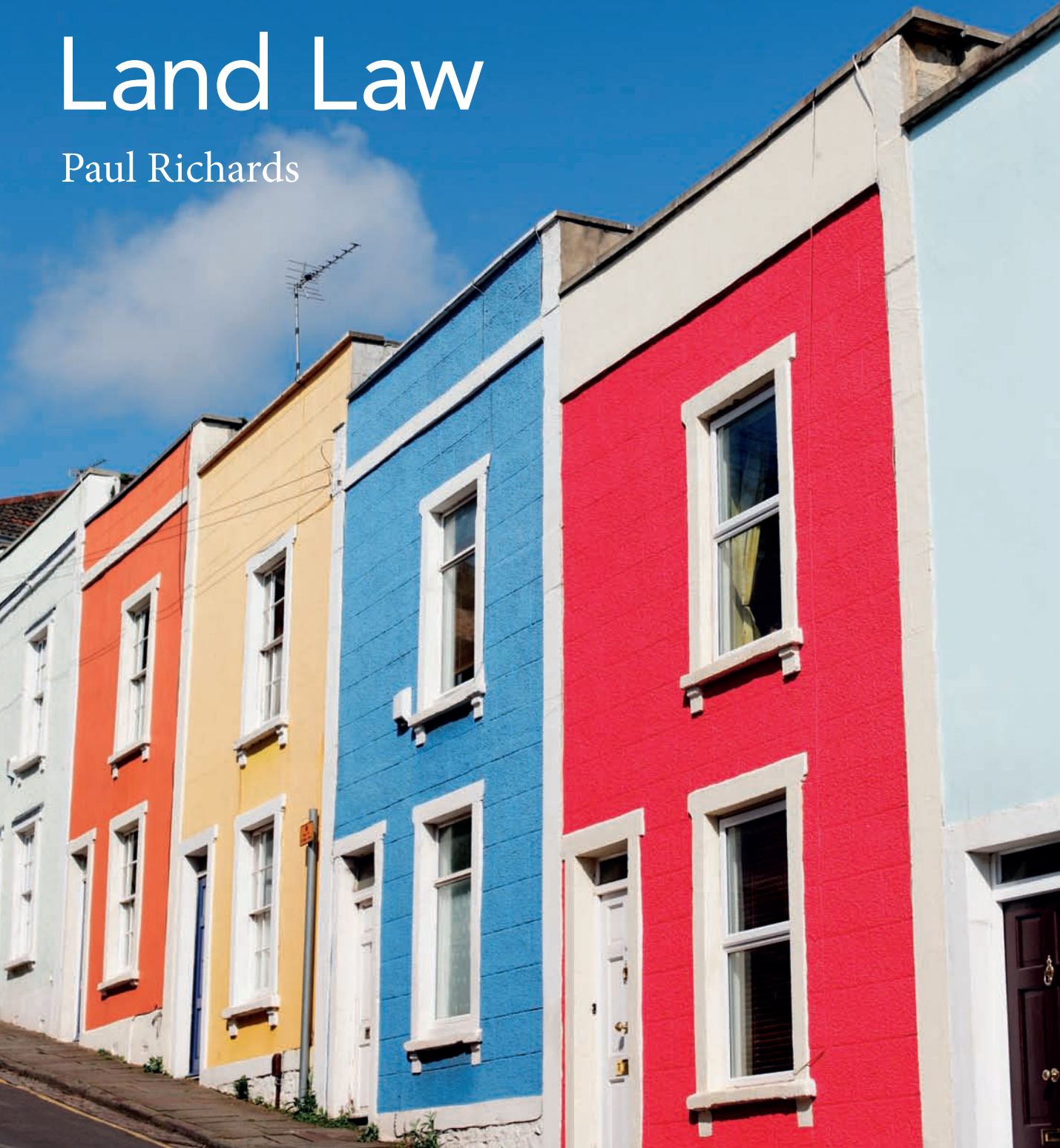


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# Land Law

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required with regards to the interests of beneficiaries under a trust of land or a strict settlement. Here the restriction provides that no registration of a registered disposition can take place unless any capital money is paid to two trustees or to a trust corporation. In this way, the disposition of the registered estate will ensure that any equitable interests under a trust are overreached so that the purchaser is assured that he or she will take free of those equitable interests when the disposition is registered.

