LAW COMMISSION **H M LAND REGISTRY**

LAND REGISTRATION FOR THE TWENTY-FIRST CENTURY
A CONSULTATIVE DOCUMENT

CONTENTS

LAND REGISTRATION FOR THE TWENTY-FIRST CENTURY: A CONSULTATIVE DOCUMENT

THE SECOND REPORT OF A JOINT WORKING GROUP ON THE IMPLEMENTATION OF THE LAW COMMISSION'S THIRD AND FOURTH REPORTS ON LAND REGISTRATION

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

FOREWORD

In our First Report, the recommendations in which have since been enacted by the Land Registration Act 1997, we promised that we would publish a Second Report, which would "seek views on much more extensive reforms to the land registration system with a view to the complete replacement of the Land Registration Act 1925". We now fulfil that promise.

We seek views on a wide range of proposals which will have the effect of making dealings in land much simpler, quicker and cheaper. At the same time, our proposals, if accepted, will mean that both title to registered land and the rights in and over it will be more secure. Underlying our proposals is the likely move to electronic conveyancing over the coming decade - the most revolutionary change ever to take place in conveyancing practice. It is important that there should be in place in the near future the necessary legislative framework to enable this change to happen. The principles of law which govern registered land must reflect the move to electronic conveyancing and this has prompted many of our recommendations.

When such important changes are to come about, it is very important that the proposals should be fully and widely considered. We therefore urge those with any interest in the conveyancing system to read and respond to this Report.

PART I
INTRODUCTION

INTRODUCTION

1.1 In this, its Second Report, the Joint Working Group makes proposals for the replacement of the Land Registration Act 1925.[1] The Report is in the form of a Consultation Paper. It is intended that draft legislation will be prepared in the light of the responses to it. A draft Bill, together with Notes on Clauses and an introduction, setting out the results of the present consultation, is likely to be published in the summer of 1999. This will enable the Bill to be scrutinised in advance of any possible legislation. On any basis, the wholesale replacement of the Land Registration Act 1925 is a major undertaking. In the following paragraphs we set out our principal reasons for doing so.

The move to electronic conveyancing

1.2 The most important single reason for new legislation has in fact emerged during the course of preparing this Report, and it is the progressive move to electronic conveyancing. This is likely to be the most revolutionary reform to the conveyancing system in England and Wales that has yet taken place. A number of fundamental changes have already occurred over the last few years—

(1) the whole of England and Wales has been subject to compulsory registration of title since December 1990, which means that most conveyances of unregistered land now have to be completed by registration;[2]

(2) the register is now open and can be searched without the authority of the registered proprietor;[3]

(3) the register is already computerised and most titles have been entered on the computer; and

(4) a system of direct access to the computerised register, introduced in January 1995, enables those who are connected to it to inspect the register almost instantly.[4]

However, the most significant change is the likely introduction of the electronic transfer of land and creation of property rights in the course of the coming decade or so. Indeed the publication of this Report coincides with the first step towards electronic conveyancing. HM Land Registry has just commenced a trial with a lending institution of a system of electronic requests for the discharge of mortgages.[5] The probable outcome of these developments will be a system under which registration becomes an

[1] The background to this Report is explained below, para 1.7.

[2] See Land Registration Act 1925, s 123 (as substituted by Land Registration Act 1997, s 1).

[3] See Land Registration Act 1925, s 112 (as substituted by Land Registration Act 1988, s 1).

[4] For details, see Ruoff & Roper, *Registered Conveyancing*, 30-06; Appendix F-08 - F-12; and below, para 11.17.

[5] See below, para 11.17.

essential element for the creation and transfer of estates, rights and interests in land, performing a similar function to the formal requirements that exist under the present law,[6] and which it would replace.[7] The implications of these changes are considerable and underlie much of the thinking in this Report. The legislative structure must be such as to enable them to happen in an orderly manner, and it must also reflect their likely implications.[8]

The deficiencies of the present legislation

1.3 The present legislation is widely acknowledged to be both badly drafted and lacking in clarity. It is also very complicated. Not only are there the 148 sections of the Act, but there are also several hundred rules made under it.[9] There is no clear division between what is in the Act and what is found in the rules. The land registration system has been made to work very effectively, but this has often been in spite of rather than because of its legislative structure. There is an obvious need for clear modern legislation, particularly as most dealings now involve land which either is, or will (as a result of the transaction) become, registered.[10]

1.4 Furthermore, after nearly three-quarters of a century on the statute book, a number of practical difficulties have arisen with the present legislation that need to be remedied. Some of these require significant changes to the legislation.

The need to develop principles appropriate to registered land

1.5 Largely because of the rather tortuous history of the Land Registration Act 1925,[11] it has always been accepted that the principles of registered land should, so far as possible, be the same as they are where title is unregistered. The Land Registration Act 1925 has been perceived as mere machinery for translating those principles into a registered format. However, this perception has never been wholly true, and there are in fact some striking differences between registered and unregistered land. Examples can be found in relation to the protection of the rights of occupiers,[12] the priority of equitable interests,[13] and the rights of adverse possessors.[14]

1.6 In most legal systems within the Commonwealth that have adopted a system of title registration, it has been recognised that the registered and unregistered systems *are*

6 See Law of Property Act 1925, s 52.

7 Instead of the three-stage process that presently exists of executing an instrument which effects the disposition, lodging it with the Registry, and then having it registered, there would be just one step: registration. See below, paras 2.45 and following, and 11.3 - 11.7.

8 As we explain later in this Report, the introduction of electronic conveyancing will *not* prevent those who wish to undertake their own conveyancing from doing so: see paras 2.48, 11.11.

9 Principally the Land Registration Rules 1925 (as amended).

10 For criticisms of the land registration system, see, eg *Clark v Chief Land Registrar* [1994] Ch 370, 382; Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed, 1984), p 196; Roger J Smith, *Property Law* (2nd ed 1998), pp 257 - 259.

11 For an admirable account, see J Stuart Anderson, *Lawyers and the Making of English Land Law 1832 - 1940* (1992).

12 See below, para 5.56.

13 See below, para 7.19.

14 See below, paras 10.28 and following.

different. At its most fundamental level, the basis of title to unregistered land is possession, whereas the basis of registered title is the fact of registration. This is reflected in the fact that many jurisdictions have adopted very different regimes for their registered and unregistered systems in relation to adverse possession.[15] The Joint Working Group has accepted that it is now highly desirable that land registration in England and Wales should develop according to principles that reflect both the nature and the potential of land registration. With more than 80 per cent of the estimated number of titles to land in England and Wales now registered, there seems little point in inhibiting the rational development of the principles of property law by reference to a system that is rapidly disappearing, and in relation to which there is diminishing expertise amongst the legal profession.[16] As we explain in the course of this Report, both the computerisation of the register and the move to electronic conveyancing make possible many improvements in the law that cannot be achieved with an unregistered system.

BACKGROUND

1.7 Between 1983 and 1988, the Law Commission published four Reports on Land Registration.[17] Of these, the First and Second were implemented,[18] but the Third and Fourth were not. Early in 1994, the Joint Working Group was set up with the approval of the Lord Chancellor to consider ways in which any parts of the Third and Fourth Reports[19] might be implemented, with or without modification. That Joint Working Group consisted of representatives from the Law Commission, the Land Registry and the Lord Chancellor's Department.

1.8 In its First Report, which was published in September 1995[20] together with a draft Land Registration Bill to implement its recommendations,[21] the Joint Working Group considered three reforms of the land registration system which could be immediately implemented—

(1) the new triggers for registration;

(2) fee concessions to promote voluntary registration; and

(3) amendments to the provisions of the Land Registration Act 1925 on indemnity.

[15] See below, para 10.17.

[16] "Increasingly, and increasingly quickly, we are losing the skill and experience to deal with unregistered land": Trevor Aldridge QC, "The Loose Ends" (1997) 141 SJ 250.

[17] Property Law: Land Registration (1983) Law Com No 125; Property Law: Second Report on Land Registration (1985) Law Com No 148; Property Law: Third Report on Land Registration (1987) Law Com No 158; and Property Law: Fourth Report on Land Registration (1988) Law Com No 173.

[18] By the Land Registration Acts 1986 and 1988 respectively.

[19] Above. We refer to these throughout this Report as "the Third Report" and "the Fourth Report" respectively.

[20] Transfer of Land: Land Registration. First Report of a Joint Working Group on the Implementation of the Law Commission's Third and Fourth Reports on Land Registration (1995) Law Com No 235. We refer to this throughout this Report as "the First Report"

[21] Which we refer to throughout as "the First Report Bill".

Only the third of these derived from the Law Commission's Third Report on Land Registration.[22] That Report also considered—

(1) Overriding interests;

(2) Minor Interests; and

(3) Rectification.

The Fourth Report consisted of a draft Land Registration Bill which was intended to replace the Land Registration Act 1925. Not only did this Bill incorporate the amendments proposed in the Third Report, but it also contained a number of very material changes to the existing legislation that arose from the process of redrafting.

1.9 The four Reports that the Law Commission published on land registration,[23] had their genesis in four Working Papers published by the Commission during the course of the 1970s.[24] However, many of the recommendations in the Third Report differed very substantially from the provisional proposals that were made in those earlier Working Papers (which were consultation documents).[25] Nor, so far as we have been able to ascertain, do those changes in every case reflect the responses to the Working Papers. There was a further limited consultation on certain aspects of overriding interests which was taken into account in the Third Report.[26]

THE LAND REGISTRATION ACT 1997

1.10 The First Report of the Joint Working Group was in the nature of a final report because it dealt only with matters on which there had already been at least some public consultation.[27] The draft Land Registration Bill attached to the Report[28] was introduced into Parliament by Lord Browne-Wilkinson as a Private Peers' Bill in November 1996.[29] It passed all its stages without amendment and received the Royal Assent as the Land Registration Act 1997 on 27 February 1997. The amendments to the provisions of the Land Registration Act 1925 on indemnity came into force on 27

[22] The first two matters derived from the Land Registry's own consultation, *Completing the Land Register for England and Wales*, 1992.

[23] See above, para 1.7.

[24] Transfer of Land: Land Registration, (1970) Working Paper No 32; Transfer of Land: Land Registration (Second Paper), (1971) Working Paper No 37; Transfer of Land: Land Registration (Third Paper), (1972) Working Paper No 45; Transfer of Land: Land Registration (Fourth Paper), (1976) Working Paper No 67.

[25] We refer to a number of examples of this in the course of this Report.

[26] These consultations took the form of a discussion document that had a limited circulation and a seminar as a follow up: Third Report, para 2.7.

[27] For the extent to which the Third and Fourth Reports were based upon public consultation, see above, para 1.9. For the Land Registry's consultation that formed the basis for part of the First Report, see above, para 1.8.

[28] With one or two minor amendments.

[29] It enjoyed all party support. Mr Michael Stephen MP took the Bill through the House of Commons.

April 1997, and the new triggers for compulsory registration on 1 April 1998.[30]

THE CRITERIA FOR REFORM

1.11 Since completing its First Report, the Joint Working Group has reviewed and reconsidered the proposals on overriding interests, minor interests and rectification that were contained in the Law Commission's Third and Fourth Reports. However, we did not consider that our remit could be restricted to those issues. This is because the Law Commission had proposed the complete replacement of the Land Registration Act 1925 in its Fourth Report. The Joint Working Group has therefore examined more widely both the provisions of the Land Registration Act 1925 and the rules made under it. Its objective has been to make proposals for the replacement of the existing legislation with a modern statute that sets out the principles of land registration in a clear and coherent manner and that simplifies the existing law. In so doing it has applied a series of agreed objectives which take account of the changed circumstances that have arisen since the Third and Fourth Reports were published. We have already outlined the main features of those changes.[31] There have also been a number of important judicial decisions since the publication of the Fourth Report which have clarified the interpretation of the Land Registration Act 1925.[32]

The agreed objectives

1.12 Against that background, there were a number of practical and realistic objectives which guided the approach of the Joint Working Group—

(1) It was essential that any reforms should simplify the existing system and establish a clear, workable and coherent body of law. The principles upon which land registration is based should be clearly articulated in the primary legislation. Any rules made pursuant to that legislation should merely provide the detailed working out of those principles.[33]

(2) Such reforms had to be of a kind that could be readily integrated into the present system of registered title without undue disruption or expense. At the same time, they would have to be flexible enough to allow for the introduction of electronic conveyancing.

(3) Any reform had to take account of resource implications. However desirable changes might be in principle, they could not be realistically considered if the cost of them was potentially open-ended and unquantifiable.

1.13 The consequence of applying these objectives is that many of the recommendations of the Joint Working Group differ significantly from, and go much further than, the

[30] The enabling power to introduce fee concessions for voluntary first registrations made pursuant to the new powers contained in s 145(3) and (3A) took effect on 1 April 1998. This was because the definition of voluntary first registration was made by reference to the new triggers for compulsory registration. It is likely that such fee concessions will introduced in the next Fee Order.

[31] See above, para 1.2.

[32] See particularly *Abbey National Building Society v Cann* [1991] 1 AC 56 (considered in Part V); *Clark v Chief Land Registrar* [1994] Ch 370 (considered in Part VI); *Norwich and Peterborough Building Society v Steed* [1993] Ch 116 (considered in Part VIII).

[33] At present there is no clear separation of function between the Act and the rules made under it.

proposals in the Third and Fourth Reports. This Report also addresses a number of issues, such as adverse possession and prescription, which were not considered at all in the Third and Fourth Reports, but where the application of the principles of unregistered land to registered title is illogical.

1.14 A number of principles have guided the Joint Working Group in making proposals for reform. Our starting point has been the statement in the Third Report that "the register should be as complete and accurate a record of information relevant to the title to a particular estate in the land as is possible".[34] The move towards electronic conveyancing will be the fulfilment of this objective, because it will mean that most transactions involving registered land will have to be registered for them to have any effect at all.[35] We therefore wish to create a "culture" of registration in advance of its introduction, by which registration is perceived to be an integral part of creating rights in or over registered land. We consider that there are three important steps that can be taken to encourage this. First, registration should provide better protection for rights and interests than it does at present. Two of our provisional recommendations are intended to meet this, namely that—

(1) registration should of itself protect the title of the proprietor against squatters;[36] and

(2) encumbrances over registered land should enjoy greater protection as a result of their registration than is at present the case.[37]

Secondly, the process of registration should be made simpler and easier.[38] Thirdly, the range of rights that can be protected outside the register - overriding interests - should be confined so far as that is possible.[39]

CONSULTATION

1.15 We have explained above that the extent to which the Third and Fourth Reports were based upon public consultation was limited.[40] The replacement of the Land Registration Act 1925 is a step that should not be undertaken lightly, and we are very anxious to consult widely to ensure that our proposals command support before draft legislation is prepared. We therefore invite comments on all the recommendations that we make. We shall also be grateful for comments on points arising out of the Land Registration Act 1925 or the rules made under it which we have not addressed but which have caused difficulty in practice. Readers are encouraged to respond to all or any part of this Paper.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

[34] Law Com No 158, para 4.13.

[35] See paras 11.8 and following.

[36] See Part X of this Report. There are other examples in the Report where the effect of our provisional recommendations will be to confer particular protection on a right by virtue of its registration: see, eg paras 5.22, 5.23.

[37] See Part VI of this Report.

[38] See Parts VI and XI of this Report.

[39] See Parts IV and V of this Report.

[40] See para 1.9.

1.16 In this Report we raise a number of issues which touch upon the European Convention for the Protection of Human Rights and Fundamental Freedoms.[41] That Convention will become part of domestic law if, as seems likely, the Human Rights Bill, presently before Parliament, is enacted. The Joint Working Group is satisfied that the provisional recommendations which are made in this Report comply with the Convention.

STRUCTURE OF THIS REPORT

1.17 The structure of this Report is as follows—

(1) Part II: an overview of the land registration system in England and Wales;

(2) Part III: definitions and the fundamental concepts of land registration;

(3) Parts IV & V: overriding interests;

(4) Part VI: protection of minor interests and restrictions on dealings with registered land;

(5) Part VII: priorities;

(6) Part VIII: rectification of the register;

(7) Part IX: mortgages and charges;

(8) Part X: adverse possession and prescription;

(9) Part XI: conveyancing issues;

(10) Part XII: summary of recommendations for consultation.

Because of the necessarily technical nature of much of this Report we have added at the end of each of Parts III - XI a passage headed "Summary and key issues" to assist readers to obtain a brief overview of that Part.

1.18 It should be emphasised that we are concerned in this Report only with changes in the substantive law, where consultation is therefore appropriate. We envisage that when legislation comes to be drafted many of the existing provisions of the Land Registration Act 1925 and the rules made under it will be recast in a simpler and clearer form. It is also our intention that there should be a more principled division between matters that are governed by any Land Registration Act and those which are contained in the rules made under it.[42]

[41] See below, paras 4.27 and following, 5.20, 5.22, 5.53 and 5.68.

[42] As we have indicated above, para 1.1, a draft Bill will be published in advance of any legislation.

ACKNOWLEDGEMENTS

1.19 We are grateful to a number of persons and bodies who kindly assisted us in the preparation of this Report. We acknowledge a number of them individually at relevant points in the text. However, we would particularly like to express our gratitude to those who kindly responded to our inquiries about potentially obsolete overriding interests. We set out their names in the Appendix to this Report.

PART II
LAND REGISTRATION TODAY: A CRITICAL OVERVIEW

INTRODUCTION

2.1 In this Part we provide an overview of the land registration system in England and Wales as it now stands under the present governing legislation, the Land Registration Act 1925 (as amended) and the Land Registration Rules 1925.[1] The purpose of this Part is to provide an introduction to the subject before we embark on the detailed consideration of the law that follows in the remaining Parts. During the course of it, we outline a number of the difficulties that exist in the present law, which are considered in greater detail later in the Report, together with options for reform. This will enable readers to understand at the outset why we have undertaken this major review of the law on land registration.

GENERAL PRINCIPLES: THE CONCEPT OF LAND REGISTRATION

Conveyancing in unregistered land

2.2 Where title to land is unregistered and the owner agrees to sell it, he or she will be required to prove to the buyer that he or she has the title to the land that accords with the contract of sale. The way title to unregistered land is deduced is to show that the seller and his or her predecessors in title have enjoyed lawful possession of the estate in land in accordance with the title back to a good root of title that is at least 15 years old.[2] A good root of title will usually be a conveyance of the estate.[3] The logic of this is that title to unregistered land is based upon possession, and the Limitation Act 1980 will bar most adverse claims after 12 years. It follows that if the land has been lawfully enjoyed according to the title for at least 15 years, there is a high probability - but not a certainty - that the seller's title to the land is sound. In addition to examining the chain of conveyances and other instruments that make up the seller's title, the buyer's solicitor will also search the land charges register[4] for any land charges registered against the names of estate owners.[5] These include matters such as restrictive covenants, equitable easements and estate contracts.[6] There may be other rights and

[1] For a clear overview of registration of title, see Roger J Smith, *Property Law* (2nd ed 1998) Ch 11.

[2] See Law of Property Act 1925, s 44(1); Law of Property Act 1969, s 23.

[3] The classic definition of a good root of title, given in T C Williams and J M Lightwood, *A Treatise on the Law of Vendor and Purchaser* (4th ed 1936) p 47, is an instrument of disposition which "must deal with or prove on the face of it, without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate and interest in the property; contain a description by which the property can be identified; and show nothing to cast any doubt on the title of the disposing parties".

[4] See Land Charges Act 1972, s 1.

[5] Registration is against the "name of the estate owner whose estate is intended to be affected": *ibid*, s 3(1). In theory this creates a serious problem. The land charges system was introduced in 1925 and there can, therefore, be many names that are undiscoverable because they are hidden behind the root of title. In practice, it is not a significant problem, because copies of searches are carried forward with the title deeds. As a result, the compensation system that was introduced to cover this problem (see Law of Property Act 1969, s 25) has been little used.

[6] See Land Charges Act 1972, s 2.

interests in or over unregistered land which do not appear from either the documents of title or from the land charges register, such as easements acquired by prescription.

2.3 A purchaser of a legal estate in unregistered land takes it subject to all other legal estates, rights and interests,[7] and to those equitable interests of which he or she has knowledge or notice (actual, constructive or imputed). In practice, the reforms of 1925 have severely restricted the doctrine of notice.

Registered land

2.4 Where title to land is registered, the register takes the place of the title deeds and of the matters that would be recorded in the land charges register were the title unregistered. It has been said that "[t]he governing principle of the [Land Registration Act 1925] is that the title to land is to be regulated by and ascertainable from the register alone",[8] though this is subject to the significant exception of overriding interests.[9] Overriding interests comprise a range of rights that are not protected on the register but which nonetheless bind any purchaser of registered land.[10] When a proprietor of registered land contracts to sell it, his or her title is deduced primarily from the register. Overriding interests or matters excepted from the effect of registration are proved separately.

2.5 There are four major differences between unregistered and registered land—

(1) The investigation of title to registered land is very much simpler and quicker than it is where title is unregistered.[11]

(2) The doctrine of notice has no application to registered land.[12] A purchaser of registered land takes it subject to estates, rights and interests which are protected by an entry on the register and to overriding interests, but to nothing else.

(3) Where a person is registered as the proprietor of an estate in registered land, HM Land Registry guarantees that title.[13] This means that if it is necessary to rectify the register to correct some mistake that has occurred, any person suffering loss as a result is entitled to payment of an indemnity from the Registry.[14]

2.6 The basis of title to registered land is not possession, but the register itself. Even if an

[7] Subject to a least one minor exception.

[8] *Abbey National Building Society v Cann* [1991] 1 AC 56, 78, *per* Lord Oliver.

[9] As Lord Oliver went on to explain: *ibid*.

[10] See below, paras 2.16 and following; and Parts IV and V of this Report.

[11] This is particularly so now that the register has been computerised and can be searched without the authority of the registered proprietor.

[12] There are in fact two minor statutory exceptions to this.

[13] It also guarantees certain other transactions, called, "registered dispositions" which are explained below, para 2.21.

[14] For rectification, see below, para 2.36; and Part VIII.

entry on the register is obtained by fraud,[15] the disposition will be effective on registration.[16] To date this fundamental principle has not been reflected in the rules which govern adverse possession.[17] The same rules apply - at least ostensibly - to unregistered and registered land alike. In practice, the mechanism by which those rules are made to apply to registered land means that the law is not in fact identical.[18] In Part X of this Report, we put forward for consideration a possible new system governing adverse possession which would apply only to registered land and which would reflect the principles which underlie it.[19]

2.7 When a person wishes to transfer or create estates, rights or interests over registered land, he or she will execute a transfer or other document in the form prescribed by the Land Registration Rules 1925, and will then lodge them for registration with HM Land Registry.[20] Whereas estates, rights and interests in unregistered land arise and take effect upon creation, dispositions of registered land operate only in equity until they are registered. Registration is deemed to be effective from the date on which the application for registration was lodged.[21] This so-called "registration gap" between the date of the transaction and its eventual registration, although quite short,[22] is one of the more significant drawbacks of the current system of land registration, and it gives rise to a number of difficulties, as we explain at various places in this Report. In Part XI, we outline how a system of electronic conveyancing, when it is eventually introduced, will largely eliminate this problem.

The move towards total registration

2.8 As we have already explained, the whole of England and Wales has been subject to the requirement of compulsory registration since December 1990.[23] What this means is that certain dealings with unregistered land have to be completed by registration. The scope of these "triggers" was considerably extended by the Land Registration Act 1997.[24] The following dispositions of unregistered land are now required to be completed by the registration of the title to the estate that is transferred, created or mortgaged—

(1) a conveyance of the freehold estate, a grant of a lease of more than 21 years, and an assignment of a lease[25] which has more than 21 years to run, and which is made for valuable consideration, by way of gift, or pursuant to an

[15] As where the transfer was a forgery.

[16] See Land Registration Act 1925, s 69(1). There may and usually will be grounds for rectification of the register in such circumstances.

[17] See further below, para 2.43.

[18] The mechanism used is that of the trust: see below, paras 10.28 and following.

[19] See below, paras 10.44 and following.

[20] For the administrative framework of land registration, see below, paras 2.10 and following. For registered conveyancing, see below, Part XI.

[21] See below, para 11.3.

[22] *Ibid*.

[23] See above, para 1.2.

[24] See s 1, inserting new ss 123 and 123A into the Land Registration Act 1925. See above, paras 1.8, 1.10.

[25] But not if it is a surrender of the lease to the owner of the immediate reversion.

order of the court;

(2) a disposition made by an assent[26] or a vesting deed of either a freehold estate or a lease which has more than 21 years to run; and

(3) a first legal mortgage of the freehold or of a lease having more than 21 years to run that is supported by a deposit of the documents of title.[27]

2.9 These 'triggers' will bring much (but not all) land on to the register. In relation to land held by corporations,[28] there may never be any disposition of the land that will lead to registration. However, it is hoped that the improvements that we propose in this Report may, in time, encourage many landowners to register their titles voluntarily, because of the benefits (and particularly the greater protection) that registered title offers.[29]

THE LEGAL AND ADMINISTRATIVE FRAMEWORK

HM Land Registry

2.10 HM Land Registry, which is an Executive Agency, is the body charged with the administration of the land registration system in England and Wales.[30] It consists of an administrative headquarters in London and 22 district land registries. Those district land registries are responsible for the registration of titles to land and other entries on the register within the areas allocated to them.[31] The Chief Land Registrar is responsible for the whole system of registration and is appointed by the Lord Chancellor.[32]

The register

2.11 The register has been described as—

> the official record of one estate owner's title to a particular property which is described by reference to an official plan kept at the Land Registry, each register carrying the unique number allotted to the title.[33]

Almost all titles are now kept in computerised form[34] and the process of converting all titles into computerised registers is expected to be complete in the near future. The

[26] Including a vesting assent.

[27] See Land Registration Act 1925, s 123(1), (2), (6) (as inserted). Section 123A (as inserted) makes provision for such transactions to operate in equity only if they are not registered within two months. The effect is that the transactions will either have to be repeated or the transferee will have to seek leave to register out of time: see s 123A(3).

[28] Including the Crown, the Church of England and many charitable bodies.

[29] If our proposals in Part X are accepted, and a new system governing adverse possession is introduced (see above, para 2.6), registration would of itself provide protection against the acquisition of title by adverse possession.

[30] Land Registration Act 1925, ss 1 (as substituted), 126, 127.

[31] See *ibid*, s 132(1).

[32] *Ibid*, s 126(1).

[33] Ruoff & Roper, *Registered Conveyancing*, 3-01.

[34] Cf Land Registration Act 1925, s 1 (as substituted by Administration of Justice Act 1982, s 66(1)).

register is open: any person can search it without any need to obtain the consent of the registered proprietor.[35] Such searches can be made orally, by telephone, in writing, by fax or by computer (for those who have direct access to the Registry's computer system).[36]

2.12 The register itself consists of three parts,[37] namely—

(1) *The Property Register*, which both describes the land and the estate comprised in the title and records the benefit of rights such as easements and covenants that are enjoyed by the property: this is the "credit entry" as regards the title;[38]

(2) *The Proprietorship Register*, which records the nature of the title,[39] the name, address and description of the proprietor, and any entries which affect his or her right to dispose of the land;[40] and

(3) *The Charges Register*, which records those encumbrances which burden the property: this is the corresponding "debit entry" in relation to the title.[41]

INTERESTS IN REGISTERED LAND

Registrable interests

2.13 The principal interests which can be registered with their own title on the register are a legal freehold and a legal term of years having more than 21 years unexpired.[42] It follows that, in relation to any one piece of registered land, there may be several titles, as where a freeholder grants a 99-year lease of the land, and the tenant then sublets for 25 years. The freehold title, the lease and the sublease will each have its own title on the register, though there will be a note on the immediately superior title of the lease and sublease respectively. The owner of the registered estate is called the registered

[35] Land Registration Act 1925, s 112 (substituted by Land Registration Act 1988, s 1(1)).

