identity and which steps could be left out of this "Black Maria standard" while still ensuring that reasonable care had not been taken. Mr Madeley also asked how this duty would compare to the steps solicitors are required to take by the SRA. He wondered if satisfying the tortious duty would mean that the solicitor was regulatorily compliant. Overall, he thought that our policy requires more thought.

14.152 Michael Hall felt it is not necessary to create a statutory tort as there is sufficiently wide liability under the existing law of negligence.

14.153 The City of Westminster and Holborn Law Society considered it "probably more practicable" to confine the statutory tort to care in respect of verifying identity, having regard to the existing obligations regarding money laundering and the proceeds of crime.

14.154 The Chartered Institute of Legal Executives also said that if a duty were imposed, it should be stated what is needed to comply with that duty. In its view, the anti-money laundering regulations and enhanced due diligence requirements already deal with this adequately. However, it noted that these requirements are not laid down formally and said it would have no objection to them being laid down, provided that they do not go beyond the current limits set by legal regulators.

14.155 The Conveyancing Association believed that verification of identity is currently completed by many parties, but in a superficial way. It argued that it would be far better for one party, namely HM Land Registry, to complete the verification of identity in a robust way at the outset of the transaction. The Association considered that HM Land Registry's plans for digitised signatures would achieve this, and would also enable the service of notice of the disposition on the registered proprietor, which may help identify fraud early on.

14.156 The London Property Support Lawyers Group did not agree that there should be "such a specific statutory tort". It proposed that a better alternative would be to add another limb to paragraph 10 of schedule 8 to the LRA 2002 to include a right of recovery against a conveyancer in respect of any loss caused by the conveyancer's failure to comply with the rationalised identity requirements. This, the Group considered, would be "fairer and less complex".

14.157 Nevertheless, if such a tort were to be introduced, the London Property Support Lawyers Group said it should be limited to verifying the identity of the conveyancer's own client, and should not operate as a limitation on the availability of an indemnity to a claimant whose conveyancer has acted in breach of the duty. The Group considered that a client should not be required to bring an action against their conveyancer, as this is contrary to a "key principle" of the current indemnity scheme – that an indemnity is available as a first resort. In its view, this key feature should be retained whatever policy is adopted.

14.158 Chancery Bar Association doubted the value of the suggestion outlined in Consultation Question 79 in view of "the ease of obtaining false identification".

14.159 HM Land Registry said that the identity of the parties is a "critical element" of any application. It explained that its view was that a duty in respect of verifying identity is

required to help in the prevention of identity and registration fraud. HM Land Registry explained that the problem it faces is that it is not, necessarily, only a question of the veracity of the identity of the client or applicant that is relevant. For example, it might be the discharging lender who is not represented at all. HM Land Registry believed that the duty already exists in respect of identity confirmation and, therefore, the proposal should not be a replacement for a general duty, "though it might usefully add to the piece". To clarify, HM Land Registry said that its view was, first, that the duty would need to be in respect of verifying that the identity of the client is one and the same as the registered proprietor; and, secondly, the duty should not be confined to individuals, but there should also be a duty of care in respect of verifying the identity of corporate clients and signatories.

14.160 The Building Societies' Association's comments in response to Consultation Question 79 were set out under Consultation Question 78 above.

CALL FOR EVIDENCE REGARDING IDENTITY-CHECKS

Consultation Question 80.

14.161 We invite consultees to share their experience of any difficulties they have experienced with current requirements in respect of verifying identity and whether they consider that the requirements could usefully be rationalised.[19]

14.162 17 consultees answered this question.[20]

A need for rationalisation

14.163 The London Property Support Lawyers Group considered that the current requirements in respect of verifying identity could usefully be rationalised, and this "would give clarity and a greater degree of certainty as to what is required". In turn, the Group anticipated that this would speed the conveyancing process and would encourage compliance. However, it considered that it should be a case of rationalising existing requirements: it should not be used as an opportunity to impose additional burdens and duties on conveyancers. Additionally, the Group noted that any new process or checklist introduced should be "realistic and workable in practice".

14.164 As to examples of difficulties experienced in relation to current identity requirements, the London Property Support Lawyers Group explained that several of its members had experienced "real problems" in relation to identity checks for attorneys who sign on behalf of a company. It suggested that confirmation from the company that an attorney is duly authorised should be sufficient in these circumstances.

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19 Consultation Paper, para 14.91.

20 Elizabeth Derrington; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Adrian Broomfield; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; City of London Law Society (Land Law Committee); the Council of Mortgage Lenders.

14.165 Pinsent Masons LLP said it would "certainly welcome" the requirements being rationalised as, in practice, the current requirements can cause difficulties and confusion where an unrepresented lender is discharging a charge by Form DS1 on a sale of the property. In this situation, the firm said, it is sometimes easiest for the buyer's conveyancers to rely on a statement given by the seller's conveyancers that they are satisfied that sufficient steps have been taken to verify the identity of the lender and that it is the registered proprietor of the charge (a "sufficient steps statement"). The conveyancer will then make the corresponding sufficient steps statement to HM Land Registry on the application form. This, the firm stated, is often "the only practical way" to deal with requirements where there is no realistic prospect of obtaining identity evidence for the lender in Form ID2. An alternative would be to require the seller's conveyancers themselves to prepare a separate application for the discharge in Form DS2; however, the firm noted that this can cause logistic difficulties where the buyer's application to register the transfer (and possibly a new charge) is to be submitted electronically via e-DRS.

14.166 Pinsent Masons LLP said that HM Land Registry Practice Guide 67[21] gives no indication as to the sort of steps HM Land Registry expects conveyancers to have taken before making a sufficient steps statement in relation to a party for whom they do not act. In particular, it does not state that conveyancers may make a sufficient steps statement on the strength of a sufficient steps statement made to them by another conveyancer involved in the transaction who is in direct contact with the relevant party (the seller's conveyancers in the scenario above). The firm considered that it would be helpful if the Practice Guide, if not the underlying legislation itself, could confirm that this is an acceptable course of action in principle.

14.167 HM Land Registry highlighted that "registration fraud invariably involves some form of impersonation and forgery of documentation", including identity documentation. It therefore supported the proposal to rationalise the requirements for verifying identity and to define a minimum standard. HM Land Registry considered that it should be for it, by issuing directions, to rationalise those requirements and/or set the minimum standard.

14.168 Amy Goymour noted that, whilst she had no practical experiences to share, she certainly agreed that the identity verification requirements could usefully be rationalised.

Experience of difficulties

14.169 Elizabeth Derrington, the Independent Complaints Reviewer for HM Land Registry, said she had investigated "a number of complaints" from HM Land Registry's non-professional customers about the arrangements currently in place for identity checks. The customers argue that the requirements force people who specifically do not wish to use conveyancers to go to conveyancers for identity checks, and moreover that the rules are far more restrictive than those for other important processes, such as passport applications. Ms Derrington said she has suggested that it would be appropriate for HM Land Registry to look again at its identity-checking arrangements to see whether it could make them simpler without compromising robustness. She agreed with the proposals

[21] HM Land Registry, *Practice Guide 67: Evidence of identity: conveyancers* (January 2018).

for rationalising and strengthening the requirements for identity checks and hoped that this would "extend to arrangements for people who do their own conveyancing".

14.170 The Conveyancing Association said that the verification of identity is an "ongoing issue" due to "the reticence of citizens to providing evidence of their identity and the perceived competition in cost". It said many parties verify identity using documents rather than more robust electronic identification because electronic identification would have to be charged to the client as a professional charge, making the conveyancer appear less competitive.

14.171 The Association stated that HM Land Registry's current practice of rejecting a transferor's signature causes "significant stress at an inappropriate point in the process". It considered that this problem would be resolved by HM Land Registry verifying the identity of all parties prior to completion.

14.172 The Chancery Bar Association said its experience suggests that the identification requirements are "costly and fairly ineffective". The Association was aware of a case where an identity fraudster seeking to refinance had changed his name by deed poll and produced documentation, partly false and partly genuine, which all looked entirely credible.

14.173 Adrian Broomfield noted that not all parties necessarily have driving licences and passports and, with utility providers increasingly encouraging paperless billing, obtaining other satisfactory forms of identity is becoming more cumbersome. He suggested that perhaps the establishment of an agency which could do this for a small fee would be helpful, suggesting something similar to the operation of credit score agencies.

14.174 The Chartered Institute of Legal Executives stated that foreign nationals and foreign companies are an issue. It stated that there can also be issues with older people who do not have "acceptable" ID. It noted that the list in the CML handbook can cause issues due to its three-month rule, and also because utility bills are now often produced online which does not meet the current CML guidance.

14.175 Burges Salmon LLP highlighted attorneys and unregistered parties as sources of difficulty. It explained that it is difficult to find a firm prepared to verify Forms ID1 and ID2 since they cannot charge a reasonable fee for the time necessary to carry out the work properly and to open a file to record that fact for future reference. The firm itself confirmed it would not verify a Form ID1 or ID2 except for an established client.

14.176 The Law Society noted that there are difficulties in acting for new clients who do not want to have face-to-face meetings or for young people who have not yet built up a financial track record. It considered that comprehensive practical guidance that is regularly updated may assist with this issue, giving the CML Handbook as a "good example" of a central repository of specified standards.

14.177 The City of London Law Society Land Law Committee said that members of its member firms had encountered problems with identity checks for attorneys who sign transfers on a company's behalf. It suggested that legislation should confirm, in relation to identity checks, that if a company is represented by a conveyancer, the conveyancer "is also

deemed to represent attorneys who are signatories for the company of the relevant document".

Other comments

14.178 Everyman Legal did not mention having experienced any difficulty. However, it commented that the increased use of paperless billing is rendering this part of the process "increasingly a joke", as the client prints out their own paper bill from online accounts to use as proof of identity. The firm stated, "there is nothing authoritative about it at all".

14.179 Michael Hall said that it is often the case that clients are not able to produce any photographic evidence of identity, as only passports and driving licences are acceptable and there is no obligation on anyone to hold either. He noted that older clients in particular are often able only to produce a senior citizen's public transport pass.

14.180 The City of Westminster and Holborn Law Society said it doubted if rationalisation can be driven just by land registration because requirements regarding money laundering and the proceeds of crime are influenced by European and international arrangements. Additionally, various lenders have specific requirements as part of their instructions to solicitors and "often conscientious firms tend to over-comply with customer due diligence".

14.181 The Council of Mortgage Lenders said that it had been discussing with the legal sector in England and Wales some potential changes to the CML Handbook to provide one unified set of instructions regarding identity and signatory requirements.

A POWER TO ISSUE DIRECTIONS REGARDING IDENTITY CHECKS

Consultation Question 81.

14.182 We invite consultees' views as to whether, in principle, Land Registry's powers in respect of identity checks should be enhanced to enable the registrar, through Directions, to provide mandatory requirements in respect of identity verification, including provision for electronic verification of identity and sub-delegation.[22]

14.183 23 consultees answered this question.[23]

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22 Consultation Paper, para 14.101.

23 Martin Wood; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Christopher Jessel; Chancery Bar Association; Pinsent Masons LLP; Adrian Broomfield; Nationwide Building Society; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Nottingham Law School; the Council of Mortgage Lenders; the Berkeley Group.

In favour of enhanced HM Land Registry powers

14.184 Several consultees agreed with our proposal without providing any substantive further comments.[24]

14.185 The Conveyancing Association agreed, stating that it believed such powers will need to be needed in any event to facilitate digital signatures.

14.186 Pinsent Masons LLP supported the proposal in principle "both in the interest of certainty and for the reasons at paragraph 14.96 of the Consultation Paper". \In particular, it said the scope it would allow for identity information to be stored and used for future transactions. However, it said that any such enhancement of powers must be subject to the safeguards referred to at paragraph 14.98 of the Consultation Paper, and also subject to the further scrutiny of individual requirements referred to at paragraph 14.99 being practically achievable whether HM Land Registry continues to operate as a public body or its operations are transferred to the private sector. It was concerned that, within the private sector, individual decisions would not be subject to judicial review. It said:

> The use of an electronic system based on identity checks carried out by a third party along the lines of Verify would appear to be a sensible option going forward.

14.187 Nationwide Building Society also supported the enhancing of HM Land Registry's powers in relation to identity checking in principle. It could see some benefits of the use of Verify or a similar model.

14.188 The Law Society said it would support "the ideal" of enabling HM Land Registry to specify mandatory requirements, which would need to be standardised across all transactions and clearly defined so that there could be no uncertainty that they had been met. The Society argued that imposing a system of additional requirements after an application had been lodged would be unacceptable, especially where the conveyancer was acting for two or more parties (such as a buyer and mortgage lender).

14.189 HM Land Registry strongly supported this proposal. It reiterated that registration fraud invariably includes some form of impersonation, whether of the seller, buyer, lender, or conveyancer involved in the transaction. Therefore, it is "imperative" that HM Land Registry is given the powers necessary to increase the level of verification it can require in respect of those who deal with it.

14.190 The Chancery Bar Association said it could see no objection to this proposal, but noted that "it should not be seen as providing any guarantee against fraud".

14.191 The Council of Mortgage Lenders said that "in principle" it supported giving HM Land Registry enhanced powers in relation to identity checking. It noted that it had previously spoken to HM Land Registry about the use of Verify and that its members could see some benefits in using that model. But the Council was keen that HM Land Registry should consult stakeholders before introducing new requirements so that stakeholders

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[24] Martin Wood; Elizabeth Derrington; Professor Warren Barr and Professor Debra Morris; Michael Hall; Amy Goymour; Chartered Institute of Legal Executives.

could check how they would work with the existing requirements on property and financing professionals.

Against enhanced HM Land Registry powers

14.192 Everyman Legal was opposed "on principle" to this suggestion. Burges Salmon LLP simply stated that it did not agree and Adrian Broomfield was not convinced of the need for such a provision at present.

14.193 The City of Westminster and Holborn Law Society had concerns about HM Land Registry's ability to "make its own law", which it considered to be all the more important in light of the Government's privatisation proposals at the time. It said that, contrary to what is indicated at paragraph 14.94 of the Consultation Paper, checks apply not just to personal identity, such as passports or photocard driving licences, but also to an individual's address using utility bills and electronic searches.

14.194 The Society said it is understandable that conveyancing has been facilitated by measures which remove some past degree of protection, such as the abolition of Land Certificates and, recently, facilitating online applications with scanned certified copies rather than lodging original documents. It explained that clients expect to be able to deal simply with their own properties with the assistance of the conveyancers who are required to do identity checks and, therefore, it would be absurd to require the client to be interrogated online for verification of identity by "some company" (HM Land Registry's successor) under a process geared to whether someone is allowed to access information on computer. The Society argued that this would "obviously hinder conveyancing" and make it more expensive, by duplicating existing controls through conveyancers. It added that presumably the process would not be immune against expert fraudsters.

14.195 The London Property Support Lawyers Group did not agree that HM Land Registry's powers in respect of identity checks should be enhanced in this way. It feared that there is a risk that HM Land Registry would introduce "new mandatory requirements that would be far too burdensome and unrealistic" in a commercial environment, and would also "go too far in shifting liability to conveyancers and lenders". The Group was additionally concerned that this risk would increase if HM Land Registry operations were moved to the private sector. However, the Group separately noted that the ability to verify through a satisfactory electronic system sounds "very sensible".

Other comments

14.196 Nigel Madeley again highlighted that fraudsters are able to spot the flaws in online systems and noted that homeowners have little option but to deal online to some extent.

14.197 Christopher Jessel noted that where a group of companies is reorganised, it is common for one company to take over the name of another which may be dissolved or retained as dormant under a new name. For English companies, he explained, that problem is overcome by the use of company numbers, but at present it may not apply to all foreign companies. In relation to individuals, Mr Jessel noted that SDLT returns require an individual's National Insurance number so this information will be available in most dispositions. He suggested that HM Land Registry could require it to be produced on applications by each individual proprietor. However, unlike a company number, a NI number should not be entered on the register "for privacy and security reasons".

14.198 The Bar Council said it had no strong views on this matter, but mentioned that in the case of incorporated bodies, the process of identification and confirmation of authority is more complex than that discussed in the Consultation Paper, which relates only to individuals.

14.199 Nottingham Law School said that it supported our proposal "in principle", but thought that it would be a "bad precedent" to change the duties upon conveyancers by changing the requirements in a form. Rather, the School favoured founding such changes "on a clear statutory power and duty to take steps to structure HM Land Registry procedures in a manner that facilitates the frustration of fraudulent practices". The School made reference to its more detailed comments on indemnity set out in Appendix 1.

14.200 The Berkeley Group suggested that HM Land Registry could require production of National Insurance or tax reference numbers and could issue personal PIN numbers (akin to those used for self-assessment tax returns). It suggested these PIN numbers could be issued to registered proprietors, effectively replacing land certificates. But it suggested that this proposal would only be satisfactory if HM Land Registry were to remain a Government body; it suggested there would otherwise be concerns over privacy and third-party access to personal data.

THE POTENTIAL EFFECTS ON MORTGAGE LENDING

Consultation Question 82.

14.201 We invite consultees to provide evidence as to the significance of the indemnity scheme in lending decisions (in the residential and commercial sectors) and of the potential repercussions of reforms that limit its availability to lenders.[25]

14.202 14 consultees answered this question.[26]

Limitations will affect the commercial lending market

14.203 The London Property Support Lawyers Group did not have any specific evidence as to the significance of the indemnity scheme in lending decisions "as this issue has not needed to be considered before now". However, the Group believed that the indemnity scheme is a "key factor in lending decisions" and limiting its availability to lenders would have a "significant effect on the mortgage market". The Group considered that if a lender's rights under the indemnity scheme are limited, lenders will "as a matter of course" require borrowers to cover the risk by obtaining title insurance in the open market for the lender's benefit. This practice, it argued, would increase conveyancing costs for borrowers and slow down the conveyancing process.

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25 Consultation Paper, para 14.109.

26 Nigel Madeley; Michael Hall; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Chancery Bar Association; Adrian Broomfield; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; City of London Law Society (Land Law Committee); the Council of Mortgage Lenders; the British Bankers' Association.

14.204 Burges Salmon LLP also said that the issue has not needed previous consideration as the assumption would be made that an indemnity would be available in appropriate circumstances. The firm anticipated that, if the indemnity scheme were to be limited or if conveyancers were in effect asked to take on the risk of a shortfall, either lenders or the conveyancer would need to cover the cost by insurance, "which would impact on the cost and speed of transactions for borrowers".

14.205 Adrian Broomfield suspected that limiting the indemnity available to lenders would incline them to force borrowers to take indemnity insurance out as condition of the loan, much like in PPI mis-selling cases. "Inevitably", Mr Broomfield stated, "any such steps would also increase conveyancing costs".

14.206 The Law Society noted that "some but by no means all" lenders try to pass on risk to conveyancers. Its view was that any curtailment of the indemnity for lenders would be likely to result in them offloading the consequences of this onto conveyancers.

14.207 The City of London Law Society Land Law Committee suggested that the indemnity scheme is "a very relevant factor in lending decisions (whether for residential or commercial property)" and that "limiting its availability to lenders would have a significant impact on the mortgage market". If limits were to be imposed, the Committee suggested that lenders will as a matter of course require borrowers to obtain title insurance for the lender's benefit, which would increase costs and cause delays in conveyancing.

14.208 The Council of Mortgage Lenders said that, while lenders do not decide to lend solely because of the existence of the indemnity, the existence of the indemnity, embedded in the wider land registration system, "provides the necessary confidence for lenders to be able to lend in the knowledge that they will have a legally enforceable security; and protection in the case of error or fraud".

14.209 The Council also took the preliminary view that the proposed changes may impact on lenders' current securitisation agreements, although it noted that this would require further investigation. It said that existence of the indemnity is currently taken into account and its potential absence would need to be factored into future agreements, which may "impact on mortgage portfolio trading in terms of lower prices paid for assets, in light of the increased risk".

14.210 Lastly, the Council raised concerns about the pursuit of reform if the privatisation of HM Land Registry were to go ahead. It worried that an operator with a financial stake in the land registration process might be incentivised to reject indemnity claims, even where they remained open to lenders, causing further uncertainty.

14.211 The British Bankers' Association said that "the guarantee of title registration and the associated HM Land Registry indemnity is a key factor in lenders when they develop product propositions".

Limitations will not affect the commercial lending market

14.212 Nigel Madeley was of the view that the impact of such a change would be "an easy one for the lending industry to over-egg". He noted that, under the unregistered land scheme, there is no indemnity and "no-one batted an eyelid". Mr Madeley considered

that the question is how the rising incidence of fraud colours the view of the indemnity scheme and whether the availability of the scheme allocates the correct moral hazard.

14.213 Mr Madeley considered that it is not the job of the indemnity scheme to "ride to the rescue" of poor, target-driven lending decisions of the sort that occurred pre-2008. He stated that the real issues here are "fraud and identity", not title defects, and lenders can do plenty to protect themselves against that without inhibiting legitimate lending.

14.214 The City of Westminster and Holborn Law Society stated that lenders presumably expect the State to, in effect, guarantee that the HM Land Registry system will be effective so that registered charges are secure. On balance, the Society doubted that limiting the availability of an indemnity for lenders would have any significant repercussions on the commercial lending market.

Other views

14.215 Michael Hall stated that it is a "fundamental principle of our constitution" that there is equality before the law and it is not legally possible to discriminate against persons on the grounds that they have more money than others. He therefore considered that institutional mortgage lenders must be entitled to equal treatment under the law to other persons.

14.216 HM Land Registry had no comment on the policy save to say that –

(1) between the financial years 2008 to 2015 HM Land Registry received 340 claims from lenders with indemnity payments totalling just over £23.5 million; and

(2) in HM Land Registry's view, lenders are usually well placed to complete robust identity checks prior to lending.

14.217 As such, HM Land Registry argued that it does not seem appropriate that, where a lender is not completing such checks, the State should be insuring its lending decision through the indemnity fund.

14.218 The Chartered Institute of Legal Executives said that, not being a lender, it could not comment; however, it observed that lenders never seem to be punished for any failure on their part to carry out identity checks, and seem to be able to rely on lawyers or their insurers, even if those parties have also been duped. The Institute commented that "this seems unfair" and that having HM Land Registry approve all identity checks would resolve this unfairness.

14.219 The Chancery Bar Association and Bar Council stated that they had no relevant evidence to offer.

LIMITING INDEMNITY FOR MORTGAGEES – RELIANCE ON A MISTAKE

Consultation Question 83.

14.220 We invite consultees' views on whether the ability of mortgagees to obtain an indemnity should be limited to claims arising from mortgages granted on the basis of a mistake already contained in the register.[27]

14.221 25 consultees answered this question.[28]

Indemnity should be limited

14.222 Nigel Madeley and the Chartered Institute of Legal Executives agreed that the ability of mortgagees to obtain an indemnity should be limited to claims arising from mortgages granted on the basis of a mistake already contained on the register.

14.223 Everyman Legal agreed, stating that lenders regard indemnities and insurance policies as "pots to be milked" and therefore any claims should be linked to action taken as a result of the mistake. The firm considered that similar restrictions should be made on their ability to claim from their insurers.

14.224 The Chancery Bar Association agreed but felt that the proposal highlights the illogicality of providing an indemnity simply because a mistake has been made when no-one has relied on it. It considered that the approach underlying this proposal should apply to entitlement to indemnity generally, and could see no reason why it should apply only to mortgagees.

14.225 HM Land Registry said it supported this proposal as it seems appropriate that mortgagees – who have not relied on the register when charges are completed and monies transferred – should satisfy themselves that they are dealing with the true owner, or suffer any losses where that is not the case. HM Land Registry acknowledged, however, that the position is different for mortgagees who enter into charges with genuine registered proprietors whose titles depend on registered forgeries or who take transfers of registered charges.

14.226 HM Land Registry considered that the difficulty here might be making sure a sufficient anti-avoidance mechanism is included in the legislation, as it would not be difficult for a mortgagee to transfer, as a matter of course, a newly created mortgage to an associated company so as to gain the benefit of the guarantee. HM Land Registry also questioned what should happen where there is a transfer from D (a fraudster who is impersonating

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27 Consultation Paper, para 14.117.

28 Martin Wood; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Dr Simon Cooper; Adrian Bromfield; Nationwide Building Society; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Cliff Campbell; Nottingham Law School; the City of London Law Society (Financial Law Committee); the City of London Law Society (Land Law Committee); the Council of Mortgage Lenders; Nationwide Building Society; the Building Societies' Association.

A) to B (who is innocent) with a simultaneous charge from B to C? It was HM Land Registry's view that, in such a situation, C would not be prevented from claiming indemnity as it would be one step removed from the fraud, despite the fact that there is no mistake in the register at the time that the charge was entered into.

14.227 Cliff Campbell said that he "strongly agreed" with our proposal and not merely on the basis that mortgagees are often in the best position to detect fraud. He said:

> Commercial lenders exist to lend money at a profit, and this activity contains inherent risks, including default in repayment and fraud. The current ability of lenders to pass on that risk of fraud to the public simply by carrying out the administrative act of registering their charge, is unfair to the Land Registry fee payers as a whole who bear the costs of the indemnity fund. This situation is tantamount to a form of statutory unjust enrichment in favour of lenders and should be curtailed.

14.228 Mr Campbell noted that our proposal would need to be implemented in such a way as to prevent mortgagees from circumventing the limitation on indemnity. He pointed out that, despite being part of the same transaction, a charge may be registered a day or two after the registration of the corresponding transfer of the property, but one would not want the mortgagee to be able to argue that the charge was completed "on the basis of a mistake in the register".

Indemnity should not be limited

14.229 Adrian Broomfield stated that he disagreed with our proposal without providing further explanation.

14.230 Martin Wood, Michael Hall and the Law Society disagreed on the basis that mortgagees should be in no different a position than anyone else.

14.231 Nationwide Building Society said it would not support proposals for mortgage lenders to be treated differently to other types of claimants and it could not see that the Consultation Paper provided sufficient justification for doing so.

14.232 Burges Salmon LLP also considered that lenders should not be treated any less favourably than other stakeholders in the registration of title process. It added that any such limit would essentially increase borrowing costs as the lenders seek to mitigate loss by insurance.

14.233 The Conveyancing Association disagreed on the basis that the change would have a "significant impact" on conveyancer's insurance premiums. It considered that HM Land Registry should continue to provide an unlimited indemnity, funded through its fees. The Association considered this a "fairer option" as it "provides for actual loss rather than the anticipatory loss which legal insurance providers often benefit from".

14.234 The London Property Support Lawyers Group strongly disagreed with the option of providing only a limited state title guarantee to lenders in these circumstances. It was of the view that a mortgagee should not be treated any differently (or less favourably) than a buyer or a tenant, as a mortgagee also has a significant financial interest in the mortgaged property. The Group said that, in its view, the suggestion that the indemnity scheme should not cover commercial risks undertaken by lenders is not logical. It noted that purchasers also acquire property as a financial investment rather than for

occupation and it is difficult to see why their financial interest should be treated more favourably than the financial interest of a mortgagee.

14.235 In relation to the argument that lenders have the ability to uncover cases of identity fraud for themselves, the Group argued that, however rigorous lenders' procedures may be and however diligent they may be in complying with them, they may still be the victims of fraud. It would, therefore, be inequitable to limit their right to an indemnity in these circumstances. In any event, the Group noted, if a lender does not take proper care, a remedy already exists under paragraph 5 of schedule 8 to the LRA 2002, which provides that no indemnity is payable (or it is reduced) where a claimant has suffered loss as a result of his or her own lack of proper care.

14.236 The Group reiterated that any attempt to restrict a lender's ability to claim an indemnity would have an adverse impact on lending decisions and be likely to increase conveyancing costs for borrowers as mortgagees will look to cover the increased risk though insurance in the open market. It also considered that a consistent approach is important to maintain the "integrity and the simplicity" of the current system.

14.237 Dr Simon Cooper set out a number of reasons why he considered the suggestion outlined in the question undesirable. First, he stated that, although the withdrawal of indemnity from mortgagees in the proposed manner might be expected to prompt mortgagees to take greater care, not all mortgagees' inquiries are driven by the indemnity provisions. The customer due diligence requirements imposed on mortgagees by the financial regulator is likely to be another influence on their practices. The sanction for noncompliance is far greater than loss of indemnity. Withdrawal of indemnity would not, therefore, lead to any socially beneficial cost saving by incentivising cheaper practices. Mortgagees would be left carrying out approximately the same level of identity checks but without the safeguard of indemnity.

14.238 Secondly, Dr Cooper argued that withdrawal of indemnity in the manner proposed might harm a mortgagee which has acted with an entirely reasonable level of care. For example, the mortgagor might have committed a brilliantly executed identity theft; or the source of invalidity might not be identity fraud but something else which reasonable inquiries could not have revealed. Dr Cooper argued that it is "undesirable" for property rights to be "destroyed through the operation of a state-administered system without fault on the mortgagee's part".

14.239 Nottingham Law School suggested that our question involves drawing an "unprincipled distinction" between mortgagees and other purchasers (who would still be entitled to an indemnity even where they have not relied on a mistake in the register). The School thought that a reform "risks aggravating the lack of incentives for careful practice that are identifiable in the present market"; mortgagees will have less incentive to show due care if, even where that care is shown, the mortgagee will not benefit from the state guarantee of title.

14.240 The City of London Law Society Financial Law Committee pointed out that a lender who takes a mortgage over land has "the same rights in respect of the land as its mortgagor, and that is the basis on which lending decisions are made". It could see no justification for treating mortgagees any differently from other people with interests in land and thought that our proposal would affect the willingness of lenders to lend.

14.241 The City of London Law Society Land Law Committee strongly opposed limiting a mortgagee's ability to obtain an indemnity as mortgagees have significant financial interests in the mortgaged properties. It noted that purchasers likewise buy property for investment reasons. Furthermore, it noted that mortgagees can still be victims of fraud despite using the best due diligence procedures. Finally, the Committee drew attention to the fact that a mortgagee's conduct can be taken into account under the current law in reducing its indemnity where the relevant losses were caused by its own lack of proper care.

14.242 The Council of Mortgage Lenders did not think that a restriction on indemnity was justifiable. It said that there was no reason to treat lenders differently from other participants in the conveyancing process. Furthermore, it noted that a restriction was less justifiable in fraud cases were a mortgagee, despite acting conscientiously, may be unable to detect fraud until it has taken place.

14.243 The Nationwide Building Society offered its support for the Council of Mortgage Lenders' views. It urged us to proceed with caution as reform could "adversely impact on the confidence which mortgage lenders currently have in the system of land registration which is currently backed by an indemnity". It added that this could add to the uncertainty felt by mortgage lenders in response to the Government's proposal to privatise HM Land Registry.

14.244 The Building Societies' Association agreed that a mortgage lender has more opportunity to discover fraud where a mortgage is obtained by impersonation before an application is made to HM Land Registry than it does where fraudulent entry on the register is used as a basis for an application for a mortgage. However, the Association commented the mortgage lender may not be at fault in either scenario. It said that "there may be reason to assess entitlement to the indemnity based on whether [lenders] have complied with the proper fraud ID checks", but it doubted that this would have a significant effect in practice as lenders already follow the proper checks. It said that it would "strongly oppose" proposals to limit indemnity in cases where there was no reliance on a mistake in the register even where the relevant checks have been carried out.

Other comments

14.245 The City of Westminster and Holborn Law Society considered that the distinction drawn in our proposal may be arbitrary. It stated that a lender should not be entitled to an indemnity if the charge was registered as a result of failure by the lender or its conveyancer to take proper care regarding identity. However, if all proper care was taken, the registration of the legal charge and later alteration of the register would leave the lender with a loss through no fault of its own. Furthermore, the Society anticipated that this the loss would have to be taken into account in determining what customers generally pay for loans.

14.246 Dr Aruna Nair said that it seemed the argument at paragraph 14.116 of the Consultation Paper provided a "compelling reason" for limiting the indemnity in this way. However, she thought that it was unclear whether that argument outweighs the potential impact of such a rule on the availability of mortgage finance. She stated:

If there were empirical evidence that it would have a significant impact, I would not support it.

14.247 The Bar Council did not express a view on the policy question behind our proposal. However, it observed that not every mortgagee is a bank and so the justification that a mortgagee is best placed to avoid or carry the commercial risks of identity fraud will not apply in every case. The Bar Council wondered whether, if the other reforms discussed in this chapter were accepted, any savings to be made through the policy outlined in Consultation Question 83 would justify the consequences for non-commercial mortgagees.

14.248 Amy Goymour made the following comments in response to the question.

(1) First, she questioned why mortgagees were being singled out. Ms Goymour asked why, if there is an argument that a chargee does not merit an indemnity as he has not relied on a mistake in the register, that argument would not apply where a person holds some other kind of interest such as a lease or freehold.

(2) Secondly, Ms Goymour considered that a fuller discussion of whether a chargee merits an indemnity is required. She noted that there is "an excellent discussion" in the Scottish Law Commission's work on void/voidable titles and land registration.

(3) Lastly, Ms Goymour noted that the discussion in this section of the Consultation Paper appeared to be in the context of commercial lenders. However, she noted that the question, if directed at mortgagees generally, would also catch private, non-commercial lenders. Ms Goymour questioned whether the reasons for limiting mortgagees' ability to recover an indemnity should apply in a blanket way to all lenders, without a thorough discussion as to whether this limitation would be appropriate for private lenders. As a result, she noted that she preferred the introduction of a new statutory duty, as this "has the capacity to impose liability in a more nuanced way", depending on the particular mortgagee's status.

LIMITING INDEMNITY FOR MORTAGEES – COMPLIANCE WITH STATUTORY DUTY

Consultation Question 84.

14.249 We invite consultees' views on whether the entitlement of mortgagees to obtain an indemnity should be subject to compliance with a statutory duty to take reasonable care to verify the identity of the mortgagor.[29]

14.250 27 consultees answered this question.[30]

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29 Consultation Paper, para 14.123.

30 Martin Wood; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; the Conveyancing Association; London Property

Indemnity should be limited

14.251 Amy Goymour commented that she "probably" agreed with this proposal.

14.252 Martin Wood agreed but thought the issue addressed by Consultation Question 84 would be covered by a specific duty in relation to identity, which he preferred. However, if this should not be the case, Mr Wood considered a separate duty should be imposed.

14.253 The City of Westminster and Holborn Law Society considered that, if the loss arises because a lender or its conveyancer fails to take reasonable care to verify the identity of the mortgagor, then there should be no indemnity.

14.254 Nigel Madeley agreed. He stated that just as HM Land Registry is "clearly unhappy" about being the last link in the chain and picking up the indemnity tab, equally there is reason for solicitors to be unhappy as the penultimate link. He argued that, if a duty were to be imposed, then everyone "involved in and benefiting from" executing deeds should be under an equal duty and have rights of recourse under the Civil Liability (Contribution) Act 1978 if one party pays all the loss.

14.255 Mr Madeley considered that any reform must make sure that lenders cannot delegate the responsibility for checking identity to solicitors (or others). He noted that lenders already have the "happy accident" of a remedy for breach of trust merely because solicitors disburse mortgage advances from their client accounts. Mr Madeley felt that we should clarify whether by using the phrase "subject to" in our proposal, we meant to allow a contributory negligence 'defence' or whether we were saying that any failure to take care would mean no indemnity at all, as opposed to a reduction consistent with the degree of fault.

14.256 The Society of Licensed Conveyancers said that indemnity for mortgagees should be limited in situations where they have failed to carry out their obligations to combat property fraud and cybercrime as described above.

14.257 Dr Aruna Nair considered that there is a strong principled case for imposing the proposed condition on indemnity, although this may be outweighed by any evidence of a negative impact on the willingness of mortgagees to lend.

14.258 The Chartered Institute of Legal Executives agreed stating that, if HM Land Registry were not carrying out the identity checks, this would be the best solution. CILEx noted that if this requirement were imposed, lenders should not be able to say they relied on a third party (for example, the conveyancer) carrying out identity checks.

14.259 HM Land Registry agreed with the imposition of the proposed condition on indemnity, reiterating that mortgagees are usually well placed to conduct robust identity checks. However, it considered that the requirement would add little to the deprivation of indemnity to a mortgagee where there is no intervening disposition and a lender takes direct from a fraudster. It is only in such cases that the duty to verify the identity of the

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Support Lawyers Group; Chancery Bar Association; Dr Simon Cooper; Adrian Broomfield; Society of Licensed Conveyancers; Nationwide Building Society; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Nottingham Law School; the City of London Law Society (Financial Law Committee); the City of London Law Society (Land Law Committee); the Council of Mortgage Lenders; the Building Societies' Association; the Council for Licensed Conveyancers; the British Bankers' Association.

borrower is significant; in other cases, where the borrower is a registered proprietor whose title derived from a registered forgery, verifying the identity of the borrower would not prevent the fraud. HM Land Registry considered that, if the limitation on indemnity suggested in Consultation Question 83 were to be accepted, then there would be no need for the duty to verify to identity. However, if this limitation on indemnity were not to be taken forward, then, in HM Land Registry's view, the statutory duty to verify the identity of the mortgagor would become essential.

14.260 The Council for Licensed Conveyancers agreed with our proposal, saying that verifying the identity of the mortgagor is an important part of the mortgage transaction and should not be delegated by lenders to others.

Indemnity should not be limited

14.261 Adrian Broomfield disagreed without providing any further explanation.

14.262 The Conveyancing Association suggested that HM Land Registry is best placed to verify the identity of parties involved in a transaction, with the cost being passed on to HM Land Registry's users through the fee schedule.

14.263 The London Property Support Lawyers Group was strongly of the view that the mortgagees' indemnity entitlement should not be subject to compliance with a statutory duty to take reasonable care to verify the identity of the mortgagor. The Group noted that there is already a remedy against claimants, including mortgagees, who do not take proper care under paragraph 5 of schedule 8 to the LRA 2002. The paragraph provides that no indemnity is payable on account of any loss suffered by a claimant as a result of the claimant's own lack of proper care and therefore, the Group argued, all that is needed is to make clear that, where the claimant is a mortgagee, "lack of proper care" includes a failure to comply with the rationalised identity requirements referred to in paragraph 14.6 of the Consultation Paper.

14.264 The Chancery Bar Association and the Bar Council also considered that the proposal is effectively provided for in paragraph 5 of schedule 8. However, the Chancery Bar Association stated that, if the intention of our proposal is that any breach of the statutory duty should wholly disentitle the mortgagee to an indemnity, it would not support the change. The Association also considered that the existing provision for partial indemnity where responsibility is shared should be retained.

14.265 Dr Simon Cooper did not agree for two reasons. Firstly, he argued that it "would not be right" to imply that there is no existing duty in this regard as the issue of reasonable care is already relevant in determining whether there should be "a proportionate reduction in quantum". Dr Cooper added that there are many cases in which similar negligence factors have been taken into account in rectification proceedings and the judiciary are accustomed to dealing with the issue of the applicant's negligence in contributing to the mistake or exacerbating its consequences.

14.266 Secondly, Dr Cooper noted that our proposal "would serve to remove the issue of reasonable care from the stage of defence as a proportionate reduction" and would "relocate it at the stage of eligibility to claim indemnity where it would be an all-or-nothing issue". He considered that there would be "no great advantage in doing so", while there are possible disadvantages. Dr Cooper stated that if negligence becomes a matter of

eligibility rather than quantum, then (a) it would cause indemnity claims to be harder fought on the negligence issue as there would be more to lose, and (b) it would make litigation more troublesome as the current, easy-going and impressionistic approach to quantification would be lost and instead the court would have to draw clear-cut distinctions between liability and no-liability, which would involve a painstaking application of the challenging concepts of duty, breach and causation.

14.267 Burges Salmon LLP stated that it did not consider lenders should be treated any less favourably than other stakeholders in the title registration process.

14.268 The City of London Law Society Financial Law Committee opposed the policy for the reasons it gave in response to Consultation Question 83.

14.269 The City of London Law Society Land Law Committee also disagreed, stating that the same principles should apply to mortgagees and other claimants for an indemnity. It noted that a mortgagee's conduct may be taken into account, under the current law, for the purpose of reducing the level of indemnity paid for losses caused by the mortgagee's lack of proper care. It suggested that "the existing legislation can be updated to take account of any rationalised identity requirements in relation to the mortgagor".

14.270 The Council of Mortgage Lenders suggested that the question was based on the assumption that lenders are best placed to prevent identity fraud. It questioned whether this is true. It suggested that conveyancers may be best placed to carry out identity checks as they are in the "unique position" of having "direct contact with all the other stakeholders in the transaction". Furthermore, it suggested that a "collaborative approach" by conveyancers and lenders is preferable for tackling sophisticated frauds.

14.271 The Council also suggested that lenders are already sufficiently incentivised to carry our due diligence and identity checks on their customers and professional service provides by a range of regulative obligations including:

(1) the FCA Handbook SYSC 3.2.6R and SYSC 6.1.1R which requires lenders to establish and maintain effective systems and controls to prevent the risk that they might be used to further financial crime;

(2) principles 1 (integrity), 2 (skill, care and diligence), 3 (management and control) and 11 (relations with regulators) of the FCA Principles for Businesses, which are set out in PRIN 2.1.1R;

(3) the Statements of Principle for Approved Persons set out in APER 2.1.2P; and

(4) in relation to guidance on money laundering, the rules in SYSC 3.2.6AR to SYSC 3.2.6JG and SYSC 6.3 (Financial crime).

14.272 The Council noted that if a lender was found to be in breach of their regulatory requirements in relation to fraud prevention and controls, they could face substantial penalties. It also noted that lenders already face a risk of loss due to fraud, as claims under their indemnity cover and claims pursued in the courts may not recover their full losses. Finally, it noted that limiting the availability of an indemnity would cause

uncertainty as to what degree of insurance cover should (and could) be obtained by lenders.

14.273 Similarly, the Building Societies' Association said that it is not necessary to create a new statutory duty on lenders and they already have a statutory duty to verify the identity of a mortgage application (and any other potential customer) under the Proceeds of Crime Act 2002 (sections 327 to 334 and regulations 7 and 8). It drew attention to section 5.1.12 of the Joint Money Laundering Steering Group guidance "Prevention of money laundering / combating terrorist financing – Guidance for the financial sector". It also commented that it had supported HM Land Registry initiatives for reducing fraud, in particular the use of the Property Alert system.

14.274 The Association said that it may be reasonable to consider a lender's entitlement to an indemnity in the context of its compliance with the requirements set out above. But it said that "it is unclear what further steps lenders could take which would warrant an extra duty being created – not least because around 70% of the mortgage market is intermediated".

14.275 The British Bankers' Association disputed whether mortgagees are best placed to prevent identity fraud. It said that, whilst mortgagees have a responsibility to undertake due diligence when identifying prospective customers, "there are not the only link in the transaction chain who have a responsibility to undertake identity checks". It did not think would be proportionate to cap or reduce the indemnity available to mortgagees alone. As fraud can be sophisticated, "a collective responsibility to minimise the incidence of fraud is required". The Association said:

> Whilst we agree with the principle of ensuring best practice in fraud detection, this should be adopted by all stakeholders, and any new requirements should only be considered where gaps have been identified and will drive enhanced standards.

14.276 The Association also drew attention to the duties already imposed on mortgagees "to undertake due diligence to verify the identity of prospective customers to meet the anti-money laundering, terrorism and legal requirements as well as to guard against reputational, operational and legal risks". It said:

> These responsibilities are embedded within the Financial Conduct Authority's (FCA) Handbook, including a principle that a firm must conduct its business with due skill, care and diligence (PRIN 2). Lenders are also accountable to the regulator to ensure that comprehensive and proportionate controls are in place to identify, assess, monitor and manage money laundering risk, which includes a requirement for customer due diligence. The regulator has powers to take action against firms that they regulate where appropriate (including the imposition of financial penalties).

Other comments

14.277 Professor Warren Barr and Professor Debra Morris held no strong views, but, for consistency with their other responses, suggested that we should not introduce a new statutory duty.

14.278 Everyman Legal commented that since mortgage lenders "put their conveyancers through hoops on this point", the firm found it hard to believe that lenders do not do not carry out reasonable identity checks already.

14.279 Michael Hall noted that the indemnity scheme in the LRA 2002 already makes provision for contributory negligence and referred to paragraph 14.41 of the Consultation Paper.

14.280 Nationwide Building Society agreed that lenders should take all reasonable steps to identify and prevent fraud. However, it noted that there are already guidelines, regulations and professional codes which need to be adhered to. The Building Society queried whether our proposal would create a fair outcome. For example, even where a lender has undertaken all of the necessary checks, it may still not be possible to detect a fraud until it has taken place. Nationwide considered it "somewhat unfair" that lenders should be treated differently to other claimants and for this reason, it did not support our proposal.

14.281 The Law Society reiterated its view that there should be agreed sets of standards and procedures for verifying identity.

14.282 Nottingham Law School expressed general support (both as a matter of policy and based on considerations of practice) for treating mortgagees differently from other participants in registered land market. However, its response was contained a much broader discussion of the management of risk in relation to registered conveyancing, which is reprinted in full in Appendix 1.

14.283 The School said that it supported "aspects" of the suggestion underlying the question, but did not support the introduction of a statutory tort and thought that any new duty should not merely be imposed on mortgagees but also on purchasers in general (although not on the conveyancers they instruct).

LIMITATION: CALL FOR EVIDENCE OF ANY PROBLEMS IN PRACTICE

Consultation Question 85.

14.284 We invite consultees to provide evidence in respect of the following issues:

(1) the incidence in practice of questions concerning the limitation period applicable to indemnity claims; and

(2) how their practice has been affected by questions concerning the limitation period applicable to indemnity claims.[31]

[31] Consultation Paper, para 14.133.

14.285 9 consultees answered this question.[32]

Evidence provided

14.286 The Chancery Bar Association stated that the existing provision "undoubtedly causes problems". In its experience the question has arisen in cases whether paragraph 1(3) of schedule 8 has the effect of postponing the start of the limitation period until a decision on rectification has been made, or whether a protective claim for indemnity has to be issued before it is known whether rectification will take place. The Association added that paragraph 8(b) of schedule 8 also offers "excessive scope for argument" about the steps which the claimant might have taken and which would have resulted in him or her knowing of the claim earlier.

Unable to provide any evidence

14.287 The London Property Support Lawyers Group, The Bar Council, The Law Society, Howard Kennedy LLP, Pinsent Masons LLP and Adrian Broomfield said they had no experience of an issue with limitation arising in practice.

14.288 The Chartered Institute of Legal Executives also did not have any evidence to offer but added that one way of bringing fraud to the attention of parties is HM Land Registry's Property Alerts system.

Other comments

14.289 Dr Harpum QC (Hon) explained that the language of paragraph 8 of schedule 8 to the LRA 2002 is substantially the same as section 83(11) of the LRA 1925. He could not see how "on any basis" it could be said that, as a matter of construction of paragraph 8, that the limitation period only arises at the time of the rectification decision. He noted that a person would know that he or she might have a claim for indemnity as soon as a claim for rectification of the register were to be made, and that claim would usually precede the application for rectification.

14.290 Dr Harpum stated that whilst the issue of limitation under paragraph 8 of schedule 8 to the LRA 2002 had crossed his desk once, he did not recall that it was ever a serious issue that threatened any claim to indemnity his client might have had. He added that the fact that there is no authority at all on paragraph 8 suggests that in practice it "is not causing any difficulties and never has". However, Dr Harpum noted that the wording of paragraph 8 of schedule 8 "does not perhaps fit comfortably" with paragraph 1(3) of schedule 8. Dr Harpum considered it "slightly odd" that a claim to indemnity could in principle be time barred, even when it had not become payable, which is "one possible effect of that paragraph on conceivable facts".

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[32] London Property Support Lawyers Group; Chancery Bar Association; The Bar Council; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Howard Kennedy LLP; Chartered Institute of Legal Executives; The Law Society.

LIMITATION: INDEMNITY CLAIMS UNDER PARAGRAPH 1(A) AND (B).

Consultation Question 86.

14.291 We provisionally propose that for indemnity claims under schedule 8, paragraph 1(a) and (b) the limitation period should start to run on the date of the decision as to rectification.

Do consultees agree?[33]

14.292 23 consultees answered this question:

(1) 21 agreed;[34] and

(2) 2 disagreed.[35]

Agreed

14.293 Professor Warren Barr and Professor Debra Morris agreed for the reasons outlined in paragraph 14.134 of the Consultation Paper.

14.294 The London Property Support Lawyers Group and Howard Kennedy LLP both considered the proposal "sensible" with the Group noting that it will "result in greater clarity and certainty".

14.295 HM Land Registry agreed with the proposal but noted that the phrase "date of the decision as to rectification" would need to be clarified.

14.296 The Chancery Bar Association agreed save that it considered the date should be that on which the claimant was notified of the decision.

14.297 Nigel Madeley thought that time should run from rectification, for the simple reason that "until then the register might not be rectified and so the claimant suffers no loss". In addition, the date of rectification would be "a clear line".

14.298 Dr Charles Harpum stated that these proposals would enact what was proposed as clause 45(12) of the draft Land Registration Bill in the Law Commission's report, Property Law: Fourth Report on Land Registration[36] and he had no objections to them. Dr Harpum noted that the first of the proposals will give a longer limitation period in

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33 Consultation Paper, para 14.136.

34 Martin Wood; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Dr Simon Cooper; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

35 Michael Hall; Nottingham Law School.

36 (1988) Law Com No 173.

cases where the register either is or could have been rectified and that "seems desirable in principle".

Disagreed

14.299 Michael Hall stated that, regarding claims under paragraph 1(a) of schedule 8 to the LRA 2002, there is "nothing wrong with the existing wording which is consistent with the general law of limitation". He explained that the cause of action arises when the claimant knows, or but for his own default would have known, of the existence of his or her claim, which would not be before the date on which the decision to rectify the register were made. However, it might be later if, for example, the claimant did not know of the decision until later or was not then informed of their right to apply for an indemnity.

14.300 Mr Hall argued that HM Land Registry should inform people (when rectifying the register against them) that they have the right to be indemnified, and that time should not start to run if it fails to do so. He stated:

> In the case of claims under paragraph 1(b), if there is a mistake which needs to be rectified, it is not necessarily the case that a decision will ever be made as to rectification, and the right to claim indemnity has already arisen, so the limitation period would have started to run. A claim to indemnity may provoke HM Land Registry into making a decision on rectification. No change in the law is necessary.

14.301 Nottingham Law School did not think that a case for reform of the limitation regime had been clearly and persuasively made. Therefore, it did not support the proposal in Consultation Questions 86 or in Consultation Questions 87 and 88, discussed below.

LIMITATION: INDEMNITY CLAIMS UNDER PARAGRAPH 1(C) TO (H)

Consultation Question 87.

14.302 We provisionally propose that for indemnity claims under schedule 8 paragraph 1(c) to (h) the limitation period should start to run when the claimant knows, or but for their own default would have known of the claim.

Do consultees agree?[37]

14.303 22 consultees answered this question:

(1) 19 agreed;[38]

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37 Consultation Paper, para 14.138.

38 Martin Wood; Elizabeth Derrington; Nigel Madeley; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Dr Simon Cooper; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; Burges Salmon LLP.

(2) 1 disagreed;[39] and

(3) 2 expressed other views.[40]

Agreed

14.304 The Chancery Bar Association agreed subject to the following comments:

(1) The Association said that, as with latent damage cases under section 14A of the Limitation Act 1980, there needs to be a detailed definition of what is meant by "knows". It suggested that the date of knowledge should be when the claimant is aware of the facts giving rise to his or her claim and that his or her claim is for a significant amount.

(2) The Association suggested that the words "or but their own default should have known" will cause problems by enabling HM Land Registry to argue that the claimant should have done earlier searches which would have revealed the error. The Association thought this wrong in principle, as it should be HM Land Registry's responsibility, not the claimant's, to discover the error.

(3) It said that there should be a discretion for the court to extend the time limit in appropriate cases.

14.305 Dr Harpum reiterated that these proposals would enact what was proposed as clause 45(12) of the draft Land Registration Bill in Property Law: Fourth Report on Land Registration[41]and he had no objections to them.

14.306 The Chartered Institute of Legal Executives agreed but questioned whether using the phrase "would but for their own default" would mean that someone who had not signed up for HM Land Registry's Property Alerts would be in default.

Disagreed

14.307 Nottingham Law School reiterated that it did not think the case for reform had been clearly and persuasively made and therefore it did not support the proposal.

Other views

14.308 Amy Goymour stated that she "probably" agreed with the proposal. However, she noted that under the existing legislation, the limitation period runs from when the claimant "knows, or but for his own default might have known", whereas the Consultation Paper proposal uses the word "would" instead of "might". Ms Goymour questioned whether this was a deliberate change, stating that the "might" test seems more relaxed, and might set the limitation period running earlier than a "would" test. Accordingly, the proposal might mean that limitation periods commence later than under the existing legislation. Amy Goymour noted that discussion of the difference between

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39 Nottingham Law School.

40 Amy Goymour; The Law Society.

41 (1988) Law Com No 173.

"would" and "might" (albeit in a different context) can be found in the cases concerning the setting aside of trustees' dispositions under the rule in *Hastings-Bass*.[42]

14.309 The Law Society considered that our proposal "probably requires input from property litigators and more information needs to be obtained". It noted that from a conveyancer's perspective it could be difficult to establish when the claimant first became aware of the mistake, which could be quite some time after the mistake occurred.

LIMITATION: THE REGISTRAR'S RIGHTS OF RECOURSE

Consultation Question 88.

14.310 We provisionally propose that the registrar's rights of recourse under schedule 8, paragraph 10(2) ought to be subject to the following statutory limitation periods:

(1) In a case within schedule 8, paragraph 10(2)(a), Land Registry should have the longer of (i) the remaining limitation period applicable to any cause of action the indemnity claimant would have had if an indemnity had not been paid; or (ii) 12 months from the date the indemnity is paid.

(2) In a case within schedule 8, paragraph 10(2)(b), Land Registry should have the longer of (i) the remaining limitation period applicable to any cause of action the person in whose favour rectification has been made would have had if the rectification had not been made; or (ii) 12 months from the date the register is rectified.

Do consultees agree?[43]

14.311 21 consultees answered this question:

(1) 20 agreed;[44] and

(2) 1 disagreed.[45]

Agreed

14.312 The London Property Support Lawyers Group agreed with our proposals on the basis that they are "rational" and will bring "greater clarity and certainty".

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42 *Hastings-Bass Trustees v Inland Revenue Commissioners* [1975] Ch 25, [1974] 2 WLR 904.

43 Consultation Paper, para 14.146.

44 Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Elizabeth Derrington; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Dr Simon Cooper; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

45 Nottingham Law School.

14.313 Pinsent Masons LLP agreed with the London Property Support Lawyers Group's assessment that these proposals are rational and would promote clarity. The firm noted that the minimum 12-month limitation period might have a residual effect on the period for which solicitors need to retain their files, commenting that the Law Society will "no doubt" review its practice guides to the profession on this should the proposals be implemented.

14.314 HM Land Registry supported the proposals, which it regarded as "essential for both clarity and fairness". However, it considered that the proposed provision for a case falling within schedule 8, paragraph 10(2)(b) should be the same as one falling within schedule 8, paragraph 10(2)(a): the time limit should run from the date of payment of indemnity and not from the date the register is rectified.

14.315 The City of Westminster and Holborn Law Society agreed subject in each case to the 12-month extension period not applying if the limitation period had already ended before payment of the indemnity.

14.316 The Chancery Bar Association considered that the proposed extension period of 12 months is too short. It suggested the period should be two years, by analogy with the period applicable to contribution claims under the Civil Liability (Contribution) Act 1978.

14.317 The Bar Council was also concerned that 12 months may not be enough time for the potential claim to be investigated and the necessary pre-action conduct to be carried out. It considered that a two-year period would be more appropriate and in line with that provided for contribution claims under the Civil Liability (Contribution) Act 1978.

14.318 Dr Harpum noted that the provisions on rights of recourse in the LRA 2002 originated from and were driven by HM Land Registry. He did not know to what extent the limitation issues raised had actually been a cause of difficulty to HM Land Registry, stating that nothing had been said about any such difficulty in the Consultation Paper. Nevertheless, Dr Harpum considered that there is "everything to be said for clarifying the issue". Dr Harpum noted that he could "see the sense" of what is proposed and supported it.

Disagreed

14.319 Nottingham Law School reiterated that it did not think the case for reform had been clearly and persuasively made. As such, it did not support the proposal.

THE VALUATION OF INDEMNITY FOR LOSS OF AN ESTATE, INTEREST OR CHARGE

Consultation Question 89.

14.320 We provisionally propose that where an indemnity is payable in respect of the loss of an estate, interest or charge following a decision not to rectify, the value of the estate, interest or charge should be regarded as not exceeding the current value of the land in the condition the land was in at the time of the mistake.

Do consultees agree?[46]

14.321 25 consultees answered this question:

(1) 19 agreed;[47]

(2) 2 disagreed;[48] and

(3) 4 expressed other views.[49]

Agreed

14.322 Professor Warren Barr and Professor Debra Morris considered it important to have some limitation on the indemnity payable, particularly given their views on introducing a cap on the level of indemnity.

14.323 Dr Harpum stated that, at the time that the LRA 2002 came into force, a party seeking indemnity to which paragraph 6(b) of schedule 8 applied was reasonably compensated because the interest was payable from the time of the mistake together with any consequential loss. He noted that at that time, the Bank of England base rate was 4%. However, as the house price index only began in February 2002, Dr Harpum had not been able to undertake a comparison of the position then and now.

14.324 Dr Harpum explained that the matter was fully debated by the Law Commission with HM Land Registry in relation to both the Land Registration Act 1997 and LRA 2002 and that it was HM Land Registry who did not want to change what is now paragraph 6 of schedule 8 to the LRA 2002. The justifications given were the availability of both interest and indemnity for consequential loss. Dr Harpum stated this is why the law remained unchanged. However, on balance, Dr Harpum supported our proposal.

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46 Consultation Paper, para 14.159.

47 Martin Wood; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Dr Simon Cooper; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; a confidential consultee; Burges Salmon LLP.

48 Christopher Jessel; Nottingham Law School.

49 Everyman Legal; Chancery Bar Association; Chartered Institute of Legal Executives; The Law Society.

14.325 The Bar Council agreed with our proposal subject to some caveats. The Council noted that the existing rule that applies in this situation does not fairly reflect the loss to the disappointed applicant; therefore, a change to a cap set to the current value of the property is appropriate. However, it noted that whether it is fair to take the property to be in the condition it was in at time of the mistake will depend on the facts of the case. The Council noted that an applicant may be left undercompensated if he or she has spent money on improving the property in ignorance of the mistake. It said that there should be some flexibility to allow for these cases. The Council considered that this flexibility may be accommodated in a way that is consistent with our proposal by making it clear that compensation may be given for wasted expenditure and other such matters in addition to compensation for value of the lost estate.

14.326 Amy Goymour made some general comments in relation to certain paragraphs of the Consultation Paper. Firstly, she agreed with the conclusion at the end of paragraph 14.149 that the level of indemnity payable should not, in principle, impact on the decision whether or not to rectify the register. Secondly, in relation to paragraph 14.150 of the Consultation Paper, Ms Goymour suggested we consider the possibility that a claimant who has developed the land might have a claim in unjust enrichment for having mistakenly improved the land whilst believing he or she was the true owner. Lastly, in relation to paragraph 14.152, Ms Goymour agreed with the first sentence of the paragraph but wondered whether it is arguably that an indemnity remedy for consequential loss might be able to cover the difference in capital value. Overall, Ms Goymour agreed with our proposal.

Disagreed

14.327 Christopher Jessel noted that, although our proposal may be fair for an estate or charge, where the loss is of an interest in land such as an easement, the financial loss may be substantially greater. Mr Jessel pointed out that, in the example mentioned in paragraph 22.68 of the Consultation Paper, the effect of the mistake could be to deprive the dominant owner of substantial potential future development value. Where a mistake involves the omission to enter a restrictive covenant imposed on amenity grounds, the loss may be difficult to quantify in money; Mr Jessel highlighted that this could apply with special force to covenants benefiting amenity bodies such as the National Trust or the Church Commissioners which have no land in the vicinity.

14.328 Nottingham Law School reiterated that it did not think a convincing case had been made for the proposed reform of the valuation of indemnity claims. It said that the problem identified in the Consultation Paper seems to be aggravated by the "unusual market conditions" that have prevailed since the financial crisis in 2007 and 2008. It noted that although these conditions have continued far longer than anyone anticipated, the likelihood must be that they will end soon. Therefore, the School did not support our proposal.

Other views

14.329 Everyman Legal commented that the solution to the issue raised in the Consultation Paper "surely this would depend on how the current value of the land is calculated?" The firm stated that, as a limited resource, land can carry a "hope value" which can be seriously affected by an error. It concluded that our proposal sounds "too simple".

14.330 The Chancery Bar Association agreed that the existing provisions of the LRA 2002 are unsatisfactory and need to be changed. However, its view was that our proposal does not address all the problems. The Association made the following points:

(1) The time at which the "current" value is to be assessed must be defined. It could be the date of (a) the application to rectify, (b) the decision on rectification, (c) the claim for the indemnity, or (d) the decision on the indemnity claim. The Association stated that there is probably no single fair answer. If property values fall and the problem came to light when the owner decided to sell, he or she should be able to recover the value of the land at the date of his application to rectify. On the other hand, if values rise, justice may require the owner to recover the value at the date when his entitlement to an indemnity is established. The Association suggested that, as in cases where the court is assessing damages based on property values, it should have a discretion to decide the appropriate date for assessing values.

(2) The Association considered that the court should have a discretion to include in the indemnity (a) compensation to the true owner who fails to obtain rectification but has carried out improvements to the property in good faith for the value of such improvements, and (b) similar compensation to the wrongly registered proprietor where the register is rectified, but limited to the cost of the improvements.

14.331 Overall the Chancery Bar Association considered that this is not just a matter of land registration and, apart from the indemnity provisions, there should be a restitutionary remedy where one party has in good faith effected improvements which have benefitted the other.

14.332 The Law Society felt that our proposal was "seeking the best of both worlds". It considered that indemnity must either reflect the value of the property at the time the mistake occurred or its current value. It said that capping it at the current value is unfair. Alternatively, the indemnity could be set at the higher of these two values. But the Law Society considered it "dangerous" to start tinkering with core principles relating to the assessment of damages. It noted that, for the claimant, this is an indemnity in respect of a mistake and from a conveyancer's perspective it would seem fairer to use current values. The Society concluded that this issue probably requires input from property litigators and more information needs to be obtained.

CALL FOR EVIDENCE REGARDING DIFFICULTIES IN VALUATION

Consultation Question 90.

14.333 We invite the views of consultees as to any difficulties that might arise in determining the current value of land in the condition the land was in at the time of the mistake.[50]

[50] Consultation Paper, para 14.160.

14.334 12 consultees responded to this call for evidence.[51]

14.335 Nigel Madeley commented that "the registration gap rears itself". He stated that, if there is a significant delay in registration, the date of registration could be long after the date of legal completion, and certainly long enough for someone to build an extension. Mr Madeley argued that even of a buyer's solicitors had been slow to act, he was not sure that this type of loss would be foreseeable, and the time it takes to register leases of part of an estate makes this a material point.

14.336 Everyman Legal stated that there would have to be a detailed way of structuring the valuation (drawing a comparison with rent reviews and lease extensions). The firm noted that, even if two valuers are instructed, they would inevitably come up with widely different figures.

14.337 Michael Hall felt the kind of valuation in issue would not necessarily be too difficult because, if development has taken place, it will be well known and usually "there is valuation evidence available from local valuers who will have a good knowledge of property generally".

14.338 The City of Westminster and Holborn Law Society considered that there are "obvious difficulties" where the condition of the land has subsequently changed to a substantial degree, but noted that professional valuers will often be able to give realistic estimations of site value from direct or comparable historic evidence.

14.339 The Conveyancing Association said it would imagine that in the case of most residential properties there would be little difficulty in establishing value based on comparable properties. However, establishing the condition the property was in at the time of the mistake would be more problematic, and more so in the case of agricultural or commercial premises were fewer comparable properties will be available.

14.340 Chancery Bar Association did not anticipate particular valuation difficulties but noted that, if there are, the case for restoring the property to the true owner by rectification is strengthened.

14.341 Dr Harpum said he do not know whether a surveyor would have any difficulty in making a calculation as to the value of the land, on the assumption that it had remained unchanged since the date of the mistake. He advised that the Law Commission seek evidence from RICS in that regard and he would be surprised if there was any difficulty.

14.342 The Bar Council did not see any difficulties with our proposed method of valuation in principle and noted that retrospective property valuations are commonplace.

14.343 HM Land Registry said there might be issues around assessing value, but it believed that comparables should exist even where previously undeveloped land has since been developed. However, it noted that there are likely to be issues around the word "condition" and questioned whether this would include the planning status of the land or only its physical condition. HM Land Registry noted that, if the planning status of a piece

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[51] Nigel Madeley; Everyman Legal; Michael Hall; City of Westminster and Holborn Law Society; Conveyancing Association; Chancery Bar Association; Dr Charles Harpum QC (Hon); the Bar Council; HM Land Registry; Chartered Institute of Legal Executives; Law Society; Professor Warren Barr and Professor Debra Morris.

of land has changed, then it will affect value even if it is in the same physical condition at the date of the mistake.

14.344 HM Land Registry also questioned whether the Act should refer to the condition and status of the land, with an explanation of the ambit of the provision in the legislation. This would make it clear that "condition" includes such things as planning status and even the application of restrictive covenants.

14.345 The Chartered Institute of Legal Executives explained that there is always a problem in agreeing a figure based on a situation occurring some time before the valuation, especially if the property has been improved or has planning permission. However, it expected that it would be possible to create reasonable guidelines. CILEx added that it "seems wrong" that, if a new owner has increased the value of land by making improvements or obtaining planning permission, they would not be compensated.

14.346 The Law Society felt that, without a schedule of condition, it could be difficult to ascertain the original condition of the property at the time the mistake occurred, particularly where much time has passed or where improvements have been carried out.

Chapter 15: General boundaries

INTRODUCTION

15.1 26 consultees responded to questions in Chapter 15 of the Consultation Paper. [1]

15.2 A majority of consultees agreed with our provisional proposal to introduce a non-exhaustive list of factors to be used to determine whether a dispute is a boundary dispute and a boundary dispute. Many of the consultees who did not agree with the proposal thought that reform should more directly address the scope of the general boundaries rule, or questioned the usefulness of a non-exhaustive list. Consultees also offered various views on the proposed factors to be included in the list.

A PROPOSED LIST OF FACTORS

Consultation Question 91.

15.3 We provisionally propose that there should be a non-exhaustive list of factors which may be used to distinguish boundary and property disputes. This list could include factors such as:

(1) The relative size of the contested land in comparison to other land clearly within the remainder of the registered proprietor's title;

(2) The importance of the land to the registered proprietor;

(3) The application of any of the common law presumptions; and

(4) The manner in which the error in the boundaries shown on the title plan came about.

Do consultees agree?[2]

15.4 25 consultees answered this question:

(1) 14 agreed;[3]

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2 Consultation Paper, para 15.35.

3 Elizabeth Derrington; Nigel Madeley; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; a confidential consultee; Chancery Bar Association; Pinsent Masons LLP; National Trust; Adrian Broomfield; Dr Aruna Nair; The Bar Council; Chartered Institute of Legal Executives; Burges Salmon LLP.

(2) 6 disagreed;[4] and

(3) 5 expressed other views.[5]

Consultation Question 92.

15.5 We invite the views of consultees as to the type of factors which should be given consideration when distinguishing boundary and property disputes.[6]

15.6 11 consultees answered to this question.[7]

15.7 Responses to these two questions overlapped. They are discussed together, below, thematically.

THE INTRODUCTION OF A LIST OF FACTORS

15.8 The majority of consultees who indicated agreement with Consultation Question 91 did so without providing any further substantive comment. The points raised by the consultees who agreed and provided additional comments are outlined below.

Agreed

15.9 Elizabeth Derrington, the independent complaints reviewer for HM Land Registry, stated that her experience strongly supported the assertion that many boundary disputes are the result of confusion on the part individuals about the effect of the general boundaries rule. Therefore, in her view, it would be "very helpful" if the rule could be stated more clearly. She agreed with our view that the proposal would assist customer understanding, especially of when an indemnity will or will not be payable.