The registrar has the power to enter a restriction under circumstances set out in s.42(1). Thus the registrar has the power to enter a restriction:

If it appears to him that it is necessary or desirable to do so for the purpose of –

- (a) preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge,
- (b) securing those interests which are capable of being overreached on a disposition of a registered estate or charges are overreached, or
- (c) protecting a right or claim in relation to a registered estate or charge.

The registrar has the power to make an entry for a restriction on his or her own initiative. Notwithstanding this, a person may apply for the entry of a restriction under s.42(1) if:

- (a) he is the relevant registered proprietor, or a person entitled to be registered as such proprietor,
- (b) the relevant registered proprietor, or a person entitled to be registered as such proprietor consents to the application, or
- (c) he otherwise has a sufficient interest in the making of the entry. (s.43(1))

If the registrar makes an entry under this provision without the consent of the registered proprietor, the registrar must notify the registered proprietor of the application and the registered proprietor's right to object to the entering of the restriction: s.45.

In some circumstances, the registrar is under an obligation to enter a restriction. Thus if the registrar enters two or more persons as registered proprietors, he or she must enter a restriction to ensure that the interests of the persons are overreached since in a co-ownership situation like this a trust of land arises automatically: s.44(1).

By s.46 a court may make an order requiring the registrar to enter a restriction if it appears to the court that it is necessary or desirable to do so for the purpose of protecting a right or a claim in relation to a registered estate or charge.

Finally, the Land Registration Act 2002 does not allow for any crossover between restrictions and notices. Thus s.42(2) and s.46(2) provide that no restriction may be entered for the purpose of protecting the priority of an interest which is, or could be, the subject of a notice.

## Unregistered interests which override a registered disposition

### Introduction

As we saw earlier under the Land Registration Act 1925, such interests were known as 'overriding interests' and it is still useful to use this expression in the vernacular, though they are not referred to as such in the Land Registration Act 2002. These types of interest can pose problems for a system that is supposedly based on registration since, despite the

fact that they do not appear on the register, they will still bind a person taking title under a registered disposition, whether or not they are a purchaser for valuable consideration. The existence of such interests amounts to a significant crack in the mirror principle that the register should reflect the variety of interests that pertain to a registered estate.

The truth of the matter is that overriding interests under the Land Registration Act 1925 provided a vehicle which rendered the system of registration to a large degree unreliable, largely helped by judicial intervention. Thus it became possible for unregistered minor interests to re-emerge as overriding interests and binding, despite the fact they were unregistered, principally through the Trojan horse of the Land Registration Act 1925 s.70(1)g overriding interest by way of the rights of persons in actual occupation of the property. Some of these interests were enforceable, despite the fact that there had been an inspection of the land and significant enquiries made by a purchaser. It therefore comes as little surprise that Cross J in *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] Ch 9 stated at 15:

Overriding interests are, speaking generally, matters which are not usually shown on the title deeds or mentioned in abstracts of title and as to which, in consequence, it is not possible to form a trustworthy record on the register. As to such matters, persons dealing with registered land must obtain information outside the register in the same manner and from the same sources as people dealing with unregistered land would obtain it.

Clearly, the existence of overriding interests provided a significant hurdle to the Law Commission in its report *Land Registration for the Twenty-first Century: A Conveyancing Revolution*, (Law Com No. 271) in achieving its objective of designing a register that would be a 'complete and accurate reflection of the state of the title to the land at any given time, so that it is possible to investigate title to land online, with the minimum of additional enquiries and inspections'. Indeed, the presence of overriding interests posed a particular problem to the aspiration of the development of e-conveyancing that was meant to streamline and speed up a conveyancing process that had become notoriously slow and cumbersome, despite the presence of registered land under the Land Registration Act 1925.

