

### 1: Contemporary Perspectives on Property, Equity and Trust Law PDF Download - AustinEmmet

*Covers a wide range of topics within land, property law and trust law, serving the needs of both practitioners and academics. Discusses the major areas of debate within the area of trusts and equity in one concise, readable volume.*

E-conveyancing, broadly defined, is already in operation<sup>1</sup> and the more extensive schemes currently being tested will bring us a fully electronic conveyancing system within a decade. In this endeavour, HM Land Registry for England and Wales is leading the world, and common law and civil jurisdictions alike, as well as the former centrally planned economies of Eastern Europe and Asia, are already regarding the LRA with the same interest as a scientist would examine a new species of guinea pig. In fact, in property law terms, the Land Registration Act is still in its infancy; barely walking, hardly talking and only just loose from the child restraints of transitional provisions. Fortunately, for the most part, the Act is drafted with a clarity that is rarely found in technical legislation, and the everyday experience of the staff of the Land Registry and their commonsense application of the Land Registration Rules has reduced significantly the scope for uncertainty. For example, electronic discharges of mortgages under the ENDS? It remains to be seen whether this will be compulsory within a decade, or simply at least initially an optional system. A number of transitional provisions expired on 12 October, three years after entry into force of the Act. I cannot lay claim to this pithy and illuminating phrase. I first heard the description from Professor Edward Burn, still the doyen of property lawyers. One aspect of the Act that has generated a certain amount of noise is the way in which it deals with the priority of third party property interests on the occasion of a dealing with a registered title, especially when contrasted with the predecessor provisions of the Land Registration Act. Given that much of the Act is driven by the imperative to establish an effective and efficient system of e-conveyancing, it is axiomatic that an intended transferee of the land – in particular a purchaser or mortgagee<sup>6</sup> – should be able to discover as much as possible about adverse property rights from an inspection of the register. Otherwise, e-conveyancing under the LRA will amount to nothing more than a method of transferring land – like deeds and written contracts – rather than the foundation of a system of title by registration. Thus, the mechanics of registering and therefore protecting adverse third party rights should be simple and effective and should, eventually, be within the orbit of compulsory e-registration. Likewise, or so the story goes, the extent to which unregistered third party rights are capable of enjoying priority over the interest of a transferee must be subject to the most rigorous scrutiny, for the existence of these unregistered, but binding, interests in any great numbers or magnitude compromises the reflection cast by the e-register. At first blush, the Act deals with this issue robustly. It purports to require the registration of very many more third party rights affecting a registered title than did the LRA, to make the process of their registration simpler and then to punish their non-registration by a loss of priority against a duly registered transferee for value. Even then, for the apparently narrow class of rights that can have this effect, the intent is that they should continue to have priority only if they are, in some sense, discoverable by an intended transferee before the transfer. Overriding interests are thus not intended to be a general safety net for a right holder who fails to register, but a necessary evil in a system of title by registration whose main concern is transactional certainty. The position of a transferee not for value is different and discussed briefly below. There is some debate about whether this should be so. If the purpose of the Act is to bring transactional efficiency and certainty, does it matter whether the transferee gives value or not? Sections 28, 28, 30 LRA. See Schedule 3 to the LRA, considered below. Third party interests can be protected on the occasion of a disposition of the registered title<sup>10</sup> either by a conscious act of registration by the right holder<sup>11</sup> or silently by reason of the interest falling within the ambit of overriding interests. The former occurs either by the use of a Notice, which confers substantive protection on the interest protected or, in specified circumstances, by the use of a Restriction which confers protection indirectly by controlling dealings with the title and thus limiting the circumstances in which a transferee may claim priority through registration as the new proprietor. To be clear, for present purposes, this means rights potentially adverse to