15.10 The London Property Support Lawyers Group also agreed that a list could give more clarity and result in a more consistent approach, a result which they described as "welcomed". The Group noted that the non-exhaustive nature of the list retained the flexibility required to take into account particular case characteristics.

15.11 Similarly, Pinsent Masons LLP supported the introduction of a non-exhaustive list of factors "in the interest of clarity and a more consistent approach by Land Registry and the Courts".

15.12 The Chancery Bar Association expressed "strong support" for our proposal that statutory guidance be available for judges. In the Association's view, it is "inherently unsatisfactory" that the distinction between boundary and title disputes, which they

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4 Martin Wood; Michael Mark; Everyman Legal; Michael Hall; Christopher Jessel; HM Land Registry.

5 Professor Warren Barr and Professor Debra Morris; Cliff Campbell; Dr Charles Harpum QC (Hon); Amy Goymour; The Law Society.

6 Consultation Paper, para 15.36.

7 Martin Wood; Nigel Madeley; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Adrian Broomfield; The Bar Council; Chartered Institute of Legal Executives.

described as being of "considerable practical importance", is so difficult to define and dependent to the extent that it is on the decisions of judges, which are hard to predict.

15.13 Nigel Madeley indicated that he agreed with our proposal, but made additional comments in relation to the payment or non-payment of indemnity in disputes that are found to concern boundary or property matters respectively. He stated:

> You make the point that registration with the line on the title plan is not a mistake if it is registering a general boundary. As it is not a mistake, there is no indemnity. The dispute is one about boundaries.
>
> I get a feeling of cart and horse here. Saying that the Registry made a mistake is not the same thing as saying that the Registry acted unreasonably. One can act reasonably and still be mistaken. If we ask 'was there a mistake?' we are not asking 'did the Registry do the reasonable thing?'. Trawling through deeds and asking for minute detail in requisitions is not going to produce prompt registrations or endear the Registry to customers, but if doing those things would have meant that the red line would have been somewhere else, there has been a mistake. And if there has to be a mistake for a dispute to be 'property' and potentially lead to an indemnity, then we have our mistake.

15.14 Mr Madeley argued that if there is a correct answer as to where the boundary is, that it is a mistake to put it somewhere else. The fact that a hearing may be needed to discover the answer is "neither here nor there". On this basis, he questioned whether all disputes of this nature are property disputes, not boundary disputes. He suggested that if there is to be a category of boundary disputes, the test should be "that nothing in the information available (including on request) to the Registry would have enabled it to put the red line in the 'right' place". Ultimately, Mr Madeley suggested that there is no principled distinction between a boundary and a property dispute, but the former is governed by "involving a relatively small piece of land adjacent to a boundary".

Disagreed

15.15 Christopher Jessel was of the opinion that the boundary/property distinction is better left to the courts to determine. He stated that if a list is considered necessary, it should exist as extra-statutory guidance. In his view, "any list is liable to be construed as more or less exhaustive even if expressed not to be so". He therefore thought it is likely that the courts would limit themselves to a restrictive interpretation of any such list.

15.16 HM Land Registry stated that it had no objection to the inclusion in statute of the few examples of what an undetermined boundary might include, as set out in the previous rule 278 of the Land Registration Rules 1925. However, it was of the view that the inclusion of a non-exhaustive list of factors would be of little use in attempting to better regulate what is likely an already litigious situation and will to give rise to bad law, potentially further complicating an already difficult area of law.

15.17 HM Land Registry explained that, in general, a person wishes to know where their boundary lies and not whether they have a property or boundary dispute. Thus, HM Land Registry thought that the Consultation Paper was drafted for those contemplating a dispute, rather than to assist registered proprietors to better understand where their legal boundary might be.

15.18 Martin Wood shared the view that the issue of the extent of the general boundaries rule is not about classifying disputes as either boundary or property. He explained that, "there will be no dispute in relation to most registered titles, but the general boundaries rule still applies to them all". Instead, Mr Wood thought that the question should have been about establishing the ambit of the general boundaries rule itself; therefore, he considered that the question was misconceived.

15.19 To this end, Mr Wood thought it was "unfortunate" that the current rules do not include the instances outlined in rule 278 of the Land Registration Rules 1925, which gave a helpful indication of the scope of the general boundaries rule.

15.20 Michael Hall did not see the proposed non-exhaustive list of factors as being of any real assistance to judges, because "it is far too vague to be regarded as a rule of law". He commented that HM Land Registry's Practice Guide 77 also did not offer clarity.[8] Mr Hall explained his view that if a boundary fence has to be moved as a result of the dispute, it is a property dispute not a mere boundary dispute. Therefore, in his opinion, no useful purpose is served by the proposal in Consultation Question 91: it "would not bring any additional clarity … as a dispute may be classified either way, or at different times as both types of dispute".

15.21 Mr Hall explained his understanding of a boundary dispute:

> The question is whether the 'general boundary' shown on the title plan has been drawn correctly, to reflect the boundary line shown on a transfer plan, or alternatively to reflect the actual position on the ground of a boundary fence which both parties accept represents the boundary; where a developer has erected a boundary fence which is not precisely on the line shown on the plan in the original transfer of part, but which has been in place since 13 October 1991 (12 years before the commencement date of the Land Registration Act 2002) title will have been acquired by adverse possession to the ground within the boundary fence which is outside the boundary line on the transfer plan and (probably) the title plan. So the issue is the accuracy of the title plan rather than the position of the boundary fence. The parties may ask the Land Registry to determine the exact line of the boundary.

Mr Hall explained that the "most difficult boundary disputes" result from inaccurate plans in conveyances, to the degree of "a thick black line about 30 feet wide on the ground and no boundary fence or only a very insecure fence".

15.22 Mr Hall contrasted this with a property dispute:

> In the case of a property dispute one party claims that the other has been trespassing on his land because the boundary fence has been moved and is in the wrong position, and applies for registration of a title by adverse possession which may provoke the other party into threatening possession proceedings. Possession proceedings may be taken and the issue arises whether the boundary fence has been the same position since 13 October 1991 so that title has been acquired by adverse possession.

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8 See HM Land Registry, *Practice Guide 77: Altering the register by removing land from a title plan* (September 2015).

> Of course it may be argued that the transfer plan was inaccurate and that the property agreed to be sold was the property within the boundary fence, which was firmly in place when the buyer viewed the property and which has not been moved since.

Other

15.23 Several consultees did not agree or disagree with the proposal, but offered other comments.

15.24 Professors Warren Barr and Debra Morris supported the concept of a non-exhaustive list of factors, but were concerned about the difficulty in practice of both defining the content of such a list and ensuring that it is not viewed as exhaustive in practice.

15.25 Cliff Campbell stated that the present law, and particularly the uncertainty as to what is a boundary dispute or a property dispute, is highly unsatisfactory both for the parties to a dispute and for HM Land Registry. He explained:

> Parties may be dissuaded from properly pursuing a property dispute incorrectly classified as a boundary dispute by Land Registry and recovering the resultant costs as indemnity.
>
> Alternatively Land Registry may be forced to "buy off" the parties to a boundary dispute at considerable expense before referral to the Tribunal, in case it is subsequently classified as a property dispute and the Registry has to pay both sides' costs of proceeding all the way to a full hearing, when the indemnity fund should not in fact be paying a penny.

15.26 Mr Campbell viewed "statutory elucidation", for example re-inclusion of the wording of the former rule 278 Land Registration Rules 1925 and the inclusion of the list of indicative factors, as desirable. However, in his view the proposals "do not go nearly far enough" to address fundamental problems with the existing law. Mr Campbell suggested that solving the general boundaries problem requires deciding as a preliminary issue, either by agreement of all interested parties including HM Land Registry or at the Tribunal or court, whether a matter is a boundary or property dispute. He argued that once this determination has been made, the matter can be dealt with effectively:

> If the matter is a boundary dispute, then prevent the parties from taking any further action at all … for the reasons stated so clearly by Mr Justice Nugee in *Derbyshire County Council v Fallon*[9]... .
>
> If however a matter is preliminarily adjudged to be a property dispute, proceed with it as such, including Land Registry involvement in the negotiation stages with a view to assisting settlement if possible on payment of appropriate indemnity, and referral for judicial determination if that does not prove possible.

15.27 Mr Campbell argued the decision in *Fallon* should be overruled in legislation to say that the position of a general boundary is never a mistake. He argued:

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9 [2007] EWHC 1326 (Ch), [2007] 3 EGLR 44.

> There is no point in spending time and money litigating a general boundary when the position of the legal boundary will remain unchanged, whatever the outcome … the concept from Fallon of correcting a mistake by showing a general boundary in a more accurate position is a logical fallacy ... [it] misses the whole point of general boundaries. They are not intended to show the legal boundary, nor be accurate, and should not be judged as mistaken if they are drawn a little bit further away from the legal boundary than they might otherwise have been.

15.28 Mr Campbell stated that HM Land Registry has always made very clear as a matter of policy that the determined boundary procedure is not the appropriate way to resolve a boundary dispute. He argued that this policy should be enshrined in the legislation, so that it is only "possible to apply to determine a general boundary based on mutual consent, or court order". However, he noted that many people see HM Land Registry as a quick, cheap and easy, administrative alternative to court proceedings. In his view, it should be clear to parties from the outset that to litigate a boundary, "they do so in court, or not at all".

15.29 Mr Campbell suggested that the registrar could retain an administrative power to alter a general boundary at his or her absolute discretion, with no right of appeal except subject to the court's prior consent and on very limited grounds such as irrationality. Lastly, Mr Campbell considered that the jurisdiction of the Tribunal should not be widened to enable determination of boundary disputes (as discussed in Chapter 21 of the Consultation Paper). In his view doing so would open the floodgates to more applications.

15.30 Dr Charles Harpum QC (Hon) explained that although he was not opposed to the proposal, he was unsure of how much the statutory list would help. He commented that, "as always, the problem with guiding factors lies in their application to particular facts". Dr Harpum described the factors identified in Consultation Question 91 as "not controversial", commenting that they would generally be considered if an issue about the general boundaries rule arose. He noted that factor (3) – the application of any common law presumptions – was listed in rule 278(2) of the Land Registration Rules 1925; he has always assumed that the rule was implicitly carried forward into LRA 2002, because section 60 was not intended to change the law.

15.31 Dr Harpum added we had not identified possession as a factor. He stated that if one party can clearly show that he or she is in possession of the disputed land, it should be a relevant factor, particularly having regard to the importance that the LRA 2002 attaches to possession.

15.32 Amy Goymour "possibly agreed" with the proposal but questioned whether the courts should be permitted to consider the consequences of the distinction between property and boundary disputes when deciding between the two options. She noted that the proposed list of factors is non-exhaustive, and therefore, it would allow the courts to consider such consequences. She stated that this could result in the courts moving towards results-driven decision-making. Ms Goymour suggested that this point ought to be considered further.

15.33 The Law Society supported the provision of guidance to enable the courts and Tribunal to determine whether a given dispute is a "property dispute" (which engages section 58 of the LRA 2002) or a "boundary dispute" (which engages section 60). However, it said

that it was unable to support the proposed list of factors "even if the list is expressed to be non-exhaustive".

15.34 The Law Society suggested that the real distinction between property and boundary disputes is the magnitude of the discrepancy between the boundary as shown on the filed plan and the parties' respective contentions as to the true location of the boundary: "the greater the discrepancy, the more likely that the dispute is a property dispute". This factor, it argued, should be the primary driver for distinguishing property and boundary disputes. It explained:

> Experience shows that cases in which the filed plan is wildly inaccurate are actually very rare and, generally, are confined to accidental "double registration" of the same parcel of land in different titles: such disputes should be characterised as "property disputes". It is unusual for a genuine dispute to involve a boundary being "moved" by more than 3m. Indeed, we would suggest that any dispute in which the boundary is alleged to be more than 3m from that shown on the filed plan over any significant length of the boundary (say 10m) should be *prima facie* a "property dispute", not a "boundary dispute".
>
> … the Society considers that this discrepancy should be assessed by linear measurements, not by area: a discrepancy of, say, 1m between the boundary shown on the filed plan and the boundary contended for is a "boundary dispute", even if the boundary runs for 500m.

15.35 Additionally, the Law Society suggested that "more than a few" residential boundary disputes would be discouraged or even prevented if not for the misconceived but widely-held view that HM Land Registry's filed plans accurately represent the boundary (in contradiction of the general boundaries rule). To this end, the Society strongly recommended that a text box be added to the bottom of every filed plan and/or to the bottom of every official copy of the register of title containing a statement such as:

> "**Warning**: Land Registration Act 2002, section 60. Unless the contrary is stated on the Property Register, this plan [the accompanying Filed Plan] does **not** accurately show the boundaries of the land comprised in this title."

THE FACTORS THAT SHOULD BE INCLUDED

15.36 Most consultees who responded were broadly supportive of including the four factors suggested in Consultation Question 91, without identifying further factors in response to Consultation Question 92.

15.37 For example, the City of Westminster and Holborn Law Society simply described the proposed factors as "sensible".

15.38 The Bar Council said they had no additional suggestions. However, it commented that it could be useful for there to be a link paragraph 5(4)(c) of schedule 6 to the LRA 2002, "so as more clearly to avoid its application beyond its intended scope, and arguments that a failure to do so reflects an intention that it should have a wider application.

15.39 The consultees who did provide comment tended to do so to explain their disagreement with the proposed factors, or to suggest clarification of them.

Factor 1 – the size of the contested land

15.40 Michael Hall commented that the "real question is whether a physical boundary is required to be moved or not".

15.41 The Law Society did not support the inclusion of a factor based on the relative size of the contested land as in its view, "there is no logical reason to distinguish between a small discrepancy in respect of the boundary of a large parcel of land the same discrepancy in respect of a much smaller parcel of land". The real test, in the Society's view, should be "how big is the alleged discrepancy". The Society described this assessment:

> This discrepancy should be assessed by linear measurements, not by area: a discrepancy of, say, 1m between the boundary shown on the filed plan and the boundary contended for is a "boundary dispute", even if the boundary runs for 500m.

The Society suggested that any dispute in which the boundary is alleged to be more than 3m from that shown on the filed plan over any significant length of the boundary (say 10m) should be *prima facie* a "property dispute", not a "boundary dispute".

15.42 Martin Wood disagreed with the inclusion of this factor:

> It again focuses on the circumstances when a dispute has arisen rather than on the scope of a general boundaries rule, which scope is, as I have suggested, a constant relating to all registered titles. If the rule were amended to revert to the old rule 278 and the approach I advocate applied, the rule would be constrained within appropriate limits.

15.43 Nigel Madeley suggested that something should be considered a boundary dispute if the dispute is resolved by moving a boundary feature by a modest distance or if the land involved is valuable, as this would distinguish it from a dispute about whose land it is. He commended that:

> The courts have the same issue with unregistered conveyancing and the principle that a change in ownership of a small area of land is enforceable, despite there being no deed and it is done informally, if it is done to resolve a dispute. So perhaps this isn't a new issue.

Factor 2 – the importance of the land to the registered proprietor

15.44 The Law Society was strongly opposed to the inclusion of the importance of the land to the registered proprietor as a factor. It explained that it would be wrong in principle for the court or Tribunal to have regard to its own assessment of the importance of the land to the registered proprietor when assessing whether the proprietor should receive an indemnity if land were removed from the title. It stated that "access to the indemnity should be determined by the extent of the land removed, not the perceived value of the land to its owner".

15.45 Martin Wood disagreed that this factor is relevant:

> Again it suffers from the focus on disputes. And it may be that particular land might be of importance to one owner but not to his successor. Is it suggested that the rule should operate differently because of this subjective factor? Surely not.

15.46 The London Property Support Lawyers Group commented that importance is arguably too subjective a factor. It further explained that the disputed land will almost always be "important" to the disputing parties, especially if they have got as far as litigation. This view was shared by the firm Everyman Legal.

15.47 Amy Goymour was similarly unconvinced, as "surely the land will always be important to the registered proprietor if they are disputing/litigating the issue". She argued therefore, that this factor might be irrelevant unless it invites the courts to ascribe its own objective value of the importance of the land to the registered proprietor, and that this might be done by making it clear that the court would only consider the value of the land to a reasonable person holding the registered proprietor's assets.

15.48 Pinsent Masons LLP's understanding of this factor was that it is:

> Intended to favour categorising as boundary disputes those situations where, for whatever reason, ownership of the land in dispute has become a matter of entrenched principle between adjoining owners seemingly out of proportion to the objective value and utility of the land in question.

Based on this interpretation, Pinsent Masons LLP suggested a non-exhaustive list of examples of (objective) importance could be included within the factor to make this clear.

15.49 A number of consultees suggested that the use or amenity value of the contested land was a useful factor. The London Property Support Lawyers Group thought the list of factors should include an assessment of whether the land in dispute has been built on, the degree of possession and the current use and value of the land in question. The Chancery Bar Association said the presence of buildings or other substantial structures on the disputed area of land should be a relevant factor in addition to the ones set out in our Consultation Paper. Adrian Broomfield suggested that the impact on the amenity of adjoining property was relevant. He cited, for example, whether access would be affected without the strip of land in dispute, including access to mines and minerals, related exceptions and reservations in title deeds.

Factor 3 – the common law presumptions

15.50 Martin Wood agreed with the inclusion of the factor relating to the common law presumptions, stating that the common law presumptions "should be brought back expressly into the rule to put some flesh on the bones."

15.51 The Law Society suggested two factors to be included in any non-exhaustive list, but directed that less weight should be attributed to them.

(1) That one or more of the common law presumptions is applicable to the resolution of the dispute, which would be an indicator of a boundary dispute; and

(2) The extent to which the contested boundary correlates to physical features. The Society notes that this factor would suggest a boundary dispute where there is a high degree of correlation and a property dispute where there is not.

15.52 Christopher Jessel noted that rule 278 of the Land Registration Rules 1925 referred to rivers and roads. He highlighted that boundary disputes about rivers and roads might raise issues of importance. To illustrate, Mr Jessel referred to the decision in *Norman v Department of Transport*[10] where for a road, ownership of half the subsoil under the *medium filum* rule[11] was crucial to a claim for compensation. In relation to rivers he stated that the same consideration may be relevant to the assertion of fishing rights:

> For instance the title to a small estate might include the bed of a river where the fishing rights are valuable. If the official plan shows the red line running along the river bank that would exclude the river bed. Although this might appear to be a boundary matter, failure to include the bed in the registered title could present problems on any dealing with the fishing.

Factor 4 – the manner in which the error came about

15.53 The Law Society was unconvinced that the manner in which an error shown on the title plan came about is a material factor. The Society commented that it is often "mere speculation" as to how the original error came about. It stated that it would be unfortunate for what may be a preliminary view as to whether a party was in any way at fault, to then colour whether the dispute should be regarded as a boundary dispute, which does not engage the right to an indemnity, rather than a property dispute which does engage that right.

15.54 Martin Wood disagreed that the manner in which the error came about "is remotely relevant to the scope of the rule".

COMMENTS ABOUT MAPPING OF TITLE PLANS

15.55 Two consultees provided comments to the questions in Chapter 15 of the Consultation Paper that focussed on mapping of title plans.

15.56 In addition to his responses to the specific questions, as outlined above, Martin Wood more generally commented on the subject of boundaries, to illustrate some of the difficulties of this area in practice.

15.57 Mr Wood informed us that, at his time working at HM Land Registry, he and his colleague gave the general boundaries rule a limited application when determining whether the general boundaries rule applied, on the basis that, otherwise, "what value would a registered title have?" He therefore expressed sympathy with Amy Goymour's view, as set out in paragraph 15.22 of the Consultation Paper, that some judges have

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10 (1996) 72 P & CR 210.

11 The *ad medium filum* rule is a rebuttable presumption that an owner of land which abuts either a public or private highway or a non-tidal river or stream also owns the soil of the highway, or the bed of the river or stream, up to the centre point.

pushed the rule beyond its proper ambit and that this is a matter of concern as it "plainly diminishes the value of registration".

15.58 Martin Wood argued that these problems have arisen as judges do not fully understand the practice of mapping registered titles and how it relates to the general boundaries rule.

15.59 He explained that HM Land Registry title maps are created based on large-scale topographical OS maps that do not, and are not intended to, show legal boundaries or the extent of legal titles. Although the physical features shown on these OS maps frequently do coincide with legal boundaries, this is purely coincidental. The accuracy of the features drawn on these original OS maps is lost when the original scale is 'zoomed in' and enlarged for example, from 1:1250 to 1:2500. Enlargement means that the new title map is not accurate to the standard of the original map and, any mistakes contained within the original will be exaggerated. Additionally, if there are two or more features close together on the ground, such as a fence and a hedge, the scale to which the OS map is drawn may be too small and detailed to allow both features to appear on the enlarged title map. Therefore, both features may be represented by a single line.

15.60 Mr Wood explained that, onto these enlarged base maps, HM Land Registry then outlines the extent of the registered title, generally edged in red. The red edging will either:

(1) Abut a line representing a physical feature; or

(2) Where the boundary does not coincide with a physical feature, the boundary will be marked with a broken line and will be accompanied by an entry stating: *"The boundaries shown by the dotted lines have been plotted from the plans on the deeds. The title plan may be updated from later survey information."*

15.61 Mr Wood explained that the general boundaries rule reflects the difficulty of establishing a precise legal boundary and carries forward the principles that have long applied in unregistered conveyancing. However, he added that the general rules should not be seen as meaning that a title plan only shows vague boundaries or is of no assistance in identifying boundaries.

15.62 To illustrate, he noted that in situation (2) above, where the boundary has been plotted with a broken line, the broken line is supposed to accurately reproduce the boundary line as shown in the deed plan. It should, therefore, show the position of the boundary with a high degree of accuracy, subject only to the limitations of scale inherent in the base plan used.

15.63 Mr Wood explained that for this reason, he was never comfortable with the decision in *Lee v Barrey.*[12] Here Mr Wood argued that the court failed to take account that the statement on the title plan – which said "the boundaries shown by the dotted lines have been plotted from the plans on the deeds" – was incorrect. In this case the plotted line did not replicate the line of the boundary on the deed plan, because it did not show a kink in the boundary shown on the deed plan. The degree of divergence caused by the kink was not attributable to the scale of the base plan, rather it was down to an incorrect

[12] [1957] Ch 251.

and poorly plotted line. Mr Wood therefore argued that the divergence could not properly be regarded as being a "boundary" dispute.

15.64 In the situation at (1) above, where the boundary line is drawn to abut a line representing a physical feature, Mr Wood explained that rule 278 in the Land Registration Rules 1925 gave some indication of how the general boundaries rule was intended to operate by referencing the inclusion or otherwise of physical features such as hedges and walls. He argued that in so doing, the old rule effectively applied the '*ad medium filum'* presumption to registered titles. Mr Wood explained that he and his colleague took the view that the old rule meant that what was left undetermined was the position of the precise legal boundary in reference to the physical feature depicted by the line on the OS map.

15.65 Mr Wood gave an example: where a wall is the physical feature to which the title is mapped, the walls foundations will commonly protrude a little beyond the face of the wall. Here, Mr Wood stated, the legal boundary is along the line of the foundations rather than the face of the wall. This is because the wording on the old rule 278 stated "whether it includes a hedge or wall … or how far it runs within or beyond it". He explained:

> This is the sort of thing the words "or how far it runs … beyond it" can legitimately seen as covering. But they should not be seen as meaning that the rule includes leaping from one feature to another where those features are a substantial distance apart and are both shown on the title plan. Otherwise, where does it all end …

15.66 In relation to the case of *Drake v Fripp*,[13] Mr Wood stated that the question should not have been which of the two physical features on the land marked the boundary, but rather "what was left undetermined by the mapping of the registration to abut the Cornish hedge?" Mr Wood was unconvinced by Lewison LJ's comment in *Drake v Fripp* that "the boundary currently shown on the title plan is a general boundary. If the title plan is altered so as to show the boundary running along the line of the fence it will still be a general boundary." He expressed the opinion that while that may be true, it disregards the point that it would be a general boundary mapped to abut a different feature on the base plan.

15.67 Mr Wood agreed with the view put forward in the Consultation Paper that there will never be a bright line to determine which cases fall into which category. However, he hoped for an approach that limits the scope of the rule in the manner that it has been applied in practice. In his view, otherwise, the value of a registered title is seriously diminished.

15.68 Similarly, Tom Grillo FRICS commented on the plans used by HM Land Registry..

> There has been compulsory registration in Surrey since 1952. Since that date, in practically every case, the Land Registry entry is based on the Ordnance Survey plans. These are produced at 1:1250 or 1:2500. The drawback to these are two-fold:
>
> (1) At that scale the thickness of a boundary line is something between 0.5m and 1.0m.

[13] [2011] EWCA Civ 1279, [2012] 1 P & CR 4.

(2) The Ordnance Survey advise that their maps are only accurate to approximately 0.9m.

The combination of these two means that a boundary between two small residential properties cannot be determined by reference to the Land Registry entry.

In short, the Land Registry plans are not fit for purpose.

Prior to the 2002 Act, the boundaries were qualified as to the custom of the county. For example, the Ordnance Survey showed physical features, ie the hedge on top of a bank. In this area, the tradition has been that the boundary of the land was on the far side of a ditch next to a bank and hedge, the theory being that the owner of the land would have dug the ditch up to his boundary and thrown the soil back onto his own land to create the bank on top of which a hedge was planted. Clearly, the Ordnance Survey maps do not recognise this.

On occasions I have sought earlier plans attached to Deeds drawn up before Land Registration. These often have measurements in feet and inches, and are sometimes very helpful.

Another aspect of Land Registration Plans is that they are not related to any particular datum point. When the land is carefully measured as it can be to the nearest few millimetres today, it is often found that the shape of the land is not identical with that on the Registration Plan. A certain amount of reorienting has to be made. This is unsatisfactory.

The Registration Plans relate to no particular datum point. Sometimes there are buildings on the land. These may or may not be accurately shown. For example, on a site which has been developed in the last few years the Land Registry entry possibly relies on the developer's drawings. These are usually those produced before the development was carried out. In carrying out the development it is occasionally the case that a detached house in a reasonable sized garden has not been built in precisely the same position as shown on the developer's plan, because the developer's plan was produced for the purpose of the planning application, and was not re-surveyed after the house was built.

The aforegoing is a catalogue of the problems that I have with the Land Registry system… .

Chapter 16: Easements benefiting short leases

INTRODUCTION

16.1 29 consultees responded to the three questions in Chapter 16 of the Consultation Paper. [1]

16.2 The vast majority of consultees agreed with the first two provisional proposals, about the registration requirements and overriding status of easements benefitting unregistrable leases that are created within the lease itself. Consultees expressed more mixed views about the treatment of easements that benefit unregistrable leases which are created separately to the lease. Consultees raised a variety of points to all three questions, with several recurring themes emerging.

THE REGISTRATION REQUIREMENTS OF EASEMENTS BENEFITING SHORT LEASES

Consultation Question 93.

16.3 We provisionally propose that, where the grant of a lease is not a registrable disposition, easements which benefit that lease and which are created within the lease itself should not be required to be completed by registration in order to operate at law.

Do consultees agree?[2]

16.4 26 consultees answered this question:

(1) 23 agreed;[3] and

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1 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Dr Nicholas Roberts; Professor Sarah Nield; Michael Mark; Everyman Legal; CMS Cameron McKenna LLP; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); National Trust; Nottingham Law School; The City of London Law Society (Land Law Committee); Adrian Broomfield; The Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

2 Consultation Paper, para 16.32.

3 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Professor Sarah Nield; Michael Mark; Everyman Legal; CMS Cameron McKenna LLP; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; National Trust; The City of London Law Society (Land Law Committee); Adrian Broomfield; The Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Burges Salmon LLP; The Law Society.

(2) 3 disagreed.[4]

16.5 The consultees who responded to this question tended to do so in strong terms, whether they agreed or disagreed with the proposal.[5] For example, Burges Salmon LLP "emphatically" agreed with the provisional policy, while CMS Cameron McKenna similarly stated "this [policy] is a long overdue correction of a flaw in the drafting of the 2002 Act". Among consultees who disagreed with the proposal, Dr Charles Harpum QC (Hon) "very much regretted" the departure from the policy put forward in our 2001 Report.

16.6 Consultees, including the three who disagreed, raised similar points in their responses. Responses are considered thematically below.

Protection for tenants

16.7 Several consultees echoed the concern that tenants are insufficiently protected under the current law. These consultees were concerned that the current law "inadvertently disadvantages"[6] tenants who are not aware of the requirement to register easements benefiting leases that do not exceed seven years.[7]

16.8 The Society of Licensed Conveyancers took the view that tenants "may inadvertently be disadvantaged". It thought that reducing the term of leases which must be registered[8] would only lessen the problem, rather than remove it.

16.9 The National Trust said that, in its experience, short term tenants often do not seek legal advice and do not register the easements to which they are entitled.

16.10 The City of Westminster and Holborn Law Society considered that:

> In practice, short term lessees will normally be paying rent for possession of premises, not for a capital asset which they expect to involve registration as to ancillary rights.

16.11 Christopher Jessel also noted the impact of non-registration of easements. He emphasised that a "short term lessee such as an annual farm tenant needs an access" and that such a farmer would be unlikely to be "impressed by being told the right expressly set out in his written tenancy agreement is only equitable and he needs to spend time and money in registering his right of way and if he does not and if his landlord sells the freehold the right might not bind the buyer".

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4 The Conveyancing Association; Dr Charles Harpum QC (Hon); Chartered Institute of Legal Executives.

5 Consultees who strongly agreed included Nigel Madeley; CMS Cameron McKenna LLP; Everyman Legal; The City of London Law Society Land Law Committee; and Burges Salmon LLP. Strong disagreement was expressed by Dr Charles Harpum QC (Hon).

6 Society of Licensed Conveyancers.

7 The City of Westminster and Holborn Law Society; Christopher Jessel; National Trust; Society of Licensed Conveyancers and Amy Goymour.

8 Consultation Question 8 in Chapter 3.

16.12 In contrast, Dr Charles Harpum, who disagreed with the proposal, considered that registration protects tenants because it removes any risk that the easements will be defeated by a purchaser if they do not meet the criteria to be an overriding interest.

16.13 Consultees also noted the options available to tenants under the current law to protect the priority of an equitable easement where the registration requirements have not been complied with.

16.14 Amy Goymour surmised that such an easement would only be protected as an overriding interest if the easement holder was in actual occupation of the land. In her opinion, this state of affairs was "unlikely, but not wholly impossible".

16.15 However, other consultees considered that tenants who fail to register easements which benefit their short leases were unlikely to have their rights restricted by their landlords. The City of London Law Society Land Law Committee and the Law Society pointed out that a landlord who is collecting rent from a tenant is highly unlikely to prevent appurtenant easements from being exercised.

16.16 Nigel Madeley (who agreed with the proposal) and Dr Charles Harpum (who disagreed) thought that tenants could, if required, legally rely on the landlord and tenant relationship in order to enforce their rights. Nigel Madeley suggested that a tenant could sue on the landlord's quiet enjoyment obligation; whereas Dr Harpum posited that a tenant could rely on the doctrine of non-derogation from grant.

Protection for purchasers

16.17 Consultees expressed differing views as to whether the proposal would prejudice purchasers of the burdened land.

16.18 On the one hand, Amy Goymour was worried that a purchaser could be "taken by surprise" by discovering that his or her title was burdened by an unregistered legal easement by virtue of its status as an overriding interest. She was concerned "notwithstanding that [the easement] must fall within one of the conditions in Schedule 3 para 3 in order to bind as an overriding interest".

16.19 Similarly, Dr Charles Harpum was particularly concerned about the impact of the policy on purchasers of burdened land which is sold separately to the landlord's freehold reversion. He argued:

> Any purchaser of [the burdened land] should be able to ascertain readily whether that land is subject to third party rights, such as easements, which may not be obvious. The best way to achieve that objective is to register those third-party rights. The matter is perhaps different in relation to [the benefited land] itself. Anybody buying the freehold should of course be told of any unregistrable leases, but even if he or she is not, the tenant will be in possession, which is likely to be obvious.

16.20 Further, Dr Harpum noted that this situation does arise in practice.

16.21 On the other hand, the London Property Support Lawyers Group thought that the conditions in paragraph 3 of schedule 3 would be "sufficient to operate as an effective limitation on the nature and number of easements which will arise as overriding interests in consequence".

Conveyancing costs

Effect of overriding interests

16.22 In a similar vein, consultees had divergent views on whether the proposal would increase conveyancing costs. The London Property Support Lawyers Group did not think that there would be a significant change to conveyancing practice. It stated that:

> the due diligence which a purchaser must undertake to ascertain the nature and extent of occupation rights will not increase significantly as a result of this change.

16.23 On the other hand, Dr Charles Harpum thought that the proposal would increase conveyancing costs by increasing the number of interests which are capable of overriding. He described overriding interests as a "conveyancing nightmare", and commented that:

> The existence of overriding interests increases conveyancing costs. The more there are the greater that cost.

Effect of registration

16.24 Consultees also considered the effect that requiring registration would have on conveyancing costs.

16.25 Burges Salmon LLP stated that, in its view, the LRA 2002's current requirement for short-term easements to be registered itself increases conveyancing costs. Similarly, the Law Society suggested that this requirement is "very burdensome".

16.26 In contrast, Dr Charles Harpum took the view that it was "not unreasonable" to expect parties to register their interests. Further, he made the point that:

> In a case where [the benefited land] and [the burdened land] are already in separate ownerships, the position is much more likely to be that the freeholder of [the benefited land] will already have been granted an easement over [the burdened land], which his or her tenants may exercise. That easement will have been registered and there will be no problem.

16.27 In light of this statement, Dr Harpum doubted that it "makes sense to talk in terms of 'efficiency savings' in the factual context of short-term leases".

The benefits of registration

16.28 The three consultees who disagreed with the proposal emphasised the benefits of registration. Dr Charles Harpum considered that registration was the "best way" for purchasers to "be able to ascertain readily whether the land is subject to third-party rights". Further, he thought that registration was in "everyone's best interests" since an easement might not be overriding if it does not satisfy one of the conditions in paragraph 3 of schedule 3. He noted that requiring registration would further the objective of the LRA 2002 that "the register should be as conclusive as it can be made".

16.29 Both the Chartered Institute of Legal Executives and the Conveyancing Association declared that they would prefer to re-align the registration requirements for short leases and the easements which benefit them by requiring the short leases to be registered.

16.30 On the other hand, six consultees who agreed with the proposal thought that registration of easements benefiting short leases was not helpful.

16.31 The Law Society, the City of London Law Society Land Law Committee and Burges Salmon LLP considered that registration leads to cluttered titles, rather than providing any benefits. The Law Society suggested that the fact that leases that do not exceed seven years do not have to be registered exacerbates the problem, as landlords' titles are both cluttered and confused. It elaborated:

> If ultimately the Law Commission considers that such easements should continue to be compulsorily registrable, it is important that in the entry relating to the easement on the title, it is clear to which lease the easement relates – details of the lease should be provided in the entry. We have received complaints from conveyancers about too many entries relating to easements on titles being unidentifiable, so that the lease containing the easement ends, the easement is not necessarily removed from the title. All of this creates a large administrative burden for landlords, who have cluttered titles, but there is no particular benefit in practice for the tenants.

16.32 The National Trust thought that "the rights associated with short leases are transient and therefore the benefits of registration are minimal".

16.33 Nigel Madeley, in responding to Consultation Question 8 in Chapter 3, said that he did not understand why an easement granted by a non-registrable lease needs to be completed by registration. He described the requirement of registration as "a notable irritant in practice".

16.34 In a similar vein, Everyman Legal thought that requiring registration of these easements undermined the exemption for leases that they benefit.

Current legal practice

16.35 The City of London Law Society Land Law Committee and the Law Society explained that there are differing practices as to the registration of easements which benefit leases that do not exceed seven years. The Law Society considered in practice easements "are very often not registered".

16.36 Both consultees reported that some practitioners take a conscious decision not to register for pragmatic reasons, namely that in most cases the tenant's easement will not be denied. For example, the Law Society noted that it was "extremely unlikely" for a landlord to prevent exercise of the easement, whereas registration is "burdensome".

16.37 Similarly, Nigel Madeley, making a comment in respect of Chapter 3, suggested that the requirement to register easements benefitting leases which themselves are non-registrable, was he suspected, "a requirement much honoured on breach".

Other points raised

16.38 Christopher Jessel said that *Wright v Macadam*[9] shows that "an easement appurtenant to premises comprised in a weekly tenancy under hand is a legal interest".

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9 [1949] 2 KB 744.

16.39 Howard Kennedy LLP queried how the provisional policy would affect easements reserved out of unregistrable leases, which are not registrable dispositions. It noted that, at present, landlords are able to note the benefit of the reservation on their registered title, suggesting that such a practice should continue.

OVERRIDING INTEREST PROTECTION AND EASEMENTS BENEFITING PAROL LEASES

Consultation Question 94.

16.40 We provisionally propose that all easements granted by or implied in leases which are not required to be created by deed by virtue of section 52(2)(d) of the Law of Property Act 1925, including equitable easements, should be capable of being overriding interests.

Do consultees agree?[10]

16.41 25 consultees answered this question:

(1) 21 agreed;[11]

(2) 3 disagreed;[12] and

(3) 1 expressed other views.[13]

Agreed with the proposal

16.42 The majority of consultees who agreed with our proposal did not provide any further comment.

16.43 The Law Society considered the proposal to be "logical" due to the fact that parol leases themselves do not need to be in writing. It thought the proposal would be "welcomed by landlords and tenants alike".

16.44 The National Trust, reiterating the reasons it gave for supporting the proposal in Consultation Question 93, considered that the policy would "benefit many tenants".

16.45 Two consultees acknowledged that the overall increase in the number of overriding interests would be small. Dr Nicholas Roberts described this "limited re-admission of equitable easements to the canon of overriding interests" as an "acceptable price" to

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10 Consultation Paper, para 16.40.

11 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Dr Nicholas Roberts; Professor Sarah Nield; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; National Trust; Nottingham Law School; Adrian Broomfield; The Society of Licensed Conveyancers; Dr Aruna Nair; The Bar Council; HM Land Registry; Burges Salmon LLP; The Law Society.

12 The Conveyancing Association; Dr Charles Harpum QC (Hon); Chartered Institute of Legal Executives.

13 Amy Goymour.

pay for the "sensible" policy of aligning the formality requirements for leases that do not exceed three years and easements which benefit them. Similarly, the London Property Support Lawyers Group, in agreeing with the proposal, described it as a "limited change in the treatment of equitable easements as overriding interests in the context of leases not required to be by deed".

16.46 Two of the consultees who agreed with the proposal commented on its impact on conveyancing costs. Both did not think that the proposal would increase conveyancing costs. The London Property Support Lawyers Group took the view that:

> The current requirements as to knowledge inspection and use will be sufficient to operate as an effective limitation on the nature and number of easements which will arise as overriding interests in consequence.

As a result, the Group considered that the investigations a purchaser must undertake in relation to occupation rights "will not increase significantly as a result of this change".

16.47 The Law Society, reiterating its view in its response to Consultation Question 93, thought that the requirements of registration under the current law creates administrative costs for the parties: the tenant must register his or her easement, and the landlord must manage clutter on his or her title. These costs would be removed if registration were not required.

Easements benefiting other types of short leases should override

16.48 Three consultees agreed with our proposal, but also thought that it should be expanded so that easements benefiting other types of short leases should be capable of overriding.

16.49 Professor Sarah Nield was concerned that the distinction between parol leases and other short leases would "add a further twist for the unwary rather than undermining formality requirements". She concluded that equitable easements benefiting any lease not exceeding seven years should also be capable of being overriding interests to "ensure consistency between registration requirements and priority implications."

16.50 Christopher Jessel and the City of Westminster and Holborn Law Society also considered that easements benefiting leases shorter than seven years should be overriding. They both pointed out that tenants of agricultural leases for a term between three and seven years may deal only with a surveyor, and not a lawyer. Christopher Jessel stated that:

> In my experience the need to use a deed may not occur to or be understood by the surveyor or the working farmer tenant. Even if the landlord's surveyor has had prior legal advice, the onus to register the easement will be on the working farmer who will think of the transaction as a tenancy agreement and will not wish to be involved with (and may have neither the time nor the skill to deal with) the formalities of wrestling with an application to the Land Registry, let alone any need to incur the expense of Land Registry fees.

Disagreed

16.51 The three consultees who disagreed with our proposal in Consultation Question 93 also disagreed with this proposal for the same reasons. These consultees, Dr Charles Harpum, the Conveyancing Association and the Chartered Institute of Legal Executives, reiterated their view that our proposal represented a step back from a complete and certain register.

16.52 Dr Charles Harpum thought that the proposal tackles a problem (the protection of unwary tenants) that is "probably academic". The only scenario that Dr Harpum could imagine a successor in title to a landlord refusing to allow a tenant to exercise their unregistered easements is where the successor in title is a developer looking to force out tenants before their assured shorthold tenancies are due to end.

16.53 In Dr Harpum's opinion, it would be unlikely for a tenant of a lease not exceeding three years to be given easements. Instead, he thought that such a tenant would be granted licenses, and if the landlord's successor in title refused to respect such licenses the courts would deal with them:

> One way would be under the doctrine of non-derogation from grant. Despite the use of the word "grant", that doctrine does not require a grant by deed, but applies very widely: see *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264 at 267. Another way would be to imply *an easement* arising by common intention (see *Pwllbach Colliery Co v Woodman* [1915] AC 634 at 646 – 7). If the AST is a legal estate, as it will be, any implied easement will also be legal and will take effect as an overriding interest in any event, of which C will be well aware (and so within LRA 2002, Schedule 3, para 3(1)(a)).

16.54 Dr Charles Harpum also considered that the proposal would increase conveyancing costs: "overriding interests of themselves generate conveyancing costs and that it is in everybody's interests that they should be avoided by requiring registration wherever is practically".

Additional comments

Formalities

16.55 Two consultees suggested that the formality requirements could be improved.

16.56 Christopher Jessel suggested that there is a "case for not requiring deeds for tenancies of less than seven years". He argued that the Law Commission should consider the impact of a recent amendment to section 52 of the Law of Property Act 1925 which excludes the rule that a deed must be used to create legal secure and introductory tenancies, on its easements policy. In Christopher Jessel's view, "it seems illogical to protect easements in public sector tenancies but not those in private sector ones of the same duration".

16.57 Amy Goymour, who neither agreed nor disagreed with the proposal, also focused on formalities. She advocated a different solution to the problem that the provisional policy looks to solve. She argued that a more "direct" solution would be to "amend s 54 LPA 1925 (and s 27 LRA 2002), so that easements attaching to short legal leases are exempt from requiring a deed or registration for their creation at law".

Creation of equitable easements

16.58 Two consultees commented on the ways in which equitable easements can arise, and consequently the scope of the proposal.

16.59 Professor Sarah Nield noted that the purported grant of an easement benefiting a parol lease may not result in either a legal or an equitable easement.

> To be created in equitable form the easement would have to be in writing - either in compliance s 53(1)(a) Law of Property Act 1925 or s 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989. A written and signed tenancy of under 3 years would probably suffice but an oral tenancy would not unless the oral assurance of the easement could be supported by an estoppel – a possibility but by no means certain whilst the equity is inchoate and in any event vulnerable in terms of priority unless protected by an entry on the register (see *Chaudhary v Yavuz* (2011)).[14]

16.60 Christopher Jessel considered that "conditional" easements may be equitable, notwithstanding that they comply with the current registration and formality requirements. He reported:

> Drafting such as "a right of way over the track coloured brown on the plan subject to and conditional on the person exercising the right contributing a fair proportion according to use of the cost of maintenance and repair" presumably creates an equitable easement. Such wording may be included in leases even where granted by deed although, because a lease can include a positive covenant to contribute, they may be less usual than in freehold grants. Rights of way of necessity are also equitable as they must end when the necessity ends although again leasehold ways of necessity may be unusual. I appreciate the issues here also affect easements benefiting freehold land and may need to be the subject of further consultation.

Other additional comments

16.61 The London Property Support Lawyers Group noted that the proposal would impact upon code rights found in the draft Electronic Communications Code which are granted in leases that are not required to be registered.

16.62 Dr Nicholas Roberts said that he was not aware of problems in practice arising from non-compliance with the requirement that an expressly granted easement be created by deed in order to operate at law. He suggested that "most practitioners" may assume that the law is such that easements which benefit leases that meet the criteria in section 54(2) of the Law of Property Act 1925 are capable of being legal.

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14 [2011] EWCA Civ 1314, [2013] Ch 249.

EASEMENTS CREATED AFTER THE GRANT OF THE LEASE

Consultation Question 95.

16.63 We provisionally propose that:

(1) easements benefiting a lease which is not required to be created by deed by virtue of section 52(2)(d) of the Law of Property Act 1925, where those easements are created separately from the lease, should be capable of being overriding interests; but

(2) the grant of an easement benefiting any other lease which is created outside of the lease document should remain a disposition which must be completed by registration to take effect at law.

Do consultees agree?[15]

16.64 22 consultees answered this question:

(1) 12 agreed with both proposals;[16]

(2) 4 agreed with proposal (1), but disagreed with proposal (2);[17]

(3) 4 disagreed with proposal (1), but agreed with proposal (2);[18] and

(4) 2 expressed other views.[19]

16.65 Consultees' explanations focused on whether the formality requirements for easements benefitting unregistrable leases should align with one another.

Proposal (1): overriding status of easements benefiting parol leases

Agreed

16.66 The majority of consultees agreed with our proposal that any easement benefiting a parol lease should be capable of being an overriding interest, whether granted in a separate deed or not. Most consultees did not provide any further comment.

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15 Consultation Paper, para 16.44.

16 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Dr Nicholas Roberts; Professor Sarah Nield; Everyman Legal; Michael Hall; Chancery Bar Association; Adrian Broomfield; Dr Aruna Nair; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives.

17 The City of Westminster and Holborn Law Society; Christopher Jessel; National Trust; The Law Society.

18 London Property Support Lawyers Group; Dr Charles Harpum QC (Hon); Burges Salmon LLP; The Conveyancing Association.

19 Nigel Madeley; Amy Goymour.

16.67 Professor Sarah Nield, who agreed with both proposals, considered that there is "justification for easements created outside a lease of between 3 to 7 years being treated differently".

16.68 Dr Nicholas Roberts described the proposal as "sensible" to "align the formality requirements" of easements and parol leases. The Law Society thought it was "logical" given the (absence of) formality requirement applicably to parol leases.

Disagreed

16.69 Four consultees disagreed with the proposal.

16.70 The London Property Support Lawyers Group were against the proposal because it thought that "the due diligence required to investigate such arrangements…would be significant". It noted that it did not think that due diligence would be significant in relation to Consultation Question 94, where the easement is granted "as part of the 'original occupational package'".

16.71 Similarly, Burges Salmon LLP thought that it would be "difficult to investigate such arrangements" and noted that, in practice, such easements will be contained in the lease in any event.

16.72 Dr Charles Harpum and the Conveyancing Association disagreed with the proposal on the same basis as for other Consultation Questions in this chapter: in their view, all expressly created easements should be registered.

Proposal (2): registration of easements granted by a separate deed

Agreed

16.73 The majority of consultees agreed with the proposal that easements benefiting short leases which are granted by a separate deed should continue to be subject to the requirement of registration.

16.74 Most consultees provided no further comment. Professor Sarah Nield thought that there was "justification" for the different treatment of parol leases compared to other short leases.

16.75 Dr Charles Harpum and the Conveyancing Association agreed with the proposal, in line with their view that all expressly created easements should be registered.

Disagreed

16.76 Four consultees disagreed with this proposal; these consultees thought that all easements benefiting a short lease should be exempt from the requirement of registration.

16.77 The Law Society did not believe that easement granted by a separate deed should be required to be registered. It noted that although it was created separately:

> The easements relates to and would not exist independently of the lease and the lease itself does not require registration.

16.78 The Law Society thought that exempting such easements from registration would be of "administrative convenience" and would "avoid cluttering the landlord's title". It thought that the grant of a separate easement for a lease between 3 to 7 years would be a "rarity", but nonetheless considered that registration should not be required.

16.79 The Law Society disagreed with our view, expressed in the Consultation Paper, that the fact that the easement is granted by a separate deed is "pertinent" in assessing whether it is "unreasonable to require registration".

16.80 The National Trust thought that it would be "odd" for the requirement of registration to depend on whether the easement was granted by a separate deed. It also expressed the view that, if registered, the deed granting the easement should also be filed and that the note on the register should refer to that deed.

16.81 The City of Westminster and Holborn Law Society and Christopher Jessel echoed their responses to Consultation Question 94, in which both had argued that equitable easements benefiting short leases (and granted by the same deed) should be overriding.

16.82 The City of Westminster and Holborn Law Society noted that in the context of agricultural land, the lease or easement might be dealt with by a surveyor.

16.83 Christopher Jessel reiterated his view that any equitable easement benefitting a short lease should be capable of overriding. He noted that:

> The main object of registration in practice is to inform a new landlord of the rights affecting the land (or possibly, where the easement affects land which is sold separately, of easements affecting that land as in the facts of *Land Reclamation Co Ltd v Basildon DC* [1979] 1 WLR 767.).

Other views

16.84 Nigel Madeley queried possible effects of landlord and tenant law on the proposal. He suggested that the grant of a separate easement could trigger a surrender and regrant and therefore be "part of the lease and so falls within your proposal that it need not be separately registered". Alternatively, Nigel Madeley pointed out that it may not always be obvious that the effect of a transaction is to grant an easement, and that the parties could see the transaction simply as a variation of the lease:

> For example a landlord gives the tenant permission to open a hole in the wall so that air can be extracted from the kitchen. Does that amount to an easement to expel air?

If this is the case, then Nigel Madeley's view was "the added easement should take its character from the lease."

16.85 Amy Goymour agreed with the "substance" of the proposal but said that she would prefer for the problem that it looks to tackle to be solved by amending the formality requirements for the creation of easements in the Law of Property Act 1925. She expressed the same view in response to Consultation Question 94 above.

16.86 Michael Mark also commented on prescriptive easements and profits under the Prescription Act 1832. He argued that the meaning of “next before some suit or action” in section 4 of that Act should be clarified in statute.

Chapter 17: Adverse Possession

INTRODUCTION

17.1 26 consultees responded to the questions in Chapter 17 of the Consultation Paper.[1]

17.2 The majority of consultees agreed with our provisional proposals in relation to the clarifying aspects of the procedure to apply for registration based on adverse possession in schedule 6 to the LRA 2002 in relation to repeated applications and reasonable belief, but in both cases expressed concern that the LRA 2002 should appropriately balance the rights of registered proprietors and adverse possessors. Consultees were evenly split as to whether the first two conditions in paragraph 5 of schedule 6 should remain. Some disagreement with the provisional proposals we made was based on disagreement with the existing policy that underlies the regime for adverse possession in the LRA 2002.

17.3 The majority of consultees also agreed with our provisional proposals to clarify the provisions in the LRA 2002 that touch on the interaction between the regimes for adverse possession in unregistered and registered land. However, some consultees thought that reform was unnecessary or that our proposals reflected the current law.

GENERAL COMMENTS ON THE LRA 2002 REGIME

17.4 Some consultees offered general comments on the regime for adverse possession in the LRA 2002.

17.5 Graff & Redfern Solicitors described the current procedure under schedule 6 as "convoluted". It therefore supported the proposed changes to the procedural rules covering adverse possession claims over registered land and clarifying the relationship between the law affecting registered and unregistered land squatter claims. It stated that the current procedures are convoluted, although did not specifically respond to our proposals.

17.6 The Society of Legal Scholars commented that the Consultation Paper assumes that the "emasculation" of adverse possession by the LRA 2002 should be accepted. Although the Society conceded that it seems fair to conclude that the 2002 reforms to adverse possession have proved workable in the short term, because new applications based on adverse possessors have reduced "to a trickle". The Society commented that,

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1 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Society of Legal Scholars; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; The Law Society; Dr Nicholas Roberts.

since major problems have not emerged in the short term, there is no immediate case for a reversal of the reform in the context of the current limited tidying operation.

17.7 However, the Society of Legal Scholars noted that the mandate for the change in 2002 was small, being 60% of consultees,[2] and that the reform was opposed by one school of thought in the academic community. The Society considered that this opposition is maintained: because there is no mechanism to make the ownership of land correspond to the realities on the ground, even over hundreds of years, in time it will become common for boundary structures to be placed in the wrong position, often simply because of the lie of the land.

17.8 The Society stated that it is "interesting" that the test case for the merits of the reform arose in the courts immediately after the consultation that led to the 2002 Act, namely, *JA Pye (Oxford) Ltd v Graham.*[3] The Society stated that those in favour of the reform the LRA 2002 enacted "need to be able to say that Pye Ltd should have been allowed to keep its land after inaction for more than 12 years - and, in the future, after a much longer period of inertia". However, opinion within the Society and the wider academic community remains divided.

17.9 In relation to comparative systems of land registration, the Society noted that continental systems do not in general support a specific regime for registered land based on the primacy of the register (but commented that German law may be an exception).

THE PROCEDURE FOR APPLICATIONS UNDER SCHEDULE 6

Consultation Question 96.

17.10 We provisionally propose a claimant to title to land through adverse possession should be prevented from making a second application for registration when an application for registration has been rejected under schedule 6, paragraph 6, unless the conditions in that paragraph under which a second application is currently permitted are fulfilled.

Do consultees agree?[4]

17.11 22 consultees answered this question:

(1) 17 agreed;[5]

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2 Law Com No 271, para 14.4.

3 [2002] UKHL 30.

4 Consultation Paper, para 17.24.

5 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Michael Hall; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Dr Charles Harpum QC (Hon); National Trust; Adrian

(2) 1 disagreed;[6] and

(3) 4 expressed other views.[7]

Agreed

17.12 The majority of consultees agreed with the proposal without commenting further.[8] The remaining consultees expressed their agreement, but did so on the condition that safeguards would apply.

17.13 The Property Litigation Association agreed that an adverse possession claimant should be prevented from making a second application if the initial application was accepted by HM Land Registry and notice served on the registered proprietor, "unless the registered proprietor does not vindicate his or her title despite the claimant remaining in adverse possession".

17.14 Other consultees, including the London Property Support Lawyers Group, emphasised that it must be clear that second applications are only prohibited if the first application reached the notification stage; it should not apply if the first application was rejected on the basis of a procedural error.

17.15 The Law Society agreed with removing the right of an adverse possessor to make a second application when the first application for registration had been "substantively rejected". In its view the proceedings should be "definitive" in the sense that there appears to be "no good reason" for renewing the application for registration:

> An adverse possessor who fails to establish their claim against the registered proprietor in the proceedings referred to in Paragraph 6 should have to accept the finality of that outcome.

17.16 The Bar Council suggested clarifying what amounts to a relevant application or rejection for the purposes of paragraph 6. It considered that the right approach is to make it clear that an application made under paragraph 6 can only be made if the sole ground for rejection of the prior paragraph 1 application is the applicant's failure to rely on, or an inability to satisfy, the criteria set out in paragraph 5 after the registered proprietor had given notice requiring the application to be dealt with under paragraph 5.

17.17 The Bar Council argued that it would be wrong for an application rejected at the outset under paragraph 1 (on the grounds of substantial invalidity or following a successful objection under section 73 to the applicant's right to apply) to be taken into account for a second application under paragraph 6. In its view this is something that is not sufficiently clear under the current legislation and should be addressed. The Council informed us that one of the contributors to its response had experience of just such a

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Broomfield; Dr Aruna Nair; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives; The Law Society.

6 Everyman Legal.

7 Michael Mark; Society of Licensed Conveyancers; HM Land Registry; Society of Legal Scholars.

8 Dr Charles Harpum QC (Hon); Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Michael Hall; The Conveyancing Association; Christopher Jessel; Chancery Bar Association; National Trust; Adrian Broomfield; Dr Aruna Nair; Amy Goymour; Chartered Institute of Legal Executives.

situation arising, but as proceedings were settled out of court, there was no judicial decision on the issue.

17.18 Conversely the Bar Council said that it saw no objection in principle to a second application being made if the first paragraph 1 application was rejected on receipt or after objection, for example, because 10 years' adverse possession has not yet occurred. In this type of situation, the Council stated that the registered proprietor should be put to an election to sue if the right to make a paragraph 1 application has not been established "otherwise very short periods of adverse possession could lead to para.6 applications". However, neither the applicant nor the registered proprietor should lose out in the event of an application being rejected on receipt. In making these comments, the Council explained, it had borne the Court of Appeal decision in *Baxter*[9] in mind.

17.19 The Bar Council went on to suggest that it might be reasonable to prevent reliance on paragraph 5 in any further paragraph 1 application which is rejected on the ground that the right to apply has not been established, with the possible exception of the third condition due to the time limit it imposes. However, if a rejection is a relevant one for paragraph 6, then a paragraph 6 application will be legitimate, subject to the *Baxter* conditions. The Bar Council agreed, however, that in those circumstances it should not be possible to make another paragraph 1 application rather than an application under paragraph 6.

17.20 The Society of Legal Scholars agreed that it should be made clear that where a claim is rejected after objection by the registered proprietor, the applicant should be precluded from making a second application for registration within the next two years. This, the Society said, "would provide an amendment to the rules on restrictions of renewed applications" under paragraph 8 of schedule 6.

17.21 Elizabeth Derrington informed us that in her experience some individuals cause themselves and their families great distress by making repeated applications with no realistic chance of success.

Disagree

17.22 Only one consultee disagreed with this proposal. Disagreeing with the adverse possession regime introduced by the 2002 Act, Everyman Legal said that the "new" adverse possession regime does not work well in principle:

> It increasingly leads to a situation where the actual occupier is being unfairly relieved of land that they may have used for many years as against a "technical" owner who has taken no steps to protect their position over the years.

17.23 Everyman Legal argued that it is easy to end up with a situation where the "technical" owner gets a windfall or the register becomes inaccurate, as it does not reflect the situation on the ground. It was therefore generally opposed to any "artificial restrictions" on trying to resolve such disputes without "complex legal and bureaucratic procedures".

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9 *Gillon v Baxter* [2003] EWCA Civ 1591.

Other

17.24 The consultees who neither agreed nor disagreed did so for different reasons.

17.25 The Society of Licensed Conveyancers stated that our proposed policy "further asserts the rights of the registered proprietor over the adverse possessor".

17.26 HM Land Registry stated that whilst it agreed with the substance of our proposal, in its opinion, our proposal represents the current law.

THE CONDITIONS IN PARAGRAPH 5 OF SCHEDULE 6

Consultation Question 97.

17.27 We invite consultees to provide evidence relating to the use of the first two conditions in paragraph 5 of schedule 6.[10]

17.28 14 consultees answered this question.[11]

17.29 Half of the consultees to this call for evidence simply informed us that they had no relevant experience to share in relation to the use of the first two conditions in paragraph 5.[12]

17.30 The Property Litigation Association stated that it was not aware of any specific examples of applications concluded using the first two conditions, claiming entitlement to land for either proprietary estoppel or other reasons. However, the Association cautioned that it cannot speak for each of its members, and commented that it is aware of one application that is currently awaiting determination by HM Land Registry.

17.31 The Chancery Bar Association stated that, in its experience, there is little use of the first two conditions. In its view, there is an "oddity" about using a procedure for obtaining a title by adverse possession in order to claim title based on proprietary estoppel.

17.32 Other consultees did provide examples of the circumstances in which they believe the conditions may be relied upon, although these views were not always based on direct experience.

17.33 The City of Westminster and Holborn Law Society did not have any specific experience of the use of the first two conditions; however, the Society anticipated that the conditions might apply in historic cases where representations were made and relied upon as to

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10 Consultation Paper, para 17.33.

11 London Property Support Lawyers Group; Pinsent Masons LLP; Adrian Broomfield; Howard Kennedy LLP; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives; Property Litigation Association; Michael Mark; Michael Hall; The City of Westminster and Holborn Law Society; Chancery Bar Association; Dr Charles Harpum QC (Hon); The Law Society.

12 London Property Support Lawyers Group; Pinsent Masons LLP; Adrian Broomfield; Howard Kennedy LLP; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives.

what land was included in a purchase as ancillary land separated from the main property by a roadway.

17.34 Similarly, Michael Hall stated that it "must regularly occur" that an error in a transfer plan means it does not include all of the land over which the buyer has possession and which is intended to be sold. He explained that, in such circumstances, the buyer should be entitled to use the second condition in paragraph 5. Additionally, he noted that in some cases property owners may have agreed to sell land informally, with no formal transfer being executed. He gave an example of a case where two neighbours bought a piece of allotment land between their houses in their joint names. Whilst the neighbours fenced the land and intended it to be legally partitioned, they did not consult solicitors in relation to dividing the title, and by the time it was discovered, one neighbour had moved and disappeared.

17.35 Consultees also expressed differing views as to the appropriate venue for such claims.

17.36 The Law Society was of the impression that claims to bar the ownership of a registered proprietor in circumstances to which the conditions in schedule 6, paragraphs 5(2) and 5(3) apply, are normally handled by the courts and not in the Tribunal. In the Society's view, these claims do not seem to be of the nature of adverse possession to which section 97 and schedule 6 are directed: "rather, they appear to be matters of asserting rights in equity to beneficial entitlement". It expressed the view that the appropriate forum for resolution of disputes in relation to interests under a trust should be the Chancery Division of the High Court. The Society added that it had no evidence as to the use of the Tribunal to resolve these issues instead of the courts. The Law Society acknowledged that the Tribunal may be a more direct method of resolution of the issues which could lead to a claimant being entitled to registration as proprietor of the land.

17.37 Dr Charles Harpum QC (Hon) (responding to this question and the Consultation Question 98 at paragraph 17.34 of the Consultation Paper) explained the background to the first two grounds in at paragraphs 5(2) and 5(3) of schedule 6 of the LRA 2002:

> At the time of [Law Com No 271], the Land Registry, which had pressed for the creation of the jurisdiction of what was then the Adjudicator, on human rights grounds, assumed that the new jurisdiction would be very much like the jurisdiction that had been exercised by the Solicitor to the Land Registry and Land Registrars under LRA 1925 in dealing with disputed applications … . That jurisdiction was informal and speedy. No one foresaw the cottage industry that the Adjudicator in fact became. It was thought that if a person had been in adverse possession of land for 10 years, and he or she fell within the first or second categories in LRA 2002, Schedule 6, para 5, they could use this procedure rather than having to go to court.

17.38 Dr Harpum commented that proceedings before the First-tier Tribunal are not always quicker or cheaper than those brought in the county court (thought they usually are). However, he explained that the main advantage of the Tribunal, in his view, is that it is a specialist tribunal and the judges are very familiar with both land law and land registration issues. He stated that Tribunal judges require less explanation than non-specialist county court judges, which in his experience "undoubtedly shortens hearings".

17.39 Dr Harpum agreed that the two conditions in question rest to some extent "on an element of fortuity". They allow a claim under schedule 6 if a squatter has been in

adverse possession for 10 years in circumstances in which he or she could claim an equity by estoppel or make a claim to the land on some other ground, avoiding what would usually involve a court hearing. However, in relation to the first condition at paragraph 5(2), Dr Harpum stated that there is a conceptual link between adverse possession and proprietary estoppel in the context in which it would arise, namely acquiescence by the landowner. He stated that our discussion in paragraph 17.29 of the Consultation Paper, and specifically the last two sentences, was wrong as a matter of law because it confuses acquiescence with permission. He explained that this an error has often been laid bare in prescriptive claims such as *Mills v Silver*.[13] He stated that some form of acquiescence lies at the core of adverse possession and while there will be many cases where a person has an estoppel claim, but is not in adverse possession, it does not follow that a person who may have an equity by estoppel in relation to land is not in adverse possession:

> If A builds his house partially on B's land, and B knowing this, acquiesces in it, A is in adverse possession, but the elements that give rise to an equity by estoppel might well also be satisfied. The right to go to court to vindicate such an equity is not equivalent to a licence by B. The court may not give effect to the equity by granting A the land, but may make some other order.

However, Dr Harpum was unsure how frequently the first condition is used in practice

17.40 Dr Harpum noted that, according to paragraph 17.30 of the Consultation Paper, the second ground at paragraph 5(3) of schedule 6 was not used in the sort of case that it was intended. However, he explained that he has had cases that fall within it.

Consultation Question 98.

17.41 We invite consultees' views as to whether the first two conditions in paragraph 5 of schedule 6 should be removed.[14]

17.42 20 consultees answered this question.[15]

17.43 Consultees were fairly evenly split between those in favour of the retention or removal of the aforementioned conditions. A number of consultees had no fixed views on the matter or made other broader comments.

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13 [1991] Ch 271.

14 Consultation Paper, para 17.34.

15 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Dr Nicholas Roberts; Michael Mark; Michael Hall; The City of Westminster and Holborn Law Society; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Adrian Broomfield; Society of Licensed Conveyancers; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; The Law Society; Society of Legal Scholars; Dr Charles Harpum QC (Hon).

In favour of retention

17.44 The Property Litigation Association was not able to offer an informed view on this point, explaining that it had no examples of concluded applications. However, the Association argued that it is "clearly important" that people are able to claim entitlement to land through proprietary estoppel or other reasons, and to have such claims determined properly. Despite the use of the two conditions being perhaps limited, the Association saw no reason why the option to make an application using the two conditions should be removed.

17.45 Similarly, Michael Hall did not think removal of the two conditions would be beneficial as "there must be situations where [they] are useful". Similarly, the Chartered Institute of Legal Executives simply said it thought the conditions should remain.

17.46 Dr Aruna Nair was of the view that retaining the conditions would be more efficient so that the rights of a person in possession of land can be determined in the context of schedule 6 proceedings.

17.47 On balance, the City of Westminster and Holborn Law Society thought that removal is unnecessary, explaining that the adverse possession process is less costly than proceedings to remedy the underlying cause of the lack of paper title.

17.48 The Society of Legal Scholars stated that the first and second conditions should be retained to allow claimants the option of going through the cheaper tribunal procedure, rather than the full litigation process, where property rights are supported by long-standing possession.

In favour of removal

17.49 HM Land Registry simply stated that the first two conditions should be revoked. The Law Society agreed, citing its response to Consultation Question 97.

17.50 The Chancery Bar Association considered that the two conditions should be removed subject to three points.

(1) If title is claimed on multiple grounds, for example proprietary estoppel and adverse possession, the claimant should not be exposed to multiple fees.

(2) There are jurisdiction problems with claims made on multiple grounds, because schedule 6 gives both HM Land Registry and the Frist-tier Tribunal exclusive jurisdiction over adverse possession claims. It considered that section 110 of the 2002 Act should make it clear that the First-tier Tribunal can transfer a dispute to the court under schedule 6, stating that the ability to do so is particularly necessary where one party is seeking interim relief.

(3) The second condition can be useful in transitional cases and it considered that there should be concurrent jurisdiction between the registrar, the Tribunal and the court in such cases.

17.51 Amy Goymour said she was inclined to agree to the conditions' removal as:

It is generally easier for a claimant to bring his estoppel/other claim directly, as there is no need then to prove 'possession' that is 'adverse'.

17.52 Ms Goymour therefore considered that our proposal brings the possible advantage of making matters simpler for claimants, "provided there are no jurisdictional barriers to claimants being able to make 'direct' claims in the relevant legal fora".

17.53 Amy Goymour made an additional observation in relation to paragraph 17.35 of the Consultation Paper in which we suggested that it might be necessary to make specific provision for the registration of squatters who had completed 12 years of adverse possession of registered land prior to the LRA 2002 coming into force (if the second condition was removed). She was not convinced such a provision would be necessary and argued that a claim could be made for alteration of the register, on the ground of 'bringing the register up to date'; she said that the squatter would hold beneficial title under a statutory trust, and could require the register to be altered to reflect the fact they were entitled to be registered as proprietor via the *Saunders v Vautier* rule.[16]

17.54 Adrian Broomfield was in favour of removal of the first two conditions being, on the grounds that other bases of claim may be applicable.

Unsure but support simplification

17.55 Two consultees did not have strong views on the matter, but they were generally in support of simplification of the law.

17.56 Elizabeth Derrington informed us that applications for adverse possession generate a steady stream of customer complaints against HM Land Registry, from both unsuccessful applicants and registered proprietors who have lost out to an adverse possessor. Whilst appreciating the rationale for the changes to adverse possession introduced by the 2002 Act, she said that the new rules are "complex and extremely difficult to explain in simple terms, especially to lay members of the public". She concluded that if the rules could be simplified or rationalised without compromising effectiveness, it would be "most welcome".