The truth of the matter was that the existence of overriding interests brought the avowed original aims of a system of registered land into almost disrepute, to the extent that there were many calls for their abolition. On its part, the Law Commission gave such an approach serious consideration, but at the end of the day had to concede that this would not be possible, stating:

The way in which the law on overriding interests has developed over the last seventy-two years has demonstrated that overriding interests are by no means only 'minor liabilities' . . . Most overriding interests do appear to have one shared characteristic, however, that is related to the orthodox explanation of them, namely that it is unreasonable to expect a person who has the benefit of the right to register it as a means of securing its protection.

Having conceded that it would not be possible to abolish overriding interests completely, the Law Commission embarked on a wholesale reform of this type of interest so as to minimise their impact. In order to achieve this objective the Law Commission adopted a number of strategies:

- 1 The number of rights that could exist in overriding interests were reduced and some rights reformed. So rights by adverse possession would not survive first registration unless the first registered proprietor had notice of them. At the same time, adverse possession was subject to reform where the title to the land was registered. Thus rights of squatters by adverse possession could no longer be binding as an overriding interest.

- 2 A number of overriding interests would be phased out after 10 years from the enactment of the Land Registration Act 2002. These interests are set out in paragraphs 10–14 of Schedule 1 and 3 of the Land Registration Act 2002 and include franchises, manorial rights, rents reserved to the Crown, non-statutory rights in respect of an embankment, or sea or river wall, and payments in lieu of titles. During this 10-year period s.117 provides that the beneficiary of the overriding interest could apply for their interest to become a caution against first registration if the land were unregistered or, if the land were registered, for the interest to be protected by an entry as a notice.

These interests cease to be overriding interests as from 13 October 2014 (10 years after the Land Registration Act 2002 came into force). The reason why a period of 10 years was selected was because there were fears that simply removing them would contravene the Human Rights Act 1998 in depriving the owner of their interest.

It should be noted that paragraph 16 rights in respect of the repair of a church chancel were added to the list of time-limited overriding interests by the Land Registration Act 2002 (Transitional Provisions) (No. 2) Order 2003.

- 3 Some overriding interests, whilst retaining their status as overriding interests, have been narrowed down and redefined. Overriding interests that fall within this group are to be found in paragraphs 1–3 of Schedule 3 and consist of short leases, interests of persons in actual occupation and easements and profits. We will focus mainly on these when we come to examine Schedule 1 and Schedule 3.
- 4 As we have already seen in the Land Registration Act 2002 s.71(a), a person applying for first registration of a subsequent registrable disposition must provide the registrar with information about any interest falling within Schedule 1. Similarly by s.71(b) a person applying for registration of a subsequent registrable disposition must provide the registrar with information about any interest falling within Schedule 3. In both these instances the registrar may then enter a notice on the register with respect of the interest falling within Schedules 1 and 3. In this way the unregistered nature of the overriding interests will cease.
- 5 On the arrival of e-conveyancing, most interests that are created will be conditional on their being simultaneously registered.

The anticipated overall effects of these strategies will significantly reduce the number of unregistered overriding interests. In the Law Commission Report at paragraph 2.27 it identified a much reduced number of overriding interests that were likely to survive. They are likely to comprise:

- (1) Most leases granted for 3 years or less;
- (2) The interests of persons in actual occupation where –
  - (a) that actual occupation is apparent; and
  - (b) the interest –
    - (i) is a beneficial interest under a trust; or
    - (ii) arose informally (such as an equity arising by estoppel);
- (3) Legal easements and profits à prendre that have arisen by implied grant or reservation or by prescription;
- (4) Customary and public rights;
- (5) Local land charges; and
- (6) Certain mineral rights.