the estate owner, held by another person and encompasses, inter alia, proprietary interests such as easements, covenants, options, rights of pre-emption see section LRA , proprietary estoppels see section LRA Leases not registrable as an estate are also included. Rights of equitable co-ownership, although not necessarily adverse to the registered proprietor, may well become so or to a successor and are one of the most common examples of rights in this category. Mortgages are excluded for present purposes, being nearly always substantively registered as a registered charge. Note, however, an equitable mortgage arising from a mere written instrument, or by reason of estoppel, would require protection using the process discussed below. We are concerned here primarily with dispositions of a registered title. The act of first registration of title, whether compulsory or voluntary, also raises questions of priority. This is discussed en passant. Or, in certain circumstances, by the Registrar - see Or making the dealing subject to specified conditions. The Restriction is not designed to confer protection - for that is the role of the Notice. However, by limiting or preventing dispositions, pre-existing rights are necessarily protected as there may be no registered disposition to take advantage of the priority rule. For example, a Restriction preventing a disposition without the consent of X, the holder of an option to purchase the land, will be as effective in practice as a Notice protecting the option. Indeed, both may well be used. The change of name is not accidental but is meant to emphasise that there is not perfect symmetry between the provisions of the LRA and the LRA It is also, in fact, a more accurate description. Schedule 2 concerns the formalities required to complete a registered disposition of a registered title and thus follows logically from Schedule 1 and before Schedule 3, the latter being concerned with the effects of meeting the requirements in Schedule 2. Section 29 LRA If the transferee does not give value, all pre-existing property rights retain their priority, section 28 LRA This is because the act of first registration necessarily does not involve a change of owner as the title already has been purchased or transferred completely as an unregistered title. It also explains why Schedule 1 appears to encompass more interests which override than Schedule 3. Of course, the goal of the LRA is to introduce e- conveyancing and thereby enhance transactional certainty and efficiency, and so there is no surprise that the legislation makes a major effort to ensure that as many third party rights as possible are brought on to the register and that as few as possible are protected without such registration. A number of strategies are employed to this effect. The general policy is that interests should override only where it is unreasonable or impractical that they should be entered on the register. Many of the overriding interests defined in the Schedules are comparable to those existing under the Act, but critically the mere existence of a third party interest falling within the statutory definition may not be enough to ensure its priority. Schedule 1, specifying unregistered interests which override a first registration, appears to be more generous than Schedule 3 which specifies interests which override a dealing with an existing registered title. In other words, the intention is that more unregistered interests will have priority at first registration than when an existing registered title is dealt with for value. This reflects the fact that first registration of title does not involve a change in ownership of the land. The existing owner is the person who applies for first registration and the Schedule of overriding interests should accommodate all those unregistered interests which bound that owner prior to registration. Conversely, a disposition subject to Schedule 3 always involves a change of registered proprietor or the grant of a significant interest to another person, and the policy of the Act is to confer added protection on such a transferee if they give value. Schedule 3 thus appears to exclude some interests or in some situations that would have fallen within Schedule 1, primarily by reference to a discoverability criterion. This is, of course, an expression of policy rather than a legal necessity. The Act proceeds on the basis that in a world with e-conveyancing, the purchaser should have priority over third party interests unless those interests are on the register or, as a necessary evil, overriding to the extent that they are discoverable. It is too late to argue about whether this is the best policy choice, but the fact that it stems from policy not necessity may have an impact when Schedule 3 comes before the courts for interpretation. Of course, that owner may have purchased the land previously and be compelled to register under the compulsory registration provisions, section 4 LRA See infra, where an assessment is made as to whether the differences between Schedules 1 and 3 are more literary than real.