17.57 Dr Nicholas Roberts explained that in teaching paragraph 5 of schedule 6 to undergraduate law and real estate students, he finds it difficult to explain the point underlying conditions (a) and (b), "or indeed the point of having these exceptions at all". Dr Roberts considered that this complexity is perhaps illustrative of the redundancy of the provisions and stated "if statutes can be simpler, they tend to be better".

No fixed views

17.58 A few consultees did not express fixed views on the matter, including Professors Warren Barr and Debra Morris and the London Property Support Lawyers Group. However, the London Property Support Lawyers Group commented that removal of the first two conditions would certainly make Schedule 6 simpler to understand.

17.59 The Bar Council said it had no strong views either way, but noted that to remove the first condition could expose an applicant who has alternative adverse possession and proprietary-estoppel claims to more complex proceedings. It thought that consideration

[16] 41 ER 482, (1841) Cr & Ph 240.

should be given, firstly, to a mechanism to allow the claims to be dealt with together, either in the First-tier Tribunal or the court. Secondly, the Council suggested consideration should be given to providing applicants with interests under wills an alternative route to apply.

Other

17.60 There were a few consultees who neither agreed not disagreed, but had general comments to make in respect of the provisional proposal.

17.61 Dr Charles Harpum did not consider that the first condition should be removed. He reasoned that an applicant is more likely to obtain "better informed justice" more cheaply through the First-tier Tribunal than in the county courts. Dr Harpum accepted that the case for retaining the second condition is weaker, based on information provided by HM Land Registry (at paragraph 17.30 of the Consultation Paper) suggests that the condition has not been used in the types of cases it was intend for. He concluded that if the condition is not meeting a need or furthering the interests of justice, then it could be repealed.

17.62 Christopher Jessel suggested that the second condition may apply where a beneficiary is entitled to call for a legal estate, particularly in cases involving ownership of minerals, where the legal estate has become separated from the equitable entitlement. Similarly, Mr Jessel was aware of instances involving surface land where a beneficiary without a legal estate is in possession such as an example where "odd scraps" of surface land, for example roadside verges, have been omitted from conveyance plans when a settlement is brought to an end, but are later included within a red line on an official plan of an adjacent title, although he said such cases are less common.

17.63 Mr Jessel also commented that he expects instances of an executor or administrator refusing to confer title are rare. He notes that whilst this might happen in a family feud, more commonly it could happen where the personal representative died intestate and a grant *de bonis non*[17] was unduly expensive.

17.64 The Society of Licensed Conveyancers contemplated that if the first and second condition are to be removed, then provision must be made for such matters to still be dealt with by the Tribunal.

[17] Latin, meaning "of goods not administered".

Consultation Question 99.

17.65 We provisionally propose that where an applicant relies on the condition in schedule 6, paragraph 5(4), his or her reasonable belief that the land belonged to him or her must not have ended more than six months from the date of the application.

Do consultees agree?[18]

17.66 22 consultees answered this question:

(1) 13 agreed;[19]

(2) 6 disagreed;[20] and

(3) 3 expressed other views.[21]

17.67 The majority of consultees agreed with this proposal, with many describing it as 'sensible'. However, a number of consultees who agreed qualified their agreement, expressing the view that a 12-month limit would be more appropriate than the proposed six-month limit.

Agreed

17.68 The Property Litigation Association considered that it is in the interests of all parties, in such cases to have the situation resolved promptly and to remedy the uncertainty in terms of the timing of such an application. The Association commented that a specific deadline would enable its members to advise their clients with certainty.

17.69 London Property Support Lawyers Group agreed with our reasoning at paragraph 17.46 of the Consultation Paper. It viewed six months as a sensible suggestion as it is the same period as relates to eviction in paragraph 1(2) of schedule 6.

17.70 Amy Goymour stated that she generally agreed with our proposal and supported the substantive change, but had always regarded our second interpretation of the statute[22] as correct under the current law. Ms Goymour made two additional suggestions. Firstly, she considered that the wording in paragraph 17.47 could be clearer. In her view, the word "from" in the proposal is ambiguous and might be better replaced by "before" or even the wording used at paragraph 17.46 of the Consultation Paper: "the application

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18 Consultation Paper, para 17.47.

19 Property Litigation Association; Elizabeth Derrington; Dr Nicholas Roberts; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; National Trust; Adrian Broomfield; Dr Aruna Nair; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives; The Law Society.

20 Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; Dr Charles Harpum QC (Hon); HM Land Registry.

21 Professor Warren Barr and Professor Debra Morris; Society of Licensed Conveyancers; Society of Legal Scholars.

22 See para 17.71 of the Consultation Paper.

should be made within six months of the reasonable belief coming to an end". Secondly, she thought that we should make it clear that our proposal is not intended to change what currently constitutes "reasonable belief", and specifically, that each case must still be decided on its facts.

17.71 The Law Society agreed that the "time issues" involved in connection with schedule 6, paragraph 5(4) should be resolved and that a period of no longer than six months appears appropriate.

17.72 Dr Nicholas Roberts said that whilst he was not convinced of the need for this provision, it seems a reasonable condition. In his view, a matter of greater concern is the apparent possibility for the situation "on the ground" to remain different from the legally-correct paper title indefinitely, with no satisfactory way of resolving the discrepancy. He noted that *IAM Group v Chaudrey*[23] adopts a generous interpretation of what may amount to 'reasonable belief' for an adverse possessor, but notes that the circumstances in that case were unusual. He considered that the more pronounced the discrepancy between the position 'on the ground' and in the title plan, the more difficult it will be for an adverse possessor to satisfy the test of 'reasonable belief'. Further, it would appear that the better a prospective purchaser investigates the reason for any apparent discrepancy pre-purchase, the more difficult it will be for them to be able to claim reasonable belief in future, and thus eventually to be registered as proprietor.

Agreed with the 12-month cut off

17.73 Both the Chancery Bar Association and the Bar Council agreed with our proposal, but were of the view that a 12-month time limit would be more appropriate.

17.74 The Bar Council stated that the period must accommodate

(1) the likelihood that the date on which the reasonable belief ended may be difficult to identify,

(2) any time spent trying to resolve the dispute about ownership privately between the parties,

(3) the time taken by the applicant to recognise the need to take action to resolve the dispute,

(4) time to take advice and consider it, and (v) time to prepare the application.

As such, the Bar Council thought that six months was "unreasonably short", especially given that, unlike in the case of eviction, an applicant may hesitate before escalating what may be a minor dispute between neighbours into a full legal dispute.

17.75 Similarly, the Chancery Bar Association noted there is likely to be scope for disputes about the commencement of the period.

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[23] [2012] EWCA Civ 505, [2012] 2 P & CR 13.

Disagreed

17.76 Michael Hall believed that 12 months would be a more reasonable period, indicating that he disagreed with our proposal because we are proposing a shorter period.

17.77 Everyman Legal disagreed on the basis that our proposal "looks like a way of removing flexibility". The firm questioned why, if an applicant was in possession for more than 10 years, would it matter when he or she became aware that the belief was mistaken, especially if the technical owner had done nothing to assert their rights in that time.

17.78 Dr Charles Harpum noted that the Law Commission and HM Land Registry set out in considerable detail in the 2001 Report[24] the intentions of the provision and how it should operate. He expressed his disappointment that the relevant passages appeared not to have been studied carefully as they were "intended to provide a clear road map" for the provisions. Dr Harpum explained that to come within the exception, a squatter would have to prove that he or she had been in adverse possession for more than 10 years and that for 10 years of his/her adverse possession, he or she believed on reasonable grounds that they owned the land.

> Given the initial burden of proof, a sensible squatter should apply promptly because if he or she does not, he or she may have a difficult task in persuading the FTT (or the court) that he/she had the requisite belief for 10 years.

17.79 Dr Harpum believed that it is reasonably clear[25] that the Law Commission and HM Land Registry intended the provisions to bear the second interpretation set out at 17.38(2) of the Consultation Paper. He was therefore "implacably opposed" to the proposal because it will defeat claims that paragraph 5(4) was meant to assist.

> It would mean that as soon as a landowner realises that there is a disparity between his or her title plan and where the fence or wall is, he or she must act within six months to put the matter right (assuming that he or she has been there 10 years). The reality is that he or she will not do so. Sleeping dogs will be left to lie. No sane person wishes to initiate a boundary dispute. The person who makes the discovery will do nothing and will wait until his or her neighbour makes a fuss.

17.80 He was also concerned that the individual in question probably would not know that they must apply as soon as they become aware of the claim and there is no reason that the individual should appreciate the need to take action. He noted that there is no other provision within the LRA 2002 that requires action within a specified period where failure to do so will lead to a permanent loss of land that the individual thought they owned.

17.81 Dr Harpum disagreed with our objection to the second interpretation at paragraph 17.41 of the Consultation Paper, arguing that the actual dichotomy in practice is between leaving "sleeping dogs to lie" and initiating a boundary dispute. In his view, if this proposal is taken forward, a person who "quite reasonably" allows sleeping dogs to lie will lose his or her land unless he or she can rely on the general boundaries rule. Dr Harpum contends that this outcome was not intended by the Law Commission or HM

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[24] Law Com No 271, paras 14.44 to 14.52.

[25] Law Com No 271, paras 14.50 to 14.52.

Land Registry. Overall, Dr Harpum felt the proposal at paragraph 17.47 had not been properly thought through and it should be abandoned.

Disagreed based on concerns about 'reasonable belief'

17.82 Two consultees disagreed with the proposal as they had concerns about how 'reasonable belief' might be interpreted.

17.83 The Society noted that an individual may have held reasonable belief for many years, but doubt may have arisen as a result of a neighbour's comments. However, the neighbour might not press the point and so the individual may suppose that no action needs to be taken, despite the uncertainty that has arisen. It commented that applications would not be possible during legal proceedings against the person.

17.84 In its consultation response, HM Land Registry explained that it did not believe that having a specific date would make dealing with such applications easier. It would not overcome the difficulty in assessing when a reasonable belief exists, and when that belief has, or should have, ceased. However, HM Land Registry also stated that it believes the current legislation should be clarified in any case due to the possible interpretations of paragraph 5(4)(c) as set out in paragraph 17.38 of the Consultation Paper.

Other

17.85 Some consultees neither agreed nor disagreed, but made other comments.

17.86 The Society of Licensed Conveyancers stated that whilst it agrees symmetry is appealing, eviction is much clearer and more obvious than a situation concerning 'reasonable belief' coming to an end.

17.87 Rather than a six-month time limit, the Society of Legal Scholars thought that the literal meaning of paragraph 5(4) of the LRA 2002 should be restored to reflect its original intention, which the Society said was that the reasonable belief should persist for any ten years. It stated that a six-month time limit from becoming aware of a mistake is not appropriate for an adverse possessor who has been mistaken about their boundary for ten years.

17.88 The Society invited consideration of wider-ranging reform in this area and suggested removal of the requirement of reasonable belief:

> Until detailed and accurate plans accompany registered titles, there is merit in allowing adverse possession to support the position on the ground. Non-lawyers are often uncomfortable with the concept of a legal boundary varying from the physical boundary, and physical boundaries are often erected for reasons of practicality away from the legal line. In many cases it is clear from the Land Registry plan that the boundary is in the wrong place, and the simplest thing is to allow the possession to have legal effect in determining the boundary. That would justify removing all reference to the applicant's reasonable belief.

17.89 Professors Warren Barr and Debra Morris informed us that they had no fixed views on this issue.

FIRST REGISTRATION OF AN EXTINGUISHED TITLE

Consultation Question 100.

17.90 We provisionally propose that where a person becomes the first registered proprietor of title to land which has in fact been extinguished by an adverse possessor, where (i) the registered proprietor did not have notice of the adverse possessor's claim and (ii) the adverse possessor is not in actual occupation of the land at the time of registration, an application for alteration of the register should be classed as rectification.

Do consultees agree?[26]

17.91 23 consultees answered this question:

(1) 17 agreed;[27]

(2) 4 disagreed;[28] and

(3) 2 expressed other views.[29]

Agreed

17.92 The majority of consultees were in support of the proposal.

17.93 Professors Warren Barr and Debra Morris felt that the policy reasons outlined in the Consultation Paper were compelling. The Bar Council saw this issue as essentially "a matter of policy" and said it acknowledged the logic behind reasons given for the proposal.

17.94 The Property Litigation Association agreed with our proposal for a number of reasons. Firstly, it explained that it appears to be the correct interpretation based on the wording of the LRA 2002; secondly, it said it is difficult to distinguish registration of an extinguished title from any other instances of the operation of section 58; and thirdly, on the basis that such circumstances will be limited in number, due to the diminishing amount of unregistered land. Further, the Association commented that in most cases of adverse possession the adverse possessor will remain in occupation and/or the registered proprietor will have notice of occupation.

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26 Consultation Paper, para 17.62.

27 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Adrian Broomfield; Society of Licensed Conveyancers; Dr Aruna Nair; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives; The Law Society.

28 Michael Mark; Everyman Legal; Dr Charles Harpum QC (Hon); Society of Legal Scholars.

29 Nigel Madeley; HM Land Registry.

17.95 Other consultees were less convinced, but nonetheless agreed.

17.96 The Law Society commented that whilst it was hesitant about this proposal, the issue appeared "more academic than practical." The Society noted it was not aware of any such incidents having ever arisen, although in its view, the alteration of the register could be a source of hardship to the registered proprietor.

17.97 The Society of Licensed Conveyancers agreed with the proposal on the basis that it ensures uniformity; however, it was of the opinion that it appears incorrect that both the ousted true owner and registered adverse possessor are benefited.

17.98 The Chancery Bar Association agreed that in such cases a registered proprietor in possession should normally succeed in resisting alteration of the register. However, the Association did not consider that, if the register is altered, a proprietor should be entitled to an indemnity "simply because he has been erroneously registered". This conclusion was reached as the Association thought it was unclear whether an incorrectly registered proprietor would be entitled to rectification if the true owner was in occupation at the time of the mistake. The Association said that in *Swift 1st Ltd v Chief Land Registrar* [30] the court held the true owner was in actual occupation and they assume the position will remain the same.

17.99 The London Property Support Lawyers Group felt that the proposal dealt with such an unlikely set of circumstances that it "hardly seems necessary to make provision for it". However, the Group considered that logically, in light of section 58, it seems necessary to make this amendment. The Group noted that the only party that could be disadvantaged by this arrangement would be HM Land Registry, since classifying such an alteration as a "rectification" would require the payment of compensation.

17.100 Pinsent Masons LLP endorsed the London Property Support Lawyers Group's response, but added that for these purposes actual occupation by a third party with the consent of an adverse possessor (such as a tenant) should qualify as actual occupation by the adverse possessor.

17.101 Christopher Jessel, on the other hand, highlighted that this type of situation can be a problem on large landed estates where the paper title is clear but owners of independently owned cottages have encroached. Whilst the owner may be in actual occupation, Mr Jessel explained that the paper owner is often unaware and will submit an application based on the title deeds in good faith. Mr Jessel argued that the policy of the LRA 2002 was to impose controls on the extent to which adverse possession prevails over registered titles, and in particular the notice to the registered proprietor who can then resist the claim to adverse possession, following comments made by the Court of Human Rights[31] on the decision in *J A Pye (Oxford) Ltd v Graham*.[32]

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30 [2015] EWCA Civ 330, [2015] Ch 602.

31 *J A Pye (Oxford) Ltd v United Kingdom*, ECHR App No 44302/02.

32 [2002] UKHL 30, [2003] 1 AC 419.

Disagreed

17.102 Everyman Legal disagreed with the provisional proposal on the basis that it seems "unnecessarily generous". The firm argued that actual boundaries on site can be easily ascertained by a surveyor and compared with the title plan.

17.103 Dr Charles Harpum said that he found this proposal "very strange". He stated that, to his mind, it rested on a failure to construe section 11(4) of the LRA 2002 correctly. Dr Harpum stated that the intention of the provision in our 2001 Report was that:[33]

> … if a first registered proprietor took the land without notice of the fact that a squatter had acquired title by adverse possession, he or she was to be regarded as being akin to a statutory bona fide purchaser without notice. The proprietor would take free of the interest. No element of mistake comes into it in those circumstances: the prior estate has been defeated and no longer exists. The very act of registering the proprietor without notice of the squatter's title extinguishes it and thereby precludes any claim that there is a mistake in the register.

17.104 Dr Harpum contends that paragraph 17.58 of the Consultation Paper contradicts the wording of the statute and, if it is correct, means that section 11(4)(c) is "redundant and confers no benefit whatever".[34] He argues that it is "inconceivable" that a court would construe section 11(4)(c) in the way suggested in the Consultation Paper, and the court "would plainly give the provision a purposive interpretation". He concluded by stating that if there is thought to be need for a provision to deal with the situation, it should be made clear that in the circumstances in section 11(4)(c), a squatter cannot seek alteration of the register.

17.105 The Society of Legal Scholars commented that the situation our proposal seeks to address does not appear to have arisen in practice since *Re Chowood's Registered Land.*[35] The Society stated it would require the applicant to state falsely in his application for first registration that he or she is in undisputed possession of the land, which the Society commented, appears unlikely if he or she has been out of possession long enough to be barred. In its view therefore, the position of the registered proprietor can be left to the existing alteration, rectification and indemnity regime. The Society did not agree with the provisional proposal on the basis that it would isolate specific instances of rectification. In its view, the better approach is to leave this issue to the development of a coherent concept of rectification.

Other

17.106 HM Land Registry said that whilst it agreed with the general principles behind our policy, it thought the current legislation should be left unamended to determine the outcome of such scenarios.

17.107 Nigel Madeley questioned whether the true position is that the former paper owner has better relative title than anyone except the adverse possessor. If so, he argued, then in

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33 See Law Com No 271, para 3.47.

34 Dr Harpum stated that the meaning of the statute is made clear in Law Com No 271, Explanatory Notes, para 41.

35 [1933] Ch 574.

the absence of an application by the adverse possessor, the original paper owner has some status to apply for a title, perhaps a qualified title, on the basis that he or she has a title good against the world except against the adverse possessor; he alternatively suggested that a possessory title could be granted, again on the basis that no-one other than the adverse possessor can dispossess him or her. Mr Madeley suggested that this might be relevant when it comes to deciding whether the applicant has caused or contributed to the mistake.

REGISTRATION WITH POSSESSORY TITLE

Consultation Question 101.

17.108 We provisionally propose that an adverse possessor of unregistered land should not be able to apply for registration with possessory title until title has been extinguished under the Limitation Act 1980.

Do consultees agree?[36]

17.109 23 consultees answered this question:

(1) 18 agreed;[37]

(2) 4 disagreed;[38] and

(3) 1 expressed other views.[39]

Agreed

17.110 Most consultees to this question agreed without providing additional comments. The more substantive comments received are discussed below.

17.111 Professor Warren Barr and Professor Debra Morris stated that there are arguments to be made both for and against the proposal. However, they agreed on balance on the basis that there is a need for "clarity and parity" between unregistered and registered land positions. Similarly, the Law Society said that to do otherwise would be anomalous.

17.112 The Chancery Bar Association said it did not have any objection to the law being clarified as proposed, but noted that it doubts whether HM Land Registry's present view of section 9(5) of LRA 2002 is correct in law.

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36 Consultation Paper, para 17.70.

37 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Society of Licensed Conveyancers; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; The Law Society.

38 Nigel Madeley; Michael Mark; Everyman Legal; Amy Goymour.

39 Society of Legal Scholars.

17.113 Whilst Christopher Jessel agreed, he stated that there could be problems in a dispute between successive possessors:

> If A is the paper owner, B then goes into possession and later C independently goes into possession, B has a better title than C and can claim against him and C can not invoke A's title as a defence. A (if he ever becomes aware of the position) will of course prevail over both. If, in B v C, B wishes to prove title to the court he will have to provide unregistered evidence.

17.114 Mr Jessel noted that at common law, any possession, however short, creates a title (even though fragile). If a paper owner does not wish to, and takes no steps to, assert his or her title, the respondent will be regarded as having a better title than anyone else.[40]

Disagreed

17.115 Everyman Legal disagreed with our proposal on the basis that the emphasis in favour of the technical, paper owner "really does not reflect reality".

17.116 Nigel Madeley contended that if a person is in possession, they have a title good against anyone except the paper owner. He questioned how we proposed to recognise that position. He argued that there is no reason why the squatter's status should not be recognised by some form of registration.

17.117 Amy Goymour did not agree on the basis that she saw no reason why a squatter's registered possessory freehold title could not co-exist with the superior owner's unregistered freehold title:

> Even if the possessory title is upgraded to an absolute title after 12 years, the superiority of the unregistered freehold title would persist unless and until it is extinguished by the squatter being in adverse possession for 12 years.

17.118 Ms Goymour was "unconvinced" by *Parshall v Hackney*[41] on the point about whether a squatter whose title is registered can be in adverse possession. She argued that, like title, adversity is better considered as a relative concept:

> The requirement being that the squatter is in adverse possession via-à-vis the real owner. If the squatter's possession is adverse to/not consented-to by the true owner, his possession is arguably relevantly adverse.

Other

17.119 The Society of Legal Scholars made an alternative proposal as part of its broader discussion of the adverse possession regime. The Society queried whether a possessory interest can be a legal estate and instead would be equitable only. As a solution, the Society argued that the title of a short possessor should not be substantively registerable and that such titles "need to be made non-registrable, and returned to the overriding category".

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40 Referring to *Walker v Burton* [2013] EWCA Civ 1228.

41 [2013] EWCA Civ 240, [2013] 568.

Consultation Question 102.

17.120 We provisionally propose that an adverse possessor of registered land should not be able to apply for registration except through the procedure in schedule 6.

Do consultees agree?[42]

17.121 23 consultees answered this question:

(1) 19 agreed;[43] and

(2) 4 disagreed.[44]

17.122 A clear majority of consultees agreed with the provisional proposal; however, there were a number of qualifications or concerns raised amongst consultees.

Agreed

17.123 Professor Warren Barr and Professor Debra Morris agreed with the proposal, noting that there is "already a procedure, which should be followed in every case".

17.124 The London Property Support Lawyers Group was supportive of the argument at paragraph 17.67 of the Consultation Paper, that it should not be possible for an adverse possessor to circumvent the procedure in schedule 6.

17.125 Whilst Dr Charles Harpum agreed with the proposal, he contended that it is already the law, citing the case of *Swan Housing Association Ltd v Gill*.[45] He thought this "almost certainly" reflects the intention of HM Land Registry and the Law Commission in relation to the adverse possession provisions. Dr Harpum stated that although he considers that *Swan* does no more than spell out what is "clearly implicit" in the legislation, it would do no harm to make the point explicit in the legislation, subject to the views of Parliamentary Counsel.

17.126 The Chancery Bar Association agreed with the proposal, subject to the solution of two jurisdictional problems it identified.

(1) If a claim for adverse possession involves other issues, the court should have concurrent jurisdiction to determine the whole matter; alternatively, the Tribunal

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42 Consultation Paper, para 17.71.

43 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Society of Licensed Conveyancers; Dr Aruna Nair; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; The Law Society.

44 Michael Mark; Everyman Legal; Amy Goymour; Society of Legal Scholars.

45 [2012] EWHC 3129 (QB), [2013] 1 WLR 1253.

should have at minimum jurisdiction under section 110 of the LRA 2002 to transfer the schedule 6 proceedings to the court.

(2) The court and the Tribunal should have concurrent jurisdiction over transitional cases under paragraph 18 of schedule 12.

17.127 The Property Litigation Association were persuaded by the arguments put forward in the Consultation Paper, noting that "schedule 6 provides a route to registration which should not be avoided by section 9(5)". It explained that "section 9(5) was not intended to provide a means of overcoming the procedure set out in schedule 6".

17.128 The Property Litigation Association also stated that it could foresee jurisdictional issues if the only way to make claim is by application to HM Land Registry. The Association advised that it is aware of a number of cases in which adverse possession has been one of a number of reliefs claimed by the claimant, so the courts should not be prevented from hearing such claims.

Disagreed

17.129 Everyman Legal was not convinced by the proposal, stating that it would have the effect of the register being increasingly unauthoritative in such cases.

17.130 Amy Goymour disagreed on the basis that the adverse possessor's possessory freehold title should be able to exist concurrently, alongside the title of the original registered proprietor.

17.131 The Society of Legal Scholars did not directly respond to the proposal. However, it proposed that in respect of claims by pre-October 1991 possessors, a new procedure should be introduced through a rule-making provision in schedule 12. The Society noted that the commonest group of claims under the second condition in paragraph 5 of schedule 6 are claims by adverse possessors who have completed 12 years of adverse possession prior to October 2003, giving rise to a section 75 trust under the LRA 1925. In the Society's view, allowing such applications through schedule 6 would require "considerable surgery to the careful crafting of schedule 6".

THE RUNNING OF TIME AND POSSESSORY TITLE

Consultation Question 103.

17.132 We provisionally propose that where an adverse possessor in unregistered land is registered with possessory title in the reasonable (but incorrect) belief that the prior title has been extinguished, the period of adverse possession should continue to run while the possessory title is open.

Do consultees agree?[46]

[46] Consultation Paper, para 17.79.

17.133 21 consultees answered this question:

(1) 19 agreed;[47]

(2) 1 disagreed;[48] and

(3) 1 expressed other views.[49]

17.134 A clear majority of consultees agreed with this proposal, although consultees expressed differing views as to the reasonable belief requirement.

Agreed

17.135 Professor Warren Barr and Professor Debra Morris agreed with the reasons advanced in the Consultation Paper.[50] The London Property Support Lawyers Group agreed, commenting that it is "unsatisfactory that there appears to be no clarity as to how the law on this question currently stands". Nigel Madeley also agreed, and linking this to the consultation question on lease enlargement,[51] noted that it appears to be accepted that a property can have more than one concurrent freehold title.

17.136 The Law Society agreed but emphasised that the period of adverse possession should only continue to run where the adverse possessor reasonably believed that the prior title had been extinguished, in line with the proposal.

17.137 A number of consultees commented specifically on the requirement of reasonable belief.

17.138 HM Land Registry said that whilst it broadly agreed with the proposed approach, it queried whether it should be necessary for an adverse possessor to show a reasonable belief that the prior title has been extinguished, as it is difficult to establish a person's state of mind; therefore, the requirement is "likely to lead to disputes".

17.139 Christopher Jessel argued that it should be made clear that the standard for 'reasonable belief' is objectively determined by "what a reasonable squatter in the position of the claimant would believe rather than a subjective belief of the actual squatter", citing *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs*.[52]

17.140 The Property Litigation Association agreed on balance. However, it stated that it could see "good reasons to the contrary" based on the previous case law, consistent with the

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47 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Adrian Broomfield; Society of Licensed Conveyancers; Dr Aruna Nair; The Bar Council; HM Land Registry; Chartered Institute of Legal Executives; The Law Society.

48 Dr Charles Harpum QC (Hon).

49 Amy Goymour.

50 See para 17.78.

51 Consultation Paper, para 3.14.

52 [2007] UKHL 28, [2008] 1 AC 221.

position that a person cannot be in adverse possession of land in respect of which he or she is registered proprietor. However, the Association stated that in circumstances where the adverse possessor has a reasonable belief that the prior title has been extinguished, they should not be disadvantaged by the fact they have sought to regularise their ownership. The Association was concerned that by requiring the belief of the adverse possessor to be tested, the proposal provides less certainty than a clear exclusion of the period of time for which the land was registered with possessory title would do.

Disagreed

17.141 Dr Charles Harpum noted that the proposal addresses a rare situation. Whilst he acknowledged that to date the situation has arisen a number of times, he suspected that it is unlikely to do so much in the future. He argued that the case for time continuing to run is that registration with a possessory title takes effect subject to the rights, if any, of the paper owner, whose own title was unregistered, pursuant to section 11(7) of the LRA 2002. He explained:

> The squatter has a separate legal estate from the paper owner and it is that which is registered. There is no reason, it is said, why the fact that the squatter has been registered should affect the rights of the squatter as against the unregistered paper owner.

17.142 Dr Harpum stated that he has a "fundamental conceptual difficulty" with the idea that a person can be in adverse possession of land of which he or she is the registered proprietor. In his view, it contradicts the logic of land registration, whatever the theory of concurrent legal estates may be. Additionally, he thought that our proposal is worded such that it is an invitation to uncertainty, questioning how it can be determinedwhether a squatter has acted reasonably in applying to be registered. He stated that his preferred method for tackling this problem would be to "follow the principles and logic of registered land" and leave it up to the unregistered paper owner to seek alteration of the register, by closing the squatter's title. There should be no time limits proposed for seeking alteration of the register and, once the squatter's title has been closed, the paper owner can recover possession.

Other

17.143 Amy Goymour neither agreed nor disagreed with the proposal. She reiterated her stance in relation to concurrent possessory and absolute title in respect of the adverse possessor and original registered proprietor, stating that there consequently was no need for this proposal.

ADVERSE POSSESSION BY TENANT

Consultation Question 104.

17.144 We provisionally propose that where a tenant is in adverse possession of land (other than land belonging to the landlord) and the presumption that the tenant is acting on behalf of his or her landlord is not rebutted, the landlord should be able to make an application under schedule 6 based on the tenant's adverse possession.

Do consultees agree?[53]

17.145 23 consultees answered this question:

(1) 21 agreed;[54] and

(2) 2 disagreed.[55]

17.146 The majority of consultees agreed with this proposal. However, consultees express different views about the appropriateness of the presumption

Agreed

17.147 The Society of Legal Scholars agreed that a landlord who acquires title through his or her tenant's encroachment should have standing to apply for registration under schedule 6, agreeing with the reasons given by Dr Emma Lees in her 2015 article in The Conveyancer.[56] The Society noted that this could also apply to a trustee after adverse possession by a beneficiary.

17.148 The National Trust strongly agreed with the proposal, noting that much of its land is occupied by tenants of residential, agricultural and commercial leases.

17.149 The Society of Licensed Conveyancers also agreed with the proposal, but emphasised that the tenant should be able to rebut the presumption.

17.150 Amy Goymour agreed, but stated that the proposal represents the current law.[57] She explained that there seems to be nothing in the current legislation to prevent a landlord from being in possession via the acts of his or her tenant, and that section 205(1)(xix)

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53 Consultation Paper, para 17.86.

54 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Michael Mark; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; National Trust; Adrian Broomfield; Society of Licensed Conveyancers; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; The Law Society; Society of Legal Scholars.

55 Everyman Legal; Dr Charles Harpum QC (Hon).

56 Dr Emma Lees, "Encroachments and schedule 6 LRA 2002: unknotting the tangle" [2015] *Conveyancer* 110, 114.

57 Ms Goymour noted this contrary to our arguments in para 17.83 of the Consultation Paper.

of the Law of Property Act 1925 might support this interpretation. Nevertheless, Ms Goymour agreed that it would be desirable for the legislation to state expressly that landlords can make such an application.

17.151 Christopher Jessel considered that if a tenant makes an application, either in the mistaken belief that the presumption is rebutted or in ignorance of it, then the landlord should be able to take over the application before it is completed. Further, if it is completed, that the registration of the tenant as proprietor of the freehold should be regarded as a mistake so that the landlord will be entitled to rectification against the tenant. Mr Jessel added that, if the tenant's interest in the lease is registered, then the possessed land should be added to the tenant's title even if by the time of registration the lease has less than seven years to run.

17.152 Nigel Madeley commented that our proposal was an interesting view, given that a person in possession of registered land by reason of receiving rents and profits is not regarded as being in actual occupation.

17.153 The Property Litigation Association agreed that the change is necessary in order to reflect that the LRA 2002 does not affect the operation of the presumption of tenants acting on behalf of their landlords in the case of adverse possession.

17.154 The London Property Support Lawyers Group stated that although the proposal "complicates the operation of schedule 6" it is important that the procedure under the 2002 Act should accommodate the presumption that a tenant in adverse possession is acting on behalf of his landlord. However, the Group stated that it expressed no view on whether the presumption is a sensible one.

17.155 The Law Society stated that it would like to see "a negation of the presumption that a tenant obtains title to land through adverse possession on behalf of their landlord". However, the Society said it was understood that that this issue is not within the scope of the current exercise of reform of the LRA 2002.Therefore, it agreed with the proposal, to enable the register to reflect the current position.

Disagreed

17.156 Dr Charles Harpum disagreed with our proposal on the basis that the reforms in LRA 2002 were intended to cut back on the scope and impact of adverse possession. He suggested that applying an adverse possession principle to registered land, simply because it developed in relation to unregistered land, missed the point of the 2002 reforms, "particularly when the rule in question is archaic and incoherent".

17.157 Dr Harpum stated that he entirely agreed with Laddie J's comments quoted in paragraph 17.80 of the Consultation Paper.[58] He questioned why an "anachronistic and very questionable presumption" of accrual to the landlord should be carried through to the LRA 2002, so as to enable a landlord to gain the land.

17.158 Everyman Legal stated that it was not convinced by the proposal.

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[58] Citing *Batt v Adams* (2001) 82 P & CR 32 at [38].

Chapter 18: Further advances

INTRODUCTION

18.1 21 consultees responded to the questions in Chapter 18 of the Consultation Paper.[1]

18.2 The questions in Chapter 18 were open questions, which sought from consultees evidence about the law in practice and their views about the necessity or desirability of reform. We also asked two questions about a potential Law Commission project on the law of mortgages, which we considered as part our consultation on the 13th Programme of Law Reform.

A PROJECT ON THE LAW OF MORTGAGES

Consultation Question 105.

18.3 We invite the views of consultees as to whether the Law Commission should conduct a project reviewing the law of mortgages as it applies to land. If consultees consider a project should be so conducted, we invite consultees to share examples of areas that such a project should cover. Please include evidence as to the problems that the law is creating in practice and the potential benefits of reform.[2]

18.4 14 consultees answered this question.[3]

18.5 This question was considered as a part of the consultation on the 13th Programme of Law Reform.

18.6 All relevant responses were considered as part of our assessment of issues for inclusion in the Law Commission's 13th Programme of Law Reform.

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1 Professor Warren Barr and Professor Debra Morris; Professor Sarah Nield; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); The City of London Law Society Financial Law Committee; Adrian Broomfield; Howard Kennedy LLP; Council of Mortgage Lenders; The Bar Council; The Building Societies Association; Berwin Leighton Paisner LLP; British Banker's Association; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

2 Consultation Paper, para 18.7.

3 Professor Warren Barr and Professor Debra Morris; Professor Sarah Nield; Everyman Legal; Michael Hall; The Conveyancing Association; Christopher Jessel; Dr Charles Harpum QC (Hon); Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives; The Law Society; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; the Building Societies Association; The City of London Law Society Financial Law Committee.

FURTHER ADVANCES UNDER SECTION 49 OF THE LRA 2002

Consultation Question 106.

18.7 We invite the views of consultees as to the circumstances in which the provisions in section 49 are most likely to be relied upon by all tiers of lender. Where lenders prefer to enter into agreements between themselves to regulate the position, is this because the legislation is perceived to be inadequate, or simply because commercially it is desirable for arrangements to be put on a contractual footing?[4]

18.8 9 consultees answered this question.[5]

18.9 The majority stated that section 49 of the LRA 2002 is not commonly relied on by lenders.

18.10 Although consultees expressed a range of views, two strong themes emerged: first, that contractual arrangements are relied upon by the majority of lenders; but secondly, that the reasons for reliance on contractual arrangements is not necessarily inadequacies of the provisions in the LRA 2002.

18.11 Everyman Legal stated that lenders prefer to "rely on their own arrangements rather than those imposed by legislation", without explaining further the reason for this.

18.12 The City of Westminster and Holborn Law Society explained that section 49 is of "limited application" to residential lending. With regard to commercial property, the Society stated that there is "minimal reliance" on section 49, and that it "anticipated further advances by the primary lender [are] dealt with on a contractual basis".

18.13 Similarly, Adrian Broomfield stated that lenders prefer to use agreements between themselves as these have "invariably been negotiated to best reflect the parties' individual interests", putting these on a "solid contractual footing". Whilst stating that he was "unable to comment" whether section 49 is inadequate, he added that "this is the implicit deduction" to be made from lenders' conduct.

18.14 The London Property Support Lawyers Group stated that commercial lenders do not "generally" rely on section 49 alone. It stated that where "it is known at the start of a transaction that there will be a senior and junior lender", the parties will enter into an "inter-creditor agreement".

18.15 The London Property Support Lawyers Group explained that the use of inter-creditor agreements resolves difficulties created by section 49. It identified that the provisions on further advances made pursuant to an obligation "creates difficulties in syndicated lending where, for example, a second charge breaches a negative pledge", or where

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4 Consultation Paper, para 18.15.

5 Everyman Legal; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Adrian Broomfield; Howard Kennedy LLP; Berwin Leighton Paisner LLP; Burges Salmon LLP; The Law Society; The Council of Mortgage Lenders.

the borrower is in default. It also identified that the requirement that "further advances must be made by the registered chargee" creates "difficulties in syndicated lending".

18.16 The Group explained that inter-creditor agreements resolve not only the above issues, but also other "significant issues" such as the "junior lender's right to buy out a senior lender, the payments waterfall and the agreed enforcement strategy". The Group explained that section 49 only comes into play where additional charges are entered into by the borrower and other creditors "who are not party to the inter-creditor agreement".

18.17 Howard Kennedy LLP added that, in the residential market, second chargees serve notice, relying on section 49, in order "to protect themselves against further advances made by the first chargee".

18.18 Similarly, Burges Salmon LLP stated that section 49 is "rarely relied upon for determining priority of charges" between the lenders for whom they act. In the "vast majority" of cases involving competing lenders, a "deed of priority or inter-creditor agreement" is entered into under the LRR 2003, rules 101 and102, often containing "commercial terms" going beyond priority of charges. In other words, "the provisions of section 49 are not the only driver for the agreement".

18.19 Burges Salmon LLP acknowledged, however, a number of problems with section 49 which are overcome by these agreements. First, the registration of a subsequent charge does not itself appear to prevent a prior charge tacking "further advantage" to the first registered charge. In addition to registration, a separate notice needs to be served on the prior chargee. In its view, "this does not sit easily with the general principle of interest being determined by registration". Secondly, "specific agreement" is often required in a "deed of priority/inter-creditor agreement" to contain either or both an obligation to make a further advance or a stated maximum amount procedure by the charge. Although these commonly appear in commercial lending charges, they appear as a result of the use of "standard Land Registry approved documents rather than consideration of how they affect priority in each case".

18.20 The Law Society also stated that section 49 is "not widely used by lenders generally, in any tier of the market". It explained that those involved in high value commercial transactions "prefer to use contractual arrangements" to regulate priority as between themselves. In the Society's view, this is not driven by the inadequacy of section 49, but the market, which "prefers to have commercial arrangements in place as between lenders".

18.21 The Society explained that section 49 tends to be used by "the second tier of lender", who commonly advance smaller sums to a diverse range of borrowers. It noted "occasional use" of section 49 in syndicated loans:

> Whilst the importance of this mechanism to a relatively small, niche market is undoubted, it is not something that arises often.

18.22 In contrast, Berwin Leighton Paisner LLP stated that it is "probably not correct" that section 49 is not commonly employed and that priority deeds are used instead. It described section 49 as a "long-standing and fair framework", in which the "great majority of mortgages operate" and which is "well understood by practitioners". In its

view, while inter-creditor agreements or deeds of priority are used in "some high value commercial transactions", these:

> tend to be in structures where the landowner-borrower is a special purpose vehicle ("SPV") with no other assets, and where the land is being mortgaged to its fullest extent at the outset, to a range of lenders or investors whose respective interests are known at the outset.

18.23 Berwin Leighton Paisner LLP suggested that "many respondents" to the consultation might work exclusively on this type of transaction, which might also explain why Baroness Scotland informed the House of Lords in 2001 that:

> the lender will always have priority for everything that is advanced under its legal charge over any subsequent disposition that is created after the legal charge (Hansard 19 July 2001 col 1603).

18.24 Berwin Leighton Paisner LLP went on to state that "it is desirable that the law should address" the eventuality of a borrower seeking to raise further funds on the security of remaining equity in a property. It said that it is "certainly not correct for anyone to suggest that" section 49 has no part to play in modern practice. It concluded that:

> For the reasons given in paras 18.52 to 18.54 of the Consultation Paper, the current system of tacking should remain, subject to the well-known errors being corrected. Any system which gives full control to the first-ranking chargee (eg that proposed in para 45 of the CLLS's draft Secured Transactions Code) would be unduly oppressive to borrowers.

18.25 The Council of Mortgage Lenders said it was not aware of section 49 of the LRA 2002 causing issues, from a residential mortgage perspective. However, it commented that "some of our members have noted that they would prefer the certainty of using Deeds of Postponement for the crucial aspect of ensuring priority of the first-charge mortgage".

ISSUE 1 – LOANS WHICH PROVIDE FOR DRAWDOWN IN INSTALMENTS

Consultation Question 107.

18.26 We invite the views of consultees as to whether the fact that, where a loan is drawn down in instalments, those instalments are classified as "further advances", is causing problems in practice.[6]

18.27 8 consultees answered this question.[7]

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6 Consultation Paper, para 18.22.

7 Everyman Legal; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Adrian Broomfield; Howard Kennedy LLP; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives; The Law Society.

18.28 The majority of consultees stated expressly that problems are caused by the classification of instalments as "further advances", or otherwise supported clarification in this area.

18.29 The London Property Support Lawyers Group stated that this classification "does create problems in practice". It gave the following example:

> A first ranking creditor agrees to lend money on the security of a registered long lease over land which is to be developed. There is also an agreement by the borrower for the grant of an underlease at a rack rent of the completed development to a company with a first class covenant. Value depends on completion of the grant of the underlease. The long lease provides for the freeholder being able to forfeit it if the development is not completed by a stated date. The lender is obliged to advance its loan by stages as the development proceeds. The loan agreement provides that the borrower may not create second ranking or subsequent charges and that the lender's obligations to lend will be discharged if the borrower breaks those provisions. The lender's obligation to make further advances is noted on the register under Section 49(3). A Restriction against registration of dispositions without the lender's consent is also registered against the borrower's title.
>
> The borrower also has an unsecured overdraft facility with another lender. The borrower pays its contribution to the development costs out of that account.
>
> Time passes. The secured lender makes its advances as the development proceeds. The borrower uses up its unsecured overdraft facility. The other lender is prepared to increase the overdraft facility if the borrower creates a second ranking fixed charge over the Lease. The borrower creates that second charge and the other lender gives notice of it to the first ranking creditor. The other lender also protects the priority of its second ranking charge (which it cannot substantively register because of the Restriction) by registering a Notice against the borrower's title.[8]

18.30 The Group then explained that where this situation leaves the first ranking lender when it receives a request for a further advance "has been an issue in practice". It explained:

> If the first ranking lender refuses to make the further advances the development will not be completed and there is a real risk that the freeholder will forfeit the lease. If the first ranking lender does make the advances, they will rank behind the second lender's charge.

18.31 The Group concluded by stating that the inter-creditor agreements suggested in the Consultation Paper[9] "may be easy enough to put in place" when the secured loans are made, but "less so in circumstances", such as this.

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8 The example also contains other issues relating to the tacking provisions in the LRA 2002, and the London Property Support Lawyers Group refer to this example in response to other consultation questions in this Chapter.

9 At paragraph 18.15.

18.32 Howard Kennedy LLP suggested that the consequences of the classification of instalments as further advances can be "serious", and referred to the significance of problems in the development processes, which "may not protect the first chargee".

18.33 Berwin Leighton Paisner LLP stated that "it is difficult to imagine" (nor does the Consultation Paper put forward) a counter argument to the proposition that instalments are further advances, capable of tacking under section 49 of the LRA 2002. It referred to the *Black Ant* judgment,[10] which addressed the "slightly different" issue of whether the restructuring of a loan operated as a further advance. In *Black Ant*, it was held that there was no further advance: the original loan remained owing, so that it took priority over the subsequent charge. Capitalised interest and fees were similarly part of the original loan. Applying this reasoning, Berwin Leighton Paisner LLP suggested that when a lender acquires the whole or part of a syndicated debt, there will not be a further advance. It suggested, however, that "to avoid any uncertainty on this point", it is "desirable" if legislation were to clarify what types of arrangement are not "further advances" but instead treated as part of the original loan. It suggested that an advance made at or before the charge would not be regarded as a "further advance".

18.34 Professor Sarah Nield stated that the classification issues identified in the Consultation Paper are "clearly of import", and that she supports the exclusion of instalment advances from the concept of further advances.

18.35 In contrast, Everyman Legal said that, in its experience, the classification did not cause problems. Similarly, Adrian Broomfield similarly stated that he was "not aware of this being a practical problem".

18.36 The Law Society stated that "there are no significant problems being caused" by the classification, but referred to "occasional difficulties where a loan agreement obliges a lender to make further advances", which may then be "further advances". Notwithstanding this, it stated that the position is sufficiently "well-established" by *Hopkinson v Rolt*,[11] such that "there are no sufficient grounds for changing the position".

18.37 The City of Westminster and Holborn Law Society stated that it took no view as to practical problems, but that clarification would be "desirable". Similarly, the Chartered Institute of Legal Executives stated that it is "not a significant issue," but welcomed redefinition in order to provide clarity for commercial lending.

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[10] *Urban Ventures Ltd v Thomas* [2014] EWHC 1161 (Ch); affirmed on appeal in *Urban Ventures Ltd v Thomas* [2016] EWCA Civ 30.

[11] (1861) 11 ER 829.

ISSUE 2 – FURTHER ADVANCES MAY ONLY BE MADE BY THE REGISTERED PROPRIETOR OF THE CHARGE

Consultation Question 108.

18.38 We invite the views of consultees as to whether it should be possible for persons other than the proprietor of a registered charge to make further advances on the security of that charge which rank in priority to a subsequent charge pursuant to the provisions of section 49 of the LRA 2002.[12]

18.39 8 consultees answered this question.[13]

18.40 Most consultees who responded agreed that the category of persons who can make further advances in accordance with section 49 should be expanded.

18.41 Professor Warren Barr and Professor Debra Morris stated that "there is a lot of sense in this proposal, given the practice of syndicated loans". Similarly, the City of Westminster and Holborn Law Society stated that they support the proposal because it reflects "commercial reality", but said it should apply "preferably where syndication arrangements…are recorded and limited to those parties so named on the register". Professor Sarah Nield also supported the proposed extension.

18.42 The London Property Support Lawyers Group agreed that it should be possible for persons other than the proprietor of a registered charge to make further advances. It noted that in syndicated loans, "the mortgagee is often not a lender", and so "does not make the further advances".

18.43 Adrian Broomfield stated that he could see "no objection in principle" to the expansion, so long as it is "clear from the charges register entry".

18.44 Berwin Leighton Paisner LLP agreed with our proposal. It stated that problem "has been raised on many occasions". It stated that the problem is not limited to lending banks under syndicated loans, but:

> would also arise if the loan is made directly to the borrower by more than four lenders, because only the first four could become registered as proprietor of the charge.

18.45 It said it would be "a pity" if it was necessary to refer to the "general law", because the Act does not clarify the position, a problem which would be avoided if "the protection of section 49 was available to all of the parties who have lent the money". However, it considered that the issue "relates only to registered land" and "could be cured by a simple amendment". It took the view that:

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12 Consultation Paper, para 18.27.

13 Professor Warren Barr and Professor Debra Morris; Michael Hall; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Adrian Broomfield; Berwin Leighton Paisner LLP; The Law Society, Professor Sarah Nield.

> The problem does not arise in unregistered land because the expression "mortgagee" is wide enough to cover the persons who have made the advances where the mortgage over the land is held by a trustee on their behalf. For example, the remedies under the mortgage are sometimes capable of being exercised by the beneficiaries (Gandy v Gandy (1885) 30 Ch D 57 (CA)), and the power of sale is exercisable by the persons entitled to give a receipt for the mortgage monies (under the Law of Property Act 1925 section 106(1)).

18.46 Berwin Leighton Paisner also considered that the problem was "very much aggravated by the LRA 2002". It took the view that:

> Under LRA 1925, section 30 did not require the further advance to be made by the registered chargee (merely that the notice of any subsequent charge should be served by the Registry upon the registered chargee). It is true however that the "obligation to make a further advance" in LRA 1925 section 30(3) (introduced by the Law of Property (Amendment) Act 1926) is required to be an obligation of the registered proprietor. But now, under LRA 2002 section 49, further advances in all cases must always be made by the registered proprietor.

18.47 The Law Society also agreed with our proposal. It referred to "a modest change to the Act" which would be desirable "in order to assist the small number of lenders participating in syndicated loans".

18.48 In contrast, Everyman Legal stated that "there seems little point to this" proposal.

18.49 Michael Hall disagreed with the proposal unless the mortgage deed contains a clause providing that "the borrower charges the land as security for such loans", and which defines "the class of lenders who are able to lend on such security".

Consultation Question 109.

18.50 We invite consultees to submit evidence as to whether, given the use of inter-creditor agreements to regulate priority within the commercial lending market, an extension to the persons who can make further advances under section 49 would be likely to have an effect in practice.[14]

18.51 4 consultees answered this question.[15]

18.52 The London Property Support Lawyers Group stated that the proposed extension "would have an effect in practice as parties do not always put in place inter-creditor agreements".

18.53 The Law Society took the view that "only…a very small number of lenders" would be affected by the amendment. However, the Law Society said that facilitation of

[14] Consultation Paper, para 18.28

[15] London Property Support Lawyers Group; Adrian Broomfield; Berwin Leighton Paisner LLP; The Law Society.

syndicated loans for even "a small number of sophisticated lenders is a worthwhile policy objective".

18.54 Berwin Leighton Paisner LLP reiterated its response to the previous question in which it stated, among other things, that "the problem…has been raised on many previous occasions".

18.55 In contrast, Adrian Broomfield stated that he does "not suspect this would make any difference in practice".

Consultation Question 110.

18.56 We invite the views of consultees, if they believe that it should be possible for persons other than the proprietor of a registered charge to make further advances on the security of that charge, as to who should be enabled to do so.[16]

18.57 5 consultees answered this question.[17]

18.58 Two consultees did not agree with our view that it would be necessary to define or limit the class of persons who should be able to make the further advances.

18.59 Michael Hall stated that it is "a matter for the borrower to determine", and that the borrower "should remain in control of who has security over his property". Similarly, the London Property Support Lawyers Group considered that it is "necessary or desirable to define or limit who should be able to make the further advances". It stated that the issue "is simply whether the advances are secured by the registered charge".

18.60 The London Property Support Lawyers Group also thought that any amendment should ensure that "the notice under s 49(1) need not be served on anyone other than the registered proprietor of the charge".

18.61 The City of Westminster and Holborn Law Society stated that the expansion should preferably be made available "where syndication arrangements for this are recorded on the register". It stated that it should therefore be "limited to those so named".

18.62 The Law Society reemphasised that any change to section 49 should be "targeted" at assisting lenders involved in loan syndications "who are sufficiently sophisticated to make and enforce between themselves suitable arrangements". It suggested that "the class should be restricted to beneficiaries of an express trust of the registered charge", which would give the market "sufficient flexibility" whilst providing a clear and simple test for identifying such persons.

18.63 Berwin Leighton Paisner LLP stated that further advances should be capable of being tacked under section 49 by (a) those "entitled to any part of the money or obligation to

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16 Consultation Paper, para 18.31.

17 Michael Hall; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Berwin Leighton Paisner LLP; The Law Society.

make the further advance", and/or (b) those "under an obligation to make the further advance in question". It suggested that "notice to the registered chargee would be sufficient" notice to the mortgagee.

ISSUE 3 – SECTION 49(1) APPLIES TO NOTICE OF ANY SUBSEQUENT CHARGE (NOT JUST NOTICE OF REGISTERED CHARGES)

Consultation Question 111.

18.64 As part of our call for evidence in relation to a separate project on mortgage law, we invite consultees to share their experiences of any benefits or difficulties caused by the principle that an equitable chargee may serve notice on a prior legal chargee and thereby prevent the legal chargee's right to tack.[18]

18.65 7 consultees responded to our call for evidence, of which two provided evidence of practice.[19]

18.66 This question was considered as a part of the consultation on the 13th Programme of Law Reform.

ISSUE 5 – ADVANCES UP TO A MAXIUM AMOUNT UNDER SECTION 49(4)

Consultation Question 112.

18.67 We invite the views of consultees on the extent to which lenders are relying on section 49(4) to stipulate a maximum amount for which a charge is security.[20]

18.68 7 consultees answered this question.[21]

18.69 Most stated that in their experience section 49(4) is not relied on to stipulate a maximum amount for which a charge is security.

18.70 Howard Kennedy LLP stated that it does "not have any evidence of lenders relying on section 49(4)".

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18 Consultation Paper, para 18.41.

19 The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Dr Charles Harpum QC (Hon); Howard Kennedy LLP; The Bar Council; Berwin Leighton Paisner LLP; The Law Society

20 Consultation Paper, para 18.58.

21 Michael Hall; London Property Support Lawyers Group; Dr Charles Harpum QC (Hon); Howard Kennedy LLP; Berwin Leighton Paisner LLP; The Law Society; the British Bankers' Association.

18.71 Berwin Leighton Paisner LLP referred to section 49(4) as a means by which mortgage lenders could gain control over the borrower's land; however, it said that it had "not encountered any cases which a section 49(4) provision has been used".

18.72 Similarly, the London Property Support Lawyers Group stated that it is:

> not aware of lenders relying on section 49(4) to stipulate a maximum amount, notwithstanding that it is likely to be beneficial as it would be a way of protecting undrawn further advances.

18.73 The Group stated that this practice "may be perceived as being commercially unattractive": the maximum amount is likely to be "significantly more than the loan amount", to take account of interest, break costs, enforcement costs, as well as repayment of the loan amount. In its view, stating such a large sum on a public register "may fetter the borrower's ability to raise finance from another chargee".

18.74 Dr Charles Harpum QC (Hon) stated that section 49(4) is "permissive", "may be used if the parties agree", which is essentially a matter "for the market". He stated that the "criticisms of s 49(4) smack of motes and beams",[22] and that in 15 of experience, he has "never seen a charge that employed s 49(4) and there have been no cases on it".[23] In contrast, he said that first legal "all-money" charges are used by primary lenders, with restrictions that prevent any subsequent legal charge of the property without the consent of the first mortgagee. Such consent is never forthcoming. He referred to this "anti-competitive practice" as "infinitely more pernicious than s 49(4)" because it prevents "borrowers from obtaining further finance elsewhere". He went on to comment that "this is obviously not a matter for an amended LRA, but…a mortgages project".

18.75 In contrast, Michael Hall stated that this does happen in practice.

18.76 The British Bankers' Association disagreed that this was standard practice:

> The consultation stated that lenders would tend to fix the maximum sum at a much higher level than the likely borrowings might appear to warrant to be sure they are adequately secured. We do not believe that this is standard practice, especially where the deed of postponement provides priority up to a maximum limit plus interest and costs. The maximum sum would however reflect the maximum contractual exposure that has been agreed as secured by the property, and not just the current drawn exposure.

18.77 The Law Society said that it is "aware that a small number of lenders…impose a maximum amount…in order to rely on section 49(4)". It described this practice as an "undesirable" and "unintended consequence" of the drafting of the provision. It stated that there is "no good reason for the inconsistency between registered and unregistered

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[22] And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" Matthew, 7:3.

[23] The only case on s 49 of which I am aware is *Re Black Ant* [2014] EWHC 1161 (Ch), which is discussed at para 18.19.

land", and "no policy justification for the departure from the generally accepted effect of *Hopkinson v Rolt*[24]".

Consultation Question 113.

18.78 We invite consultees to provide any evidence that reliance on section 49(4) in this way is preventing borrowers from obtaining further finance elsewhere.[25]

18.79 4 consultees answered this question.[26]

18.80 The London Property Support Lawyers Group stated that section 49(4) "may prevent borrowers from obtaining further finance", although it stated that it did not have any evidence of this in practice.

18.81 Similarly, Berwin Leighton Paisner LLP stated that it had no experience of section 49(4) being used, and thus that that it had "not encountered cases where borrowers were prevented from obtaining finance" because of it. The firm stated, however, that it "seems obvious" that a section 49(4) provision:

> can cause additional problems for borrowers who seek to find additional finance from a different lender.

18.82 Berwin Leighton Paisner LLP also stated that "there may be some unusual cases in which a section 49(4) provision would be suitable". It cited as possible examples the 16 cases between April 2015 and January 2016 referred to by HM Land Registry, in which "it would not be appropriate to deprive such users of it".

18.83 The Law Society stated that it is "not in a position to present any evidence" on section 49(4) being used to prevent borrowers from obtaining further finance. It also endorsed the criticisms of section 49(4) made by the editors of *Fisher & Lightwood's Law of Mortgage* and Professor Sir Roy Goode, and stated that it "would welcome an amendment to section 49 to align it with the position in *Hopkinson v Rolt*".[27]

RESPONSES TO ISSUE 4 – FURTHER ADVANCES MADE PURSUANT TO AN OBLIGATION

18.84 We did not ask any consultation questions about issue 4 (further advances made pursuant to an obligation). However, 5 consultees provided comment concerning this issue.

18.85 The City of London Law Society Financial Law Committee said:

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24 (1861) 11 ER 829.

25 Consultation Paper, para 18.59.

26 London Property Support Lawyers Group; Berwin Leighton Paisner LLP; The Law Society; Dr Charles Harpum QC (Hon).

27 (1861) 11 ER 829.

Having said that, we do agree with the difficulties with the current law described in the Consultation Paper, in particular that:

> in practice there will very likely be no obligation on the first chargee to lend because the creation of the second charge will be a drawstop under the first charge (paragraph 18.44).

18.86 Michael Hall said:

> One common bad practice which should not be permitted is when mortgagees include a statement in their mortgage deed that the lender is under an obligation to make further advances, when in fact the lender is under no such obligation.
>
> This is done for the purpose of tacking, gaining priority for further advances, over any subsequent mortgage. There should be a requirement for lenders who claim that they are under an obligation to make further advances, to make a statement as to the extent of the obligation and the manner in which it arose. Tacking should only be possible for further advances made under a genuine obligation.

18.87 Berwin Leighton Paisner LLP said:

> The Response Form does not provide a separate section to respond to paras 18.42 to 18.46 (further advances made pursuant to an obligation), so the response is being set out here instead:
>
> The possibility that the obligation might have been released because of defaults by the borrower has been a concern for many years. Para 18.46 footnote 33 of the Consultation Paper mentions The Law Commission's 1991 Report on Transfers of Land – Land Mortgages (Law Com No 204). In paragraph 9.4 of that Report, the Law Commission had recommended that "this could be very easily remedied, by amending section 94(1)(c) of the Law of Property Act 1925 to make it clear that it applies whenever the mortgage originally imposed an obligation to make further advances, even if the mortgagee has subsequently been released from its obligation to do so by a default of the mortgagor". Sadly, that proposal was not taken forward.
>
> Nevertheless, it would be a simple matter for this review to adopt that proposal in relation to registered land. Alternatively, the point could be dealt with by a provision along the lines that:
>
> > (a) For the purposes of section 49(3) only, the obligation to make the further advance shall be deemed to be continuing notwithstanding any breach by any party which would otherwise have the effect of releasing that obligation; and
> >
> > (b) Any further advance made in the circumstances referred to in para (a) shall not operate as a waiver of the breach.

18.88 The London Property Support Lawyer Group said:

> Generally, commercial lenders do not rely on section 49 alone. We agree that the condition that the advance must be made in pursuance of an obligation creates difficulties where, for example, a second charge breaches a negative

pledge. Likewise there are difficulties in syndicated lending that further advances must be made by the registered chargee. Therefore, where it is known at the start of a transaction, that there will be a senior and junior lender, an inter-creditor agreement will be entered into. This agreement will resolve not only the above issues but will also deal with other significant issues such as a junior's lenders right to buy out a senior lender, the payments waterfall and the agreed enforcement strategy.

Section 49 would only come into play where further charges are entered into by the borrower and other creditors, who are not party to the inter-creditor agreement.

Another reason why section 49 is considered inadequate is that as soon as a borrower is in default there will be no obligation on a lender to make further advances as the lender will have discretion (therefore the further advances will not be protected).

18.89 Burges Salmon LLP said:

Although charges issued by commercial lenders will often contain either or both of an obligation to make a further advance or a stated maximum amount procured by the charge, these appear to be as a result of the use of standard LR approved documents rather than consideration of how they affect priority in each case. This is another reason why even where such provisions are contained within charges, specific agreement is required in a deed of priority/inter-creditor agreement.

18.90 Howard Kennedy LLP said:

Generally, commercial lenders do not rely on section 49 alone. We agree that the condition that the advance must be made in pursuance of an obligation creates difficulties where, for example, a second charge breaches a negative pledge.

Chapter 19: Sub-charges

INTRODUCTION

19.1 20 consultees responded to the questions in Chapter 19 of the Consultation Paper.[1]

19.2 The clear majority of consultees who responded to our provisional proposals agreed with them, both in relation to clarifying the effect of section 53 and of an absence of a restriction on the register in relation to a sub-charge. On the later point, consultees generally did not think that transitional provisions were necessary. Consultees also did not provide evidence of problems in practice in relation to the discharge of a principal registered charge when there is an existing registered sub-charge.

THE EFFECT OF SECTION 53

19.3

Consultation Question 114.

19.4 We provisionally propose that section 53 of the LRA 2002 should be clarified to ensure that its effect is to confer powers on a sub-chargee, not remove them from the sub-chargor. It would be open to the parties to a sub-charge to agree otherwise.

Do consultees agree?[2]

19.5 18 consultees answered this question:

(1) 16 agreed;[3]

(2) 1 disagreed;[4] and

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1 Professor Warren Barr and Professor Debra Morris; Professor Sarah Nield; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Berwin Leighton Paisner LLP; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

2 Consultation Paper, para 19.34.

3 Professor Warren Barr and Professor Debra Morris; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Professor Sarah Nield.

4 Berwin Leighton Paisner LLP.

(3) 1 expressed other views.[5]

Agreed

19.6 Most consultees who agreed did not provide further comment.

19.7 Professor Warren Barr and Professor Debra Morris stated that the proposal "would add useful clarity to the law" and "allow the parties to change their position on the issue by express agreement".

19.8 Professor Sarah Nield referred to the proposal as "sensible".

Disagreed

19.9 Berwin Leighton Paisner LLP disagreed with the proposal. It explained that a sub-charge is a "proprietary interest affecting the land", rather than a "mere limitation on the powers of the sub-chargor". It suggested that many of the issues in the chapter do not arise, because the chapter assumes "wrongly" that a sub-charge is a mere limitation.

19.10 Berwin Leighton Paisner LLP explained that the relationship between a sub-chargor and a sub-chargee is "essentially exactly the same as the relationship between the landowner and the chargee under the principal charge". The existence of a registered charge over land does not normally prevent the landowner from continuing to use the land. The chargee comes into play "only when the chargor has defaulted", and the chargor's equity of redemption is extinguished "only when the chargee has actually contracted to sell" the land.

19.11 Berwin Leighton Paisner LLP then referred to three consequences of the above.

(1) If default occurs under the sub-charge, the main remedy of the sub-chargee is to sell the benefit of the principal charge. The position of the landowner and the person who is the principal chargee will not be affected, except that the benefit of the principal charge will now be vested in the buyer from the sub-chargee. In particular, the sub-chargee has no power to enforce the principal charge in this scenario.

(2) If a default occurs under the principal charge, the main remedy of the principal chargee/sub-chargor is to sell the land under its mortgagee's power of sale.

(3) In a case where defaults have occurred under both, then obviously it is the sub-chargee who would be exercising its enforcement powers and who would be selling the land itself (not just the benefit of the principal charge).

19.12 In relation to the second point, Berwin Leighton Paisner LLP added (in its addendum response) that a sub-chargor who exercises the power of sale "is under a duty to take reasonable care to obtain the best price reasonably obtainable". In practice, it would "obtain discharge of the sub-charge, normally by using part or all of the sale proceeds", rather than selling the land when it is "encumbered by the sub-charge". Berwin Leighton Paisner LLP therefore took the view "that no clarification is required". Instead, it

[5] HM Land Registry.

considered that "the exercise of powers…should continue to be governed by the terms of the documentation agreed by the parties in each case".

19.13 Berwin Leighton Paisner LLP added that paragraph 19.8 of the Consultation Paper wrongly suggested "that LRA 2002 sections 23(2)(a) and 24 only permit a registered chargee to deal with the charge (and do not permit enforcement by disposing of the land itself)". It characterised this proposition as "troubling" because, in its view, the power in section 23(2)(a) for a chargee or sub-chargee "to make a disposition of any kind permitted by the general law in relation to an interest of that description" logically includes the power of sale of the land itself. It continued that any doubt about section 24 "needs to be amended at once to make it clear that such chargees can deal with the land itself". It also thought that it should be clarified that, despite section 28:

> a sale by such a chargee will overreach all interests over which the charge has priority…in the same way as LRR 2003 rule 112(2)(b) provides in relation to foreclosure.

19.14 Finally, Berwin Leighton Paisner LLP noted that section 23(2)(b) refers "only to sub-charges which secure the payment of money". It explained that charges are "sometimes used to secure the performance of obligations as well as the payment of money". It considered that a sub-charge securing the performance of obligations, a disposition permitted by the general law, "ought [to] be registrable under section 23(2)(a)", which also applies to charges themselves under section 23(1)(b). It noted that section 129(1) defines "charge" as "any mortgage charge or lien for securing money or money's worth", and so thought that section 23 should not be limited to money.

Expressed other views

19.15 HM Land Registry stated that although it "broadly" agreed with the proposal. However, it suggested that "any agreement about the powers under a sub-charge should only take effect if [the agreement] is registered in accordance with rules", and referred to section 61(2) of the LRA 2002 as an example.

PROTECTION OF DISPONEES UNDER THE LRA 2002

Consultation Question 115.

19.16 We provisionally propose that, unless there is an appropriate restriction on the register, the powers of the sub-chargor shall be taken to be free from any limitation contained in the sub-charge. This would not affect the lawfulness of the disposition as between the sub-chargor and the sub-chargee.

Do consultees agree?[6]

19.17 19 consultees answered this question:

[6] Consultation Paper, para 19.35.

(1) 18 agreed;[7] and

(2) 1 disagreed;[8]

Agreed

19.18 Many of the consultees who agreed did not provide further comment.

19.19 Professor Warren Barr and Professor Debra Morris stated that they agreed with the discussion at paragraph 19.30 of the Consultation Paper, and stated that our proposal is "in the spirit of protecting an innocent purchaser, on which the foundation of the LRA 2002 (and the LRA 1925) is built".

19.20 Everyman Legal stated that "it would help if the register is clear".

19.21 Professor Sarah Nield referred to the proposal as "sensible", but queried:

> what would happen should both a sub-chargor and sub-chargee purport to exercise their concurrent powers under the charge to different purchasers where there is no restriction on the register.

19.22 She commented that, in this situation, "presumably the first purchaser to register their disposition would take priority".

Disagreed

19.23 In contrast, Berwin Leighton Paisner LLP stated that the proposal "is not required" for the reasons discussed in its response to Consultation Question 114 above. It added that "it would not be right for the sub-chargor to be able to flout the terms of the sub-charge" by purporting to deal with the principal charge "as if it was unencumbered". It took the view that:

> the provisions to protect disponees from limitations to the powers of a sub–chargee are (or should be) exactly the same as the provisions applicable to a registered charge.

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7 Professor Warren Barr and Professor Debra Morris; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Professor Sarah Nield.

8 Berwin Leighton Paisner LLP.

DISCHARGE OF THE PRINCIPAL CHARGE

Consultation Question 116.

19.24 We invite consultees to submit evidence of their experience of the discharge of a principal registered charge where there is an existing registered sub-charge. We invite consultees' views on whether there needs to be a mechanism built into the land registration system to allow a sub-chargee to prevent the principal chargee from discharging the principal charge, where this would not be permitted under the terms of the sub-charge. How do consultees believe this could best be achieved?[9]

19.25 7 consultees answered this question.[10] Generally, they did provide evidence of problems in practice.

Experience of problems in practice

19.26 Two consultees had some limited experience with discharge of a principal charge where there is also a registered sub-charge.