[36] See Land Registration (Official Searches) Rules 1993, r 3. For the direct access scheme, see below, para 11.17.

[37] Land Registration Rules 1925, r 2.

[38] *Ibid*, r 3; see Ruoff & Roper, *Registered Conveyancing*, 3-05 - 3-08.

[39] That is, whether it is absolute (as is usually the case), good leasehold, possessory or qualified. For these grades of title, see below, para 5.78.

[40] Land Registration Rules 1925, r 6; Ruoff & Roper, *Registered Conveyancing*, 3-09 - 3-10. The entries in question are cautions, restrictions and inhibitions. See below, paras 2.25 and following; and Part VI of this Report.

[41] Land Registration Rules 1925, r 7; Ruoff & Roper, *Registered Conveyancing*, 3-11 - 3-15. Such encumbrances fall into two categories: registered charges (mortgages) and other rights which are protected by notice. See below, para 2.26; and Part VI of this Report.

[42] See generally Ruoff & Roper, *Registered Conveyancing*, Chapter 9; and below, para 3.6.There are certain other miscellaneous legal interests which, because they are treated as land for the purposes of the Law of Property Act 1925 (see 205(1)(ix), can also be registered with their own titles. These include a legal rentcharge granted for an interest in fee simple or for a term of years of which more than 21 years are unexpired. See Ruoff & Roper, *Registered Conveyancing*, 26-03. For the position of manors, see below, para 3.20.

proprietor.[43]

2.14 There are other categories of registrable interests which do not have their own title, but which may be protected by an entry on the charges register of the title burdened by them. First, there are registered charges. These provide the mechanism by which legal mortgages of registered land are created.[44] Secondly there are certain incorporeal legal interests, such as easements and profits *à prendre*.[45] These are incapable of being registered with their own title even if they exist in gross.[46]

2.15 Estates and interests which are capable of being registered estates will, until registered, take effect in equity only and not as legal estates or interests.[47] As such they will be overridden by any registered disposition for valuable consideration.[48] It is the risk that an interest may be defeated in this way that serves as the inducement to register a disposition of registered land.[49]

Overriding interests

2.16 Overriding interests are interests in or over registered land which are not protected on the register but to which all registered dispositions of the land nonetheless take subject.[50] They are listed in section 70(1) of the Land Registration Act 1925.[51] Amongst the most important are the following—

[43] He or she will be given a land certificate as an indicia of his or her title. Although this records the state of the title on the date when the certificate was granted, it is the register alone that is conclusive as to the state of that title. The land certificate will be retained in the Registry if the proprietor creates a registered charge (ie, a mortgage) over his or her land.

[44] Although the registered proprietor of the charge does not have his or her own title, a charge certificate is issued to him or her. We make certain minor recommendations in relation to registered charges in Part IX of this Report.

[45] Where the rights are appurtenant to and for the benefit of a registered estate (such as the benefit of an easement), they may be noted on the property register of that estate, but will in any event pass with that estate on any transfer.

[46] See below, para 3.17 for the possible difficulty which this may create. A right in gross is a free-standing right over another's land, such as a profit *à prendre* to shoot game or take fish, that is enjoyed for the benefit of the grantee, and not for the benefit of another piece of land. Easements cannot exist in gross (though this view has not gone unquestioned: see M F Sturley, "Easements in Gross" (1980) 96 LQR 557), but some profits *à prendre* can: see Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) pp 834 - 835, 909 - 912.

[47] See Land Registration Act 1925, s 101.

[48] For registered dispositions, see below, para 2.21.

[49] For the position where a disposition of *unregistered* land is required to be registered and is not, see Land Registration Act 1925, s 123A (substituted by Land Registration Act 1997, s 1); above, para 2.8.

[50] See Land Registration Act 1925, s 3(xvi).

[51] See below, Part V of this Report, where they are considered in detail.

(1) certain easements and profits, customary and public rights[52] and appurtenant rights;[53]

(2) squatters' rights;[54]

(3) rights of persons in actual occupation;[55]

(4) seignorial and manorial rights and franchises;[56]

(5) leases granted for 21 years or less;[57]and

(6) rights in coal.[58]

2.17 Because overriding interests bind transferees of the land even though they are, by definition, not protected on the register, they are widely acknowledged to be a potential source of difficulty in registered conveyancing. They necessarily reduce both the reliability and the comprehensiveness of the register. This is especially so given both the breadth of the rights which can be overriding interests (as the above examples demonstrate) and the fact that some of them are not readily discoverable. It should be noted that most overriding interests - but not quite all - are capable of protection by registration instead.[59]

2.18 In Part IV of this Report we examine the reasons for overriding interests.[60] We conclude that the characteristic that most (but not all) share is that it is unreasonable to expect the person having the benefit of the interest to protect it by registration.[61] We go on to examine in detail in Part V of this Report ways in which both the numbers and the scope of overriding interests could be reduced, and seek views on our proposals.

Minor interests

2.19 Finally, there is a residual category of interests - called minor interests - which are neither registrable nor overriding interests.[62] This "definition" is slightly misleading. First, there are rights which may be protected by an entry on the register as minor interests, but which will take effect as overriding interests if they are not so protected. For example, a person in occupation of land under an agreement for a lease may

[52] Land Registration Act 1925, s 70(1)(*a*); below, paras 5.2, 5.25 and 5.30.

[53] Land Registration Rules 1925, r 258; below, para 5.2.

[54] Land Registration Act 1925, s 70(1)(*f*); below, para 5.42.

[55] *Ibid*, s 70(1)(*g*); below, para 5.56. Under this category, an occupier may protect rights that are expressly created and which could, therefore, have been protected by registration.

[56] Land Registration Act 1925, s 70(1)(*j*); below, para 5.84.

[57] *Ibid*, s 70(1)(*k*); below, para 5.87.

[58] *Ibid*, s 70(1)(*m*); below, para 5.97.

[59] Leases granted for a term of 21 years or less (Land Registration Act 1925, s 70(1)(*k*)) cannot be protected on the register, but can only take effect as overriding interests.

[60] See below, paras 4.4 and following.

[61] See below, para 4.4.

[62] Cf Land Registration Act 1925, s 3(xv).

protect that agreement either by relying on his or her occupation so that it takes effect as an overriding interest,[63] or by entering it as a minor interest on the register. Secondly, a disposition of registered land which is a registrable interest takes effect as a minor interest pending its registration. The category of minor interests is in fact enormously wide. It includes rights over registered land which, if the title had been unregistered, would have been registrable as land charges,[64] interests under trusts of land and settlements, and interests which, in unregistered land, would have depended for their protection on the doctrine of notice.[65] As we explain below, there are four methods of protecting minor interests on the register - notices, cautions, restrictions and inhibitions.[66]

MAKING DISPOSITIONS OF REGISTERED LAND

Introduction

2.20 We set out below the ways in which estates, rights and interests in registered land should be created, transferred or protected, and we explain what form registration should take. As we have already indicated,[67] a registered proprietor of land may create interests in or deal with the land in the same way as if the title were unregistered. However, until the disposition is registered, it takes effect as a minor interest. As such it is liable to be overridden by a subsequent registered disposition for valuable consideration.[68]

Registered dispositions

2.21 Certain dispositions by a registered proprietor, called "registered dispositions", should be completed by registration,[69] and the validity of them is then guaranteed by the Registry. What links such registered dispositions is that they involve the grant or transfer of a legal estate, or the creation or reservation of a legal right over the land.[70] They include[71]—

(1) a transfer in whole or part of the registered estate in the land;

(2) a transfer of the mines and minerals in the land apart from the surface or *vice versa*;

(3) the grant of a rentcharge in possession;

[63] The rights of persons in actual occupation: Land Registration Act 1925, s 70(1)(*g*).

[64] Such as restrictive covenants.

[65] Such as an equity arising by estoppel.

[66] See paras 2.25 and following.

[67] See above, para 2.15.

[68] Land Registration Act 1925, s 101.

[69] There is an obvious ambiguity in the term "registered disposition". It is only when the particular disposition has been registered that it is, in reality, a registered disposition.

[70] Land Registration Act 1925, ss 18(4), 21(4). The creation of an equitable right over land, such as a restrictive covenant, is not therefore a registered disposition.

[71] For the main statutory provisions, see Land Registration Act 1925, ss 18, 21, 33, 34. See too Ruoff & Roper, *Registered Conveyancing*, 15-03.

(4) the grant of an easement, right or privilege[72] in or over land;

(5) the transfer of the registered estate subject to the reservation of a rentcharge, easement, right or privilege;

(6) the grant of a lease or underlease;

(7) the creation of a registered charge;

(8) the transfer of a registered charge.

2.22 A registered disposition confers on the transferee or grantee the estate or interest in question, together with the benefit of all appurtenant rights. The transferee or grantee takes the land subject to—

(1) the incumbrances and other entries appearing on the register;

(2) overriding interests;[73] and

(3) where the interest is leasehold, "all implied and express covenants, obligations, and liabilities incident to the estate transferred or created";[74]

but free from all other estates and interests.[75] It is this "special effect or priority" that is the hallmark of registered dispositions.[76]

2.23 The Land Registration Act 1925 makes special provision for the priority of competing registered charges. It provides that they are to rank in order of registration not in order of creation.[77] This is in fact no more than an application of the rule set out in the previous paragraph.

Priority searches

2.24 We have explained that there is necessarily a period of time between the execution of a transaction, and its registration as a registered disposition.[78] To protect a purchaser in the period prior to the transaction up to the time when the transaction is registered, a purchaser may apply to search the register in such a way as to obtain priority for a period of thirty days.[79] Any entry which is made during the thirty days is "postponed to a subsequent application to register the instrument effecting the purchase".[80] A "purchaser" is, for these purposes, defined as—

[72] This phrase includes rights such as profits *à prendre*.

[73] Unless the contrary is expressed on the register.

[74] Land Registration Act 1925, s 23(1)(a).

[75] *Ibid*, ss 20(1), 23(1).

[76] *Ibid*, s 3(xxii). We consider priorities in detail in Part VII of this Report.

[77] Land Registration Act 1925, s 29; see below, para 7.5.

[78] See above, para 2.7.

[79] See Land Registration (Official Searches) Rules 1993.

[80] *Ibid*, rule 6.

any person (including a lessee or chargee) who in good faith and for valuable consideration acquires or intends to acquire a legal estate in land.[81]

The intending grantee of some minor interest cannot make a priority search, because he or she does not intend to acquire a *legal* estate.

Minor interests

2.25 Because the transferee or grantee of a registered disposition takes it free of interests which are not protected on the register or which do not take effect as overriding interests, it is incumbent on a person who has the benefit of a minor interest to ensure that an appropriate entry is made on the register. There are four types of entry that can be made: notices, cautions, restrictions and inhibitions. Their functions are very different, and with the exception of a notice, the primary aim of making them may *not* be to ensure that a particular interest in land will bind the grantee or transferee under a registered disposition. The Registry does not guarantee the validity of minor interests, even though they are protected by registration.[82] In this respect they differ from registered dispositions.[83]

Protection by notice

2.26 The entry of a notice is the best method of protecting an encumbrance over land which is not an interest under a trust (and therefore capable of being overreached on a disposition of the land).[84] A notice provides a permanent form of protection for a right and will ensure that it binds any person who acquires the land.[85] It may be entered on the register only with the concurrence of the registered proprietor, or pursuant to an order of the court or the registrar. The entry on the register will set out the nature of the interest.

Protection by caution

2.27 The entry on the register of a caution against dealings is not, as such, a means of protecting an interest in land. Such an entry institutes a procedure whereby a person interested in the land (the cautioner) will be notified of a proposed dealing with the property.[86] He or she can then take steps to assert the priority of his or her right. Unlike the notice, a caution may be entered unilaterally, without the permission, or even the prior knowledge, of the registered proprietor. When registering a caution there is no requirement for the cautioner to prove the existence of the right. All that he or she has to do is set out the claim in outline in the accompanying declaration. It is essentially a personal entry as the register will state only the name and address of the cautioner.

[81] *Ibid*, r 2(1).

[82] If, eg, an option were protected on the register by the entry of a caution, and it turned out that the option was void for (say) failure to comply with the formal requirements of the Law of Property (Miscellaneous Provisions) Act 1989, s 2, the grantee of the option would not be entitled to any indemnity if the caution was removed from the register.

[83] See above, para 2.21.

[84] For a full consideration of notices, see below, para 6.3. For overreaching, see below, para 2.32.

[85] Land Registration Act 1925, ss 48(1), 52(1).

[86] For cautions against dealings, see below, para 6.10.

2.28 The caution entitles the cautioner to notice of any proposed registered dealing of the land. No dealing with the land may be registered without the cautioner's consent until such notice has been served.[87] If on service of the notice the cautioner objects, the Land Registration Rules 1925 provide a procedure for dealing with his or her claim before the registrar.[88] At the hearing, the main options open to the registrar are—

(1) to allow the transaction to proceed and to cancel the caution;

(2) to refuse to register the proposed disposition; or

(3) to make an entry on the register to protect the cautioner's interest on the register in a permanent form, such as by a notice.

It is unusual for the registrar to allow the transaction to proceed while at the same time allowing the caution to continue. Because the entry of a caution does no more than initiate a procedure, it confers no priority on the right or interest of the cautioner.[89] In Part VI, we identify this as the principal weakness of a caution.[90]

The differences between a notice and a caution

2.29 The differences between the entry of a caution and of a notice are best illustrated by an example. 1 Acacia Avenue, Newtown has a registered title. A conveyance between John Doe and Richard Roe reserves to the owners of 3 Acacia Avenue a right of passage, through 1 Acacia Avenue. The owner of 3 Acacia Avenue is Joanna Harrison. If she were to lodge a caution, to protect her right of way, she would apply to the Registry stating that she claimed an interest in 1 Acacia Avenue. The entry on the register would read—

> Caution in favour of Joanna Harrison of 3 Acacia Avenue, Newtown.

This entry would entitle Ms Harrison to be notified of any subsequent registered dealing with the land, and to object to any such dealing. If she does not object to a dealing her caution is unlikely to remain on the register. On the other hand if Ms Harrison were to register a notice she would apply to the Registry, sending the instrument which created the right, in order to prove her entitlement. The entry on the register would state—

> The land is subject to the following rights reserved by a conveyance dated 1 June 1996 made between (1) John Doe and (2) Richard Roe :
>
> Reserving to the owners and occupiers for the time being of 3 Acacia Avenue a right of way over the passageway through 1 Acacia Avenue

[87] When a caution has been lodged, the Registry notifies the registered proprietor. There is provision under the Land Registration Rules 1925, r 218, by which the proprietor can challenge the caution without having to wait until there is a disposition of the land. For such "warning off", see below, para 6.15.

[88] See r 220.

[89] *Clark v Chief Land Registrar* [1994] Ch 370.

[90] See below, para 6.16.

This entry would preserve the right of way against any registered disposition of 1 Acacia Avenue, and it would be entered as a notice on the charges register of the title.

2.30 The example illustrates the fundamental differences between a caution and a notice. The caution is a personal and temporary method of protection designed to warn *the cautioner* of impending transactions. The notice is impersonal and provides permanent protection for *the interest*.

Protection by restriction

2.31 The purpose of a restriction is to record any limitation on the otherwise unlimited powers of disposition of the registered proprietor. A restriction is only available to restrict the disposition of a registered interest, it cannot be used to restrict the disposition of a minor or overriding interest.

2.32 Restrictions are often used to protect interests under a trust, and are indeed the best method of doing so. They provide a means of ensuring that such interests are overreached on any disposition by the trustees.[91] Overreaching can only take place if there are two trustees, and a restriction can be employed to ensure that this is so.

Protection by inhibition

2.33 An inhibition is an order, made either by the court or the registrar, that inhibits the registration or entry of *any* dealing with registered land or with a registered charge. The registration of an inhibition effectively freezes the register. It is a draconian remedy of last resort, to be used primarily in cases of fraud and bankruptcy.

Criticisms

2.34 In Part VI of this Report, we examine critically the operation of the methods that presently exist for the protection of minor interests.[92] They are unnecessarily complicated, and there is, in our view, no need to have *four* separate methods of protection. We single out for particular criticism the inadequate protection that is offered in respect of cautions. We also identify a number of other miscellaneous defects. We recommend the replacement of the present system with a simple system in which the only types of entry would be notices and restrictions.[93]

The priority of minor interests

2.35 Although the Land Registration Act 1925 sets out the priority of registered dispositions, it is silent on the priority of minor interests between themselves. However, the matter has now been settled by judicial decision, and it is clear that because minor interests take effect in equity only, the traditional rules governing the priority of equitable interests apply to such interests, and that this is so, whether or not the interest is protected by an entry on the register. It follows that the register provides no guide as to the priority of minor interests. We explain these rules on the priority of

[91] Overreaching applies as much to interests in registered land as it does to interests where the title is unregistered. Even if the interests of the beneficiaries under the trust are overriding interests they may be overreached: see *City of London Building Society v Flegg* [1988] AC 54.

[92] See below, paras 6.43 and following.

[93] See below, paras 6.48 and following.

minor interests in detail in Part VII of this Report.[94] Our conclusion is that the future introduction of electronic conveyancing makes it unnecessary to create any statutory system for regulating such priorities.

RECTIFICATION AND INDEMNITY

2.36 Rectification is the process by which mistakes in the register are corrected. If any person suffers loss as a result of either rectification or a decision not to rectify the register, they are entitled to be indemnified by the Registry.

Rectification

2.37 We explain in detail in Part VIII of this Report the ten grounds on which the register may be rectified. However, they may be broadly summarised as follows—

(1) Where a court makes an order which either gives effect to an established property right or interest, or orders the removal from the register of an entry in respect of a right which has not been established.[95]

(2) Where the court or the registrar decides that the register is incorrect in some way.[96]

(3) Where the registrar decides that a clerical error needs to be corrected.[97]

Even where a ground for rectification exists, it is a matter of discretion whether or not it is ordered. However, in practice, in a case where a court has concluded that a person is entitled to a right or interest in the land, rectification will always be ordered.[98]

2.38 There is a significant restriction on the power to order rectification of the register, which we refer to as a form of qualified indefeasibility. Where the registered proprietor is in possession, the register may not be rectified so as to adversely affect the registered proprietor's title unless—

(1) the rectification is required in order to give effect to an overriding interest;[99] or

(2) the proprietor caused or substantially contributed to the error or omission, by fraud or lack of proper care;[100] or

(3) it would be unjust not to rectify the register.[101]

[94] We also consider the difficult subject of the priority of overriding interests, on which, subject to one exception, there is no statutory guidance.

[95] Land Registration Act 1925, s 82(1)(*a*), (*b*).

[96] *Ibid*, s 82(1)(*c*),(*d*),(*e*),(*f*),(*g*), and (*h*).

[97] Land Registration Rules 1925, rr 13, 14.

[98] See *Norwich & Peterborough Building Society v Steed* [1993] Ch 116, 139; below, para 8.13.

[99] Land Registration Act 1925, s 82(3).

[100] *Ibid*, s 82(3)(*a*).

[101] *Ibid*, s 82(3)(*c*).

As we explain in Part VIII, there is some doubt about exactly who constitutes a proprietor in possession for these purposes, as the definition is potentially wide enough to include *all* registered proprietors.[102] Even if one of these grounds is established, there is still a discretion as to whether the register will be rectified. In practice, it usually will be, particularly where an overriding interest has been established. When rectification is ordered, it may affect not only the title of the registered proprietor but also those with derivative interests in the land.

2.39 The present law governing rectification works well in practice and gives rise to few difficulties. Nevertheless, this review of land registration offers an opportunity to simplify and clarify the legislation, and we make provisional recommendations to this effect in Part VIII.

Indemnity

2.40 The provisions for rectification and for indemnity are directly linked. Where the register is rectified, any person suffering loss by reason of the rectification may be indemnified.[103] However, indemnity also serves a wider purpose in that it protects persons from loss—

(1) caused by errors and omissions on the register, even where the register is not rectified;[104]

(2) because documents lodged at the Registry have been lost or destroyed; or

(3) as a result of an error in any official search.[105]

2.41 Where the claimant for an indemnity has caused all or part of the loss by fraud, no indemnity will be paid. If the loss is caused by a lack of proper care the indemnity will be reduced, according to what is just and equitable having regard to the person's responsibility for the loss, unless the loss was caused wholly by a lack of proper care in which case no indemnity will be paid.[106]

2.42 We make no recommendations for the reform of the law on indemnity, because that task was undertaken in the First Report of the Joint Working Group. The recommendations in that Report were implemented by the Land Registration Act 1997.[107]

ADVERSE POSSESSION

2.43 As we have already indicated, the principles of adverse possession apply to registered land in a similar (but not identical) way to the manner in which they apply to

[102] See below, para 8.24.

[103] Land Registration Act 1925, s 83(1) (as inserted by the Land Registration Act 1997, s 2). This includes the case where the proprietor of the land or charge claims in good faith under a forged disposition: *ibid*, s 83(4).

[104] There is now a power to award indemnity where a person seeks and obtains rectification, but still suffers loss as well: *ibid*.

[105] Land Registration Act 1925, s 83(3) (as substituted by Land Registration Act 1997, s 2).

[106] *Ibid*, s 83(5) (as substituted by Land Registration Act 1997, s 2).

[107] See above, para 1.8.

unregistered land.[108] The essential features of the treatment of adverse possession in registered land are as follows—

(1) The rights of a squatter constitute an overriding interest.[109] As such, once the rights of the registered proprietor have been barred by 12 years' adverse possession, the squatter's rights will bind any purchaser of the land even though the squatter has ceased to be in possession of the land.[110]

(2) Once his or her rights have been barred, the registered proprietor holds the registered estate on trust for the squatter.[111] The squatter can apply to be registered as proprietor of the land in place of that registered proprietor. The full implications of this trust device have not been fully worked out. However, as we explain in Part X of this Report, the results could be very unsatisfactory.[112]

2.44 The ability of a squatter to acquire title by adverse possession is a sensitive issue, and is, from time to time, the subject of hostile public criticism.[113] We have already explained that there is no logical reason why the rules of adverse possession for registered and unregistered land should be the same, given that the basis of title is fundamentally different,[114] and that we propose for consideration in Part X a wholly new system of adverse possession that would be applicable only to registered land.[115] We also propose—

(1) the abolition of the use of the trust as a means of giving effect to the rights of squatters;[116] and

(2) that squatters' rights should only be an overriding interest while the squatter remains in actual occupation of the land.[117]

[108] See above, para 2.6; and below, paras 10.27 and following.

[109] Land Registration Act 1925, s 70(1)(*f*); below, para 5.42.

[110] Unless, of course, the squatter's rights have themselves been barred by 12 years' adverse possession.

[111] Land Registration Act 1925, s 75(1).

[112] See paras 10.28 and following.

[113] Cf Limitation of Actions, Consultation Paper No 151, para 13.119.

[114] See above, para 2.6; and below, para 10.11, for further discussion

[115] See below, paras 10.44 and following.

[116] See below, paras 10.70 and following.

[117] See below, para 5.49.

CONVEYANCING ISSUES

The move to electronic conveyancing

2.45 As we have already mentioned,[118] under the present system of registered conveyancing, where a disposition of registered land is made, the following steps occur—

(1) a document in the form prescribed by the Land Registration Rules 1925 is executed by which the transaction is effected (whether it be a transfer, or the creation of some right or interest in land);

(2) that document is lodged with the appropriate district land registry; and

(3) when the transaction has been processed, the appropriate entry is made on the register.

2.46 In Part XI of this Report we draw attention to a number of unsatisfactory features of this system.[119] It is enough to emphasise at this stage—

(1) the fact that there is a period of time - albeit not a very long one - between the completion of the transaction and its entry on the register; and

(2) the duplication of effort[120] and the risk of error that flows from the present system.

2.47 It is against this background that we propose in Part XI that there should be a move to electronic conveyancing. Our ideas for such a system must necessarily be tentative because such a system lies some way off. However, its objective would be to move from the three-stage process described above in paragraph 2.45 to a one-stage process, by which the creation and registration of a disposition of registered land would be conterminous.[121] In relation to the dispositions to which it applied, it would mean that it was no longer possible to create a right "off the register" as it is now.[122] Our provisional view is that the requirement of electronic "creation by registration" would apply to the transfer of registered estates, to registered dispositions, to the creation of registered charges, and to the express creation of any right that would be entered on the charges register. Rights that could arise without express grant or reservation or by operation of law, interests under trusts and short leases which were overriding interests would *not* be subject to the "creation by registration" requirement.

2.48 The move to electronic conveyancing would not prevent persons conducting their own conveyancing.[123] We consider it important that this should be retained. However, such transactions would not enjoy the advantages of simultaneity that electronic conveyancing should provide.

[118] See above, para 2.7.

[119] See below, paras 11.5 - 11.7.

[120] And therefore cost.

[121] See below, paras 11.8 and following.

[122] See above paras 2.7, 2.15.

[123] The number of sales and purchases which are conducted by persons undertaking their own conveyancing is very small. Gifts of land and discharges of mortgages are much more commonly undertaken personally.

Proof of title

2.49 As we have indicated above, the register itself provides proof of title to the land, except as regards matters upon which it is not conclusive, such as overriding interests.[124] The provisions of the Land Registration Act 1925 which regulate the deduction of title are somewhat prescriptive in the requirements that they lay down.[125] They do, of course, date from the time when the register was not open, and it was therefore necessary to obtain the registered proprietor's consent to search the register. We examine these provisions in detail in Part XI[126] and conclude that they are largely unnecessary. We conclude that the parties should be free to agree what proof of title they will require to satisfy the seller's obligation both to have and to prove his or her title.

[124] See above, para 2.4.

[125] See s 110.

[126] See below, para 11.35.

PART III
DEFINITIONS AND CONCEPTS

INTRODUCTION

3.1 One of the principal weaknesses of the Land Registration Act 1925 is that it does not contain a clear statement of the fundamental elements of which it is constructed.[1] The Joint Working Group considers that it would be highly desirable to set out those elements at the beginning of the Act. Part of this task involves no changes in substance to the present legislation, but a recasting of it in a form that is much clearer and more comprehensible. Although the Joint Working Group has undertaken much detailed work in preparing this reformulation, it is not a matter on which, for the most part, consultation is necessary.[2] In this Part we seek the views of readers only on those matters where a change is either proposed, or where a case can be made for it.

3.2 It may be helpful for readers to know that the Joint Working Group intends that any legislation should contain definitions of the following terms—

(1) "an interest";

(2) "a registered estate";

(3) "a registered charge";

(4) "an overriding interest"; and

(5) "a minor interest".

The first of these terms is not in fact presently defined by the Land Registration Act 1925 at all, but its nature is implicit. It encompasses any estate, charge, interest in or over land and, to the extent that these do not fall within that description, any pending action, writ, order or deed of arrangement.[3] As regards the third, we seek the views of readers on a proposed definition in Part IX of this Report.[4]

3.3 There are however a number of specific issues on which we seek the views of readers in this Part. For convenience they may be summarised as follows—

(1) In relation to registered estates—

(a) should there be any change in the law as to which leases are capable of registration as registered estates?

(b) are their any incorporeal rights existing in gross which are not presently

[1] This comes as no surprise, given the manner in which the Act was built up by accretion from earlier land registration statutes, particularly the Land Transfer Acts 1875 and 1897.

[2] But see below, para 9.3.

[3] See Land Registration Act 1925, s 59.

[4] See paras 9.2, 9.3.

registrable that ought to be?

(c) should manors continue to be substantively registrable?

(2) Are there any rights which are presently characterised as minor interests that ought to be elevated to the status of registered dispositions?