The guiding principle in determining these is that interests should only exist as overriding interests if it is unreasonable to expect them to be protected in the register.



## Interests that are overriding

The Land Registration Act 1925 provided one list of overriding interests that were contained in s.70(1). In that Act no distinction was made between overriding interests that arose on first registration and those that arose in subsequent dealings. Under the Land Registration Act 2002 this distinction is made and, although there is a great deal of commonality between the different overriding interests, there are also significant differences between them with regards to certain interests.

The Land Registration Act 2002 therefore provides two sets of overriding interests contained in Schedules 1 and 3. Schedule 1 contains interests that override first registration and Schedule 3 contains those overriding interests that override subsequent dealings with the registered estate. We will now proceed to examine both of these schedules.

### Schedule 1 – Unregistered interests which override first registration

The reason why Schedule 1 is included in the Land Registration Act 2002 is that the applicant for first registration already has the legal estate vested in them as part of the unregistered land conveyancing process and is therefore already subject to those interests. First registration is only intended to bring the legal estate within the system of land registration and is not intended to affect the enforceability or priority of interests that have been established by the unregistered land process. This is, of course, not the case with subsequent registered land dispositions where there are issues of enforceability and priority possibly arising in relation to a new owner of the title. A further reason for this list is that it would be clearly incorrect to allow an owner to avoid an interest by applying for registration (either voluntarily or compulsorily) by way of the operation of s.29 (see above).

In Schedule 1 the overriding interests are set out in paragraphs 1–16. These comprise:

- Para 1 – Leasehold estates granted for a term not exceeding seven years from the date of the grant.
- Para 2 – An interest belonging to a person in actual occupation so far as relating to land of which they are in actual occupation, except for an interest under a settlement under the Settled Land Act 1925.
- Para 3 – A legal easement or profit.
- Para 4 – A customary right.
- Para 5 – A public right.
- Para 6 – A local land charge.
- Para 7 – An interest in any coal or coal mine.
- Para 8 – In the case of land to which title was registered before 1898, rights to mines and minerals created before 1898.
- Para 9 – In the case of land to which title was registered between 1898 and 1925 inclusive, rights to mines and minerals created before the date of registration of the title.
- Para 10 – A franchise.
- Para 11 – A manorial right.
- Para 12 – Crown rents.
- Para 13 – A non-statutory right in respect of an embankment, sea or river wall.
- Para 14 – Payments in lieu of titles.
- Para 15 – A right acquired under the Limitation Act 1980.
- Para 16 – A right in respect of the repair of a chancel.

As we have already seen, those interests in paragraphs 10–14 (in both Schedule 1 and 3) ceased to be overriding as from 13 October 2013. It should be noted that these interests will nevertheless continue to be binding if they are protected in the appropriate manner (see above). We will consider para 15, rights acquired under the Limitation Act, in each schedule separately.

The overriding interests that arise in Schedule 3 largely duplicate the interests contained within Schedule 1; however, there are significant differences with regards to the interests contained in paragraphs 1–3 and therefore we will look at these in Schedule 1 before considering the Schedule 3 interests.

### Paragraph 1 – Leasehold estates granted for a term not exceeding seven years from the date of the grant

One key word here is ‘grant’ and thus this provision means that *legal* leases granted for a term not exceeding seven years will override first registration. The paragraph provides three exceptions to the overriding status of short leases. These are contained in s.4(1)(d), (e) or (f); that is, a grant of a lease out of unregistered land that is to take effect in possession after more than three months from the date of the grant; the grant of a lease out of unregistered land in pursuance of Part 5 of the Housing Act 1985 under the ‘right to buy’ provisions; and the grant of a lease out of unregistered land in circumstances where, in the private sector, the lease is granted to the landlord where the tenant’s right to buy is preserved within the ambit of s.171A of the Housing Act 1985.