19.27 The London Property Support Lawyers Group stated that it had "limited experience" of this in practice; however, it said that in the "few occasions" where a principal registered charge has been discharged where there is an existing registered sub-charge, "the note of the sub-charge has not been removed from the register". This required that the sub-charge be resolved in order to complete the sale or re-mortgage.

19.28 Conversely, Burges Salmon LLP noted that, in its experience, HM Land Registry is unwilling to discharge a registered charge where there is a registered sub-charge, "unless the sub-chargee also provides a DS1".

Suggested mechanisms

19.29 The majority of consultees supported a mechanism to prevent the principal chargee from discharging the principal charge, even if they did not have evidence of problems in practice. Consultees made a number of different suggestions as to how this could best be achieved.

19.30 The London Property Support Lawyers Group suggested that, at the least, the sub-chargee should be able to apply to insert a note on the register requiring the sub-chargee's consent for discharge of the principal charge. It stated that that could be added to the details of the registered proprietor of the principal charge, and that a new form of restriction would "ideally" be created for this purpose.

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9 Consultation Paper, para 19.38.

10 The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; The Bar Council; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society

19.31 The Chartered Institute of Legal Executives also suggested that a restriction could be a "desirable" method.

19.32 The Bar Council stated that it had "no evidence to give". Nevertheless, it said that it would "make sense in principle" to require a discharge from both the charge and sub-chargee, as the ability to discharge, or to withhold a discharge, is the "principle practical means of ensuring that those with security over a property are paid when it is sold".

19.33 The Law Society stated that it did not believe that there is a serious problem with the unlawful discharge of the principal registered charge where there is a registered sub-charge. It believed that any occurrences are "very few in number". Notwithstanding this, the Law Society stated that a mechanism built into the system of land registration which allows a sub-chargee to prevent the principal chargee from unlawfully discharging the principal charge "would be beneficial". It continued that there are "undoubted difficulties with devising such a mechanism, given that discharge of a charge is not a disposition", but suggested that the "least disruptive way" would be to change the way registered charges are removed from the register. It suggested that:

> a proprietor wishing to remove a registered charge where there is also a registered sub-charge should be required to satisfy the registrar that the sub-chargee has been served with an application to remove the charge.
>
> The charge would be removed only if the registered owner of the charge has:
>
> (5) consented to the removal of the charge;
>
> (6) failed to reply within (say) 28 days; or
>
> (7) has (say) within 42 days failed to satisfy the Registrar that the charge should not be removed.

19.34 The Law Society acknowledged that although this mechanism places an "onus on the registered proprietor of the estate, not the charge", it is a "proportionate obligation". It emphasised that it is "generally for the chargee to satisfy itself that it is entitled to discharge a charge".

No need for an in-built mechanism

19.35 The City of Westminster and Holborn Law Society stated that the "desire to protect a sub-chargee" must be balanced against the expectation of the borrower that upon settling his or her debt, he or she will be discharged "promptly and without need to persuade some sub-chargee to concur under arrangements that have not involved the borrower (land proprietor)".

19.36 Berwin Leighton Paisner LLP reiterated its view that no change was need: in particular, no new mechanism is required as "this situation ought to be incapable of arising", for the reasons given in its response to other consultation questions in this chapter. As the sub-chargee has a legal interest in the principal charge, it stated that it is not possible for the sub-chargor to release the principle charge unilaterally. It suggested that the position has "become confused" as a result of the "somewhat oblique" method by which sub-charges are required to be created under section 23(2)(b) of the LRA 2002 (by way of a charge over the "indebtedness secured by the registered charge", a method dating

back to the Land Transfer Act 1875). In its view, "a layman would invariably take those words to mean that such a charge does not affect a land interest at all". The wording could also result in the creation of a sub-charge over land, "when the parties only intended to deal with the money" and were "not concerned with any security which happened to be in place for the money".

TRANSITIONAL PROVISIONS

Consultation Question 117.

19.37 We invite the views of consultees as to whether transitional provisions are necessary for existing sub-charges as a result of our proposals, or if it is sufficient that an existing sub-chargee may apply for a restriction in order to reflect any limitation on the rights of the principal chargee laid down in the sub-charge.[11]

19.38 8 consultees answered this question.[12]

19.39 Most consultees who responded were not in favour of transitional provisions distinguishing new and existing sub-charges.

19.40 In the Law Society's view, transitional provisions are neither necessary nor desirable. It stated that "there is no advantage in perpetuating the current uncertainties", and that "an existing sub-chargee will obtain sufficient protection from its ability to apply for a restriction in these circumstances".

19.41 Berwin Leighton Paisner LLP stated that transitional provisions are not necessary, for the reasons it had given in response to other consultation questions in this chapter.

19.42 Professor Warren Barr and Professor Debra Morris stated that "a clean break … is necessary". Similarly, the City of Westminster and Holborn Law Society said that it is "better to leave it to sub-chargees to take initiative to obtain increased protection from change of law".

19.43 The London Property Support Lawyers Group stated that transitional provisions are not necessary "provided that a note is placed on the Register". Adrian Broomfield stated that "a restriction should suffice". The Chartered Institute of Legal Executives commented that "an application seems acceptable".

19.44 In contrast, Howard Kennedy LLP stated that transitional provisions "probably are a good idea".

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11 Consultation Paper, para 19.43.

12 Professor Warren Barr and Professor Debra Morris; The City of Westminster and Holborn Law Society; London Property Support Lawyers Group; Adrian Broomfield; Howard Kennedy LLP; Berwin Leighton Paisner LLP; Chartered Institute of Legal Executives; The Law Society.

OTHER COMMENTS

19.45 Dr Charles Harpum QC (Hon) provided more general comments on the issue of sub-charges. He stated that he had nothing of value to add in relation to sub-charges, and that he had never encountered one in practice. He referred to a "striking lack of authority on them (other than the *Credit & Mercantile* case)" and stated that he was "not sure how important they are in practice". He did, however, suggest that the provisions of the LRA 2002 "essentially followed the law under" the LRA 1925 and the LRR 1925.

Chapter 20: Electronic conveyancing

INTRODUCTION

20.1 33 consultees provided information relevant to the content in Chapter 20 of the Consultation Paper.[1]

20.2 Most consultees who directly responded to our provisional proposal to remove the requirement of simultaneous completion and registration supported removal of the requirement. Some consultees were concerned that retention of the requirement restrains the development of electronic conveyancing, while others thought that removal of the requirement could inject "flexibility" into the development of electronic conveyancing. Responses to our provisional proposal to provide the Chief Land Registrar with a timetabling power were more mixed, with only approximately half of consultees agreeing. A number of consultees raised concerns about the possibility of HM Land Registry being privatised in relation to this proposal. The majority of consultees agreed with the third provisional proposal that sought to ensure that overreaching can take place in electronic conveyancing.

GENERAL COMMENTS

20.3 Some consultees also gave more general statements to set out their views on electronic conveyancing.

Achievable goals

20.4 Dr Charles Harpum QC (Hon), a barrister and the Law Commissioner responsible for the delivery of the 2001 Report, lamented the fact that the 2001 vision has not become a reality:

> It is a source of great sadness to me that electronic conveyance as it was visualised in LRA 2002 has not come to pass. The provisions on electronic conveyancing were the most difficult in LRA 2002 and a very great deal of effort went into them. The outcome was a coherent and principled approach. The principles influenced the rest of the Act and were a key factor in the legislation being taken forward. At the time, there really was only one model on the table. Under it, solicitors and licenced conveyancers effectively became registrars.

20.5 Professor Julian Farrand QC (Hon) submitted release 105 of the looseleaf publication *Emmet and Farrand on Title* as his consultation response. In this release, which was

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[1] Martin Wood; Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Professor Sarah Nield; Everyman Legal; CMS Cameron McKenna LLP; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); City of London Law Society Land Law Committee; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; Council of Mortgage Lenders; The Bar Council; Land Registry; Berwin Leighton Paisner LLP; Graff & Redfern Solicitors; Council for Licensed Conveyancers; Amy Goymour; Chartered Institute of Legal Executives; Professor Simon Gardner; Burges Salmon LLP; The Law Society; a confidential consultee; Professor Jullian Farrand QC (Hon); Glenn Pearce.

also endorsed by Glenn Pearce, Professor Farrand noted that simultaneous completion and registration is needed in order to achieve our 2001 Report's "fundamental objective" of achieving a complete and accurate register via electronic conveyancing. However, Professor Farrand wrote "that objective has not been achieved. Nor could it be achieved. The registration gap is not the only crack in the mirror of title". Professor Farrand suggested that there could be a more fundamental review of the underlying policy of facilitating conveyancing, to provide more protection for registered proprietors rather than purchasers.

Conveyancer risk

20.6 A number of consultees were concerned about a heightened assumption of risk that the introduction of electronic conveyancing could require of conveyancers, covered in individual responses below. More generally, CMS Cameron McKenna wrote:

> We would oppose any attempt to seek to pass risk from the Registry to conveyancers and their clients through a "back-door" introduction of a direct access system.

20.7 Conveyancer risk was also raised in the context of delegation of the power to electronically sign for dispositions to conveyancers. The Chartered Institute of Legal Executives, for example, said that the development of "a clear procedure laid down with pro-forma documents" would be useful in minimising the risks posed to conveyancers.

Electronic-conveyancing scepticism

20.8 A couple of consultees expressed wholesale scepticism about electronic conveyancing.

20.9 Martin Wood described electronic conveyancing as a "difficult trick to pull off", and set out a number of concerns about dealings with land taking place online. First, he expressed concern that some models of electronic conveyancing could limit access to do it yourself (DIY) conveyancing. He was concerned that implementation of a model of electronic conveyancing whereby professional conveyancers provide the final authorisation of dispositions would prevent persons from conducting their own conveyancing. He told the Law Commission that "facilitating DIY conveyancing, so reducing the cost to the consumer, used to be viewed as one of the merits of title registration" but when the move to electronic conveyancing takes place "registration will be used to do the opposite". Secondly, Martin Wood questioned "what benefits e-conveyancing really brings", and suggested that there is a mistaken assumption that "doing things electronically is always better". Finally, Martin Wood said that electronic conveyancing has an increased vulnerability to fraud.

20.10 Nigel Madeley's and Michael Hall's responses contained similar questions. Michael Hall also queried the security of electronic conveyancing systems, while Nigel Madeley asked: "given the scams and fraud involved in online banking, is electronic conveyancing still a desirable objective?"

SIMULTANEOUS COMPLETION AND REGISTRATION

Consultation Question 118.

20.11 We provisionally propose that:

(1) Simultaneous completion and registration should no longer be required in a system of electronic conveyancing implemented under the LRA 2002; and

(2) Equitable interests should be capable of arising in the interim period between completion and registration.

Do consultees agree?[2]

20.12 24 consultees answered this question:

(1) 22 agreed;[3] and

(2) 2 expressed other views.[4]

Agreed

20.13 Professor Warren Barr and Professor Debra Morris described the requirement of simultaneous completion and registration as a "hostage to fortune", noting that removal of the requirement "would not in any way destroy the operation or utility of a system of e-conveyancing".

20.14 The Council of Mortgage Lenders thought that removal of the simultaneous completion and registration requirement would engender "better flexibility for the introduction of e-conveyancing". Graff & Redfern Solicitors similarly stated that "replacing [the requirement of simultaneous completion and registration] with more practical goals would provide impetus to e-conveyancing".

20.15 Professor Sarah Nield suggested taking a "step back from one particular focus" would allow "conveyancing practice to play a greater role in the development of e-conveyancing". Likewise, the Law Society described the proposed amendment as a "practical way of proceeding" as it would "have the effect of replicating, for electronic conveyancing, the present process".

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2 Consultation Paper, para 20.25.

3 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Nigel Madeley; Professor Sarah Nield; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; Council of Mortgage Lenders; The Bar Council; Graff & Redfern Solicitors; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society; Land Registry; Amy Goymour.

4 CMS Cameron McKenna; Dr Charles Harpum QC (Hon).

Future of simultaneous completion and registration

20.16 Consultees who agreed with the proposal expressed different views on whether simultaneous completion and registration should be retained as the long-term goal of electronic conveyancing.

20.17 The Law Society was of the view that while "simultaneous completion and registration should remain a long-term goal of an electronic conveyancing system", maintaining the requirement without the required technology and associated "practice" to implement it was "distracting". It said that once the necessary developments have been made it would like to be involved in "further discussion and consultation with the Law Commission and across the industry" about implementation of simultaneous completion and registration. The Law Society was of the view that removal of the requirement for simultaneous completion and registration should be temporary. However, it thought that registration gap problems could be "ameliorated by the ability to carry out protective searches, to file SDLT returns electronically and to apply to register by e-DRS".

20.18 Other consultees provided criticisms of simultaneous completion and registration that would have to be dealt with in the event of a future move to that position. HM Land Registry was concerned that "simultaneous completion and registration gives less (or no) opportunity to consider potential fraudulent applications". The Chartered Institute of Legal Executives did not think that "the mortgage industry would be able to cope with the original model".

Other comments

20.19 Graff & Redfern Solicitors queried whether HM Land Registry's "previous practice of requirement of payment of an expedition fee" would ameliorate the registration gap in light of the move away from simultaneous completion and registration.

20.20 Amy Goymour asked for clarification of the difference between an "application" and a "submission", as well as clarification of the definition of "equitable interests" in the provisional proposal. Amy Goymour was also of the view that the "term 'e-conveyancing' or 'electronic conveyancing' now encompasses too many things to be useful terminology, and is liable to confuse". She suggested that this confusion could be remedied by the creation of "a new term to cover the narrow process whereby people external to the Land Registry can make direct changes to the land register electronically".

Neither agreed nor disagreed

20.21 Dr Charles Harpum said that he would support the temporary removal of the requirement for simultaneous completion and registration, only if a provision is included in the LRA 2002 "which would at a future date compel simultaneous completion and registration". In Dr Harpum's opinion, simultaneous completion and registration "will never happen" if a future commitment to the objective is not included in primary legislation. Dr Harpum remained convinced of the benefits of simultaneous completion and registration. He stated:

> It is a source of great sadness to me that electronic conveyance as it was visualised in LRA 2002 has not come to pass. The provisions on electronic conveyancing were the most difficult in LRA 2002 and a very great deal of effort went into them. The

outcome was a coherent and principled approach. The principles influenced the rest of the Act and were a key factor in the legislation being taken forward. At the time, there really was only one model on the table. Under it, solicitors and licenced conveyancers effectively became registrars.

20.22 CMS Cameron McKenna was concerned that our electronic conveyancing proposals would "facilitate the permanent embedding of the registration gap".

POWERS TO IMPLEMENT ELECTRONIC CONVEYANCING

Consultation Question 119.

20.23 We provisionally propose that:

(1) The decision to enable electronic conveyancing and the subsequent decision to end paper-based conveyancing should be vested in the secretary of state, to be enacted through secondary legislation;

(2) Following the enactment of such secondary legislation, the timetable for the introduction of electronic conveyancing and for ending paper-based conveyancing, in each case on a disposition by disposition basis, should be delegated to the chief land registrar; and

(3) The secretary of state and the chief land registrar should be required to consult with stakeholders before exercising their powers in respect of electronic conveyancing.

Do consultees agree?[5]

20.24 26 consultees answered this question:

(1) 13 agreed;[6]

(2) 7 disagreed;[7] and

(3) 6 expressed other views.[8]

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5 Consultation Paper, para 20.35.

6 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; The City of Westminster and Holborn Law Society; The Conveyancing Association; Dr Charles Harpum QC (Hon); Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; The Bar Council; Council for Licensed Conveyancers; Amy Goymour; Chartered Institute of Legal Executives; The Law Society.

7 Nigel Madeley; Professor Sarah Nield; CMS Cameron McKenna LLP; a confidential consultee; Michael Hall; London Property Support Lawyers Group; Burges Salmon LLP.

8 Everyman Legal; Christopher Jessel; Chancery Bar Association; Pinsent Masons LLP; HM Land Registry; Professor Simon Gardner.

20.25 Consultees, whether agreeing, disagreeing or expressing other views, raised similar points. These points are covered thematically below.

Parliamentary scrutiny

Secondary legislation

20.26 Several of the consultees that supported the proposal agreed that secondary legislation with parliamentary scrutiny should be used to "switch on" electronic conveyancing and "switch off" paper conveyancing, while timetabling powers should be given to the Chief Land Registrar, without parliamentary scrutiny. Professor Warren Barr and Professor Debra Morris described the result of these amendments as a "sensible process to enable e-conveyancing". The Council for Licensed Conveyancers similarly agreed that "the 2002 Act should be amended to increase flexibility around the timing of the introduction of electronic conveyancing and ending paper based conveyancing". Dr Charles Harpum supported a reduction in Parliamentary scrutiny, provided the major stakeholders who are affected by the decision are appeased.

20.27 The Law Society expressly agreed with all limbs of the proposal. The Law Society's support for delegation of the timetabling power to the Chief Land Registrar was, however, conditional on HM Land Registry remaining in the public sector.

20.28 HM Land Registry, which expressed other views, adopted the position that "where anything under the land registration regime needs to be changed or implemented by statutory instrument" it would be preferable if "those changes etc could be made by direction, or failing that, by use of the negative parliamentary procedure".

20.29 In contrast, the Chancery Bar Association, also expressing other views, expressed "doubt whether it is acceptable" for timetabling decisions to be "delegated to the Chief Land Registrar and not require secondary legislation".

Primary legislation

20.30 Several consultees[9] disagreed with the proposal on the basis that the move from paper-based conveyancing to electronic conveyancing should occur entirely via primary legislation.

20.31 CMS Cameron McKenna LLP's were firmly of the opinion that it is "not appropriate to introduce e-conveyancing by statutory instrument" as it could "easily be done in a flawed form".

20.32 The London Property Support Lawyers Group and Pinsent Masons LLP argued that primary legislation should be used to effect the change in conveyancing form because of the scrutiny that it offers. The London Property Support Lawyers Group stated:

> We believe that any proposals to move from a paper based system of conveyancing to an electronic based system should be by primary legislation to allow for the fullest discussion and consultation of the proposals as this would be a major shift in conveyancing policy

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9 CMS Cameron McKenna LLP; London Property Support Lawyers Group; a confidential consultee; Pinsent Masons LLP.

Consultation requirement

20.33 The Council for Licensed Conveyancers, who agreed with the proposal, commented that "full risk assessments" would have to be carried out prior to the powers being exercised, and that these risk assessments should consider "transitional arrangements".

20.34 The Law Society agreed that the Secretary of State and the Chief Land Registrar should be subject to a consultation requirement. The Law Society suggested that the Law Commission could "set out some high level parameters in relation to the scope of the consultation" and that there should be "an obligation to take reasonable account of views".

20.35 The Law Society and Adrian Broomfield discussed the impact of notifying practitioners of proposed changes in advance. Adrian Broomfield said that it was important that "stakeholders can plan and budget for the implementation of the various measures". The Law Society submitted:

> Practitioners and the industry generally will need to know when the switch will be flicked in good time, perhaps as long as eighteen months to two years in advance, so that new systems can be purchased and configured and training provided etc. By the time that this happens it may only apply to very few organisations.

20.36 Pinsent Masons LLP, which expressed other views in response to the proposal, suggested that the "guiding principle" for the move to electronic conveyancing is that it should take place "only after the widest possible active consultation with stakeholders in both the residential and commercial property sectors". Pinsent Masons LLP thought that this consultation would "ensure that the system is accessible" and "reduces the scope for fraud and error so far as realistically possible".

20.37 HM Land Registry, which also expressed other views, was of the view that although the Secretary of State's decision to "switch on" electronic conveyancing or "switch off" paper based conveyancing should be subject to a consultation requirement, the Chief Land Registrar should not. HM Land Registry argued that "it should be possible to undertake any consultation that is necessary at that earlier point rather than introducing a further stage into the process".

Move to mandation

20.38 Three consultees commented on the finality of the "switch off" power in their consultation responses.

20.39 Burges Salmon LLP disagreed with the provisional proposal. It doubted whether "it would ever be possible to move to mandatory electronic conveyancing without a paper based alternative".

20.40 The London Property Support Lawyers Group, who also disagreed, questioned whether it is "desirable or fair to move to a mandatory system of electronic conveyancing". The Group reasoned that a mandatory system would "exclude those who by reason of age or disability are less able to use computer systems".

20.41 The Law Society, agreeing with the proposal, was open to mandatory electronic conveyancing; however, it said that "it is necessary to bring the industry along with changes and only mandate the service when there is a sufficient majority of users". The Law Society was optimistic that "if there are benefits to be gained from using a new service, users will move to it", and cited the fact that 97% of Stamp Duty Land Tax payments now take place online as evidence of this point. The Law Society also considered the transitional arrangements that would be required before the move could be made to mandatory electronic conveyancing:

> We agree that it is likely to be desirable, and probably necessary, to have simultaneous paper and electronic systems for a period. A transitional period may be required to establish when the paper system will end: assuming that this will never be the fall back position if the electronic system fails. Presumably the backup would be alternate electronic systems.

HM Land Registry privatisation

20.42 A handful of consultees raised the impact of the possibility of privatisation of HM Land Registry on our proposals. The Law Society was clear that it would not support delegation of the timetabling power to the Chief Land Registrar if HM Land Registry were to be privatised. If privatisation were to happen, the Law Society stated that

> these powers should remain with the Secretary of State and obligations in relation to the requirement to consult with the industry and to take reasonable account of its views should be incorporated in the primary legislation.

20.43 Professor Sarah Nield explained that her "only concern" with our proposals was how the proposed powers could be affected by Land Registration privatisation. She hoped that:

> …in that [privatisation] process appropriate accountability and duties will be imposed on any private organisation charged with the operation of the Land Registry.

20.44 Everyman Legal, expressing other views, was concerned that privatisation could affect the basis for the decision to move to electronic conveyancing. In its opinion the basis for the decision "is more likely to be made on the grounds of profitability and cost-saving than benefit to the public or the conveyancing process".

DIY conveyancing

20.45 Two consultees who disagreed with the proposal, Michael Hall and the London Property Support Lawyers Group, expressed concern that our proposals would restrict the ability for laypersons to do their own conveyancing. Michael Hall was particularly worried about the human rights implications of our proposals:

> At present it is possible for anyone to do their own conveyancing and write out a transfer, have it signed by the seller, and register it without going to a solicitor or licensed conveyancer. This is an important human right which should not be interfered with.

E-conveyancing scepticism

20.46 Nigel Madeley and Michael Hall disagreed with the proposal because they also questioned the premise that a move to electronic conveyancing is a desirable objective. Nigel Madeley asked: "Given the scams and fraud involved in online banking, is electronic conveyancing still a desirable objective?"

20.47 Michael Hall criticised electronic conveyancing on a number of grounds. He thought that electronic conveyancing is not "practical" and was anxious that "the removal of paper-based conveyancing would be an interference the right to property which is protected under the ECHR". Michael Hall was also of the view that "electronic conveyancing would create a greater risk of undetectable fraud occurring and speeding up the registration process would reduce the opportunity to detect fraud". He concluded his consultation response with the following critical statement:

> A great deal of money has already been wasted on trying to develop electronic conveyancing and it was abandoned for good reasons – it was impractical, expensive and of doubtful benefit. The objective appears to be to fully automate the process in order to allow human beings to be thrown on the scrap heap.

20.48 The Council for Licensed Conveyancers, in contrast to Michael Hall's submission, thought that electronic conveyancing could "mitigate risks that exist in the current system by joining up processes together more closely and eliminating gaps that assist fraudsters". The Council for Licensed Conveyancers gave the work currently being undertaken by HM Land Registry, HMRC and the Valuation Office Agency on Stamp Duty Land Transfer payment becoming a condition of registration as an example of a joined up process which will eliminate a gap in the system. The Council speculated that opportunities could arise to "make client funds safer with more secure communications throughout the conveyancing process".

Other comments

20.49 Dr Charles Harpum commented that level of Parliamentary scrutiny would need to be precisely provided for in the legislation, pointing to section 128 of the LRA 2002 as the "possible menu".

20.50 Professor Simon Gardner raised the point that the Consultation Paper did not discuss the nature of the transactions or dispositions that the Chief Land Registrar could bring out of the paper-based conveyancing regime and into the electronic conveyancing regime. Professor Gardner asked whether the Chief Land Registrar's powers should apply only to "classes of 'transaction', or 'disposition', that currently require formality/registration for their creation". Professor Gardner's concern was:

> if the proposal were to allow the Chief Registrar to rule that currently informal rights should arise only through e-conveyancing, thereby demanding that they thenceforth require formality (and of a particular exacting kind) after all, that would seem a move of a very different order, not at all suitable for the kind of low-level determination represented by the proposal.

20.51 Christopher Jessel thought that the problem of escheat (the reversion of land to the Crown) will have to be tackled before the move to electronic conveyancing could take place.

OVERREACHING IN ELECTRONIC CONVEYANCING

Consultation Question 120.

20.52 We provisionally propose that the following propositions of law should be confirmed:

(1) Trustees may collectively delegate their power to sign an electronic conveyance and give receipt for capital monies to a single conveyancer under section 11 of the Trustee Act 2000;

(2) A beneficiary's interest in a trust of land will be overreached when trustees collectively delegate their power to a single conveyancer to sign an electronic conveyance and give receipt for capital monies; and

(3) A beneficiary's interest in a trust of land will be overreached when two or more trustees, by power of attorney, grant to a single conveyancer the power to sign an electronic conveyance and give receipt for capital monies.

For overreaching to take place it will remain necessary for the disposition that follows the delegation to be one with overreaching effect.

Do consultees agree?[10]

20.53 24 consultees answered this question:

(1) 18 agreed;[11]

(2) 4 disagreed;[12] and

(3) 2 expressed other views.[13]

20.54 Again, consultees' responses raised similar issues, so they are addressed thematically below.

Overreaching

20.55 Consultees expressed a variety of views as to how the legal concept of overreaching should develop.

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10 Consultation Paper, para 20.47.

11 Professor Warren Barr and Professor Debra Morris; Dr Lu Xu; Everyman Legal; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Howard Kennedy LLP; Dr Aruna Nair; Council of Mortgage Lenders; The Bar Council; HM Land Registry; Amy Goymour; Burges Salmon LLP; The Law Society.

12 Nigel Madeley; Michael Hall; Chartered Institute of Legal Executives; Professor Sarah Nield.

13 Christopher Jessel; Berwin Leighton Paisner LLP.

20.56 Professor Warren Barr and Professor Debra Morris confined their response to overreaching in the context of electronic conveyancing. They said that the proposal "seems a sensible way to operate the process of overreaching in a new age".

20.57 The City of Westminster and Holborn Law Society gave a broader response; it said that "traditional overreaching (involving two trustees or a trust corporation) needs to be modernised with suitable restrictions".

20.58 Michael Hall, who disagreed with the proposal, took the opposite stance. He was firmly of the opinion that "the signatures of two trustees should continue to be required on the deed in order for overreaching to occur". Professor Sarah Nield, also disagreeing with the proposal, expressed an even stronger view:

> I am reluctant to see any further facilitation of overreaching of an overriding interest under a trust of land ie where the beneficiary is in occupation under Schedule 3 para 2. I thus have reservations concerning your proposal in 20.47. Rather I would like to see the proposals combined with implementation of the recommendation of the Law Commission in Law Comm No 188 requiring the consent of a beneficiary in occupation before overreaching can take effect. This recommendation is more often than not observed in practice thus there would seem little objection for it to be enshrined in law.

20.59 Similarly, Nigel Madeley said that the proposal was not "consistent" with the current law which "insists on 2 trustees each appointing an attorney". He therefore disagreed with the proposal.

Parties signing themselves

20.60 The Chartered Institute of Legal Executives said that, as far as it was aware, HM Land Registry intends for individuals to have their own e-signatures. The Conveyancing Association said that such a state of affairs would be preferable as "it would be better fraud prevention for all parties to provide digital signatures". It therefore disagreed with the proposal.

20.61 The Law Society, who agreed with the proposal, was of the view that even if individual e-signatures come to pass, this provisional proposal would remain worthwhile as "it may still be useful for conveyancers to sign on behalf of their clients where they are happy to do so". The Law Society also said that it was aware that a number of government departments are looking to provide individual electronic signatures: the Law Society thought that it would be useful if there is a "degree of consistency across the piece" in the development of such signatures.

20.62 Nigel Madeley opposed the development of individual electronic signatures to be used to execute dispositions of land, describing it as "rather scary".

Conveyancer risk

20.63 Two consultees were worried that the proposal would subject conveyancers to greater risks than they currently undertake.

20.64 The Chartered Institutes of Legal Executives said that it would not agree to a proposal whereby conveyancers sign on behalf of their clients unless there was "a clear

procedure laid down with pro-forma documents to be used so conveyancers would avoid any liability if they followed the procedures fully".

20.65 The Law Society focussed on the Network Access Agreement in its response. It wrote:

> If the Network Access Agreement (NAA) is not amended the assumption of risk when adopting electronic processes the risk of dealing electronically has the potential to be far greater than when dealing through paper based systems.

In light of this opinion, the Law Society requested that the Law Commission either review the terms of the Network Access Agreement or set out a requirement that further consultation on the Network Access Agreement must take place in advance of a move to mandatory electronic conveyancing.

Whether change is necessary

20.66 Dr Charles Harpum was of the view that the proposal reaffirms the current law. He questioned whether the proposal was "strictly needed", and told the Law Commission that "Parliamentary Counsel may take some persuasion to draft what are essentially declaratory provisions". Nevertheless, he supported the idea that these matters should be clarified "in an appropriate way".

20.67 The Council of Mortgage Lenders agreed that the law should amended so as to "clarify" the position proposed in the consultation question.

20.68 The Law Society did not have a "unified response" as to whether the proposal confirmed the current law. However, it agreed with the outcome of the proposal.

Checks on the delegation power

20.69 Pinsent Masons LLP supported the proposal but said that references to trustees throughout the proposal should include "duly appointed attorneys of trustees acting within the scope of the relevant power".

20.70 HM Land Registry commented that:

> there must be clarity over how the delegation is evidenced and recorded and that further consideration is needed as to how that status might be checked to ensure that the conveyancer granted the power is able to act and regulated by a professional body.

Other comments

20.71 Berwin Leighton Paisner LLP, which neither agreed nor disagreed with the proposal, pointed out that overreaching is "not limited" to interests under a trust. It explained that the concept also applies to "some commercial equitable interests such as equitable mortgages and liens".

20.72 Christopher Jessel also expressed other views. He said that the proposal needed to be worked through in the context of a charitable trust. He suggested factors that the Law Commission might wish to consider:

Although some landholding charities are corporate bodies there are still many whose land is vested in human trustees. Beneficiaries might include people housed in connection with the charity's purposes. Normally the conveyancer acting for the charity will need to be satisfied that any decision to sell land is authorised by the trustee body under Charities Act 2011 s. 119 but in practice instructions to the conveyancer are often given by an employed executive. Where there is a programme of sales the charity trustees may have given a standing power to the conveyancer. This is not necessarily a bad thing but there need to be safeguards, especially where there may be beneficiaries of the charity in occupation of the land, such as an old people's home, whose rights may otherwise be overridden. This needs to be consistent with Charities Act 2011 s. 333 which refers to execution of a document.

20.73 The Law Society asked whether there could be "some statutory provision setting out some kind of virtual signing" to aid conveyancers. It suggested that this statutory provision could emulate the Law Society's Practice Note on execution of Documents by Virtual Means.[14] The City of London Law Society Land Law Committee also recommended that the Law Commission look at the practice note and "consider whether the approach adopted by the protocol can be of any assistance to the development of future legislation in relation to electronic conveyancing".

[14] http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-documents-by-virtual-means/.

Chapter 21: Jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber)

INTRODUCTION

21.1 23 consultees responded to the questions in Chapter 21 of the Consultation Paper.[1]

21.2 Most consultees were in favour of expressly expanding the Tribunal's jurisdiction in relation to determined boundaries and equity by estoppel and beneficial interests.

DETERMINED BOUNDARIES

Consultation Question 121.

21.3 We provisionally propose that the Land Registration Division of the First-tier Tribunal (Property Chamber) should be given an express statutory power to determine where a boundary lies when an application is referred to it under section 60(3) of the LRA 2002.

Do consultees agree?[2]

21.4 23 consultees answered this question:

(1) 22 agreed;[3] and

(2) 1 expressed other views.[4]

21.5 The vast majority of consultees agreed with the proposal as set out in the Consultation Paper. The remaining consultee expressed his agreement, but did so on the condition that the proposed jurisdiction be more limited.

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1 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Land Registration Division Judges; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Dr Aruna Nair; Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

2 Consultation Paper, para 21.24.

3 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Elizabeth Derrington; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; London Property Support Lawyers Group; Land Registration Division Judges; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Dr Aruna Nair; Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; Burges Salmon LLP; The Law Society.

4 Christopher Jessel.

Agreed

21.6 Professor Warren Barr and Professor Debra Morris stated that giving the Tribunal jurisdiction to determine boundary disputes when an application is made under section 60(3) would "give effect to what many landowners would have already anticipated that the Tribunal covered" and would "undoubtedly save time and money".

21.7 Elizabeth Derrington commented that it would be appropriate to give the Tribunal the power to determine where a boundary lies when dealing with a determined boundary application. She continued that it would not be appropriate to extend the Tribunal's jurisdiction further, for the reasons given in the Consultation Paper.

21.8 The Chancery Bar Association thought that the Tribunal's jurisdiction already extends to determining boundaries, following a number of recent decisions of the Upper Tribunal. However, it agreed that this jurisdiction should be formally enacted "for the avoidance of doubt".

21.9 Similarly, Dr Charles Harpum QC (Hon) stated that the matter needs to be "settled definitely" following the judgment of Judge Elizabeth Cooke in *Bean v Katz*.[5] The Land Registration Division Judges also referred to *Bean v Katz*, stating that although the judgment to some extent resolved the uncertainty, an express power to make declarations would be "helpful to all concerned" and "ensure that there was no risk of the parties needing to commence proceedings in more than one forum".

21.10 Adrian Broomfield also agreed with the proposal, stating that allowing the Tribunal to make boundary determinations will create a "quicker and more cost effective forum and means of resolving such issues than court proceedings".

21.11 The Property Litigation Association also agreed that the Tribunal "should be given an express statutory power" to make boundary determinations. The Association said that doing so will:

> provide for a more streamlined process, avoiding the need for the Tribunal and the Court to consider the same evidence and will provide for quicker and cheaper resolution of boundary disputes.

21.12 The Property Litigation Association was of the view that the Tribunal has the relevant legal and surveying expertise to make such determinations, and that it has "long considered" that boundary disputes can result in the parties, often neighbours, "incurring disproportionate costs on time consuming litigation". On this basis, the Association commented that "alternative dispute mechanisms such as mediation should be preferred where possible".

21.13 Everyman Legal agreed with the proposal, but suggested that "a quick and non-costly way of resolving these disputes without one party being able to bully the other into submission" is what is really needed.

21.14 The Law Society expressed its support, stating that dividing the jurisdiction to determine boundaries between the First-tier Tribunal and the court is "artificial" and "may operate

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5 [2016] UKUT 168 (TCC).

in a capricious way". In its view, it should not matter whether the dispute arose first following an application to fix a boundary, some other application to the Registrar, or in the context of a claim for trespass.

21.15 The Law Society also stated that the Tribunal should have the same jurisdiction to grant final injunctions and to assess and award damages as the County Court under the County Courts Act 1984. Doing so would "prevent duplicity of proceedings", allowing "all aspects of a boundary dispute to be resolved in proceedings in the same forum". However, the Law Society stated that the jurisdiction to grant interim injunctions should remain with the courts because "the Tribunal system is not sufficiently responsive to deal with injunctions in cases of genuine emergency".

21.16 Michael Mark supported the proposal, stating that "more is needed…by way of clarifying the Tribunal's jurisdiction and preferably more".

21.17 Michael Hall suggested that the Tribunal's jurisdiction should be extended to including applications for judicial review of decisions to HM Land Registry.

21.18 Nigel Madeley similarly referred to the possibility of the Tribunal considering appeals from HM Land Registry decisions, emphasising the possibility that HM Land Registry might be privatised, "so that its decisions aren't amenable to judicial review". Mr Madeley stated that Parliament has delegated land registration to HM Land Registry, whose functions are "administrative" and for which the Department for Business, Innovation and Skills[6] is "answerable to Parliament".

Other

21.19 Christopher Jessel, who expressed other views, commented that the Tribunal's jurisdiction to determine boundary disputes:

> should only apply where the registered proprietors of both sides of the boundary are actually represented before the Tribunal or give express consent to the proposed order.

21.20 Mr Jessel suggested that it may be insufficient merely to serve notice on the adjoining owners at their registered addresses. For example, if the adjacent land is unregistered, efforts should be made to locate the owner. He also suggested that, if the boundary adjoins a highway, the highway authority should be involved in so far as the surface is concerned. If the boundary adjoins unclaimed common land, then any commoners' association and the relevant local authority should be contacted.

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6 Now the Department for Business, Energy and Industrial Strategy.

EQUITY BY ESTOPPEL AND BENEFICIAL INTERESTS

Consultation Question 122.

21.21 We invite the views of consultees as to whether the jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber) should be expanded to include an express statutory jurisdiction in cases that come before it to allow it to:

(1) determine how an equity by estoppel should be satisfied; and

(2) determine the extent of a beneficial interest.[7]

21.22 21 consultees answered this question.[8]

21.23 Consultees largely supported this expansion of the Tribunal's jurisdiction. Those opposed were concerned about whether the Tribunal is the appropriate forum in which to determine one or both issues.

General agreement

21.24 Michael Mark agreed that it is "plainly unsatisfactory" that the Tribunal does not have jurisdiction to determine the extent of a claimed beneficial interest. He said it also remains unclear whether the Tribunal has jurisdiction to determine whether a notice protecting a charging order should be entered, or whether the claimant should have to litigate the issue in the court which made the charging order originally.

21.25 Everyman Legal also favoured the expansion, stating that "any changes which produce a quick way of resolving these issues is to be welcomed".

21.26 The City of Westminster and Holborn Law Society stated that expansion "seems desirable". It commented that receiving financing from HM Land Registry does not mean that the Tribunal should not review disputes with HM Land Registry, rather than the dispute going to a "non-specialist Court limited to judicial review", which it saw as "cumbersome".

21.27 The Land Registration Division Judges stated that it would be "helpful" for the jurisdiction relating to beneficial interests "to be placed beyond doubt". In their experience, the Tribunal judges "are accustomed to making findings of fact" about the "quantum of the interest". They also thought that this jurisdiction should be "supplemented by an express jurisdiction to determine how an equity by estoppel should

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7 Consultation Paper, para 21.28.

8 Property Litigation Association; Professor Warren Barr and Professor Debra Morris; Nigel Madeley; Michael Mark; Everyman Legal; Michael Hall; The City of Westminster and Holborn Law Society; The Conveyancing Association; Christopher Jessel; London Property Support Lawyers Group; Land Registration Division Judges; Chancery Bar Association; Pinsent Masons LLP; Dr Charles Harpum QC (Hon); Adrian Broomfield; Dr Aruna Nair; Bar Council; HM Land Registry; Amy Goymour; Chartered Institute of Legal Executives; The Law Society.

be satisfied", including the power to make financial orders (therefore reflecting section 110(4) of the LRA 2002, "with appropriate modification").

21.28 The Judges stated that Chapter 21 of the Consultation Paper should be "seen in the context of other moves" to eliminate "unnecessary gaps" in the Tribunal's jurisdiction (specifically referring to the report on judicial deployment presented to the Civil Justice Council). Generally, they said it is "undesirable for litigants to have two actions rather than one", that the "expertise and experience" of the Tribunal judges makes the Tribunal a "suitable" forum for the resolution of disputes relating to land, and that parties should not "run into obstacles created by the narrow terms of the LRA 2002". For these reasons, the Judges stated that there would be "much to be said" for the Tribunal having the power to grant equitable relief and to award damages, or to make orders for sale under the Trusts of Land and Appointment of Trustees Act 1996. They noted that several current judges already exercise such powers as Recorders, and that the implementation of these proposals "needs to be considered in the wider context".

21.29 The Chancery Bar Association stated that the Tribunal "may already have such jurisdiction", but that "it should be made clear that it has". In its view, it would be "anomalous" if the Tribunal had jurisdiction in adverse possession cases but not others.

21.30 The Law Society agreed that the Tribunal's jurisdiction should be expanded as proposed in the Consultation Paper. The Society stated that "it is not cost-effective" nor "in the interests of justice" for these issues to be excluded from the Tribunal's jurisdiction, since they "commonly arise in the context of disputes that do fall within its jurisdiction". In its view, it is "self-evidently better" for related issues to be determined in "a single hearing before the same forum". The Society added that such expansion would require the "rules and procedures of the Tribunal" to be brought in line with the Civil Procedure Rules.

21.31 Also in support of the suggested expansion was Dr Aruna Nair. She stated that the "law/equity distinction" seems "out of step with the broader approach of the Consultation Paper and the LRA 2002", and that it is "reasonable" for the Tribunal to have this jurisdiction. In her view, the determination of equitable rights may be a "necessary precursor to determining their rights at law".

21.32 Michael Hall, Adrian Broomfield and Amy Goymouralso agreed with the suggested expansion of the Tribunal's jurisdiction, and the Conveyancing Association stated that the Tribunal "should have jurisdiction over these areas".

Concerns in relation to determining the extent of a beneficial interest

21.33 Christopher Jessel stated that "an equity by estoppel is a matter of land law and suitable for the Tribunal". However, Mr Jessel noted that the extent of beneficial interests "may be relevant in other contexts", including inheritance, divorce or the breakup of cohabitation. Therefore, there is a "risk of conflicting decisions in different contexts". However, he commented that "it could be helpful for the Tribunal to make a finding that the beneficiary was a person entitled to be registered which could then be acted on by the Land Registry", in the context of lost titles where the location of the legal estate is "unknown" or "difficult to prove", or where it has vested in the Public Trustee or in the President of the Family Division and a grant de bonis non would be required.

21.34 Dr Charles Harpum stated that he had "no strong views on this issue". He referred to the existing jurisdiction of the Tribunal in one case to deal with issues of estoppel, which is "readily justifiable on conceptual grounds", and stated that "the specialist skills" of the Tribunal judges would "enable them to deal with issues concerning estoppel". Dr Harpum said he was "less convinced" about disputes concerning beneficial interests. He said that they are often determined by family judges and more akin to exercises of discretion, that is, the "everyday business" of family judges. Dr Harpum concluded by suggesting that the Law Commission should canvass the views of the Judges of the Chancery Division, and referred to the "pilot scheme to bring about an interaction" between the First-tier Tribunal and the county court.

Wider reforms

21.35 The Property Litigation Association stated that giving the Tribunal jurisdiction to determine how an equity by estoppel should be satisfied in cases where it is required to determine the existence of an interest by estoppel would avoid the need for the Tribunal and court to "consider the same evidence"; it would therefore "provide for quicker and cheaper resolution". It explained that the Tribunal already has statutory jurisdiction to determine the existence of a proprietary estoppel in the context of a claim for adverse possession; however, it was not aware of any example of proprietary estoppel being relied upon as a ground for adverse possession, or the extent to which the Tribunal addresses such issues. Although in favour of the expansion, the Association noted that it would represent "a shift which may not fit neatly within the LRA 2002", which is concerned with "legal (rather than beneficial) ownership". On this basis, the Property Litigation Association concluded that:

> It may be that such a shift is better dealt with as part of the wider reform being considered by the working party set up by the Civil Justice Council in relation to Property Disputes.

21.36 The Association also stated that it would be "sensible" to expand the Tribunal's jurisdiction to determine the extent of a beneficial interest. It noted that where the parties ask the Tribunal to consider the respective shares of the parties in the property in question, the Tribunal will already make a finding of fact "which for all practical purposes disposes of the matter". Again, in the Association's view, expansion of the Tribunal's jurisdiction would avoid duplication of proceedings in the Tribunal and the court, providing a more streamlined process for parties.

21.37 The Chancery Bar Association commented that the Tribunal judges can currently sit as county court judges and vice versa, and that if the Interim Report of the Civil Justice Council on Property Disputes is implemented (and specified types of property dispute can be transferred or retained by the county court or the Tribunal), "the various jurisdictional problems will largely disappear".

General disagreement

21.38 The London Property Support Lawyers Group also queried whether the Tribunal is the "most appropriate forum to determine these issues". The Group stated that the determination of equities and the extent of beneficial interests can include "detailed questions of trust law and complex legal issues on which legal argument will be heard with counsel for both sides". The Group concluded by stating:

> Without expressing a preference either way, might these issues be better suited to be determined by the Chancery division of the High Court?

The Group's response was endorsed by Pinsent Masons LLP, who queried "whether such issues might be better suited to the Chancery Division of the High Court".

21.39 The Bar Council said that it "can understand" the reason for expanding the Tribunal's jurisdiction along the suggested lines. However, the Bar Council commented that:

> There is a significant school of thought that the jurisdiction of the FTT has been interpreted more widely than Parliament originally intended and that a tribunal that is administrative in origin should not be deciding rights and granting remedies in the way that the courts have done hitherto.

The Bar Council said that although the Tribunal judges are "undoubtedly specialists", they are "not as senior and not likely to be as experienced as" the judges in the county court or High Court, given the complexity and likely high value of such disputes.

21.40 Professor Warren Barr and Professor Debra Morris were also against the expansion. Whilst acknowledging the need for such disputes to be resolved as "efficiently" as possible, they stated that they are "wider issues than of registration" and should therefore not fall within the Tribunal's jurisdiction.

21.41 Nigel Madeley similarly referred to the issues in question as "matters of equity unconnected to land registration", that can be "rather complex". He also said that the route of appeal from the First-tier Tribunal, via the

21.42 Upper Tribunal, "seems to be rather convoluted" if such issues were to be determined by the Tribunal.

Other comments

21.43 HM Land Registry did not express itself to be in favour or against expansion of the Tribunal's jurisdiction along the suggested lines. It explained that both issues, the satisfaction of an equity by estoppel and that the extent of a beneficial interest, are not or are unlikely to be directly relevant to registration. HM Land Registry therefore surmised that the proposals were "aimed at keeping costs down for litigants and avoiding further litigation".

21.44 HM Land Registry stated that the proposed expansion of jurisdiction is "unlikely" to increase significantly, if at all, HM Land Registry's contribution to the running costs of the Tribunal, as the Tribunal judges "are already likely to hear the relevant evidence". However, it proposed that any expansion to the Tribunal's jurisdiction, and "attendant increases in its costs", should be borne by the parties.

Appendix 1: Extracts from consultees' responses

1.1 In a number of instances, consultees provided responses to consultation questions which talked more generally about issues of land registration. Some of these responses were outside the scope of the consultation questions and so are reproduced here in full. Others, while addressing the consultation questions, are best read within the wider context and have been reproduced here for that purpose (rather than only summarised in the body of the analysis of responses).

1.2 The headings below identify to which question the response was provided.

GENERAL COMMENTARY

1.3 Martin Wood said:

> I have to confess I was never much in favour of the complete replacement of the 1925 Act by a new act. The 1925 Act had endured for 75 years with only incremental revisions. It was well understood, had stood the test of time and was largely still fit for purpose. Much of the 2002 Act is a mere rehash of the 1925 Act, but did this represent an improvement or is it merely different? The re-wording has inevitably led to questions as to whether any change in the law was intended. Such substantive changes as are in the 2002 Act could have been effected by incremental amendment of the 1925 Act. It is therefore disappointing that it has been found necessary to conduct an extensive review of the 2002 Act only 12 years after it came into force. Of course, if there are substantive changes for which there is a compelling case, they should be made. But please avoid making changes that really amount to another rehash – like renaming the two forms of notice. The land registration scheme needs constancy as much as possible.

1.4 Nigel Madeley provided a short cover email summarising his views and a longer piece as preliminary comments to his response. In his cover email, Nigel Madeley's said:

> I've submitted this personally because I am something of a registration sceptic. In particular (and these are points that I expand on in my response):
>
> > 1) I am not convinced that we have a shared understanding of registered land.
> >
> > 2) We now have 2 distinct sectors of property work - I term them 'bulk' and 'bespoke'. I'm not sure that the Land Registry serves them both equally.
> >
> > 3) I don't trust the rise of remote dealing and, with the open register, consider this to be, at least in part, responsible for the rise of fraud. I am a complete e-conveyancing sceptic.
> >
> > 4) I think you over-state the case for registered land. Indeed I believe that there is much to be said for an entirely voluntary system where people can register and de-register their property (as I would) and register it again - at least until we resolve (if indeed we do) the issues around fraud and the open

register. One could combine this with compulsory registration of the general boundaries of legal estates, an electronic and encrypted deeds registry or a closed register of ownership (i.e. to the old system of authority to inspect and physical deeds). Commercial owners might choose to leave their title on an open, online register, and might residential owners who want to remortgage on a regular basis using online applications and call-centre conveyancing.

5) It's time to close the registration gap by giving disponees a legal title on notification of legal completion (by which I mean dating the documents and handing over money) to the Land Registry. This would also enable us to abolish (to at least dramatically cut down) owner's powers (something else that appears not to be understood).

6) I'm not convinced by the proposals about responsibility for 'non-genuine' documents, not least because 1) they do not attribute responsibility to all who benefit from the system and 2) 'genuine' and 'binding' are different concepts, and 'forged' is another.

7) I think that restrictions have got out of hand. The idea that they can pass the burden of positive contractual obligations rather cuts across the considered proposals for the reform of land obligations. That said, options are genuinely conceptually difficult.

8) I think that secured lenders are over-protected. I accept that that is by no means the Land Registry's responsibility, but I do think that this policy has encouraged moral hazard. This takes the discussion of the indemnity into the realm of the social, economic and political because the need to pay for mistakes arises, in part at least, over the perceived goods of the open register, online activity and dynamic security. With registered land being imposed by the state, the state must surely be responsible for the downsides of the registered land system where it causes loss. If a levy from participants is necessary to protect the taxpayer, how is to be taken and from whom?

9) I think we need more clarity on how the Registry registers certain matters, particularly when it just notes that a deed dated [blob] contains [blob]. Likewise we need more clarity on registering legal and equitable easements and easements with lift-and-shift.

10) I wasn't sure that your discussion on indefeasibility takes into account how the owner of the benefit of a covenant or easement 'exercises' their rights for the purpose of rectification and the proposed long stop.

All that said, I have endeavoured to agree with as much as I can.

1.5 Nigel Madeley also made the following preliminary comments:

I would like to make some points before responding to the consultation questions themselves.

…

Do we understand registered land (despite some 170 years of trying)?

Here is David Hayton in 'Registered land' 3rd edition (1981) writing about the Law Commission's working papers:

> "… the Law Commission [is] getting away from unregistered land principles and the idea that registered land is mere conveyancing machinery, changing unregistered substantive land law as little as possible".

And this is Baroness Hale's recent dictum in *South Pacific Mortgages* (with my underlining):

> "It is important to bear in mind that the system of land registration is merely conveyancing machinery. The underlying law relating to the creation of estates and interests in land remains the same. It is therefore logical to start with what proprietary interests are recognised by the law and then to ask whether the conveyancing machinery has given effect to them and what the consequences are if it has not. Otherwise we are in danger of letting the land registration tail wag the land ownership dog."

So which is registered land? 'Mere conveyancing machinery or not? They can't both be right. But those statements were made 33 years apart and we are still none the wiser. Reform will fail if there is no shared understanding of what registered land is – whenever there is a dispute that goes to the root of it, those adjudicating it will feel unstable ground beneath their feet.

I view aspects of your discussion of notices and restrictions, in which I suspect some elision of personal and property, as a pertinent example of Baroness Hale's point.

You also say:

> Title registration … aims to facilitate conveyancing by eliminating the need to check the underlying deeds. What is seen on the register is what the purchaser gets. The register is supposed to set out the details of ownership.

But whenever there is a dispute about what the register says, the parties and the courts go back to the deeds to see whether the register is to be rectified – i.e. whether the register is correct *having regard to the deeds*. So the need to check the deeds is not "eliminated"; it is simply pushed back to the stage of 'if there is a dispute' rather than 'on investigation'. Title deeds are still the determinant of title – for e.g., unless you go back to see if there was a forgery, then you don't know if the Registry made a 'mistake' in registering a forged document. As such, the careful solicitor has to advise a buyer client that what they see on the register might not be the truth, and that the ultimate truth is what the deeds say.

Added to that are the instances when the register is not definitive, such as estoppel (e.g. *Scottish & Newcastle v Lancashire Mortgage Corporation*) and subrogation (e.g. *Bank of Cyprus v Menelaou*). So then the solicitor needs to advise about the indemnity. Or rather he would if there was a shared understanding of how it works.

And yet lenders and the Land Registry are doing their best to rid themselves of messy title deeds. But they are the bottom line of real property. Hence my question – do we really understand registered land? I'm not convinced that we do. And if we don't, after some 170 years, what does that say about it?

Bulk and bespoke

I have only practiced in what might now be called (OK. I call it …) the 'bespoke sector'. I use that phrase to contrast it with the 'bulk sector'. When I first worked in a legal office 1974, and when I qualified in 1983, no-one would have thought to distinguish practice areas in that way.

I would say that the bulk sector began in a serious way around about 1990, and that the contributors to it were technology and the recession, when repossessions peaked at about 100,000 a year.

I think that the Land Registry is now set up to serve the bulk sector. That means that process is king and anything that does not fit into the process suffers (I imagine there are many studies of this, but Nicholas Carr 'The glass cage' will do for starters).

As you will see from my responses, I am no fan of e-conveyancing. We already have legal services provided by call-centres based on the sites of the most recent major industry to close, and therefore very frequently not only miles away from the property in question but from the people selling and buying. We have businesses like Purple Bricks aiming at the agency sector, and online mortgage applications are well-established. Soon there will be no direct human contact at all. I do not regard that as a good thing. Couple it with the open register and abolition of title deeds and the surprising thing is that some are surprised that there is fraud. And we only need to read the reports of fraud in the banking sector to see how far from resolved that problem is (take for e.g. the recent use of the SWIFT network to defraud the Bangladesh central bank's account at the New York Fed). I have every respect for the brainpower of the likes of Charles Harpum, but fraudsters have the knack of seeing the weaknesses in systems and exploiting them. Unless you have that type of brain, you are going to struggle to outthink them. 'Catch me if you can'.

For me, the high point of the Land Registry came in 1995, when I was putting together a complex title in north-west England intended as the site of a supermarket. The site had all the wonderful things that legal Lancashire throws at you, and the person who dealt with it at the Land Registry was almost as keen I was to reduce the title – we ended up with about a dozen entries in the charges register. My favourite experience was the day that he rang me, without prompting, to say that he'd found way of getting rid of a few more entries. But I get the feeling that that (highly professional) experience would not be reproduced in the modern Land Registry.

The older-style of conveyancing was indeed dearer (I show how much later on), but the solicitor and client met, usually 3 times (instructions, pre-exchange and to execute documents) and the solicitors, agents and building society people involved usually all each knew each other. That system could have been refined to give better value for money without losing its essential characteristics. As a 19 year old I did our completions – had I made a mistake, no-one would've taken advantage (I fondly recall an old-fashioned managing clerk trying on a point in a contract with me and being

rather pleased when I picked it up – so much so that he rang the proprietor of my firm to congratulate him). No-one needed to think about fraud.

Overstating the case for registered land

I take issue with your starting point.

> An effective land registration law is essential for everyone who owns land, whether as home owners, owners of businesses or investors.

No it is not. People owned and traded land well before registration. And I would prefer my land (home) to be unregistered – or perhaps I am not "everyone". The reasons are privacy and the risk of fraud – and they are of course linked. I am sure that I do not need to labour this note with the reasons, for they are obvious to anyone who knows about registered land. I will merely offer you this from Master Mathews this year in *Chief Land Registrar v Caffrey & Co*. It is not often that a Master's decision is reported and it is not difficult to understand why this one was:

> "The problem is that the system of registered land at the time of these events unfortunately was, and was known to property lawyers and to others to be, not sufficiently secure against this kind of fraud. That was not the Defendant's [solicitors'] fault. There were media reports of such cases, articles written in learned journals, and even debates in Parliament, about this problem. The real question at bottom for me therefore is how the law should allocate the risks of such fraudulent activity where, and in the circumstances in which, it is successfully practised."

Until the risks are correctly allocated, I would sooner have the matter – or more accurately the deeds – in my own hands. With my deeds, with the law that a forgery is void, and by being in possession, I would feel safer than with the risk in registered land that a fraudster with access to the open register could forge a transfer, create a charge and disappear with the money.

You continue:

> The means by which we own our homes and ensure that the property rights we have are enforceable is dependent on the effective operation of the land registration system.

Again, no. It depends on an effective legal system of which registered land is merely an optional part. Real property was protected for many years before registered land.

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

Once again, no. The property market existed and operated long before registered land. Besides, to an Englishman, what is a "land administration system" supposed to mean? Land does not need to be "administered". Perhaps something got lost in translation.

Or do I sense that someone feels obliged to justify registered land, in the light of all its problems, and is trying rather too hard to do so?

As a senior Land Registry person said at a talk I attended a few years ago, if the LRA 2002 hadn't promised (the then sexy but now rather less so) e-conveyancing, it would never have got government time to be passed. I think that says something.

What are the benefits and drawbacks of registered land?

What does registered land actually do? After relatively brief thought, this is what I come up with. Of course, this is a bespoke conveyancer speaking.

Plans. It does trace the general boundary of land onto an OS map. That this is possible is largely thanks to that excellent public body, Ordnance Survey. But one does not need registered land to have ownership boundaries marked on a plan. Boundaries could be made public, but owners' and title details known only to the relevant authorities for tax purposes (see Thomas Piketty 'Capital in the C21th' for reasons for needing tax returns – but of course there remains the risk of lost laptops and cds …).

Searches: You don't need to check old Land Charges searches when investigating title.

Stamp duty: You don't need to check that the right stamp duty was paid.

Simplifies some titles: See my example above.

Here are some of things it does not necessarily do:

Searches: Obviate the need for searches – a Land Registry search replaces a Land Charges search.

Signatures. One always needs to check that a signature 'looks right'. After all, most signed (or executed, I shan't draw a sharp distinction) documents are made valid by estoppel and not by being signed by the 'right' person. This is inevitable. If it wasn't the case, the only safe way of signing documents would be to collect all participants from their home addresses in a Black Maria, checking their passports and utility bills etc on entry, and only letting them out to sign the documents, which they would have to do together. There is no step that you can safely leave out. Clearly that is unworkable, hence estoppel (I refer to this later as the 'Black Maria standard').

In registered land, you have the 'protection' of rectification etc, but that 'protection' is made necessary by the public register making forgery much easier. So is there really a saving in having a registered title?

Reliance on a paper record. We'll come to that with defeasibility and rectification.

Make title investigation simpler. It does – but often only for an already simple title. With a complex title one can be better off with unregistered land because the whole history is on view.

Registered land ether provides snippets that – unrelated to context – are often inadequate for the purpose, or simply says "a deed dated [*blob*] and made between [*blob*] is expressed to do [*blob*]" – in which case registered land is little better than unregistered (but someone has at some point paid a fee for that gem of information).

In some instances, registered land might be worse than unregistered Take "by a deed dated … the covenants in [*blob*] were expressed to be released". If the person releasing the covenants was not the original covenantee, then one doesn't know whether that person had title to provide the release. And as no deeds are available, one will never be the wiser. At least with the deeds there is a bit more hope of checking whether the person releasing had title and if not who might have. As it is, most entries of this nature have to be insured.

Speedy dealing. Buyers don't have to wait to get the title deeds. Nor need they. If we opted for an encrypted deeds registry system, title documents would available just as quickly.

Who does registered land protect?

Another fundamental issue is the protection given to dealings over ownership, and in particular the favourable treatment of the holders of registered charges. It is not possible for a pure lawyer to answer the question whether a system that encourages lending secured on residential property is an economic good, but it is certainly possible to doubt that it is. But until that issue is resolved, one cannot draft the legislation. Lawyers cannot draft in a political vacuum.

The obvious example here is *Scott v South Pacific Mortgages* (2014). The current system of registered land at least assisted the conclusion that the holders of registered charges were afforded protection over the former house-holders who had been duped by the registered chargees' own customers. The law, as it stands, imposed no direct or indirect responsibility on the lenders to do due diligence on their own customers. But it would not have been difficult for the lenders to have appreciated that what was going on was untoward. This is what happened on completion – taken from the trial report:

> "RML [the lender] transferred £95,750 to its solicitors. On the same day its solicitors transferred the purchase price of £115,000 to the solicitors for the vendor. The completion statement of the vendor's solicitors shows that out of those moneys all but £41,029 was used to discharge prior mortgages. Out of the £41,029 £38,000 was paid to NEPB and £3,029 paid to the vendors"

This was not a one-off residential purchase. This was a business transaction among many others. What did the lender think was happening to the £38,000? After all, NEPB was its customer – the actual house-buyer was a mere nominee. What was NEPB's business plan? How did it make a profit? Why did the seller receive so little? It didn't matter to the lender because it was getting a legal charge and it didn't need to look closely at how it got it.

If we protect secured lenders to the degree that we do, they will have no incentive to ask such questions. All they have to do is take security and they are freed from other responsibility. That creates moral hazard.

Reforming completion by registration

I question 'completion by registration' – or to put it another way, withholding legal title until bureaucratic steps, that can only be taken after payment of the price payable on completion, have been completed.

You do discuss this but without asking a question of consultees. You say:

> Finally, in 1998 title by registration was a relatively new idea, whereas now it is an entrenched and fundamental part of the regime of land registration in England and Wales.

If 'title by registration' is regarded originating with the 1925 Act, then it wasn't new in 1998 – it was 73 years old. It was even older if you go back to the first legislation. I don't see how a 'new' 73 year old idea suddenly becomes "entrenched" a mere 17 years later.

Brown and Root was known during discussion of the 2002 reforms, but it was consigned to a footnote because e-conveyancing was going to solve the problem. It has not and will not any time soon (or – ideally – at all). So to say that we can't reform the registration gap because withholding legal title is too entrenched is to say 'we got it wrong in 1998-2002 and it's too late to put it right now'. That is not a happy position, although regretfully it does seems known to the law – witness the Supreme Court's disappointing (in the "reasonable expectations of an honest businessman" sense – Lord Steyn of course) comments when it considered *Ellis v Rowbotham* in *Marks & Spencer v BNP Paribas* earlier this year.

This withholding is unnecessary and prejudicial. There is no good reason why legal title cannot be transferred on legal completion – after all, the buyer has paid for the property in full so why should his legal rights depend on bureaucratic steps?

In principle, all this can happen on legal completion:

> 1) Buyer pays the price.
>
> 2) Seller authorises the buyer to communicate with the Land Registry.
>
> 3) Buyer informs the Land Registry of the dealing with evidence of the authorisation.
>
> 4) Buyer is entered on the register and is the legal owner.

What is missing is obtaining the Land Registry's satisfaction to the disposition. But that can be dealt with. The Land Registry just notes these stages on the register:

> A) Notice of dealing given – the buyer is the legal owner but has not demonstrated title to the Land Registry.
>
> B) Land Registry has received the Buyer's demonstration of title.
>
> C) The Registry has made requisitions on the Buyer's demonstration of title – copies of the requisitions can be posted on the title.

D) The Buyer's title has been demonstrated to the Registry' s satisfaction.

In this way, any person who wants to deal with the new legal owner (i.e. the buyer) can see exactly what is going on and can deal with the owner with eyes open (and if dealing before stage D can decide on what contractual protection they want from the buyer or its seller). The Registry is protected because it can withhold the title guarantee until stage D. The former buyer is protected because having paid the full price he has a legal title. The registration gap is no more – the buyer is the legal owner, as he should be.

A possible fly in the ointment is the restriction, which has become an over-used device. The restriction is a curious beast, having no counterpart in unregistered land and therefore infringing the mirror principle. It also offends another principle – that of not creating new interests in land, such as elevating a mere contract into an interest in land. The protection of an overage contract is not contemplated by the legislation, only by the Land Registry practice guide, and yet appears to be accepted by the courts (albeit *obiter* and at first instance by Peter Smith J) as a legitimate device. Very arguably, it is not.

I ask here whether restrictions are so important that they alone can prevent a buyer from acquiring a legal title on legal completion. When it comes to the point that the Land Registry is offering, as an anti-fraud device, a restriction that no disposition can be registered unless a conveyancer certifies that the disponor is the person they purport to be, something strange is going on. Anyone forging the proprietor's signature is not going to baulk at forging a conveyancer's as well (hence my desire to own my house as unregistered land).

It might be that restrictions were originally intended not to protect a commercial interest, such as overage, but legal due process. Insofar as it is clear from the buyer's title that the Land Registry has not received evidence of a restriction being satisfied, then the buyer's title is at risk and a successor is on notice. The position is different if the restriction protects a commercial interest because the seller will have been paid and the beneficiary of the restriction unpaid. But if restrictions weren't intended to protect commercial interests, then why should their use prevent a legal title from passing on legal completion?

A main use of a restriction was to be to overreach beneficial interests. But was it necessary? If the Registrar knows that the land is held on trust, just put a note on the register to that effect and refer to the need to appoint a 2nd trustee. If a disponee ignores the note does not ensure that the 2nd trustee is appointed, he has bought land subject to a beneficial interest – surely that is his look-out; all the information was right there in front of him. That is not necessarily a concern for the Land Registry because legal title has legitimately passed and it is not exposed paying an indemnity.

There is another point. As you recognise from *Westdeutsche*, a person who holds the entire interest in a property does not own separate legal and beneficial interests – they only come into play when a trust is declared or they are separately disposed of. This artificial land registration device separates the 2 forms of ownerships without an appropriate disposition by the owner, who has of course disposed of his entire legal and beneficial interest (in that he has put the legal title out of his hands). Registered land offends the *Westdeutsche* principle.

If no reform is made, do we need to put in all registrable dispositions a clause to the effect of that in Sweet & Maxwell Property Law Bulletin (2016) 36.9 (the seller having to appoint the buyer to do things the buyer should be entitled to do)?

Finally, there's the passing of the benefit of covenants that aren't landlord and tenant covenants. A successor in title takes the benefit of covenants that touch and concern the land, but only so long as he has a legal estate. With unregistered conveyancing that is fine, but the registration gap potentially puts a coach and horses through that – and the passing of the benefit of guarantee clauses in leases is a prime example of the practical importance of the point.

What of the Land Registry?

With bulk conveyancing has come a change in the Registry. Our perception is that process is more important then professionalism. In saying that I do not criticise the individual staff. But if the underlying ethic of the organisation is to reduce as much as possible to process – or tick-box – then the Registry will not be in a position to deal with "the underlying law relating to the creation of estates and interests". They are messy and when in dispute are not usually susceptible to easy solutions.

If the Registry is to be an organisation of process, whether by choice or necessity, then the functions that we entrust it with must be very closely circumscribed – even more so when (there does not appear to be an 'if') it is privatised (it has to be to help finance the deficit that matters – the trade deficit – because only by selling the family silver for foreign money can we finance it).

Practice and terminology

To take an example, the LRA 2002 defines a notice as an entry in the register in respect of a burden on the estate. What is an "entry in the register"? The commonest burdens are easements and restrictive covenants, and easements can be legal or equitable. Many transfers contain easements and restrictive covenants that both benefit and burden the sold and retained land.

It seems to me that the Land Registry does not have a standard, good, practice for noting.

When the Registry notes a legal interest by referring to the deed and saying that it contains easements or covenants:

> Is that an "entry"?
>
> Is a reference in the property register alone that a deed contains rights and reservations (and possibly covenants) meant to cover both benefiting and burdening rights?
>
> Is it enough then that a reference in the property register is sufficient to give notice of a burden? But isn't the charges register the place for burdens, and don't the Rules require that? Is the reader required to read the property register in order to find out the burdens on the estate?

> If the charges register contains a reference to a deed that contains a burdening restrictive covenant, but the deed also contains burdening easements, is that reference an adequate "entry" for the easements as well as the covenant?

If these easements and covenants are noted by the simple expedient of "a deed dated [etc] contains …" then we really aren't far removed from unregistered land. All that registered land has done is taken the deed from the pile of title deeds and said "here you are, read this". I don't particularly object to this, but it contributes to my point about overstating the case: the Land Registry is not doing anything that a deeds registry wouldn't do.

Later, I briefly tackle the problems of 'lift and shift' and rights over common parts.

Interpreting registered documents

I see concerns with the majority reasoning in *Cherry Tree Investments Ltd v Landmain Ltd* (2012). Just because a document is on a public register does not mean that it is a public document.