(3) Should the status of the following rights that are at present in some way either uncertain or unsatisfactory be clarified or changed—

(a) rights of pre-emption;

(b) rights arising by estoppel or acquiescence; and

(c) inchoate rights arising under the Prescription Act 1832?

(4) How should the concept of "purchaser" be defined for the purposes of the law on land registration?

3.4 One aspect of the working of the present law upon which the Joint Working Group received a number of criticisms in the course of its inquiries, is the treatment of mines and minerals. For reasons which we explain,[5] although we have considerable sympathy with the concerns that were raised, we have felt unable to make any recommendations at this stage to resolve them.

REGISTERED ESTATES

The present definition

3.5 At present, the Land Registration Act 1925 defines a registered estate as—

> the legal estate, or other registered interest, if any, as respects which a person is for the time being registered as proprietor, but does not include a registered charge...[6]

The definition therefore includes both estates and interests in land. "Interests" is not here used in the technical sense in which it is employed in para 3.2 above, but to indicate an incorporeal hereditament.[7] To avoid any confusion, we refer to these as "incorporeal rights". We examine each in turn and raise for consultation whether there is any case for extending the range of estates and rights which can be registered with their own titles.

[5] See below, para 3.13.

[6] Section 3(xxiii).

[7] Under Land Registration Act 1925, s 2, a person can only be registered as proprietor of a legal estate. For these purposes, a "legal estate" includes incorporeal rights over land: see *ibid*, s 3(xi) referring by necessary implication to Law of Property Act 1925, ss 1(1), (2) and 205(1)(x).

Estates which may be registered

3.6 As we have already explained,[8] the only *estates* with which a proprietor of registered land may be registered are, subject to certain minor statutory exceptions,[9] the following[10]—

(1) a legal fee simple absolute in possession; and

(2) a legal term of years of more than 21 years.[11]

The grant of estates in mines and minerals gives rise to special considerations which are explained below.[12]

Registered estates: specific issues

Leases

3.7 Any lease granted for a term of 21 years or less is not capable of substantive registration[13] but takes effect as an overriding interest. [14] As such a lease cannot be noted on the register of title, it can never be a minor interest.[15] Any dealings with it have to be conducted in accordance with the rules of unregistered conveyancing,[16] rules which are both technical[17] and, as we have already explained, increasingly unfamiliar.[18] Nowadays, many leases with substantially less than 21 years to run have a high capital value.[19] Indeed the traditional twenty-five year business lease (which is registrable) is becoming less common and terms of fifteen years or less (which cannot be registered) are now regularly granted instead.[20]

8 See above, para 2.13.

9 These relate to certain underleases of 21 years or less granted to a tenant under the right to buy legislation: see Housing Act 1985, Schedule 9A, para 2.

10 See Land Registration Act 1925, ss 2, 4, 8.

11 A lease may come to be registered either when it is first granted, or in the case of a lease of unregistered land, on its assignment, if more than 21 years of the lease remains unexpired. Where a lease has been granted for more than 21 years out of a registered estate, it can be registered even though, at the time when the application for registration is made, the lease has 21 years or less to run: see Land Registration Act 1925, ss 19(2), 22(2); Ruoff & Roper, *Registered Conveyancing*, 21-11.

12 See para 3.13.

13 Land Registration Act 1925, ss 19(2), 22(2).

14 *Ibid*, s 70(1)(*k*). See para 5.87 below.

15 Land Registration Act 1925, s 48(1).

16 See Ruoff & Roper, *Registered Conveyancing*, 6-32.

17 See Mark Thompson, *Barnsley's Conveyancing Law and Practice* (4th ed 1996), Chapter 10.

18 See above, para 1.6.

19 Traditionally business leases were granted for 25 years. A period of 10 to 15 years is now more common.

20 See James Robinson "Inflexible leases stifle business, warns RICS" [1997] 44 EG 52, recording a RICS-sponsored report which suggested that lease lengths fell from an average of 23 years in 1990 to 14 years in 1995. See too Jane Roberts, "Tenants set the pace" [1997] 24 EG 55 recording the trend to much shorter leases.

3.8 We believe that it is appropriate to consider as part of this comprehensive review of land registration whether the range of registrable leases should be widened.[21] It is particularly important that it should be considered in the light of the future move to electronic conveyancing. As we explain below,[22] the introduction of electronic conveyancing should offer considerable benefits. In relation to leases, one of the most important of these benefits is the reduction in the considerable paper storage and access problems associated with modern leases. If leases granted for 21 years or less remain as overriding interests, they will not benefit from the move to electronic conveyancing. Any dealings with them will be according to the increasingly unfamiliar principles of unregistered conveyancing. An extension of the registration requirements to leases granted for some duration that is less than 21 years will be warranted if it is likely to facilitate dealings with them—

(1) by making it easier to grant or assign them;

(2) by making it easier to access the terms of the lease; or

(3) by increasing the security of title for any derivative interests - sub-leases and charges - which are carved out of them.

We therefore wish to know whether—

(1) the fact that leases granted for 21 years or less are incapable of registration causes any difficulties in practice at present;[23] and

(2) practitioners foresee that it may, once electronic conveyancing is introduced.

3.9 In seeking the views of readers we wish to canvass a number of options. It would be possible to retain the present structure by which leases of a certain length are either required to be registered or take effect as overriding interests. There is however another possible approach. As the law stands, a lease which is required to be registered but is not takes effect as a minor interest and will be overridden by a disposition of the land for valuable consideration,[24] unless the tenant is in actual occupation.[25] It would be possible to make provision by which longer leases would remain, as now, subject to a *requirement* that they must be registered, but that in relation to other shorter leases, the tenant would be *permitted* to register the lease. In relation to this latter category, if the tenant chose not to register the lease, it would take effect as an overriding interest. Any

[21] In the Land Registry Consultation Document, "Completing the Land Register in England and Wales" (1992), the Registry undertook not to consult again on new triggers for compulsory registration for five years. That period has now elapsed.

[22] See para 11.14.

[23] When the Law Commission sought views on the subject in October 1985 from a very limited body of specialist representatives at a seminar, there was a consensus in favour of retaining the 21 year period, "on the twin grounds of not increasing the cost and inconvenience to tenants and their professional advisers or the workload of HM Land Registry": Law Com No 158, para 2.41. Although those two concerns have become less pressing than they were at that time, they will remain relevant until electronic conveyancing is introduced. For this seminar and those who attended, see *ibid*, para 2, Appendix A, Part II.

[24] Land Registration Act 1925, s 101(2).

[25] The lease will then take effect as an overriding interest under s 70(1)(*g*) (rights of persons in actual occupation). See below, para 5.56.

lease that was neither required nor permitted to be registered would also take effect as an overriding interest.[26] It must be noted that there are possible risks in introducing any such option, and we have reservations about it. It could lead to confusion as to which leases *had* to be registered, and there might therefore be a failure to register where registration was necessary.[27]

3.10 **We therefore seek the views of readers as to which of the following options they favour—**

(1) that the present law should remain unchanged;

(2) that leases granted for a term of more than 14 years should be required to be completed by registration;

(3) that leases granted for a term of 21 years would, as now, be required to be registered, but leases of a term of more than 14 years could be registered if the tenant (or some other person having the power to register) so wished but would otherwise take effect as overriding interests; or

(4) that there should be some other requirements for the registration of leases (please specify).

We deliberately make no recommendation on this issue.

3.11 Even if readers think that there should be no change to the present law, we would welcome their views on the possibility of conferring on the Lord Chancellor a power to extend by statutory instrument the range of leases that were capable of registration. If at some future date consultation revealed that there was support for the registration of shorter leases, the necessary changes could then be made without the need for primary legislation. **We ask readers whether they agree with our provisional recommendation that there should be a power for the Lord Chancellor by rule to reduce the duration of leases that—**

(1) may be registered as registered estates, both on first registration and in relation to dealings by a registered proprietor; and (commensurately with such a change)

(2) can exist as overriding interests and cannot be noted on the register.

3.12 We provisionally recommend that there should be one qualification to this proposal. Rules made by statutory instrument under the Land Registration Act 1925 are not subject to annulment, but merely have to be laid before Parliament.[28] We consider that

[26] The suggestion is made by Roger J Smith in "Land Registration: Reform at Last?", Paul Jackson and David C Wilde (ed), *The Reform of Property Law* (1997) p 129 at p 139.

[27] It would also be something of an anomaly in the system of electronic conveyancing as we presently visualise it. Under the scheme which we tenatively outline in Part XI of this Report, leases other than short leases which were overriding interests, would be incapable of creation except by registering them. Leases which were overriding interests would be wholly outside the registration scheme: see below, paras 11.8 - 11.12. The clarity of that division would be blurred.

[28] Land Registration Act 1925, s 144(3).

this procedure would not be appropriate to extend the requirement of registration to leases granted for 21 years or less because it is a step of considerable significance.[29] **We provisionally recommend that any such rule should be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament. We ask whether readers agree.**

Mines and minerals

3.13 The grant of estates in mines and minerals requires special comment.[30] Where a registered proprietor either transfers the freehold in or grants a lease for a period exceeding 21 years of all or any mines or minerals apart from the surface, the transferee or grantee must be registered as proprietor of that interest.[31] Where the owner of *unregistered* land makes an equivalent disposition, there is no obligation to register it, because the registration of mines and minerals apart from the surface are at present exempt from the requirements of compulsory registration.[32] It should also be noted that rights to coal take effect as overriding interests only.[33]

3.14 Although the registration of a transfer of freehold land or the grant or transfer of leasehold land is deemed to include the mines and minerals in the absence of contrary evidence,[34] no indemnity is payable on account of any mines or minerals or of the existence of any rights to work or get them, unless a note is entered on the register that the mines and minerals are included in the registered title.[35] In practice not only will such a note be rare, but where a grant of mines and minerals is made, the grantee will seldom be registered with an absolute title. There are a number of reasons for this which include the following—

(1) Where properties were registered prior to 1898, any severed mineral rights that were enjoyed over them were not registrable but took effect as what would now be called overriding interests. As regards titles that were registered after 1897 and before 1926, the same was true of mineral rights granted before the land was registered.[36] Our inquiries suggest that such rights are still

[29] Compare the power conferred by Land Registration Act 1925, s 123(4) (as inserted by Land Registration Act 1997, s 1) to add new grounds for compulsory registration (and see below, para 3.18, n 47). This too must be done by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: *ibid*, s 123(5). For such "negative" or "prayer" procedure, see J A G Griffth and M A J Wheeler-Booth, *Parliament: Functions, Practice and Procedures* (1989) pp 245, 246; and Criminal Law: Consents to Prosecution, Consultation Paper No 149, paras 7.28 - 7.30. See further below, paras 11.19, 11.20, where we recommend the use of the same procedure in relation to a statutory instrument to introduce rules for the introduction of paperless conveyancing.

[30] Cf para 3.4, above.

[31] Land Registration Act 1925, ss 18(1), 21(1); Land Registration Rules 1925, rr 50, 53.

[32] Land Registration Act 1925, s 123(3)(*b*) (inserted by Land Registration Act 1997, s 1).

[33] Land Registration Act 1925, s 70(1)(*m*). See below, para 5.97.

[34] This follows because "land" is defined to include mines and minerals: Land Registration Act 1925, s 3(viii); see Ruoff & Roper, *Registered Conveyancing*, 12-27. Where it is apparent from the documents of title or the admission of the proprietor that all or some of the mines and minerals have been severed from the land, a note is entered on the Property Register to indicate that they are excepted from registration: Land Registration Rules 1925, r 196.

[35] Land Registration Act 1925, s 83(5)(*b*) (as substituted).

[36] See below, para 5.95; and Ruoff & Roper, *Registered Conveyancing*, 6-26.

encountered.[37]

(2) Where land was formerly copyhold, the minerals belonged to the lord of the manor and did not pass on the enfranchisement of the copyhold.[38] Manorial rights of this kind may be protected by an entry on the register of the title affected, but more usually take effect as overriding interests.[39]

(3) Mines and minerals may have been granted away many years ago when title was unregistered, and the fact of the severance may not have been carried forward on the title.[40]

3.15 We are very conscious that the treatment of mines and minerals in registered land is unsatisfactory both for historical and other reasons. In the course of our inquiries, we have been made aware of the dissatisfaction with the present position of those in the mining and extraction industries. However, we consider that rights to mines and minerals in registered land raise peculiar difficulties of a distinct kind that would be better resolved as a discrete exercise. We have therefore decided to make no recommendations in relation to such rights at this time, but we hope that it may be possible to address them fully at a future date after full consultation with interested parties.

Incorporeal rights over land

The present law

3.16 In addition to those estates of freehold and leasehold that may be registered with their own titles, there are certain *interests*[41] - all of them incorporeal hereditaments - of which a person may be a registered proprietor. These are not specifically listed in the Land Registration Act 1925 itself. However, the Land Registration Rules 1925 make provision for the first registration with their own separate title of "manors, advowsons, rents, tithe rentcharges or other incorporeal hereditaments".[42]

Incorporeal rights in gross

3.17 Some incorporeal rights may exist only as appurtenant to an estate in land. Easements fall into this category and profits *à prendre* may be granted or acquired as appurtenant to land. Such rights must benefit ("accommodate") the land to which they are attached. There are however certain incorporeal rights that can exist "in gross". These are free-standing rights that do not have to benefit other land belonging to the person who enjoys them. They include franchises, manors[43] and profits *à prendre* which have

[37] See further para 5.96 below.

[38] See Ruoff & Roper, *Registered Conveyancing*, 12-29.

[39] Land Registration Act 1925, s 70(1)(*j*); see below, para 5.84.

[40] See Ruoff & Roper, *Registered Conveyancing*, 12-28.

[41] We are not here using the word "interest" in the technical sense given to it in para 3.2 above, but simply to indicate an incorporeal right over land which is not an estate.

[42] See r 50. This rule also deals with the first registration of certain types of corporeal land, such as flats, cellars, mines and minerals. The reference in r 50 to advowsons is now otiose, because such rights are no longer interests in land for the purposes of registered land: Patronage (Benefices) Measure 1986, s 6.

[43] For our proposals on manors, see below, para 3.20.

been granted in gross. The Land Registration Rules 1925 expressly provide that the benefit of easements, rights and privileges (which includes profits *à prendre*) are not capable of registration except as appurtenant to a subsisting legal estate.[44] While the sense of this is obvious in relation to easements and those profits *à prendre* that do not exist in gross, it is less so in relation to either profits *à prendre* in gross or franchises. As regards profits, it means that the owner of valuable shooting or fishing rights can only protect those rights by registering the burden of them against the land affected.[45] The title cannot be proved from the register, but must be deduced by the owner as if the title to the land were unregistered. Certain franchises, especially franchises of market, are of some importance and have been the subject of much reported litigation in recent years.[46]

3.18 It should be noted that—

(1) there is at present no requirement of compulsory registration as regards registrable estates which are incorporeal hereditaments;[47] and

(2) new rentcharges can now only be created in a very few situations and most existing ones will be extinguished in 2037.[48]

It follows from (1) that if the list of incorporeal rights of which a person might be a registered proprietor were extended, no person who had the benefit of such a right would be thereby prejudiced. It would be entirely a matter for him or her to decide whether or not to register the right.

3.19 We do not know whether the fact that neither profits *à prendre* in gross nor franchises can be registered with their own title is the source of any difficulty in practice. It may be that dealings in such rights are not common and that it is not thought necessary to change the law to make provision for their registration. Once again, this is a point on which the views and experience of readers will be of the greatest assistance to us and where we make no recommendation. **We ask whether readers consider that—**

(1) profits *à prendre* in gross; and/or

(2) franchises;

should be capable of being registered with their own titles.

[44] Rule 257.

[45] Land Registration Rules 1925, r 197(5). Rule 197 is concerned with the entry on the register of overriding interests. It seems intrinsically unsatisfactory that a profit *à prendre* that has been expressly granted can only be entered on the register under this provision. See below, para 5.14.

[46] See, eg, *Spook Erection Ltd v Secretary of State for the Environment* [1989] QB 300.

[47] Land Registration Act 1925, s 123(3)(*a*) (inserted by Land Registration Act 1997, s 1). The Lord Chancellor now has power by statutory instrument to add to the dispositions which are subject to the requirement of compulsory registration: Land Registration Act 1925, s 123(4) (inserted by Land Registration Act 1997, s 1). This includes the three cases listed in section 123(3) that are at present expressly excepted from the requirement, of which incorporeal hereditaments are one. For another, see below, para 3.22.

[48] See Rentcharges Act 1977, ss 2, 3.

Manors

3.20 The position of manors requires special consideration. By "manor" we mean specifically the lordship of a manor and not other seignorial rights (which are subject to quite different considerations).[49] The manorial rights of a lord of the manor are wholly incorporeal[50] and may be (and commonly are) owned separately from the land that was comprised in the manor. They impose no burden on any land within the manor and they are therefore "land" only in the most abstract sense.[51] Although a manor may be registered with its own title,[52] the experience of the Land Registry suggests that this is no longer appropriate. The position of manors is closely analogous to that of another type of incorporeal hereditament, namely advowsons.[53] For the purposes of the Land Registration Act 1925, these are no longer regarded as land.[54] We consider that manors should be treated in the same way. **We provisionally recommend that, for the purposes of the Land Registration Act, manors should cease to be regarded as land. Do readers agree?**

3.21 The proprietary status of manors would not be affected by this change, and sales of manors would be conducted as if they were unregistered land. Our proposals would not affect either—

(1) manors that have already been registered with their own titles (which would continue to be dealt with as registered estates);[55] or

(2) seignorial rights (which would continue to be overriding interests or minor interests).

3.22 There is one concomitant of this recommendation. Most dispositions of unregistered freehold land or unregistered leases with more than 21 years to run are now subject to the requirement of compulsory registration.[56] At present, that requirement does not apply to "corporeal hereditaments which are part of a manor and are included in the sale of a manor as such".[57] The thinking behind this exception is, apparently, as

[49] For seignorial rights, see below, para 5.84.

[50] In practice, the principal rights conferred by ownership of a manor (apart from the title) are (i) to hold one's own court (but this is meaningless in fact as nobody owes suit); and (ii) to have the manorial records. There may be others: see below paras 5.84 and following, and generally, *Corpus Christi College, Oxford v Gloucestershire County Council* [1983] QB 360, 365.

[51] Cf the position of advowsons which are no longer land for the purposes of registered land: Patronage (Benefices) Measure 1986, s 6.

[52] Land Registration Rules 1925, rr 50, 51.

[53] An advowson is a right to present to a living in the Church of England.

[54] See Patronage (Benefices) Measure 1986, s 6(2), amending Land Registration Act 1925, s 3(viii).

[55] We do not propose to follow the model of advowsons to the extent of deeming the existing registered titles to manors to be closed: cf Patronage (Benefices) Measure 1986, s 6(1). We take the view that if those who own lordships of the manor have taken the trouble to register them, it would be unreasonable to remove them from the register.

[56] Land Registration Act 1925, s 123 (substituted by Land Registration Act 1997, s 1).

[57] Land Registration Act 1925, s 123(3)(*c*) (inserted by Land Registration Act 1997, s 1: this provision was formerly contained in Land Registration Act 1925, s 120(1), which was repealed by Land Registration Act 1997).

follows.[58] The lands of the manor are appurtenant to the manor. Although the manor itself *may* be registered (under the present law), it is not *required* to be. If, therefore, the manor is not subject to compulsory registration then its appurtenances should not be either.

3.23 If manors cease to have the status of land for the purposes of land registration, then they can no longer have appurtenances. If that is so, we can see no good reason why transfers of land which would otherwise be registrable should be exempted from the requirement because they happen to be transferred with a right that is no longer regarded as land. **We provisionally recommend that the exception from compulsory registration of "corporeal hereditaments which are part of a manor and are included in the sale of a manor as such" should be repealed.[59] We ask whether readers agree with us.**

REGISTERED DISPOSITIONS

3.24 We have explained that—

(1) certain dispositions by a registered proprietor are called registered dispositions;[60]

(2) when registered these are given "special effect or priority"[61] in the sense that the transferee or grantee takes subject only to entries on the register and overriding interests;[62] and

(3) such dispositions are guaranteed by HM Land Registry, whereas minor interests are not.[63]

As we indicated, the uniting characteristic of registered dispositions is that they all involve the grant or transfer of a *legal* estate, or the creation or reservation of a *legal* right over land.[64] In the preceding paragraphs of this Part we have identified a number of situations in which a case could be made for registering a legal estate or interest with its own title where at present it cannot be. We seek the views of readers as to whether the range of registered dispositions should be extended. Are there any other rights or interests the creation or transfer of which are not registered dispositions, but which should be?

3.25 The provisional view of the Joint Working Group is that—

[58] See Brickdale & Stewart-Wallace's *Land Registration Act 1925* (4th ed 1939), p 270.

[59] It would of course have been inappropriate for the Joint Working Group to recommend this repeal in its First Report because we had not at that stage reviewed the status of manors within the scheme of registered land. It is already the case that, where there is a disposition of a manor as such that also includes the lands of the manor (which have unregistered title) and the transfer is not one on sale, it will normally be subject to the requirements of compulsory registration: see Land Registration Act 1925, s 123(1), (2), (6) (inserted by Land Registration Act 1997, s 1).

[60] See above para 2.21.

[61] Land Registration Act 1925 s 3(xxii).

[62] See above, para 2.22.

[63] See above, paras 2.21, 2.25.

[64] See above, para 2.21.

(1) only the creation or transfer of legal estates, rights and interests ought to be registered dispositions; and

(2) if any new legal rights were created, then the creation or transfer of such rights should have the status of registered dispositions.

3.26 The difficulty in extending the status of registered disposition to the creation or transfer of certain minor interests lies in formulating appropriate criteria for identifying those interests for which the status would be appropriate. Once some minor interests are admitted to the fold as registered dispositions, there will be pressure for others to follow. It should also be noted that the elevation of any right to the status of a registered disposition would have implications for the evidence of title to the right or interest that would have to be deduced before the Registry could guarantee it. That could have implications for the speed and cost of registration.

3.27 However, notwithstanding our provisional view, we consider that it is important for readers to have an opportunity to express their opinions on this issue. **We therefore seek the views of readers as to whether there are any rights over, or interests in land, the creation or transfer of which ought to be registered dispositions when completed by registration, but which at present are not. If it is thought that there are any such rights, on what basis should they be made registered dispositions?**

RIGHTS OF UNCERTAIN STATUS

3.28 There are a number of rights in or over land, the exact status of which is in some sense uncertain or unsatisfactory. They are as follows—

(1) a right of pre-emption;

(2) an equity arising by estoppel or acquiescence before effect has been given to it by a court order;

(3) an inchoate right arising under the Prescription Act 1832.

It is in each case uncertain either whether such a right is a property right at all, or where it may be, the time at which it becomes so. This has clear implications for the means by which such rights may (if at all) be protected. The proposals which we make in relation to these rights do not derive from the Law Commission's Third and Fourth Reports and we would be particularly grateful for the views of readers upon them.

Rights of pre-emption

3.29 A right of pre-emption is a right of first refusal. The grantor undertakes that he or she will not sell the land without first offering it to the grantee. It is similar to but not the same as an option, because the grantee can purchase the property only if the grantor decides that he or she wants to sell it.

3.30 The precise status of a right of pre-emption was considered by the Court of Appeal in *Pritchard v Briggs*.[65] In some cases it had previously been held that it was merely a

[65] [1980] Ch 338.

contractual right and could never be an equitable proprietary interest.[66] In others, the right was held to create an equitable interest in land from its inception.[67] There are also a number of statutory provisions which were enacted on the assumption that rights of pre-emption created interests in land.[68]

3.31 In *Pritchard v Briggs*,[69] a majority of the Court of Appeal expressed the view that a right of pre-emption did not confer on the grantee any interest in land. However, when the grantor chose to sell the property, the right of pre-emption became an option and, as such, an equitable interest in land.[70] It should be noted that the remarks of the Court of Appeal were only obiter[71] and have been recognised as such.[72] They have been much criticised,[73] and this criticism has not escaped judicial attention.[74] Not only was there no previous authority for "this strange doctrine of delayed effectiveness,"[75] but if it is correct its effects can be unfortunate—

(1) It can lead to something "which a sound system of property law ought to strive at all costs to avoid: the defeat of a prior interest by a later purchaser taking with notice of the conflicting interest",[76] as indeed happened in *Pritchard v Briggs* itself. For example, if A grants B a right of pre-emption which B immediately registers, and A then mortgages the land to C, it seems

[66] See eg, *Murray v Two Strokes Ltd* [1973] 1 WLR 823. This was also the view of Goff LJ, dissenting, in *Pritchard v Briggs*.

[67] See, eg *Birmingham Canal Co v Cartwright* (1879) 11 ChD 421. This was also the view of Walton J at first instance in *Pritchard v Briggs* [1980] Ch 338.

[68] See, eg Law of Property Act 1925, s 186; Land Charges Act 1972, s 2(4)(iv).

[69] [1980] Ch 338.

[70] Goff LJ dissented, holding that a right of pre-emption was a mere contractual right and could never be an equitable interest in land.

[71] The conflict in that case was between a right of pre-emption and an option that was granted subsequently. The terms of the right of pre-emption and the option were such that they did not in fact conflict: the former was exercisable only prior to the death of the grantor, the latter only after his death. The view of the majority of the Court of Appeal, that the option would have taken priority over the right of pre-emption in any event (because it created an equitable interest in land when it was granted, whereas the right of pre-emption created no equitable interest until the grantor decided to sell the land), was therefore necessarily obiter.

[72] See *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1994] 1 WLR 31, 38. Although the remarks were applied by Vinelott J in *Kling v Keston Properties Ltd* (1983) 49 P & CR 212, the right of pre-emption was held to have crystallised in that case and was binding on the purchaser of the land in question. In *Homsy v Murphy* (1996) 73 P & CR 26, M had granted H a right of pre-emption over a property, which had been protected by a notice on the register. M then granted a lease of the premises to X. In a claim for damages, M alleged that X was bound by H's right of pre-emption (which had crystallised), that H could enforce his rights against X, and that M was not therefore liable in damages, because H has suffered no loss. The Court of Appeal rejected this argument on the basis that there was no evidence as to when M had *agreed* to grant the lease to X. It might have pre-dated the grant of the pre-emption to H. Although Beldam LJ referred to Templeman LJ's views in *Pritchard v Briggs*, above, it was only to distinguish them.

[73] See especially HWR Wade, "Rights of Pre-Emption: Interests in Land" (1980) 96 LQR 488; Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) pp 604 - 606.

[74] See the remarks of Peter Gibson LJ in *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1994] 1 WLR 31, 38, in which both Beldam and Ralph Gibson LJJ concurred.

[75] HWR Wade, "Rights of Pre-Emption: Interests in Land", (1980) 96 LQR 488, 489.

[76] *Ibid*.

likely that C will not be bound by the right of pre-emption because the execution of the mortgage probably does not cause the pre-emption to crystallise into an equitable interest. C could therefore, in exercise of his paramount powers as mortgagee, sell the land free from B's right of pre-emption.