This provision has no application to equitable leases that are not created out of deed by signed writing although such equitable leases may be caught by paragraph 2 below if the tenant is in actual occupation of the premises at the relevant time. Legal leases that are created for three years or less and take effect in possession within the exception contained in the Law of Property Act 1925 s.54(2) will also override first registration even if created orally.

### Paragraph 2 – An interest belonging to a person in actual occupation

Paragraph 2 states:

An interest belonging to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for an interest under a settlement under the Settled Land Act 1925.

This is an extremely important category that provides that the interests of persons who are in actual occupation of the land are overriding interests. This was a concept that was found in the old Land Registration Act 1925 s.70(1)g; however, the provision in the Land Registration Act 2002 gives no protection to persons who are in receipt of rents and profits since they are not necessarily in *actual* occupation of the land. Thus the land must actually be occupied by the holder claiming the overriding interest.

It is very important to understand that it is not actual occupation per se that gives rise to the overriding interest. The person claiming the overriding interest must prove that he or she has a proprietary interest in the land at first registration and that he or she is in actual occupation at the relevant time. Thus to claim the overriding interest there *must* be:

An Interest in Land + Actual Occupation = Overriding Interest

### Example

A purchases Blackacre for £200,000. She is helped in gathering the purchase price by her son, X, who contributes £50,000. Blackacre is conveyed into A's name alone but, rather than live there herself, she allows X to live there with his girlfriend, Y. All goes well until, five years later, X and Y have an argument and X leaves. Since A's intention was to buy Blackacre for the purposes of providing a home for X and Y to live in, and since X and Y have now broken up, A decides to sell the property to B. X and Y attempt to establish an overriding interest against B. In this situation, X will not be able to establish an overriding interest because, whilst he has an interest in the property by virtue of his contribution to the sale price, he is not in actual occupation of Blackacre. Y will also not be able to claim an overriding interest since, whilst she is in occupation of Blackacre, she has no interest in the property. B can therefore take Blackacre free from any claims of X and Y.

Much of the debate about overriding interests arising out of an interest belonging to a person in actual occupation arose out of the application of the Land Registration Act 1925 s.70(1)g.

The Land Registration Act 1925 s.70(1)g defines the category of overriding interest as:

The right of every person in actual occupation of the land or in receipt of the rents or profits thereof, save where enquiry is made of such a person and the rights are not disclosed.

In this respect, Schedule 1 paragraph 2 is little different from this provision. In examining the rights of a person in actual occupation, we need to look at the two components set out above in more detail.

### An interest in land

The interest in land must be a proprietary right in land. A personal right, such as a licence to occupy the land, will *not* suffice. The position was first set out by Russell LJ in **National Provincial Bank Ltd v Hastings Car Mart Ltd** [1964] Ch 665, where he stated at 696:

Section 70 in all its parts is dealing with rights in reference to land which have the quality of being capable of enduring through different ownerships of land, according to normal conceptions of title to real property.

That view of Russell LJ was confirmed in **National Provincial Bank Ltd v Ainsworth** [1965] AC 1175. In that case, the House of Lords decided that a wife, who was not entitled to a share of the ownership of the matrimonial home, did not have the right to occupy the home merely because of her status as a wife. Since she had not established a share of the ownership, she was incapable of establishing an overriding interest. Lord Denning had argued that she should have the protection of s.70(1)g based on a 'deserted wife's equity' in the property. This argument was rejected and Lord Wilberforce made it clear that s.70(1)g did not extend to all rights, irrespective of whether they were of a personal nature or not. Lord Wilberforce stated at 1261:

To ascertain what 'rights' come within this provision, one must look outside the Land Registration Act and see what rights affect purchasers under the general law. To suppose that the subsection makes any right, of howsoever a personal character, which a person in occupation may have, an overriding interest by which a purchaser is bound, would involve two consequences: first that this Act is, in this respect, bringing about a substantive change in real property law by making personal rights bind purchasers; second, that there is a difference as to the nature of the rights by which a purchaser may be bound between registered and unregistered land; for purely personal rights including the wife's right to stay in the house (if