There is a clear difference between a document in a public register on which members of the public might rely – say when dealing with assets of community value – and one that is only ever relevant to those who are (or become) party to it or deal with a party. I do carefully say "public" – in *Chartbrook v Persimmon* prospective lenders clearly relied on the contract, but not as members of the public. A lender could, if it wanted, ask the parties to disclose details of their dealings before deciding whether to lend. This is not open to the public.

To put it another way, a charge over unregistered land is not in a public register (except at Companies House, but charges have been registered there for years and no-one has worried about it) and so will (presumably) be interpreted according to 'pure' *ICS* principles. That will be the case whether the document is capable of being assigned or not – the courts do not adopt *ICS* only for non-assignable contracts, and have explicitly said that *ICS* applies to easements and section 106 agreements that transmit to successors in title (the latter being quite interesting, given the separate principles that apply to interpreting planning permissions).

Make the charge over registered land, and why should that change?

Even more to the point, does the manner in which a document is to be interpreted change when the land is first registered? If it was agreed when the land was unregistered, does that mean that is it always interpreted according to 'pure' *ICS* principles, but if it was agreed when the land was registered, it is interpreted according to *Cherry Tree*?

I think the Arden LJ's dissenting analysis is the more compelling (and I say that as a long-standing Lewison fan) – a document can only mean what it means interpreted according to one method, but how that interpretation might affect parties depends on its status as a document relating to land when it passes through different ownership.

Summary

A system of registered land is neither necessary nor an unalloyed good. It is a choice among other choices (a mapping registry and an encrypted deeds registry for one, title insurance for another).

I'd also refer to the somewhat puzzled comments of the English House of Lords judges in the Scottish case of *Burnett's Trustee v Grainger* (2004), responding to system that allowed the time of registration to be the sole determinant of who had the real rights (the 'race to the register') , and not who has paid the money, as evidence that what is on the register should not be the end of the story.

I therefore approach the questions in the consultation from the point of view that our system of registered land is not entitled to be favoured by its mere existence, but that it is perfectly legitimate to question its underlying basis.

I do incline to the view that the truest test of property is possession, not the bureaucratic act of altering a piece of paper.

CHAPTER 3

Consultation question paragraph 3.14

1.6 In his response to this question, Christopher Jessel said:

Where there is land to benefit, such as neighbouring property benefiting from a repairing covenant (compare the facts of Rhone v Stephens [1994] UKHL 3) the covenants may qualify as relating to that land. In that situation the effect of s. 153(8) may be to attract the benefit of LPA 1925 s.78 and s. 79. This applies in particular to pre 1995 leases where touching and concerning was a requirement.

If a covenant does not touch and concern land then, if it was contained in an old (pre 1995) lease, it could not be enforced against a successor in title to the original lessee even while the lease was running. For a new lease the Landlord and Tenant (Covenants) Act 1995 s. 2(1) and s. 3(1) saves the covenant while the lease is running but that Act does not apply once the lease has been enlarged into a fee simple. Even if there is no requirement to touch and concern, so that the covenant is preserved by s. 153(8), while possibly the benefit could be assigned as a chose in action detached from land under LPA 1925 s. 136 or might pass under the Contracts (Rights of Third Parties) Act 1999, in the absence of any common law rule for freeholds analogous to Spencer's Case there is no clear provision for the burden to be enforceable against a transferee of the new enlarged freehold.

If there is no specified land to benefit from the covenant there would seem little practical point in retaining the former landlord's title on the register. If there is land (normally adjacent or neighbouring) which benefits then that benefit could be entered on the register of the benefited land which would not be a superior freehold but simply a nearby title, which might be the residue of the former landlord's title once the premises in the enlarged lease had been taken out. The effect would be similar to the benefit of a restrictive covenant although the effect of s. 153(8) would be to extend to positive covenants.

If it were to be the case that the burden of the preserved covenants which do not benefit land is enforceable against future proprietors of the land comprised in the

enlarged lease, then I can see it would be helpful to have a public record of the person entitled to enforce them. If it is possible for a covenant which does not benefit land to be enforceable by an assignee of the former landlord then it will be necessary to have some means of identifying the person entitled to do the enforcing.

Rather than retaining a nominal superior freehold which, in my view, is not land but is incorporeal, it will be necessary to show the title to enforce the covenant on a new register comparable to the registers of rentcharges, franchises and profits a prendre. Otherwise there would need to be a mechanism similar to that for identifying the beneficiary of a notice as in my reply to 22.45.

If, contrary to my view, the right to enforce is to be regarded as an estate in land rather than an incorporeal interest it would nevertheless seem that it is no longer to be regarded as being in possession. Despite your comments in para 3.5, it is arguable in view of LRA 2002 s. 131 that "possession" in the relevant context means direct or imputed physical possession. The former landlord does not have direct possession and as there would be two freeholds, it is not clear it will be imputed under s. 131. If so then the former landlord's interest has become equitable, and in that case more would be required than a simple amendment to LRA 2002 s. 5(2). As the Act does not allow for registration of an equitable freehold or other similar right it would be necessary to legislate to provide that the right of the former landlord under s. 153(8) should become a legal estate or interest.

I agree with your point in para 3.7 that s.153 needs to be considered on its own rather than as a side effect of a review of the LRA 2002. If it serves a useful purpose then it should be reconstituted. For instance the reference to a married woman in s. 153(6)(i) is obsolete. Also, as the careful distinction between freehold and fee simple in the wording of the section shows, it was drafted at a time when there could be more than one legal freehold estate and that wording does not seem to have been amended in light of LPA 1925 s.1(1)(a), possibly deliberately as it referred to leases granted before 1925 as well as after 1925. It may be that, if the principal use is to preserve positive covenants and if your recent report on easements, covenants and profits a prendre is adopted, (I understand the Government intends to publish a draft Law of Property Bill) then the need to use it in future will not arise.

The point in para 3.8 is important in that the register could in principle be cluttered up with a hierarchy of numerous freehold titles as used to be capable of creation before 1290. If the land registry view is correct then we risk returning to medieval complexity.

I would add that, if it is the case that the former landlord's title is preserved, then, as discussed in my article, enlargement is not covered by LRA 2002 s. 4. In order to make matters clear it may in any case be worth adding enlargement to the triggers for first registration of the tenant's new fee simple.

Consultation question paragraph 3.59

1.7 In his response to this question, Christopher Jessel said:

> 1. I am familiar with instances where the minerals were excepted to a traditional landed estate held in a strict settlement. When such settlements end the surface lands may be sold off and the proceeds of sale divided among a family, and any

knowledge of former holdings could disappear. Sometimes where title is unregistered all residual assets in a trust may be vested in a beneficiary and if so the minerals may be treated as included (for a related issue see Bath and Wells Diocesan Board of Finance v Jenkinson [2003] Ch. 89). Alternatively there may be an express "sweeping up" clause to cover rights not known to the draftsman of the assurance. Often however there is no such clause and it is simply assumed that anything of value has been dealt with. If there is an obligation to register and that is not done the effect is that legal title is not transferred and will remain with the former holder, such as the last surviving former trustee (who might be a retired solicitor and after decease his or her family may have no connection with the landed estate). If the matter does not come to light for many years it may be necessary to pursue a chain of executorships to establish legal title and if there has been an administration it may be necessary to apply to court or obtain a grant de bonis non. This does not affect the equitable title. I suggest therefore that a beneficiary who can show a good equitable title to the minerals should be able to persuade the land registry to register a legal title as a person entitled to be registered. Where one or more beneficiaries together are absolutely entitled it may be possible to perfect title under TOLAATA 1996 part II. Otherwise if, when the mineral rights come to light, the land registry insists on production of the legal estate this could involve expense.

2. I have also encountered mineral rights excepted in the 1920s to a company which was dissolved some years later: I was not aware of any indication that the liquidator had transferred title and if not then it would have vested as bona vacantia in the Treasury Solicitor who would have no information about the assets and may not be aware of the company.

3. It can happen that on an early conveyance the minerals are excepted and on a later one this is done over again. This could be by a mistake (so that on the second occasion the conveyance took effect as "excepting to the second vendor" instead of "subject to the exception to the first vendor". More often it could be deliberate, especially if the first exception was of a particular type of mineral, or of minerals in a particular seam or stratum, or of minerals below a specified depth and on the second occasion the intention is to except all mineral other than those already vested in the first vendor. This may be the reason for the point in the last sentence of para 3.28(3).

4. As considered in my reply to 22.11 below, where minerals are owned in undivided shares, the owner of some shares may be known but the owner of others unknown and if the unknown shares comprise 50% or more then there are problems in transferring legal title from the Public Trustee.

Minerals belonging to the lord of the manor

In my reply to 22.37 below I make some suggestions to replace the existing arrangement to protect manorial rights in light of the criticism by the Justice Committee of the unilateral notice procedure. Minerals in former copyhold land are by far the most important manorial rights but lords of manors have a variety of mineral rights. The main categories are:

1. Manorial minerals in the strict sense under LPA 1922 Sch. 12 para (5) and its predecessors in former copyhold land governed by general custom. These arose automatically on statutory enfranchisement (and the position could

not be replicated on common law enfranchisement) and replace customary rights arising from the copyholder's duty not to commit waste and from the former tenurial superiority of the lord. The lord had and retains property in the minerals and the landowner has possession of them. By general custom neither party can interfere with the rights of the other so there is a stalemate and if the minerals are to be worked the royalties normally have to be shared.

2. Although by general custom the lord's preserved rights in former copyhold land confer no right of entry, in a few manors there is a special custom giving a right of underground working so long as there is no damage to the surface. See Hilton v Granville (1844) 5 QB 701, Newcastle under Lyme BC v Wolstanton Ltd [1940] A.C. 860; Commissioners of Inland Revenue v Joicey (No. 2) [1913] 2 K.B. 580. (These cases related to manors where either the Crown or the Church were the lords and that may be relevant as they may have enjoyed special rights. Some of those right may, following a sale of the manor, have become vested in private owners.) I understand that in such cases the land registry is prepared to register the lord's right of working as a profit a prendre since it includes the right to take minerals away.

3. It was possible on enfranchisement for the lord and copyholder to agree terms different from those in the Copyhold Acts or the LPA 1922 and in many cases it was agreed that the amount of compensation would be reduced in return for the copyholder giving the lord wider mineral rights than those enjoyed by general custom including powers of surface working. Even though these replace former manorial rights, they are not manorial rights within the LRA 2002 but take effect as an agreed severance of minerals creating a normal fee simple. Reference is needed to the words of each compensation agreement but in most cases it was referred to as an exception although the best analysis would be that the copyholder released the possession of the minerals to the lord so that possession united with property to give a full freehold.

4. Many inclosure acts reserved the minerals under inclosed waste to the lord, sometimes with rights of entry and working and sometimes not (see numerous decisions including Butterknowle Colliery Co v Bishop Aukland Industrial Co-operative Co [1906] AC 305 and Consett Industrial and Provident Society LTD v Consett Iron Co Ltd [1922] 2 Ch 135). These are not manorial rights within the meaning of the LRA 2002 and will usually be construed as an exception of the freehold in the minerals but reference must in every case be made to the wording of the special act. Some later inclosure acts or orders incorporate the Inclosure Act 1845 s. 98 although its meaning is obscure but the Inclosure Act 1859 s. 3 refers to a "right or interest" in the minerals.

5. I have encountered a case where in the 1950s the surface of demesne or waste land forming part of a landed estate was sold to a mineral company. The seller excepted the minerals as a freehold to himself as lord of the manor. It is likely that the sale was structured in that way to mitigate tax but the annexation to the manor may have been to ensure that title would not be overlooked on any devolution of the estate.

Categories 3, 4 and 5 are normal mineral freeholds and can be registered as such. The correct legal analysis for the purposes of the LRA 2002 of the rights of the parties to manorial rights in the strict sense under general or special custom (categories 1 and 2) under modern law is unclear. Under the transitional provisions of the LRA 2002 Schs. 1 and 3 paras 11 the lord's rights ceased to be overriding interests on 12 October 2013 and many are now protected by cautions or unilateral notices. Both Mr Nugee and I in our LQR articles referred to in footnote 31 to para 3.19 argue (for different reasons) that the lord has a freehold which is capable of registration but the land registry does not accept that view and I understand may consider the lord's right to constitute a privilege within LPA 1925 s 1(2)(a). There can be little doubt that the lord has a fee simple interest in the minerals. That was the situation before enfranchisement and LPA 1922 Sch. 12 para (5) says that Act "shall not affect" the lord's rights. Before 1926 the lord had a legal estate. The difficulty now is that it may not be in possession although the logic of your para 3.5 is that "possession" can have a variety of meanings .

Whatever the legal analysis, as manorial rights to minerals are a valuable asset, then they should be capable of registration with their own title in order to simplify demonstration of ownership and to facilitate sale or lease; if that is not the present law they should become registrable under LRA 2002 s. 3. The evidence to the Justice Committee on manorial rights also supports the desirability of a means whereby the public in general and the landowner in particular can identify the person entitled to manorial minerals. If you do not agree that the manorial mineral rights of the lord constitute a fee simple absolute in possession it would be possible to provide, analogously with LPA 1925 s. 7, that the lord's fee simple should for the purposes of the LRA 2002 be a fee simple absolute or a registrable freehold. If that is not possible then the lord's right should become a new registrable interest within LRA 2002 s. 3(1).

Where the rights (whatever their origin) belong to a lord in right of the manor then a conveyance of a manor (or transfer of a registered manor) would normally include whatever mineral rights there are (LPA 1925 s. 62(3)). However in many cases the parties may not be aware of the existence or extent of the rights. The position is similar to surface waste of a manor which is in theory registrable if the manor is conveyed but in practice is often unknown or of negligible or even of negative value. It may be particularly difficult to prove title to mineral rights belonging to a lord of a manor or even identify where they are as it may be hard to identify the extent of former copyhold land. LRA 1925 s. 120(1) as originally enacted provided that "corporeal hereditaments parcel of a manor and included in the sale of a manor as such" were not compulsorily registrable. This would not have been relevant to minerals, already excluded under s. 120(1), but to waste land. (Curiously when the LRA 1997 s.1 amended LRA 1925 s. 123(3)(c) and extended compulsory registration to transactions other than sale the text was not amended so that registration of such hereditaments became compulsory on gift or assent but still not on sale but this anomaly was removed by the LRA 2002.) Although it is not clear if the customary manorial mineral rights of a lord in former copyhold land are to be regarded as corporeal, most rights under an inclosure act are corporeal as are rights agreed on enfranchisement although sometimes they may constitute an incorporeal profit. The policy underlying the words in LRA 1925 s.120(1) may still be relevant to unidentified mineral rights which are parcel of a manor.

Suggestions

Accordingly I suggest, first in relation to mineral rights generally:

a. Compulsory registration should apply to a freehold disposition of the minerals on their own where minerals had previously been severed from the surface. Where there was no previous severance it should also apply to the mineral rights where there is a freehold disposition of the surface excepting the minerals and to a disposition of the minerals excepting the surface.

b. It should also be compulsory on grant of a lease of the minerals for over 7 years or an assignment of a mineral lease with more than 7 years to run. Sometimes a lease may demise (firstly) the minerals over a wide area and (secondly) a small area of surface for shafts or mine buildings or spoil heaps. Where the mineral rights extend outside the limits of the second demise that should be treated as separation.

c. A grant of a profit of minerals either in fee simple or for a term exceeding 7 years should also be completed by registration both by an entry on the surface title (if registered) and also by registering the profit with its own title.

d. On a release to the surface owner, where the rights will merge, a note can be entered on the surface title that the minerals are included. If the surface is not already registered, this should be a trigger for first registration .

e. Where someone has mineral rights but can not identify the area affected or where it is not practicable or economically sensible to identify the extent of the mineral rights or to demonstrate a good title to the satisfaction of the land registry then the legal estate in those rights should not be lost. That would include an assent in general terms (as of “all other property of the testator”) or where they are part of a larger estate vesting in a beneficiary or where they are included in a conveyance under a “sweeping up” clause. Either compulsory registration should not apply or, if it does, late applications should be permitted. Late application should apply to a person who can demonstrate a claim to a legal estate in the minerals as beneficial owner or as trustee. Where the title to the legal estate is difficult to trace it should also apply to the owner of an absolute equitable beneficial interest (who would be entitled to call for the legal estate if the holders of that estate could be identified) and to persons who together have the right to appoint a trustee under TOLAATA 1996. Such applications should be permitted irrespective of any lapse of time since the minerals were the subject of a registrable devolution.

f. Where a claimant to mineral rights can show the location of the rights sufficient to identify the surface affected but can not produce a clear title to the satisfaction of the land registry then it should be possible to protect priority by lodging a caution or, if the surface is registered, a notice. As indicated in my reply to 22.11 this should extend to beneficiaries under trusts.

g. LRR 2003 r. 25 should be modified so that if an applicant is not able to provide full details some form of registration can still be made.

Secondly I have the following specific suggestions in relation to mineral rights which belong to a lord in right of a manor:

h. If you take the view that the lord's right by general custom to manorial minerals in former copyhold land is not under the current law a freehold in land then either a new type of registered title should be added into LRA 2002 s. 3(1) or it should be enacted that the right shall be treated as a freehold for the purposes of the LRA 2002.

i. Where the extent of mineral ownership and the identity of the owner are both clear, registration of title to the minerals should be compulsory on a disposition of the manor (whether the manor itself is on the register of manors or not). If the manorial mineral rights are expressly severed from the manor they should be compulsorily registrable on severance or later disposition.

j. Where the lord has lodged a caution or notice under the transitional provisions of the LRA 2002 (or subsequently as indicated in footnote 52 to para 9.47) then there should be a period of 10 years for title to be registered and if not the mineral rights should not be enforceable against the landowner. It will of course be necessary for the lord to satisfy the land registry as to the quality of the title both to the lordship and that the land was formerly copyhold. This should not cause difficulty for such lords as presumably they carried out sufficient research before lodging the notice. This would meet some of the concerns of the Justice Committee and should be acceptable within the terms of the Government Response. Even if the lord is unable to satisfy the land registry of the title then after 10 years the unilateral notice should nevertheless be cancelled. I appreciate that loss of the lord's rights might involve human rights issues but it seems to me that if a lord can not show a title after 10 years has been allowed to do so, it is reasonable to assume that the claim to a title is illusory. It is possible that some of the unilateral notices were lodged without sufficient supporting evidence, and indeed it seems that a number of them have been challenged and have been cancelled or withdrawn for that reason. The problem of a surface owner needing to identify the owner of a void will not arise because the void already belongs to the landowner (Eardley v Granville (1876) 3 Ch D 826).

k. Where the land registry has under LRR 2003 r. 35 or its predecessor made an entry on the property register on examination of the title on first registration of the land that the land had been copyhold then registration should normally be compulsory on disposition of the manor. That should apply where either the manor itself is shown in the register of manors or the lord has lodged a caution or notice against the title to the surface of other land in the same manor and therefore presumably knows that there are such entries. Again the lord will need to provide a satisfactory title. Where the manor is unregistered and the entry was made on the property register under LRR 2003 r. 35 then it may be difficult to identify the current lord or to require compulsory registration of mineral rights. In most cases the land registry has picked up the former copyhold status of the land from the title deeds and often the current lord is unknown. In many, probably most, such cases the lord will not know of the rights and if so may be assumed to be prepared to lose them. It may therefore

still be acceptable for the manorial rights to cease to have effect after the ten year period.

l. Where a lord claims mineral rights under an inclosure act or award or under an agreed exception on enfranchisement (which are not manorial rights but which comprise a severed freehold) and it is possible to identify the affected surface then again registration should be compulsory on a disposition of the manor but if the land registry is not sufficiently satisfied of the lord's title to be able to provide the indemnity then the lord should be required to lodge a notice or caution against the title to the surface. Where an inclosure award or a compensation agreement has survived it should be possible to identify the affected land.

m. Where the minerals (other than manorial rights in former copyhold land) belong to the lord in right of the manor and are included in a transfer of the manor as such, but the area affected can not be specifically identified, then either they should not be compulsorily registrable on such a transfer or late registration should be permitted irrespective of any lapse of time since the devolution of the manor. This will apply to corporeal rights under an inclosure act or order or award and to rights under an agreed enfranchisement.

1.8 The City of Westminster and Holborn Law Society provided the following discussion of the challenges associated with mines and minerals:

As explained in Land Registry Practice Guide 65, although the supposition is that the owner of the surface land owns any mines and minerals below it (in the absence of any available evidence to the contrary), it is only exceptionally that the Land Registry will guarantee that this is so. Unless there has been recent mining activity by the surface owner, generally far more than 15 years ownership will need to be demonstrated. It is difficult to prove that there was no severance of mines and minerals perhaps by an exception and reservation in a conveyance in the nineteenth century or an inclosure award perhaps in the eighteenth century. Particular difficulties can arise for instance as much land was at some stage copyhold land. Possession of the surface does not normally mean possession of mines and minerals below ground. These can be underground mining even without the knowledge of the owner of the surface land above the activity.

There is a case for compulsory registration upon severance by a sale of only the mines and minerals or the grant of a lease only of them. Normally transactions affecting minerals include some surface land for access but these can be reasons for having a disposition for value (premium and/or royalties) of only mines and minerals plus a separate Deed of Grant of rights of access via the surface. Where specific mining is involved with money being paid it is likely that some evidence of ownership will be available. Of course, it is likely that there would in such a case be a voluntary application for first registration of title to the mines and minerals in.

Problems could arise in other cases such as where severance is by gift of only mines and minerals or even where there is a disposition of a large area of mines and minerals believed to be owned, perhaps from mineral rights or ancient exceptions and reservations, but with no certainty that the minerals are significant. Often the historic

information for the whole area is difficult to apply to modern geography of the surface land so as to be sure exactly what land is affected.

It would also be a problem if the severance arises merely because when selling off lands from an estate the conveyances include vague exceptions and reservations for any mines and minerals which might at some future time become significant.

Where specific property is involved there is a possibility of obtaining a qualified title based on presumed ownership over many years but even that is difficult for a very large area of uncertain extent and with little documentation to support title to mines and minerals which may not have been worked for many years, if ever.

It is no good having a trigger which may well not result in a registered title at all and then with the prospect that the gift or the exception becomes ineffective rather than merely having standing in unregistered conveyancing with the possible need for later verification if the minerals become significant.

In relation to registration of manorial mineral interests, we have been assisted by the Land Registry but that was a relatively simple exercise in comparison with what is proposed. Estates often have maintained records of significant manorial interests in minerals etc. Where good records are supplied the Land Registry has given absolute title. For areas where the estate only have a longstanding belief of entitlement, the Land Registry refused the application for first registration.

Where estates in the past sold off surface land and excepted mines and minerals, often in vague general terms, there may or may not have been comprehensive records, partly depending upon whether it is a traditional mining area and whether it was thought likely that there would be further mining.

Often, mining interests are passed down only in sweeping up wording in assents or vesting assents as it may be impractical to investigate what happened on sales of surface land years ago. Often there is a longstanding trust and so unregistered property such as verges and underground mines and minerals will pass on appointment of new trustees by virtue of Section 40 of the Trustee Act 1925 often without anyone even thinking about mines and minerals etc. A trigger for first registration in such circumstances would be unrealistic.

It is a good aim to have registered titles to as much surface land as possible. The same does not apply as regards all underground strata which is often of no significance but applying to very extensive areas below ground. In 2003 the prospect of new registrations of manors was ended as not worth the difficulty.

Where mines and minerals are known to be significant in the short term there is an incentive for voluntary first registration. However, in other cases it would be pointless to impose a requirement of compulsory first registration as even if it is believed that mines and minerals are owned there may be no papers available to show to the Land Registry. Even if there is evidence of title, it is a waste of money to have the process of first registration where there is no known significance. In such cases, the estate owners will not bother to register, despite the requirement, but wait to see what may occur in the future.

The proposal about severance is only in relation to unregistered land as distinct from registered land for which ownership of minerals is unknown. Sometimes there is a division made within a family so that mines and minerals (generally or particular minerals) devolve separately from the surface land, perhaps by assent or vesting assent or within a trust arrangement. Sometimes it is just by way of exception and reservation when the surface land is dealt with, perhaps on a sale. The first registration of title to the surface land should record the exception and reservation. If the minerals are thought to be significant and ownership can be proved, there is an incentive to register title to the severed mines and minerals. It would be impracticable to have compulsory first registration where there is no such incentive.

Presumably it is not intended that first registration of title to mines and minerals will be triggered merely by including an exception and reservation of them when granting a lease of the surface for say eight years. Of course, that would also apply when granting a lease of the surface for say 999 years rather than conveying the freehold and excepting and reserving mines and minerals (with the possibility that the proposals extend to trigger first registration in such a case).

Standard documents not only of lawyers but also of surveyors may have express exceptions and reservations such as mineral rights, timber, sporting rights etc, regardless of what is on the title (registered or unregistered). Surveyors deal for instance with granting of agricultural tenancies often of more than three years and even for more than seven years. The estate owner's lawyers may not be involved and often the tenant is not represented by lawyers on taking the lease of the surface land.

1.9 Cliff Campbell said:

Registering absolute title to mines and minerals is unusual, and normally involves showing express title going back centuries, often after incurring considerable time and expense preparing the application, including professional historical research.

In most cases however this is impossible because either there is no express title at all available or if there is any it is insufficient.

Therefore qualified title is usually granted, often based on the ad coelum presumption or on limited documentation, due to the considerable possibility of earlier inclosure, copyhold tenure and/or prior severance.

In such cases the grant of qualified title may well shed no further light on the true ownership of the mines and minerals.

This would not therefore bring us any closer to achieving the goal of comprehensive registration of title, but would in many cases cause unnecessary and unwelcome work and expense.

I do not agree that separation of ownership means that the mines and minerals are “likely” to be exploited in some way (paragraph 3.58). On the contrary in many cases ownership will routinely be reserved “for the future”, “ just in case”, with no present or future intention whatsoever to actually exploit.

Future owners of the registered surface titles are made aware of severance from the mines and minerals exception entry on the register.

Against that background I do not think compulsory registration of mines and minerals on purported severance would be a useful development. It would be preferable to keep registration optional, as now.

Likewise as regards serving notice before granting qualified title to mines and minerals, this will hugely increase the need for serving notice, because as you acknowledge, qualified title will be appropriate in most cases.

The detrimental consequences to recipients outlined in paragraph 3.65 vastly outweigh the supposed benefits stated in paragraph 3.61.

Applicants for registration rarely have sufficient evidence of title to mines and minerals, so surface owners will likewise rarely have enough evidence to pursue an objection, and the ad coelum presumption is unlikely of itself to be an adequate basis on which to object.

The reason most owners only become aware of title to mines and minerals or its absence on sale, is because it does not usually matter to them otherwise.

Developers who proceed solely in reliance on the presumption would be ill-advised to do so due to the considerable possibility of third-party ownership. The bravery or foolishness of doing so would be the cause of later difficulty, not the absence of a Land Registry notice being served in the past, because proper investigation would disclose the existence of a qualified title to mines and minerals, even if prior notice of its earlier registration had not been served. The odd amateur developer might inadvertently proceed without sufficient investigation, but it is unlikely nowadays that most competently advised professional developers, who undertake most developments, would do so.

CHAPTER 9

General discussion of notices

1.10 A number of consultees provided general comments on the notice system.

1.11 Referring to various paragraphs in Chapter 9 of the Consultation Paper, Martin Wood said:

> I cannot agree that the 2002 Act reduced the number of means of protection to two. In fact it reduced them to three: restriction, agreed notice and unilateral notice. The last of these is effectively a reformed caution. The 1925 scheme of protection worked in practice perfectly satisfactorily. The 2002 scheme is different, but is it better? This is at best questionable. But we are where we are. The 1925 regime endured for over 75 years. Now we are talking of changing the 2002 scheme after only 12 years. We really should not be making yet more changes to the scheme after such a short time unless there are compelling and pressing needs for doing so. The scheme needs to be kept as stable and consistent as possible for as long as possible; otherwise we will end up with effectively three parallel systems operating for a substantial period of time: 1925, 2002, and revised 2002. This is highly undesirable and unhelpful to the users

of the scheme – which includes the ordinary public. Any proposed changes must be tested against the question: will they really make the system sufficiently better, as opposed to merely different, to justify the additional complication and upheaval they will cause?

9.35-9.40- Similar points could have been made regarding the caution under the 1925 Act. Under that scheme, the Registry did in practice require evidence in support of a contested warning off. The procedure in practice was essentially that illustrated by Figure 1 (page 180). The practice was aimed at promoting an agreed settlement or, if the cautioner did not produce sufficient supporting evidence, the Registry cancelling the caution. Of course, if neither of these outcomes happened, the Chief land Registrar or, later, the Solicitor to the Registry or a deputy, could conduct a judicial hearing, so the matter could be disposed of fully "in house". The present situation is perhaps at least partly a reflection of the current split between the Registry and the Tribunal.

9.41- These issues are more a result of the, in my view unwise, decision to change the status of these overriding interests. Their status under the 1925 had not caused any major problems, and the change was motivated by an over enthusiastic adherence to the theory of the mirror principle rather than attention to the practicalities of the ownership of property interests. The authors of the 1925 Act had thought out the scheme with great care and their decision on what interests should be overriding interests was well founded. The reasons for that decision had not changed by 2002. The change in their status was bound to lead to (a) a great deal of work and expense; (b) conflict and anxiety where applications were made to note them; (c) unfair loss of rights where the owner of them was unaware of the change of status. If ever there were a case for letting sleeping dogs lie …

9.50- As to objective (4), indeed. However, the reality was that the registration of a caution was frequently a hostile act, and I imagine the same applies to the unilateral notice.

9.65- Is the unilateral notice so different from the caution? Whilst different in details, in broad terms it is similar and fulfils the same function.

9.90- I entirely agree that Option 2A (which as I say is essentially the caution procedure) is the right choice. As you say (para 9.88) the end result of Option 2B is much the same, whilst being a good deal messier.

9.109 – 9.113- If I may suggest it, the initial question for the Registry on a "warning off" (if I dare use that expression!) of a unilateral notice is whether the unilateral notice should be summarily cancelled because the "cautioner" has not put forward any arguable case; or, if you like, the objection is groundless. It is only in those circumstances that the notice should be summarily cancelled. If that is not the case then the objection would need to be resolved appropriately. What is appropriate would depend upon the strength of the case put forward by the "cautioner". The evidence might be sufficient to satisfy the registrar of the validity of the claim, in which case the notice would remain. An example of this might be a contract for sale. If the case falls short of that, but is not groundless, then it would be a case of the parties attempting to reach an agreed settlement, failing which the Registry would refer the dispute to

the Tribunal. An example of this might be a right of way claimed by prescription. So cases will fall into one of three categories.

1. Groundless. Action: summary cancellation.

2. Registrar satisfied of validity. Action: notice remains.

3. Anything else. Action: parties attempt settlement, failing which reference to Tribunal.

It is not therefore a question of a choice between 1 and 2 to the exclusion of the other, as suggested in paragraph 9.109. Both are relevant to the consideration of an objection, together with category 3.

1.12 Cliff Campbell said:

In dealing with disputed registration applications, the Registry finds it essential to distinguish between its administrative role, and the judicial role of the Property Chamber, First Tier Tribunal.

In requiring the registrar to satisfy himself as to the validity or otherwise of the interest protected by a summary notice, you are in effect asking the registrar to take sides, and determine the dispute.

This is on the basis that only one party, and not the other, will be required to lodge evidence, which may therefore be of questionable legality.

And also on the basis that that evidence may contain facts which are disputed by the applicant, the correctness or otherwise of which cannot be ascertained without judicial processes taking place, such as examination of witnesses.

If either party is dissatisfied with the decision taken, then depending at what level it was taken, it may require a final review by a Local Land Registrar, which is a thorough and time-consuming process.

A party dis-satisfied with the outcome of a final review, who may be the beneficiary of a notice whose objection is not allowed to proceed, only has available to them the remedy of judicial review, which is entirely unsuited to what is required in the circumstances, which is a full hearing of the dispute relating to the application.

The dispute is between the parties, but unfortunately as proposed, will often turn into a dispute between one of the parties and HM Land Registry.

Whilst the idea of earlier disclosure of evidence is superficially attractive, it is jumping the gun.

Disclosure of evidence is a matter of judicial procedure pursuant to directions, which are properly the remit of the Tribunal not the registrar, which has striking out powers if disclosure is insufficient. This may be unclear, for example, if the only evidence is a statutory declaration or statement of truth repeating matters set out in the earlier application for the notice.

The fundamental point however is that the assessment of evidence with a view to deciding the validity or otherwise of the interest, is completely different when considering an application to register a full notice, than it is in a dispute situation. The former is a routine administrative task, but the latter is a judicial function incorporating everything which that entails, properly exercisable by the Tribunal not the registrar.

The best way forward therefore is not the inappropriate conflation of administrative and judicial roles, but to refer the application to the Tribunal as quickly as possible, so it can order disclosure of evidence at the soonest possible stage, and then if necessary proceed to determine the dispute.

That is not to say there might not be other ways of improving the process.

It seems to me more fair and balanced than the current procedure for notice to be served first and to expire without objection before the summary notice entry is made, as suggested in option 2B. Avoiding a fait accompli for the registered proprietor appears to be a desirable end to achieve.

You refer to unspecified situations where a subsequent applicant may need an application completing subject to the notice as the reason not to adopt this change, but in my experience this rarely if ever happens, because in reality purchasers and chargees invariably want the notice removing before proceeding with their transaction, although you may know differently.

The costs position could be strengthened by requiring an undertaking or bond for costs from the beneficiary immediately on referral to the Tribunal in appropriate cases with some injunctions.

It may be possible to expedite the procedure by shortening or removing altogether the 15 working day period for comments on a draft case summary, given that these are rarely forthcoming, and when given, often do not result in amendments. In the extremely unlikely event that an issue arises from this then it can be resolved between the parties and the Tribunal following referral.

But placing the registrar in a judicial role is not the appropriate way forward.

1.13 Referring to paragraphs in Chapter 9 of the Consultation Paper, Dr Charles Harpum QC (Hon) said:

Para 9.23: The inherent jurisdiction of the High Court to order the removal of notices and restrictions that should not be on the register, which was discussed by Morgan J in Nugent v Nugent [2015] Ch 121, should not be a mere footnote in the CP. In practice, if a client needs to get rid of an improper entry in the register quickly, he or she will take advantage of this jurisdiction, which usually secures the removal of the offending entry within a week. Such applications are not uncommon: I have made several. This summary jurisdiction was not affected by the LRA 2002 and was not meant to be (In Nugent v Nugent, although Morgan J correctly concluded that the inherent jurisdiction had not been abolished by LRA 2002, he did not (with all due respect) seem to appreciate that the function of legislation is to change the law and that if existing rules of law are not changed, they remain). There is much to be said for putting the summary jurisdiction on a statutory basis and extending it to the county

court. There does need to be a simple and very quick way of securing the removal of inappropriate entries in the register. The issue invariably arises where a sale or other disposition is pending. The LC should look at this again. The solutions offered in Chapter 9 do not amount to much and will not solve the problem on their own.

At the time when the policy for LRA 2002 was developed, disputed applications, which in those days were dealt with by District Land Registrars, were uncommon. No one foresaw the way in which the procedure laid down in LRA 2002, s 73, would lead to an explosion of hearings before what is now the FTT. It should be noted that the policy on disputed applications was driven by LR not LC. There is force in the point made at para 9.26 about the low threshold in LRA 2002, s 73(6) (the matter must be referred to the FTT unless the registrar considers that the objection is groundless). See further below, at para 59.

Paras 9.30 – 9.33: LRA 2002, s 77, was a section that was meant to have teeth and was intended to be a real deterrent, in much the same way as s 4 of the Landlord and Tenant Act 1988. The latter Act has been robustly applied and substantial damages awards have been given: see Design Progression Ltd v Thurloe Properties Ltd [2004] 2 P & CR 31. There is no doubt that that tough approach has had an effect in practice. The courts have not given the same deterrent effect to LRA 2002, s 77: see, e.g., Fitzroy Development Limited v Fitzrovia Properties Limited [2011] EWHC 1849 (Ch) at [144], Morgan J. Had they done what the LC and LR had intended, I suspect that many of the tactical registrations of unilateral notices would not have been made. While the CP alludes to this at para 9.36, I do not see anything in the CP that proposes any sharpening up of LRA 2002, s 77. I would respectfully suggest that it should. Perhaps the LC might consider a re-wording of s 77 that would enhance its deterrent effect. There might, for example, be a presumption by which, if an objection was not upheld by the FTT, it was presumed to have been made without reasonable cause unless the contrary can be shown by the objector.

Para 9.50: The objectives that are set out here are very much in line with the original objectives that lay behind unilateral notices. The problem with unilateral notices as they stand is that they do not meet the concerns that are set out at para 9.50(4). I do not think that many people (if any) would attempt to defend the present situation. There must be clear and quick procedures for getting rid of unilateral notices that should not have been entered in the register.

Para 9.109: I think that it is worth exploring whether there is some intermediate point between the beneficiary of a notice (1) having to show the validity of the interest and (2) merely having to show that the objection is not groundless. The “real prospect of success” test, which is employed, for example, in CPR 52.3, and is mentioned in footnote 93, is one possible test, but it may not be the only one. The issue is whether the beneficiary of a notice has an interest that justifies the entry of that notice. What should be required therefore is evidence that the beneficiary does have an interest and which thereby shows the basis for the beneficiary’s claim. It should be evidence that satisfies the registrar that there is a genuine issue to be determined between the parties. There will have been no such evidence before the registrar when the unilateral notice was entered. This matter is something that a registrar should be able to decide, as he or she sees applications to register interests every day. This is the background to my response set out below at paras 62 – 63.

1.14 The Berkeley Group said:

> I welcome the proposal that the burden of proof of showing that the interest is valid should be shifted to the person with the benefit of the notice. One of the main advantages for us and our buyers is that the details of the terms of the agreement protected by the unilateral notice remain confidential. Therefore, any evidence provided to support an application to prevent cancellation should remain also confidential. It is and should not be subject to the general rule that all information available to the Registry is publicly available. In many instances, registered proprietors do not object to the noting of a unilateral notice because of these commercial sensitivities. If this was removed buyer's protections would be diluted or possibly could lead to a greater use of restrictions. Also, I am concerned that EIDs are in the Registry's discretion and might not be observed contractually. With Privatisation on the horizon, this is of particular concern for users of the Register.
>
> As discussed, I think it would be helpful where an unilateral notice protects, for example, an estate contract that when the dealing, which is the subject matter of the contract completes, for example, the registration of the apartment lease, the application form includes a section which prompts confirmation that the earlier notice can be removed on completion of the registration. Simple operational measures such as this could immediately reduce the Registry's workload and address the issue of outdated notices. This issue is acute where the benefit of the contract is assigned before completion of the sale.
>
> I believe the proposed timetable for removal of a notice outlined on page 180 in tabular form is too long. In effect it could be over 3 months, and inevitably the beneficiary of the notice will apply for and obtain a further extension of time. As an application should not be made unless there is reasonable cause, the beneficiary should have the evidence readily to hand and it should be within the agreement that they are seeking to protect. Therefore, they should be able to respond promptly. As mentioned in para 9.114, when making an application for the registration of a unilateral notice, a warning notice could be set out which reminds the applicant of the need to produce such evidence within the stipulated timetable.

Manorial rights and chancel repair liability

1.15 A number of consultees noted the discussion of chancel repair liability and manorial rights in Chapter 9 and provided general discussion on these issues, although outside the scope of the Consultation Paper.

1.16 Pinsent Masons LLP said:

> In relation to chancel repair liability, however, we consider that issues arise not from any ambiguity as to the legal status of chancel repair liability as a former overriding interest itself, but rather from the perception of the liability as a result of Land Registry's practice of continuing to register notices (for the reasons outlined in paragraphs 8.24 to 8.41 of the consultation).

1.17 Christopher Jessel said:

> Replacing unilateral notices while protecting manorial rights

The evidence to the Justice Committee indicated public dissatisfaction with unilateral notices as the means of protecting manorial rights. In order to meet the Committee's concerns it should be possible to secure (first) that the extent of the rights is defined as clearly as possible and (second) that successive owners of the protected rights are identified easily. The evidence to the Committee on behalf of landowners suggested that claimants to manorial rights should be required to prove their case (see paras 25-26 and 29 of the Report). From the point of view of lords, as some of these rights may be valuable and may in future be the subject of dealings, it is worth providing a mechanism for them to be substantively registered with their own titles.

Although manorial rights are not defined in the LRA 2002 (nor in the LRA 1862 or the LRA 1925), your view as expressed in Land Registration for the 21st Century: A Consultative Document LC 271 para 5.84 and Land Registration for the 21st Century: A Conveyancing Revolution LC 271 para 8.41 and which is shared by the land registry in Practice guide 22: manors para 4.1 is that the current meaning refers to the rights in LPA 1922 Sch. 12 paras (5) (minerals, sporting and markets) and (6) (certain liabilities). These rights relate to enfranchised copyhold land. Having regard to the construction placed by the courts on the similar expression "seigniorial rights" in cases about inclosure acts I would agree. However this is not certain and it is open to a court to construe the expression to include other rights of a lord which pass with a manor including rights under inclosure acts and covenants (Re Mansfield District Council's Application (1977) 33 P. & C.R. 141). The paras (5) and (6) rights, and my suggestions in relation to the way they impact on the register of title, are as follows:

1. I have discussed manorial minerals in my reply to 22.3 above. I suggest there that the lord's rights should be registrable as a freehold with its own title and that where they can be identified registration should be compulsory.

2. Manorial sporting rights are in general much less important and indeed now hardly exist. The main purpose of the preservation of sporting rights in LPA 1922 Sch. 12 para (5) and its predecessors was to protect rights of free warren. They often existed over copyhold land (Morris v Dimes (1834) 1 Ad & E 654, 110 ER 1357; Carnarvon v Villebois (1844) 13 M. & W. 313; 153 E.R. 130) but they were abolished on your recommendation by the Wild Creatures and Forest Laws Act 1971. Although your report (Law Com. No. 28 App 2 para.7) observed that in a few cases "warren might sometimes be claimed in the land of another to the exclusion of the owner" the 1971 Act does not contain any protection for such claimants and accordingly their rights are now extinct. In a few cases where the former franchisee has continued sporting over the land a prescriptive profit may have come into existence.

Rights of entry on copyhold land for sporting under custom are rare. In Pickering v Noyes (1825) 4 B. & C. 639; 107 E.R. 1198, Bayley J said "We all know that a very mistaken notion long prevailed that the lord of a manor had a right to go not only over his own lands, but over the lands of others within his manor." Likewise in Bruce v Helliwell (1860) 5 Hurlstone and Norman 609; 157 E.R. 1323 Martin B. said "In the West Riding of Yorkshire an idea prevails that lords of manors have a right and liberty of hawking, hunting, coursing, fishing and fowling, analogous to that of free warren or free chase. But that notion is erroneous. They have no such right."

In a few cases a lord may have claimed a right by special custom to enter copyhold land to hunt and hawk: see the material quoted in Hutchinson v Morritt (1839) 3 Y. & C. Ex. 547; 160 E.R. 818 and Doe dem. Watt v Morris (1835) 2 Bingham New Cases 189; 132 E.R. 75 although those cases concerned other issues and the incidental reference to hunting and hawking may have been to free warren. As such a customary right must have existed in theory since 1189 it could not include the use of firearms (see Moore v The Earl of Plymouth (1820) 7 Taunt. 614, 129 E.R. 245 although that concerned an express right). Although it may be arguable in accordance with the interpretation of Fitch v Rawling (1795) 2 Hy Bl 394, 126 ER 614 in Mercer v. Denne [1904] 2 Ch. 534 at 553 per Farwell J that the right is exercisable by such means as should be lawful from time to time I do not consider that a modern court would interpret such a rare custom in that way (notwithstanding Gunnerside Estates Limited v Milner [2010] EWLandRA 2009 1331).

In my evidence to the Justice Committee I suggested that by general custom, even though the lord had no right to enter copyhold land, there might have been a right to prevent a copyholder (and therefore a modern freeholder) killing wild animals in a similar way to the mutual veto in respect of minerals (and formerly timber). In my response to a query about your wildlife consultation (email of 20 June 2014) I suggested this might explain the Game Act 1831 s. 35. Having considered Sowerby v Smith (1873-74) L.R. 9 C.P. 524 per Cockburn CJ at 531, I am now doubtful if such a right existed as I have seen no reference to it in cases or textbooks.

I suggest therefore that in the rare instances where a lord can establish a subsisting manorial right to hunt and hawk over former copyhold land it should in future take effect as a profit a prendre. Where a notice has been lodged under the transitional provisions of the LRA 2002 the lord who claims a right to enter and exercise sporting rights should be required to demonstrate and register it as a profit within a ten year period and if that is not done it should lapse. As with minerals, where such a claimed right has been protected by unilateral notice the lord should have discovered evidence of it before lodging the notice. The lord will not have needed to do so where there can be reliance on the land registry having made a note on the proprietorship register on first registration under LRR 2003 r. 35 or its predecessor. In that case either the lord is aware of the right (and ideally should have exercised it in the recent past) and should be able to take steps to prove title to register the profit or, if the lord is not aware of it (and has not exercised it), the right may not be important enough to merit survival.

Lords may also have sporting rights under inclosure acts (there are numerous reported cases on this) and under agreed enfranchisements but these raise different issues. Assuming your view of the meaning of manorial rights is correct these are not included in the expression and could not have been the subject of a notice under LRA 2002 s. 117. They are profits and registrable as such.

3. Market and fairs are franchises and as such can be registered with their own title under the LRA 2002 s. 3. It is unclear why the draftsman of the LPA 1922 (who was repeating wording in the Copyhold Acts) thought that the effect

of enfranchisement would otherwise prejudice these rights but it may have been considered that on enfranchisement the former copyholder would in the absence of express provision acquire the freehold free of the restriction against holding a rival market within the franchise area.

4. LPA 1922 Sch. 12 para (6) preserves certain liabilities. Similar ones (for instance for repair of sea walls) not necessarily associated with manors were considered by you in Law Com 271 para 8.45 and like manorial rights they lost their overriding status after 10 years. There was provision for some protection by way of land charge under what was the Land Charges Registration and Searches Act 1888, now a land charge of Class A under the LCA 1972. It may be possible to discover if there are any current registrations. I have no experience of para (6) liabilities and I expect they are rare.

I suggest therefore that

a. Where a lord has registered a notice under LRA 2002 s.117 (or as you point out subsequently) then, as suggested in my reply to 22.3 above, there should be another period of say 10 years for the lord to prove title to mineral rights and register them.

b. In the rare cases where a lord can prove the existence of a special custom to hunt and hawk over copyhold land that should also be registrable within 10 years as a profit or be lost. This would be analogous to the extinction of rights of free warren under the 1971 Act.

c. I do not consider any provision is needed to protect markets and fairs. However if there is a good reason for LPA 1922 Sch. 12 para (5) to have referred to them then an affecting franchise should be registered and so bind the estate.

d. If there are any para (6) liabilities then lords are likely to know about them so they also can be specifically mentioned on the register. Where such rights benefit lords they will presumably have protected any subsisting rights under the transitional provisions. The wording of para (6) extends the benefit to “any land within a manor” and therefore in theory one copyhold tenant (or indeed manorial freehold tenant) might have had a right against another tenant. While it is unlikely that a successor to a manorial tenant would have registered a caution or notice before 13 October 2013, such rights might be covered by a LRR 2003 r. 35 entry. It seems unlikely that they have any continuing practical importance.

e. Accordingly once the transitional period has passed all unilateral notices and cautions to protect manorial rights can be removed. It follows that the reference to any mineral or sporting rights which the lord can substantiate will be governed by the general rules about the protection of mineral freeholds or mineral profits and about profits of sporting.

f. Although not relevant to overriding interests, it may also be necessary to consider the situation where an entry has been made on the proprietorship register under LRR 2002 r.35 or its predecessor. I suggest that if the person

entitled to the benefit of such an entry (usually the lord of the manor) is not known then the right may be of little value.

g. It should be expressly enacted that ”manorial rights” and rights in former copyhold land means those in LPA 1922 Sch. 12 paras (5) and (6).

h. I would also comment on para 9.129. I appreciate the reasoning. However if it is established that manorial mineral rights or sporting rights exist either by acceptance by the proprietor or by the production of evidence, it would seem that the effect is similar to a right having been the subject of an exception. The old theory, to be found in many cases, was that copyhold land originated in a grant by the lord before 1189 and the rights of the lord derived from exceptions out of that grant. Although that is now recognised as historically incorrect (see *Newcastle under Lyme BC v Wolstanton Ltd* [1940] A.C. 860 at 871) I can see that it is illogical for some accepted manorial rights to be protected on the proprietorship register and others on the charges register as the way the rights can be exercised in practice is the same. The point was made to the Justice Committee that the charges register is not a suitable place for this type of entry. Where such rights continue to enjoy priority it is arguable that they should be treated in the same way as if they had arisen by exception. Alternatively, as there is little practical distinction between third party rights arising by exception and those by grant, it may be possible to assimilate the way all such rights are treated on the register.

CHAPTER 10

21.45 Robert Brialey responded after closure of the consultation period. As a response he directed the Law Commission to certain parts of an essay he had written addressing the difficulties of the use of restrictions (and positive and restrictive covenants) within land registration. As he did not address issues specific to the consultation the relevant part of the essay is reproduced here:

> One of the founding principles of the land registration system was that it should provide a mirror of the title without the need to consider documentation outside the same. There are however matters excepted from the effect of registration, which are known as overriding interests and are listed in Schedules 1 and 3 of the Land Registration Act 2002. There are also other matters not included in the registration system which include the benefit of restrictive covenants which are not noted on the covenantees title and the benefit and burden of positive covenants which are not noted on either the covenantees or the covenantors title.
>
> This means that neither the covenantee nor the covenantor are able to ascertain from a registered title the extent of the land having the benefit of a covenant and therefore:
>
> 1. a covenantee may be unaware that the land has the benefit of covenants.
>
> 2. a covenantor would be unable to ascertain the extent of the land having the benefit of a covenant which is a fundamental requirement in connection with any proposed modification or discharge.

3. a covenantor may be unaware that the land is subject to positive covenants.

A covenantor who enters into positive covenants may be unaware of the fact that a note of the burden is not entered on the register and an indemnity covenant may therefore be inadvertently overlooked on a subsequent disposal of the property. This is specifically relevant in the system of electronic or dematerialised conveyancing. The covenantor may therefore find himself in the invidious position of remaining responsible for the performance of the covenants if the property was not sold subject to the covenants and he did not obtain an indemnity covenant from the buyer to observe and perform the covenants notwithstanding that he no longer owns the property.

The burden of positive covenants are not noted on the covenantors title because "as a general rule only the covenantor and his estate can be rendered liable for breach of positive covenants. Consequently the land registration system does not require that their existence should be revealed on the register. To assist practitioners in their task of deciding upon the necessity for indemnity covenants, the Registrar has, as a special concession, permitted a limited reference to these covenants on the register." [Registered Land Practice Note 0.1] "In the case of positive covenants (including express covenants of indemnity) created after first registration, a note is made in the proprietorship register to the effect that the transfer contains a purchaser's personal covenant. The covenants themselves are set out verbatim on a separate sheet entitled "Personal Covenants". This is bound up in the land certificate but does not form part of the register of title. When a subsequent transfer includes a further purchaser's indemnity covenant, a copy is added to the Personal Covenants sheet. No reference is made in the register of the existence of positive covenants created prior to first registration." (Thompson, M. 1996 Barnsley's Conveyancing Law and Practice Butterworths London p 497)

The following issues arise from the above:

1. the most significant limitation or defect is that it only applies to positive covenants created after first registration. This therefore means that positive covenants created before or on first registration are not noted on the register.

2. in order to ascertain whether positive covenants were created before or on first registration it is therefore necessary to investigate title documentation before or leading to first registration. This defeats the whole purpose of land registration.

3. the transfer leading to first registration is retained by the Land Registry and unless a certified or duplicate copy is retained with the title deeds the covenantors solicitors may be unaware of the existence of the positive covenants by the covenantor and the need for an indemnity covenant on the first sale of the property after first registration.

The Land Registrar may remove from the registered title:

1. restrictive covenants which were not correctly registered as a land charge before first registration and entry on the register of an unenforceable land charge will not revive it (Supra p 498)

2. positive covenants if an indemnity covenant is not given on a subsequent disposition

The whole basis of the Land Registry's contention that positive covenants should not be entered on the register is because only the covenantor is liable for a breach is considered to be very questionable. The same principle, in effect, applies to restrictive covenants and "the covenantors continuing liability for breach of covenant renders it essential for a vendor to obtain an indemnity covenant from the purchaser whenever he is (i) the original covenantor who will remain liable on the covenants after the conveyance or (ii) a successor in title who entered into an effective indemnity covenant when he acquired the land. The need is the same whether the covenants are negative or positive ..." (Supra p 575). The same contention applies to both positive and restrictive covenants and they should therefore both be dealt with on a similar basis. If there is to be a differential, it is considered that positive rather than restrictive covenants should be noted on the register on first registration rather than vice versa as positive covenants involve the expenditure of money. This is, indeed, the main reason why positive covenants do not bind successors in title at law or in equity. It is a total inconsistency to say that positive covenants do not bind successors in title because they involve the expenditure of money but that if they are imposed on a basis whereby they may bind successors in title they will not be entered on the register if they were imposed before or on first registration. It is the old adage that you can't have it both ways.

The following is by way of an example of the complexity and difficulty of the law concerning the registration of covenants in practice. The Land "Registrar does not inquire whether a restrictive covenant is still enforceable" on first registration and "he can be requested to omit from the register any restrictive covenant that is void for non-registration as a land charge. This request must be supported by an official certificate of search against the correct name of the covenantor, which does not disclose the registration of the restriction as a land charge." (Supra p 498) "Once a land charge becomes void against a purchaser for non-registration, it remains unenforceable against his successors in title whether or not for value." "A subsequent registration may nevertheless be effective against a purchaser of a different estate." If a vendor fails to register the covenants pursuant to a priority notice and the buyer simultaneously with completion of the purchase enters into a mortgage the mortgagee will not be bound by the covenants if the property is sold by the mortgagee in exercise of its statutory power of sale. A subsequent purchaser from the buyer will be bound provided that the covenants are registered before completion of the sale to him (Barnsley. D G 1973 Conveyancing Law and Practice Butterworths London p 350).

So far as the registration of a priority notice is concerned, the vendor "must lodge his priority notice at the Land Charges Registry at least fifteen working days before completion. After completion an application for substantive registration pursuant to the notice must be registered within thirty working days after the notice was entered on the register. Registration then takes effect as if it had been made at the time when the covenants were created, i.e. on completion of the" conveyance by the vendor to

the purchaser. “Since this precedes momentarily the” mortgage by the buyer with the mortgagee, “the covenants are deemed to be registered before completion of the mortgage. The existence of the priority notice will be revealed on any official search certificate made by the mortgagee, so he has notice of the intended registration.” (Supra p 351) However, certificates of the results of searches will only be endorsed on the basis that the covenants are expressed to be registered pursuant to a priority notice and there is therefore no guarantee by the Land Charges Registry that the covenants have been correctly registered pursuant to a priority notice and that the strict time limit requirements have actually been complied with. This would therefore, in effect, mean that a buyer from a prospective mortgagee should ascertain whether any relevant covenants were registered pursuant to a priority notice and then whether the requirements for a priority notice were complied with.

With regard to the above, the question would then arise of whether the Land Registrar would cancel the registration of a covenant not correctly registered against a mortgagee exercising a power of sale or whether it would have to be dealt with by the Lands Chamber.

Covenants may be void against a mortgagee selling under a power of sale if they were not registered pursuant to a priority notice. It may therefore be appropriate for a buyer’s solicitor to ascertain whether the buyer requires him to investigate the same and advise the buyer accordingly. To do so would increase the costs payable by the client and not to do so would be a disservice to the legal conveyancing process. If the question was not even contemplated it may be the subject of a compensation claim. Simplification and unification is required in respect of both the above doctrines and the rules regarding registration. The existing land charge and Land Registry rules will however continue to apply to land obligations as detailed above.

“Section 14(3) of the” Land Charges “Act” 1972 “renders it unnecessary to register any land charge created by a conveyance or other instrument which leads to compulsory first registration of title under section 123 of the Land Registration Act 1925. Such charges will be entered on the register of title on first registration” (supra p 392). “There is, therefore, no need to register such restrictions as land charges to ensure their continuing enforceability” (Supra p 498).

Following the above and the fact that the title to all land in England is now compulsory registerable at H M Land Registry cases such as *Barrett v Hilton Developments Ltd* ([1975] Ch 237) concerning the registration of covenants and priority notices in the Land Charges Register should no longer arise. In fact, if the land the subject of the case was compulsorily registerable at such time, the writer would question why the case arose. It would merely appear to be necessary for each sale and sub sale to be completed in the relevant order as appropriate and submitted to the Land Registry for registration within the priority period of the buyers search at the registry (Adams J.E 1989 Sub-sales, land charge registrations and new restrictive covenants Conveyancer and Property Lawyer Part 1 pp 232-233 and Part 2 pp 317-320).

A similar principle applies to registered land. A prospective mortgagee should make a search at the Land Registry before completion of the sale/mortgage to make sure that priority has not been given to any other prospective mortgagee as, if so, the

second mortgagees mortgage will take priority over the first mortgagees mortgage on completion of the buyers registration. It is also then necessary for the mortgagee to ensure that the substantive application for registration of the transfer and mortgage is submitted to and received by the Land Registry before the expiration of the priority period of the mortgagees search. The mortgagee cannot rely on the result of the buyers search as they are in respect of differing estates and interests. If the substantive registration is not completed within the priority period, there was and maybe still is a procedure to extend the priority period of the result of the search. It was not merely a procedure of submitting a new search as this would reveal the priority of the second mortgage and the first mortgage would therefore again be subject to and lose priority to the second mortgage.

The above should be read in conjunction with the procedure regarding the imposition of overage/clawback provisions as detailed in the comments concerning touch and concern detailed earlier in this thesis. This clearly shows the nature and complexity of the registration system which has been allowed to develop for covenants. Whilst it may have been practical and workable when the ownership of land was limited to a minority of people, it is clearly not applicable or fit for purpose in the twenty first century. It also shows that there may be a considerable number of covenants which may be registered at the Land Charges Registry and the Land Registry which may be unenforceable against the owner of the land but which may be considered or construed by the parties as enforceable.

The above deals with the question regarding the non-registration of positive covenants on first registration. The second major deficiency in the land registration system regarding covenants is the fact that the benefit of covenants is not noted on the covenantees title. **It is stated in the Consultation "that there is no requirement or power for Land Registry to enter the benefit of an equitable interest such as a restrictive covenant on the register of title to the dominant land" (**Law Commission (2008) Easements, Covenants and Profits `a Prendre Consultation Paper (Law Com No 186) para 7.36).

Regard should however be had to section 40(3) of the Land Registration Act 1925 which provides: "Entries shall be made on the register in the prescribed manner of all.....obligations and reservations acquired by him for the benefit of the registered estate."

From a draft of the Land Registration Rules 1925, rule 3(2)(c) provides that "The Property Register shall contain" "such notes as have to be entered relating" " to easements, rights, privileges, conditions and covenants for the benefit of the land, and other like matters." Rule 3(2)(c) was superseded by Rule 5(b)(ii) of the Land Registration Rules 2003 which was amended by the Land Registration (Amendment) Rules 2008 which came into force on the 10th November 2008 and amended Rule 5(b)(ii) to refer to the following "easements, rights and privileges benefiting the registered estate and other similar matters." The reference to "conditions and covenants" has accordingly been omitted.

Rule 3(2)(c) was only superseded and replaced in 2003 but even, up to that time, the Land Registry had not, as a matter of practice, entered the benefit of covenants on the covenantees title. It is therefore considered that there was an

inconsistency between the Land Registration Act and Rules 1925 and the Land Registry's practice Thompson, M.P. (1996) Barnsley's Conveyancing Law and Practice, Butterworths, London pp 499 and 500 which also refers to the following in footnote 1: (1986) Ruoff and Roper, Registered Conveyancing 35-23 where neither s 40(3) or rule 3(2)(c) appear to have been considered concerning this matter; (1939) Brickdale and Stewart –Wallace, The Land Registration Act 1925 p 328; Whether the Land Registry's restrictive policy can still be justified after Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 All ER 371 CA?; Conveyancing Committee Report 11, 57, para 4.56).

There will also be a difference between the 2008 rules whereby the Land Registry do not enter the benefit of covenants on the covenantees title and the proposal concerning Land Obligations whereby the benefit of covenants would be entered on the covenantees title.

The fact that reference to covenants has now been deleted from the rules would appear to confirm that it was applicable and should have been acted on by the Registrar. It is somewhat surprising to note that a requirement to enter the benefit of covenants on the register was imposed in 1925, notwithstanding the fact that it was not acted on, and deleted in 2008.

Notwithstanding the provisions of the 1925 Act and rule, if there was any doubt concerning the same, it is considered that a requirement to note the benefit of covenants on registered land titles could have been included in one of the many property law enactments since 1925 notwithstanding that it is an equitable interest. It could merely have been enacted that the benefit of the equitable interest of restrictive covenants should be noted on the title to land at H.M. Land Registry.

In addition to the above, the Consultation (supra para 7) states that a further problem in identifying who holds the benefit of restrictive covenants is that "there is no requirement that the instrument creating the covenant should describe the benefited land with sufficient clarity to enable it to be identified without extrinsic evidence."

It is considered that it is the invariable practise when drafting documents to identify the land having the benefit of a covenant. Whilst extrinsic evidence is admissible to identify the same it is considered to be the exception rather than the rule. If the Land Registry is prepared to note the benefit of covenants on the dominant owners title if it is precisely identified, vague descriptions which require the admission of extrinsic evidence where the dominant owners title is registered are likely to disappear. The dominant owner's draftsperson will describe the dominant owners land and if it is not drafted with sufficient certainty to enable the Land Registry to precisely identify it and note it on the title to such land, any problems concerning the same must lie with the dominant owner. There must, in any event, be an element of certainty about the description of the dominant land as the imposition of the covenant may otherwise be void for uncertainty.

It can be seen that the existing law and procedure regarding the registration of covenants is extremely complicated and this is in addition to the basic requirement of drafting covenants to suit the circumstances and which are specific and certain in order that they cannot be avoided by different or other

interpretation. The last thing that is therefore needed is the introduction of a further set of rules and procedure regarding land obligations. As is said on a number of occasions in this thesis, what is required is for the law to be simplified, unified and brought up to date without being built around fixed principles such as touch and concern.

It is considered that the law should be amended to provide:

1. for the compulsory registration of title to all land within 30 years.

This is notwithstanding the fact that some landowners such as government departments, local authorities, the church and the railways own large areas of unregistered land as such time frame would be long enough to enable them to deal with the same.

2. on submission of an application to the Land Registry for first registration or a dealing of title to a property, the buyer's solicitor or other professional adviser should confirm whether or not the:

i. land has the benefit of covenants and, if so, whether the

ii. covenantee still requires the benefit of the covenants or agrees to their discharge

This would be on a similar basis to the existing requirement on an application for first registration when confirmation must be given whether any land charge entries, including class D (ii) restrictive covenants, relate to or affect the land and notice of them is then entered on the register.

3. If the property does have the benefit of covenants, notice of the benefit should be entered on the covenantees title and details of the covenantees title should be entered on the covenantors title and whether or not the covenantee agrees their discharge.

This would then eventually:

i. avoid the need for the continuous investigation on every disposition of property of whether covenants are relevant and enforceable

ii. provide for the cross reference of benefit and burden and enable the register to mirror the title which is the purpose and intention of land registration

iii. reduce costs on subsequent transactions involving the property by the avoidance of repetition of costs investigating the same thing.

4. positive covenants should be noted on the covenantors title

The nature and extent of the benefitted and burdened estates would then be developed by the normal conveyancing process over a period of time and

whether or not the covenantee agrees to their discharge would be ascertained. A covenantors solicitor may ascertain the extent of the dominant estate and if and when entry is made that the covenantees of the dominant estate no longer require the benefit of the covenant, he may apply to the Lands Chamber for automatic discharge.

CHAPTER 13

1.18 In addition to answering the specific consultation questions posed in Chapter 13 of the Consultation Paper, some consultees provided general comments on points raised in the chapter or on further issues concerning the law of rectification. Insofar as these comments have not already been summarised in the Analysis of Responses they are reprinted below.

1.19 Martin Wood provided comments on the discussion of rectification at the beginning of Chapter 13. The comments are linked to particular paragraphs:

> 13.15(2): Finality. I would question why there must come this point. At present that is not the case. Such finality is not an imperative, it should not be pursued as a purist objective for its own sake. It is a choice depending on how one decides to model the state guarantee. The overriding approach to doing so is to ask: what model will produce the most just outcome in the greatest number of cases?
>
> 13.18: I have, of course, spent a good deal of time over the years musing about the various approaches to guaranteeing title and, importantly, applying the English approach in practice in a large number of diverse cases. My view, in the light of this long and extensive experience, is that the English approach is more apt to produce a fair, just and acceptable result than the other approaches. Of course, no approach will entirely satisfy everyone all of the time because of the situation one finds oneself in: that is, to take the most straightforward example (as in paragraph 13.20), there are two claimants to the same piece of land and there is no miracle by which both of them can have it. One will get the land, the other will have to be satisfied with money. That is the simple reality and it is as well to keep this in mind when considering the subjects of rectification and indemnity (which should be seen together as an overall scheme), including indefeasibility.
>
> 13.29: With respect, the question posed – is the registration of C a mistake? – is not the correct one. The right question is: will rectification correct a mistake? Put this way, the answer is obviously, yes: it will correct the registration of B (even if B is no longer on the register). This was certainly the position under the 1925 Act, and I agree that the answer is the same under the 2002 Act.
>
> 13.30: Agreed, agreed and agreed again! The overriding merits of the English approach are (1) the flexibility and (2) the pre-eminence given to the party in possession, which reduces the flexibility in a way that recognises the reality of the situation on the ground. Remember the unavoidable truth – land for one, money for the other – and one readily reaches the conclusion that the general approach of not disturbing the established possession on the ground and giving the money to the party not in possession is the one that produces the fairest approach in the most cases. Of course, "A may be out of possession for all manner of deserving reasons"; but that

does not mean that the subsisting possession of B is any the less deserving, and one still comes down to the two choices:

> (1) Turn B out of his home, indemnify him and restore the land to A;
>
> (2) Leave B in his home, indemnify A.

The choice is a stark one, and in the absence of compelling reasons for doing otherwise, there is no good reason for favouring (1) over (2).

Of course, other situations are more complex, but the English scheme of constrained flexibility really is an elegant and successful arrangement that in practice has worked well in the wide variety of cases that have presented themselves. One should be very cautious about disturbing it. I cannot see that any of the alternatives discussed – Torrens or Scotland - offer a superior solution.

13.40: I see no reason at all to dilute the importance given to possession in the current scheme. As far as I can see it is based on the apparently instinctive, purist notion that at some point there must be finality; a notion that I do not agree with.

13.46 to 13.59: I agree with the analysis of the *Malory* 1 argument.

13.60: This was always taken to be the position under the 1925 Act.

13.73: Agreed. If one asks the right question – will rectification correct a mistake? (paragraph 37 above) - this conclusion is easily reached.

13.74: All true, but I don't see that the fact that the title may have changed hands a number of times affects the merits of the arguments.

1.20 Martin Wood provided some additional comments on double registration and the decision in *Parshall v Hackney*:[1]

13.129: Double registration may not necessarily be the result of a double conveyance. It may be an HM Land Registry mapping error.

13.132: *Parshall v Hackney* is, with respect, not a good example on which to found a discussion about double registration because when the matter came before the court there was no double registration. The case was concerned with whether the proprietor in whose title the land was wrongly registered could claim in adverse possession.

13.135: I agree that the outcome of *Parshall v Hackney* is unsatisfactory, but for rather different reasons than those set out here. I do not agree with the court's conclusions about the availability of a claim to adverse possession. But setting aside that point, why was the proprietor of no. 31 not protected against rectification as a proprietor in possession? The judgement is sparse on this point, saying only,

> "The points forcefully advanced by Mr Rodger QC against rectification could not disguise the plain unvarnished fact that his client is seeking to take the

[1] [2013] EWCA Civ 240, [2013] Ch 568.

benefit of a mistake by HM Land Registry, which had occurred through no fault on the appellants' side and which it would be unjust not to correct."