(2) Although the person having the benefit of a right of pre-emption may register it at the time it is created either as a land charge (where the title is unregistered)[77] or as a minor interest (where the title is registered),[78] the right is effective for the purposes of priority only from the moment when the grantor demonstrates an animus to sell the land, not from the date of registration.[79]

(3) Similarly, if the grantee of the right of pre-emption is in actual occupation of the land to which it relates and the title is registered, the right of pre-emption takes effect as an overriding interest under section 70(1)(*g*) of the Land Registration Act 1925 only when the grantor does something to indicate an intention to sell.[80] The precise time when that occurs is uncertain, but it will be no later than the time when the contract to sell to a third party is executed.[81]

3.32 Because the remarks in *Pritchard v Briggs* were merely obiter, the law cannot be regarded as finally settled, particularly in the light of the criticisms that have been made of them. We therefore propose that, for the purposes of registered land, the matter should be clarified and the effect of *Pritchard v Briggs* should be modified. **We provisionally recommend that, for the purposes of determining priorities, a right of pre-emption should take effect as an interest in registered land from the time when it is created and we ask whether readers agree with us**. The effect of this will be that such a right will be subject to the same rules on priority as any other minor interest. Furthermore, the right will exist as an overriding interest from the date upon which it is created, if coupled with actual occupation. We would emphasise that this provision would not affect the status of a right of pre-emption (whatever it may be) for other purposes - such as whether the grant of such a right is a contract for the sale or other disposition of an interest in land so as to fall within the formal requirements of the Law of Property (Miscellaneous Provisions) Act 1989,[82] or whether it is subject to the rule against perpetuities.[83]

Rights arising by estoppel or acquiescence

3.33 The doctrine of proprietary estoppel is one of increasing importance, because it has

[77] Land Charges Act 1972, s 2(4)(iv).

[78] Land Registration Act 1925, ss 49(1)(*c*); 59.

[79] Ruoff & Roper, *Registered Conveyancing*, 35-18.

[80] *Kling v Keston Properties Ltd* (1983) 49 P & CR 212.

[81] *Ibid*, at p 217.

[82] Section 2. This point has not yet been the subject of any reported decision. Cf below, para 11.21.

[83] Cf The Rules Against Perpetuities and Excessive Accumulations (1998) Law Com No 251, para 3.46. If the recommendations in that Report were implemented, it would be clear that the rule against perpetuities was inapplicable to rights of pre-emption.

become one of the principal vehicles for accommodating the informal creation of proprietary rights.[84] Although the courts deprecate any attempt to define with undue precision the elements of proprietary estoppel,[85] it is possible to summarise the effect of the doctrine as set out in the following paragraphs.

3.34 The owner of land, A, in some way leads or allows the claimant, B, to believe that he has or can expect some kind of right or interest over A's land. To A's knowledge, B acts to his detriment in that belief. A then refuses B the anticipated right or interest in circumstances that make that refusal unconscionable. In those circumstances, an "equity" arises in B's favour. This gives B the right to go to court and seek relief. The court has a very wide discretion as to how it will give effect to this equity, but in so doing it will "analyse the minimum equity to do justice" to B.[86] It will not give him or her any greater rights than he or she had expected to receive. The range of remedies that the courts have shown themselves willing to give is very wide. At one extreme, they have ordered A to convey the freehold of the land in issue to B.[87] At the other, they have ordered A to make a monetary payment to B (in some cases secured on A's land).[88]

3.35 It will be apparent from this that the doctrine of proprietary estoppel involves two stages. First, the circumstances must occur which generate the "equity" in B's favour. Secondly, the court may give effect to that equity in proceedings brought for that purpose or in which it is in issue. Clearly, once the court has declared how the equity should be satisfied there is little difficulty. If B is held entitled to a property right, that right can then be recorded in the usual manner on the register.[89] In such circumstances the register can be amended to give effect to the order of the court.[90] The difficulty arises in the interim period between the equity arising and effect being given to it. There is some controversy as to the status of the equity in this interim period. Because the court may not grant B any proprietary rights over A's land, but only, say, a sum of compensation, some commentators have tended to regard B's equity as a purely personal right.[91] If that is so, it cannot be protected against third parties either as a minor interest, or by B's actual occupation of the land affected, as an overriding interest.[92] Against this however, there are good reasons for regarding the inchoate

[84] For proprietary estoppel as the means of creating rights in or over property, see *Western Fish Products Ltd v Penwith District Council* (1978) [1981] 2 All ER 204, 217; *West Middlesex Golf Club Ltd v Ealing London Borough Council* (1993) 68 P & CR 461, 478.

[85] See, eg *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* (1979) [1982] QB 133, 148.

[86] *Crabb v Arun District Council* [1976] Ch 179, 198, *per* Scarman LJ.

[87] See, eg *Pascoe v Turner* [1979] 1 WLR 431.

[88] See, eg *Baker v Baker* [1993] 2 FLR 247.

[89] See Graham Battersby "Informal Transactions in Land, Estoppel and Registration" (1995) 58 MLR 637, 641, 642.

[90] See Land Registration Act 1925, s 82(1)(*a*).

[91] See D J Hayton "Developing the Law of Trusts for the Twenty-First Century" (1990) 106 LQR 87, 97, n 26.

[92] Under the Land Registration Act 1925, s 70(1)(*g*).

equity as a property right.[93] There is indeed some authority that, where title to the land is unregistered, the equity is binding on both a purchaser of the land affected who has notice of B's rights[94] and a donee regardless of notice.[95] Furthermore, where the title is registered, not only has it been accepted that an equity arising by estoppel coupled with actual occupation could be an overriding interest,[96] but it is already the practice of the Land Registry to allow such an equity to be registered as a minor interest.[97]

3.36 In view of the increasing importance of estoppel as a mechanism for the informal creation of rights over land, it is obviously desirable to clarify in relation to registered land the status of an equity arising by estoppel before effect has been given to it by a court order. **We therefore provisionally recommend that an equity arising by estoppel or acquiescence in relation to registered land should be regarded as an interest from the time at which it arises.**[98] This will make clear that such an equity is a minor interest and that it may also exist as an overriding interest where the person having the benefit of it is in actual occupation.

Inchoate rights arising under the Prescription Act 1832

3.37 In Part X of this Report, we examine the prescription of easements and profit *à prendre* over registered land.[99] We explain that there are three methods by which easements may be acquired by prescription - at common law, by the doctrine of lost modern grant, and under the Prescription Act 1832.[100] The status of rights in the course of acquisition by prescription over registered land under the 1832 Act is uncertain[101] due

[93] See in particular Graham Battersby, "Contractual and Estoppel Licences as Proprietary Interests in Land" [1991] Conv 36, 45; Simon Baughen, "Estoppels Over Land and Third Parties: An Open Question" (1994)14 LS 147, 154; Graham Battersby, "Informal Transactions in Land, Estoppel and Registration" (1995) 58 MLR 637, 642.

[94] *Duke of Beaufort v Patrick* (1853) 17 Beav 60, 78; 51 ER 954, 961; *Inwards v Baker* [1965] 2 QB 29, 37; *E R Ives Investment Ltd v High* [1967] 2 QB 379. In *Lloyds Bank Plc v Carrick* [1996] 4 All ER 630, 642, Morritt LJ commented that "[i]n the circumstances it is unnecessary to consider further the submission... to the effect that a proprietary estoppel cannot give rise to an interest in land capable of binding successors in title. This interesting argument will have to await another day, though it is hard to see how in this court it can surmount the hurdle constituted by the decision of this court in *Ives v High*".

[95] *Voyce v Voyce* (1991) 62 P & CR 290, 294, 296.

[96] *Lee-Parker v Izzet (No 2)* [1972] 1 WLR 775, 780, obiter. Cf *Habermann v Koehler* (1996) 73 P & CR 515, where the Court of Appeal remitted a case for a retrial to determine *inter alia* whether an equity arising by estoppel could bind a purchaser as an overriding interest under Land Registration Act 1925, s 70(1)(*g*).

[97] Under the Land Registration Act, ss 49(1)(*f*) (notice); 54(1) (caution). See Ruoff & Roper, *Registered Conveyancing*, 8-02; 35-33; 36-13.

[98] It has not been definitively settled when an equity arises. At the very latest it will be when the circumstances make it unconscionable for the land owner, A, to go back on the expectation which he has created by representation or conduct: *Lim v Ang* [1992] 1 WLR 113, 118. In most cases that will be when the other party, B, has acted to his detriment in reliance upon the expectation. That moment will not always be easy to define.

[99] See below, paras 10.79 and following.

[100] See below, paras 10.80 - 10.86.

[101] No similar uncertainty exists in relation to the rights of an adverse possessor. From the time that he takes adverse possession, a squatter has a fee simple absolute in possession. This is so regardless of the estate against which he is adversely possessing. The squatter's fee is of course liable to defeasance by a person having a better right to possess. See *Rosenberg v Cook* (1881) 8 QBD 162, 165; below, para 10.22.

to the provisions of that Act. By that Act, certain rights are deemed to be either free from challenge on the ground that they had not been enjoyed since 1189, or "absolute and indefeasible", depending on the nature of the right asserted and the length of time that it has been exercised without interruption.[102] However, each of the specified periods is "deemed and taken to be the period next before suit or action" in which "the claim or matter to which such period may relate shall have been brought into question".[103] This provision has been taken to mean that it is only on the commencement of legal proceedings that "the enjoyment... shall ripen into a right".[104] In consequence of this—

> however long the period of actual enjoyment, no absolute or indefeasible right can be acquired till the right is brought in question in some action or suit. *Until it be so brought in question, the right, if it can be called a right, is inchoate only*...[105] (italics added).

3.38 In Part X, we provisionally recommend that, for the future, the only means by which an easement or profit *à prendre* could be established should be under the Prescription Act 1832. It would no longer be possible to rely upon prescription at common law or by lost modern grant.[106] Even if readers reject these proposals, there is a problem that needs to be addressed. In many cases where prescription under the Prescription Act 1832 could be established, prescription at common law (or more usually) under the doctrine of lost modern grant could also be successfully asserted.[107] In such cases, if the necessary preconditions are met, the right can be regarded as established. It is not in any sense "inchoate". There may however be cases where a right can only be established under the Prescription Act 1832 and not at common law or under the doctrine of lost modern grant. This will be so in some cases where the servient owner lacked the capacity to grant such an easement.[108] There is a real risk in such cases that a person, who has been exercising a right over registered land for more than the relevant period prescribed by the Prescription Act 1832,[109] might find that his right was defeated. This is because that right might be regarded as being too shadowy to exist as an overriding interest[110] and so not bind a purchaser of the servient land. To avoid these difficulties **we provisionally recommend that rights acquired or in the course of being acquired by prescription, whether or not such rights are regarded as inchoate, shall be interests for the purposes of the Act.**

[102] Sections 1 (rights of common and profits *à prendre*); 2 (rights of way and other easements); and 3 (rights of light). See below, para 10.82.

[103] Prescription Act 1832, s 4.

[104] *Cooper v Hubbuck* (1862) 12 CB(NS) 456, 467; 142 ER 1220, 1225, *per* Willes J.

[105] *Hyman v Van den Bergh* [1907] 2 Ch 516, 524 - 5, *per* Parker J, approved on appeal: [1908] 1 Ch 167. See too *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 189 - 190; *Newnham v Willison* (1987) 56 P & CR 8, 12.

[106] See below, para 10.94.

[107] These are explained below, paras 10.81; 10.84 - 10.86.

[108] For the circumstances in which this will be the case, see J Gaunt & P Morgan, *Gale on Easements* (16th ed 1996), paras 4-58 - 4-60.

[109] The different periods laid down in that Act are in fact measured backwards from the time when proceedings are brought in which the right is in issue: s 4.

[110] We provisionally recommend that prescriptive rights in the course of acquisition should be overriding interests: see para 5.17 below.

"PURCHASERS"

The definition of "Purchaser"

3.39 In the Third Report, two proposals were made as to the definition of "purchaser" for the purposes of the Land Registration Act 1925.[111] These were that all purchasers and transferees—

(1) should take free of an unregistered minor interest only if they were in good faith for valuable consideration; but

(2) would not be regarded as dishonest merely because they had actual knowledge of the unprotected minor interest in question.

3.40 The reasons given in the Third Report for the first of these proposals were that—

(1) it would resolve an ambiguity as to whether a "transferee" for valuable consideration (who takes free of unregistered minor interests) was "a purchaser" for the purposes of the Act;[112] and

(2) it would ensure that the definition of "purchaser" in the Land Registration Act 1925[113] remained in line with that which is found in the Law of Property Act 1925 and the Settled Land Act 1925.[114]

It is clear that the Commission intended that on a transfer of registered land for valuable consideration, the transferee would take free of unregistered minor interests only if he or she were in good faith and that the question of good faith could therefore be in issue.[115] This might appear unremarkable. However, the result that the Commission desired appears to be very similar to the situation that applies under Torrens systems of title registration in Australia and New Zealand, under which a purchaser of land acquires an indefeasible title free of unregistered interests except in cases of fraud.[116] Actual knowledge of an unregistered interest without more is not for these purposes fraud.[117] Although the courts insist that there must be "actual fraud, ie, dishonesty of some sort, not what is called constructive or equitable fraud",[118] it has

[111] Law Com No 158, paras 4.14 - 4.15. These proposals were incorporated in the Draft Bill in the Fourth Report: see Law Com No 173, Draft Bill, Cls 70(1) and 9(4) respectively.

[112] Compare Land Registration Act 1925, ss 20(1), 23(1) (which concern transferees for valuable consideration), with s 3(xxi), which defines a purchaser as "a purchaser in good faith for valuable consideration and includes a lessee, mortgagee, or other person who for valuable consideration acquires any interest in land or any charge on land". In *Peffer v Rigg* [1977] 1 WLR 285, 293, 294, Graham J had held that where a transferee within s 20(1) was in fact a purchaser, he or she was to be regarded as a "purchaser" for the purposes of the definition in the Act and therefore had to be "in good faith".

[113] Section 3(xxi) (set out in the preceding footnote).

[114] Sections 205(1)(xxi) and 117(1)(xxi) respectively. In each case, purchaser is defined as "a purchaser *in good faith*" for value or valuable consideration.

[115] Though the onus of proving lack of good faith would have rested on the person with the unprotected minor interest: Law Com No 158, para 4.17.

[116] See, eg ss 42, 43, Transfer of Land Act 1958 (Victoria).

[117] *Ibid.*

[118] *Assets Co Ltd v Mere Roihi* [1905] AC 176, 210, *per* Lord Lindley.

been said that "the meaning of the concept of fraud within the Torrens system is far from clear".[119] The experience under such Torrens systems suggests that the existence of the uncertain exception of fraud may undermine the indefeasibility of registered title.[120] Given this criticism, it would be unfortunate if these principles were introduced into the English system, not least because it would require courts to investigate the motives of the parties to a transaction, a task of peculiar difficulty.[121]As we explain in Part XI of this Report, when electronic conveyancing is introduced, it will be impossible to create many types of right or interest except by registering them.[122] In relation to such rights and interests, the difficulty considered in this paragraph could not therefore arise. Even so, electronic conveyancing is still some way off, and there will be certain categories of rights and interests that will still be capable of being created without registration.[123]

3.41 The present definition of "purchaser" in the Land Registration Act 1925 as "a purchaser in good faith" is a legislative accident.[124] The Law of Property Act 1922 amended the Land Transfer Acts as a prelude to their consolidation in what is now the Land Registration Act 1925. Amongst the amendments was the insertion of a definition of "purchaser" as including "a lessee, mortgagee, or other person who for valuable consideration acquires any interest in land or in any charge on land".[125] That definition contained no reference to good faith. There was no further amendment to this provision by the Law of Property (Amendment) Act 1924. By some quirk however, the words "in good faith" were included in the Land Registration Act 1925, which was a consolidating Act and, as such, not intended to change the law.

3.42 Instead of following the definition of "purchaser" in the Law of Property Act 1925 and the Settled Land Act 1925, we consider that it would be more appropriate to revert to what was intended to be in the Land Registration Act 1925 and what is actually found in the Land Charges Act 1972. The latter is also a registration statute and its underlying assumption (like that of the Land Registration Act 1925) is that registration takes the place of notice. That Act defines "purchaser" as "any person (including a mortgagee or lessee) who, for valuable consideration takes an interest in land or in a charge in land".[126] It is the intention of the Joint Working Group that in drafting any

[119] I J Hardingham, "*Midland Bank Trust v Green* under the Torrens System" (1982) 2 OJLS 138, 140. It is fraud if the purchaser is party to a sham transaction that is set up to defeat an unregistered interest, or knows of the vendor's fraudulent purpose to defeat such an interest by means of a sale: *ibid*.

[120] See, eg R Sackville, "The Torrens System - Some Thoughts on Indefeasibility and Priorities" (1973) 47 ALJ 526, 540 *et seq*.

[121] *Midland Bank Trust Co Ltd v Green* [1981] AC 513, 530. See the criticisms of Law Com No 158 on this point: Roger J Smith, "Land Registration Reform - The Law Commission's Proposals" [1987] Conv 334, 346 - 347.

[122] See below, paras 11.8 - 11.11.

[123] See below, para 11.12.

[124] See Professor D C Jackson, "Security of Title in Registered Land" (1978) 94 LQR 239, 244 - 246.

[125] Law of Property Act 1922, Sched 16, para 2(2).

[126] Land Charges Act 1972, s 17(1).There are however special exceptions in cases of bankruptcy where a purchaser of a legal estate in good faith for money or money's worth will, in certain circumstances, take free of a petition in bankruptcy or a bankruptcy order: see *ibid*, ss 5(8), 6(5), 6(6). Concepts of good faith are employed elsewhere in dealings which involve a bankrupt's property: see, eg Insolvency Act 1986, s 342 (as amended by Insolvency (No 2) Act 1994, s 2).

new legislation the doubts that have arisen as to whether and when a transferee for value is a purchaser should be avoided.

3.43 At present, the Act defines "valuable consideration" so as to include marriage but not a nominal consideration in money.[127] We consider that marriage consideration is an anachronism and should cease to be regarded as valuable consideration in relation to dealings with registered land. A transfer of land in consideration of marriage is in substance in most cases a wedding gift. We therefore propose that for the purposes of the Act—

(1) marriage should cease to be valuable consideration; and

(2) a transfer of land in consideration of marriage should be regarded as a gift.[128]

Doctrines of notice and registered land

3.44 In proposing this new definition of "purchaser" we are concerned to emphasise what is generally assumed to be the case, namely that issues of good faith and notice are, subject to certain statutory exceptions,[129] irrelevant in relation to registered land.[130] The point is not wholly free from doubt because of the attempt to import doctrines of good faith and notice into registered conveyancing by the much-criticised decision in *Peffer v Rigg*.[131] In that case, Graham J, applying the definition of "purchaser" that is presently found in the Land Registration Act 1925,[132] held that a purchaser could not be in good faith if he had notice of something which affected his title. It is generally assumed that this reasoning cannot be supported and our new definition of purchaser should preclude any possible repetition of it. However, we consider that the matter should be placed beyond doubt by a statement in the Act of the general principle that the doctrine of notice should have no application in dealings with registered land except where the Act expressly provides to the contrary.

3.45 In making this recommendation, we are very conscious that we are going against the

[127] Land Registration Act 1925, s 3(xxxii).

[128] It is important that such a transfer should be designated a gift. Transfers of unregistered land made by way of gift are now subject to the compulsory registration provisions found in Land Registration Act 1925, s 123(1), (6)(a)(ii), as substituted by Land Registration Act 1997, s 1.

[129] See Land Registration Act 1925, ss 33(3) and 61(6). Cf s 59(6).

[130] "The doctrine of notice has no application to registered conveyancing": *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 508, *per* Lord Wilberforce ; "...the doctrine of purchaser for value without notice has no application to registered land...": *Barclays Bank Plc v Boulter* [1998] 1 WLR 1, 11, *per* Mummery LJ. See too *Frazer v Walker* [1967] 1 AC 569, 582, where, in the context of the New Zealand Land Transfer Act 1952, Lord Wilberforce observed that "[i]n all systems of registration of land it is usual and necessary to modify and indeed largely to negative the normal rules as to notice, constructive notice, or enquiry as to matters possibly affecting the title of the owner of the land".

[131] [1977] 1 WLR 285. The criticisms are conveniently summarised in K J Gray, *Elements of Land Law* (2nd ed 1993) pp 190 - 193.

[132] Section 3(xxi).

view strongly expressed by a number of distinguished academic commentators.[133] They have urged us to introduce a principle by which purchasers of registered land would be bound by registrable but unregistered interests affecting that land of which they had actual knowledge (but not merely constructive notice). To do so, it is said, would "allow a more truly equitable allocation of priority"[134] by introducing into the registered system an "ethical element".[135] The position has been summarised as follows—

> One can readily comprehend the argument that a purchaser who is aware of an unprotected right should not be able to take advantage of a failure to register it. Whilst one of the most important benefits of registration is the ouster of constructive notice, protection of purchasers who are aware of unprotected interests is less easy to defend. As has been observed time and time again, the courts strive to find means of holding these purchasers bound: judges obviously feel that justice points in that direction. That may be reasonable on the facts of a particular case, but the question facing the law reformer is whether it causes an unacceptable level of uncertainty for purchasers generally.[136]

3.46 We have the greatest respect for these views and for the concerns that underlie them. However, we have concluded - as the Law Commission has done on two previous occasions[137] - that there should in general be no place for concepts of knowledge or notice in registered land. We have reached this conclusion for the following reasons—

(1) It was intended that the system of registration under the Land Registration Act 1925 should displace the doctrine of notice.[138]

(2) There is little evidence of which we are aware that the absence of the doctrine of notice in dealings with registered land has been a cause of injustice in the seventy-two years in which the present system has been operative.

(3) The ethical argument is weaker than at first sight it appears to be if the issue is considered in relation to those principles which should in our view, guide

[133] Graham Battersby "Informal Transactions in Land, Estoppel and Registration" (1995) 58 MLR 637; Jean Howell, "Notice: A Broad and a Narrow View" [1996] Conv 34; Roger J Smith, "Land Registration: Reform at Last" in Paul Jackson and David C Wilde (ed), *The Reform of Property Law* (1997) p 129. We have also been urged to adopt the principles relating to notice for a very different purpose. In "The Proprietary Effect of Undue Influence" [1995] Conv 250, 253, Peter Sparkes suggests that "[T]he Land Registration Act 1925 requires urgent amendment to allow a bona fide purchaser to override overriding interests". We consider what is probably the most significant aspect of this point further below, para 5.71.

[134] Jean Howell, "Notice: A Broad and a Narrow View" [1996] Conv 34, 42.

[135] Graham Battersby "Informal Transactions in Land, Estoppel and Registration" (1995) 58 MLR 637, 655.

[136] Roger J Smith, "Land Registration: Reform at Last" in Paul Jackson and David C Wilde (ed), *The Reform of Property Law* (1997) p 129 at p 136.

[137] Property Law: The Implications of *Williams & Glyn's Bank Ltd v Boland* (1982) Law Com No 115, Appendix 2, paras 16 - 17; Third Report (1987) Law Com No 158, para 2.62.

[138] See Property Law: The Implications of *Williams & Glyn's Bank Ltd v Boland* (1982) Law Com No 115, Appendix 2, para 17; Mark P Thompson, "Registration, Fraud and Notice" [1985] CLJ 280, 289, 290.

the development of land registration.[139] Registration should be regarded as an integral part of the process of creating or transferring interests in registered land, closely akin to the formal requirement of using a deed (or in some cases, writing) in unregistered conveyancing. Just as a deed is required to convey or create a legal estate or interest in unregistered conveyancing,[140] a disposition of registered land must be completed by registration if it is to confer a legal estate or interest.[141] When electronic registration is introduced, it seems probable that many rights will be incapable of being created *except* by registering them.[142]

(4) In practice, if it were provided that unregistered rights in or over registered land were binding because a purchaser had *actual* knowledge of them, it would be very difficult to prevent the introduction by judicial interpretation of doctrines of *constructive* notice. If actual knowledge sufficed, the question would inevitably be asked: why not wilful blindness as well?[143] In reality the boundary between actual knowledge and constructive notice is unclear and is, in our view, incapable of precise definition.[144]

(5) The mere fact that a purchaser *could* be bound if he or she had actual knowledge of an unregistered right or interest would inevitably weaken the security of title that registered land at present provides. Disappointed third parties, who found their rights apparently defeated by a purchaser, would threaten litigation. Because of the nuisance value of such threats, purchasers would often settle out of court.

3.47 We do however acknowledge that there is a need for some form of "safety valve" in the registration system, for cases where parties cannot reasonably be expected to register their rights.[145] This requirement is substantially met by the category of overriding interests, which we consider in Parts IV - V.

3.48 Furthermore, we consider that the separate but related concerns that underlay the

[139] See above, para 1.14.

[140] Law of Property Act 1925, s 52.

[141] Land Registration Act 1925, ss 19, 22 and 26. Although a deed is at present required to make a registered disposition (see Ruoff & Roper, *Registered Conveyancing*, 15-12, for discussion), its functions are evidential, cautionary and standardising rather than dispositive. (For these and other functions of formality requirements, see J D Feltham, "Informal Trusts and Third Parties" [1987] Conv 246, 248, 249.) The effect of the deed is shortlived and is spent once the disposition is registered. For possible future developments, see below, paras 11.21 - 11.23.

[142] See below, para 11.10.

[143] Compare the as yet unresolved arguments over the degree of knowledge or notice that is required to make a person liable for receiving trust property transferred in breach of trust. In fairness, those who advocate the introduction of actual knowledge address this point. Thus Professor Battersby comments that "[w]e must certainly avoid any repetition of the kinds of difficulties in which the courts have become ensnared in defining the degree of knowledge necessary to establish liability for knowing receipt of trust property..., but this problem is soluble by careful thought and skillful drafting": "Informal Transactions in Land, Estoppel and Registration" (1995) 58 MLR 637, 656. We do not share his optimism.

[144] Cf Roger J Smith, *Property Law* (2nd ed 1998), p 224.

[145] Eg, because the right can be created informally.

proposal in the Third Report,[146] are already met. This is because the law provides a wide range of *personal* remedies against those who in some way behave improperly.[147] The operation of these personal remedies can be demonstrated by four examples:

(1) If A transfers trust property to B in breach of trust and B knows or (perhaps) has notice of this, B is liable as constructive trustee for "knowing receipt" of trust property.[148] Liability is personal and not proprietary and the obligation is to make restitution for the loss suffered by the trust. It has been assumed that this form of liability may apply where the trust property transferred is registered land and the rights of the beneficiaries have not been protected, so that as a matter of property law, the transferee takes the land free of the trust.[149]

(2) If property is transferred by A to B expressly subject to some right of C's which will not in fact bind B,[150] a constructive trust may be imposed upon B if he refuses to give effect to C's right in circumstances in which that refusal is unconscionable.[151] B can in this way be compelled to give effect to C's rights. This principle has emerged clearly only since the publication of the Third and Fourth Reports.[152]

(3) There may be circumstances where tortious liability is imposed because A conspires with B to defeat C's proprietary rights.[153]

(4) If B induces A by misrepresentation or undue influence to charge his or her property to C to secure B's debts, A will be able to set the charge aside if C has notice of B's misconduct.[154]

3.49 In each of these cases, a purchaser may acquire the registered land free from the rights of the third party, yet find himself personally liable for the loss suffered by that third

[146] Law Com No 158, paras 4.14 - 4.15.

[147] See Mark Thompson, "Registration, Fraud and Notice" [1985] CLJ 280.

[148] The Law Commission is presently examining the liability of persons who receive trust property transferred in breach of trust.

[149] *Eagle Trust Plc v SBC Securities Ltd* [1993] 1 WLR 484, 503 - 504.

[150] Perhaps because it requires registration but has not been registered, or because it is a purely personal right, such a contractual licence.

[151] *Ashburn Anstalt v Arnold* [1989] Ch 1, 22 - 26. See too *IDC Group Ltd v Clark* [1992] 1 EGLR 187, 189 - 190.

[152] The principle is not without its difficulties. It is a novel use of a constructive trust to compel a person to give effect to a contractual undertaking or to make them bound by some form of encumbrance. In all other cases in which a constructive trust is imposed, the trustee becomes subject to one or more aspects of a trustee's or fiduciary's obligations or liabilities.

[153] See *Midland Bank Trust Co Ltd v Green (No 3)* [1982] Ch 529.

