

PROPERTY LAW

Can overriding interests and the Crack on the Mirror principle be reconciled?

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Introduction

After the Land Registration Act (LRA) 1925 was established, a universal system of land registration was created. This requires details relating to parcels of land to be recorded by registration.¹ The LRA 2002 was later introduced to modify the drawbacks of the 1925 legislation.² Despite these modifications, the doctrine of overriding interests, interests which are not recorded on the register but nonetheless bind the land and its intended purchasers,³ remain a substantial obstacle in achieving a conclusive system of land registration and, according to Harpum, means that the system itself cannot be as “efficient, certain and just as was intended”.⁴

This essay will explore the doctrine of overriding interests by critically examining the conflicts between existing land law principles and overriding interests, detailing the changes introduced by the LRA 2002 to ameliorate some of these issues, and analysing why overriding interests were not completely removed from the LRA 2002 as well as the justifications for their retention. Overall, the article will agree with Harpum and argue that, although the LRA 2002 reduced the negative effects of overriding interests in some respects further reform is needed. Accordingly, possible solutions for reform will be posited.

The Land Registration System and overriding interests

The land registration system was introduced in 1925 to eliminate the obstacles caused by the previous system of title to land, particularly the system relying on the title deeds. Historically, title to land needed to be proved by title deeds, an inherently problematic system due to the potential for such documents to be misplaced or lost by landowners, resulting in possible failure to provide good title to land.⁵ Moreover, relying on title deeds to prove title to land was wearisome and intricate because of the repeated examination of the same title.⁶ This rendered the conveyancing process complicated and lengthy.⁷ However, the 1925 Act was also criticised as being unsatisfactory and unfair, largely due to the operation of the doctrine of notice whereby an individual with an equitable interest in the land would have that interest “swept off” the land if the purchaser was a *bona fide* purchaser of the legal estate for value without notice.⁸ Consequently, the LRA 2002 was established, aimed at achieving “faster, cheaper and more reliable dealings” in relation to the conveyancing and ownership of land.⁹

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¹ N. Gravells, *Land Law: Text and Materials* (2nd edn, Sweet & Maxwell 1999).

² M.J. Prichard, ‘Registered Land—Overriding Interests—Actual Occupation’ (1979) 38 *Cambridge Law Journal* 254.

³ Law Commission, *Updating the Land Registration Act 2002* (Law Com No 380).

⁴ C Harpum, *The Law of Real Property* (8th edn, Sweet & Maxwell 2021) 151.

⁵ Paul Richards, *Land Law* (Pearson 2014).

⁶ *Williams Glyn’s Bank Ltd v Boland* [1981] AC 487, per Scarman LJ.

⁷ E. Dowson and V. Sheppard, *Land Registration* (2nd edn, HM Stationery Office, 1968).

⁸ Richards (n 5) 59.

⁹ S. Cooper, ‘Equity and Unregistered Land Rights in Commonwealth Registration Systems’ (2003) 3(1) *Oxford University Common Law Journal* 198, 201.

In order to reach this objective, the 2002 Act was underpinned by three fundamental principles: the mirror principle, the curtain principle and the insurance principle.¹⁰ The mirror principle aims to ensure an efficient and reliable register of land ownership by requiring the register to accurately and conclusively reflect the ownership and interests relating to the land.¹¹ Under the curtain principle, purchasers need not concern themselves with the rights behind entries on the register in order to ensure the system is less complicated for prospective purchasers.¹² The insurance principle encapsulates the notion that registered title is guaranteed by the State by providing statutory indemnity for any errors made in relation to registration.¹³ Based on these fundamental principles, the LRA 2002 was founded with the purpose of reflecting land ownership more completely and precisely than its predecessor.¹⁴

Despite the improvements introduced by the LRA 2002, the Act was criticised for retaining the doctrine of overriding interests. Overriding interests are not recorded in the Land Register, but are, nonetheless, binding on purchasers, therefore representing a “crack” in the mirror principle and ultimately undermining the construction of a “trustworthy record”.¹⁵ Moreover, they are discoverable only by the prospective purchaser making enquiries regarding any such attached interests, or physically inspecting the property, thus undermining the curtain principle.¹⁶ Furthermore, overriding interests present an obstacle to electronic conveyancing that aims to expedite and streamline the conveyancing process with accuracy.¹⁷ The doctrine therefore conflicts with the stated fundamental principles of the land registration system and thus hinders the system from fully achieving its legislative intent. Because the existence of unregistered but binding rights undermines and damages the mirror principle, Dworkin insists that overriding interests should ultimately be abolished or significantly reduced.¹⁸

However, calls for the abolition of overriding interests were rejected by the Law Commission, who stated that requiring individuals to protect their interests by registering them would be unreasonable.¹⁹ Further reasons posited against abolition were that overriding interests could not be registered in certain circumstances because the interest holder may not realise the existence of such an interest in their favour.²⁰ Despite not being abolished by the LRA 2002, the Act sought to minimise the impact of overriding rights by reducing the number of potential overriding interests and limiting the effect of the remaining ones.²¹ For instance, rights of adverse possession cannot be enforced as overriding interests

¹⁰ S King, *Beginning Land Law* (Routledge 2015).

¹¹ Richards (n 5).

¹² M Dixon, *Modern Land Law* (7th edn, Routledge 2010) 34.

¹³ *Ibid*, 35.

¹⁴ Law Commission and HM Registry, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001) para 2.24.

¹⁵ *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] EWHC 9

¹⁶ Richards (n 5) 128.

¹⁷ *Ibid*, 142.

¹⁸ G. Dworkin, ‘Registered Land Reform’ (1961) 24 *Morden Law Review* 135.