This is a non-reason in the context of registration. A registered proprietor in possession always gets the benefit of a mistake in the register where the title includes land it shouldn't have, and usually there will be no fault on the true owner's side. There must be more than that to render it unjust not to rectify.

But let us change the facts of the case a little and assume that at the time the matter came before the court there was still the double registration. Clearly the double registration cannot remain, so one of the titles must be rectified. So which? There is no mistake in the title to no. 29; the land is correctly included in that title. There is therefore no case for removing the land from no. 29. So the title to no. 31, which contains the mistake, must be rectified, even if the proprietor of 31 is in possession – unless of course the court allows the adverse possession claim. This does rather bring out the inconvenience of the court's conclusion on the adverse possession point.

13.144: But how can there be rectification against A when there is no "mistake" in A's title?

1.21 The Society of Legal Scholars provided some general comments on (and expressed support for) parts of Chapter 13.

In many respects the CP accepts the status quo, and with many of these we concur.

The CP accepts the approach taken in *Knights Construction v Roberto Mac* and *Gold Harp v McLeod* that rectification is available against successors to the mistaken title. We support this view.

The CP accepts the approach taken in *Swift 1st v Chief Land Registrar* that, upon the mistaken registration of a new proprietor, the old proprietor does not retain a beneficial interest. We support this view.

The CP accepts the approach taken in *Parshall v Hackney* that in cases of conflicting double registrations the dispute should be resolved through rectification and not adverse possession. We tentatively support this view, but we refer to the discussion below (paras 112-126) where we advert to the need to decide the basis for adverse possession.

The CP preserves the judicial discretion in rectification proceedings through the tests of 'exceptional circumstances' and 'unjust not to rectify'. We support this view.

The CP accepts the approach taken in *Gold Harp v McLeod* that rectification may operate 'retrospectively' in the sense that a de-registered derivative interest may be reinstated with priority over an intervening interest acquired for valuable consideration on the faith of a clear register. We support this view.

1.22 The Society of Legal Scholars also provided some comments about the issues of fraud, double registration and the alteration of the day list, which it said had not been addressed in the Consultation Paper:

FRAUD

There is a provision relating to indemnity in paragraph 1(2)(b) of schedule 8 which applies only to the special case of forgery. It declares that a person claiming in good faith under a forged disposition is to be regarded as having suffered loss by reason of rectification. But the provision is entirely superfluous. If a title vested by registration is rectified, then there is a genuine loss. There is no point to a provision which deems any loss. The fact that the provision is unnecessary does not provide a particularly strong reason for removing it. But there is a further, strong reason for removing it: it is the source of a danger. It could easily lead a reader to conclude that without the clause there would have been no indemnity. That suggests that registration does not give a state guarantee against defects in the immediate transaction to the proprietor; in other words, it suggests that the system operates deferred indefeasibility rather than immediate indefeasibility. That conclusion would be in conflict with the fundamental policy of the structural reforms that occurred in the transition from the Land Transfer Act 1897 to the Land Registration Act 1925. The whole scheme of modern land registration is based on 'title-by-registration' and any argument that registration does not confer title when the immediate transfer is defective must be nipped in the bud. The fraud provision provides support for that argument. It is unnecessary and it is dangerously misleading. It should be removed.

DOUBLE REGISTRATIONS

In a case of conflicting double registrations, there is currently a power to alter only the entry which is mistaken. However, there may be occasions when the fairer outcome would be to alter that which is not mistaken. A bespoke provision could confer the necessary power. We invite the Law Commission to consider the desirability of this option.

DAY LIST

The court has found that it has power to alter the day list (Franks v Bedward [2012] 1 WLR 2428) under a generic power contained in the Civil Procedure Rules. It may be used to amend the order of transactions in the queue for registration by restoring an application that had been wrongly cancelled against the applicant's wishes. This CPR power can be seen as sharing functional effects with rectification of the register since it may adjust the relative priority of competing registered entitlements. However, it operates outside of the protections built into the rectification scheme. Although it is unlikely to invoked frequently, and although the power is unlikely to be exercised to the prejudice of third parties, we believe it merits action and we invite the Law Commission to consider the desirability of a bespoke provision dealing with alteration of the day list.

1.23 In addition to answering our specific questions, Dr Simon Cooper urged us to introduce a statutory definition of mistake, arguing that it would help resolve many of the problems we addressed in Chapter 13:

The CP considered and rejected the suggestion that a definition of mistake should be included in the Act (paragraph 13.82) and is not consulting on this issue. It was felt that any statutory definition would not be exhaustive, but, at best, likely to replicate

the LRA 1925 insofar as specific instances of mistake would be supplemented with a "catch all" provision.

I agree that any definition should not be drafted as a list of fact-specific circumstances in which the power to rectify would be available. That would be retrograde and unhelpful (although, surprisingly, there are various instances when the CP adopts precisely that approach).

The definition could and should instead be drafted in a way that explains the concept underlying the word and which may then be used to inform all decision making about its application to individual cases. The existing literature points the way to such an approach. It is considered in Ruoff & Roper, Megarry and Wade, and S. Cooper, "Regulating Fallibility in Registered Land Titles" (2013) 72 Cambridge Law Journal 341 and S. Cooper, "Mistake, Omissions, and Responsibility for Registration" Oxford Brookes University School of Law Working Paper (No. 1 of 2015).

Models for defining the concept underlying mistake have been proposed by other law commissions elsewhere (in respect of indemnity) which are suitable for application to the English rectification power: Joint Land Titles Committee, Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada (Edmonton 1990), p. 29; Land Law Review Committee of the Northern Territory Guarantee of Torrens Title in the Northern Territory (Darwin 1990) pp. 3-4.

The failure of the Act to explain the concept embodied in the word 'mistake' is a serious weakness. That is because mistake is crucial as the criterion which defines the eligibility for indemnity. It is vital that those using the register know precisely the circumstances in which the state's financial guarantee is and is not available. Mistake also defines the scope of the power to rectify and is relevant in deciding what types of fraud or carelessness should be penalised in rectification claims, but in those two roles it is not crucial because there is the back up provided by indemnity.

The failure of the Act to define mistake will continue to cause considerable litigation. It leaves many important questions of principle outstanding. Already litigation has been needed to resolve basic issues:

- whether mistake requires some procedural default;

- whether a mistake exists in a title merely because the title is held by a proprietor who is the successor to a proprietor whose entry was undoubtedly mistaken;

- whether mistake is cleared away by the exercise of owner's powers;

- whether mistake is cleared away by the special rule of priority;

- whether an outcome which contravenes the priority rules is a mistake;

- what types of failure to get on the register amount to mistake;

- what role is played by mistake in resolving double registration scenarios;

- whether the reversal of a judgment on appeal makes the register mistaken.

Further issues will require litigation in future:

- whether mistake occurs when an unauthorised entry is made by an electronic conveyancing agent who is deemed by statute to be authorised;

- whether mistake occurs where the registrar upgrades the grade of title in a way that rules out the enforcement of some outstanding interest.

A number of the issues raised in the Law Com consultation paper would not have been required had there been a clear structure for determining mistake:

- whether the priority rules are subject to schedule 4;

- whether a mistake spontaneously occurs in A's registered title by the fact that B becomes registered proprietor of the same land;

- the position of omitted interests at first registration.

All of those issues could be answered using the concepts already put forward in the existing literature mentioned above. It is therefore submitted that mistake should be defined in a way that explains the concept underlying the word and which may then be used to inform all decision making about its application to individual cases.

1.24 Dr Cooper also made suggestions for reforming the grounds and tests for alteration and rectification.

There are several heads of alteration. The Consultation Paper (paragraph 13.5) recognises there is overlap between the heads, mentioning in particular the overlap between 'bringing up to date' and 'correcting a mistake'. The heads of alteration are categorised in the statute according to procedure and factual cues rather than by their concept or substantive effect. In consequence, matters which are conceptually united are distributed amongst different provisions. Furthermore, there exists a significant penumbra of doubt in their terms as they contain hapax legomena that cannot be related to terms existing elsewhere in the legislation. In particular, there remain unresolved questions about the scope of the head of alteration which may represent an omnibus provision for the entry of all rights wherever doing so would not disturb priority. Conceptual clarity is not aided by the fact that the heads of alteration are not mutually exclusive.

The existence of ambiguous and overlapping heads of alteration has had an unfortunate impact on the development of the case law. Where there is no practical significance to the choice of head, disputing parties will not indulge in unnecessary efforts to ensure a particular case is allocated to the right head, leading to an increased risk that less attention will be paid to the forensic interpretation and application of each head. This effect is especially treacherous because of its impact on the interpretation of the correction jurisdiction. A hasty decision about the definition of "mistake" in a correction claim that was relatively uncontroversial because it would not prejudice a registered proprietor could set a precedent that might subsequently

be applied in rectification cases where it would detract from a registered proprietor's guarantee of title.

For example, omission by failure to lodge an application might be inaptly admitted to mistake in a decision under the mistake head when it should have gone to the updating head, and, when later followed in true rectification case, this could prejudice a registered proprietor or require an unjustifiable indemnity payment if refused. Alternatively, an omission by the registry's failure to process an application might be inaptly excluded from the correction head in favour of the updating head, and, when later followed in a rectification case, it would prejudice a rightholder who carefully lodged for entry but will obtain neither rectification nor indemnity. Other omissions, such as overriding interests which involve no mistaken change to the register, might also be wrongly processed through mistake, in which case the danger is that rectification bar might be wrongly applied to resist them. Miscategorisations of this nature can be seen in the case law. The solution is to identify the concepts embodied in the heads and parcel them out amongst redrafted heads which exclusive jurisdiction.

The current language expressing the judicial discretion in rectification proceedings has scope for rationalisation. The 'exceptional circumstances' test and 'unjust not to rectify' tests have certain commonalities. Both are intended to create strong presumptions. The type of factors relied on in the 'exceptional circumstances' test are also applied in the 'unjust not to rectify' test. Unification of the tests is therefore desirable. I address this point in S. Cooper, "Discretion in Property Law: A Study of Judicial Reversal of Registered Title" Oxford Brookes University School of Law Working Paper (No. 2 of 2015).

The 'exceptional circumstances' test is well known in other legal contexts and for that reason might be assumed to be the preferred option. However, I do not support its application here.

> (i) There is a danger that 'exceptional circumstances' test will be understood as an inquiry into whether the circumstances are common or familiar. That is unsatisfactory. The test should focus not on whether the circumstances are of a common type, but on their significance to the parties. The court should be able to displace the usual rule if the consequences are of a common type but happen to have disastrous effect on a party. The new test should not offer that ambiguity.
>
> (ii) Currently, the exercise of discretion takes account not only of the impact that rectification or non-rectification would have on the parties, but also on the history of their dealings, such as their degree of carelessness in failing to take precautionary steps. In any reform to the discretionary tests, assuming this principle is to be carried forward, the language would have to be broad enough to refer not only to future effects but also past dealings. That could be accommodated by reference to 'injustice'.
>
> (iii) Currently, the statutory tests are intended to create strong presumptions that may only be displaced where the circumstances reach a certain level of intensity of injustice. In order to replicate that in a new test, a suitably intensifying epithet should be selected. The use of the word 'manifest' in

describing the New Zealand reforms should be avoided as it is ambiguous in conveying either a level of intensity of injustice or that the injustice is visible from a cursory survey. A better choice would be 'serious'. The unified test should therefore be one which displaces the presumption wherever it would cause 'serious injustice'.

1.25 Nottingham Law School made some general comments about the drafting of schedule 4 to the LRA 2002 and the terminology used in Chapter 13 of our Consultation Paper:

> The 2002 Act places rectification and indemnity in schedules. This seems the wrong place to put central provisions. We feel rectification and indemnity are central aspects of the system of land registration in England and Wales. Indeed, together with the protection given to the rights of occupiers, the generous rectification and indemnity provisions are probably defining characteristics of the Land Registration system in England and Wales.
>
> The Law Commission uses the language of indefeasibility to frame the issues of rectification and indemnity – this seems wrong as the 2002 system is not one based on indefeasibility, because of its provisions concerning rectification and indemnity. Title is defeasible under the English system – the issue is when and how. Hence the centrality of rectification and indemnity for the system, as noted above.

1.26 Nottingham Law School then commented on the general principles we identified as underlying the law of alteration and rectification, arguing that we did not give sufficient consideration to the problems of fraud and bad faith.

> Whilst we welcome the articulating and arguing from objectives and principles (paragraphs 13.12(1) and 13.15 to 13.21) we feel the objectives (principles) identified are not adequate to the task. Specifically, the discouragement of mala fides market participants is not identified as an objective (nor is its corollary the protection of bona fides participants in the market). Rectification and indemnity can either uphold or undermine the honesty of the land market – hence an important objective is to discourage fraud, and encourage practices that support an honest market: not merely respond to the consequences of fraud.
>
> The four objectives or principles identified (paragraphs 13.5) do not reflect the necessary principles required for a full appreciation and development of the registration system. Specifically, the potential prophylactic effects of the system are not noted, and the self-protective "duty of care" is relegated to a minor aspect of principle (4) as a prerequisite for an indemnity.
>
> Always present in the rectification and indemnity provisions have been provisions to incentivise care and good faith conduct in dealings. Both rectification and indemnity are, and have always been, subject to requirements of "lack of fault" – this should be recognised for its central role in rectification and indemnity. It aims to deny remedy both to the dishonest and to those who are careless in their conduct – because the careless allow the dishonest to thrive. Rectification and indemnity threaten to undermine care in the market – as they compensate those who have been duped. Innocent is not the key concept; good faith market participant is the key concept.

One major objective required in a registered system of land title is the prevention of fraud – security of title rests upon an honest land market. Title guarantee is made to serve good faith participants in the land market. The aim is to reduce transaction costs (see paragraph 13.1) by providing State supply of the public good of an honest and reliable land market.

Markets are not automatic generators of honesty, indeed the contrary. Therefore, the system needs a set of bona fide provisions – provisions with the aim of preventing dishonest behaviour being economically advantageous. The ideal is not a super-efficient punishment system that spends resources finding, prosecuting, and punishing malefactors. The ideal is a system that makes fraud so expensive to carry out that it becomes not worthwhile to most potential participants in the market. Residual dishonesty can then be met with civil and criminal sanctions.

Keeping a market honest is expensive. It requires participants to monitor others and to be willing to risk the costs of enforcing the norms of the honest market – potentially to lose profit opportunities and even expend resources on the pursuit and sanctioning of malefactors. These costs are worth paying if the market is honest enough that the benefits of an honest market can be enjoyed.

Thus, a major concern of the system (the law of land registration) is the honesty of the system – the avoidance of fraud (or sharp practice that borders on fraud). This is a public good and will be under-supplied if left to market forces. Therefore, it needs to be an aim of the system. Honesty in transactions is a principled aim of property law, and of land registration (which is a branch of property law).

This aim requires clear articulation and conscious pursuit. As set out in paragraph 13.15, the aim is hidden under (1), (3) and (4). Rectification and indemnity are concerned (inter alia) with the discouragement of fraud and with the redressing of the consequences of fraud. The framing of the Consultation Paper obscures the aim of fraud prevention.

Paragraph 13.17 illustrates the problem posed by not articulating the anti-fraud objective.

Paragraph 13.17 sketches a legal world driven by nostalgia, or tracking of the old common law system. In fact, the law is driven by opposition to fraud or sharp practice. The system of unregistered land title had a central prophylactic mechanism in the doctrine of equity's darling. Also, the doctrine of nemo dat made it essential for purchasers to take care (in a rather less principled manner perhaps). It is these aspects of the old law – its robust measures for fraud prevention – that are necessary in the registered system. However, the law and discourse of registration has not directly or fully articulated these issues.

An assumption of an honest market is easy to make in a legal system that so arduously supported this objective. However, honest markets are achievements, not a default result of market activity. The mechanism and role of rectification and indemnity in supporting an honest market in registered land is vital, and not clearly identified in the Consultation Paper.

1.27 Amy Goymour made a number of general points "which arise from the introduction sections of Chapter 13, but do not relate to any particular Consultation Paper proposals":

> Generally, I found the discussion leading up to paragraph 13.87 rather bold in its assertion that the cases have reached the point where A can recover the land from C, in a scenario concerning ABC. Whilst this is probably the tenor of the caselaw, there are, of course, cases pointing the other way, and which protect C's registered title.
>
> I am not sure that I agree with paragraph 13.53 – that *Malory* has the capacity to generate a random outcome when one compares a case where the trust interest is overreached, with a situation where overreaching does not operate. Whilst the result may look random, the "randomness" is surely caused by the overreaching doctrine, not by the reasoning in *Malory*.
>
> I am not comfortable with the reasoning in footnote 67 (page 259) – which suggests that Swift regards a void disposition as a "disposition" for all purposes. Whilst this may be the tenor of the judgment in *Swift*, *Swift* was a two-party case, to which section 29 was not strictly applicable, and therefore cannot be treated as a definitive authority on the point as to whether a registered void disposition triggers section 29.
>
> Regarding paragraph 13.62, it would be worth considering what happens in an ABC scenario, when the AB disposition is forged, but the BC disposition is not. Here, can C obtain an indemnity via the schedule 8 loss-deeming provision? That would depend on whether C is treated as having taken under a forged disposition. Strictly speaking, C has not taken directly under a forged disposition, but given that the BC disposition flows from the AB disposition, might it be arguable that C has (at least indirectly) taken under the AB forgery?
>
> Paragraph 13.63 assumes that it is "unacceptable" to deny B an indemnity. This might be right, but it is not necessarily so. The Scottish Law Commission reports have examined the extent to which B should be protected by indemnity against problems flowing from a forged disposition (as opposed to problems caused by a mistake in the register which B relied on). There may be good reasons why B should be indemnified – as the Scottish Commission ultimately concluded – but equally there are reasons why the Registry should not pick up the bill for a problem in the documents.
>
> Paragraph 13.63: the discussion in the middle of this paragraph troubles me slightly, to the extent that it assumes that *Swift* was a case concerning overriding interests. Whilst the Court of Appeal admittedly discussed overriding interests, strictly the decision should not have concerned section 29's priority rule: that rule is only engaged where there is a "priority triangle" issue: in other words, where the disponee seeks to take free from a pre-existing right that was binding on the disponor's estate. That was not the case in *Swift*, where it was the disponor itself which sought to claim against the disponee.
>
> Paragraph 13.70: whilst I broadly agree with the general proposal (that rectification be available against C, a chargee) but I wonder whether you might be able to deal with the argument that the following might also achieve a functionally equivalent outcome:

Rectification against C (a chargee) is not allowed, but A receives an indemnity. A can then use the indemnity to pay off – and therefore discharge – C's charge.

Paragraph 13.72: I do not necessarily agree with the reasoning in this section. It is arguably possible to read the indemnity provisions to give A a full indemnity – on the basis that A's loss has been caused by B's mistaken registration (which was in turn the cause of C's registration). It strikes me that it would be wholly desirable to do a full assessment to whether, policy-wise, it would be desirable for C's title to be vulnerable to rectification. The analysis in this section focuses on the technical rules, possibly at the expense of the bigger contextual picture.

Paragraph 13.73: I agree with this broad statement. However, it might be useful if the Law Commission could express a view (if possible) as to which view of the relevant mistake (of the various options considered by Lord Neuberger MR in *Guy*) it takes as being preferable.

Paragraph 13.75: I think "policy" (economic and social contextual concerns) deserves consideration as a relevant fact in formulating reform proposals.

Paragraph 13.80: Although I find Simon Cooper's work generally very compelling, I am not convinced by your use of this extract as a useful summary of the law as to what constitutes a mistake: if section 58 LRA 2002 is taken seriously, then it is arguable that C is entitled to procure registration, having bought from B, the deemed registered proprietor.

Paragraph 13.84: I am not convinced by the reasoning in this paragraph. If one looks across to proprietary estoppel, we see that estoppel equities are capable of being proprietary (see section 116 LRA 2002), even though the remedy is inherently discretionary. The burden of these inchoate equities can not only bind third parties (if protected by a notice, or as an overriding interest, via discoverable occupation) but the benefit can also be transmitted (see the discussion of this point in McFarlane's book on Proprietary Estoppel). As such, although an alteration claim is very fragile, it is not absolutely inconceivable that it might operate in a proprietary fashion.

Paragraph 13.86: I was very pleased to read the discussion in the first half of this paragraph, which makes the point very clearly that overriding interests are only relevant in a three-party setting (reflecting my concern about *Swift*, made above).

1.28 Professor Simon Gardner made some additional comments about various matters raised in Chapter 13:

Paragraph 13.15 refers to the desirability of the law relating to indefeasibility to be "fact-sensitive". It expands by saying that the law needs some "in-built flexibility to ensure that the land should pass to or remain in the ownership of the person who most needs it or values it".

I would suggest that even the expansion, and certainly the original bald reference to "fact-sensitivity" ("yes, but what facts?"), are far too open-textured to be satisfactory here. Read on their own, they would give some adjudicator the power to reallocate persons' property rights (at any rate, as viewed from outside the registration bubble)

in a very impressionistic way. The strictures against remedial constructive trusts in *Re Polly Peck International* would be quite in point.

Later in Chapter 13 (paragraphs 13.100 and following), however, a much more structured set of rules seems to be envisaged. Without commenting on the proposed rules' substance, I would say that this appears a much more appropriate approach. I suggest that in the ensuing report, care is taken over this issue's presentation.

There seem to me to be difficulties with what is said at paragraphs 13.79 to 13.82, regarding the term "mistake" in schedule 4.

Paragraph 13.79 depicts a "mistake" as occurring where the registrar would have made the register up differently had he known the true facts; and it is claimed that this interpretation is both already the law, and substantively satisfactory. Both claims can be questioned.

As to the interpretation's being already the law, the basis given for thinking so is merely secondary opinion. Is there anything better? I haven't checked, but I think there may be a passage in *Baxter v Mannion*. On the other hand, I seem to remember that in *Barclays Bank v Guy*, the court refused to be pinned down to this or any other understanding. So it appears unsafe to regard the interpretation as already the law. If it is nonetheless the desired interpretation, the legislation had better say so.

Then as to the interpretations being desirable.

The first difficulty here is that the Consultation Paper leaves unclear what the interpretation means – just when the registrar would have made the register up differently.

Although the consultation paper doesn't say so, one might expect the answer to be controlled by a set of rules, stated elsewhere in the LRA so not needing to be repeated in a definition of "mistake". That would be fair enough.

But when we come to paragraphs 13.81 to 13.82, a different impression is given: that "mistake" is not to be defined precisely because it is, and ought to be, an open-textured idea.

This would mean that rectification itself is heavily discretionary. But taken with paragraph 13.79, it would imply more than this: if the approach to rectification is heavily discretionary, and that approach tracks the work of the registrar, the work of the registrar must be heavily discretionary too.

As already noted, heavy discretion is unacceptable in this context of fixing people's property rights.

1.29 Professor Julian Farrand QC (Hon) suggested some corrections to the text of Chapter 13 and identified some areas in which our proposals did not go far enough:

In the meantime, may I express gratification in spotting occasional citations of *Emmet & Farrand on Title*? However, I was a little surprised by the one in paragraph13.85:

the text of *Emmet* cited ought not to be read as giving support as opposed to an account of that aspect of the Malory decision.

In contrast, I was disappointed not to find any reference to paragraph 9.009.01 of *Emmet*, where strong support is certainly given to what the Consultation Paper calls the "Malory 1 argument". In that paragraph, what your Consultation Paper states (at para,13.59) as being held in the *Swift 1st* case, is described as follows: "This was unarguably obiter and also erroneous and should not be followed." Compelling reasons, in my opinion, are given in *Emmet* for that description, none of which are considered the Consultation Paper.

This leads to a constructive question: in case *Emmet* is right and the Consultation Paper wrong, would not the Law Commission be well-advised to recommend a clarifying provision?

Another connected question: if A, in the Consultation Paper's two scenarios (paragraph.13.7), will not retain an equitable interest capable of being an overriding interest but nonetheless has a right to seek rectification of the register, which will also not be an overriding interest, will B or C be able to claim indemnity if the register is rectified irrespective of any forgery? This question is prompted by paragraphs 13.157 and 13.158 of the Consultation Paper, in respect of which no proposals appear to be made.

CHAPTER 14

1.30 Some consultees offered additional general comments on themes or issues raised in Chapter 14 of the Consultation Paper. Where these comments have not already been addressed in relation to one of the specific questions in the chapter, they are set out below.

1.31 Martin Wood offered some general comments on the issue of fraud in registered conveyancing:

Before commenting briefly on the proposals in this chapter, I would like to set out my perspective on the issue of fraud particularly, based on my long and extensive, but admittedly now no doubt somewhat out of date, experience.

Let me say at once that there is not the slightest doubt that the key to reducing fraud, in particular forgery, is rigorous checking of identity.

Forgeries in relation to land registration is nothing new. It was of great concern to me in the 1980s and 1990s. I well remember a solicitor saying to me: "Of course, old boy, defrauding one's family members is the national sport." The introduction of the open register heightened my concerns. Before then, most fraud and forgery took place within the family because it was family members who knew who they had to impersonate to effect a fraud. Opening the register meant anyone could find this out for any registered property. The abolition of land and charge certificates increased the risk. Whilst by no means an absolute assurance, they did provide some obstacle to fraud. The creation of this vulnerable landscape made even more vital the need for identity checks as a precaution against fraud.

I have to say that the awareness of and attitude towards these issues back in those days was, shall we say, in need of improvement.

Let's take the case of a house owned jointly by a husband and wife. It was perfectly possible then for H to walk into a solicitors' office, say “my wife and I want to sell our house”, and for the solicitors to carry out the sale never seeing W. Of course, it then turns out that H and W are separated, W knows nothing of the sale, and H has forged her signature on the transfer and run off with all the money.

I well remember one case of that scenario I dealt with where on the day of completion W happened to turn up at the house to find, to her consternation, purchasers moving in. She promptly phoned the solicitors acting on the sale, supposedly for her and H, and said “I know nothing of this, what is going on?” At that point completion had not taken place, yet nevertheless the solicitors went ahead and effected completion. When I queried with them why despite the call from W, their answer was, “well, we couldn't stop then as everyone was in the process of moving”.

When, at a meeting, I put it to the assembled solicitors that since to rent a video from Blockbusters (remember them?), I had to produce ID, it was rather odd that I could instruct solicitors to sell a house owned by myself and my wife and worth hundreds of thousands of pounds without the solicitors insisting on seeing my wife, I was met with the response: “If we insisted on that, all our clients would go down the road to another firm”.

I hope and believe that we have moved on somewhat from that, although I am not up to date with the ID checks that are now normally made. But what is clear to me is that if we are really to get serious about combatting fraud, those who are responsible for conducting conveyancing transactions need to have the responsibility for carrying out sufficient checks to verify the identity of their clients/the parties, and they need to be incentivised to do so. This should normally mean verifying instructions face to face and examining ID to verify that the people in front of them are who they say they are. Cutting corners on this for the sake of business convenience will not do. People need to be incentivised to carry out these checks, and there need to be in place provisions that do this. There should be no top limit to indemnity (Option 1). Unlimited liability is fundamental to the state guarantee. The imposition of a limit would seriously erode the confidence in the security of title provided by registration that underpins the property market. However, the quid pro quo for there being no limit must be that participants in the conveyancing process – parties and professional advisers – must take proper steps to check identity to protect themselves and the public purse. Thus, a claimant who fails to take these steps personally or through their advisers should be debarred from receiving indemnity or have the amount of indemnity reduced appropriately, as at present; and conveyancers who fall short (such as the solicitors in the example I have given above in the sale of the jointly owned property) should be directly liable to the Registry under a statutory duty.

1.32 Glenn Pearce also commented on the issue of fraud in general in two email responses to our Consultation Paper, endorsing the views of Professor Julian Farrand QC (Hon) from the 20 April 2016 release bulletin for update 105 of Emmet & Farrand on Title.

1.33 Oliver Price made a number of comments about the proposals at the beginning of Chapter 14 of the Consultation Paper in general that were not focussed on any

particular question. Many of these comments concerned the insurance implications of our proposals:

> Broadly speaking there are two proposals. First, to cap the indemnity that can be claimed from the Land Registry (paragraph 14.60) and then recommendations that statutory duties are imposed so that conveyancers must declare they can satisfy themselves that documents relation to the application are genuine (14.72), that Deeds and documents are authentic (14.80) and also to verify identity (14.85).
>
> I question whether taken together these proposals require further consultation, not only with the conveyancing industry, but also with the insurance industry.
>
> I have made a request of my firm's own insurers to confirm whether Professional Indemnity policy presently covers these sorts of risks. I am aware that whilst there is certain cover in relation to breaches of statutory duty in relation to client, when it comes to third parties including wither the Land Registry or other third parties in conveyancing transactions, the position is presently unclear. My firm's insurance broker is not able to confirm whether my firm is covered for this sort of risk and further enquiries are being made to that end.
>
> I understand that the Law Commission will consult with the insurance industry presumably to consider the likely cost impact of the proposals as they are made in relation to conveyancing.
>
> Having spoken with conveyancing colleagues at my firm, concerns about the proposals as they are presently drafted are as follows:
>
> Conveyancing Costs
>
> Conveyancing will become more expensive. The risk for any insurance will either be borne through an increase in premiums in the indemnity policy (which will need in some ways to be passed on to clients to reflect those premiums) or by stand alone title risk indemnity policies of the sort currently provided for in respect of other risks e.g. chance of repair of manorial rights. Costs of those sorts of policies are typically several hundreds of pounds. I adopted universally for each conveyance, there will be two costs increases. Firstly, the costs of insurance that I just mentioned and secondly the costs for solicitors adding (suggested by my property partners) between 1 – 2 hours for a typical conveyance. The present market value for routine residential conveyancing might mean that the typical combined costs are increased by about £500.
>
> Delay
>
> The profession as a whole is risk averse and while proposals may be aimed at the less careful end of the profession, it is simply enough to observe that a higher degree of duty will mean solicitors take greater time over the checking of people and documents. There is no way to note how long that might delay transactions but it most certainly will.
>
> Indemnity Costs

Lastly I refer to the evidence refereed to at paragraph 14.34 total of indemnity claims and including those attributed to fraud. I note that in the year 2005-6 the total indemnity paid was £14,100,000 whereas in 2014-15 it was £8,400,000 and that respective costs arising out of fraud were £8,6000,000 and £5,900,000. Whilst there have been fluctuations over the years, there can be little doubt that whilst fraud universally has substantially increased in value, when it comes to indemnity claims, there is no evidence that the overall cost is on the increase. In fact it is slightly reduced.

Indemnity Remedies

The final point I make is about the rights of recall and the availability of effective remedy to victims of fraud. As you will know frauds are often not spotted for many reasons and in some cases long after both the fraudster and the professionals involved have disappeared. Therefore creating statutory duties the focus of which is shifting from Land Registry indemnity to professional insurance risks entails a peril. That is simply that someone claiming long after the events of being a victim of a fraudulent mistake will (if the only remedy is via the professional duties) be left without remedy. Insurers sometimes have solutions for this sort of situation. So it could be possible to design a scheme where the indemnity comes into play should a professional insurance policy not be available i.e. as a secondary layer of insurance.

In conclusion it seems to me that the greatest argument is that the overall levels of claims for indemnity arising out of fraud are significantly less than will be the like burden of insurance premiums placed upon land and property owners by virtue of the costs referred to above, which on my own very simple maths, I estimate to be well over £100,000,000,000. That cos will I estimate be considerably higher than a potential saving in Registry indemnity costs.

1.34 Dr Tola Amodu asked us to consider whether, instead of proposing specific fixes to the indemnity regime, we should re-examine its fundamental principles. She wrote:

The proposals relating to indemnity throw up challenges that relate rather less to land registration per se and rather more to the changing value of land and indeed the rise of fraudulent activity consequential upon this. For this reason, the questions here appear to relate rather less the system of registration but instead to compensating mechanisms arising from extraneous factors. It seems to be that the as rationales for indemnity (in particular providing incentives for registration) shift this has an impact upon the base premise. Eroding the principle of equality (e.g. regarding the position of mortgagees under Option 4A) without further investigation as to the impact on the wider market and, in particular, the apportionment of risk and consequent allocation of responsibility appears to be premature and could lead to further counterproductive effects. Perhaps the time has now come to revisit the full nature of the “insurance principle” and its effects, rather than viewing the changes as a technical “tidying up” of the LRA 2002.

1.35 Dr Simon Cooper commented on a number of aspects of the indemnity regime under the LRA 2002 which had not been considered in our Consultation Paper:

NON-GUARANTEED TITLES

It is possible for the Land Registry to decide to register a person with a title that is excepted from the state guarantee of title. Such titles are not backed up by the indemnity fund. Currently this power to give non-guaranteed titles is exercised cautiously and only in special cases. However, there is no legal test that controls this practice. It is restricted only by guidance issued from time to time and an exceedingly low threshold of judicial review (R (Diep) v Land Registry). To avoid the danger of jeopardising the security of people's property holdings by issuing non-guaranteed titles without a compelling reason, there should be a rule enshrined in law that tightly prescribes the conditions in which non-guaranteed titles may be issued.

FIRST RESORT

There have been isolated comments to the effect that the indemnity fund is a fund of last resort. For example, Al-Sabah v Ali, paragraph 66 per Ferris J: "I think that the scheme of the Act is to make the Land Registry in substance an insurer of last resort in respect of registered titles." It suggests that the fund is accessible only once a citizen has exhausted other possible sources of redress, such as bringing a lawsuit against a negligent lawyer. That conflicts with the foundational idea of the indemnity fund as a form of insurance paid for by the users. To avoid any doubt on the matter, the status of the indemnity fund as a fund of first resort should be enshrined in law.

INDEMNITY REDUCTION FOR CONVEYANCER CARELESSNESS

The current indemnity scheme provides for reduction of indemnity in the event that a claimant's loss is suffered 'partly as a result of his own lack of proper care'. The case law, notably Prestige Properties, interprets this as extending to the lack of proper care by a claimant's conveyancer.

I have reservations about this approach. It is founded on the tradition that a person is responsible for the acts of his agent. But that is not particularly suited to the context of land registration.

First, prospective clients are not practically equipped to make an informed assessment of the risks in employing a particular conveyancer. Prospective clients should be able to assume their conveyancers as regulated professionals will meet the required standards. Prospective clients might also have little practical choice in selecting their conveyancers (particularly in remote areas). Withholding indemnity can therefore penalise the client where the client is in no way at fault in selecting a poor agent.

Second, in the event of an indemnity claim the claimant will obtain a sum that represents only part of the loss, and must pursue the conveyancer in a negligence action for the other part. In this context, the indemnity fund is therefore operating, in a sense, as a fund of second resort. That is not a good basis for a state guarantee of title as it adds another hurdle to retaining the value of vested property rights.

I invite the Law Commission to consider whether it is preferable to restrict the indemnity fund's defence to cases of lack of proper care by the claimant himself and not his conveyancer.

RECOUPMENT

When a payment is made out of the indemnity fund, the Land Registry has the power to pursue recoupment from third parties of the amounts paid out in indemnity. During the passage of the Land Registration Act 2002 through the House of Lords, the power of recoupment was the subject of a particular assurance by Baroness Scotland noted in the CP. Exceeding the parameters of that assurance would impose an unfair burden on conveyancers and would be likely to cause defensive conveyancing practices to the detriment of clients. A clause along the lines of Baroness Scotland's assurance - requiring at least negligence and perhaps restricted to crassa negligentia - should be enshrined in law.

FTT CONTRIBUTION

Where one person's application for registration is contested by another, in many types of case the question is not determined by the Land Registry but the matter is referred to the First Tier Tribunal and the applicants are left to fight it out there. Decision making in relation to many types of these disputes was traditionally seen as an integral part of the operation of the land registration system, and so the costs were borne by the Land Registry as part of the governmental process of deciding what to register. The Adjudicator and then the First Tier Tribunal have changed matters. Lawyers are now commonly instructed; the loser not only pays the costs of his or her own lawyer but the Tribunal also has power to compel the loser to pay the costs of the winner's lawyers; and the Tribunal is reportedly evolving into a more formal and more court-like environment which is increasingly expensive. As a result, there is a concern that a person has to pay very large sums to have their property rights protected by the state through this process. Currently, the Land Registry negotiates an annual settlement with Treasury to subsidise the cost of the Tribunal's adjudication on registration matters. To prevent escalation of costs to applicants, there should be a rule enshrined in law that prescribes the formula for the financial contribution that must be made by the land registry to the Tribunal in these cases of referring a registration matter.

1.36 Nottingham Law School offered some general comments on the approach taken in Chapter 14 of the Consultation Paper and some specific comments on the abolition of land certificates:

We welcome the general approach to indemnity – that the issue should be approached with the system objective of aligning incentives for participants in the land market with vigilance for fraudulent practices (14.17; 14.31; 14.103; 14.120). As such work in institutional economics as Elinor Ostrom's makes clear, monitoring of other participants in exploitation of a shared resource or in a competitive market is a central issue for robust and successful institutions (Understanding Institutional Diversity Princeton 2005). To state the same issue in a more abstract manner, problems of information asymmetry have been recognised as major impediments to efficient operation of markets, and investigations in conveyancing minimise information asymmetries.

In considering indemnity in chapter 14 we think the Consultation Paper does identify the key systemic issue: which is not recovery of funds, but is incentives for market participants to take steps to guard against fraud and illicit practice. In this way indemnity can be part of the provision of the public good of an honest land market.

This is an acute issue as indemnity (in effect universal compulsory insurance with no adjustment of premium for claims history) could undermine incentives for participants to guard against fraud.

We are unconvinced that the abolition of Land Certificates has had no detrimental effects in practice (paragraph 14.28) sufficient to warrant their re-introduction. Electronic conveyancing promises (non-proven) efficiencies in reducing time and costs of dispositions of land. However, if it facilitates fraud and undermines the levels of trust and honesty in the land market it will not reduce costs, but increase them, as participants take up cautionary procedures in an untrustworthy market. Therefore, it would be appropriate in light of the stakeholder opinions noted at paragraph 14.28 and in the light of our experience, to consider a modified role for Land Certificates in the new partially electronic system.

A full remote system, with no site visit, and no physical checks on identity, would facilitate fraud and is not compatible with recommendations in the Consultation Paper and the protection given to occupiers by our system of registration of title. Therefore, as there is good reason to believe Certificates might have an effective anti-fraud role to play, the issue should be carefully examined rather than dismissed as against the movement towards remote conveyancing.

1.37 Regarding paragraph 14.67 of the Consultation Paper, Nottingham Law School said:

We think non-legislative changes to Land Registry policy would open up challenges based on Pepper v Hart. Our view is Pepper v Hart is not merely concerned with policy at the time of passage of legislation, but is relevant to interpretation regardless of subsequent changes in policy. Therefore, it would be perilous to rely upon the arguments set out in paragraph 14.67.

1.38 The School offered a detailed analysis of what duties of care should exist in relation to registered conveyancing and of how the risk of fraud should be managed, with a particular focus on the obligations of mortgage lenders:

The questions of what duty of care does exist, to whom it is owed, by whom it is owed; and what duty of care should exist, owed by whom, to whom, are all connected. We think the task is to frame the law in a way that reproduces the prophylactic effect of the bona fide purchaser doctrine in a limited area of operation. Obviously it would be counter-productive to reproduce the elements of the old law that dealt with proof of title – that is now governed by registration. However, the creation of a risk (not a liability for non-performance of a positive duty) which could be avoided by due care is a sound principle that aligns incentives (to take due care) with self-interest (avoiding the risk).

The risk may be that indemnity is not paid if due care is not taken. However, it may also be that rectification will be more readily given when the party against whom the Register is rectified failed to take due care. Obviously the combination of these two risks will be mutually supporting. This approach has been successfully employed in the context of undue influence and misrepresentation through the Barclays Bank v O'Brien; CIBC v Pitt, and Royal Bank of Scotland v Etridge (No 2) cases. The potential of legislation to follow this example is illustrated by the fact that in Etridge, the House of Lords adopted a unique quasi-legislative approach to the articulation of the law at

the request of the banks. The avoidance of the risk of challenge to the security was seen as best served by clear guidance on how to proceed.

The litigation also taught us something about the risk that powerful market players, lenders, will try to use the intermediary role and market vulnerability of legal service providers to shift risk onto legal service providers. As is clear from the litigation that culminated in Etridge, the legal service providers were faced with unilaterally imposed changes to standard contracts that shifted responsibility onto their shoulders, and then not supplied with the information required to actually provide the advice in an adequate manner, the same advice that they would be held responsible for providing. The first response of lenders was a classic “tick box” response: that addressed the risk to their own interests but ignored the underlying principles and policy of the law.

Taking these general issues into account it can be seen that the fact of market power determines a policy of placing primary risk on the lenders (mortgagees) which aligns with the argument that they are in the best position to monitor and deter fraud (see paragraphs 14.102 to 14.109). Both power and position are an aspect of their organisational size and resources. Therefore, it may be permissible to treat mortgagees differently from other purchasers (as suggested under Option 4) but the reason lies in policy (provision of the public good of an honest market) rather than legal principle. The policy is one that benefits repeat market participants most. The most important repeat market participants are the lenders. Therefore, it imposes costs that the market will not impose, upon those who stand to reap the benefits from those costs. By providing an institutional structure that imposes the costs on all market participants, through regulation, it avoids unfair discrimination between market players.

We argue above that differential treatment for mortgagees can be justified in policy. However, it is undesirable to set up a discrimination that is not also justifiable in principle. We think the differential treatment can also be justified in principle. The mortgagees in their market actions generate risks for other people involved in land ownership and the land market – if their charges are to be effective then other interests must be subordinated to them. This subordination is a product of the general law of property and the registration scheme. It is a privilege created by the legal system that facilitates the business of secured lending. Lenders are required to comply with the requirements of registration to gain the benefits, and this easily seen as principled. A requirement to take care not to permit or facilitate fraud seems equally principled. A successful fraud is the destruction of the interests of a victim. Defence of the vulnerable, unlucky, gullible, naïve, or desperate against the predations of the unscrupulous and dishonest is a principled end for law. Thus, providing the response is proportionate, the imposition of statutory duties to take due care or risk loss of statutory benefits of security of title and indemnity is principled.

These considerations give rise to a set of evaluative guides for use in consideration of the reform proposals.

We should place the primary duties on lenders because they are the most powerful and effective market players, and therefore both most able and having most to gain from effective anti-fraud measures. The role of legal service providers thus becomes primarily one of transmission – they act for mortgagees in order to protect mortgagees

from risk to title: their specific duties are defined by this fiduciary and contractual duty. As the risks to mortgagees shift by legislative change so will the duties of the legal service providers. To avoid the shifting of the risk onto their shoulders (and insurance) the agents must transmit their knowledge to their principals (imputed notice) and duties laid down by law must be taken to have been complied with (constructive notice).

To re-state: this notice is not applicable to issues of title but relates to proposed statutory duties – to establish the identity of borrowers, and to raise inquiry in suspicious circumstances, and to alert HM Land Registry to any known risk or suspicion. Failure would not give rise to a right of action, but would make rectification against the party who failed more likely, and would leave indemnity reduced or denied altogether. It would also be sensible, to refuse registration if declarations of compliance with statutory duties are not made (this overlaps with the approach suggested in (14.72) and (14.96) and seems a principled way to approach the situations in which the Land Registry can refuse to act – which should reflect the underlying substantive law and the rights and duties of the parties).

The sole positive duty (one which gives rise to a cause of action if it is breached and damage follows as a result of the breach) that would need to be imposed would be to prove that due care had been taken by the mortgagee. Finally, where a duty already exists (to check identity) compliance with this duty could be automatically considered to be necessary to fulfil the requirement of due inquiry.

Such a regime should: (1) allow modification through contract by lenders - how they comply will ultimately be down to their own preferred risk management principles, not imposed by an external regulator; (2) allow modification through judicial decision – either in the Tribunal or general Courts – this is important because fraud is ever changing (paragraph 14.97) and quickly responds to rule based regulatory structures; (3) align incentives of the most powerful market players with the policing of the market for fraud.

1.39 The Council of Mortgage Lenders offered some general comments about the land registration system, backed by the indemnity, and the role of HM Land Registry in ensuring that the register is reliable:

The UK residential mortgage market, represented by CML members, places a heavy reliance on the system of land registration, backed by a state guarantee of title through the provision of an indemnity. This reliance underpins mortgage lending and associated funding, maintains confidence in the secured lending arena and so impacts on the conveyancing process as a whole. We are concerned that some of the changes proposed to the indemnity may erode that confidence.

We are also of the view that it is not fair, in principle, to introduce distinctions based on those who can claim and those who cannot, based on a perception as to the extent to which a specific HM Land Registry user can protect their position. We do not believe it is appropriate to single out stakeholders such as mortgage lenders in this way. This is especially so in cases involving fraud, as the fraud may

At the current time, there is a significant backlog of applications awaiting registration. First registrations and leaseholds in particular are taking months to complete, because

of a lack of skilled staff within HM Land Registry to deal with these applications in a more-timely manner. We are aware that HM Land Registry has been actively attempting to bring on more resource for some time. However, as the Law Commission notes at paragraph 5.73 of the Consultation Paper, this gap between application and actual registration presents risks for those parties relying on the register, which they may need to mitigate.

We highlight this issue as it contrasts with the Law Commission's focus on those other than HM Land Registry who have the power to prevent fraud. A swifter registration process would help to lessen fraud risk and this can be achieved by sufficient resourcing of HM Land Registry.

1.40 The Council also offered some comments on our goal in Chapter 14 of the Consultation Paper of incentivising best practice:

While we support the general principle of incentivising best practice to prevent and detect registration fraud, we note the options set out to improve a duty of care for conveyancers or even impose a statutory duty of care will overlay existing professional and legal requirements. Any new duties will need to work in complement with these existing requirements.

As we note at paragraph 14, identity fraud can be difficult to detect regardless of the checks made by various stakeholders and we have commented on this further below in respect of lenders. We recognise that the Land Registry is not necessarily best placed to establish if there are potential fraud indicators, depending on the type of fraud being perpetrated. Broadly, we support a collaborative approach between stakeholders to help prevent and detect identity fraud in the context of property transactions and we engage with the legal sector and the Land Registry on a regular basis to discuss ways of tackling property fraud.

1.41 The Building Societies' Association made the following comments about our proposals to treat mortgagees differently than other participants in the conveyancing process:

Equal treatment of claimants

Referring specifically to section 14.102 of the consultation, we see no reason to depart from the tradition of treating all claimants equally under the indemnity scheme. We would strongly echo the Law Commission's concerns that removing or limiting its operation for mortgagees could reduce appetite to lend as currently the indemnity is a vital part of lenders' security.

With respect to the Commission's assertion that "risk management is an integral aspect of business" for lenders – while clearly this is true, it is not backed up by any examples of poor risk management practices which would justify the position of mortgagees to be changed.

The BSA also contests the Law Commission's implication that lenders "do not have an incentive to develop best practice….to identify fraud". This statement is in tension with that in the previous paragraph, as fraud is a key risk which lenders have processes and checks in place to combat.

Indeed, failure to have adequate fraud checks in place could result in significant regulatory action against lenders. This is made clear in both the FCA Handbook on Senior Management Arrangements, Systems and Controls and in the FCA Principles for Business.

General comment

These proposals appear to be driven by a view that mortgagees are unique within the indemnity scheme because of "the commercial risk undertaken by lenders and the ability of lenders to uncover cases of identity fraud".

As the Law Commission recognises in the rest of the paper, lenders are not the only parties with a statutory duty to verify the identity of their clients or opportunities to uncover cases of identity fraud prior to dealings with the Land Registry – solicitors, accountants and licensed conveyancers have the same requirement.

Solicitors, accountants and licensed conveyancers also have commercial risk through loss of fees. It is also in their business interest to mitigate the risks arising from potential fraud. We would further argue that in a residential property transaction, the conveyancers who are acting for seller and buyer are best placed to prevent identity fraud. Conveyancers are in the unique position of having ongoing personal contact with all the other stakeholders involved in the transaction.

There is therefore no consistent logic to limiting the ability of mortgagees to obtain an indemnity in cases of identity fraud without a wider application.

1.42 Graff & Redfern Solicitors offered some general comments on our proposals in Chapter 14:

Should the indemnity from the Land Registry for loss caused by transaction fraud be capped? Controversially, the Commission are raising the question: "whether a duty of care that conveyancers may owe Land Registry in respect of applications that they make should be enhanced and whether a statutory duty of care should be introduced." The duty of care imposed upon conveyancers is ludicrously high and any increased obligation would result of necessity in an increase in the already unrealistically low fees charged to clients who would not tolerate any substantial increase or alternatively result in stagnation in movement.

What would happen to the mortgage lending market if mortgagees had their right to claim indemnity from the Land Registry for registered land transaction fraud limited or even removed? – Undoubtedly they would attempt to secure payment from borrowers of appropriate indemnity insurance cover which would be added to the mortgage debt.

CHAPTER 15

1.43 Martin Wood provided an additional submission broadly discussing what he considers the difficulties of the general boundaries rule, set out in full below:

Some surveyors are critical of the treatment of boundaries in land registration. Their ire is aimed at rule 278 of The Land Registration Rules 1925, the general boundaries rule. They say that registered titles are unsatisfactory in not defining the exact position

of boundaries and that this leads to boundary disputes. But are their criticisms justified?

A proper consideration of this question first requires the definition of four key concepts.

> "Physical boundary". The physical features marking the boundary of a property, such as walls, fences, hedges and streams, and within which the legal boundary falls.
>
> "Legal boundary". An imaginary line of no thickness being the precise boundary of a property in law.
>
> "Defined boundary". A boundary of a property in relation to which the precise position of the legal boundary has been determined by a process of adjudication.
>
> "General boundary". A boundary of a property in relation to which the precise position of the legal boundary has not been determined by a process of adjudication.

It is important in discussing property boundaries that the distinction between legal and physical boundaries is understood and which is being talked about is made clear. The term "boundary" is commonly used loosely without the distinction being made clear or, it frequently seems, being appreciated by those using the term.

It is equally important to recognise that these concepts are relevant to all land, registered and unregistered.

Before the introduction of land registration in 1862, land ownership had long proceeded on the basis that, in the main, properties had general boundaries. The general boundaries rule applies this approach to registered land. The essence of the rule is that "*the filed plan… shall be deemed to indicate the general boundaries only [and] in such cases the exact line of the boundary will be left undetermined''.* This does not, however, mean that the position of boundaries is without any definition or all. Nor does it mean that the exact position of the legal boundaries of a registered property can never be identified; frequently they can.

Let me expand on these points. Historically, most properties in England and Wales have been enclosed by physical boundaries. For most property owners this physical definition of their property is sufficient. There is usually, for practical purposes, no need for or benefit in identifying the precise position of the legal boundary – indeed, most landowners, no doubt, give little thought to it.

Conveyancing practice mirrored – still mirrors – these practical considerations. Frequently, title deeds are silent about the exact position of the boundaries. Indeed, many contain no plan and couple this with only the most general verbal description: *" the property known as number 3 Acacia Avenue with the outhouses, garden and appurtenances belonging thereto"* is a typical description. Dimensions, when given, are generally qualified by the words *"or thereabouts"* to make clear that they are not to be taken as being exact.

The registration scheme accommodates these practical and legal realities by two complementary features. First, registered titles are required to be mapped on the large scale Ordnance Survey maps, thus defining the extent of a registered property in relation to its actual physical boundaries as depicted on that map. Secondly, registrations are, in the main, subject to the general boundaries rule. Therefore, the extent to which the boundary is undetermined by the registration is confined to the limits of the physical feature – wall, hedge, fence - to which the title is mapped.

Where there is no physical feature, the line of the boundary is shown by a dotted line plotted to accord with the position of the boundary identified from the title deeds. Any available particulars of the position of the boundary, such as dimensions, are added to the filed plan, as required by rule 279. In this way, unmarked boundaries are mapped to tolerances equivalent to those applicable to physical boundaries.

But it must be emphasised that these procedures and the general boundaries rule do not mean that it is impossible in any case to find out where the legal boundary is. Do not think this leaves the position of the boundaries completely woolly and incapable of being discovered. This is simply not true. In many cases, although as a matter of law the registration does not determine the position of the boundaries, their position can in practice be discovered from information contained within the registration itself. Even if the exact legal boundary cannot be pinned down to the last millimetre –and, anyway, what do we mean by exact in this context? – it can often be placed with an accuracy which ought to satisfy even the most fastidious property owner.

How? Agreements and declarations dealing expressly with the position of boundaries may appear on the register. Transfers of building plots commonly contain plans to a scale larger than the OS map and define the boundaries more precisely. More subtly, a careful reading of the detailed provisions of the transfer may help.

Let me give an actual example. The position of the boundary in the vicinity of a garage wall was in dispute. On the transfer plan of the property concerned, the red line delineating the extent transferred appeared to coincide with the garage wall. In addition, the transfer contained rights for the eaves of the garage to overhang and the foundations to underlap onto the adjoining property, and for the adjoining owner to key into the garage wall. These provisions, coupled with the plan, clearly placed the legal boundary immediately adjacent to the garage wall.

Remember that even if a complete copy of a transfer is not sewn up in the land or charge certificate, or even is not referred to on the register at all, a complete office copy can be obtained from the Land Registry. Remember also that if the registration does not provide the answer, the pre-registration deeds may contain provisions that help. Check them.

There are also certain legal presumptions that will sometimes be relevant. Where such a presumption applies, the law assumes the boundary to be in a particular place in the absence of rebutting evidence. The best known are the *ad medium filum* rule and the hedge and ditch rule.

Under the *ad medium filum* rule, it is presumed that the boundary of land abutting a road, public or private, extends to the middle of the road. This presumption can be of

importance where difficulties arise over the use of a private road. It is, however, readily rebutted by contrary conveyancing evidence.

The rule also applies to properties abutting non-tidal rivers and streams, which are presumed to extend to the centre line of the river. If the course of the river changes naturally over time, the position of the boundary changes with it. If, however, its course alters suddenly, the boundary does not move with it.

Then there is the hedge and ditch rule, which says that if a man-made hedge and ditch separate two properties, the boundary is along the opposite side of the ditch from the hedge. The same applies to a fence and ditch.

A warning on this one. Where there is a hedge and ditch, the OS map will often show only the hedge. If a conveyance of a property to the hedge side of the hedge and ditch defines the land conveyed by reference to the OS parcels, the courts have decided that the conveyance will not include the ditch. Let us say a farmer owns a number of fields. He sells off some of them. The boundary between the land sold and that retained is a hedge and ditch, with the retained land on the hedge side. If the farmer wants to retain ownership of the ditch, it is crucial that the land sold off is not simply defined by reference to the OS map. If it does, the conveyance will include the ditch. It must be made clear that the ditch is being retained, either by using a plan showing the position of the intended boundary or by the wording of the conveyance expressly stating that the ditch is being retained.

But now, in the recent case of [Wibberley], the courts have gone further. The effect of defining the land sold by reference to an OS map will be the same even if the adjacent properties are in separate ownership. In this case, a property had for many years included the disputed ditch. However, in [ ], it was conveyed by reference to an OS map and the Court of Appeal found that the conveyance did not include the ditch, the ownership of which remained with the vendor. This decision was by a two to one majority and an appeal to the House of Lords is pending. Even so, whatever the outcome of the appeal, the lesson is that care is needed in when using OS maps in conveyances.

Finally, on presumptions, there is a common view that the posts of a fence are on the owner's side and that this is conclusive proof of ownership. Whilst this is common practice and may provide a pointer to ownership of the fence (and therefore the position of the boundary), there is no legal presumption to this effect.

But, say the critics, general boundaries are not good enough; that registrations do not show the exact position of every boundary is a fundamental defect in the system. Every registered title should have defined boundaries, they say. This would, they claim, avoid boundary disputes.

It cannot be denied that this argument is superficially alluring. But is it remotely practical? And would it avoid disputes? Let us examine these questions more closely.

What the critics forget is that in many cases the exact position of the legal boundary is unknown. The mere fact of registration cannot itself cure this as if by magic. If the registered title is to show defined boundaries, their position first has to be determined.

What does this mean? It is important to understand what defining a boundary involves. It is not simply a matter of surveying. Defining the position of a legal boundary is fundamentally a legal process, not a surveying exercise. Of course, surveying will often play an important role in the process, although not always; in the garage wall boundary example given above, the position of the legal boundary was identifiable without any surveying being required. And whatever steps are required in any particular case to define the boundary, the fundamental legal nature of the process must never be forgotten. Before the position of the defined boundary can be surveyed and shown on the title plan, its position must first be determined. This determination may bring in a variety of legal issues.

These include applying the principles the courts have laid down for interpreting conveyances. For example, if there is a conflict between the verbal description (the parcels) and the plan, which takes precedence? In such cases, the general position is that if the plan is described as being "*for identification purposes only"* the parcels take precedence; if the land is "*more particularly delineated"* on the plan, the plan overrides the parcels.

Another example. Mrs Jones has lived next door for fifty years and can confirm that the boundary is exactly where you say it is. But will the court allow you to call her as a witness to say so? Or, to put it legalistically, to what extent can you adduce such extrinsic evidence to aid the interpretation of the conveyance? The general rule is that extrinsic evidence will only be allowed if the conveyance is incomplete, uncertain or ambiguous. Otherwise, the court will look only at the conveyance itself. After all, what would be the point in the requirement for land transactions to be set down in deeds if people could later come along and say the intention was to do something different?

Adverse possession, or squatter's titles, also frequently come into the picture. These involve complex and difficult legal questions.

These are merely examples to illustrate the point. Other legal issues may be relevant in particular cases.

Let me now put this into context. There are over sixteen million registered titles. There is still a large number of unregistered titles, perhaps some six million, which will eventually be registered

Of course, in many cases adjoining owners will agree about the position of their boundaries. Even if they do, to define the boundaries will still require a detailed survey and the recording of the boundaries on the title plan. One might ask what is the benefit of forcing the trouble of this on them when they are living happily side by side? And who pays? And in those cases where there was disagreement requiring formal judicial proceedings, the cost in terms of time and trouble as well as hard cash would be much greater.

This brings me to the next point: would defining boundaries in fact avoid disputes? Experience suggests not. The first land registration scheme introduced in 1862 did require boundaries to be defined. This was the main reason for its failure. Not only did it require huge effort and expense, it was found actually to encourage disputes by focussing people's minds on their boundaries and provoking a dispute about

something they had not even thought about before. This is why the general boundaries rule was introduced in 1875.

I would therefore suggest that to define the boundaries of every registered title would involve enormous and disproportionate effort and expense without bringing any demonstrable benefits.

Indeed, it should not be forgotten that rules 276 and 277 of the 1925 rules already provide for boundaries to be defined, or "fixed" as the rules describe it. An owner of a registered title may apply to the Land Registry for the boundaries to be fixed. The Land will serve notice on adjoining owners. A thorough examination of the adjoining title deeds and a detailed survey will be required. Any dispute about the position of the boundaries is resolved in a judicial hearing before the Solicitor to the Registry or in the courts. When the position of the boundaries has been determined, the detailed particulars are added to the filed plan and a note made on the register that the boundaries have been fixed. The filed plan is then "*deemed to define accurately the fixed boundaries".*

This procedure is rarely used. No one knows how many titles have fixed boundaries, but it is thought certainly to be less than one hundred. At the time of writing, there is one fixed boundary application in progress. The last one before that was in the 1970s. This hardly demonstrates overwhelming public support for the principle.

No, the merits and practicality of the general boundaries rule were described many years ago by the then Chief Land Registrar, Sir John Stewart Wallace, in terms that remain as valid today:

> "In this way the method of describing registered land corresponds with the usual practice of people buying and selling land and property in England and Wales. The practice is elastic, it recognizes the essential difference in importance of inches in urban and rural properties; it permits the ''little more or less'' descriptions so often found in conveyances of land. It allows sleeping dogs to lie in a characteristically English way. It prevents officialism getting to work on a few inches of border land here and there of no value to anyone."

CHAPTER 17

1.44 The Society of Legal Scholars provided a long response to the discussion and questions in this chapter. Specific comments on our policy recommendations have been incorporated into Chapter 17 of the Analysis of Responses. Nevertheless, the response as a whole has been reproduced here to provide the context of their comments and also new issues raised.

A. Acceptance of the LRA 2002 reform of adverse possession

The CP assumes that the 'emasculation' of adverse possession by the LRA 2002 should be accepted.

Continental registers usually apply the general limitation principles, but these are often in practice so restrictive that title cannot really be obtained by possession: usucapio may only operate in favour of a party who is acting bona fide so there is no possibility

of hostile acquisition. In systems which operate extraordinary limitation, it is possible to acquire title in a hostile manner, but limitation periods are much longer than in England. A few systems recognise the actio Publiciana and hence an 'ownership' in a person who is on his way to acquiring title extraordinarily and these systems are quite similar to the limitation system operating in unregistered land. Continental systems do not, therefore, in general support a specific regime for registered land based on the primacy of the register, though German law may be an exception.

It seems fair to conclude from the case law that the reform in 2002/2003 has proved workable in the short term. New applications by adverse possessors have dropped to a trickle and the reform has been sufficiently attractive to encourage many voluntary registrations, for example of local authority housing stock (both points according to Dixon. Modern Land Law, 9th edn, 462, 463, 484). In the short term no really major problems have emerged. So there is no immediate case for a reversal of the reform in the context of the current limited tidying operation.

The mandate for the change was small – 60% of respondents: Law Com 271 [14.4]. The reform was opposed by one school of thought in the academic community. That position is maintained as in course of time it will become common for boundary structures to be placed in the wrong position (often simply because of the lie of the land) and there is now no mechanism to make the ownership correspond to the realities on the ground even over one hundred or two hundred years.

It is interesting that the test case for the merits of the reform arose in the courts immediately after the consultation, that is JA Pye (Oxford) Ltd v Graham [2002] UKHL 30; only the first instance decision could be considered in the final report: Law Com 271 [14.1]. Proponents of the reform need to be able to say that Pye Ltd should have been allowed to keep its land after inaction for more than 12 years - and, in the future, after a much longer period of inertia.

Opinion within the section and the wider academic community remains divided.

B. Reform of the substantive law

If the adverse possession reform is an accomplished fact, some reforms of substantive law would be desirable.

The October 1991 cut off. Pre-abolition law should be made redundant as soon as possible. Particularly if an adverse possessor is in occupation (and so may override the register) the title can be just as uncertain as before the reform.

The cut-off point of October 1991 is not based on clear cut facts so a number of reported cases have turned on fine factual distinctions. The large element of uncertainty introduced is shown by permutating the facts of Trustees of Grantham Christian Fellowship v Scouts Association Trust Corporation [2005] EWHC 209 (Ch) in which a registration application in 2000 turned on the grant of an oral licence granted in 1959 between parties who could no longer be traced. The same issue would have arisen had the application been made after the LRA 2002 came into force. This suggests that cases can continue to arise for generations in which the entire validity of the title depends upon a commencement date that will be increasingly difficult to prove. Either a deadline should be set to register title or a period of reverse

prescription based on registration of the title should be introduced. People who have given up possession are a trap, but people in possession are more important in relation to certainty.

Changes to substantive law. The objective of securing certainty of registered titles would be greatly enhanced by some minor changes to the substantive law of adverse possession. The law has been confused by changes designed to limit claims to adverse possession which are no longer needed now that adverse possession is limited anyway. Changes to the rules on licences would help. The rule introduced in 1833 was that any periodic tenancy or tenancy at will or licence would terminate after the first year unless renewed in writing or by payment of a rent or licence fee. This remains true for periodic tenancies but not for tenancies at will or licences. The Grantham case shows the degree of uncertainty introduced. The function of the licence in negating the claim of an adverse possessor is redundant. It would now be better for it to be clear when a former licensee comes to possess adversely after a year (subject to written renewal or payment), since the registered proprietor can always reject the claim to be registered.

Similarly there seems to be no justification for allowing the Crown longer for foreshore, other extensions based on disability, nor preserving a trustee's title until a life tenant dies.

C. Objection to a sch 6 application

An adverse possessor of ten years' standing can apply to be registered as proprietor of the estate of which he is in possession, but notice is given to the registered proprietor who has a right to serve a counter notice objecting to, and usually blocking, the registration. This procedure is set out in LRA 2002 sch 6.

The sch 6 procedure is judged by the Law Commission to be working well and only a minor reform is proposed. We propose that if an applicant applies for registration and that claim is rejected after objection by the registered proprietor, it should be made clear that the applicant should be precluded from making a second application for registration within the two year period. This would provide an amendment to the rules on restrictions on renewed applications LRA 2002 sch 6 para 8 [CP 17.24].

The CP does not address the issue of which parties should be entitled to notice of an adverse possessor's application. At present this is (for freeholds): the proprietor, a registered chargee, a person registered for this purpose (LRA 2002 sch 6 para 2, LRR 2003 r 194). The power to add categories by rules has not been exercised (except for land of dissolved companies), but this could now be done. The most likely situation in which a notice will be issued but not responded to is where the registered proprietor has died. Indeed, just this occurred in Best v Chief Land Registrar, resulting in the registration of the squatter Best. It would be very unsatisfactory if titles were left insecure on the death of the proprietor, a situation in which the personal representatives are not required to register themselves (see also subheading 'Equitable Interests' below). A possible solution is to allow the (putative) personal representatives to enter the death or enter a practitioner dealing with the estate without registering their title but merely to record their entitlement to receive a notice in this situation. No doubt the Best notification hole can be filled without legislation,

but it appears to us to be the major practical defect to have emerged in the sch 6 procedure.

We agree that a landlord who acquires title through his tenant's encroachment should have standing to apply for registration under sch 6 for the reasons stated by Dr Emma Lees [2015] Conveyancer 110, 114. [CP 17.86]. This could also apply to a trustee after adverse possession by a beneficiary (Jourdan & Radley-Gardner [20-79]).

D. Grounds for a successful application under sch 6 – conditions 1 and 2

A sch 6 application for registration will be accepted in three circumstances, the first two being loosely estoppel and other property right (called in sch 6 para 5 the First and Second Conditions). The CP questions the need for these first two grounds.

Equity by estoppel. The first condition is where the claim of the applicant is supported by an equity by estoppel so that it would be unconscionable for the registered proprietor to dispossess the applicant. In addition it must be shown that the applicant ought to be registered. This is said to reflect the doctrine of proprietary estoppel subject to minimum equity theory (Law Com 271 [14-36]). The discussion in the CP refers throughout to proprietary estoppel whereas the statue refers to an 'equity by estoppel' – and it seems possible therefore that claims might fall within sch 6 which are not proprietary in character, and as such outside existing registry procedures.

The CP suggests [CP 17.34] that each of these cases should be handled under other registry procedures and their existence in sch 6 is leading to poorly drafted claims. However, we suggest that it may be preferable to adjudicate such claims in the Tribunal rather than requiring full litigation: Jourdan & Radley-Gardner [22-77].

Other entitlement to be registered. It is suggested that cases of this kind should be handled under other registry procedures and the statement of the second condition in sch 6 is leading to poorly drafted claims. The CP [17.34] suggests the schedule would be cleaner without this Condition. However, again we suggest that it may be preferable to adjudicate such claims in the Tribunal rather than requiring full litigation: Jourdan & Radley-Gardner [22-77].

The commonest group of claims under the second condition are claims by an adverse possessor who completed 12 years before October 2003 and therefore is entitled to a s 75 trust under LRA 1925. A new procedure would be needed, possibly by amendment to sch 6, but we would suggest more conveniently by providing a new rule making power in the schedule of transitional provisions, schedule 12. We would not agree that any application for registration of an adverse possessor of land claimed under LRA 1925 should be made under sch 6, as this would require considerable surgery to the careful crafting of sch 6 [CP 17.71].

E. Grounds for a successful application under sch 6 – condition 3

Boundary adjustment by adverse possession. A sch 6 application is also allowed where it meets the 'third condition' (sch 6 para 5(4)(c)). It applies in applications for land adjacent to the applicant's land with a general boundary where-

‘(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant … reasonably believed that the land to which the application relates belonged to him.’

This condition is ‘tightly drawn’ (M&W [35-083]; Crosdil v Hodder) - indeed too much so.