[154] See *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 (laying down both the principle and the circumstances in which C would be fixed with notice). As Mummery LJ explained in *Barclays Bank Plc v Boulter* [1998] 1 WLR 1, 11, "[i]n *O'Brien* cases it is irrelevant whether the land is registered or unregistered: the question is whether the third party creditor has actual or constructive notice of the facts on which the equity to set aside the transaction is founded" (citing Martin Dixon and Charles Harpum, "Fraud, Undue Influence and Mortgages of Registered Land" [1994] Conv 421). This is just one example where a personal equity exists against a person who has a registered estate or charge.

party or subject to some personal equity, which enables the transaction to be set aside. This accords with the principle applicable under Torrens systems that indefeasibility of title, "in no way denies the right of the plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant".[155] In addition to any claims which he may have against the purchaser, the third party may have remedies against the person who transferred the land whether for breach of trust or contract or in tort.

3.50 **In the light of these considerations, we provisionally recommend that—**

(1) "purchaser" should be defined to mean "any person (including a mortgagee or lessee) who, for valuable consideration takes an interest in land or in a charge on land";

(2) "valuable consideration" should for these purposes be defined to mean money or money's worth but should not include marriage or a nominal consideration in money;

(3) a transfer of land (whether registered or unregistered) for marriage consideration should take effect as a gift for the purposes of the Act;

(4) it should be made clear in the Act that the doctrine of notice shall not apply to dealings with registered land except in those cases where the Act expressly provides to the contrary.

We ask whether readers agree with our provisional view and, if they do not, what their preferred approach would be in relation to each of these issues.

SUMMARY AND KEY ISSUES

3.51 In this Part we consider and seek views on whether the estates which must or may be registered as registered estates with their own titles should be extended to—

(1) leases granted for a term of more than 14 years (rather than 21 as at present);

(2) profits *à prendre* in gross; and

(3) franchises.

We offer as a possible alternative to (1) the possibility of retaining the present position by which leases granted for more than 21 years are *required* to be registered, but *permitting* leases of more than 14 years to be registered.

3.52 We also recommend that—

(1) the Lord Chancellor should have power to reduce by statutory instrument the duration of leases that must be registered; and

[155] *Frazer v Walker* [1967] 1 AC 569, 585, *per* Lord Wilberforce. See D Skapinker, "Equitable Interests, Mere Equities, 'Personal' Equities and 'Personal Equities' - Distinctions with a Difference" (1994) 68 ALJ 593.

(2) manors should cease to be regarded as land for the purposes of the Land Registration Act (and so be incapable of protection by registration).

3.53 We ask readers whether the range of registered dispositions should be extended to the creation or transfer of any rights or interests in land which do not have that status under the present law.

3.54 We seek to clarify the status of certain rights which are at present uncertain, and recommend that—

(1) for the purposes of determining priorities, rights of pre-emption should take effect as interests in registered land from the time at which they are created;

(2) in relation to registered land, an equity arising by estoppel or acquiescence should be regarded as an interest from the time at which it arises; and

(3) rights acquired or in course of being acquired by prescription should be regarded as interests in registered land.

By characterising any of these rights as an interest, it would be capable of protection, either as a minor interest by an entry on the register, or, where the person having the benefit of the right is in actual occupation of the land, as an overriding interest.

3.55 Finally, we make recommendations as to the meaning of both "purchaser" and "valuable consideration" in any legislation. We take the view that considerations of good faith and notice are unnecessary in dealings with registered land both because of the protection given to overriding interests and because of the wide range of personal remedies that are available to counteract unconscionable conduct.

PART IV
OVERRIDING INTERESTS - THE APPROACH TO REFORM

INTRODUCTION

4.1 In Parts IV and V we examine overriding interests. These are, by definition, interests in or over registered land which do not appear on the register but which will nevertheless bind transferees of the land.[1] All but one of the rights that can exist as overriding interests are currently listed in section 70(1) of the Land Registration Act 1925.[2] Because such rights subsist and operate outside the register, they are an inevitable source of tension within the land registration system. In making proposals for reform there is often a difficult balance to be struck between, on the one hand, the desire to achieve a fair result in individual cases, and on the other, the goal of making conveyancing simpler, quicker and cheaper, which is the justification for title registration.

4.2 The structure of this Part is as follows. First, we explain the rationale of overriding interests. Secondly, we consider the criticisms that have been made of such interests as a category of rights in registered land. Thirdly, we examine some of the proposals for reform that were made by the Law Commission in its Third Report and explain why we are unable to accept two of its principal recommendations. Finally, we outline the strategy that we have adopted towards reform and the principles upon which it is based.

4.3 Although we consider the different overriding interests individually in Part V of this Report, it may be helpful at this stage to indicate in summary form the nature of the rights in question.[3] The following are the main categories of overriding interests—

(1) certain easements and profits, customary and public rights[4] and appurtenant rights;[5]

(2) liabilities having their origins in tenure;[6]

(3) liabilty to repair a church chancel;[7]

[1] See Land Registration Act 1925, s 3(xvi).

[2] For the exception, see below para 5.2. Until recently, there were *two* categories of overriding interests that were not listed in s 70(1). However, one of these has now been added to the section by amending legislation: see s 70(1)(*m*); below, para 5.97.

[3] This is not intended to be a precise list. For the exact content of each of the categories, see Part V.

[4] Land Registration Act 1925, s 70(1)(*a*); below, paras 5.2, 5.25 and 5.30.

[5] Land Registration Rules 1925, r 258; below, para 5.2.

[6] Land Registration Act 1925, s 70(1)(*b*); below, para 5.32.

[7] *Ibid*, s 70(1)(*c*); below, para 5.37.

(4) liability in respect of embankments, and sea and river walls;[8]

(5) liability to make various payments in lieu of tithe or tithe rentcharge;[9]

(6) squatters' rights;[10]

(7) rights of persons in actual occupation;[11]

(8) interests excluded from the effect of registration where the proprietor is registered with a title other than absolute title;[12]

(9) local land charges;[13]

(10) seignorial and manorial rights and franchises;[14]

(11) leases granted for 21 years or less;[15]

(12) certain mineral rights in relation to property registered prior to 1926;[16] and

(13) rights in coal.[17]

THE RATIONALE OF OVERRIDING INTERESTS

Why do we have overriding interests?

4.4 The orthodox explanation for the existence of overriding interests is that they are—

> various minor liabilities which are not usually, or at any rate not invariably, shown in title-deeds or mentioned in abstracts of title, and as to which, therefore, it is impracticable to form a trustworthy record on the register... As to these, persons dealing with registered land must obtain information *aliunde* in the same manner and from the same sources as persons dealing with unregistered land obtain it.[18]

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". Furthermore, as will become apparent from the analysis of individual

[8] *Ibid*, s 70(1)(*d*); below, para 5.38.

[9] *Ibid*, s 70(1)(*e*); below, para 5.40.

[10] *Ibid*, s 70(1)(*f*); below, para 5.42.

[11] *Ibid*, s 70(1)(*g*); below, para 5.56.

[12] *Ibid*, s 70(1)(*h*); below, para 5.78.

[13] *Ibid*, s 70(1)(*i*); below, para 5.80.

[14] *Ibid*, s 70(1)(*j*); below, para 5.84.

[15] *Ibid*, s 70(1)(*k*); below, para 5.87.

[16] *Ibid*, s 70(1)(*l*); below, para 5.95.

[17] *Ibid*, s 70(1)(*m*); below, para 5.97.

[18] Brickdale & Stewart Wallace's *Land Registration Act, 1925* (4th ed 1939) p 190. The substance of the passage is retained in Ruoff & Roper, *Registered Conveyancing*, 6-04.

overriding interests in Part V of this Report, this explanation of the rationale of such interests is no longer correct in all respects, whatever the position may have been perceived to be when the legislation was first enacted. 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 the person who has the benefit of the right to register it as a means of securing its protection*. As we shall explain, not every overriding interest can be justified on that basis, and this in itself is a reason for examining such interests in detail. An examination of the list of overriding interests - at least as they have come to be understood in practice - suggests that most of them fall into five tolerably clear categories.

Categories of overriding interests

Those which provide a means of accommodating rights which may be created informally or where the origins of the rights may be obscure

4.5 First, overriding interests provide a means of accommodating rights which can be created (or may arise) informally, and where registration at the time of creation may therefore be unrealistic. These include—

(1) easements that arise by prescription or by implied grant or reservation;[19]

(2) the rights of adverse possessors;[20] and

(3) in the case of persons in actual occupation, rights arising by estoppel or constructive trust.[21]

4.6 The inclusion of customary and public rights as overriding interests,[22] is justifiable on a similar basis, namely the obscurity that may surround their origins. Customary rights can only be established by long user - in theory (but not in practice) this must be shown from the beginning of legal memory in 1189.[23] Although public rights can of course arise in other ways, it is not uncommon for their origins to be uncertain and undocumented and, in effect, to depend upon proof of long exercise.[24]

Rights that had overriding status prior to 1926

4.7 Secondly, rights which were the equivalent of overriding interests under the previous land registration legislation[25] became overriding interests under the Land Registration

[19] See Land Registration Act 1925, s 70(1)(*a*); but note the doubts about whether such rights arising by implied grant and reservation really are accommodated by the system of registered title: below, para 5.11.

[20] Land Registration Act 1925, s 70(1)(*f*); below, para 5.42.

[21] *Ibid*, s 70(1)(*g*); below, para 5.56.

[22] *Ibid*, s 70(1)(*a*); below, paras 5.25, 5.30.

[23] See Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 849. There is in fact some uncertainty as to the sense in which the expression "customary rights" is employed in the Land Registration Act 1925: see below, para 5.25.

[24] Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 844.

[25] See Land Transfer Act 1875, s 18, as amended by the Land Transfer Act 1897. The rights were rather clumsily described as interests which were not deemed to be encumbrances within the meaning of the Land Transfer Act 1875.

Act 1925.[26] Most of these rights were of a kind that could no longer be created. The overriding interests that fall within this category are—

(1) liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges having their origin in tenure;[27]

(2) chancel repair liability;[28]

(3) liability in respect of embankments, and sea and river walls;[29]

(4) liability to make various payments in lieu of tithe or tithe rentcharge;[30]

(5) seignorial and manorial rights and franchises;[31] and

(6) in relation to land registered—

(a) prior to 1898, mineral rights created before that date; and

(b) after 1897 and before 1926, mineral rights created prior to first registration.[32]

It would obviously have been unreasonable in those circumstances to impose an obligation to register such rights.[33]

Incorporeal rights in existence at the time of first registration but not registered

4.8 Thirdly, incorporeal rights such as easements and profits, which were in existence but were not noted on the register at the time of the first registration of the land burdened by them, take effect as overriding interests.[34] The status of overriding interest here acts as a "fail-safe" mechanism to protect such rights in case they do not come to light on first registration.[35]

[26] The five categories of overriding interest that were introduced for the first time in the Land Registration Act 1925 were (i) customary and public rights (s 70(1)(*a*)); (ii) the rights of adverse possessors (s 70(1)(*f*)); (iii) the rights of persons in actual occupation (s 70(1)(*g*)); (iv) the rights excepted from the effect of registration in cases where title was registered with some title other than absolute (s 70(1)(*h*)); and (v) rights under local land charges (s 70(1)(*i*)).

[27] See Land Registration Act 1925, s 70(1)(*b*); below, para 5.32.

[28] *Ibid*, s 70(1)(*c*); below, para 5.37.

[29] *Ibid*, s 70(1)(*d*); below, para 5.38.

[30] *Ibid*, s 70(1)(*e*); below, para 5.40.

[31] *Ibid*, s 70(1)(*j*); below, para 5.84.

[32] *Ibid*, s 70(1)(*l*); below, para 5.95.

[33] There are other situations in the 1925 property legislation where a registration requirement was imposed prospectively, so as not to affect the existing method of protecting rights that had already been created. Thus restrictive covenants and equitable easements created before 1926 are not registrable as land charges in unregistered land, but continue to be protected by the doctrine of notice: see Land Charges Act 1972, s 2(5)(ii), (iii).

[34] This can be inferred from Land Registration Act 1925, ss 70(1)(*a*); 70(2); and 70(3).

[35] Cf *ibid*, s 70(2).

Rights which it would be inconvenient or pointless to register

4.9 Fourthly, some rights are overriding interests because it would be either inconvenient or even pointless to register them. Leases granted for a term not exceeding 21 years,[36] and rights in coal[37] both fall into this category.

Rights which are otherwise protected

4.10 Finally, there are rights which are otherwise protected and where it may therefore be regarded as otiose to expect them to be registered. An obvious example of this is the category of local land charges which are protected by registration on a register kept by the relevant local authority.[38] More controversially, the rights of those in actual occupation[39] are also explicable on this basis. At common law, the rights over land of a person in occupation - and perhaps in possession as well - were protected by that occupation or possession.[40] The exact scope of this principle was never precisely defined.[41] Sometimes it was explained on the basis that occupation gave notice of the rights of the occupier.[42] On other occasions, it was formulated more widely. The mere *fact* of occupation, whether or not it was apparent, was notice of the rights of the occupier.[43] Whatever the extent of the principle, the idea that an occupier was not required to take any further steps to protect his or her rights in the property was an ancient and deeply engrained one.

CRITICISMS OF OVERRIDING INTERESTS

Introduction

4.11 Although, as we have explained, it is possible to explain the rationale of most of the categories of overriding interests,[44] such interests have nonetheless been much criticised. In the following paragraphs we set out the most important grounds of criticism.

Title not absolute

4.12 First, the existence of overriding interests means that absolute title cannot be absolute in the true sense, because the register may not be a true mirror of the state of the title. However, the register could only be a wholly accurate reflection of the title at a price, namely the suppression of many third party rights. This is because in practice the nature of overriding interests is such that if they were now required to be registered,

[36] *Ibid*, s 70(1)(*k*); below, para 5.87.

[37] *Ibid*, s 70(1)(*m*); below, paras 5.97, 5.98, where an explanation is given as to why rights in coal are overriding interests.

[38] *Ibid*, s 70(1)(*i*); below, para 5.80.

[39] *Ibid*, s 70(1)(*g*); below, para 5.56.

[40] For a discussion, see Charles Harpum, "Overreaching, Trustees' Powers and the Reform of the 1925 Legislation" [1990] CLJ 277, 315 - 320.

[41] Nor, given the effect upon it of the provisions of the Law of Property Act 1925 and what is now the Land Charges Act 1972, is it ever likely to be.

[42] See, eg *Barnhart v Greenshields* (1853) 9 Moo PC 18, 32; 14 ER 204, 209.

[43] *Holmes v Powell* (1856) 8 De GM & G 572, 580 - 581; 44 ER 510, 514.

[44] See above, paras 4.4 and following.

some at least might not be.[45] They would therefore be defeated by any subsequent disposition for value of the land burdened by them.[46] There are in fact only two other ways in which such rights can be accommodated with the land registration system. First, they could simply be extinguished wholesale by statute. To do this in accordance with the European Convention of Human Rights, it would almost certainly be necessary to pay compensation to those deprived of their rights.[47] To adopt this option would involve an unquantifiable commitment to pay compensation on a potentially large scale. The second option is to accept (as the Land Registration Act 1925 does accept) that such rights can exist independently of the register.

Undiscoverability

4.13 Secondly, overriding interests are not necessarily discoverable from a reasonable inspection of land.[48] For example, to ascertain whether a property is subject to a liability to pay for chancel repairs,[49] it may be necessary to search the tithe records which are kept in several different branches of the Public Record Office. As those records are incomplete, there is in fact no certainty that a property is free from liability even when such a search has been made. As regards the rights of occupiers, it has been said that "there can be cases where a purchaser may make the most searching enquiries without discovering that the land in question is in the actual occupation of a third party".[50] A purchaser of registered land may find that he or she is bound by a right that has not been protected by an entry on the register,

> notwithstanding that there is no person other than the vendor in apparent occupation of the property and that careful inspection and inquiry has failed to reveal anything which might give the purchaser any reason to suspect that someone other than the vendor had any interest in or rights over the property.[51]

[45] See the discussion below, paras 4.25, 4.26.

[46] Where it can be demonstrated that a category of overriding interests is almost certainly obsolete, these considerations do not apply. In such cases we consider that the category should be removed from the list of overriding interests: see below, para 4.31.

[47] See Article 1 of the First Protocol of the Convention, considered below, para 4.27.

[48] This appears to have been recognised as a defect since the Act was passed: see Brickdale & Stewart Wallace's *Land Registration Act, 1925* (4th ed 1939) p 193; below, para 5.57.

[49] Which is an overriding interest under Land Registration Act 1925, s 70(1)(*c*).

[50] *Kling v Keston Properties Ltd* (1983) 49 P & CR 212, 222, *per* Vinelott J. Factually similar situations can produce different results: compare *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071 (parking a car on a strip 11' x 80' was *not* actual occupation) with *Kling v Keston Properties Ltd*, above (parking a car within a garage *was* actual occupation).

[51] *Kling v Keston Properties Ltd*, above, at p 222.

Rectification but no indemnity

4.14 The third criticism that is often made of overriding interests is one that is, in our view, unjustified. Where an overriding interest exists, the register may be rectified even as against a proprietor in possession in order to give effect to an overriding interest.[52] Furthermore, because a purchaser of registered land takes it subject to overriding interests,[53] when the register is so rectified, no indemnity is payable. This is because the proprietor is not a "person suffering loss by reason of any rectification of the register" within the meaning of the Land Registration Act 1925.[54] In such a case, all that the rectification of the register does is to ensure that it reflects the true state of affairs.[55] It is for this reason that we are unconvinced by this particular criticism of overriding interests. It should be noted that in this regard the position of registered land is exactly the same as unregistered land. A purchaser of unregistered land would not expect to receive state compensation because it transpired that part of the land that he or she had purchased belonged in fact to a squatter who had acquired title to it by adverse possession. Any remedy which the purchaser might have would be against the vendor on the implied covenants for title. It is not obvious to us that this outcome is wrong, particularly as the covenants for title now provide a more effective remedy in many such instances than was formerly the case.[56]

Unsatisfactory drafting

4.15 Fourthly, the drafting of section 70(1) of the Land Registration Act 1925 is unsatisfactory for the following reasons—

(1) the range of rights which may exist as overriding interests is not clearly or precisely defined;

(2) a number of rights that are listed as overriding interests in the section are now obsolete;

(3) certain rights which must in practice be treated as overriding interests are omitted from the section;

(4) it fails to exclude - as in principle it should - expressly created easements,[57] which have in consequence been held to be overriding interests;[58]

(5) the wording of the section is verbose and several of the rights listed are no more than examples of broader categories contained within it.

4.16 Given that overriding interests operate in effect outside the register, it is clearly important that the range of such rights should be defined with as much precision and clarity as possible and that the list should be no wider than is necessary. We note that

[52] Land Registration Act 1925, s 82(3). It is only in the four exceptional cases listed in that subsection, of which this is one, that the register may be rectified against a proprietor who is in possession. We consider this matter further below, at paras 8.23 and following.

[53] Land Registration Act 1925, ss 20(1), 23(1).

[54] Section 83(1) (as substituted).

[55] *Re Chowood's Registered Land* [1933] Ch 574.

[56] See the Law of Property (Miscellaneous Provisions) Act 1994.

[57] Which ought of course to be completed by registration as registered dispositions.

[58] See below, paras 5.8, 5.9.

in a recent decision, Staughton LJ expressed a similar sentiment when he said that "[i]t is desirable that overriding interests should be in a narrow rather than a wide class and should be clearly defined".[59]

THE RECOMMENDATIONS IN THE THIRD REPORT

The approach to reform

4.17 With the criticisms listed above as a background, the Third Report made a number of recommendations in relation to the reform of overriding interests.[60] In making its recommendations for reform, the Commission applied two principles.[61] First, in the interests of certainty and of simplifying conveyancing, the class of right which might bind a purchaser otherwise than as the result of an entry in the register should be as narrow as possible.[62] This first principle was however subject to the second, which was that—

> interests should be overriding where protection against purchasers is needed, yet it is either not reasonable to expect nor sensible to require any entry on the register.[63]

The Joint Working Group, would not dissent from these objectives.[64] However, we would place the emphasis rather differently. In our opinion, it is a necessary corollary of the first principle that the *only* overriding interests should be those "where protection against purchasers is needed, yet it is either not reasonable to expect nor sensible to require any entry on the register".

Two specific proposals

4.18 While the Joint Working Group agrees with many of the recommendations made by the Law Commission in its Third Report,[65] two of the most important of those proposals - which were interlinked - have proved to be particularly controversial both because of their cost implications and because they cut across the principles which have hitherto governed registered land. We recommend that they should be abandoned because there is no realistic prospect of their being implemented in the foreseeable future.

Indemnity for overriding interests

4.19 The first was that indemnity should be payable when the register is rectified to give

[59] *Overseas Investment Services Ltd v Simcobuild Construction Ltd* (1995) 70 P & CR 322, 330. See too Peter Gibson LJ at p 327: "the court should... not be astute to give a wide meaning to any item constituting an overriding interest".

[60] Law Com No 158, Part II.

[61] *Ibid*, para 2.6.

[62] This principle was in fact derived from Transfer of Land: Land Registration (Second Paper) (1971) Working Paper No 37, para 34.

[63] Law Com No 158, para 2.6.

[64] Cf above, para 4.16.

[65] As will be apparent from the recommendations made in Part V.

effect to an overriding interest.[66] There is undoubtedly a strong case for this proposal. If overriding interests are not discoverable on inspection they can work great hardship on purchasers and the system of registered title - which is supposed to increase the security of title - can be seen to fail them. Nevertheless, this proposal has proved to be the major stumbling block to the acceptance of the Third and Fourth Reports, however desirable many other proposals in those Reports might be. We consider that, notwithstanding its attractions, it is open to a number of serious practical objections—

(1) It would create an open-ended financial liability. The extent of this liability would be incapable of prediction but it might be considerable. The cost would have to be borne by all users of the Land Registry. It would undoubtedly increase registration fees and thereby detract significantly from the attractiveness of land registration.

(2) The potential liability would never end. There would be no final extinction of overriding interests or prohibition on their creation.

(3) It would mark a significant change in the concept of indemnity. Hitherto indemnity has been paid for those errors in the register which cause loss.[67] Where the register is rectified to give effect to an overriding interest, the change does no more than reflect the reality of the title.[68] The only loss that the registered proprietor may suffer in such circumstances is the cost of the rectification and indemnity proceedings and this is in practice recoverable from the Registry as indemnity.

4.20 We note for the record that the recommendation in the Third Report that indemnity should be payable in respect of overriding interests—

(1) was contrary to the proposal made by the Law Commission in an earlier Working Paper that it should not;[69] and

(2) was not itself the subject of a full public consultation in the way that is usual with the Law Commission's proposals.[70]

[66] Law Com No 158, paras 2.10 - 2.14. See too Law Com No 173, Draft Bill, Cls 45(1)(c) and 45(2).

[67] See Land Registration Act 1925, s 83 (as substituted by Land Registration Act 1997, s 2).

[68] In some cases it can be said that rectification of the register to give effect to an overriding interest does put right a "mistake", as where A is registered as proprietor of land to which B had previously acquired title by adverse possession (as in *Chowood Ltd v Lyall (No 2)* [1930] 2 Ch 156). In others, there may have been no "mistake" in any real sense, either because the overriding interest arose after a person was registered as proprietor (as where a squatter acquires title by adverse possession subsequent to such registration, and where the registrar is *required* to register the squatter as proprietor: Land Registration Act 1925, s 75(3)), or because the register is amended to record some encumbrance which had hitherto bound the proprietor as an overriding interest (as where an easement that arose by prescription is entered on the register).

[69] Transfer of Land: Land Registration (Third Paper), (1972) Consultation Paper No 45, para 101. This proposal does not appear to have attracted any criticism from consultees.

[70] See above, para 1.9.

Overriding interests and general burdens

4.21 The second, interconnected proposal was that the present categories of overriding interests should be sharply reduced and a number of existing overriding interests should be recategorised as "general burdens". Broadly speaking, a purchaser of registered land takes it subject to entries on the register and overriding interests.[71] It was noted in the Third Report, however, that registration did not confer on the registered proprietor freedom from any right, liability or obligation affecting land which did *not* amount to an estate or interest, such as the liability to the consequences of planning laws or to tortious or criminal liability in relation to land.[72] These obligations could be regarded as "general burdens". The Law Commission considered that public rights, chancel repair liability, local land charges, certain pre-1925 mineral rights, and franchises should all cease to be overriding interests and should instead fall into this category of general burdens.[73] The one significant feature of general burdens as they were proposed was that there would never be any question of rectifying the register to give effect to them. As a result, no indemnity would be payable in respect of them.[74] As the Joint Working Group recommends that the proposals as to the payment of indemnity for overriding interests should be abandoned, a separate category of general burdens becomes wholly unnecessary.[75] In any event, the Joint Working Group considers that the division drawn in the Third Report between general burdens and overriding interests was in practice an arbitrary one.[76]

4.22 **We therefore provisionally recommend that—**

(1) the rule that no indemnity should be payable where the register is rectified to give effect to an overriding interest should be retained; and

(2) in consequence, there should be no new category of "general burdens".

STRATEGIES FOR REFORM

Introduction

4.23 The scope for the reform of overriding interests is necessarily limited for the reasons

[71] Land Registration Act 1925, ss 20(1), 23(1).

[72] Law Com No 158, para 2.1.

[73] *Ibid*, paras 2.15 and 2.107. See too Law Com No 173, Draft Bill, Cl 5(3), giving a rather fuller list. See Law Com No 158, paras 2.6 and 2.24 for the criteria adopted by the Commission in selecting these particular rights.

[74] Law Com No 158, paras 2.15 and 2.107.

[75] For proposals that will put it beyond doubt that transferees of registered land take it subject to burdens imposed by the general law which are not encumbrances even though such rights are not overriding interests, see below, para 4.36.

[76] Two examples will illustrate the point. First, certain rights that were designated by the Commission as "general burdens" for which no indemnity would have been payable were rights that cause considerable difficulties as a matter of conveyancing practice because they are not readily discoverable. An obvious example is chancel repair liability. Secondly, the practical difference between customary rights (which would have remained overriding interests and for which indemnity would therefore have been payable) and public rights (which would have been general burdens) is, in some cases at least, negligible.

outlined above.[77] As we have already indicated,[78] our principal objective in making proposals for reform is to ensure that a right is protected as an overriding interest only where it is unreasonable or unrealistic to expect it to be registered. To achieve this, the Joint Working Group believes that it is necessary to have recourse to a number of strategies. We have considered six. Of these, we have rejected one and accepted the second only in limited circumstances. We consider that the remaining four offer the best prospects of success.

Abolition of substantive rights?

4.24 First, some rights which can exist as overriding interests are anomalous and may be difficult to discover.[79] These could be abolished as a matter of substantive law but only after a detailed consideration of each of them. Although it may be desirable that such an exercise should be undertaken, it is not one that can be done as part of this Report. It would have to be conducted on the clear understanding that it could have very significant financial implications.[80] We have therefore rejected this as a viable strategy for reform.

Remove the status of overriding interest from certain rights?

The recommendations in the Third Report

4.25 Secondly, some rights which are presently listed as overriding interests might lose their status as such. If they were still extant, they would instead become minor interests which would require registration if they were to bind third parties. In the Law Commission's Third Report, the Commission recommended that a number of overriding interests should be treated in this manner.[81] The Commission's recommendations encompassed both rights that are for all practical purposes dead, and those which are still actively enforced. As regards the former, there is little point in apparently perpetuating rights that have in practice ceased to be asserted. Indeed it is in the public interest to remove any risk that rights that had long been abandoned might be resurrected at some future date in circumstances where the landowner could not have discovered their existence. However, where there is a real prospect that such rights exist on any scale, it may be unreasonable to remove their overriding status in the absence of other countervailing considerations.