However, given that, by definition, the third party right already binds the registered proprietor – it already overrides – the typical applicant for registration has little to lose, and possibly something to gain by disclosure<sup>21</sup> and in any event failure to disclose does not cause the loss of overriding status. No penalty is specified in the Act or Rules, but anecdotal evidence suggests that professional advisers are seeking to pass the risk of non-compliance whatever that is to the existing proprietor through the contract of sale, or are using pre-contractual enquiries to extract maximum and often irrelevant information from the seller. This is not conducive to the smooth operation of e-conveyancing. Secondly, however, it may well be appropriate to advise applicants for registration not to disclose interests about which they are uncertain. Not only would disclosure and registration effectively crystallise a previously uncertain adverse right,<sup>23</sup> but simply raising the possibility that an adverse interest might or might not exist can generate problems where none existed before. Third party rights that have been quietly exercised for many years e. The introduction of a straightforward procedure for the registration of a Notice, which always confers substantive protection,<sup>24</sup> combined with the effective abolition of land and charge certificates, is a welcome simplification of the system that operated under the Land Registration Act. Nevertheless, the Act is over-ambitious in its goal of encouraging maximum disclosure of the content of third party rights as well as their existence. The two variants of the Notice – the Agreed Notice and Unilateral Notice – are meant to serve different. By ensuring that for the future, the register reflects the true state of his title and that a purchaser can buy or lend with confidence. It would of course be absurd if the proprietor by his own failure could cause the adverse right to lose its priority. Although registration by means of a Notice does not guarantee the validity of the right registered – section 32(3) LRA – it would be difficult for a registered proprietor to later dispute the validity of an interest which he had disclosed. Section 32 LRA, assuming the interest protected is otherwise valid under the general law, section 32(3). An Agreed Notice is meant to protect an interest about which there are no concerns as to its validity, either because its existence is accepted by the registered proprietor of the burdened title or because it arises from an order of a court. Indeed, it may well be that certain proprietors in granting third party interests – e. It institutes a statutory scheme of priorities that replaces the less organised system of the Land Registration Act. The position in respect of first registrations is similar to the law of the LRA with necessary modifications, but the position in respect of registered dispositions dealings of a registered estate is re-cast in a rather more radical way and may well be the source of problems. First, interests protected by an entry on the register – e. Of course, the Registrar must be furnished with sufficient details to accept the validity of the right purported to be registered, sections 35 and 36 LRA. For example, would a landlord of a mixed use shopping centre with several units be happy to have the details revealed of the different rents payable by the different tenants? For leaseholds, section 12 LRA, also specifies that unsurprisingly the leasehold is subject to implied and express covenants and obligations in the lease. Secondly, those interests which override under Schedule 1 LRA, having not been entered on the Register through disclosure. Thirdly, interests acquired by reason of adverse possession of which the proprietor has notice, although if the adverse possessor has not completed 12 years adverse possession at the time of first registration, this is likely to mean no more than the ability to apply to be registered as proprietor under the new scheme of the LRA. However, there are two points of note. First, the priority rule applies to all first registrants, irrespective of whether they were purchasers or donees of a gift. This is as it should be, given that as explained above first registration of title does not signify a change in ownership and should not change pre-existing priorities. If, at first registration, an adverse possessor already has completed 12 years adverse possession of the previous unregistered title, established common law principle means that he has a better title than the paper owner. This entitlement will override the first registered proprietor if the proprietor has notice section 11 or if the adverse possessor is in actual occupation of the land sufficient to establish an overriding interest within para. Of course, most adverse possessors will fall into one of these two groups. However, a claimant who has completed 12 years adverse possession but is not within either of these provisions appears to have no priority over the first registered proprietor. The Act, surprisingly perhaps, contains no protection per se for the adverse possessor who had completed the period

required for adverse possession while the land was unregistered, despite the general view that first registration should not alter pre-existing priorities. Assuming, 12 years adverse possession has been completed prior to first registration, the interest will be an overriding interest if the adverse possessor is in actual occupation within the meaning of Schedule 1. In the unlikely event that the possessor is not in such occupation, then this provision ensures that the proprietor is bound if he has notice of the adverse possession, not being able to escape its consequences knowingly through his own act of first registration. Persons who have not completed 12 years possession and thus are forced to apply under the new scheme are unlikely to acquire title given the way the scheme works. Registration with qualified or possessory title enjoys the same priority save that, for qualified title, the enforcement of a third party interest excepted from the effect of registration is preserved. For possessory title, the priority of any interest affecting the estate at the time of registration is preserved. If absolute title to a leasehold is not possible perhaps the superior freehold is not registered, then good leasehold is as strong as absolute title, save that registration does not secure priority over any matter affecting the title of the lessor to grant the lease. It would have mattered at that time whether they gave value or not.

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