A relatively minor amendment is proposed by the CP to this condition to make clear when the possessor must make an application after becoming aware of his mistaken belief. The applicant will be disabused of his belief before applying to be registered (but see Zarb v Parry [2011] EWCA Civ 1306 at [77-80]. Is it sufficient for the applicant to have held his belief for:

- Any ten years? That is certainly the intended meaning (Megarry & Wade, 8th edn, [35-083]) and is the only possible meaning of the wording?]; or

- A recent period of ten years, requiring him to act promptly after becoming aware that he is not in fact the owner? (Zarb v Parry [2011] EWCA Civ 1306 at [58], Arden LJ, IAM Corp v Chowdrey [2012] EWCA Civ 505).

The CP [17.47] now proposes a six month time limit should be enacted. We propose that the literal meaning of the paragraph be restored to reflect the original intention as stated in Megarry & Wade.

We invite the Law Commission to consider the desirability of a wider ranging reform. Until detailed and accurate plans accompany registered titles, there is merit in allowing adverse possession to support the position on the ground. Non-lawyers are often uncomfortable with the concept of a legal boundary varying from the physical boundary, and physical boundaries are often erected for reasons of practicality away from the legal line. In many cases it is clear from the land registry plan that the boundary is in the wrong place, and the simplest thing is to allow the possession to have legal effect in determining the boundary. That would justify removing all reference to the applicant’s reasonable belief. We therefore invite the Law Commission to consider the possible reform of removing the requirement of reasonable belief.

F. First registration of an extinguished title

The CP proposes to deal with cases where an unregistered title extinguished by Limitation Act 1980 s 17 is accepted for first registration. The issue does not appear to have arisen in practice since Re Chowood’s RL [1933] Ch 574. It would require the applicant to state falsely in his application for first registration that he was and had been in undisputed possession of the land, which appears unlikely if he has been out of possession long enough to be barred. The position of the registered proprietor can therefore be left to the existing alteration/rectification/indemnity regime. We do not agree with the approach of the CP [17.62] that would isolate specific instances of rectification. We think the better approach is to leave this to the development of a coherent concept of rectification (see Jourdan & Radley-Gardner at [21-48ff] who regard this as important.)

G. Sch 6 adverse possession and more general adverse possession

The major problem with the LRA 2002 reforms to the law of adverse possession is that it has not made the law simpler. It has simplified one aspect of law - where adverse possession is used to seek registration as proprietor of a registered estate. Student texts (such as Dixon) quite properly focus on sch 6 to the exclusion of all other aspects of adverse possession, so we are breeding a generation of students who see adverse possession exclusively in terms of a squatter against a registered proprietor. The reports written before 2002 seemed to assume an identity between adverse possession and limitation, except in one Explanatory Note (Law Com 271 [EN 436]) – the source for texts such as Gray & Gray and Megarry & Wade. Once limitation is separated from adverse possession, it cannot be said that sch 6 has clarified the law.

(1) What is possessed?

The Land Registration Act 2002 treats possession as operating against a registered estate but muddles this concept with the view that possession is held against the land (whereas limitation worked against particular interests). This has profound consequences.

On the one hand, a successful sch 6 application effects a Parliamentary conveyance, so someone occupying a boundary strip becomes subject to his neighbour's mortgage (!). This conception necessarily sees registration as related to a particular estate. On the other hand there is the view in Parshall v Hackney [2013] EWCA Civ 240 that a proprietor registered with one title cannot be in adverse possession against a proprietor registered with a quite separate title. This seems to envisage both possession and limitation as attaching to the land.

Since the registered estate is now transferred to the adverse possessor, it would be beneficial to make clear the effect of a restriction on the register (cf Jourdan & Radley-Gardner [20-08]) and also the question of whether easements can be impliedly granted when strips of land move from one title to another.

Some provision is also needed to deal with dissolved companies, since the dissolution of a company will effect an escheat, and so it might be logical to require a new period of adverse possession against the land itself. (LRR 2003 r 188A now requires notice of the sch 6 application to be given to the Crown etc.)

(2) Possession too short to make a sch 6 application

What of possession by someone building up to a sch 6 application? Before 2003 the title from short possession was an overriding interest (in the sense that it occurred off the register). An application for a freehold title could be made by 'any estate owner holding an estate in fee simple' LRA 1925 s 4. An absolute title could be granted on proof of title to the registrar's satisfaction (s 4 proviso (i)) and a possessory title on 'giving such evidence of title … as may for the time being be prescribed' (proviso ii)). This required proof of possession for twelve years. Effectively therefore to secure a full land registry guarantee it was necessary to have possession for two 12 year periods, the first to give entitlement to be registered and the second to upgrade the possessory title to absolute. This was logical to restrict indemnity claims. Possessory titles were once granted after shorter periods, but current practice is to require twelve years' standing.

The LRA 2002 states that title to any legal estate may (s 3) and sometimes must (ss 4, 6) be registered. But current registry practice is to continue the pre-2003 practice of refusing registration depending on duration of possession. It appears that either those provisions of the Act are defective in unconditionally allowing registration, or the current practice is based on a misreading of the provisions.

That said, it must be queried whether a possessory interest can be a legal estate, since it is a fee simple, but liable to be determined if the possessor is registered with the estate possessed against: sch 6 para 9. If it is equitable it could not be registered. A solution would be to restore it to the overriding category.

Obviously there are two policies in tension: the comprehensiveness of the register and restraint in issuing guaranteed titles. One is the desire to have a comprehensive land register. It is desirable to get as much land as possible registered so that adverse interests can be protected by notice. The land registry practice means that there is some land which cannot be registered because the paper title has been barred by a squatter who is no longer in possession and the current possessor does not have long enough standing to be registered.

On the other hand, it is perfectly reasonable to require two times ten/twelve years' standing before attracting a land registry guarantee and a buyer should be warned just how tenuous a title is before the first ten years.

We suggest that three solutions are possible:

to recognise two classes of possessory title;

to register land without a proprietor; or

to treat short possessory titles as overriding once more.

It is submitted, therefore, that the best solution is to treat the possessor's interest as an overriding interest. This is to depart from the provisional proposal in the CP [17.70].

(3) Equitable interests

The application of LRA 2002 s 96 to trusts really needs clarification. The Law Commission made it perfectly clear what was intended, and yet it is evident from the drafting that that the legislation does not achieve what was intended.

With unregistered title (or LRA 1925 title) possession creates an estate and the possessor then had to bar adverse rights separately using the Limitation Act 1980. Very often, A's life interest would be barred without time having started against B's remainder nor against the legal title of the trustees.

There is no doubt that this was not supposed to happen under the LRA 2002.

'Because the effluxion of time does not of itself have any effect, there can be no concept in our scheme of the barring of the rights of those with mere equitable interests in land.' (Law Com 271 [14.92])

The explanatory notes to the draft Bill make clear for the first time (Law Com 271 [EN 436]) that there are very many situations where limitation continues to apply to registered titles, though the list given is by no means comprehensive. Limitation continues to operate against rights which are not registered estates. Since adverse possession operates against the registered estate (not the land), there is no reason why equitable interests cannot be barred outside sch 6.

Suppose RP1 and RP2 hold on trust for A for life, remainder to B absolutely. No limitation period runs against the trustees (LRA 2002 disapplies Limitation Act 1980 s 15), adverse possession cannot run against B until A dies, and the trustees (RP1 and RP2) cannot be barred until B is barred (sch 6 para 12). But there is nothing to say that A could not be barred. For the purpose of barring A, A is deemed to have an action for the recovery of land (s 18 Limitation Act 1980). This s 18 limitation period is not disapplied by LRA 2002 s 96. It therefore seems to leave open the possibility that A's beneficial interest can be barred by the adverse possessor. The moral for squatters is: choose land limited in succession.

Generally speaking, we suggest that the Birkenhead reforms of legal estates need to be reflected in the limitation regime.

H. Summary of answers to points raised in CP

CP [17.24] Legislate to prevent second application within 2 years.

CP [17.34] Conditions 1 and 2 should be retained to give the cheaper tribunal procedure where property rights are supported by long possession.

CP [17.47] Condition 3 – a six month time limit from becoming aware of the mistake is not appropriate for an adverse possessor who for ten years has been mistaken about his boundary.

CP [17.62] It is unnecessary to legislate about the first registration of an extinguished title.

CP [17.70] Titles of short possessors need to be made non-registrable, and returned to the overriding category. They should not be substantively registrable.

CP [17.71] Claims by pre-October 1991 occupiers should be dealt with under new rules under sch 12.

I. Summary of other points

[A] Action is needed to remove the uncertainty caused by pre-October 1991 possessors.

[B] Substantive law of adverse possession should be stripped of rules designed to limit the effect of adverse possession, especially the use of licences to deny the adverse character to possession.

[C] LRA 2002 needs thorough review to take a consistent line on whether possession is of the land or a registered estate, to remove future confusions like that in Parshall v Hackney.

[D] Sch 6 needs minor amendment to ensure that beneficial interests are properly barred.

[E] A short provision is needed to deal with the land of dissolved companies.

[F] A legislative solution is required to provide for the notification gap which arises when registration of adverse possession is sought against unregistered personal representatives of a deceased proprietor as in the Best litigation.

CHAPTER 18

1.45 We received a number of general responses to Chapter 18 that extend beyond the questions we asked in the Consultation Paper. These responses are reproduced in full here.

1.46 Referring to paragraphs in the Consultation Paper, Professor Sarah Nield said:

> *Further Advances 18.15, 18.22, 18.27, 18.28, 18.31, 18.41, 18.58 and 18.59* I am unable to provide the evidence you seek on the practical implications of section 49 relating to the law governing further advances. However the issues that the consultation paper identifies in relation to loans advanced by instalments and syndicated loans is clearly of import. I would support the exclusion of instalments advances within the concept of further advances considered in 18.22 as well as the extension of the application of section 49 to advances made other than by the registered proprietor considered in 18.27.

1.47 The City of London Law Society Financial Law Committee said:

> Tacking Further Advances
>
> We agree that it is not desirable to amend the tacking rules in relation to registered land in isolation without considering the issue in the wider context (paragraph 18.10 of the Consultation Paper).
>
> In our view, the problem with the current tacking rules is that they are not rules which allow tacking to take place. They are, in fact, rules which restrict the ability of a creditor to tack in accordance with the terms of its security document. And the problem is compounded by the fact that there are different tacking rules for registered land, unregistered land and other assets (as is explained in paragraph 18.10 of the Consultation Paper).
>
> In our view, there is often a misunderstanding about what the tacking rules are trying to achieve and what they actually do in practice.
>
> The starting point is that when a chargor creates a charge over an asset in favour of a chargee, the terms of the charge document will establish two key matters – the extent of the charged assets and the scope of the secured obligations. It is for the parties to determine both of these matters. It follows that the extent of the secured obligations depends on the proper interpretation of the charge document.
>
> That works well as long as there is just one charge. But what if there is a second charge? In principle, if the second charge ranks behind the first (and it normally will if

it is second in time, although there are exceptions), it would be expected that the second chargee would only be entitled to the charged assets once the first charge had been satisfied, which would happen once the secured obligations under the first charge had been paid.

The second chargee will make a decision whether or not to lend based on the terms of the first charge. In practice, the parties are likely to enter into an intercreditor or priority agreement to regulate their respective priorities.

But the effect of the decision of the House of Lords in *Hopkinson v Rolt* is to restrict the ability of the first chargee to enforce its charge in accordance with its terms. Once the first chargee has received notice of the second charge, amounts subsequently lent by the first chargee generally rank behind amounts lent by the second chargee in the meantime.

In our view, this makes no commercial sense. It cuts across the terms of the express agreement between the chargor and the first chargee. It is not necessary for the protection of the second chargee because the second chargee does not need to lend until it has reviewed the terms of the first charge. And the chargor should be bound by the terms of its agreement with the first chargee.

The problem is then multiplied because there are different restrictions on tacking depending on whether the asset concerned is registered land, unregistered land or anything else.

The result is to subvert the commercial arrangements between the parties and unnecessarily to complicate the law.

In our view, all restrictions on tacking further advances should be abolished in relation to all types of asset.

We appreciate that this is beyond the scope of the current Law Commission project, but we can see little point in tinkering with particular rules of tacking relating to registered land when the most sensible thing is just to abolish the tacking rules altogether.

Having said that, we do agree with the difficulties with the current law described in the Consultation Paper, in particular that:

> subsequent instalments are classified as further advances (paragraph 18.22);
>
> in a syndicated facility, the proprietor of the registered charge is the security trustee, not the lenders (paragraph 18.31); and
>
> in practice there will very likely be no obligation on the first chargee to lend because the creation of the second charge will be a drawstop under the first charge (paragraph 18.44).

We appreciate that much of what we say in this paper is outside the scope of the current project but, in view of the invitation in Chapter 18 of the Consultation Paper, we thought we should make these views known.

1.48 British Bankers' Association:

Lenders will typically take a prudent risk-free approach upon receiving intimation of the creation of a subsequent charge.

Where a charge is taken to secure a loan where payments are drawn in stages (e.g. a self-build residential property loan), upon notification of a subsequent charge,

Further drawings are typically restricted until confirmation is received from the new mortgagee that any further drawings have priority over their subsequent charge.

This would typically be achieved by obtaining a deed of postponement.

Where the charge is to secure a revolving credit facility (e.g. an overdraft)

- Further drawings would typically be restricted.

- Confirmation would be required from the new mortgagee that the further drawings under the revolving credit facility have priority over their subsequent charge (including consideration of the rule in Clayton's case for any existing exposure)

- This would typically be achieved by obtaining a deed of postponement

Forms CH2 (application to make further advances) and CH3 (agreed maximum amount of security) are not used extensively by lenders. Where there is a (conditional) commitment to allow further advances to be made, there is a presumption of close engagement with the borrower and monitoring of their facility. There is a low expectation that the borrower would seek additional finance without the knowledge of the original lender and therefore these forms would be considered an unnecessary process and cost.

The prudent approach to require a deed of postponement or similar, is to provide the lender with legal certainty both in terms of the amount of borrowing to which they have a prior claim on the property, and also the treatment of interest and costs in respect of the borrowing facility and the associated collateral.

Where a deed of postponement is to be entered into between lenders to establish the amount of priority

- The priority will typically be defined as a 'maximum limit' (maximum capital amount borrowed) plus interest and costs relating to the charge or the contract (e.g. contractual interest on the loan; fees incurred to repossess the property, or costs incurred through the early repayment of the charge)

The value of the 'maximum limit' may differ depending upon the nature and terms of the credit agreement, which would typically be

- Where the loan has been fully drawn (e.g. a residential mortgage purchase) the limit would reflect the current exposure.

o Where the loan has not been fully drawn (e.g. self-build residential property loan), the 'maximum limit' would reflect the maximum agreed advance including undrawn amounts.

o Where the property is used as security for a revolving credit facility, the 'maximum limit' would reflect the maximum agreed exposure (e.g. the overdraft limit).

The consultation stated that lenders would tend to fix the maximum sum at a much higher level than the likely borrowings might appear to warrant to be sure they are adequately secured. We do not believe that this is standard practice, especially where the deed of postponement provides priority up to a maximum limit plus interest and costs. The maximum sum would however reflect the maximum contractual exposure that has been agreed as secured by the property, and not just the current drawn exposure. Some residential mortgage products have been developed which provide the borrower with an agreed secured 'reserve' facility to allow the customer to borrow against the equity in their property. As a contractual obligation exists to allow the customer to draw down against this 'reserve limit', even where it is not currently utilised, the lender would include the limit in the total maximum sum secured by the property.

CHAPTER 21

1.49 Michael Mark provided the following as part of his submission to the Law Commission. Specific quotes have been extracted in separate chapters of the Analysis of Responses but the response is reproduced here in full as much of the discussion benefits from being read as a whole:

My relevant background

I was a Deputy Adjudicator to the Land Registry from April 2005 until the Adjudicator's functions were transferred to the First-tier Tribunal in July 2013. I was then a fee paid judge of the First-tier Tribunal (Property Chamber) in the Land Registration Division until my retirement at the end of January 2016. I sat in those capacities for a total of well over 1400 days, including days spent hearing and deciding cases, dealing with interlocutory work and training other judges. I also sat during that period and before as a Deputy Social Security Commissioner and as a fee paid judge of the Upper Tribunal (Administrative Appeals Chamber).

Amongst many other decisions, I was the adjudicator in *Derbyshire County Council v Fallon* (the quotation attributed to Nugee J in paragraph 15.14 of your consultation paper was in fact from my decision as quoted by him in upholding that decision), in *Silkstone v Tatnall* (to which I shall refer later in considering the desirable scope of any proceedings before the First-tier Tribunal), and in *Knights Construction v Roberto Mac*. In relation to this last case, I note your comments at note 63 to paragraph 13.58 as to the position of B if the title had been unregistered. Those comments may have some force in relation to the position of the ultimate purchaser, Roberto Mac, if the title was unregistered, although Roberto Mac would have had a claim against the Salvation Army for breach of covenants as to title if the land had been unregistered. However, the position of the original owner, in that case, Knights Construction, is that if title had been unregistered, it would not have lost that title. The principal point with

which I was concerned was that if there was no rectifiable mistake and Knights Construction could neither recover its title nor (because there was no relevant mistake) get an indemnity under Schedule 8, it would plainly have lost its property without compensation as a result of the 2002 Act, and there would be a real A1P1 point.

The scope of these submissions

I seek to address problems encountered by me in dealing with Land Registration cases and possible solutions. My comments are largely in response to the specific questions raised in the consultation paper, but I also address others that have not been identified there.

As a general point, many of the problems that have arisen have been due to lack of clarity in the 2002 Act. That lack of clarity manifested itself in particular in relation to the now resolved issues as to what constituted a mistake for the purposes of Schedule 4 to the Act, as to the third condition in paragraph 5 of Schedule 6 (where the Court of Appeal in *Zarb v Parry* considered it unarguable that the provision had a completely nonsensical meaning contrary to the clearly expressed intentions of the Law Commission and Land Registry, to which it was not even referred) and in relation to the jurisdiction of the Adjudicator – now the First-tier Tribunal.

While the report to Parliament incorporating the Land Registration Bill is plainly material in construing unclear provisions in the Act, unfortunately it is quite rare for either counsel or the court to look at what is said there. As a result, in trying to construe the 2002 Act, and the rules made pursuant to the provisions contained in it, some courts, and more recently Judge Dight sitting in the Upper Tribunal in *Murdoch v Amesbury*, have succeeded in producing decisions that have made a nonsense of parts of the 2002 Act and gone contrary to the clear intention of the Law Commission, the Land Registry and Parliament as intended to be reflected in those provisions.

Contrary to views I have heard expressed by a former Law Commissioner, brevity in a statute is not necessarily a virtue and can be a vice if it leads to lack of clarity.

The specific topics which I address below are

(1) Dispositions by persons entitled to be registered as the proprietor.

(2) Determined boundary applications.

(3) The provisions for adverse possession in the 2002 Act.

(4) Problems with the approach of the Land Registry to applications.

(5) the present and future scope of the jurisdiction of the Adjudicator to the Land Registry (now the First-tier Tribunal (Property Chamber)

(6) misconceptions evinced in a recent article by Harrington and Auld in The Conveyancer.

I also attach a critique of the decision in *Murdoch v Amesbury* insofar as it relates to the present jurisdiction of the First-tier Tribunal, which I wrote for the benefit of the

First-tier Tribunal judges in the Land Registration division. All the Adjudicator's and First-tier Tribunal cases cited by me are available on the old Adjudicator's (now First-tier Tribunal) decisions web pages as well as on Bailii.

1. Dispositions by persons entitled to be registered as the proprietor

I disagree with the proposal in paragraph 5.63 in relation to persons entitled to be registered but who have not been registered as the proprietor without regard to any limitations except those reflected on the register. The restrictions on the register are those affecting the person registered. But if A sells to B, it can happen that B acquires the property subject to restrictions which did not apply to A. B may acquire the property on trust or subject to a charge. Any restriction or charge could only be registered at the same time that B's title is registered. To allow B to dispose of the property free from those trusts or that charge prior to registration would appear to be wrong. It would leave the beneficiaries or chargee with only personal remedies without their having had the normal opportunities to protect themselves.

2. Priorities

There is a question as to how section 29 and schedule 3 to the 2002 Act ought to be construed and given effect to insofar as they purport to remove previously acquired property rights bearing in mind article 1 of Protocol I of ECHR, which I considered without deciding, in *Davies v John Wood Property Ltd* REF/2008/528, paragraphs 44-46. This also raises the question of the protection of possessory rights, dealt with below, where the person with those rights does not even appreciate that he does not have a legal title.

3. Indemnity

Para.6.57 – I agree with this proposal. In broad terms anybody who, without fault, loses a property right (including, on the basis of recent decisions of ECHR certain legitimate expectations that such a right will be acquired – see my notes on adverse possession below) because of statutory or subordinate legislation, should be entitled to compensation.

Para.6.59 ???

4. Valuable consideration – I agree with 7.68. I disagree with 7.69. I have encountered several cases where property has been transferred between family members or companies in a group in circumstances in which no real consideration has passed and in some cases the objective has been to override interests not noted on the register. I would prefer to see a definition something like "consideration passing on a bona fide arms length transaction for value". Where an interest has a negative value, whether a reverse premium is paid or not, one of the questions that needs to be asked is whether that transaction had as an objective the negating of a known property interest.

5. Objections to applications

LRA 2002, section 73(1) provides that, with limited exceptions which do not apply to determined boundary applications, anybody may object to an application. This would

include proprietors of superior or inferior titles to the same land although they would first have to be made aware of the application. Section 73(4) provides that the right to object is subject to rules. In the case of a determined boundary application, the rules impose a time limit by reference to the time a notice of the application was provided to the owner of the adjoining land. No time limit is provided for objections by anybody else. Unless the registrar is satisfied that the objection is groundless (see section 73(6), section 73(5) requires him to give notice of the objection to the applicant and provides that he may not determine the application until the objection has been disposed of. Section 73(7), as amended, provides that "If it is not possible to dispose by agreement of an objection to which subsection (5) applies, the registrar must refer the matter to the First-tier Tribunal". Before July 2013 the reference was to the adjudicator but his jurisdiction was then transferred to the tribunal.

Harrington and Auld have criticised these provisions on three grounds. Firstly, it is said that it should not be open to anybody to object to an application unless they had some contrary interest. There can be a real problem here in some cases, but it arises only if and when the matter is referred to the tribunal. At the administrative stage of dealing with an application at the Land Registry it is important for third parties to be entitled to object to protect the position of others who are not in a position to do so because they had no notice of the application, or lack the capacity to respond to it. This may happen, for example with land the subject of an adverse possession claim, where the paper title owner has died or where … It also happens, not infrequently, where a local authority which has, or claims to have, provided accommodation to an elderly person under .. seeks to register a charge over a property as security for … and there is an issue whether in fact the conditions for declaring the charge have been met. The elderly person, unable to look after him or herself, may also not be able to challenge the legitimacy of the charge. If the Land Registry is aware of the objection, …. [adverse possession claim rejected/application by trustee not given effect to/no charge so no registration]

There is, however, a difficulty here when the matter is referred to the tribunal. At that stage, as I pointed out in *Kent CC v Fremlin*, one of a number of local authority charge cases which have been referred to the tribunal/adjudicator, the matter ceases to be administrative and becomes a judicial dispute. As a judicial dispute, it is necessary to have the right parties before the tribunal, but this is not always possible because, despite every effort to persuade the tribunal rules committee to include such provision, the rules do not permit of litigation friends for persons under a disability or for the estates of persons who have died and there has been no grant of probate or letters of administration.

The scope of the powers of the Land Registry and the basis for referrals to the First-tier Tribunal

I agree with the consultation paper that the Land Registry should not have power where there is a disputed application to decide if an application has a reasonable prospect of success before referring it. There are two essential reasons for this – firstly the Land Registry is not exercising judicial functions and secondly it is my experience that those entrusted at the Land Registry with dealing with issues of this kind do not appear to deal with them well, whether because of lack of the necessary experience and training or because they are under too much time pressure to deal

with such issues adequately. In addition (1) objectors at the Land Registry do not necessarily have any interest in the property to which the application relates but may be seeking to protect the interests of somebody else who, for example, does not have the capacity to object (see as to potential problems caused by this, which would be exacerbated if the Land Registry had power to determine the matter administratively without any opportunity for the incapacitated person to play any part, *Kent County Council v Fremlin* REF/2010/756), (2) the whole purpose of creating the Adjudicator was to enable issues to be dealt with judicially and independently in a way which did not infringe the European Convention on Human Rights, an objective which would be seriously undermined if factual and legal issues, which potentially affected its own liability to provide an indemnity, could be determined administratively by the Land Registry without any apparent recourse to the law or only one by way of judicial review, which would seem a wholly inadequate remedy for typical litigants in person in small cases of relatively little financial value, and (3) an incorrect rejection of an application can lead to priority being lost if there is another application waiting behind it. There are also other potential problems. For example, third parties may be affected by any decision who have been given no notice of an application. This can be the case under the current Land Registration Rules where there is a determined boundary application following a boundary agreement – it is expressly provided in the rules that no notice need be given to the other party and this appears to be so even where that party may wish to question whether the determined boundary correctly follows the agreed line (LRR, rule 119(2)). So too under the existing rules no notice of a determined boundary application need be given to the owner of a superior or inferior estate in the land but only to adjoining owners (LRR, rule 119(1)). Another example is where there may be an issue, when an objection to a claim to a possessory title is based on the land or part of it being an alleged public highway, whether the local highway authority ought to be involved, an issue as to which I sought to give some guidance in *Perrott v Cutter* REF/2011/1034.

A significant number of the matters referred to the tribunal are cases where either the application or the objection are groundless. Examples include cases where a charging order had been granted by a court and the registration of a notice in respect of the charging order was challenged on the sole basis that the judgment was obtained improperly or that the underlying debt did not exist. Such references continued to be made despite it being plain that a charging order is entitled to protection so long as it has not been set aside (subject to a separate question as to how it should be dealt with if the judgment debtor does not have a beneficial interest in the charged property – I deal with this in relation to the question of beneficial interests).

Further, it is clear that there must be a significant number of cases where an application or objection is wrongly rejected in whole or in part as groundless but is subsequently proved to be correct. An example is *Coates v Evans* REF/2014/356, where A claimed title to land either on the basis that it was conveyed to his predecessor in title in the 1920's or on the basis that he or his predecessor had acquired a possessory title to it subsequently. The Land Registry purported to reject the paper title claim as groundless and to refer only the claim to a possessory title. I held that the duty of the Land Registry was to refer the whole matter before it, and not just part of it. I went on to hold that the paper title had been established, at least in part, but insofar as it had not been established, the claim to the possessory title failed. It is also clear in the light of *Parshall v Hackney* that the paper title claim had to be

judicially determined first before any possessory title claim could be considered. Other judges have also reported cases where the Land Registry has purported to reject as groundless claims or objections which ultimately succeeded.

A further problem which arises is that many applicants and objectors are unrepresented and that the real issues between them are not properly understood by them or by those dealing with these matters at the Land Registry. An example of this was in *Oakfinch v Hall and others* REF/2008/1088 and other joined references, where a right of way by necessity was claimed by A over land which had been sold off by an earlier owner to several different purchasers. All the purchasers were in person and, after the matter had been referred to the Adjudicator, none put in any Statement of Case. It was, however, clear from A's Statement of Case (A being legally represented) that A had failed to plead any facts giving rise to a right of way by necessity over anybody's land, and even if such a right had existed, it could only have been over the last purchaser's land. None of this had been picked up by the Land Registry. Although the purchasers were all debarred from defending, the claim failed.

Additionally, there are cases where the facts established do not give rise to the right claimed but do give rise to a different right. In those cases, many of which do not get identified by the Land Registry, the Adjudicator and the tribunal have held that with suitable safeguards to ensure that the other party can deal properly with the matter, the Chief Land Registrar can be directed to note the true rights established on the register under powers contained in the Practice and Procedure Rules. An example is *City of Wakefield v Symonds* REF/2006/0931 where A claim adverse possession of a piece of land. His evidence did not support this but was not challenged and did support a right of way by prescription and a right to park two cars on the land.

An additional problem which can cause delay is when there are two or more applications before the Land Registry but only one of them is referred although they are interconnected. It is then often necessary for the tribunal to stay the referred proceedings until the other applications are referred, which can take time and in some cases involve a degree of pressure on the Land Registry to refer them at all. There have even been cases where the person dealing with the matter at the Land Registry has taken the view that the other applications should not be dealt with until the referred application has been decided by the tribunal.

These problems link in with the question, dealt with below, of what the jurisdiction of the tribunal is presently and should ideally be once a matter has been referred to it.

The timing of referrals and whether referrals are the best way of dealing with disputes

Section 73 of the 2002 Act says that duty to refer arises when "…". The Land Registry has a practice, referred to without adverse comment in the consultation paper, of referring automatically after 6 months even if the parties are still negotiating and do not want a referral. Although, when faced with such a referral the tribunal has simply adjourned the proceedings at the request of both parties until the negotiations have reached a conclusion or one of the parties has asked for the adjournment to be lifted, it seems to me that the referral was made without jurisdiction as … More significantly in terms of good practice it has the effect of forcing potentially expensive litigation on the parties unnecessarily when they are seeking ADR.

It seems to me that referrals should only be made at the request of one of the parties, unless perhaps there is a subsequent application that cannot be dealt with until the earlier application has been dealt with or some other need for the matter to be resolved. Alternatively, the Land Registry might have power to direct that unless an identified party commences proceedings before the tribunal the application will be dealt with adversely to that party. That would give that party the opportunity to commence proceedings without compelling him or her to do so. This would potentially save costs liability in many cases where there is a referral and one of the parties decides that the costs regime makes them unwilling to pursue their case by litigation, but before that decision is communicated to the other side that other side incurs costs which are then claimed from the withdrawing party. Again, however, there are potential funding and representation difficulties as (a) a party may not be in the position to commence proceedings, or obtain representation to do so, without funding and such funding can take time to resolve; (b) a party may prefer to commence court proceedings or may say, accurately or not, that they are in the process of doing so; (c) …

Costs before the tribunal

In principal the costs regime should be substantially the same which ever jurisdiction a dispute is heard in. Where one has the option to commence court proceedings or tribunal proceedings to resolve the same issue, there seems to be no good reason to have two different costs regimes in the two alternative jurisdictions. There might, however, be a brief window following a reference, before any significant costs are incurred, where the potential respondent is given the opportunity to drop the application/objection without costs sanctions before any action is required by the other party.

What is the better venue for a dispute – the courts or the tribunal?

It may be going beyond the terms of the Law Commission's reference, but it seems plain that in principle property disputes should be dealt with by a specialist property tribunal rather than by a county court, with a judge who usually has little knowledge of property law and little experience of conveyancing practice. The judges in the tribunal all have many years of experience of property disputes at the Bar or in solicitors' practices. This enables relevant issues to be identified at an early stage, and proper consideration of those issues bearing in mind that litigants in person and indeed many of the legal representatives do not have the ability to identify them and address them properly. It also means that the judges are very familiar with the leading cases on matters such as adverse possession, easements and boundary disputes and do not need to be taken in detail through those cases. So too, that knowledge means that they can identify and address the evidence that is relevant to decide the issues. Hearings before the tribunal rarely take more than one or two days, plus where needed a site view. By contrast, proceedings going on appeal to the Court of Appeal on matters such as boundary disputes and rights of way regularly appear to have followed on very lengthy hearing before a county court judge. There is therefore a significant saving in costs.

There is a downside in that the tribunal judges are largely based in London – only about 5 are outside London, in Birmingham, Manchester, Liverpool and Somerset.

This means that interlocutory issues are largely dealt with on paper, and that either judges have to travel to a local hearing centre or the parties have to come to London for any hearing. Interlocutory oral hearings are uncommon, however, and the cost of travel is outweighed by the savings in time in other respects.

The matter referred to the Tribunal and the scope of its jurisdiction

The scope of the tribunal's jurisdiction has never been totally clear and has been thrown further into doubt by Judge Dight in *Murdoch v Amesbury*. Those doubts have been partially resolved by the decision of Judge Elizabeth Cooke in …, and my attached note on *Murdoch v Amesbury* deals with the flaws in that decision and the current scope of the jurisdiction.

Even on the basis propounded by me in that paper, however, there are real problems with limitations on the jurisdiction. Some of these are raised in the consultation paper. Thus in a beneficial interest case, it is plainly unsatisfactory that the tribunal does not have jurisdiction to determine the extent of the beneficial interest. Sometimes this can be achieved by sufficiently detailed findings of fact leading to the conclusion that a person has an x% beneficial interest and is therefore entitled to maintain a restriction. In some cases at present, a case before the tribunal has proceeded almost to a hearing without any concession that a claimant had any beneficial interest at all. There has then followed a concession that the claimant is entitled to the claimed restriction because she has at least a one per cent interest. This has left the tribunal with nothing to decide and is likely to have led to fresh litigation to determine the extent of the claimed interest.

A further common problem arises in relation to charging orders over beneficial interests. Theoretically, under the Charging Orders Act 1979 a court ought not to grant a charging order over a beneficial interest unless satisfied that the debtor has some beneficial interest in the property – it does not have to decide what interest – theoretically it could be 0.0001%. Although sometimes, where a third party intervenes to challenge the existence of any beneficial interest on the part of the debtor, the court will decide that issue, the relevant third party does not always intervene or even necessarily have notice of the hearing. The third party then seeks to challenge the application to register notice of the charging order on the basis that the debtor does not have any interest in the property. Typically this happens when a couple has separated or divorced, often years earlier, and there is a formal or informal agreement between them by which the debtor assigned his beneficial interest to his partner. There has been a difference of opinion between judges in the tribunal as to whether there is jurisdiction to determine whether the notice should be entered on the register or whether the partner, who is usually acting in person, should be directed to go back to the court which made the charging order and have the point litigated there. I have always taken the view that if, as usual, the point has not expressly been determined by the court, the tribunal has jurisdiction to decide the point. It appears to me to be hugely undesirable to send litigants in person from court to court in search of justice if the point can effectively be determined by the tribunal or court where the dispute currently is and that if the debtor clearly has no beneficial interest in the property there is no reason to register notice of the charge against the property, with all the problems that involves, leaving the unfortunate real beneficial owner, acting in person, to apply to the original court. I so held in *Yorkshire Bank v Elliott* REF/2005/0256, followed by

Deputy Adjudicator Brilliant in *F&H (Didsbury Ltd)* REF/2012/0614, although Deputy Adjudicator Rhys took a different view in *Commercial First Business v Choudhry* REF2011/0713. It appears to me that in such cases, it should be made clear that the tribunal has power to deal with the case and determine what, if any, beneficial interest the debtor has in the property.

A final issue in relation to beneficial interests,

In another case, *Facey v Bedford Borough Council*, No.2, REF/2014 (decision dated 17 November 2014) the actual application referred (by an applicant in person) was to register a possessory title to a piece of land where a registered title had been obtained dishonestly by a local authority to land in the occupation of the applicant to which the local authority had no paper title. Although the only application was for a possessory title, I dealt with the matter by directing the rectification of the register to remove the land from the local authority's title and then to give effect to the applicant's possessory title, the true paper title owner having long since abandoned it. Had the land remained registered and had I been unable to deal with the registration of title as I did, the applicant's application may have failed because he knew that the land was not his – this may have been a case where paragraph 5(3) of schedule 6 could have assisted the applicant but this was not clear.

Other examples of cases where it appeared right to me to consider issues that had not been raised by litigants in person included (1) *UK Housing Alliance (North West) Limited (in administration) v Bowyer and others* REF/2011/604, 617, 623 and 625, which affected many other cases before the Adjudicator and which involved similar issues to those raised in the proceedings which ended in the Supreme Court sub nom *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52, (2) *City of Wakefield v Symonds* REF/2006/0931, where the facts proved on an adverse possession claim did not establish a right to a possessory title but did establish a right of way and a parking easement, and (3) *Hussain v Salam* REF/2011/136, where I found that A had a beneficial interest in property and then ordered that notice of a charging order over that interest should be restored to the register, it having previously been cancelled as a result of clear perjury by the registered proprietor in giving evidence, supported by a forged document, that A had no such beneficial interest.

Multiplicity of proceedings

It is a standard principle that in general all related disputes should be determined in a single set of proceedings and that a party should not be permitted to raise points in fresh proceedings that ought to have been raised in earlier proceedings. The current jurisdiction of the tribunal, even broadly interpreted, as I sought to do, inhibits this – see for example my decision in *Gordon v Chatfield* REF/2005/1543, where new facts giving rise to a claim to an equitable interest in a property, based on work done to the property, were sought to be put forward shortly before the hearing of a claim to an equitable interest based on alleged capital contributions made by the claimant. I refused to permit him to make these new allegations so close to the hearing, without prior warning and without any explanation why they were not made much earlier although he had been legally represented. I considered that it would be wrong to permit these new claims to be raised in fresh proceedings and directed the Chief Land Registrar to reject any future application based on them.

The approach of Judge Dight in *Murdoch v Amesbury* would often make it impossible and give rise to multiple litigation. Thus, in *Silkstone v Tatnall*, there would have been no need for the Silkstones to seek to withdraw the claim to a prescriptive easement reserving the right to claim a similar easement under s.62 of the Law of Property Act 1925. If my jurisdiction was limited to dealing with the claim to a prescriptive easement, they could not have raised the s.62 point in the proceedings before me, and there could have been no bar to a further application for a s.62 easement, possibly followed by a further application for a *Wheeldon v Burrows* easement.

So too, in … I would have had no jurisdiction to deal with the obvious right of way and easement to park, but could only have directed the registration of the council's title, without any apparent power to protect –'s rights on the register. Another case is *Crowe v Stapleton Construction Ltd, REF/2008/1105*, where a caution had been registered to protect rights under a lease which proved by the time of the hearing to be void. I held that the caution was effective to protect prescriptive rights arising from the use of the land as contemplated by the invalidly granted rights.

Adverse possession issues

Adverse possession of unregistered land for less than 12 years

I simply draw attention to my decision in *Bezkorowajny v Dawson* REF/2010/1203 REF/2011/521, where the title of the paper owner had been extinguished by adverse possessor 1 who had then, before dying, transferred possession informally to Mr. B. The personal representatives of adverse possessor 1 then wanted Mr B to have the land but took no formal steps to transfer it to him, and were no longer available or interested in it. I held that Mr. B ought to be registered with a possessory title, having been in possession for 8 years since the personal representatives of adverse possessor 1 had assented to the adjoining land, to which the adverse possessor had a paper title) vesting in him, apparently not appreciating that this additional land was not included. There are presumably many other cases where an adverse possessor who has extinguished the title of the paper title owner simply goes off "giving" the land to somebody else with the intention that they should have it. It may be worthwhile clarifying the law to provide that in such circumstances, although technically the possession is not adverse to the original owner of the possessory title, this should not prevent the new possessor acquiring a possessory title. This would also affect the position of a purchaser in possession where completion has not taken place but the paper title owner has disappeared, or where there is a sale of a house and garden as registered in title x but the property includes land which has been squatted by the previous owner.

Prescriptive easements under the 1832 Act

A matter which caused some concern in references to the Adjudicator was at one point as to the meaning of "next before some suit or action" in s.4 of the Prescription Act 1832. Although the very sensible approach of the Adjudicator in REF/2011/420 seems to have been generally accepted so that the suit or action includes an application to the Land Registry, or at least a contested application, in respect of the claimed right, I am by no means satisfied that as a matter of law that decision is correct and I would suggest that it is confirmed by statute for the avoidance of doubt.

In relation to boundaries the 2001 Report provided as follows –

> "BOUNDARIES
>
> The general boundaries rule
>
> 9.9 In many countries, there is a cadastre, which is a record of all land holding. This is commonly kept for fiscal purposes, and under such systems, boundaries are often surveyed and delimited with at least some degree of precision. No doubt because of a different approach to taxes on land ownership, this cadastral system has not been adopted in England and Wales. In general, in this country, the register is not conclusive as to boundaries. This is because of the so-called "general boundaries rule" that is presently contained in rule 278 of the Land Registration Rules 1925. This provides that
>
> Except in cases in which it is noted in the Property Register that the boundaries have been fixed, the filed plan… shall be deemed to indicate the general boundaries only.
>
> 9.10 Although there is a power to fix boundaries, it has hitherto hardly ever been used for two main reasons. The first is the expense of so doing, which, given the manner in which boundaries have been fixed hitherto, is considerable. **The second is that the process of fixing of a boundary is all too likely to create a boundary dispute where none had existed hitherto. This is because it is necessary to investigate the titles of all adjoining landowners.** (emphasis provided)
>
> 9.11 The general boundaries rule is to be retained under the Bill. However, as we explain below, it is anticipated that fixed boundaries are likely to become more common for the future. Given the importance of the rule, it is included in the Bill itself rather than, as now, in rules. The Bill provides accordingly that the boundary of a registered estate as shown for the purposes of the register is a general boundary, unless it is shown on the register as determined. A general boundary does not determine the exact boundary. Rules may, however, make provision which will enable or require the exact line of the boundary of a registered estate to be determined. In particular, rules may make provision about
>
> (1) the circumstances in which the exact line of a boundary may or must be determined;
>
> (2) how the exact line may be determined;
>
> (3) the procedure in relation to applications for the determination of a fixed boundary; and
>
> (4) the recording of the fact of determination in the register or in the parcels index (which is explained below).
>
> 9.12 There are two points that emerge from this rule-making power. First, it will be open to the Lord Chancellor to prescribe a means of fixing boundaries that

is less demanding than that which is presently employed. The development of modern mapping techniques is likely to make this possible. It is anticipated that, if this can be done, wider use may be made of voluntary fixing of boundaries, for example, when a development is laid out.

9.13 Secondly, **there may be circumstances in which it will be possible to require that the boundary be fixed. One particular case arises in the context of adverse possession** (emphasis provided). We explain in Part XIV of this Report that the Bill introduces a new system of adverse possession in relation to registered estates. In general, a person who has been in adverse possession of a registered estate for at least 10 years will be able to apply to be registered as proprietor of it. However, if the proprietor (or certain other interested persons) serves a counter-notice, the application will be rejected. There are certain exceptions to this. In particular, where

(1) an adjacent landowner has been in adverse possession; and

(2) for at least 10 years of that period of adverse possession, he, she or any predecessor in title has reasonably believed that the land to which the application relates belonged to him or her the applicant will be entitled to be registered. The thinking behind this exception is that legal and physical boundaries do not always coincide, as where an estate is laid out and the fences are not where the plans on the register say that they are. If, in such circumstances, a neighbour has acted in the reasonable belief that he or she owned the land, his or her claim should succeed. The exception does not, however, apply where the boundary has been determined by rules under Clause 60(3). Furthermore, rules under Clause 60(3) are likely to require that where an applicant does come within the exception and acquires title to the land, he or she will be required to have the boundary fixed when he or she is registered. This will ensure that he or she (or any successor in title) cannot ever invoke this exception again.

It is clear from this account, if it is not clear without it, that (1) boundary disputes and investigation of the relevant parties titles was regarded as part and parcel of any determination of an exact boundary and (2) the intention, not totally realised in the subsequent rules, was that the rules were to make provision as to when and how the exact line of the boundary was to be determined and the recording of the fact of determination, and that there would be included provisions requiring the boundary to be determined in particular circumstances. The principal circumstance contemplated where it was likely to become compulsory was where a claimant acquired adverse possession of part of a neighbour's land under Schedule 6 to what was to become LRA 2002 based on a reasonable belief that the land belonged to that claimant. If there were to have been a determination of the exact boundary in those circumstances, it would almost inevitably have involved considerable room for argument as to where the area of adverse possession ended and where the exact boundary of the adversely possessed land lay. Further, that consideration, in the event of disagreement, would have to have been by the adjudicator.

B. LRR 2003

The rules for determining the exact line of a boundary are set out in LRR 2003, rules 118 to 122. For present purposes the relevant rules are rules 118-120, which provide as follows:

> "118 Application for the determination of the exact line of a boundary
>
> (1) A proprietor of a registered estate may apply to the registrar for the exact line of the boundary of that registered estate to be determined.
>
> (2) An application under paragraph (1) must be made in form DB and be accompanied by –
>
> > (a) a plan, or a plan and verbal description, identifying the exact line of the boundary claimed and showing sufficient surrounding physical features to allow the general position of the boundary to be drawn on the Ordnance Survey map, and
> >
> > (b) evidence to establish the exact line of the boundary.
>
> 119 Procedure on an application for the determination of the exact line of a boundary
>
> (1) Where the registrar is satisfied that –
>
> > (a) the plan, or plan and verbal description, supplied in accordance with rule 118(2)(a) identifies the exact line of the boundary claimed,
> >
> > (b) the applicant has shown an arguable case that the exact line of the boundary is in the position shown on the plan, or plan and verbal description, supplied in accordance with rule 118(2)(a), and
> >
> > (c) he can identify all the owners of the land adjoining the boundary to be determined and has an address at which each owner may be given notice,
>
> he must give the owners of the land adjoining the boundary to be determined (except the applicant) notice of the application to determine the exact line of the boundary and of the effect of paragraph (6)
>
> (2) Where the evidence supplied in accordance with rule 118(2)(b) includes an agreement in writing as to the exact line of the boundary with the owner of the land adjoining the boundary, the registrar need not give notice of the application to that owner.
>
> (3) Subject to paragraph (4) the time fixed by the notice to the owner of the land to object to the application shall be the period ending at 12 noon on the twentieth business day after the date of issue of the notice or such longer period as the registrar may decide before the issue of the notice.
>
> [*provision for the extension of the 20 days period on request*]

[*provision for representations by the applicant as to such extension and for the decision of the registrar as to any extension*]

(6) Unless any recipient of the notice objects to the application to determine the exact line of the boundary within the time fixed by the notice (as extended under paragraph (5), if applicable, the registrar must complete the application.

120 Completion of application for the exact line of a boundary to be determined

(1) Where the registrar completes an application under rule 118, he must –

(a) make an entry in the individual register of the applicant's registered title and, if appropriate, in the individual register of any superior or inferior registered title, and any registered title affecting the other land adjoining the determined boundary, stating that the exact line of the boundary is determined under section 60 of the Act, and

(b) subject to paragraph (2), add to the title plan of the applicant's registered title and, if appropriate to the title plan of any superior or inferior registered title, and any registered title affecting the other land adjoining the determined boundary, such particulars of the exact line of the boundary as he considers appropriate.

(2) Instead of, or as well as, adding particulars of the exact line of the boundary to the title plans mentioned in paragraph (1)(b), the registrar may make an entry in the individual registers mentioned in paragraph (1)(a) referring to any other plan showing the exact line of the boundary."

It is a surprising feature of these rules that although, if the application is completed, the boundary is noted on any superior or inferior registered titles, there is no provision for notice to be given to be given to the registered proprietors of those titles so that they could object to the application. It is also plain that the completion of the application affects the title to the adjoining land by determining where the boundary comes. Also, where there is a boundary agreement in writing with the owner of the adjoining land, there is no need to give notice to that owner even though the boundary agreement may not be by reference to the plan submitted to the Land Registry. In such circumstances, LRR 2003 does not give the adjoining owner any opportunity to object that the plan is inaccurate in some respect. Completion of the application by the Land Registry, however, is only an administrative act and not a judicial one, and it remains open to anybody affected by it to apply under schedule 4 to LRA 2002 to alter the register by removing or altering any entry in any register, but in such circumstances the burden is on the person applying to alter the register to show that there has been a mistake which prejudicially affects a registered proprietor.

A further oddity is that rule 121 provides that where the exact line of part of a boundary has been determined, the ends of that part of the boundary are not to be treated as determined for the purposes of adjoining parts of the boundary the exact line of which has not been determined. Precisely how that is supposed to work if, when later determining the remainder of the boundary, those ends are determined to be elsewhere is unclear. While sub-atomic particles can be in two places at once in the

world of quantum physics, it is a novel concept to have the same boundary point in two places at once.

What is clear once again is that there is a distinction in the rules between the exact line of the boundary, which is to be recorded, and the plan produced to identify it. Any objection may, on the face of it, be (a) to the claimed position of the exact line of the boundary or (b) to the accuracy of the plan produced to identify that position or (c) to both the claimed line and the accuracy of the plan.

Although there is nothing in the rules as to the scale of any plan or as to the degree of accuracy required for it, in practice the Land Registry requires that the plan should be to a particular scale and should be certified to be accurate to within 10mm. Again, there is nothing in LRA 2002 or LRR 2003 which requires that particular scale or degree of precision in all cases or indeed at all.

Also relevant are rules 16 and 17. Rule 16 applies where an application is not in order and allows the registrar to raise such requisitions as he considers necessary for the applicant to comply with. Rule 17 provides that "If the registrar at any time considers that the production of any further documents or evidence or the giving of any notice is necessary or desirable, he may refuse to complete or proceed with an application, or to do any act, or make any entry, until such documents, evidence or notices have been supplied or given." These provisions, unsurprisingly, would appear to enable the registrar on a determined boundary application, if the plan supplied is defective in any way to require a compliant plan to be supplied rather than cancelling the application. That would appear to be the case whether the defect was spotted before any notice was given to anybody else or whether it was pointed out by an objector.

Objections to applications

LRA 2002, section 73(1) provides that, with limited exceptions which do not apply to determined boundary applications, anybody may object to an application. This would include proprietors of superior or inferior titles to the same land although they would first have to be made aware of the application. Section 73(4) provides that the right to object is subject to rules. In the case of a determined boundary application, the rules impose a time limit by reference to the time a notice of the application was provided to the owner of the adjoining land. No time limit is provided for objections by anybody else. Unless the registrar is satisfied that the objection is groundless (see section 73(6), section 73(5) requires him to give notice of the objection to the applicant and provides that he may not determine the application until the objection has been disposed of. Section 73(7), as amended, provides that "If it is not possible to dispose by agreement of an objection to which subsection (5) applies, the registrar must refer the matter to the First-tier Tribunal". Before July 2013 the reference was to the adjudicator but his jurisdiction was then transferred to the tribunal.

The jurisdiction of the tribunal

Under section 108(1) of LRA 2002, the tribunal "has the following functions – (a) determining matters referred to it under section 73(7)". Section 109(2) then provides that rules may regulate the practice and procedure to be followed with respect to proceedings before the tribunal and matters incidental to or consequential on such proceedings, and section 109(3)(c) provides that such rules may in particular make

provision about the form in which any decision of the tribunal is to be given. There is no definition of "matter" in LRA 2002, but section 110(3) provides –

> "Rules may make provision about the functions of the [tribunal] in consequence of a decision on a reference under section 73(7) and may, in particular, make provision enabling the adjudicator to determine, or give directions about the determination of –
>
> (a) the application to which the reference relates, or
>
> (b) **such other present or future application to the registrar as the rules may provide**." (emphasis supplied)

In presenting the Bill to Parliament the 2001 Report observes in relation to this provision at paragraph 16.18 –

> "The principal reason for (2) is that where the Adjudicator decides a particular point, rules may enable him to give specific directions in related applications. However, **the power is wide enough that rules might empower him to give general directions that could apply to pending and future applications that were quite unconnected with the case before him. This would of course obviate the need for further references to him on the same point and would provide guidance to the registrar as to what he is to do in future in a similar case**." (emphasis provided)

The powers and duties of the adjudicator until July 2013 were contained in the Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003 (the Adjudicator's Rules). With the transfer of the jurisdiction to the tribunal, new rules were also introduced, the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the Tribunal Rules). Both sets of rules were expressly made under, inter alia, section 110 of LRA 2002. "Matter" was defined in Rule 2 of the Adjudicator's Rules as meaning "the subject of either a reference or a rectification application"; "reference" is defined as "a reference from the registrar to the adjudicator under section 73(7) for determination of the matter by the adjudicator"; and "rectification application" was defined there as an application to the adjudicator to rectify or set aside a document under section 108(2) of LRA 2002. There are no equivalent definitions in the Tribunal Rules.

Rule 3 set out the overriding objective of the Adjudicator's Rules, which was to enable the adjudicator to deal with matters justly. This was stated to include, so far as practicable, saving expense, dealing with matters proportionately to the value of the land and other interests, the importance and complexity of the matter, and the financial position of each party, and ensuring that the matter was dealt with expeditiously and fairly. The adjudicator had to seek to give effect to the overriding objective not only when exercising powers under the Rules, but also when interpreting them, and the parties were required to help the adjudicator to further the overriding objective. The overriding objective is similarly stated in Rule 3 of the Tribunal Rules, except that the objective now is to deal with matters not merely justly but fairly and justly, which is stated to include proportionately, avoiding unnecessary formality and seeking flexibility, ensuring, so far as practicable, that both parties are able to participate fully in the proceedings, using any special expertise of the tribunal effectively and avoiding

delay so far as compatible with proper consideration of the issues. The provisions in the Adjudicator's Rules about exercising powers and interpreting the Rules and about the parties being under a duty to assist the tribunal to further the overriding objective are repeated in the Tribunal Rules.

Rules 39 and 40 of the Adjudicator's Rules provided for a "substantive decision" and a "substantive order" in each case. The Tribunal Rules refer only to decisions, orders and directions.

"Substantive decision" was defined in Rule 2 of the Adjudicator's Rules as "a decision of the adjudicator on the matter or on any substantive issue that arises in it" but not any interim direction or costs order. "Substantive order" was defined as "an order or direction that records and gives effect to a substantive decision". Some minor exceptions to this were later introduced by amendment. A substantive decision could be given orally at the end of a hearing or reserved, but had to be recorded in a substantive order (Rule 39). That order had to be in writing and satisfy certain formalities and other requirements, including stating any steps that had to be taken to give effect to the substantive decision (Rule 40(1)-(5). Written reasons had to be given to the parties for the substantive decision and for any steps that had to be taken to give effect to it, but these did not need to be given in the substantive order (Rule 40(6)-(7)).

Rule 36 of the Tribunal Rules provides that the tribunal may give a decision orally at a hearing but, subject to certain exceptions, must provide to each party as soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings or of a preliminary issue (a) a decision notice stating the decision, (b) written reasons for the decision, and (c) specified information as to rights of appeal.

Rule 41 of the Adjudicator's Rules was headed "Substantive orders on a reference that include a requirement on the registrar". It provided as follows -

> "(1) Where the adjudicator has made a substantive decision on a reference, the substantive order giving effect to that substantive decision **may include** a requirement on the registrar to –
>
> > (a) give effect to the application in whole or in part as if the objection to that original application had not been made; or
> >
> > (b) cancel the original application in whole or in part.
>
> (2) A requirement on the registrar under this rule may include –
>
> > (a) a condition that a specified entry be made on the register of any title affected; or
> >
> > (b) a requirement to reject any future application of a specified kind by a named party to the proceedings –
> >
> > > (i) unconditionally; or
> > >
> > > (ii) unless that party satisfies specified conditions.

It can be seen that the order that the adjudicator could make on the basis of a substantive decision did not have to include a requirement to the registrar at all. That would necessarily be the case where the decision was on a substantive issue arising in the proceedings that did not determine those proceedings. It can also be seen that a substantive decision was not limited to telling the registrar whether to give effect to or cancel the application in whole or in part – the provision is simply for its inclusion where appropriate and for any such requirement on the registrar, when made, to include additional conditions or requirements. As explained by Rimer LJ in *Chief Land Registrar v Silkstone* [2011] EWCA Civ 801, at the end of paragraph 45:

> "although the heading to rule 41 suggests that that rule is only directed to 'substantive orders' that *include* requirements on the registrar, the rule itself shows that it is not: its use of the word 'may' in subsection (1) shows that it also refers to orders that include no such requirement. In practice, though, most such orders will include such a requirement."

Rimer LJ had previously, at paragraph 44, found that a decision under the Adjudicator's Rules was "the adjudicator's ruling or judgment on the reference or on a substantial issue arising in it", and that an 'order' was "the document giving formal effect to such a decision."

There are now similar provisions in Rule 40 of the 2013 Rules, which provides as follows –

> "(1) The Tribunal must send written notice to the registrar of any direction which requires the registrar to take action.
>
> (2) Where the Tribunal has made a decision, that decision may include a direction to the registrar to –
>
> > (a) give effect to the original application in whole or in part as if the objection to the original application had not been made; or
> >
> > (b) cancel the original application in whole or in part.
>
> (3) A direction to the registrar under paragraph (2) must be in writing, must be sent or delivered to the registrar and may include –
>
> > (a) a condition that a specified entry be made on the register of any title affected; or
> >
> > (b) a direction to reject any future application of a specified kind by a named party to the proceedings -
> >
> > > (i) unconditionally; or
> > >
> > > (ii) unless that party satisfies specified conditions"

Rule 41(2)(b) of the Adjudicator's Rules and rule 40(2)(b) of the 2013 Rules were both made under the powers contained in section 110(3) of LRA 2002, and, construed as required in accordance with the overriding objective of dealing with matters justly, give power to the adjudicator, and now to the tribunal to determine or make directions

about the determination of present or future applications, even ones, as the 2001 Report contemplated, unconnected with the application before him. The requirement for a specified entry to be made on the register of any title affected has frequently been used. Examples include the following:

> 1. An application for first registration is objected to because the objector claims a right of way over the property to be the subject of the registration. If the claim to a right of way succeeds in whole or in part, the registrar will be directed to give effect to the application for first registration but to note the right of way on the register.
>
> 2. A claim is made to rectify the register by virtue of a claim for a possessory title to an area of the registered land. The evidence in support of the claim for a possessory title does not establish such a claim but is sufficient to establish a right of way or an easement to park. After ensuring that the registered proprietor has a proper opportunity to deal with the entitlement to any such claimed easement, if it is established, the registrar will be directed to note it on the register of the servient property when cancelling the application for a possessory title – see for example *City of Wakefield v Symonds* [2007] EWLandRA 2006_931.
>
> 3. In one case heard by me, *Hussain v Salam* [2013] EWLandRA 2011_0136, the respondent, S, had applied to the Land Registry to register a purported transfer from the joint names of the applicant, H, and S into the sole name of S. I found that the transfer had not been executed when it was supposed to have been and was a concoction to deceive creditors of H, supported by perjured evidence by S. It had previously been used to in other proceedings before the adjudicator, together with other evidence that now proved to have been perjured, to defeat an application by one of those creditors to register a charging order he had obtained over the beneficial interest of H in the property. I ordered that the application to register the purported transfer should be cancelled, and that notice of H's creditor's charging order should be entered on the register.

Directions to reject future applications of a specified kind have in general been given where a party has made a hopeless application and has given the impression that he would make further such applications.

Boundary disputes, whether as to the position of the general boundary or on a determined boundary application, have generally been dealt with in the same way. In order to determine where the general boundary comes or whether a determined boundary claim succeeds, the adjudicators, and since 2013 the tribunal judges, have frequently determined where, or approximately where, the boundary in fact comes. In the case of a general boundary dispute, they have directed the registrar (if in a different place from the position of the general boundary as shown) to redraw the general boundary in accordance with their findings and in some cases to note those findings on the register. In the case of a determined boundary application, similar directions have been given to the registrar to note on the register the position of the boundary as found. In some cases the findings have been precise enough to enable a new determined boundary application to be made based on those findings; in other

cases the findings have been less precise but have been sufficient to bring to an end the dispute between the parties. Thus, for example, in *Fagan v Hall* [2015] EWLandRA 2014_535 neighbours had each submitted their own conflicting determined boundary applications. I dealt with them by determining where the boundary did lie as a result of an agreed boundary being laid out some years earlier when one of the sets of neighbours had bought their land from the predecessor in title of the other. Unfortunately, the title plan, which was based on an ordnance survey plan, was inaccurate because the line on the ground had been mis-plotted onto the plan. This happened because a building by reference to which the line had been drawn was misplaced on the ordnance survey plan and the error had not been noticed. I directed that both determined boundary applications should be cancelled but included in the order a direction to the Chief Land Registrar to note on the register that the parties have agreed the other boundaries on the ground subject to determination of the line of the disputed boundary and that the disputed boundary ran in a straight line as shown on a plan ultimately agreed by the parties. Determining the question where the boundary lay resolved both applications and the answer was the reason why both applications failed. The direction to the Registrar to note on the register where the boundary did lie resolved matters between the parties and made the position plain to subsequent purchasers, as contemplated by the 2001 Report. It was also in my judgment at the time, and it remains my view, an order which I could properly make under rule 40 of the 2013 Procedure Rules.

Directions to commence court proceedings

Section 110(1), as amended, provides that –

> "In proceedings on a reference under section 73(7), the First-tier Tribunal may, instead of deciding a matter, direct a party to the proceedings to commence proceedings within a specified time in the court for the purpose of obtaining the court's decision on the matter."

It is to be noted that any direction for court proceedings must be for the purpose of obtaining the court's decision on "the matter", which would appear to be a clear reference to the matter referred by the registrar under section 73(7). This power has most frequently been used in practice in beneficial interest cases involving spouses where there are divorce proceedings and it would make no sense for a separate determination of beneficial entitlement by the tribunal because the divorce court has powers to redistribute property which the tribunal does not have. It is also used in partnership disputes and in cases where there are alternative claims not all of which are within the tribunal's jurisdiction.

The authorities before *Murdoch v Amesbury*

In *Jayasinghe v Liyanage* [2010] 1 WLR 2106, Briggs J, as he then was, had to consider an application for a restriction to protect a claimed, but contested, beneficial interest in a property. At paragraphs 16 to 18 of his judgment he stated:

> "16. It follows in my judgment that what has to be referred to the Adjudicator under section 73(7), where an objection which is not obviously groundless cannot be disposed of by agreement, is not merely the question whether the applicant has a relevant right or claim, but the additional question whether the

> entry of a restriction is necessary or desirable for the purpose of protecting that right or claim. Both of those questions fall within what is described in section 73(7) as "the matter" to be referred to the Adjudicator.
>
> 17. It is also apparent from section 73(5) to (7) that determination of the application for the restriction, where there has been an objection, requires the objection to be "disposed of". The disposal of the objection is therefore an integral part of the matter referred to the Adjudicator under section 73(7).
>
> 18. It follows from that analysis that the precise nature of the Adjudicator's function on any particular reference under section 73(7) will be significantly affected by an examination of the precise restriction sought, the nature of the claim or right thereby sought to be protected, and the basis of the objection which has led to the reference. It is plain from section 110(1) that the Adjudicator is given a broad discretion, on a reference under section 73(7), whether to decide "a matter" himself, or to require it to be decided in a competent court, and it is equally plain from the panoply of procedural powers given to the Adjudicator under the Practice and Procedure Rules that a decision to decide a matter himself may properly involve a trial, rather than merely a summary review directed merely to the question whether an asserted claim is reasonably arguable."

In *Chief Land Registrar v Silkstone*, the issue for decision was whether the Silkstones had a prescriptive right of way across their neighbour's garden. They applied to register a unilateral notice in respect of the claimed right of way. The neighbour, Mr. Tatnall, objected and "the matter" was referred to the adjudicator. The issue under appeal was whether the adjudicator had jurisdiction to prevent the Silkstones from withdrawing their application at the commencement of the hearing except upon terms that they conceded that they had no right of way (a concession that they were not willing to make).

It is also worth noting that the reason the Silkstones were seeking to withdraw was that they were seeking to find evidence at a very late stage that would provide grounds for claiming, as an alternative to a prescriptive right of way, a right of way arising under section 62 of the Law of Property Act 1925. This was said to have arisen because their property and Mr. Tatnall's property were said once to have been in common ownership, the right of way arising when one of the properties was sold off. That was not the same right of way which was claimed by prescription, which could only have arisen long after the properties had ceased to be in common ownership. If all that was before the adjudicator in that case was the claim to a prescriptive easement, and "the matter" referred did not include all bases of the claim to a right of way, none of the issues in that case need have arisen. The Silkstones could not have sought to amend to plead a section 62 right of way, and the decision of the adjudicator on the claim to a prescriptive right of way could not have prevented a claim to a different right of way based on section 62 unless it could have been said that it was an abuse of process to make the fresh claim at a later stage instead of including it in the initial application to the Land Registry. It is difficult to see why, in those circumstances, it would have been an abuse of process to do so. If the claim to a prescriptive right had been cancelled by the Land Registry without the matter being referred to the adjudicator, there would have been no abuse in subsequently bringing a fresh claim

under section 62. If, instead of cancelling that application the registrar referred it to the adjudicator, and the jurisdiction of the adjudicator was then limited to deciding that issue, the Silkstones could not amend their application before the adjudicator at any stage, however compelling the facts on which the alternative claim to a section 62 right of way may have been, even with the consent of Mr. Tatnall. As they would have had no right to include such a claim in those proceedings, it cannot have been an abuse of process to bring the claim in separate proceedings. Yet the appeal in *Silkstone* proceeded on the basis that the Adjudicator had determined once and for all any question of entitlement to any such right of way however arising, so that no new claim under section 62 could then be made by the Silkstones. This can only be because either "the matter" included any claim on any basis to the alleged right of way, or because section 110 of LRA 2002 and the rules made under that section empowered the adjudicator to determine all issues relating to the claimed right of way, however arising.

The question is of wide significance to the jurisdiction of the adjudicator and now of the tribunal. It frequently happens before the tribunal that one or both parties raise issues that go beyond those raised in the original application or objection and provided they relate to the entitlement of the applicant to what is sought by him, the amendments have been permitted by the Adjudicator. Thus, if the Silkstones had sought, at an early enough stage, to put forward a substantial case based on section 62, subject to consideration of the overriding objective and any submissions by Mr Tatnall, permission to plead that case by way of amendment would have been granted. I can say this with some certainty as I was the adjudicator in that case. By way of further example, there are many cases of a person claiming adverse possession under Schedule 6 to LRA 2002 whose claim ought to have been brought under the transitional provisions in paragraph 18 of Schedule 12 to that Act, but whose claim as presented to the Land Registry did not include sufficient facts to show this. They have standardly been permitted to pursue their claim on this basis. By contrast, a claim brought under paragraph 18 of Schedule 12 could not be transformed into a Schedule 6 claim, because a Schedule 6 claim needed to be brought using a different form and with an entirely different procedure before the Land Registry which had not happened.

To return to *Silkstone*, at paragraph 37 of his judgment, Rimer LJ stated -

> "The first point is that, in a case like the present, 'the matter' referred to the adjudicator was one that required him to decide the underlying merits of the objection. He was not concerned simply to decide whether the Silkstones had an arguable case to a prescriptive right of way over No 3. He was required to decide substantively whether they *did* have such a right of way. He had, therefore, to consider the merits of their claim and his determination of that question would provide the answer as to whether the objection was or was not well founded. It appears to me obvious from the legislation that the adjudicator's jurisdiction requires him to decide the underlying substance of the objection on its merits."

At paragraph 48, Rimer LJ summarised the position as follows –

> "A reference to an adjudicator of a 'matter' under section 73(7) confers jurisdiction upon the adjudicator to decide whether or not the application should succeed, a jurisdiction that includes the determination of the underlying merits of the claim that have provoked the making of the application. If the adjudicator does not choose to require the issue to be referred to the court for decision, he must determine it himself. In the case of an application under section 36 to which an objection has been raised, the relevant issue will be the underlying merits of the claim to register the unilateral notice."

How then, apart from *Murdoch v Amesbury*, does this naturally relate to determined boundary applications. A determined boundary application is one to determine the exact line of a boundary of a registered estate. It therefore seeks to determine precisely the limits of that estate. The claim that has provoked the making of the application is the claim by the applicant that the line on the ground contended for by him represents the extent of his property. LRR 2003 provides a mechanism and procedure to be followed to have that exact line determined. They require both a plan and evidence to establish the exact line and the registrar has to be satisfied that there is an arguable case that the exact line is in the position shown on the plan. The plan is, however, secondary. Thus, if there is a written boundary agreement, the registrar does not have to give notice of the application to the other party even though the plan itself may have formed no part of that agreement. The primary question is as to the position of the exact boundary on the ground. A secondary question is whether it is in the position shown on the plan. It may be that objections are sometimes made as to the accuracy of the plan, even where the exact line on the ground is accepted by the other party, but I am not aware of any dispute purely as to the accuracy of the plan ever having had to be referred to the adjudicator or tribunal. The objections which have been referred have primarily been as to the position of the boundary on the ground, with any issues as to the quality or accuracy of the plan being secondary.