4.26 There are several reasons for this. First, many such persons would not appreciate the need to register their rights (though this difficulty could be minimised by consultation and publicity). Secondly, in order to register their rights they would have to pay for legal advice and the costs of registration (though it may be possible to meet this objection in part by transitional provisions). Thirdly, failure to register carries with it the risk that the right might be lost. This would occur if the land affected by it was sold

[77] See para 4.12.

[78] Above, para 4.17.

[79] See, eg chancel repair liability and certain manorial rights.

[80] Because of the European Convention on Human Rights. See above, para 4.12; and below, para 4.27.

[81] See Law Com No 158, paras 2.82 and following. The rights in question were the liability to repair highways by reason of tenure, liability in respect of embankments, and sea and river walls, crown rents, payments in lieu of tithe and for the redemption of certain tithe rentcharges, and seignorial and manorial rights (other than franchises).

to a purchaser, who would necessarily take free of it as an unprotected minor interest.[82] As we explain in the following paragraphs, this might be regarded as tantamount to expropriation. Finally, experience of the workings of the one modern statute that has required the registration of existing property rights on a large scale - registration of rights of common under the Commons Registration Act 1965 - strongly suggests that it is an experiment not to be repeated.[83]

The European Convention on Human Rights

4.27 Implicit in these reasons is a particularly important issue that was not considered in the Third Report. The European Convention for the Protection of Human Rights and Fundamental Freedoms (which we refer to hereafter as "ECHR") is likely to be incorporated into domestic law in the near future.[84] Article 1 of the First Protocol of the Convention provides that—

> 1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[85]
>
> 2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

4.28 Article 1 has been held by the European Court of Human Rights in *Sporrong and Lönnroth v Sweden*[86] to comprise three distinct rules. The first "enounces the principle of peaceful enjoyment of property". The second "covers deprivation of possessions and subjects it to certain conditions". The third "recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose".

4.29 The decisions of that Court on the interpretation of this Article, establish the following propositions that are relevant to the present issue—

(1) In substance it guarantees the right of property.[87] It is clear that an interference with the right to peaceful enjoyment can be brought about by legislation which in some way deprives a person either of his or her

[82] See Land Registration Act 1925, ss 20, 23.

[83] Not only has the Commons Registration Act 1965 provoked considerable litigation, but it has been necessary to pass corrective legislation - the Common Land (Rectification of Registers) Act 1989 - which has itself led to a number of reported decisions.

[84] The Human Rights Bill is presently before Parliament.

[85] It has been held by the European Court of Human Rights that "the general principles of international law are not applicable to a taking by a State of the property of its own nationals": *James v United Kingdom* (1986) 8 EHRR 123, 151, para 66. For this reason, this particular element of the Article has no relevance here.

[86] (1982) 5 EHRR 35, 50, para 61. This analysis has been applied by the Court in all subsequent cases.

[87] *Marckx v Belgium* (1979) 2 EHRR 330, 354, para 63.

possessions or the effective rights that go with them.[88]

(2) The exception of deprivation in the public interest has been widely interpreted to encompass at least some situations where there is a transfer of property from one private individual to another. It need not be a deprivation by the state.[89] The Court has said that "a taking of property effected in pursuance of legitimate social, economic or other policies may be 'in the public interest', even if the community at large has no direct use or enjoyment of the property taken".[90]

(3) In determining what is "in the public interest", a state enjoys "a margin of appreciation" so that it is "for national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken".[91] It is only if the state's assessment is manifestly unreasonable that the deprivation will be taken to fall outside the exception.[92]

(4) There must be "a reasonable relationship of proportionality between the means employed and the aim sought to be realised",[93] when a state takes away property rights in the public interest.[94] In particular, "the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances".[95]

(5) By contrast, where the regulation of property rights by the state (rather than their expropriation) is in issue,[96] "a right to compensation is not inherent".[97] Whether or not compensation should be paid in such a case will depend upon an assessment of "the proportionality of the response in question".[98]

4.30 If the status of overriding interest were to be removed from an existing right that had hitherto enjoyed it, so that it took effect thereafter only as a minor interest that step

[88] *Sporrong and Lönnroth v Sweden*, above (planning blight caused by expropriation permits that were never eventually exercised).

[89] *James v United Kingdom*, above, at p 140, para 40 (leasehold enfranchisement legislation). See too *Mellacher v Austria* (1989) 12 EHRR 391.

[90] *James v United Kingdom*, above, at p 142, para 45.

[91] *Ibid*, at p 142, para 46.

[92] *Ibid*, at p 144, para 49; *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301, 336, para 37.

[93] *James v United Kingdom* (1986) 8 EHRR 123, p 145, para 50; *Holy Monasteries v Greece* (1994) 20 EHRR 1, 48, para 70. It has also been expressed in terms of striking a fair balance between the demands of the general interest of the community and the protection of the individual's fundamental rights: *Stran Greek Refineries v Greece* (1994) 19 EHRR 293, 328, para 69.

[94] In other words, when the first and not the second paragraph of Article 1 is in issue.

[95] *James v United Kingdom*, above, at p 147, para 54. This principle has been frequently applied by the Court: see, eg *Holy Monasteries v Greece*, above at p 48, para 71.

[96] That is, where the second and not the first paragraph of Article 1 is relevant.

[97] *Banér v Sweden* No 11763/85, 60 DR 128, 142 (1989) (European Commission on Human Rights).

[98] *Ibid*.

might be regarded as either—

(1) a deprivation of a property right within the first paragraph of Article 1 of the First Protocol;[99] or

(2) a control of use within the second paragraph of Article 1 of the First Protocol.[100]

As we have explained above,[101] this reduction in status would jeopardise the right and might lead to its destruction. However, we consider that this step would probably fall within the "public interest" exception contained in the Article. The objective of the legislation would be the legitimate economic aim of simplifying and cheapening the transfer of land by making the rights in question more readily discoverable. By itself this would not of itself satisfy the requirements of Article 1—

(1) If the reduction of status fell within the first paragraph of that Article, the requirement of proportionality would not normally be satisfied unless adequate provision were made for compensation in such cases. That compensation might have to come from the Land Registry (and this would have considerable resource implications), or it might take the form of a payment from the person whose land had previously been burdened by the right.[102] Any scheme to give effect to the latter would be difficult both to devise and to implement.

(2) If the reduction of status fell within the second paragraph of the Article, there might still be an issue of compensation "in cases where a regulation of use may have severe economic consequences to the detriment of the property owner".[103] While this seems unlikely in relation to the overriding interests where abolition is likely to be an issue,[104] it cannot be ruled out.[105]

We have therefore concluded that, as the removal of overriding status in the absence of compensation carries with it at least *some* risk of contravening Article 1, it cannot be contemplated except where—

(1) rights can reasonably be regarded as obsolete;

[99] That is the second rule in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 50, para 61; above, para 4.28.

[100] That is the third rule in *Sporrong and Lönnroth v Sweden*, above.

[101] See para 4.26.

[102] Cf *James v United Kingdom* (1986) 8 EHRR 123.

[103] *Banér v Sweden* No 11763/85, 60 DR 128, 142 (1989). There is some difficulty in knowing exactly what this means. Suppose a person was entitled to corn rents of £2,000 per annum from certain land, and that right lost the overriding status it presently has under Land Registration Act 1925, s 70(1)(*e*), below, para 5.40. If, as a result of a sale of the land burdened, the right to corn rents was then lost, would that amount to "severe economic consequences" if, say, the recipient depended in part on that income?

[104] Cf above, para 4.25.

[105] No doubt other steps could be taken, eg allowing a long transitional period to register such rights before they lost their overriding status, and giving extensive publicity to the need to register them.

(2) those affected have consented;[106] or

(3) there are other strong policy grounds for so doing and suitable transitional arrangements are put in place.[107]

The extent of obsolete overriding interests

4.31 In the light of the recommendations in the Third Report, the Law Commission has made extensive preliminary inquiries to discover—

(1) which overriding interests of those recommended for abolition in that Report, if any, are obsolete; and

(2) what difficulties are perceived to exist in relation to the possible removal of overriding status from those categories of interests.

We are very grateful to those who kindly assisted us in these inquiries and whom we have listed in the Appendix to this Report. The conclusion that we have drawn from this survey is that there are in fact only two categories of overriding interest that can safely be abolished in whole or part on the grounds that they are in practice obsolete.[108] We make appropriate recommendations below.[109] We would stress that, as a strategy for reducing the impact of overriding interests, the repeal of those categories which are obsolete is, by definition, largely a paper exercise. It does however have the merit of removing any uncertainty for the future.

Clarify the meaning of the legislation

4.32 Thirdly, the drafting inadequacies that presently exist in section 70(1) (which have already been outlined[110]) could be addressed. It is important that the existing categories of overriding interest should be clearly and accurately defined. We consider this to be essential to any reform of the law and we make recommendations that will have this effect.

Redefine the scope of certain overriding interests for the future

4.33 The fourth possible strategy for reform is closely connected with the third. There are, under the present law, particular uncertainties in relation to the scope of specific

[106] Article 1 will not avail those who have consented to the deprivation of their rights: see *Holy Monasteries v Greece*, above, at p 49, paras 76 - 78. As it happens, we have not in the end been able to recommend the abolition of overriding status for any rights on the basis of consent: cf below, para 5.40.

[107] See below, paras 5.42 and following, where we identify as such a case the rights of squatters who are no longer in actual occupation of land.

[108] See Land Registration Act 1925, ss 70(1)(*b*) (various tenurial liabilities) and 70(1)(*e*) (payments in lieu of tithe, etc). In the case of the latter, one of the rights encompassed by the paragraph - the liability to pay corn rents - does still exist. Although in many cases it has ceased to be economic to enforce it, and the principal recipient, the Church Commissioners, have raised no objections to the abolition of its overriding status, we have discovered that other landowners do still receive significant sums from it. The overriding status of the liability to pay corn rents is therefore recommended for retention.

[109] Paras 5.36 and 5.40.

[110] See para above 4.15.

overriding interests. There are also a number of rights which are overriding interests which, having regard to the fundamental principles of land registration, should not be. In particular, rights which have been expressly granted or reserved over registered land ought to be entered on the register. We consider that the scope of overriding interests should accord with the fundamental principles of registered land that we identified in Part I of this Report.[111] The fourth strategy is therefore both to resolve these uncertainties and to abolish the status of overriding interest in relation to rights to which it should not apply.[112] This strategy offers a substantial opportunity to reduce the number of overriding interests for the future.

Encourage the registration of overriding interests

4.34 Fifthly, we consider that positive steps should be taken to encourage the registration of overriding interests which come to light when a person acquires registered land. We believe that the obligations to make disclosure that the law imposes on vendors of land may provide a means of achieving this objective. However, we consider that incentives as well as penalties should be used to encourage the registration of overriding interests. An obvious way to achieve this is to improve significantly the protection that is given to minor interests that are entered on the register. We explain in Part VI of this Report that if an interest that has hitherto been an overriding interest is protected instead as a minor interest by means of a caution, it is possible that it may be *less* well protected than it was before.[113] We make recommendations in that Part to remedy that defect.[114]

Electronic conveyancing

4.35 Finally, although electronic conveyancing will be introduced over a period of years, it offers what is probably the most effective means of limiting the creation of overriding interests for the future. In Part XI, we outline the system of electronic conveyancing that we envisage will be introduced.[115] One of its most important features is that it will be impossible to create many rights and interests in or over registered land except by registering them.[116] This will necessarily restrict the ambit of what is at present one of the widest overriding interests, the rights of persons in actual occupation.[117]

RIGHTS AND LIABILITIES UNDER THE GENERAL LAW ARE NOT OVERRIDING INTERESTS

4.36 We would stress by way of clarification that only rights and liabilities which can in law constitute proprietary rights and interests in or over land are capable of being overriding interests. This means that neither—

(1) rights and liabilities that are merely potential and not actually in existence; nor

[111] See above, para 1.14.

[112] See above, para 4.17.

[113] See below, para 6.18.

[114] See below, paras 6.50 and following.

[115] See below, paras 11.8 and following.

[116] See below, para 11.10.

[117] See below, para 5.56.

(2) rights and liabilities that are imposed in relation to property generally;[118]

should be regarded as proprietary rights or interests.[119] To the extent that owners of land are bound by such rights it is not because they are proprietary rights or interests but because they are part of the general law.[120] Any right that is not a proprietary right or interest by these criteria cannot be an overriding interest. **We therefore provisionally recommend that section 70(1) should be redrafted to make it clear that—**

(1) only proprietary rights could subsist as overriding interests; and

(2) rights and liabilities that were—

(a) merely potential and not actually in existence; or

(b) imposed in relation to property generally;

would bind a transferee of registered land under and to the extent that is provided by the general law.

SUMMARY AND KEY ISSUES

4.37 In this Part we explain in detail why there are overriding interests. They provide a means of protection for rights that a person cannot reasonably be expected to register. We explain the criticisms that have been made of them. Of these, the most powerful are that—

(1) overriding interests may be undiscoverable; and

(2) the drafting of section 70 of the Land Registration Act 1925 (which lists all but one of the overriding interests) is defective in a number of respects.

4.38 We examine the approach that was taken to overriding interests by the Law Commission in its Third and Fourth Reports and we provisionally reject two proposals that were made in them, namely—

(1) that indemnity should be payable where the register is rectified in respect of an overriding interest (which is not at present the case); and

(2) that there should be a new category of interests called "general burdens" in respect of which such indemnity would not be available.

[118] Cf Ruoff & Roper, *Registered Conveyancing*, 6-09: "all land is subject to the potential rights and powers of central and local government on behalf of the public arising, for example, from such matters as planning control or compulsory acquisition". These rights under the general law are not the same as the "general burdens" to which registered land would have been subject if the proposals made in the Third Report had been accepted: see above, para 4.21. Such general burdens would have included rights which are presently overriding interests, namely public rights, chancel repair liability, local land charges, certain pre-1925 mineral rights and franchises. None of these overriding interests falls within the proposals contained in this paragraph.

[119] See Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 611.

[120] We note that in Law of Property (Miscellaneous Provisions) Act 1994, s 3(2) this point was expressly recognised.

In respect to each, we recommend that the law should remain unchanged.

4.39 We examine a number of possible strategies for the reform of overriding interests—

(1) We reject as a strategy the wholesale abolition of substantive rights as a means of reducing the number of overriding interests. Any such abolition would have to be conducted as a separate law reform exercise with full regard to its implications.

(2) We accept that it may sometimes be appropriate to remove the overriding status of interests and require them to be protected instead by registration as minor interests. The danger of abolishing the overriding status of an interest is that to do so *might* contravene the provisions of the ECHR which protect rights of property. We consider that it can only be justified—

(a) if such rights are obsolete;

(b) where the persons having the benefit of them agree to it; or

(c) where there are significant policy grounds for doing so and appropriate transitional provisions are made.

(3) We regard it as highly desirable that the legislation should be clarified so that the existing categories of overriding interest are accurately defined.

(4) We consider that the scope of specific overriding interests should be prospectively redefined so as to exclude from them rights that ought to be protected on the register.

(5) We think it desirable that positive steps should be taken to encourage the entry on the register of overriding interests which come to light on a disposition of land. Part of this strategy is to provide better protection for rights that are entered on the register.

(6) The introduction of electronic conveyancing will of itself significantly reduce the number of overriding interests, because it will not be possible to create many rights except by registering them.

4.40 We provisionally recommend that the legislation should be redrafted to make it clear that rights and liabilities under the general law are not overriding interests.

PART V
OVERRIDING INTERESTS - PROPOSALS FOR REFORM

INTRODUCTION

5.1 In this Part we begin by considering critically the operation of the thirteen categories of overriding interest that are listed in section 70(1) of the Land Registration Act 1925. We examine each of these categories in the light of the general principles of land registration that we have identified and in accordance with the strategies for reform that we have set out above.[1] We make recommendations in relation to every category. In some cases, we recommend the abolition of the overriding interest. In others, we suggest either that there should be no change or that the provision should be redrafted in some way. Finally, we examine a number of general points relating to the operation of overriding interests.

EASEMENTS AND ANALOGOUS RIGHTS

Section 70(1)(a)

Introduction

5.2 There are at present two provisions which deal with easements, profits, customary and public rights and they must be considered together. The first is contained in section 70(1)(*a*) of the Land Registration Act 1925, which provides that the following rights shall be overriding interests—

> Rights of common, drainage rights, customary rights (until extinguished), public rights, profits *à prendre*, rights of sheepwalk, rights of way, watercourses, rights of water, and other easements not being equitable easements required to be protected by notice on the register.

Secondly, by rule 258 of the Land Registration Rules 1925—

> Rights, privileges, and appurtenances appertaining or reputed to appertain to land or demised, occupied, or enjoyed therewith or reputed or known as part or parcel of or appurtenant thereto, which adversely affect registered land are overriding interests within section 70 of the Act.

These provisions are amongst the most unsatisfactory in the Land Registration Act 1925 and the Land Registration Rules 1925 respectively, and it is necessary to make a detailed criticism of them. In so doing, we echo many of the points that were made about them in the Law Commission's Third Report.[2]

5.3 The wording of section 70(1)(*a*) encompasses four distinct entities—

(1) easements;

[1] Paras 4.23 - 4.35.

[2] See Law Com No 158, paras 2.19 - 2.21; 2.25 - 2.35.

(2) profits *à prendre*;

(3) customary rights; and

(4) public rights.

5.4 The following expressions found in the paragraph are all superfluous[3]—

(1) "rights of common" and "rights of sheepwalk"[4]: these are examples of profits *à prendre*;

(2) "drainage rights" and "rights of way": these are either examples of easements or of public rights; and

(3) "watercourses": in so far as these are not natural rights, they are just one example of an easement.[5]

5.5 We examine in turn the position of the four categories of rights that presently fall within section 70(1)(*a*) in the light of the interpretation that has been given to that paragraph.

Easements and profits à prendre

5.6 The paragraph protects both easements and profits *à prendre* "not being equitable easements required to be protected by notice on the register". Where a registered proprietor grants or reserves an easement or profit *à prendre*, that disposition is required by the Land Registration Act 1925 to be completed by registration.[6] If such a disposition is not registered, it takes effect as an unregistered minor interest, and as such is liable to be overridden by a disposition of the registered land for valuable consideration.[7] If the land registration system is to work effectively, the principle that rights expressly created should be registered should be applied absolutely.[8] It provides a powerful incentive to complete a disposition by registration and this incentive should not be undermined by providing a fall-back position by which such a disposition can take effect as an overriding interest although not registered. As we explain in Part XI, within the comparatively near future, we expect registration to become an essential step in the express *creation* of a right, so that no right would come into being unless and until it was registered.

3 *Ibid*, para 2.20.

4 More accurately described as rights of "fold-course": see *Robinson v Maharajah Duleep Singh* (1879) 11 ChD 798.

5 In *Taylor v Corporation of St Helens* (1877) 6 ChD 264, 271, Jessel MR considered that the express grant of a watercourse could mean one of three things: (i) an easement to the running of water; (ii) the channel-pipe or drain which contained the water; or (iii) the land over which the water flowed. If it was not clear from the context which of these it was to mean, it would be taken to mean (i). Natural rights cannot be overriding interests because they are not property rights at all but are protected by the law of tort: see Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 842.

6 Sections 18(1)(*c*) & (*d*); 19(2); 21(1)(*b*) & (*c*); 22(2).

7 See Land Registration Act 1925, s 101; above, para 2.20.

8 See above, para 1.14.

5.7 It was long thought that equitable easements and profits *à prendre* could not be overriding interests within section 70(1)(*a*) because they were necessarily excluded by the wording of the paragraph.[9] On that basis neither of the following could be an overriding interest within the paragraph—

(1) an equitable easement or profit *à prendre* that was in existence at the time of first registration but was not noted on the register; or

(2) an easement or profit *à prendre* that was expressly granted or reserved over registered land but was not noted on the register and therefore took effect in equity only.

However, it has been held that this interpretation of the paragraph is incorrect.

5.8 In *Celsteel Ltd v Alton House Holdings Ltd*,[10] Scott J considered section 70(1)(*a*), and particularly the words "not being equitable easements required to be protected by notice on the register" and held as follows—

(1) In this context, "equitable easement" was not to be given the restrictive interpretation that it had received when used in the Land Charges Act 1972,[11] but included *all* equitable easements.

(2) The expression "required to be protected" meant "need to be protected".

(3) *All* equitable easements fell within the exception and could not therefore be overriding interests *except* those which, by reason of some other statutory provision or principle of law, could be protected without an entry on the register.

(4) An equitable easement which fell within rule 258 of the Land Registration Rules 1925, that is, one which was openly exercised and enjoyed by the dominant owner as appurtenant to his land, was one which did not require protection by entry on the register and could therefore be an overriding interest within section 70(1)(*a*).

5.9 It follows from this, that whenever an easement is expressly granted or reserved, it will be unnecessary to protect it by registration, even though it is a registered disposition, provided that it is openly exercised and enjoyed with the land to which it is appurtenant.[12] This reasoning conflicts with the principle that underlies this Report,

[9] See, eg D J Hayton, *Registered Land* (3rd ed 1981) p 84.

[10] [1985] 1 WLR 204. The relevant part of the judgment is at pp 219 - 221. The decision on this point has been approved by the Court of Appeal: *Thatcher v Douglas* (1996) 146 NLJ 282.

[11] In *E R Ives Investments Ltd v High* [1967] 2 QB 379, 395, Lord Denning MR held that, for the purposes of Class D(iii) land charges under what was then the Land Charges Act 1925, "equitable easements" referred to that limited class of rights which before the 1925 property legislation were capable of being created or conveyed at law but thereafter were capable of existing only in equity. The reason for this narrow interpretation has never been apparent.

[12] In *Thatcher v Douglas* (1996) 146 NLJ 282, transcript, p 23, Nourse LJ rejected the view that r 258 applied only to legal and not to equitable interests. He noted that the Law Commission had recommended in the Third Report that only legal easements should be overriding interests but considered that r 258 as worded could not be so limited.

namely that rights which are expressly created over registered land should be completed by registration.[13] When electronic conveyancing is introduced, it is anticipated that they will have to be.[14]

5.10 Where title to land is unregistered, there are a number of ways in which an easement or (in some cases) a profit *à prendre* may arise by implied grant or reservation.[15] These are summarised in the table below.

IMPLIED RESERVATION	IMPLIED GRANT
1 Easements of necessity	1 Easements of necessity
2 Intended easements	2 Intended easements
—	3 Easements arising under the rule in *Wheeldon v Burrows*[16]
—	4 Easements and profits *à prendre* impliedly granted under section 62 of the Law of Property Act 1925.

5.11 The Land Registration Act 1925 makes no provision for the implied reservation or grant of easements and profits *à prendre* except those arising under section 62 of the Law of Property Act 1925.[17] Indeed, there is nothing in the Land Registration Act 1925 which indicates whether it is even possible to create easements and profits *à prendre* by implied reservation or grant other than under section 62 of the Law of Property Act 1925. It is however generally assumed that—

(1) it is possible for easements and profits *à prendre* to be created by implied grant or reservation in registered land just as much as it is where title is unregistered; and

(2) such rights take effect as overriding interests.

Although these propositions remain untested by judicial decision, and cannot be regarded as wholly free from doubt, they do accord with common sense. It is precisely in those cases where easements and profits *à prendre* arise otherwise than by express grant or reservation that their status as overriding interests is needed.

5.12 Both the Land Registration Act 1925 and the Land Registration Rules 1925 make express provision for the application of section 62 of the Law of Property Act 1925 to registered land.[18] Section 62(1) provides that a conveyance of land is deemed to

[13] See above, para 1.14.

[14] See below, para 11.10.

[15] For an account of the law, see Sir Robert Megarry & Sir Williams Wade, *The Law of Real Property* (5th ed 1984) pp 859 - 869.

[16] (1879) 12 ChD 31.

[17] See below, para 5.12.

[18] See Land Registration Act 1925, ss 19(3), 22(3); Land Registration Rules 1925, rules 251, 258.

include and shall operate to convey with the land—

> all… liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of the conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.[19]

Rule 258 of the Land Registration Rules 1925 echoes this wording very closely, and appears to say that easements arising under section 62 are to take effect as overriding interests and not as encumbrances. The logic of this is obvious. As section 62 commonly converts into full legal easements rights that had hitherto been enjoyed permissively,[20] it is unlikely that any right so acquired would be registered. Hence rule 258 provides that it takes effect as an overriding interest. The Joint Working Group considers that this is correct in principle.

5.13 Having regard to the inadequacies of the present law, the Joint Working Group considers that the part of section 70(1)(*a*) that is concerned with easements and profits *à prendre* should be replaced with a new provision. The objectives of the new provision would be as follows.

5.14 Easements and profits *à prendre* expressly granted[21] or reserved should be completed by registration (as the Land Registration Act 1925 itself suggests) and should not be capable of existing as overriding interests under section 70(1)(*a*).[22] When the electronic transfer or creation of rights over registered land is eventually introduced, it will cease to be possible to *create* easements and profits *à prendre* except by registering them.[23]

5.15 There are five situations in which an easement or profit *à prendre* should take effect as an overriding interest until such time as it is entered on the register. In each case, we consider that the legislation should make the overriding status of such rights explicit.

[19] Although the creation of easements by s 62 is often referred to as a form of implied grant, it is more accurate to regard its operation as a form of express grant: see *Broomfield v Williams* [1897] 1 Ch 602, 610. The section implies into a conveyance words that were at one time commonly incorporated expressly by conveyancers. It can be excluded by an expression of contrary intention in the conveyance: s 62(4).

[20] See, eg *International Tea Stores Co v Hobbs* [1903] 2 Ch 165. For criticism of this principle, see Louise Tee, "Metamorphoses and Section 62 of the Law of Property Act 1925" [1998] Conv 115.

[21] Other than under Law of Property Act 1925, s 62, if that does indeed operate by way of express grant.

[22] This was in fact the recommendation of the Law Commission in its Third Report: Law Com No 158, paras 2.25 - 2.26. However, in the Draft Bill attached to its Fourth Report, this proposal was implemented by a clause which provided that only *legal* easements and profits *à prendre* could exist as overriding interests: Law Com No 173, Draft Bill, Cl 7(2)(a). This seems unnecessarily restrictive. It is possible for equitable easements to arise impliedly, where there is, for example, a contract to grant a lease: see *Borman v Griffith* [1930] 1 Ch 493 and *Sovmots Investments Ltd v Secretary of State for the Environment* [1977] QB 411 at 440; and the discussion in Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) pp 867, 868. There is no obvious reason to deny them the status of overriding interests. Rather than confine overriding interests to legal easements and profits *à prendre*, the Joint Working Group considers that it would be better to provide that easements and profits *à prendre* that had been expressly granted could not be overriding interests.

[23] See below, para 11.10.

5.16 The first category are those arising by implied grant or reservation, whether these are legal or equitable. This category would include easements and profits *à prendre* arising through the operation of section 62 of the Law of Property Act 1925. We have already explained the reasons why we think such easements and profits *à prendre* should be overriding interests.[24]

5.17 The second category is that of easements and profits *à prendre* that have been acquired by prescription.[25] At present, under the Land Registration Rules 1925, the easements and profits *à prendre* which have been acquired by prescription are to take effect as overriding interests and, as such, may be noted on the register of the servient title.[26] The third category is a related one. It is those easements and profits *à prendre* that are *in course of acquisition* by prescription. The status of such rights is not at present addressed by either the Act or the Rules.[27] To give them overriding status will put it beyond argument that a change of ownership of the burdened land will not mean that prescription has to start afresh.