¹⁹ Law Commission and HM Registry, *Land Registration for the Twenty-first Century: A Consultation Document* (Law Commission No. 254, 1998).

²⁰ *Ibid*.

²¹ Dixon (n 12) 41.

unless the first registered proprietor had notice of them, which implies that squatters by adverse possession no longer exist.²²

Additionally, paragraphs 10-14 of Schedules 1 and 3 set out that overriding interests such as franchises, manorial rights, rents reserved to the Crown and non-statutory rights would be phased out in ten years since the LRA 2002 was enacted. However, a period of 10 years was introduced to avoid the removal of such interests contravening the Human Rights Act 1998. Besides, overriding interests of short leases, interest of persons in actual occupation, and easements were narrowed down and redefined in the LRA 2002.²³

Schedule 1 of the 2002 Act relates to interests that override first registration while Schedule 3 focuses on subsequent dealings with the property. The scope of Schedule 3 is also narrower in relation to enforceability and priority.²⁴ Since actual occupation is one of the key overriding interests in Schedule 3 and is thought to be the “most sweeping and most often litigated one”,²⁵ the related legislation and cases should be discussed. Various cases have clarified that a person’s actual occupation could not satisfy the demand of overriding interest without an interest in the land,²⁶ which ought to be a proprietary interest instead of a personal right (such as a marriage relationship²⁷ or a licence).²⁸ Moreover, overriding interests of persons in actual occupation are now restricted to them having “physical presence” on the land²⁹ or an “intention to occupy”.³⁰ It should be emphasized that Schedule 3 underlines instances in which actual occupation might fail to be binding if the occupation would “not have been obvious on a reasonably careful inspection of the land prior to the disposition” or if the person in actual occupation did not reveal the interest when asked about it.³¹

The limitations imposed by the LRA 2002 seem to be reasonable and practical, yet there are various concerns. First, the test of intention is thought to be unverifiable and opaque, and the extent to which courts should rely on “intention” to determine actual occupation remains ambiguous.³² Second, it is assumed that the definition of “reasonably careful inspection” is subjective, which may lead to uncertainty in its interpretation.³³ Thus, although the LRA 2002 remedied concerns of the LRA 1925 to some degree, there are still difficulties when adapting the law of land registration.

Although the retention of overriding interests in the LRA 2002 has been subject to criticism, the justification for their continued existence is to secure the specific interests of individuals who cannot be reasonably expected to register every right they may have in land.³⁴ From the perspective of persons in actual occupation, the potentially vulnerable position of these

²² Richards (n 5) 143.

²³ Richards (n 5) 143.

²⁴ Richards (n 5) 128.

²⁵ Harpum (n 4) 203.

²⁶ Caswell (n 21).

²⁷ *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

²⁸ Caswell (n 21).

²⁹ Boland (n 6).

³⁰ *Thompson v Foy* [2009] EWHC 1076.

³¹ LRA 2002 Schedule 3, para 2.

³² Barbara Bogusz, ‘The relevance of intentions and wishes to determine actual occupation: a sea change in judicial thinking?’ (2014) 1 *Conveyancer and Property Lawyer* 27.

³³ Dixon (n 25) 13.

³⁴ Bogusz (n 32).

persons must be acknowledged and therefore protecting their overriding status is important.³⁵ This is particularly evident in cases such as *Chhokar*,³⁶ where it was held that the wife, whose husband held the sole legal title to the house they shared and sold the property when she was giving birth to their baby in the hospital, should be protected by the court by recognising her overriding interest. It can also be seen in *Bustard*,³⁷ that without the protection of overriding interests, Mrs. Hussein would have lost her home. On the other hand, the interests of intended purchasers should also be considered. In this regard, the LRA 2002 introduced a policy of encouraging people to register any known overriding interest they may have in land, thus strengthening the certainty and reliability of the registration system³⁸

Nevertheless, a considerable number of overriding interests remain, as individuals refuse to follow this policy.³⁹ Human rights should also be considered in the issue of overriding interest. Under the European Convention on Human Rights 1950, individuals are entitled to enjoy peaceful possession of their land without being deprived by others.⁴⁰ In *Beaulane*, it was argued that adverse possession might result in the destruction of title and therefore contradict the Convention.⁴¹ Although a similar appeal was rejected by the court in *Pye*,⁴² it remains uncertain for courts to take the Human Rights Convention into consideration because of the slim four-three majority at first instance.

Conclusion

In conclusion, this essay has supported the opinion that the overriding interest results in a crack to the registered system and hinders it from achieving its objectives, despite the LRA 2002 making some modifications. After introducing the doctrines of registered land and the overriding interest, this essay has analysed the conflicts between them and how the LRA 2002 developed to eliminate the conflicts. Further, this essay has suggested that the LRA 2002 could not practically enable the registration system to become as efficient, certain and just as was supposed. Finally, three justifications have been given, including protection for vulnerable people, encouragement about registering overriding interests, and reference to the Human Rights Convention. From this, it is clear that although further reform may be necessary to make the law in relation to overriding interests clearer, they are necessary in order to protect the interests of vulnerable individuals and therefore their retention in the LRA 2002 is justified.

³⁵ Bogusz (n 32).

³⁶ *Chhokar v Chhokar* [1984] Fam Law 269.

³⁷ *Link Lending Ltd v Bustard* [2010] EWCA 424.

³⁸ LRA 2002, s. 71.

³⁹ Dixon (n 12) 42.

⁴⁰ European Human Rights Convention on Human Rights 1950, Article 1, Protocol 1.

⁴¹ *Beaulane Properties v Palmer* (2005) EWHC 817.

⁴² *Pye (Oxford) Ltd. v United Kingdom* (2008) 46 EHRR 45.