It further plainly follows from Rimer LJ's summary at paragraph 48 of *Silkstone* that the adjudicator/tribunal has jurisdiction to determine the underlying merits of the claim, that is the underlying merits of the claim that the exact line of the boundary on the ground is where the applicant says it is. If there are cross-applications, as sometimes happens, then there is jurisdiction to determine the underlying merits of both claims. Determining the underlying merits of a claim that a boundary is in a precise place must involve considering where it does come. That investigation may lead to the conclusion that, in whole or in part, the exact boundary does come where it is said to come. It may lead to the conclusion that it is in some other place, which may or may not be able to be identified with any degree of precision, and the reasons for finding that it comes in that other place, whether that place is identified precisely or approximately, are the reasons for finding against the applicant.

Further, if the exact line of the boundary is as claimed by the applicant, in whole or in part, a defect in the plan need not lead to the application failing. The plan is simply something which must accompany the application to show where the boundary is and to enable it to be properly recorded by the registrar. If, for example, there was a defect in the plan which was corrected by a fresh plan in the course of the proceedings before the tribunal, it would hardly be in accordance with the overriding objective to tell the registrar to cancel the application rather than to give effect to the application using the new, and very possibly agreed, plan.

While the scope of the referred matter may require consideration in different contexts, and the cases cited relate to the facts before them, it is also plain from the context that **the matter referred must include the objection.** An objection specifying that the boundary comes in a different place to that claimed must be part of the matter therefore, whether or not any other objection is taken, such as to the quality or accuracy of the plan. That objection must be capable of being addressed by the tribunal. If it found that the boundary is where the objector/respondent claims, or if it found that wherever the boundary lies it is not where the applicant claims, then the tribunal will need to direct the registrar to cancel the application. The finding is the reason, or one of the reasons for such a direction. It is also sensible therefore to include in the decision some form of determination as to where the boundary lies. That must accord with the overriding objective in both the 2003 Rules and the 2013 Rules, and it is not difficult to construe the provisions of rule 40 of the 2013 Rules, in accordance with the overriding objective, to enable such a decision to be made. **The decision authorised by rule 40 does not consist solely of a direction to the registrar to cancel or give effect to the application but may include such a direction**. **Even within such a direction moreover there is provision for a condition that a specified entry should be made on the registers of the titles concerned and for a direction to reject any future application by either party for a determined boundary unless it is within the range permitted by the findings in the instant case.** It is plainly not in the overriding interest that the parties should be left to renew their dispute as to the boundary by repeated fresh applications for determined boundaries or to have to commence fresh proceedings in the local county court, with all the expense and stress involved, and probably before a judge with little experience of property disputes. It is difficult to see who such a course could benefit other than an unsuccessful litigant wanting to re-litigate a dispute.

Murdoch v Amesbury [2016] UKUT 3 (TCC)

That was not the approach of HH Judge Dight, sitting as a judge of the Upper Tribunal, in *Murdoch v Amesbury* on appeal from a decision of Judge Hargreaves. In that case there was a dispute between the parties as to their true boundary. The difference between the parties was a matter of inches stretching over a length of about 200 feet (see para. 4 of the decision and paragraph 3 of the decision of Judge Hargreaves cited at paragraph 9 of Judge Dight's decision). The two properties had at one time been in common ownership and the principal issue was as to the precise position of the boundary resulting from the sale off in 1960 of one of the properties. A secondary contention by the respondents was that if the legal boundary was not as they had contended then the disputed inches had been acquired by them by adverse possession. The essential issues therefore were the construction of the first conveyance which, being unclear read alone, had to be considered in the context of all the circumstances at the time, and a claim for adverse possession.

This was a typical neighbours dispute with which those dealing regularly with property litigation are very familiar. The applicant had applied to the Land Registry in December 2011 for a determined boundary and the **respondent had objected on two grounds** – that the **application plan was not accurate** because it used measurements taken from unreliable fixing points **and that the plan was inconsistent with evidence of the original physical boundary** and with plans submitted to the local authority by the applicants. **So far as appears from the case**

summary provided by the Land Registry, quoted at paragraph 22 of Judge Dight's decision, **no adverse possession point was taken at that time by the respondents**. There does not appear, however, to have been any point taken that it was not open to the respondents to take this further point, and this is consistent with the standard practice of the adjudicator and the tribunal over 10 years that the matter referred was the dispute between the parties including the objection but including any additional grounds that may be raised in the statements of case for giving effect to or cancelling the application.

As pointed out by Judge Dight at paragraph 27 of his decision, "it is plain from the terms of her judgment … that the learned Judge's findings as to the legal boundary were not the reasons why the Appellants' application for a determined boundary had failed." Her order, as Judge Dight then pointed out was in simple form directing the registrar to cancel the applicants' application. The deputy adjudicator "made no order and gave no directions as to the position of the legal boundary. Thus the only place in which her conclusions as to the legal boundary were to be found were in her written reasons for her decision." The point is repeated at paragraph 47 of Judge Dight's decision. On the basis that the findings as to the legal boundary were not part of the reasons for the decision (that is the order), and found no place in the deputy adjudicator's order, the obvious conclusion must be that they were purely obiter. They could not bind the parties and no question of jurisdiction to make the findings should have arisen. There had, however, been an issue of jurisdiction raised by the respondents, who had contended that the deputy adjudicator had no jurisdiction to make such findings but the deputy adjudicator had concluded, with the support of the applicants' counsel, that she did have jurisdiction, with the implication that her findings would be binding even though not embodied in any order or the basis of the order that was made. In this, she was plainly wrong, as Judge Dight held, although not for the reasons that he gave. Quite simply, findings in a decision which are irrelevant to the decision come to, as was the case here, cannot bind the parties. As will be seen, the position would have been different if it had been the findings as to the legal boundary which were one of the reasons for the order which was made to cancel the application. There is, of course no reason why the judge should not have given two reasons for directing the cancellation of the application and they would both have then been part of the reasons for the decision. There is also no reason, as explained above, why she should not have given a direction to the registrar to note her findings on the register, and that again would leave no doubt as to the decision and the right of appeal from it.

Having lost as to the position of the boundary, the applicants, who had contended before the deputy adjudicator that she had jurisdiction to determine the position of the boundary, appealed on the basis that she had no such jurisdiction. Judge Dight gave permission to appeal, holding that there was a right of appeal against the findings as to the position of the boundary on the ground, insofar as I can follow his reasoning at paragraphs 43-53 of his decision, that if the deputy adjudicator's decision had been recorded in a final order there would have been jurisdiction to entertain an appeal from it. It appears to have proceeded on the basis that the deputy adjudicator had held, wrongly, that although her decision on the point was not part of her reasons for the order and was not embodied in that order, it was a decision that bound the parties. On that basis, it is perhaps not surprising that permission to appeal was granted, although it may have been simpler, cheaper and quicker to have refused permission

on the basis that anything said on the point was, for the reasons I have given, purely obiter and did not bind the parties. As it was the appeal was heard over 3 days in December 2014 and it then took Judge Dight over a year, until 31 December 2015, to produce his decision. The decision under appeal was dated 20 August 2013, so that the total time by the Upper Tribunal Tax and Chancery Chamber to deal with the appeal was over 28 months, a delay that reflects no credit on that Chamber. Given the problems arising from the decision and the basic errors in it, it is also very unfortunate that the case, which raised issues affecting the jurisdiction of the tribunal going well beyond determined boundary disputes, was not allocated to a High Court judge.

The appeal to the Upper Tribunal proceeded on a common basis accepted by Judge Dight and recorded in paragraph 31 of his decision as follows –

> "It is common ground that in deciding whether to give effect to or cancel the application for a determined boundary in the circumstances of this case the learned Judge need only have relied on the indisputable fact that the plan which had been attached to the application was not within the accepted tolerances; the experts agreed that the Appellants' determined boundary line was out by at least 11mm between points F-G on the plan."

That agreement was plainly incorrect, and undermines the decision. The application was to determine the exact position of the boundary on the ground. The plan was simply a requirement under LRR 2003, rule 118(2) and the requirement for accuracy within 10mm is not even in the rules. It is simply the registrar's interpretation of what is required. If the only point taken before the registrar was that between two points on the plan there was an agreed divergence of at least 11mm, it is inconceivable to me that the registrar would have cancelled the application out of hand. Certainly he would at least have had a discretion, which any rational registrar would have exercised using the powers in rules 16 and 17, to ask for a revised plan showing the boundary within the correct tolerances. Subject to being provided with that plan, he would then have given effect to the application. If the registrar could do that, then so could the adjudicator, and so now can the tribunal.

With respect to Judge Hargreaves, she approached matters the wrong way round. Unless the application was so flawed as to be hopeless, he first step in the process should have been to determine whether the exact boundary on the ground was in the position claimed or not. This may, but need not, involve finding that it was on some other precise line. If it was not on the line claimed at all, the application would need to be cancelled. If it was in part on that line, the application could, subject to other requirements, be given effect to in part. The other requirements included a proper plan, and if the only problem was that the line on the plan was inaccurately drawn, an accurate plan could be directed as a condition of giving effect to the application.

So too, this mistaken assumption, on the basis of which Judge Dight proceeded, fatally undermines most of that part of his decision dealing with jurisdiction, to which I now turn. He begins, uncontroversially, by pointing out that the adjudicator was a statutory creation and the only jurisdiction the adjudicator could exercise was that assigned to him by statute. Additional jurisdiction could not be conferred by the consent of the parties. He then turned to consider the specific statutory provisions

relating to the resolution of disputes relating to registration of land, the powers and duties of the Land Registry, the adjudicator and the tribunal (paragraph 60 of his decision). He recited the provisions of section 60 of LRA 2002, and continues **at paragraph 62, where he states:**

> "Section 60 makes no mention of title to land and, properly construed, relates to the registration of plans which show the parcels, and boundaries, of the related registered titles. Sub-sections 60(1) and (2) refer to general boundaries, which necessarily have room for doubt as to precisely where on the ground the legal boundary is to be found. By contrast, however, I infer that the purpose of section 60(3) is to prevent potential disputes between adjoining land owners in the future and provide a public record of boundaries which cannot be disputed on grounds of inaccuracy. Therefore, as will be seen, the details and plan to be provided by the applicant for a determined boundary is to have a very high degree of accuracy, a tolerance of 10mm. The required accuracy is, in my judgment, the key to understanding the scope of this subsection, the procedure for determining a boundary and the role of the Adjudicator/Tribunal in the event of a reference being made by the Registrar. It is the accuracy of identification of the line, rather than title to the line, which is the focus of the application according to the rules. Mr Glen submits that the only sensible reason for rejecting an application for a determined boundary is because the true line is somewhere else. Superficially that is true but does not mean that the issue to be resolved is one of title to a line rather than accuracy of the plan depicting it. If the plan is not accurate there is no requirement in the LRA 2002 or related rules for the true position of the boundary to be identified: as will be seen, the application must in those circumstances be rejected by the Registrar or the Adjudicator/Tribunal as the case may be."

This is, quite simply, wrong. Section 60(3) refers to the provision of rules enabling the exact line of a registered estate to be determined. The whole point of determining the exact line is that it fixes on the ground where one title ends and another begins. There is no distinction between "the accuracy of the identification of the line" and "title to the line". The line, as explained in Law Commission's and Land Registry's report to Parliament, fixes and records who owns what. The statement that if the plan is not accurate the application must be rejected is also plainly wrong. It was plainly open to the registrar to require a revised plan under rules 16 and 17 of LRR 2003. It was also open to the applicants and any objector to resolve their differences if there was a disagreement as to the accuracy of the plan for there to be no need to refer any dispute to the tribunal. Suppose, for example, objection was made not to the line of the boundary on the ground, which was agreed or accepted, but to a defect in the plan, and the objector then produced a revised plan which the applicant accepted as being accurate. Or suppose that the initial plan is only certified as being accurate to within 12mm. Is Judge Dight seriously suggesting that the original application must be cancelled by the registrar without more ado, rather than either, in the first example, giving effect to the application using the revised plan, or in the second case using his powers under rules 16 and 17 to give the applicant an opportunity to produce a revised plan to the degree of accuracy required by him in the exercise of his discretion?

Suppose next that the plan is accepted as an accurate representation of where the applicant says the boundary comes but the objection is that the boundary is in the

wrong place. The objector may or may not identify precisely where it comes and may or may not make his own cross-application for a determined boundary in the position for which he contends. It is then plain that the issue is one, and only one, as to title to the line. The dispute between the neighbours is, in such cases, usually the reason for the application in the first place. Rule 119(1)(b) of LRR 2003 requires that the applicant show an arguable case that exact line of the boundary is in the position shown on the plan – that is an arguable case that he has title up to that line. If there is also a case which is not groundless that the boundary is not in that position, and the objection cannot be disposed of by agreement, the registrar must refer "the matter" to the tribunal.

At paragraph 64 of his decision, Judge Dight states:

> "On a proper construction of rules 118 and 119 they do not require proof of the applicant's title, and the Registrar at that stage is not to undertake a detailed investigation into questions of title, the emphasis is on the accuracy of the line claimed."

In fact, there is equal emphasis in those rules on the registrar being satisfied that the plan or plan and verbal descriptions indentify the exact line of the boundary and on there being an arguable case that the exact line of the boundary being in the position shown. There must therefore be an arguable case that the line is where the applicant claims it to be – the line cannot be shown, even in the absence of objections in an arbitrary position or one for which there is no arguable case. It is true that this does not involve a detailed investigation into title but it does involve some consideration of it and there has then to be an opportunity for the adjacent owner to object that it is not in the right position.

In paragraph 65, Judge Dight goes on to point out that if there is no objection, the registrar has to give effect to the application even though only an arguable case has been made out for the line claimed so long as that line is properly identified. That again is true, but a similar result would follow on a reference, as in any other case before the tribunal, if there was an objection, but the objector failed to plead any case before the tribunal. Also, it would still be open to the adjoining owner to apply to alter the register subsequently if he could show that there was a mistake on it. His further reliance on a contention that the rules do not make provision for objectors to put in their own plan disregards the fact that there is nothing in the rules to stop the objector putting in a plan of his own as part of the objection and that if the objector wishes, as some do, to claim a determined boundary of their own, they can do so, with both applications being referred to the tribunal together. **Further, whatever the rules provided in 2003 cannot affect the intention of Parliament in 2002, and the report of Law Commission and Land Registry in 2001 which was the basis of the legislation plainly contemplated a determined boundary being used in the context of certain adverse possession claims. Most significantly, however, it is impossible to see how Parliament cannot have contemplated a boundary dispute where there was an application and disagreement as to where the exact line of the boundary was, and it is clear that that is precisely what the 2001 Report did expressly contemplate.**

His conclusion in that paragraph that "the correct analysis of these provisions is that the scheme intends that the outcome of the application will be completion or cancellation, not a general determination of boundary issues" ignores the fact that in the event of a dispute as to where the boundary is, it is not possible for the registrar or the tribunal to determine the claim (assuming that the plans and other evidence comply with the regulations) without first deciding whether the boundary comes where it is claimed to come. Such a determination may or may not involve determining where the boundary does come.

Judge Dight then, in paragraph 66 points out that there are better ways of resolving boundary disputes and gives as examples alteration of the register under Schedule 4 to the Act and by applications based on adverse possession under Schedule 6. There is no doubt that such applications can be better suited to some cases, but neither is suited to a case where there is no adverse possession claim and where there is no room for a Schedule 4 application because the area in dispute is a matter of inches so that there is no room to adjust the general boundary to a more accurate position on the title plans. He must also have been ignorant of the proposal in the 2001 Report to add rules for a determined boundary where there was a certain type of adverse possession claim. He concludes that "Given the existence of these other provisions there is no need to strain the natural meaning of the provisions relating to determined boundaries so as to found a jurisdiction to resolve a general boundary dispute based either on a disputed construction of documents of title, the accuracy of the registered plans, or adverse possession." **The basic problem here is that it is Judge Dight who is straining the natural meaning of the statutory provision, which is for determination of the exact line of the boundary of a registered estate, something which cannot be determined, if not agreed, without construing documents of title, while an adverse possession claim, whether under the transitional provisions applying where title was acquired before October 2003 or under Schedule 6 to LRA 2002 does not have to specify, and rarely, if ever, does specify the exact line of the boundary of the land claimed.**

In paragraphs 67 to 69, Judge Dight concludes that the jurisdiction of the Adjudicator on a referral was, and that of the tribunal is, to determine matters referred by the Land Registry and nothing more. He then turned to identify the matters referred in the case before him. He concludes in paragraph 71 that the matter which was referred was the applicants' application for a determined boundary "the issue for the Adjudicator being the accuracy of the Appellants' plan. That the issue identified in the case summary was the accuracy of the plan submitted by the Appellants is consistent with my view that the key to understanding the provisions relating to determined boundaries is that very accuracy."

In fact, as appears from paragraph 22 of his decision, two issues were identified by the case summary provided by the registrar, the accuracy of the plan and the position of the boundary. In any event, in my experience the case summary does not always accurately identify the points taken by the parties and cannot be conclusive of the issues between them. It would also be very strange if the parties could not take relevant points in the judicial proceedings before the tribunal even if these had not been taken before the registrar. The result could be that the tribunal would be bound to come to a decision which ignored a relevant point, when it was likely or even inevitable that that point would be raised in a fresh application to the Land Registry by

the unsuccessful party. Thus, in the case of a determined boundary application, if only one of the above two points had been taken unsuccessfully by the objector before the reference, and this failed before the tribunal, the tribunal would have to direct the registrar to give effect to the application even though it may be obvious that the other point, if taken, was bound to succeed. That point would then have to be made on a fresh application by the losing party to alter the register. It simply does not make sense to litigate in this way, and it is absurd to impute such an irrational intention to Parliament in enacting section 60 of LRA 2002. That it is contrary to the intention of the Law Commission, the Land Registry and Parliament is apparent from the passage in paragraph 16.18 of the 2001 Report cited above, but of which Judge Dight appears to have been ignorant. It also ignores the additional powers conferred on the tribunal by section 110(3) of LRA 2002 and Rule 40(3) of the 2013 Rules.

In paragraph 72 of his decision, Judge Dight goes on to quote from rule 41(1) of the Adjudicator's Rules and rule 40(2) of the 2013 Rules, but omitting any reference to the most relevant rules, rule 41(2) and 40(3), or to the overriding objective in both Rules and the provisions in them as to how those Rules were to be construed. Nor does he refer to section 110(3) of LRA 2002. His failure to do so is remarkable, and it renders his decision *per incuriam* and one that the tribunal is not obliged to follow even to the extent that it forms part of the reasoning for his order and is not merely *obiter*. It is also *per incuriam* because it is based on an agreed position between the parties which is manifestly incorrect. Judge Dight also fails to notice that even the provisions which he does cite permit an application to be given effect to in whole or in part, so that if there is a minor error in the application plan between points F and G there would be no reason not to give effect to the application as regards the rest of the boundary insofar as it was not affected by that error. Instead, at paragraph 74 he states that "the power of the Adjudicator/Tribunal to give directions to the Registrar is binary in that he may direct the Registrar to give effect to or cancel the original application but nothing else."

Judge Dight goes on to state in paragraph 75 that his analysis is consistent with the view of HM Land Registry as expressed in their Practice Guide 40. That may be largely right, **but the Practice Guide** is revised from time to time and does not address the position when the matter is referred to the tribunal. What is clear is that it **postdates LRA 2002, perhaps by several years in the form cited by Judge Dight, and the view of the Land Registry which led to the enactment of LRA 2002 is set out in the 2001 Report.**

In paragraph 77, he considers that the correct approach for the tribunal faced with a boundary dispute, rather than the accuracy of the plan relied on, was to direct court proceedings under section 110(1) of LRA 2002, because the court would not be constrained in making appropriate findings of fact and law and giving effect to them by appropriate consequential orders, including declaratory relief, a course which, he stated, "simply was not open to the learned Judge who was limited by the procedure which brought the matter before her. There are two points to make here. Firstly, the power to direct court proceedings under section 110(1) are only "for the purpose of obtaining the court's decision on the matter". This pre-supposes that the boundary dispute is part of the matter which has been referred to the tribunal. But if it has been referred, then the tribunal can decide it, and given its expertise compared with that of a typical county court judge, and its powers as described above, there would normally

seem no good reason why it should direct court proceedings. A reference would cause delay and lead to increased costs and usually also to the matter being determined by a non-specialist judge and probably as a result taking longer than before the tribunal. Secondly, if the matter referred does not include the boundary dispute, then there is no power to direct court proceedings as these can only be directed "for the purpose of obtaining the court's decision on the matter."

Judge Dight then went on to refer to, and disagree with, the decision of Deputy Adjudicator McAllister (as she then was) in *Matson v Maynard* REF/2004/579 that the adjudicator had jurisdiction to determine the underlying issue, which was the true position of the boundary. Although he stated at paragraph 79 that "I appreciate, and sympathize with, her concern that to hold the jurisdiction of the Adjudicator was limited in the way suggested would in some respects by "unduly restrictive and contrary to good sense", he felt constrained by his interpretation of LRA 2002 and the related rules to come to the conclusion that the jurisdiction was so limited. He found that "It would be wrong in principle to seek to imply words into a statute so as to confer additional jurisdiction to that which is specifically identified", ignoring the fact that the words were there and did not need to be implied, and manifestly misinterpreting section 60 of LRA 2002. He then stated that the adjudicator should not make findings of fact as to the position of the boundary which could not result in relief being given to the parties by the adjudicator, ignoring the provisions which enabled such relief to be given and the intention of Parliament derived from the 2001 Report that such relief should be given where appropriate. He then suggests that the adjudicator in *Matson v Maynard* failed to recognise that findings as to the position of the boundary involved a finding of law, though there is plainly no reason why the adjudicator or tribunal should not make relevant findings of both fact and law.

The remainder of this part of Judge Dight's decision considers and purports to distinguish the cases of *Jayasingh v Liyanage* and *Silkstone* based on his previous analysis of determined boundary applications and the jurisdiction of the tribunal. It is unnecessary to consider this in any detail. If he had been correct in other respects, those cases could be distinguished. For the reasons I have given, however, he was plainly wrong.

The decision was plainly *per incuriam* and wrong for several reasons. First it was based on the incorrect premise set out in paragraph 31 of his decision, a premise which was common ground in the proceedings before him and never argued. Secondly, his observations as to what could be included by the tribunal in an order plainly overlooked section 110(3) of LRA 2002 and rule 40(3) of the 2013 Rules and the equivalent provisions in the Adjudicator's Rules. Thirdly, it overlooks that the rule as to decisions provides that a decision may include a direction to the registrar, not that, as Judge Dight has found, there is nothing else that could go into the decision. Fourthly, Judge Dight seeks to construe LRA 2002 without regard to the 2001 Report and misconstrues it as a result. He also seeks to interpret the Adjudicator's Rules and the 2013 Rules without regard to the requirement in them that they should be interpreted so as to give effect to the overriding objective.

Appendix 2: Additional issues raised by consultees

2.1 This appendix extracts consultee responses which raised new issues related to but not directly addressing questions in the Consultation Paper. Such issues do not properly fall within the discussion in the Analysis of Responses so are reproduced here to acknowledge the consultees' contribution.

OVERREACHING

2.2 Professor Dermot Cahill and Dr John Gwilym Owen said:

> We wish to make representations concerning the Law Commission's assertion that "the existing mechanisms for the protection of beneficial interests under trusts are sufficient." We respectfully disagree and propose that the Law Commission should take this opportunity to provide for better restrictions as a means of regulating the doctrine of overreaching in respect of registered land transactions. We realise that the Law Commission is not currently considering reforms to the operation of the doctrine of overreaching, but it may do so at some point in the future, and this could be seen as a lost opportunity. This could be debated against the backdrop of proposals for the consideration for the registration of trusts generally, a topic which, again, may be considered at some point in the future by the Law Commission.
>
> Therefore, to assist the Law Commission with its deliberations, we are taking this opportunity of attaching our working paper on the topic. Although it needs a little editing before it is submitted for publication, at least it will provide the basis for the development of our main arguments, which we summarise below:
>
> Do we need the concept of overreaching at all? If we do not, then consent restrictions could be the way forward and overreaching would be effectively abandoned. The Law Commission does not currently have any appetite to consider reforming overreaching along these lines. For the reasons set out in the attached paper, we take the view that the concept of overreaching is one that is worth preserving.
>
> On that basis, we suggest that the Law Commission consider proposals for better forms of restriction, which would preserve overreaching, as argued in section 2.1 of Part IV of the paper at pages 33-35.
>
> The alternative to our proposal for better forms of restriction is the registration of trusts and for the curtain principle to be breached. While debates concerning trust registration continue, the reform of the overreaching defence through modifications to restrictions, set out above, might be viewed as a desirable reform proposal. The matter could be reviewed at a later date once the debates about trust registration in this jurisdiction become a little clearer. Our arguments concerning trust registration are set out in section 1 of Part IV of the paper at pages 25-33. This proposal is made against the backdrop of growing evidence to suggest that there should be more transparency in business dealings, which could be brought about by the registration of beneficial interests on the register in registered land transactions.

This would not only promote legal certainty and align UK practices with more modern trends, but it would also serve the added goal of promoting transparency in line with other areas such as money laundering; combatting use of charitable vehicles for use in terrorist financing; transparency in public tendering etc. In other words, the current regime is out of step with current trends in making business dealings more transparent, and bringing transparency to the registration of trusts would represent a major step forward.

2.3 Amy Goymour said:

At paras 1.20 and 2.35, the CP concludes that overreaching does not fall within its current view. Whilst I unquestioningly accept this to be the case – overreaching is outside the remit of the project – I regret that this is the case. Overreaching is an example of a 'priority rule', which allows one interest in land to be subordinated to a later interest, just as s 29 LRA 2002 is another type of 'priority rule'. To consider 'priority' merely in the context of the LRA 2002's rules might be too narrow. The interaction between, and cumulative effect of, the LRA 2002's priority rules and the overreaching machinery arguably deserve to be considered side-by-side.

2.4 Professor Simon Gardner said:

You will be familiar with the "two-trustee rule", whereby, under the general law, a disposition by, and payment of the price to, only one trustee will not overreach beneficial interests. This rule underlay Williams & Glyns Bank Ltd v Boland, for example.

By LRA 2002 s 26, in the absence of an appropriate restriction, a disposition is deemed to take place with full "owners' powers". One might take this to mean that -- absent such a restriction -- a disposition by, and payment of the price to, only one trustee will after all overreach beneficial interests; in effect reversing the Boland decision.

Although, so far as I am aware, this possibility has not been raised or discussed in the cases, it has been in some of the secondary literature -- I am sure you can track this down.

Everyone seems clear that the possibility cannot be allowed to be true (and para 13.53 of the consultation paper assumes it is not), but there seems to be less consensus or certainty about why or how, in terms of s 26's wording, it is not.

I suggest that coverage of this in the ensuing report would be helpful, therefore.

Incidentally, the point also bears on the position taken in para 1.20, that overreaching lies outside the scope of this project. As regards overreaching where money is paid to two or more trustees, that is of course correct. But if overreaching in effect occurs, by virtue of s 26, additionally where there is only one trustee, it is less correct.

2.5 Berwin Leighton Paisner LLP said provided the following in its response to question 6.36 in the Consultation Paper, recommending reform to the law of overreaching:

The apparent ability of two trustees to sell the land and overreach any equitable mortgage under LPA section 2(1)(ii). This possibility was exposed recently in Mortgage Express v Lambert [2016] EWCA Civ 555 at paras 32 to 39, although a reference to this point is also tucked away in para 47.73 of Fisher & Lightwood. Many regarded LPA section 2(1)(ii) as relating only to equitable interests under trusts (and to mortgagee sales), and not to commercial equitable interests. To the same effect was the 1989 Report No 188 (at paras 2,9 to 2.13), the 2001 Report No 271 (at paras 6.9, 6.41, 6.43 and paras 165 on p489 and para 198 on p.494), and even in this present Consultation Paper nearly all references to overreaching are in the context of beneficial interests under trusts. LPA section 2(1)(ii) is written in what is now unfamiliar terms (i.e. terms which applied only to unregistered land as it was 80 years ago).

Perhaps the time has come to spell out how overreaching of equitable interests should work today in relation to registered land and, if necessary and appropriate, confine overreaching to equitable interests under trusts and mortgagee sales.

NOTICES

Inability to protect beneficial interests by notice

2.6 Amy Goymour said:

At para 1.21, the CP notes that the 'treatment of beneficial interests in the LRA 2002 sits within a much wider matrix of considerations of how the law balances the desire of home-owners to secure their interest in the home, with the interests of purchasers and those (such as mortgage lenders) with a financial interest in the property' and that the Law Commission 'did not consider that it would be appropriate to interfere with long-established assumptions by looking at how beneficial interests are dealt with by the LRA 2002 in isolation from the broader debates.' Again, I wonder whether this is a missed opportunity. It would be worth considering – even if no reform is ultimately recommended – whether beneficiaries should be able to protect their interests on the register (by way of a notice). This comment relates to my later comments on the triggering of s 29's special priority rule by trust beneficiaries, where they have paid valuable consideration for their interest (see my notes on paragraph 6.30 below).

Extent of protection given by notices

2.7 The London Property Support Lawyers Group said:

The Land Registry will include an entry on the register of a lease that is not registrable in its own right if that lease grants easements over the property or the Land Registry may include an entry in the form "a deed dated X contains covenants – copy filed."

Questions sometimes arise over the extent of the protection afforded by the notice. In the examples above:

the lease contains a tenant's option to acquire the freehold reversion or an option to renew the lease (either of which would be capable of being noted in their own right). Does noting the lease (originally only to protect the easements) have the effect of also protecting the option in the lease? There is no clear guidance on this; and

the deed of covenant also grants a right over the property. Does the noting of the deed also give notice of the easement?

2.8 Taylor Wessing LLP said:

> Subsequent priority for matters protected by Unilateral Notice: Where a transaction is protected by Unilateral Notice, and subsequently by substantive registration, there can be an adverse claim of priority for a transaction registered between the two. To avoid this, where a substantive registration follows on Unilateral Notice (which is cancelled) the substantive registration should have noted on the Register that it is registered following a Unilateral Notice which had been noted on the title on a specific date

Removal of notices and human rights

2.9 Michael Mark said:[2]

> There is a question as to how section 29 and schedule 3 to the 2002 Act ought to be construed and given effect to insofar as they purport to remove previously acquired property rights bearing in mind article 1 of Protocol I of ECHR, which I considered without deciding, in Davies v John Wood Property Ltd REF/2008/528, paragraphs 44-46. This also raises the question of the protection of possessory rights, dealt with below, where the person with those rights does not even appreciate that he does not have a legal title.

Protection of agreements for underlease

2.10 The London Property Support Lawyers Group said:

> A freeholder enters into an agreement for a headlease to be granted out of a registered title. The proposed tenant then enters into an agreement for underlease with a proposed undertenant. How should the proposed undertenant protect its estate contract?
>
> The following table illustrates the various permutations that have to be considered:

Notice of the agreement for lease on freehold title	**Notice of the agreement for underlease on the freehold title**	**Effect**
No	No	If a third party buys the freehold, it takes free of the agreement for lease and the agreement for underlease. The undertenant loses everything.

[2] See Michael Mark's full response in Appendix 1.

		(This is subject to the rule in Lyus v Prowsa Developments Ltd [1982] under which a third party will take its interest subject to the second party's rights in certain cases)
No	Yes	If a third party buys the freehold, it takes free of the agreement for lease and the agreement for underlease. Undertenant loses everything. *Some take the view that putting a notice of the agreement for underlease on the freehold title means that a third party dealing with the freehold will take subject to the agreement for underlease. However, the freeholder could presumably get the notice taken off as not protecting an interest affecting the freehold*
Yes	No	If a third party buys the freehold, it takes subject to the agreement for lease. However, once the lease has been granted, nothing protects the agreement for underlease unless either (a) the tenant mentions the agreement for underlease in its application for first registration of the headlease or (b) the undertenant itself puts a notice of the agreement

		onto the register of the headlease – but this is unlikely given that it will not know when the lease has been granted
Yes	Yes	This must be the same answer as immediately above. In particular, once the headlease has been granted, the notice on the freehold title to protect the agreement for underlease cannot possibly work. The only place that such a notice can be put now is on the title to the new headlease

In addition to protecting the interest of the undertenant, a person taking security over the undertenant's interest in the property has no means of protecting its interest until the underlease has been granted.

Protection by notice of interests that are varied

2.11 The London Property Support Lawyers Group said:

> A number of issues arise where an interest protected by a notice on the register is varied that could usefully be clarified as part of the Law Commission's review.
>
> A grants B an option to purchase A's freehold. The option is to last 10 years. B registers an agreed notice on A's title. A charges the property to C and the charge is registered. A and B then agree that the option period will last another five years.
>
> The Land Registry's view is that a new notice is required to protect the option as varied; the existing agreed notice will be removed and the new AN1 will appear below the charge. This does not seem right. At least the existing AN1 should stay so if the option were exercised within the initial 10 years then it has priority over the charge.
>
> A similar point arises from the case of A2 Dominion Homes Ltd V Prince Evans Solicitors [2015] EWHC 2490 (Ch). Perhaps not on the facts of that case, but if an AN1 protected an agreement for lease, then there was a charge, then a variation of the agreement for lease (within section 2 Law of Property (Miscellaneous Provisions) Act 1989 essentially meaning there is a second contract) should the tenant lose priority over the charge?
>
> A broader question is whether the decision in the A2 Dominion case should be put on a statutory footing?

Protection of party wall awards by way of a notice

2.12 The Society of Legal Scholars said:

> The CP makes no proposal to alter the current law on what rights are eligible for protection by notice under section 32 and what are excluded from protection by notice under section 33.
>
> Comment:
>
> We invite the Law Commission to consider the desirability of explicitly permitting the protection of awards under the Party Wall etc Act 1996 by way of Notice. The position is not explicitly covered in the Party Wall etc Act 1996, unlike analogous orders under the Access to Neighbouring Land Act 1992 section 5. It appears that certain aspects of awards are capable of binding third parties who acquire the land, yet there is authority under the LRA 1925 that at least certain obligations under an award would not sustain protection by way of caution (Observatory Hill v Camtel Investments [1997] 1 EGLR 140).

Registration of leases – date of grant

2.13 The London Property Support Lawyers Group said:

> Under section 4 of the Land Registration Act 2002, a lease granted "for a term of more than seven years from the date of grant for valuable or other consideration ……." must be registered.
>
> The reference to date of grant has an uncertain effect where a reversionary lease is granted and the term commencement date falls within three months of the date of the lease so that the lease is not registrable as a result of the rules relating to reversionary leases.
>
> The following illustrates this. On 1 May 2016 I grant a lease to take effect in possession on 1 July 2016. The term of the lease will run from 1 July 2016 to 31 May 2023. The term is less than seven years but it expires more than seven years from the date of grant. Is it for 'a term of more than seven years from the date of grant'?
>
> The same question arises under section 27(2)(b)(i) in relation to grants out of registered land.
>
> Although this is a minor point, it could usefully be clarified as part of the consultation process.

CAUTIONS

Cautions against first registration of a head lease

2.14 The London Property Support Lawyers Group said:

> These were not discussed in the Law Commission consultation but can cause some issues in practice where the caution is registered to protect the potential first registration of a head lease.

Assume a registered freehold title. A lease for 15 years was granted in 2000 (so unregistrable at the time, but potentially registrable after 2003 on assignment). In 2010 an underlease was granted for 5 years and was not capable of registration. The undertenant registered a caution against first registration of the leasehold title. In 2015 the underlease (and the lease) expire and the property becomes vacant.

The freehold title changes hands and the freeholder grants a new registrable lease. The tenant applies for registration and the application gets stuck because of the caution. The freeholder cannot withdraw/cancel the caution because it is registered against the first registration of a lease title and not the freehold title.

Two issues arise here. The first is that the only way that the caution can be discovered is by carrying out a SIM search as no notice of it can appear on the freehold title. As it should not usually be necessary to carry out a SIM search on the acquisition of a single freehold registered title, the caution may come as a nasty surprise and the caution can be difficult to remove. More importantly, there does not seem to be any procedure to time limit cautions against first registration against a leasehold title so as to expire with the lease to which they relate or, if earlier, with the underlease that they protect. Could the Law Commission give consideration to allowing cautions against first registration of a leasehold title to be limited in time to prevent them remaining registered after the leases to which they relate have come to an end?

Cautions against first registration for the holder of a derivative interest in minerals

2.15 Christopher Jessel said:

It can be difficult to distinguish between a direct interest under a trust and a derivative interest. If T1 and T2 hold the land in trust for A B and C and C assigns his share to D, then D will have a direct interest. If instead C declares a trust of his share then D will have a derivative interest. If C agrees to transfer his share but does not actually do so, or only does so orally, is D's interest direct or derivative?

Undivided shares

There is also a link beyond that suggested in the opening words of para 4.36 with mineral rights. I suggest that it should also be possible for the holder of a derivative interest in minerals in what was formerly an undivided share in land and is now an equitable interest under a trust of land to lodge a caution not only against the minerals themselves but also the surface. Although derivative interests in undivided shares in unregistered surface land may be less common, this may also be relevant to them.

Before 1926 mineral rights often became held in undivided shares, typically a 50% share each and these subsisted as legal tenancies in common. I am familiar with this in the west of England but no doubt it occurred elsewhere. I have experience of a situation where on 31 December 1925 a 50% undivided share in certain minerals was held in settlement. The present owner, successor to the owner of that share, is known. It is thought that in 1925 ownership of the remaining 50% was divided among several individuals, but it has not been possible to trace any successors to them and for practical purposes the ownership of their half has been lost.

The LPA 1925 converted undivided shares into interests in a trust fund and provided for the legal estate to be vested in certain persons on the statutory trusts. Under Sch. 1 part IV para (4) if on 1 January 1926 paras (1) to (3) did not apply (because a share, but not the entirety, was held in settlement) then the legal estate in the land vested in the Public Trustee and now still remains so vested irrespective of later devolution of the shares. Holders of shares who can assemble a majority interest can appoint new trustees under proviso (iii) but often some of the part owners are now untraceable so that someone with an exact 50% share (quite common) or less can not do so and would have to apply to court under proviso (iv). If the minerals are at present of limited value but exploitation may be possible in the future this would incur current expense which the interested persons may not wish to do.

The minerals will therefore remain vested in the Public Trustee who under proviso (i) can not act unless the holders of more than 50% interests ask him. Indeed he would usually be dependent on other persons for information sufficient to apply for registration of title or even to support a caution. A direct beneficiary under the statutory trust can presumably apply for a caution to protect the legal estate in the minerals but this should extend to derivative interests. Just as some such interests were held in trust in 1926 so, where they belong to family estates, they may now still be in a trust of land. The address for notification should be that of the beneficiary / trustee although no doubt the Public Trustee should also be notified so it would be sensible for the beneficiary to inform the Public Trustee of the situation at the time of lodging the caution.

If the surface is not registered then just as a single mineral owner should be entitled to register a caution against the surface title (see my reply to 22.3), so should a direct beneficiary of the mineral rights. If so it would follow that so should the holder of a derivative interest in a share held under the trust of land holding the mineral rights.

Although I am most familiar with this in the context of mineral rights, the problem may also arise for other land. Sometimes before 1926 undivided shares in a driveway leading to a group of houses might be conveyed to each of the then house owners. Sometimes, while the houses may have been conveyed in the years since 1925, the undivided shares in the driveway may have been overlooked and may not have been expressly assigned. That is particularly likely if title to the houses is registered but the driveway would not be. Possibly LPA 1925 s. 63 might help but that is not certain.

In such a case then even if the other beneficiaries of the statutory trust are known the owner of an undivided share might wish to lodge a caution against the driveway. Normally that would relate to a direct interest in the trust but if one of the houses was itself held under a trust of land between co-owners, the interest of each co-owner in the driveway would be a derivative interest. While in most cases the co-owners would cooperate in the caution, there might be circumstances where one did not wish to do so and if so the others should be free to take action.

PRIORITY SEARCHES

Priority searches and overriding interests

2.16 The London Property Support Lawyers Group said:

Ruoff and Roper state (at para 30.013):

> A registrable disposition of a registered estate for valuable consideration, when completed by registration, takes effect subject to interests which are protected by a notice in the register and overriding interests. Making an official search with priority can get round the problem of third party interests being noted in the register in the period up to registration: this is done by deferring dealing with the third party's application for entry of the notice until the end of the purchaser's priority period. During this time, the purchaser's application should have been made. But an official search does not give the purchaser priority over an interest which is an overriding interest. Such an interest is instantly binding, without there having to be any application for an entry in the register to protect it: there is nothing to defer.

This is undoubtedly a correct statement of the law but it can create issues where an overriding interest comes into being between the date of a priority search and the registration of a transaction protected by that search.

Assume a bank taking security does a priority search: it is clear. Before completion of the charge, the owner grants an unregistrable lease and tenant takes up occupation. The lease includes an option for the tenant to buy the freehold. The charge is subsequently completed and registered and, at a later date, the lease and the option to purchase in the lease are noted on the title.

The option and the lease are both overriding interests unless the bank can show that the tenant's occupation and the bank's knowledge of it was 'not enough' for Schedule 3 Land Registration Act 2002. That will probably be difficult in practice, since it is occupation at the date of disposition which is relevant. How in practice can a bank (or realistically any purchaser) check that? It raises the following question that we believe the Law Commission should consider:

> should occupation protect an option which ought to be protected by notice? We don't think it should, especially if the proposals in chapter 7 are enacted.

If the lease was registrable and registered at the same time as the option, we think the lease itself would also be an overriding interest and so have priority over the charge (because the only exclusion of leasehold estates from paragraph 2 of Schedule 3 to the Land Registration Act 2002 relates to reversionary leases (para 2(d)). If a lease is not within paragraph 1 of Schedule 3, should occupation make it an overriding interest under paragraph 2?

More generally, should a priority search afford protection to the holder of the search in relation to overriding interests that come into being during the priority period?

This issue also highlights another point of concern where a person has obtained the benefit of a priority search and another person applies to register a unilateral notice in respect of mines and minerals or chancel repair liability. These overriding interests are, by their very nature, difficult to spot. Even though they lose their overriding status on completion of a disposition after 12 October 2013 where they have not been noted on the register, they still appear on the register where the application to note them was made during the currency of a priority search. To provide greater clarity and

transparency, we suggest that a priority search should provide priority against the registration of a notice to protect an overriding interest whose overriding status would come to an end on completion of the disposition to which the search relates within the priority period.

Searches of part and searches for easements

2.17 The London Property Support Lawyers Group said:

> We would like the Land Registration Act 2002 to clarify the position on searches on a disposition of part. In practice problems arise where a landowner is making multiple dispositions of part, for example to tenants, and the tenants make OS1 applications. Subject to the points made below in relation to easements, we believe the Act should state that a search of whole does not afford priority on a disposition of part.
>
> The position relating to priority searches on a disposition of part with easements being created over the retained land is more problematical and unsatisfactory. Either the disponee (T1) makes a search of the whole title and risks the search not being the "appropriate" search under rule 147(3) with the result that there is no priority or T1 makes an OS2 search over the land being acquired and relies on rule 148(3) to the effect that the search affords priority on the ancillary disposition (of the easements) as well. The risk with rule 148(3) is that it is subject to the application for the search being "in order" and it is not clear what is meant by that. It is also unsatisfactory from the point of view of a disponee of the retained land (T2) as the pending grant of the easements will not be revealed. If this means that T2 takes free of the easements T1 is prejudiced (T1 cannot control the terms of the disposition to T2 so as to ensure that there is a suitable 'carve-out' in relation to the easements). If T2 takes subject to the easements then (whilst it might have a claim against the disponor) it has a clear search, which is at best misleading.
>
> Ruoff and Roper at paragraph 30.006 states that
>
> > "A search of whole is not normally required in order to protect easements and other rights granted over the retained land."
>
> Priority is accorded to "any entry made in pursuance of" the application protected by the search" and cites section 100(3) but this seems to be an incorrect reference and probably should refer to section 72(2) of the Land Registration Act 2002.
>
> One solution might be to require or permit T1 to make a second OS 2 search over the retained land in respect of the easements, and to amend the OS forms to add an 'E' category. Sufficient flexibility would need to be allowed with the definition of the land to be searched so as to allow easements over a defined strip of land, such as a right of way and easements over a much more diffuse area and which might not be easily plotted on a plan, such those through wires and cables through a building or over, effectively, the whole of the retained land.
>
> The same problems would arise if the proposals to make other interests (such as restrictive covenants) protectable by a priority search were enacted.

2.18 The Law Society said:

While there was no specific question on the following point, the Society believes that there is a practical point worth noting in relation to priority searches. The applicant has to specify the reason for the application, that is, the disposition that the search is intended to protect, namely, purchase, lease or charge. A priority search may be used to protect an easement or profit a prendre and according to Land Registry practice guide 12 they should be categorised as a purchase or "P". The Society believes that a further category should be added to cover easements and profits a prendre for value ("E" for example), since on the face of the official search form it is not obvious that an easement or profit a prendre can be protected.

RESTRICTIONS

Sale by equitable chargee

2.19 The London Property Support Lawyers Group said:

> The way in which restrictions work can put an equitable chargee in a stronger position than a registered one. To illustrate:
>
> > there is a restriction on title preventing dispositions by the registered proprietor or the proprietors of a registered charge without consent;
> >
> > a later notice is added to the title to protect an equitable charge; and
> >
> > the equitable chargee obtains a court order allowing a sale.
>
> The sale by the equitable chargee is not a disposition caught by the restriction so the transfer will be registered. The restriction will remain on the title. If the transferee wishes to dispose then the restriction must be satisfied.
>
> Whether this creates a problem will depend on what the restriction is protecting. However, it places an equitable chargee in a better position than a registered chargee which seems anomalous. It also creates a trap for the person with the benefit of the restriction, for example if the restriction is only intended to apply until the first transfer, its benefit may be lost.

Restrictions and trustees

2.20 Amy Goymour said:

> A general comment on your proposals relating to the use of restrictions to protect trust interests: the use of restrictions (or notices – see my comments above) to protect trust interests requires, I think, some further consideration. There are big questions to be asked as to the extent to which it is desirable – economically or otherwise – for trust beneficiaries to have a mechanism whereby they can protect their rights in their home (if that is what the property is for them) other than by being in discoverable occupation. It is not at all obvious – legally, or as a matter of policy – that consent restrictions should be available only where the express terms of the trust impose consent conditions. The obtaining of consent is an implied duty on trustees within TLATA: might this justify the entering of a consent restriction? As a matter of policy, why should express trusts be treated so differently from implied trusts?

ADMINISTRATION OF THE REGISTER

Missing and illegible copies

2.21 The London Property Support Lawyers Group said:

> The issue of missing and illegible copies arises largely as a result of the scanning exercise that the Land Registry carried out to digitise all documents referred to on a register.
>
> As a result of this process, there are some documents that we come across where the register says that a copy has been filed but neither the original document or a scanned version of it can now be found.
>
> On other occasions, the scanned copy is received but for whatever reason, is illegible as the paper version has not scanned clearly.
>
> As to missing copies, the register will refer to a document and then state "Copy filed" or "Copy file under title number xxx". When we apply for an official copy of that document we frequently receive the response that the Land Registry is unable to produce it. It seems to be that in some cases the paper copy has, over the years, been put in the "wrong" paper file and so is now missing or that it has simply become lost while in the care of the Land Registry. For whatever reason, the failure to produce such documents means that the register is incomplete.
>
> Could the Law Commission consider whether the indemnity provisions in the Land Registration Act 2002 need to be widened to allow a registered proprietor to be indemnified where the information previously held in paper form has now been destroyed or has become illegible as a result of the digitisation project and where the Land Registry is unable to produce an official copy of a document which has been sent to it and which, at some stage, has been the subject of the "copy filed" note on the register?

2.22 The City of London Law Society Land Law Committee said:

> The digitisation of documents by Land Registry has led to missing and illegible documents referred to on the register. The Committee requests the Law Commission to consider whether the indemnity provisions in the Land Registration Act 2002 should be widened to allow a registered proprietor or other person to be indemnified for losses suffered as a result of such missing and illegible copies.

2.23 The National Trust said:

> Although the National Trust supports the "mirror principle", there are situations where it is still necessary to refer back to the underlying title deeds. One example is where a restrictive covenant or easement is mentioned without sufficient details in the register to establish which land has the benefit. Another example is where questions are raised over the location of the legal boundaries and the underlying title deeds can be invaluable in establishing where the legal boundary was believed to be in relation to historic, real-world boundaries features. Ideally the Land Registry would be under a statutory duty to retain copies of all the underlying title deeds, but otherwise we

suggest that applicants are encouraged to send the Land Registry certified copies rather than original documents and to retain the original, underlying title deeds.

HM Land Registry registration fees for restrictions

2.24 Christopher Jessel said:

> There is another issue, not mentioned in the Consultation paper, relevant to fees for registering or altering restrictions. The Fees Order charges a separate fee for restrictions on each title. The fourth and subsequent titles are charged at a reduced rate but there is still a bill per title. When a substantial landed estate is registered it is normal registry practice to do so in a large number of individual titles – over 100 for a big estate. This has benefits but I was involved with such an estate in a Settled Land Act settlement, and the decision was taken not to apply for voluntary first registration because if the only dealing was to be a retirement and appointment of trustees a large land registry fee would be due every time because of the need to change Form G for every title. I suggest that the land registry should reconsider the basis of charging for altering restrictions in such cases.

Removal of notices

2.25 Taylor Wessing LLP said:

> Removal of a unilateral notices on completion of the documentation referred to in that unilateral notice. There should be a better procedure for having these unilateral notices removed, because otherwise they remain on the register. This may be achieved in a practical manner by the appropriate Land Registry form for registration containing a box on the form referring the conveyancer to any appropriate unilateral notice which will need to be removed on completion of the registration.

Removal of expired leases

2.26 Taylor Wessing LLP said:

> A new procedure needs to be introduced in relation to removal of leases to avoid the Land Registry becoming cluttered with leases which have expired, and affect dealings. Maybe the answer is to introduce a notice procedure within the new legislation such that if notice is given to the tenant that the lease has expired and requiring its removal, and the tenant does not responded to that notice agreeing to its removal or objecting within a certain timescale, the lease can simply be removed.

Restrictions being wrongly carried over onto new titles

2.27 Ian Cook said:

> I recently attended a presentation by Professor Nick Hopkins and Ms Sarah Dawe in relation to the Consultation on the proposed changes to the Land Registration Act 2002. One point that was not specifically covered but on which I was asked to submit an email as I raised it in discussions relates to restrictions.
>
> There is a current practice amongst the Land Registry of carrying forward restrictions that appear on titles to new titles that are created out of the title containing the restriction.

A typical example is a residential development estate where the developer's title contains a restriction to protect contractual obligations to pay overage, or to obtain a Deed of Covenant if the site, or part of the site, is sold to a third party. However, sales of completed residential units are defined as "Exempt Disposals" and are not intended to be affected by the restriction.

Typically, the restriction requires a certificate to be given by a conveyancer, either that the provisions of certain clauses in the original acquisition document have been complied with, or that they do not apply to the transaction. Sometimes the certificate is required to be given by the party who originally sold the site to the developer, or their conveyancer, but often the restriction is worded in a way that allows "a conveyancer" to provide the relevant certificate. Normally, in such a situation, the developer's solicitor will provide the certificate.

It is clear that the intention of the parties is for dispositionary first leases and transfers of part relating to individual units should not be caught by the restriction. However, the Land Registry's practice seems to be to register the restriction against the new leasehold or freehold title created for the flat or house that is leased or transferred by the developer to the first purchaser. Subsequently, this can then cause problems on future sales as, by that time, the provisions of the restriction are no longer within the experience or knowledge of the parties dealing with the transaction.

If the buyer's conveyancers notice that the Land Registry have carried forward the restriction, then they will often come back to the developer's conveyancers to ask for the developers to arrange for the restriction to be removed. However, the way in which the restriction is worded in the first place was designed to avoid any need to go back to the original seller, who may stand to benefit from the overage provisions in the original document. The other possibility that arises at the time is for any interested party to make an application using Form RX3, but this involves additional time and expense, etc.

There ought to be some mechanism for making it clear that the restriction that requires a certificate to be granted stating that the provisions of the restriction do not apply, should not then be registered against the new title created as a result of the disposition that is not caught by the restriction.

Land registration and section 237 of the Town & Country Planning Act 1990

2.28 Burges Salmon LLP said:

If a Local Authority acquires an interest in land for planning purposes it may use s.237 to negate third party rights over registered titles by converting them into a right to compensation. The Local Authority does this by resolving to approve the use of s.237 powers.

Once s.237 has been deployed the third party rights affected are in effect terminated and no longer apply to the property concerned.

At present there is no procedure whereby the Land Register can be altered to reflect that rights shown on the register have been removed by the application of s.237

powers. So they remain on the title and cause confusion and increased due diligence costs on future title investigations.

It would be helpful if as part of the LRA reforms now being contemplated, consideration could be given to the mechanism by which an application to modify the register to reflect the operation of s.237 could be implemented.

SECTION 30 AND THE POSITION OF UNAUTHORISED LEASES ON A LOAN TRANSFER

2.29 The City of London Law Society Land Law Committee said:

The Committee would also like to raise another issue concerning priorities under sections 29 and 30 of the Land Registration Act 2002 - a problem scenario relating to priority of interests on a loan transfer.

As context, section 30 sets out rules of priority and "postponement" of interests in the case of dispositions of charges, and section 29 does the same for dispositions of estates. The consultation paper contains an entire chapter (8) on the operation of section 29 and the Law Commission states in paragraph 7.77 (page 134) that "the reforms that we have proposed in the context of section 29 of the LRA 2002 cannot easily be applied in the context of charges. Nonetheless, to the extent that our proposals can sensibly be applied to dispositions of charges, we see no distinction in principle between sections 29 and 30". As such, the Committee has assumed that the Law Commission's comments, insofar as relevant, relate to section 30 as well, albeit only where the comments are applicable to the transfer of charges.

The problem is that, as a result of section 30(1) of the Act, the purchaser of a loan portfolio may take subject to an unregistered lease, which did not bind the original mortgagee. A mortgagor grants a legal mortgage, which is protected by registration in the ordinary way and by a restriction. The mortgagor then grants a six year lease without the mortgagee's consent.

The generally accepted view is that the mortgagee is not bound and can sell free of the unauthorised lease (Lever Finance v Needlemans' Trustee [1956]). However, if the mortgagee sells the mortgage to a new lender, under section 114 of the Law of Property Act 1925, the new lender stands in the mortgagee's shoes and has all the mortgagee's powers (including the power to sell free from the lease). The Land Registration Act 1925 was aligned with the Law of Property Act 1925, so that under section 34(4) of the LRA 1925, the proprietor of a registered charge sold free of interests inferior to his, but subject to everything affecting the title at the time of registration of the charge. However, under section 30(1) of the 2002 Act, the new lender is bound by anything registered by notice, or any overriding interest at the time of registration of the transfer. So the question is whether (as it seems) the new lender will be bound by the unauthorised lease, even though the original mortgagee had no knowledge of it and it is not on the title.

Section 29(4) deems the lease to be registered by providing as follows:-

> "Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition, this section has effect as if-

(a) the grant involved such a disposition; and

(b) the disposition were registered at the time of the grant"

There is no equivalent subsection (4) in section 30 and it strikes the Committee that the above issue might merit similar consideration.

EASEMENTS

2.30 Amy Goymour said:

As a general preliminary point, I wonder whether LRA 2002, Schedule 3, para 3 might be tidied up. Although not discussed in the CP, the current wording of the provision is liable to confuse, containing as it does double/triple negatives. The provision was clear as initially drafted back in 2002 – when it contained transitional provisions. However, the removal of the transitional provisions means the provision now appears badly-worded. Speaking as an academic teacher, my students are routinely confused by the provision, and the same confusion may be caused in practice! Although any change would be cosmetic, not substantive, as part of a tidy-up exercise, I would recommend Schedule 3 be framed *positively* – ie that legal easements override if *either* (a) used in the last year; *or* (b) obvious on a reasonably careful inspection of the land; *or* within the actual knowledge of the disponee.

2.31 Christopher Jessel said:

Where an easement is created by a separate document benefiting a lease over 7 years or is otherwise registrable it should need to be completed by registration.

The wording used on the register of the landlord's title should refer to the easement. Where easements are granted by the original lease the normal form of entry is in very general terms "The parts of the land affected thereby are subject to the leases set out in the schedule of leases hereto. The leases grant and reserve easements as therein mentioned." That is instead of saying (as would be usual for a freehold easement) that there is a right of way over the pathway coloured yellow on the plan. It is therefore necessary to look at the lease in any case. It is not clear from your second proposal how detailed the reference would be. If the original lease granted rights of way and then there was a supplemental deed granting an additional right, then if the new right is treated in the same way as a right granted by a freehold deed the entry will be specific and inconsistent with the reference for the original leasehold easements; but if the treatment is consistent with the reference to easements in the original lease then the reference to the supplemental deed will be in general terms. The simplest resolution would be to retain the existing practice for easements granted by the original lease and then refer to the separately created easement only by specifying the document creating it, which must be filed and, like the lease itself, available for public inspection.

2.32 Christopher Jessel also provided in his covering email:

While I appreciate what you say in your email about some of the issues I have raised being beyond the scope of your project, and obviously that is a matter for you to determine, I have nevertheless referred to a few of them in my response where I think

there may be issues relevant to those you have dealt with in your Consultation Paper. In para 22.18 I have referred to statutory easements. The implementation of the CROW Act for lost rights of way on 1 January 2026 could affect many people as the former public footpaths and bridleways will become private land. This is also relevant to the exception of mineral rights in inclosure acts which may have surface rights. Statutory easements are unlikely to be entered on the register and may be lost if they do not satisfy LRA Sch. 3 para 3. The Law Commission report on easements, profits and covenants did not consider the specific problems associated with unregistered easements conferred by Parliament and I suggest this might be looked at.

2.33 Nigel Madeley said:

> [Lift and shift] does give rise to problems. My own take on it is this (and I may be wrong): say A sells a field to B and excepts and reserves rights to existing conduits and to lay new conduits, and gives B the right to shift them. The dominant tenement is the retained land and the servient tenement is … ?
>
> My view is that if the servient tenement is the field, then B can shift the pipes and cables to new routes in the field and the shifted routes are still legal easements. If on the other hand the servient tenement is the route of the existing and new conduits (possibly with a defined easement corridor), then if B shifts them to a new route outside those locations (i.e. not within the servient tenement) then the shifted conduits are not the same easement. That would mean that the right to shift can only be a contract to grant an easement and so is an equitable easement (see DG Barnsley 'Equitable Easements – 60 years on' in the 1999 LQR). If the parties have not specified for the grant of a new easement, then the shifted routes will only ever be equitable easements. Tricky.
>
> That takes us to the problem thrown up by London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd (1994). What is registered when landlords define the 'estate' as being land that they can add to or take away from? There is no answer in the abstract as the effect (if any) of that definition on easements granted by the lease depends on the wording and context, but for registration purposes they could be legal or equitable or a contract to grant new easements.
>
> Easements over common parts (e.g. of a shopping centre) present their own problems. A landlord will often reserve the right to change the layout. Take a corridor, over which tenants and their customers pass, that has a shopping unit on either side. The landlord wants to combine these to form a single unit including the corridor. The lease grants rights to use common parts, and they are defined as the areas designated as such by the landlord. What is the status of this right? It might be a mere licence, but if 'granted' by the lease is more likely to be an easement. It could be that my servient tenement analysis works and both the original and re-routed access are legal easements. Or it might be that you can't have every shopping unit potentially subject to a right of way and so they are all equitable. Either way, everyone knows where the they stand in practice and no-one wants to have to consider whether they are legal or equitable and how they need to be registered, so long as they are.

2.34 Mark Fairweather raised an issue to be considered for reform:

As mentioned I have recently come across what appears to be a flaw in the system concerning “invisible easements.” I think it is best if I try to explain my concern by reference to my clients’ experience. They bought a small piece of land with the right to lay a drainage pipe across the seller’s retained land. The seller’s title was unregistered. Following completion of my clients’ purchase they were registered as proprietors of the land and the property register showed (and continues to show) the benefit of the easement. My clients did not exercise the easement. A few years later the seller sold the retained land to someone else. For whatever reason the transfer to my clients was not included in the title deeds which the conveyancers acting for the new owner of the retained land submitted to the Land Registry with their application for first registration. As a result the retained land is now registered without reference to the drainage easement. The Land Registry tell me that as a result the drainage easement does not burden the retained land and that in effect my clients’ easement is now lost. It would have been different if it had counted as an overriding interest, but it doesn’t because it is not visible and not exercised. Moreover the Land Registry say that that if my clients were to claim compensation the Land Registry may seek to resist the claim on the basis that their “guarantee” of title applies only on the date of registration and not thereafter.

This is not to my mind a satisfactory situation. Everyone in this scenario is innocent, even if it is the case that some of the conveyancers involved (including my firm) could perhaps have done a better job. I appreciate that the purchasers of the retained land should not lose out, because they didn’t have notice of the easement. But nor should my clients either. A simple solution in future would be for the Land Registry to put an automatic caution against first registration against unregistered land where it registers easements over that land for the benefit of registered land. Could consideration please be given to introducing that practice?

I am also concerned about the extent to which the public can rely on the Land Registry title “guarantee.” I appreciate that rights may be created and indeed abandoned “off register.” But subject to this the extent of the guarantee should be clarified so that everyone including the Land Registry knows where they are when the register doesn’t mirror the reality of the legal title.

I hope this is helpful. I appreciate that in the scheme of things it’s a small issue, and perhaps one that doesn’t arise very frequently. But to my mind the current situation causes injustice which a small adjustment to Land Registry practice could eliminate

OVERRIDING INTERESTS

2.35 Christopher Jessel said:

the treatment of some unregistrable interests which appear not to be overriding interests arising from (or confirmed by) statute is obscure and they may need to be added to Schs. 1 and 3.

The status of land as a registered town or village green does not appear to be registrable under the LRA 2002 (and in practice it would be unusual for that status even to be the subject of a notice) but it does not seem to be an overriding interest within Schs. 1 and 3. Use by local inhabitants does not amount to occupation under para 2 (Epsom Borough Council v Nicholls (1998) 78 P&CR 348). Although originally

these rights were enjoyed by custom, that is no longer the case and they now depend on statute (Oxfordshire County Council v. Oxford City Council ([2006] 2 AC 674 at [19]) so para 4 does not apply. Nor, at least at common law, is this a public right under para 5. A customary way for the benefit of inhabitants of a locality is regarded as a private right of way (Brocklebank v Thompson [1903] 2 Ch 344 at 349; also R v Richards (1800) 8 TR 634, 101 ER 1588 for an equivalent statutory right) and this would probably apply equally to the right of recreation over greens of local inhabitants which are not rights of the public generally (by contrast with the public right under the Countryside and Rights of Way Act 2000). Sch. 3 para 3 refers to registration under the Commons Act 2006 but the reference in that paragraph is to an easement or profit and the right of local inhabitants to indulge in sports and pastimes is neither. I suggest that it should be made clear that this is an overriding interest. The alternative that provision be made for entries to be made on each title affected is probably impractical. I am not aware that any objector to registration of land as a TVG has sought to argue that a transferee of the land would take free of the rights of local inhabitants and it is possible that a court would find a way of rejecting such a claim (perhaps on the ground that the right to indulge in sports and pastimes benefits a section of the public, albeit a small one, and LRA 2002 Schs. 1 and 3 para 5 can be construed accordingly) but the position ought to be made clear.

There can also be other unregistrable rights by virtue of statute. These include rights of way, particularly under the Countryside and Rights of Way Act 2000 s.50 and the Natural Environment and Rural Communities Act 2006 s. 67(5) which both came into force on 2 May 2006 and under the CROW Act 2000 s. 56B which is due to come into force on 1 January 2026. These rights were not or will not be registrable on creation, which took or will take place automatically under the statute. Under LRA 2002 Sch. 1 para 3 these are overriding interests on first registration but on a disposition they need to satisfy the conditions in Sch. 3 para 3. As some of these are “lost ways” (so that the conditions in sch.3 para 3 may not be satisfied) but nevertheless may be required there is an argument that rights granted by Parliament should take priority. I have commented on this in an article in [2015] Conveyancer p. 324 where I pointed out that some of the rights are contingent and the rights which are due to arise in 2026 are (until that date) future. These rights are therefore equitable and as such unregistrable. It is more important for the rights under the CROW Act 2000 s. 56B because that affects land which becomes wholly private on the extinction of the former footpath or bridleway. The rights under the CROW Act 2000 s.50 and NERCA 2006 s. 67(5) affect restricted byways where the surface remains maintainable by, and therefore vested in, the highway authority.

Similarly in The Mayor and Burgesses of the London Borough of Bexley v Maison Maurice Ltd [2006] EWHC 3192 (Ch) the joint effect of the Highways Act 1980 s. 127 and an estoppel created a right of way across a ransom strip owned by the Council. It seems unlikely that the right would have been noted when it arose but it would have been particularly important to preserve the right if the Council had disposed of the strip.

This could extend to surface rights to work minerals conferred in inclosure acts as suggested above.

I therefore suggest that any private right conferred by Parliament in a statute should be an overriding interest. As such statutory rights have continued to exist as legal interests and the effect of the LRA 2002 was not to extinguish them but simply to affect priority, and any loss of priority was probably not intended, any transitional provisions should have the effect of reviving any priority which might have been lost.

2.36 Christopher Jessel made a further point in his response to Chapter 3, in relation to rights over the surface which accompany a mines and minerals estate:

> Where surface rights exist but have not been entered on the surface title, there is a risk that they will not bind a transferee for value. Where the surface was first registered before 13 October 2003 they will be saved by LRA 2002 Sch. 12 para 9. If the surface was first registered after 12 October 2003 then where they do not satisfy the conditions to qualify under LRA 2002 Sch. 3 para 3 as overriding interests they will not bind a transferee for value because they will not be obvious (where the minerals have never been worked) or known to the disponee (because there has been no entry) and will not have been exercised within a year before a disposition. Although Sch. 8 para 2(b) refers to rights to work minerals, this by itself does not save the easement under Sch. 3 para 3. I suggest it should be clarified that such rights will nevertheless remain overriding since loss of surface rights may render the minerals valueless and if that has been the effect of the enactment of the LRA 2002 it could have involved a breach of A1P1 human rights.
>
> It may in any case be necessary to clarify the interaction between LRA 2002 s. 29(2) and rights created by inclosure acts. These will not be public rights within Sch. 3 para 5 but there is an argument that rights conferred by Parliament should not be removed by the general rules of the LRA 2002 (see my reply to 22.18).

FIRST REGISTRATION

2.37 The Chartered Institute of Legal Executives said:

> Sales of part of unregistered title mean that the unregistered title is not registered and the covenants may not be noted on the unregistered title. This is an error by the conveyancer but it can happen or there can be uncertainty as to land with the benefit or burden of covenants.
>
> CILEx considers that unregistered retained land should be registered in those circumstances. From our dealings with the Land Registry via the Advisory Council this is a view that they share and is a trigger that they would like to see. Given the policy to aim for 100% registration, this idea has merit and would significantly assist with registration of all land.

ESCHEAT

2.38 Christopher Jessel said:

> Before electronic conveyancing can be introduced it will be necessary to deal with the vexed problem of escheat (for which the LRA 2002 provided what in Law Com 271 para 11.28 you called a “stop-gap solution“). At present it works for Crown bodies who have so far been the ones affected. The land registry retains the extinguished freehold

title on the register and then creates a new one when the Crown body sells the land. However the possibility of a mesne lord claiming escheat can not be ruled out. Most such instances would relate to enfranchised copyhold and it is likely that as a result of researches before lodging a unilateral notice many lords are now better informed than previously about what land had been copyhold. Both Mr Nugee and I have considered that copyhold land enfranchised under the Copyhold Acts 1852 to 1894 escheats to the lord and Mr Nugee, in his article which you cite, extended that to the LPA 1922. My impression is that disclaimers of freeholds are becoming more common and it may only be a matter of time before a lord asserts a right to escheat. Although the disclaimed freehold had been registered before extinction, the lord's superior title could not have been in my view (Mr Nugee might have disagreed). Even if the manor has a registered title the land can not escheat to that title because it is incorporeal – see LPA 1925 s. 201. The effect is that the land becomes deregistered. That may not fit easily with electronic conveyancing. The lord may decide to sell the land or to keep it. It may be possible to adapt the existing rules used for Crown escheat to mesne lords but this needs to be considered further.