5.18 The fourth category are those legal (but not equitable) easements and profits *à prendre* that were in existence at the time when the property burdened by them was first registered, but were not then noted on the register.[28] Equitable easements and profits *à prendre* that were in existence at the time of first registration should not, in our view, be overriding interests. Where title is unregistered, such rights should be protected by registration as Class D(iii) land charges under the Land Charges Acts 1925 or 1972. If that is so, a corresponding entry should be made on the register at the time of first registration and the rights would then be protected as minor interests. If any equitable easement or profit *à prendre* had not been registered as a land charge, it would not be binding on any purchaser of a legal estate for money or money's worth.[29] Its position should not be improved on first registration by elevating its status to that of an overriding interest.[30]

5.19 Finally, those easements and profits *à prendre* that are appurtenant to an overriding interest should themselves be overriding interests. This will be the case in relation to rights appurtenant to a legal lease granted for a term not exceeding 21 years,[31] or to an equitable lease arising from an agreement for a lease which is not protected by a notice on the register.[32]

[24] See above, para 5.11.

[25] For a discussion of prescription, see below, paras 10.79 and following.

[26] See r 250, (made pursuant to Land Registration Act 1925, s 75(5)).

[27] Indeed the power to make rules under Land Registration Act 1925, s 75(5) (see above) applies only to cases "where an easement, right or privilege *has been acquired* by prescription" (emphasis added).

[28] See above, para 4.8

[29] See Land Charges Act 1972, s 4(6).

[30] First registration of title will normally take place on a disposition for value and so any unregistered equitable easements will generally have become void when the title is registered anyway. However, this will not always be the case, as where registration of title is effected voluntarily or under the new triggers for compulsory registration (see Land Registration Act 1925, s 123, as substituted by Land Registration Act 1997, s 1).

[31] Land Registration Act 1925, s 70(1)(*k*); below, para 5.87.

[32] *Ibid*, s 70(1)(*g*), below para 5.56.

5.20 It will be necessary to make transitional provision for those easements that are in existence at the time when the legislation comes into force and which under the present law take effect as overriding interests even though they were expressly created. As it has been settled since 1984 that expressly created easements *can* be overriding interests within section 70(1)(*a*),[33] and that view now enjoys the approval of the Court of Appeal,[34] it would be unreasonable to remove the overriding status of such rights. To do so would (in effect) compel those who had the benefit of such rights to register them or risk losing them for non-registration as against any purchaser of the servient tenement. For reasons that have already been explained,[35] the removal of overriding status might contravene the ECHR, unless provision were made to pay compensation in such circumstances. We have therefore concluded that those existing easements and profits *à prendre* which are overriding interests at the time when the legislation comes into force should retain that status.

5.21 We do have one concern however. It has been settled comparatively recently that once an easement has been established, the mere fact of non-user - for however long - will not raise any presumption that the easement has been abandoned.[36] The view that used to be widely held, that mere non-user of the right for a period of 20 years *would* raise such a presumption,[37] has been rejected by the Court of Appeal. Abandonment is a matter of intention, and it will not be lightly presumed.[38] In *Tehidy Minerals Ltd v Norman*,[39] Buckley LJ explained that—

> [a]bandonment of an easement or of a profit *à prendre* can only... be treated as having taken place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else.

Furthermore, there is no statutory power to discharge or modify an easement or profit *à prendre* on the ground that it is obsolete or would impede some reasonable user of the land, as there is in relation to restrictive covenants.[40]

5.22 If an easement or profit *à prendre* takes effect as an overriding interest even if it has not been exercised for many years, there is a potential conveyancing trap of some magnitude. A purchaser may find that he or she is bound by a right that was wholly undiscoverable. Furthermore, not only is there no mechanism for the discharge of such a right, but the purchaser will be unable to obtain any indemnity if the register is

[33] *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 204.

[34] *Thatcher v Douglas* (1996) 146 NLJ 282.

[35] Above, paras 4.27 - 4.30.

[36] See *Benn v Hardinge* (1992) 66 P & CR 246, where non-user for 175 years did not establish abandonment.

[37] See Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 898. This view has many attractions. If 20 years' user of a right normally leads to the conclusion that there is an easement or profit *à prendre* under the doctrine of lost modern grant (see below, para 10.84), it seems illogical that, if the right is not then exercised for 20 years, there is no presumption of abandonment.

[38] See *Benn v Hardinge*, above; *Bosomworth v Faber* (1992) 69 P & CR 288, 294, 295; *Snell & Prideaux Ltd v Dutton Mirrors Ltd* [1995] 1 EGLR 259, 261, 262.

[39] [1971] 2 QB 528, 553.

[40] See Law of Property Act 1925, s 84 (as amended by Law of Property Act 1969, s. 28).

rectified to give effect to such an overriding interest.[41] We consider that a proportionate response to this problem, and one which would not contravene the ECHR, would be to reinstate what until recently was thought to be the law, namely, that if an easement or profit *à prendre* could not be shown to have been exercised within the previous 20 years, there should be a rebuttable presumption that the right had been abandoned.[42]

5.23 We would emphasise that—

(1) this presumption would apply only to those easements and profits *à prendre* that took effect as overriding interests: there would be no such presumption if the right had been protected by registration;[43] and

(2) the presumption would be rebuttable if the party asserting the right could show that there was some reason for its non-user other than abandonment, such as user of some alternative right, or the absence of any occasion to exercise the right.

The recommendations set out in the previous paragraph are consistent with one of our main objectives in this Part, which is to secure the registration of overriding interests wherever possible. They are more generous to a person claiming an easement or profit *à prendre* by prescription than are the equivalent proposals which we make in relation to a squatter who has extinguished the rights of a registered proprietor, but has then ceased to be in actual occupation of the land.[44] We consider that this difference of treatment is justifiable. Prescription is based on a presumption that the right claimed has some lawful origin. That right must therefore be openly enjoyed without the use of force.[45] The owner of the land does not lose his or her land, but holds it subject to the easement or profit *à prendre*. By contrast, adverse possession is based upon wrongdoing. It can be forcible in its origin, it need not be open, and it leads to the owner losing his or her title altogether.[46]

5.24 **We therefore provisionally recommend that—**

(1) all easements and profits *à prendre* should be overriding interests except where—

(a) they have been expressly granted; or

(b) they arise from a contract to grant such a right expressly;[47]

[41] No indemnity is payable where the register is rectified to give effect to an overriding interest, because no loss is suffered by reason of the rectification: see above, para 4.14.

[42] See above, para 5.21.

[43] This is consistent with our view that the fact of registration should of itself protect a right.

[44] See below, paras 5.49 and following.

[45] See below, paras 10.1, 10.79.

[46] See below, para 10.1.

[47] It has been held that a grant does not include a contract to grant: *City Permanent Building Society v Miller* [1952] Ch 840. It is therefore necessary to make express provision for equitable easements and profits arising out of contracts to grant such rights.

(2) without prejudice to the generality of that rule, the following easements and profits *à prendre* (whether legal or equitable) should be overriding interests unless and until they are noted on the register of the servient title—

(a) those arising by implied grant or reservation, including rights arising by the operation of section 62 of the Law of Property Act 1925;

(b) those that are acquired or are in the course of being acquired by prescription;

(c) those to which a property was subject at the time of its first registration, which were legal rights but were not noted on the register; and

(d) those which are appurtenant to an overriding interest;

(3) to the extent that there was any conflict between the principles in (1) and (2), those in (2) should prevail;[48]

(4) rule 258 of the Land Registration Rules 1925 should be revoked;

(5) where an easement or profit *à prendre* takes effect as an overriding interest, there should be a rebuttable presumption that the right had been abandoned if the party asserting it was unable to show that it had been exercised within the previous 20 years; and

(6) there should be transitional provisions by which easements and profits *à prendre* which are—

(a) in existence when the legislation comes into force; and

(b) overriding interests immediately prior to that date even if they would not be created thereafter;

should retain their status as overriding interests.

We ask whether readers agree.

Customary rights

5.25 The Land Registration Act 1925 provides no definition of customary rights. The term has been used to describe two distinct types of rights and it is uncertain which of these the draftsman of the Act had in mind.[49]

5.26 First, there are those which had their origin in tenure, such as the customary suits and

[48] This is to make it clear eg, that if A granted B a lease for 3 years together with a right of way over the land which A retained, B would not have to register his right of way because it would be appurtenant to B's lease, which was an overriding interest.

[49] See Ruoff & Roper, *Registered Conveyancing*, 6-08.

services of customary freeholders and copyholders, and the customary modes of assurance and descent. These have all been abolished.[50] The reference in the Act to "customary rights (until extinguished)",[51] suggests that it may have been these rights which the draftsman had in mind. Further support for this view comes from the fact that customary rights were not listed in section 18(4) of the Land Transfer Act 1875 (from which much of section 70(1)(*a*) of the Land Registration Act 1925 derives).[52] The addition of "customary rights" to the list of overriding interests may therefore have been intended merely as part of the transitional provisions of the 1925 Act. If this view is correct, this category of overriding interests is now obsolete.

5.27 Secondly, there are the customary rights which are enjoyed by all or some of the inhabitants of a particular locality. These rights are certainly not obsolete and have the following characteristics[53]—

(1) they may be exercised by all who enjoy the benefit of the custom;

(2) they may exist in gross: there is no requirement of a dominant tenement; and

(3) they are not exercisable by members of the public generally, but only by the members of a local community or some particular defined class of such persons.[54]

5.28 The range of rights which can exist as customary rights is very wide,[55] but is probably analogous to those that can exist as easements and profits *à prendre*. Such rights are similar to public rights except that they benefit a more limited class of persons. As both public rights and easements can exist as overriding interests, it would be anomalous to deny the same status to customary rights of this second category.

5.29 **We therefore provisionally recommend that—**

(1) as customary rights arising by tenure have ceased to exist they should no longer be listed as overriding interests; and

(2) unless and until they are noted on the register, customary rights that are exercisable by all or some of the inhabitants of a particular locality (other than those arising by tenure) should be a separate and distinct

[50] See Law of Property Act 1922, s 128 and Schedule 12; Administration of Estates Act 1925, s 45.

[51] See s 70(1)(*a*).

[52] The list of what are now called overriding interests in Land Transfer Act 1875, s 18(4) was "rights of common, rights of sheepwalk, rights of way, watercourses, and rights of water, and other easements."

[53] See Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 849.

[54] See, eg *Goodman v Mayor of Saltash* (1882) 7 App Cas 633 (right for the inhabitants of free tenements in the Borough of Saltash to fish for oysters); *Mercer v Denne* [1905] 2 Ch 538 (right of the fisherman of the parish of Walmer to dry their nets on private land); *Wyld v Silver* [1963] Ch 243 (right of inhabitants of Wraysbury to hold a fair or wake on waste land of the parish); *Peggs v Lamb* [1994] Ch 172 (right of freemen and the widows of freemen of the Borough of Huntingdon to pasture and graze beasts on certain common land).

[55] See Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 850 for examples.

category of overriding interests.[56]

Public rights

5.30 Once again, the Land Registration Act 1925 provides no definition of "public rights" for the purposes of section 70(1)(*a*), though like all overriding interests, it has hitherto only encompassed rights that are proprietary.[57] Public rights have been described as those which are exercisable "by anyone, whether he own land or not, merely by virtue of the general law"[58] and in *Overseas Investment Services Ltd v Simcobuild Construction Ltd*,[59] the Court of Appeal accepted that description as a definition of a public right for the purposes of section 70(1)(*a*). It did not have the wider (and vaguer) meaning of "rights of a public nature". The court provided additional guidance as to the meaning of "public rights"—

(1) it was confined to public rights presently exercisable and did not include potential rights;[60]

(2) it would include matters such as rights of passage along the highway, rights of passage in navigable waters, rights of fishing and rights to discharge into a public sewer, because "each such right is exercisable by anyone merely by virtue of being a member of the public and under the general law".[61]

5.31 In the light of these observations, we consider that it would be helpful if the nature of public rights was codified in the Act in accordance with the *Overseas Investment* decision. **We therefore provisionally recommend that—**

(1) "public rights" should remain as a category of overriding interest in cases where the rights have not been noted on the register; and

(2) they should be defined as rights exercisable by any member of the

[56] It is clear from the Law Commission's Third Report that the reference to "customary rights" in Land Registration Act 1925, s 70(1)(*a*) was thought by the then Commissioners to refer to this second category of customary rights rather than the first: see Law Com No 158, paras 2.71 - 2.73.

[57] See *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175. This is because Land Registration Act 1925, s 70(1) provides that registered land is deemed to be subject to such of the overriding interests listed in that subsection "as may be for the time being subsisting in reference thereto".

[58] Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 844.

[59] (1995) 70 P & CR 322, reversing the unreported decision at first instance of Judge Colyer QC, sitting as a deputy High Court judge. See Ruoff & Roper, *Registered Conveyancing*, 6-09.

[60] (1995) 70 P & CR 322, 327. It did not therefore include an agreement made under Highways Act 1980, s 38, by virtue of which land was to be dedicated as a highway with effect from a future date - which was the issue in that case. That agreement had not been registered and it was held that a purchaser of the land was not bound by the agreement. At first instance, Judge Colyer QC had held that the agreement did not fall "within the category of matters which section 1 of the Local Land Charges Act 1975 constitutes local land charges": unreported, 22 October 1993, transcript, p 40. However, it is not entirely clear why it did not fall within s 1(1)(*d*) of that Act (see now however New Roads and Street Works Act 1991, s 87). Had it been a local land charge, it would have bound the purchaser under Land Registration Act 1925, s 70(1)(*i*); considered below, para 5.80.

[61] (1995) 70 P & CR 322, 328, *per* Peter Gibson LJ.

public over land under the general law.[62]

Do readers agree?

LIABILITIES HAVING THEIR ORIGINS IN TENURE

Section 70(1)(b)

Introduction

5.32 Section 70(1)(*b*) lists as overriding interests—

> Liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges (until extinguished) having their origin in tenure.[63]

As a result of our inquiries, we are reasonably satisfied that this category of overriding interests is now virtually (if not completely) obsolete.

Tenurial obligations to repair highways

5.33 First, as regards tenurial obligations to repair highways, the only evidence that we have been able to discover in the course of our inquiries of the existence of any such obligations has come from the Crown Estate. None of those whom we consulted could give us an actual example of such a right.[64] We have therefore concluded that such rights are probably obsolete, at least for all practical purposes. We would however be glad to learn of any specific examples from readers, in case our view is incorrect.

[62] Public rights which are local land charges will fall within s 70(1)(*i*) rather than s 70(1)(*a*). See below para 5.80.

[63] See Ruoff & Roper, *Registered Conveyancing*, 6-10.

[64] One correspondent drew our attention to Highways Act 1980, ss 56, 57, which deal with proceedings to obtain an order to repair a way or a bridge and which applies *inter alia* to "a highway which a person is liable to maintain... by reason of tenure". These sections serve perhaps as a warning of the dangers of retaining provisions on the statute book in respect of liabilities which are obsolete. The mere fact that statutory provisions refer to tenurial liabilities to maintain highways encourages the belief that such obligations are still extant.

Quit rents, heriots and other charges

5.34 Secondly, quit rents,[65] heriots,[66] and other charges having their origins in tenure, were amongst the last vestiges of the old system of feudal tenure, and were finally abolished at the end of 1935[67] by the provisions of the Law of Property Act 1922.[68] They can no longer exist therefore.

Crown rents

5.35 Thirdly, we have had some difficulty in ascertaining exactly what Crown rents might be, as did the Law Commission when it considered them in the Third Report.[69] We agree with what the Commission then said about such rights, namely that—

(1) from the wording of section 70(1)(*b*), they must be of a tenurial character; and

(2) they are probably the rents payable on land held in ancient demesne, that is, land of the manor that belonged to the Crown at the time of the Norman Conquest and which was then granted by the Crown to a subject in return for the payment of a rent.

None of those whom we contacted - including the Crown Estate - were certain of the precise meaning of the phrase. In consequence, none were aware of the existence of any such rights. It seems likely therefore that even if Crown rents do in theory still exist, they have in practice been obsolete for many years.

5.36 In the light of these findings, and subject to any information about the incidence of such rights that may be disclosed on consultation, **we provisionally recommend that—**

(1) section 70(1)(*b*) should be repealed; and

(2) any tenurial liabilities within the paragraph that may still exist should cease to be overriding interests and should take effect as minor interests instead.

Do readers agree?

LIABILITY TO REPAIR THE CHANCEL OF ANY CHURCH

Section 70(1)(c)

5.37 Liability to repair the chancel of any church is an overriding interest under section 70(1)(*c*) of the Land Registration Act 1925. It is a highly anomalous liability that

[65] Quit rents were payments made in commutation of services due under socage feudal tenure: Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (4th ed 1984) pp 18, 19.

[66] Where land was held in copyhold tenure, this was the lord's right to take the tenant's best beast or other chattel on the tenant's death: *ibid*, p 24.

[67] *Ibid*, p 35.

[68] See especially Sched 13.

[69] Law Com No 158, para 2.87.

attaches to certain properties and requires the owner (the "lay rector"[70]) to pay for the repair of the chancel of some pre-Reformation churches.[71] It is still enforced,[72] on occasions even against landowners who purchased the land without knowing of the liability, and its existence can be very difficult to discover.[73] The obligation to pay is several, so that where there is more than one lay rector, one of them can be required to meet the whole amount due and has then to seek contribution from the others.[74] This liability will necessarily have to remain as an overriding interest. **We therefore provisionally recommend the retention of chancel repair liability as an overriding interest in cases where it has not been noted on the register.**

LIABILITY IN RESPECT OF EMBANKMENTS, AND SEA AND RIVER WALLS

Section 70(1)(d)

5.38 "Liability in respect of embankments, and sea and river walls" has the status of an overriding interest by section 70(1)(*d*) of the Land Registration Act 1925.[75] As the Law Commission explained in its Third Report, this liability is not confined either to carrying out repairs (it may include a duty to contribute to the cost of carrying out such works) nor to obligations deriving from tenure.[76] It has been held that "it is part of the duty of the Crown of England to protect the realm of England from the incursions of the sea by appropriate defences",[77] and that this duty is "for the benefit, not of one person in particular, but of the whole commonwealth".[78] In fact, over the centuries - beginning in 1427 - the Crown's duties have been placed in the hands of a number of statutory bodies,[79] to the extent that those duties are now subsumed within the statutory scheme.[80] That scheme is presently to be found in the Coast Protection Act 1949, the Land Drainage Act 1991 and Part IV of the Water Resources Act 1991.

5.39 At common law, a landowner whose property fronted on the sea or on a river was

[70] Or "lay impropriator".

[71] For an excellent summary of the development of the law, see J H Baker, "Lay Rectors and Chancel Repairs" (1984) 100 LQR 181.

[72] The Law Commission has on its files a number of very recent instances of this, including one in which the liability may exceed the value of the land burdened by it.

[73] We have already mentioned above (para 4.13) that the tithe records are incomplete and are scattered at several branches of the Public Record Office.

[74] In 1985, the Law Commission recommended that the liability should be terminated ten years after the legislation came into force: Property Law: Liability for Chancel Repairs, Law Com No 152. It is understood that the Government is likely to indicate its response to this Report in the near future.

[75] For a helpful survey of the law on coastal protection and sea defences, see W Howarth, *Wisdom's Law of Watercourses* (5th ed 1992) pp 59 -65, to which we are indebted. See too the Third Report, Law Com No 158, paras 2.84, 2.85.

[76] Law Com No 158, paras 2.83, 2.84. Cf Land Registration Act 1925, s 70(1)(*b*) ("liability to repair highways by reason of tenure"); above, para 5.33.

[77] *Attorney-General v Tomline* (1880) 14 ChD 58, 61, *per* James LJ.

[78] *Attorney-General v Tomline* (1879) 12 ChD 214, 231, *per* Fry J.

[79] Originally commissioners for sewers.

[80] See *Symes & Jaywick Associated Properties Ltd v Essex Rivers Catchment Board* [1937] 1 KB 548, 572.

under no obligation to repair the sea wall or river bank.[81] However, liability to repair and maintain such defences might be imposed on a frontager by contract, prescription, covenant (supported by a rentcharge), grant, custom, tenure or statute.[82] A contractual obligation, not being proprietary,[83] cannot subsist as an overriding interest within section 70(1)(*d*). Nor can liability imposed by statute[84] because it arises under the general law.[85] The others are, however, proprietary[86] and do fall within the paragraph.[87] In its Third Report, the Law Commission recommended that these liabilities should be reduced from the status of overriding interests to that of minor interests.[88] Our inquiries have not yielded any specific examples of the survival of this liability. However, a number of those who responded expressed surprise that the Commission considered that it might be obsolete. We shall be glad to learn from any readers whether they have any experience of obligations falling within section 70(1)(*d*). Subject to any views expressed or information that may be offered on consultation, **we provisionally recommend—**

(1) the retention of liability in respect of embankments, and sea and river walls as overriding interests; and

(2) that it should be confirmed by the Act that such liability is limited to that arising by prescription, grant, covenant (supported by a rentcharge), custom or tenure.

Do readers agree?

PAYMENTS IN LIEU OF TITHE, AND CHARGES OR ANNUITIES PAYABLE FOR THE REDEMPTION OF TITHE RENTCHARGES

Section 70(1)(e)

5.40 As a relic of a category of overriding interests that was once rather wider, section 70(1)(*e*) of the Land Registration Act 1925 provides that—

> …payments in lieu of tithe, and charges or annuities payable for the redemption of tithe rentcharges

are overriding interests. Formerly the list also included "land tax" and "tithe

[81] *Hudson v Tabor* (1877) 2 QBD 290. The case was concerned with a sea wall but "[i]t appears that the same principle extends to the bank of a river, whether it is tidal or non-tidal": W Howarth, *Wisdom's Law of Watercourses* (5th ed 1992) p 62.

[82] See, eg *London & North-Western Railway Co v Fobbing Sewers Commissioners* (1896) 75 LT 629 (liability "*ratione tenurae*").

[83] Cf *Eton Rural District Council v Thames Conservators* [1950] Ch 540.

[84] See, eg Public Health Act 1936, s 264 (obligation imposed on owners and occupiers in certain urban areas to repair, maintain and cleanse any culvert in, on or under their land).

[85] See above, para 4.36.

[86] They have been described as "ancient incidents of land tenure the origin of very many of which is lost in the obscurity of history": *ibid*, at p 547, *per* Vaisey J.

[87] These liabilities are specifically preserved by the Coast Protection Act 1949, s 15(2); the Land Drainage Act 1991, s 21; and the Water Resources Act 1991, s 107(4). There is a power to commute such proprietary liabilities: Land Drainage Act 1991, s 33.

[88] Law Com No 158, para 2.86.

rentcharge" but those references have been repealed.[89] The highly technical body of law that underlies this paragraph was explained by the Law Commission in its Third Report[90] and it is unnecessary to rehearse it. With one exception, the rights listed in this paragraph are obsolete. Certain payments, commonly known as "corn rents" do still exist and some are still paid,[91] though the sums involved are normally so modest that corn rents have largely faded away. Indeed, the principal beneficiary of corn rents,[92] the Church Commissioners, ceased to enforce them in 1990 because they were uneconomic to collect.[93] They have indicated that they have no objections to the removal of overriding status from such rents. However, our inquiries suggest that there are other recipients of corn rents and that, in one instance at least, the sums involved are not negligible. In these circumstances, we feel unable to recommend the complete repeal of section 70(1)(*e*). We do however consider that the scope of this category should be narrowed to include just this one situation. **We provisionally recommend that liability to make payments (commonly known as corn rents) by any Act of Parliament other than one of the Tithe Acts, out of or charged upon any land in respect of the commutation of tithes, should continue to be an overriding interest, but that section 70(1)(*e*) should otherwise be repealed. Do readers agree?**

5.41 There is a minor connected point. Section 70(1) of the Land Registration Act 1925 provides that the registrar may enter on the register the fact that any land which is or is about to be registered is exempt from land tax (which no longer exists), or tithe rentcharge or payments in lieu of tithe (which are obsolete). Even though some corn rents still exist, we doubt that this provision is still needed. If, on registration, it appears that the land is subject to a liability to pay corn rents, that fact will be noted on the register.[94]

SQUATTERS' RIGHTS

Section 70(1)(f)

Introduction

5.42 The Land Registration Act 1925 makes elaborate provision for the application of the Limitation Acts to registered land and we consider this subject more fully in Part X of this Report. What is of particular relevance here is that, unless and until the squatter

[89] By Finance Act 1963, s 73(8)(*b*); Sched 14, Pt IV; and Tithe Act 1936, s 48(3); Sched 9, respectively.

[90] Law Com No 158, paras 2.89 - 2.92.

[91] We are concerned with those so-called corn rents which are payable out of or are charged upon any land by any Act of Parliament other than one of the Tithe Acts (the Acts in question date from the time of Charles II up to 1836). Not all of these payments are variable with the price of corn and many of them are fixed. Some corn rents are not within s 70(1)(*e*) because they are unrelated to tithes. These are chiefly associated with the Colleges of Oxford, Cambridge, Eton and Winchester.

[92] We wish to record our gratitude to the Country Landowners Association for their assistance. Through their kind offices we were able to make known our interest in corn rents, and received a number of interesting letters, for which we are very grateful. Of a number of cases that were drawn to our attention only one was a corn rents within s 70(1)(*e*), but that one case was, however, of considerable interest.

[93] The statutory machinery for their collection is likely to be repealed in the near future.

[94] See Land Registration Act 1925, s 70(2), (3); below, para 5.99.

becomes registered as proprietor under the provisions of the Act,[95] his rights take effect under section 70(1)(*f*) of the Land Registration Act 1925 which provides that—

> Subject to the provisions of this Act, rights acquired or in course of being acquired under the Limitation Acts

are overriding interests.

Recommendations in the Third Report

5.43 In its Third Report, the Law Commission did not suggest any fundamental reappraisal of this category of overriding interest. The Commission considered that "a right in the course of acquisition by adverse possession, but not yet acquired" could not be treated as an overriding *interest*.[96] For this reason, it was recommended that there should be a separate and distinct provision to make it clear that time should not start to run again on the registration of a new proprietor. This was duly reflected in the Draft Bill contained in the Fourth Report.[97] This particular proposal appears to rest on a misconception of the legal status of an adverse possessor's interest in the land in question. As Jessel MR explained in *Rosenberg v Cook*,[98] "the title of the disseisor is in this country a freehold title".[99] However bad his or her title may be, the squatter has a freehold in the land *from the moment that he or she takes adverse possession*, regardless of the estate of the person against whom he or she is adversely possessing, and notwithstanding that the freehold is liable to defeasance by title paramount. As a squatter has an estate in land, he or she must therefore have an "interest" for the purposes of s 70(1) of the Land Registration Act 1925.[100]

The treatment of adverse possession in this Report

5.44 The Joint Working Group has considered the position of squatters in relation to registered land in some detail. In Part X of this Report we explain both the nature of adverse possession and the rules of law which govern its application.[101] We provisionally recommend that the rules which govern the acquisition of title to registered land by adverse possession should be recast to reflect the principles of title registration.[102] We further propose that, whether or not readers wish to see any change in the substantive law, the existing machinery by which the principles of adverse possession are applied to registered land should be replaced by a much simpler and clearer system.[103] What is important for present purposes is that adverse possession will continue to apply to registered land whether in its present or in some much more attenuated form.

[95] See s 75.

[96] Law Com No 158, para 2.37.

[97] Cl 17(3)(e).

[98] (1881) 8 QBD 162, 165.

[99] See the discussion of this below, paras 10.22 - 10.24.

[100] Compare the suggested definition of "interest", above, para 3.2.

[101] See below, paras 10.4 - 10.39.

[102] See below, paras 10.65 - 10.69.

[103] See below, para 10.78.

Squatters' rights as overriding interests: two problems

5.45 As we explain in Part X,[104] for a squatter to acquire title by adverse possession—

(1) he or she must take possession of the land, whether by dispossessing the true owner or by entering land which has been abandoned;

(2) that possession must be adverse and not (for example) with the true owner's express or implied licence;

(3) he or she must intend to exclude the world, including the true owner; and

(4) such adverse possession must continue for the duration of the limitation period.

5.46 There are two difficulties about the overriding status that is given to squatters' rights under section 70(1)(*f*) of the Land Registration Act 1925. The first is that there is no requirement that adverse possession should be obvious to anybody who inspects the land.[105] Indeed there can be situations where the person against whom adverse possession is taken is wholly unaware of the fact.[106] Adverse possession is "possession as of wrong",[107] and there is therefore no requirement that it should be enjoyed openly.[108] Furthermore, the acts that may amount to a taking of adverse possession may be slight, given either the nature of the land or the fact that the true owner has abandoned it.[109] It follows that a purchaser of registered land may be bound by the rights of a squatter of whom the vendor was unaware at the time of sale and which the purchaser could not reasonably have discovered.[110] If that does happen, and the register is rectified to give effect to the squatter's rights, the purchaser will receive no indemnity.[111] If the proposals that we make in Part X of this Report are accepted by readers, this particular risk will be considerably reduced, but it will by no means be eliminated.

5.47 The second difficulty arises from the fact that once a squatter has barred the rights of the true owner by adverse possession, his or her rights continue to be an overriding interest, even if he or she abandons possession of the land and the registered proprietor

[104] See below, para 10.4.

[105] An example involving an unfortunate purchaser of unregistered land, who was registered as first registered proprietor, is *Chowood Ltd v Lyall (No 2)* [1930] 2 Ch 156. The land in question was woodland and it may be inferred from the report that the squatter's possession was not apparent. The case arose out of an action for trespass brought by the purchaser against the squatter who entered the land to which she had in fact acquired title in order to cut underwood.

[106] See *Red House Farms (Thorndon) Ltd v Catchpole* [1977] 2 EGLR 125 (owner unaware that defendant was shooting fowl on its land); *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1998] EGCS 51; *The Times* 13 May 1998 (neighbour took over party wall without owner's knowledge).

[107] *Buckinghamshire County Council v Moran* [1990] Ch 623, 644, *per* Nourse LJ; below, para 10.1.

[108] It has been accepted that a person may lose his or her title to an adverse possessor even though he or she has not been negligent: see *Rains v Buxton* (1880) 14 ChD 537, 540.

[109] See below, para 10.4.

[110] Cf *Chowood Ltd v Lyall (No 2)*, above.

[111] See above, para 4.14.

resumes possession.[112] It is the registered proprietor who is then in adverse possession and the rights of the former squatter will not be barred until the proprietor has remained in possession for the limitation period. Should that proprietor sell the land to a purchaser in the interim, that purchaser will be bound by the former squatter's overriding interest. In this way, a situation can arise where a purchaser can acquire land from a registered proprietor, who is the only person in possession, and yet find that he or she can both be deprived of that land by a squatter and have no entitlement to indemnity.[113] Once again, if the proposals that we make in Part X are accepted by readers, this risk will diminish considerably, but it will still remain to some degree.[114]

5.48 Whether or not readers favour the wide-reaching reform to the law of adverse possession of registered land that we provisionally propose in Part X of this Report, we consider that the present unqualified overriding status of squatters' rights over-protects such rights. As between a purchaser and a squatter whose possession is not apparent, we are firmly of the view that the equities favour the purchaser. Indeed, we suspect that most people would be astonished to discover that there was any possibility that a squatter who had long ago abandoned a piece of land, could reappear and successfully claim it from an innocent purchaser who had bought it from the registered proprietor. The Joint Working Group considers that a solution to the two difficulties which we have identified lies in striking a balance between the protection that should be given to—

(1) the rights of those who are in actual occupation of land, including both purchasers and squatters;[115] and

(2) purchasers against rights which are neither registered nor readily discoverable on a reasonable inspection of the land.

In our view that balance can be struck quite simply by repealing section 70(1)(*f*) of the Land Registration Act 1925. We explain the results in the following paragraphs.

The solution: repeal section 70(1)(f) and protect only squatters in actual occupation

5.49 If section 70(1)(*f*) were repealed, any squatter who was in actual occupation of the land in question and - if the recommendation that we make below is accepted[116] - whose rights were apparent on a reasonable inspection of the land would be protected under another category of overriding interests which we consider below, namely the rights of persons in actual occupation.[117]

[112] If the squatter abandons adverse possession *before* the registered proprietor's title is barred, the period of adverse possession has no effect on the registered proprietor's title: see below, para 10.49(4).

[113] See the valuable analysis by Roger J Smith, "Land Registration: Reform at Last", in Paul Jackson and David C Wilde (ed), *The Reform of Property Law* (1997) p 129 at p 139.

[114] Under the proposals that we make, title would not be barred merely by lapse of time: see below, paras 10.49; 10.65.

[115] For the meaning of "actual occupation" in this context, see below, paras 5.71 and following.

[116] See para 5.75.

[117] Land Registration Act 1925, s 70(1)(*g*), below, para 5.56.

5.50 A squatter who was in possession but not in actual occupation would have merely a minor interest which would not bind a purchaser unless protected in some way on the register.[118] Such a squatter who wished to protect his or her interest could either—

(1) apply to be registered as proprietor of the land if he or she had been in possession long enough to entitle him or her to do so;[119] or

(2) apply to protect his or her minor interest by an entry on the register if that was not the case.

In practice a squatter who was not in a position to apply to be registered as proprietor would be very unlikely to apply for the entry on the register of his or her minor interest. This is because, under the proposals which we make in Part VI, the registered proprietor would at once be notified of any such application to which he or she had not assented,[120] and would therefore be likely to take steps to evict the squatter. It follows that, in most cases, where a registered proprietor made a disposition of the registered land, any purchaser would take the land free of the rights of any squatter who was in possession but not in actual occupation. If the squatter remained in adverse possession after such a disposition, time would start running afresh from the date of that registered disposition for limitation purposes.

5.51 Where a registered proprietor made a disposition of registered land in circumstances in which—

(1) the squatter had become entitled to be registered as proprietor;

(2) the squatter was not in actual occupation; and

(3) the purchaser therefore took free of the squatter's rights;

we consider that the squatter should have a claim in damages for trespass against the former registered proprietor who had sold the land. If the squatter were not given such a claim, his or her "entitlement" to be registered would be meaningless. These circumstances would not occur very often. If the law on adverse possession were to remain unchanged, the liability would arise when the squatter had been in adverse possession for the limitation period and was therefore entitled to apply to be registered. If the recommendations that we make in Part X were to be accepted, there would only be one very unusual situation in which a squatter was actually *entitled* to be registered, and therefore potentially entitled to damages under this proposal.[121]

5.52 We accept that our proposals could lead to apparent anomalies where the squatter had adversely possessed against land which comprised both registered and unregistered titles. Where the squatter was not in actual occupation, a purchaser of the land would be bound by the squatter's rights to the unregistered part but not to the registered. We do not consider that this militates against our provisional recommendation because—

[118] Cf Land Registration Act 1925, ss 20, 23.

[119] Whether under the proposals that we make in Part X or, if those are rejected by readers, as at present, at the end of the limitation period.

[120] See below, para 6.52.

[121] See below, paras 10.60, 10.62, 10.66(8); 10.67(3).

(1) the fact that a purchaser of unregistered land can be bound by the rights of an absent squatter is instrinsically unsatisfactory and there seems no good reason to replicate the outcome in registered land;

(2) we have accepted that our reforms will lead to a divergence between registered and unregistered land;[122] and

(3) we provisionally recommend in Part X of this Report that the adverse possession of registered land should be subject to different rules from those applicable where title is unregistered.

5.53 If our proposals were to apply to the rights of persons already in adverse possession so as to reduce their status from that of overriding interests to minor interests, they could of course lead to the divesting of accrued rights. For reasons that we have already explained,[123] it is necessary to consider whether transitional arrangements are needed to prevent this. The case is not so clear cut as it is in relation to easements.[124] English law treats adverse possessors with much greater indulgence than do systems based on the civil law.[125] A squatter acquires title to land without paying for its acquisition. To provide either that the new arrangements should be restricted to adverse possession which commences after the legislation is brought into force, or that state compensation should be payable if accrued rights are lost because of their non-registration would, in our view, be excessively generous and would go beyond the proportionality that the ECHR requires.[126] This is especially so because—

(1) it is only the rights of adverse possessors who are not in actual occupation that will be affected; and

(2) a squatter who loses his or her land would have a claim in damages for trespass against the registered proprietor who had sold the land.[127]

We consider that an appropriate balance would be struck by providing that where any person was in adverse possession at the time when any legislation came into force, their rights would remain as an overriding interest for a period of three years. They would therefore have three years' grace in which to take steps to register their interest.[128]

5.54 We are aware that these proposals may regarded as controversial and that readers may prefer that the present law, which is well known and understood, should remain unchanged. We would be particularly grateful for views on this issue and for comments on any practical difficulties that might ensue if our proposals were implemented.

[122] See above, para 1.6.

[123] See above, paras 4.25 - 4.30.

[124] See above, para 5.20.

[125] See above, para 5.44.

[126] See above, para 4.29.

[127] See above, para 5.51.

[128] It should be noted that those whose adverse possession had not been sufficiently long to defeat the rights of the registered proprietor would stand to lose a merely defeasible right. Those who had already barred the rights of the registered proprietor would have the right to have themselves registered as proprietor of the land.

5.55 In the light of these observations, **we seek the views on readers as to whether—**

(1) the existing law should remain unchanged; or

(2) section 70(1)(*f*) should be repealed and rights acquired or in course of being acquired under the Limitation Acts—

(a) should no longer be overriding interests unless the adverse possessor was in actual occupation for the purposes of section 70(1)(*g*); and

(b) should otherwise take effect as minor interests unless and until the adverse possessor was registered as proprietor;

If readers favour (2), we ask whether—

(1) they consider that there should be transitional arrangements by which, where a person was in adverse possession at the time when any legislation came into force, their rights should remain an overriding interest for a period of three years, even if they were not in actual occupation; and

(2) they agree that a squatter should be able to claim damages for trespass against a registered proprietor who sold land to which the squatter was entitled to be registered as proprietor.

THE RIGHTS OF OCCUPIERS

Section 70(1)(g)

Introduction

5.56 The most notorious - and most litigated - category of overriding interests is contained in section 70(1)(*g*)—

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

We are aware that any proposal which we may make in relation to this paragraph will be controversial because it is a provision that has both strong supporters and equally vocal detractors. We explain first the background to the paragraph. We then explain the proposals made by the Law Commission in its Third Report and our responses to them. In the light of these comments, we make our own recommendations for reform.

The background to the paragraph

5.57 The origins of this paragraph can be traced to the Royal Commission on the Land Transfer Acts.[129] This recommended that—

> There should be provision that the rights of parties actually in occupation

[129] (1911) Cd 5483, para 81.

> or receipt of the rents and profits of the land at the time of first registration should not be affected by the registration; and that these rights should be protected as against all transferees so long as the parties or their successors in title remain in such occupation or receipt. This is in accordance with the ordinary law applicable to sales of land.[130]

The Commission was plainly influenced by the evidence which it received from the then Registrar, Charles Brickdale.[131] He considered that the justification for this category of overriding interest was that "the register was only intended to take the place of the documentary title",[132] and that what was proposed would replicate the position where title was unregistered. Two points are plain both from Brickdale's evidence and from his own commentary on section 70(1)(*g*) of the Land Registration Act 1925.[133] First, the concept of "occupation" was to be widely understood and would not be confined to cases where a person was living in the particular property. It would therefore include the rights of a person "in occupation of an underground space, such as a tunnel or cellar only accessible from other land, or a mine".[134] Secondly, the paragraph would apply "whether the fact of such occupation was discoverable by an ordinary inspection of the property or not".[135] There is in fact some doubt whether this does replicate the position in relation to land with unregistered title. There is a sharp conflict of authority as to whether, where title is unregistered, the mere fact of possession, even if it is not apparent, is notice of the rights of the possessor.[136]

5.58 As regards the first of those points, the courts have interpreted the paragraph as Brickdale anticipated. It is well-established that "actual occupation"—

(1) means physical presence on the land as opposed to a mere legal entitlement to possession;[137] but

(2) carries no connotation of "residence".[138]

The question whether the occupation must be apparent has not been so clearly

[130] For this "ordinary law", see above, para 4.10.

[131] Set out *in extenso* in J Stuart Anderson, *Lawyers and the Making of English Land Law 1832 - 1940* (1992) pp 277 - 279. It is clear from the passage there quoted that Brickdale's motives for the view that he took were cost driven.

[132] *Ibid*, at p 278.

[133] See Brickdale & Stewart Wallace's *Land Registration Act, 1925* (4th ed 1939) pp 192, 193.

[134] *Ibid*, p 193; and see J Stuart Anderson, *op cit*, at pp 277 - 278.

[135] Brickdale & Stewart Wallace, *op cit*, p 193; and see J Stuart Anderson, *op cit*, at pp 278 - 279.

[136] There are powerful dicta in the judgment of Knight Bruce LJ in *Holmes v Powell* (1856) 8 De GM & G 572, 580, 581; 44 ER 510, 514, which unequivocally assert that it is. However, in *Cavander v Bulteel* (1873) LR 9 Ch App 79, 82, James LJ was "not prepared to go to the length of the dicta in that case; it is difficult to see how possession of which there are no visible signs can put a purchaser on enquiry, and so affect him with notice". The position of unregistered land has of course been substantially qualified in any event by the provisions of the Law of Property Act 1925 and the Land Charges Act 1972.

[137] *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 505.

[138] *Lloyds Bank Plc v Rosset* [1989] Ch 350 at 394 (the case went on appeal: [1991] 1 AC 107, but on the view taken by the House of Lords, the meaning of "actual occupation" did not arise).

answered,[139] and while the balance of authority is probably against it, [140] the point cannot be regarded as finally settled by any means.[141] It is perhaps noteworthy that exactly the same doubt persists in relation to unregistered land.[142] The existence of this uncertainty on a matter of such fundamental importance has been a major consideration for the Joint Working Group in making our proposals for reform.

The recommendations in the Third Report

5.59 In the Third Report,[143] the Law Commission made the following recommendations[144]—

(1) the rights of persons in actual occupation should remain overriding interests;[145]

(2) the requirement of actual occupation should not be qualified by the addition of the words "and apparent" because to do so would introduce into land registration the doctrine of notice;[146]

(3) the category should be restricted by excluding from the paragraph the rights of persons "in receipt of rents and profits";[147]

(4) the rights of beneficiaries under a settlement created under the Settled Land Act 1925 which can at present only be minor interests,[148] should be capable of existing as overriding interests in the same way as can interests under trusts for sale or bare trusts;[149]

(5) the reference in the paragraph, "save where enquiry is made of such person

[139] See Roger J Smith, *Property Law* (2nd ed 1998) pp 234 - 237.

[140] See, eg *Kling v Keston Properties Ltd* (1983) 49 P & CR 212, 222.

[141] See *Lloyds Bank Plc v Rosset*, above, at p 394, where Mustill LJ commented that "although the paragraph does not actually say that the acts constituting actual occupation must be such that a purchaser who went to the land and investigated would discover the fact of occupation and thereby to be put on enquiry, the closing words of the paragraph are at least a hint that this is what Parliament principally had in mind". In the same case, Purchas LJ expressed the view that the provisions of the paragraph "clearly were intended to import into the law relating to registered land the equitable doctrine of constructive notice": *ibid*, at p 403, and see his further comments at p 404. Similar sentiments were expressed by Ralph Gibson LJ in *Abbey National Building Society v Cann* [1989] 2 FLR 265, 278 (the point did not arise on appeal: [1991] 1 AC 56).

[142] See above, para 5.57.

[143] Law Com No 158, paras 2.54 - 2.70.

[144] For convenience, we refer to them as "recommendation (1)", "recommendation (2)" etc, although these numbers do not appear in the Third Report.

[145] *Ibid*, para 2.67.

[146] *Ibid*, para 2.62.

[147] *Ibid*, para 2.70.

[148] See Land Registration Act 1925, s 86(2).

[149] Law Com No 158, para 2.69. All trusts for sale and bare trusts, whenever created, now take effect as trusts of land: Trusts of Land and Appointment of Trustees Act 1996, s 1(2).

and the rights are not disclosed", performed no useful function[150] and should be replaced by a general provision by which no overriding interest of any category would be allowed to prevail against a purchaser in any case of fraud or estoppel;[151]

(6) the reference to "land" in the paragraph should include "part of the land".[152]

The Draft Bill in the Fourth Report duly gave effect to these recommendations with a clause replacing section 70(1)(*g*) as follows—

> A right of any person who is in actual occupation of, or of any part of, the land in which the right subsists.[153]

5.60 The Joint Working Group agrees with recommendations (1), (3), (4) and, subject to certain qualifications, (6). We disagree with (2) and with part of (5). Our views on (2) are particularly significant and we address this matter last.

Retention of the overriding status of occupiers' rights

5.61 As regards (1), we consider that it is unreasonable to expect all encumbrancers to register their rights, particularly where those rights arise informally, under (say) a constructive or resulting trust or by estoppel. The law pragmatically recognises that some rights can be created informally, and to require their registration would defeat the sound policy that underlies that recognition. Furthermore, when people occupy land they are often unlikely to appreciate the need to take the formal step of registering any rights that they have in it.[154] They will probably regard their occupation as the only necessary protection. The retention of this category of overriding interest is, we believe, justified not only by the fundamental principles that we have identified in Part I of this Report,[155] but also because this is a very clear case where protection against purchasers is needed, but where it is "not reasonable to expect or not sensible to require any entry on the register".[156]

[150] *Ibid*, para 2.59.

[151] *Ibid*, para 2.75.

[152] *Ibid*, para 2.55.

[153] Law Com No 173, Draft Bill, cl 7(2)(*d*).

[154] For a striking example, see *Lloyds Bank Plc v Carrick* [1996] 4 All ER 630. In that case, a purchaser of *unregistered* land paid the full purchase price and entered into possession under an oral contract of sale (which was thereby enforceable under the now abolished doctrine of part performance), but the title remained in the vendor (her brother-in-law). The estate contract was not registered as a land charge and the vendor charged the land to the bank. It was held that the mortgagee bank was not bound by the rights of the purchaser in actual occupation. Morritt LJ commented on the discrepancy that existed between unregistered and registered land in this regard: see [1996] 4 All ER 630, 642. In unregistered land, a land charge of Class C(iv) (an estate contract) that has not been registered under the Land Charges Act 1972 will not bind a purchaser of a legal estate for money or money's worth even though the person having the benefit of the land charge is in actual occupation. By contrast, had title been registered, Mrs Carrick's rights would have been binding on the bank as an overriding interest.

[155] See above, para 1.14. Although expressly created rights should be registered, where rights can arise *informally*, they should if possible be protected without the need for registration. This cannot always be achieved.

[156] See above, para 4.17.

5.62 This point is however subject to one very important qualification. As we have already indicated,[157] and will explain more fully in Part XI, [158] it is likely that in the comparatively near future, registration will become an essential part of the process by which rights over registered land are expressly created. There will be no right at all unless it is registered. As and when that happens, the only rights that will be capable of being protected by actual occupation will be those that can be created without the need for registration. That is likely to comprise rights that can arise informally (for example, by estoppel or adverse possession), and interests under trusts. This will significantly restrict the ambit of section 70(1)(*g*) for the future.

Rights under settlements created before 1997

5.63 We also readily accept that rights existing under Settled Land Act settlements should be capable of existing as overriding interests under section 70(1)(*g*) (recommendation (4)), though for the future this is a matter that will be of diminishing importance. This is because, under the provisions of the Trusts of Land and Appointment of Trustees Act 1996, it is no longer possible to create new settlements.[159] The rights in question will therefore be those arising under settlements that were created prior to 1997. For the future, trusts of land must be used to create successive interests and such interests will be capable of protection under section 70(1)(*g*) because they will always be interests in land.[160]

Rights of those in receipt of rents and profits

BACKGROUND

5.64 Recommendation (3) - that the rights of persons in receipt of rents and profits should cease to have overriding status - raises issues that are less clear cut. However, after careful consideration, we have concluded that it is correct in principle, particularly in the light of the future introduction of electronic conveyancing. Because it is a point of some difficulty, we explain the issues very fully. At common law, under the so-called rule in *Hunt v Luck*[161]—

> (1) A tenant's occupation is notice of all that tenant's rights, but *not* of his lessor's title or rights; (2) *actual knowledge* that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor *is* notice of that person's rights.

This rule, which continues to apply to unregistered land,[162] is not replicated by section 70(1)(*g*). A purchaser of registered land will be bound by the persons who are in receipt of the rents and profits of the land whether or not he knows of them. In practice however, the positions in registered and unregistered land may not differ substantially.

[157] See above, paras 1.2, 4.35.

[158] See below, paras 11.8 and following.

[159] Trusts of Land and Appointment of Trustees Act 1996, s 2(1).

[160] Cf Trusts of Land and Appointment of Trustees Act 1996, s 3(1) (abolishing the doctrine of conversion).

[161] [1901] 1 Ch 45, 51, *per* Farwell J; affirmed [1902] 1 Ch 428, 434, CA (emphasis added).

[162] Though its importance is greatly reduced by the requirements of registration under the Land Charges Act 1972.

Where unregistered land is subject to a series of legal leases and underleases, any purchaser of any estate in that land will take subject to those leases regardless of any knowledge that he or she may have of them, simply because they are *legal* estates. We have not been able to ascertain why the rights of those who are in receipt of rents and profits was given overriding status in registered land. However, it may have been to protect leases which were neither overriding interests (because they were granted for more than 21 years[163]) nor substantively registered (because, at the time when they were granted, they were in an area that was not then subject to compulsory registration).

THE CASE FOR REMOVING OVERRIDING STATUS

5.65 There are two principal reasons that can be advanced as to why the rights of those who are in receipt of the rents and profits should cease to enjoy overriding status—

(1) Dispositions of registered land should so far as is possible be completed by registration.[164] That is one of the guiding principles for reform [165] and the overriding status of the interests of those who are in receipt of rents and profits may discourage this objective.[166] There is no particular logic in exempting the recipients of rents and profits from this requirement. Although, as we explain in the following paragraph, the removal of overriding status could lead to hard cases, this is simply a concomitant of the fundamental principle of registered conveyancing that an unregistered disposition is void against a purchaser. That rule provides a powerful incentive to register. In any event, as we have already indicated[167] and will explain in more detail in Part XI,[168] we envisage that, with the introduction of electronic conveyancing, it will become impossible to create most rights over registered land expressly, *except* by registering them. That will in time necessarily eliminate this particular problem.

(2) To require a purchaser[169] to discover the existence of some intermediate landlord may place an unreasonable burden upon him or her, because the existence of such a person may not be readily discoverable and is unlikely to be obvious from an inspection of the land.

THE CASE FOR RETAINING OVERRIDING STATUS

5.66 There are three main reasons for retaining the overriding status of the rights of those in receipt of rents and profits—

(1) Its abolition could, *as the law presently stands*, lead to results that are harsh and

[163] Land Registration Act 1925, s 70(1)(*k*); below, para 5.87.

[164] They will have to be once electronic conveyancing is introduced: see below, para 11.10.

[165] See above, para 1.14.

[166] As all land is now subject to compulsory registration, all new leases which are not overriding interests by reason of their duration should normally be registered: see Land Registration Act 1925, s 123 (as substituted by Land Registration Act 1997, s 1).

[167] See above, para 1.2.

[168] See below, paras 11.08 and following.

[169] Whether of the freehold reversion or of a leasehold estate.

capricious, as the following example will demonstrate.[170] A Plc, which owns a freehold, sells it to B and a transfer is duly executed. B's solicitor fails to register the transfer. B goes abroad to work and grants a lease of the house to C for three years. C's lease is an overriding interest under section 70(1)(*k*).[171] A Plc then transfers all its assets to D Plc. Those assets will of course include the title to B's land, of which A Plc was still registered proprietor. If B's rights no longer took effect as an overriding interest, D Plc would take the land free of them.[172] Furthermore, because the validity of C's lease is dependent on B's interest, it would also be invalidated and would not bind D Plc either, notwithstanding that it had been an overriding interest. Such remedies as B and C might have, would lie only in damages.[173] By contrast, under the present law, D Plc takes the land subject to B's overriding interest and B is therefore entitled to be registered as proprietor. B would recover his land and C's lease would remain unaffected.[174] Although this is a potential trap as the law stands, it will cease to be so when electronic conveyancing is introduced. It will not be possible to transfer a registered estate except by registering it.[175]

(2) In many cases the rights of such persons will be protected in any event because they will hold under a lease granted for 21 years or less[176] that is itself an overriding interest. It follows that any purchaser of any estate or interest in the land must in practice make inquiries of the person in occupation of the land to discover whether they pay rent to someone other than the freeholder.

(3) If the overriding status of such rights were abolished, it would be necessary to make appropriate transitional provisions.[177] Not only would the framing of such provisions be difficult, but the existence of them would for many years defeat one of the main objectives of abolishing overriding status, namely the reduction in the range of inquiries that any purchaser would need to make.

5.67 Despite these difficulties, we consider that the future introduction of electronic conveyancing tips the balance in favour of abolishing for the future the overriding status of the rights of those who are in receipt of rents and profits. When that system comes in, it is likely to be impossible to create registrable leases except by registering them. Our provisional view is, therefore, that the opportunity should be taken to remove that overriding status as part of the present exercise. We would however be particularly grateful for—

(1) information about any problems that they have encountered with the present law; and

[170] HM Land Registry has encountered facts of this kind from time to time.

[171] See below, para 5.87.

[172] Because they would take effect as an unregistered minor interest.

[173] B might have claims against A Plc and against his solicitor. C might have a claim against B if the lease contained an express covenant for quiet enjoyment.

[174] It should be noted that under a land registration system in which failure to register places a right at risk of defeat by a disposition of the land for value, harsh results will inevitably occur.

[175] See below, paras 11.8 and following.

[176] Or any lesser period that may be favoured on consultation.

[177] For possible transitional provisions, see below, para 5.68.

(2) any difficulties that we have not mentioned that they can foresee if overriding status were removed from those in receipt of rents and profits.

TRANSITIONAL PROVISIONS

5.68 If the overriding status of those who were in receipt of rents and profits are abolished as we provisionally recommend, the change will have to be prospective only. It will apply only to estates, rights and interests created *after* the legislation is brought into force. Existing estates, rights and interests which were overriding interests by reason of this limb of section 70(1)(*g*) will continue to be so. To remove overriding status from rights that presently enjoy it might contravene the ECHR (in the absence of any provision for compensation), should this result in the right being lost.[178] There is a further problem that arises however. If a person has an overriding interest by reason of the receipt of rents and profits at the time when any legislation comes into force, should that overriding status be permanently lost if they cease to be in such receipt? The obvious case is where a tenant has granted a sublease, that sublease expires and the tenant resumes possession. If the tenant then granted a new sublease, would the overriding status that he or she had previously enjoyed revive, or would it become necessary to protect his or her lease by registration?[179] If registration is required, the tenant's interest is inevitably placed at risk. If the landlord disposes of the freehold, the purchaser would not be bound by the tenant's lease if it had not been registered. The danger is that the tenant may not appreciate that he or she needs to register the lease in those circumstances in order to protect it. This is an issue upon which the Joint Working Group considers it inappropriate to make a recommendation and seeks the views of readers.

Provision for fraud or estoppel

5.69 We agree with that part of recommendation (5) in the Third Report that there should be a general provision by which no overriding interest of any category should prevail against a purchaser in cases of fraud or estoppel and we make recommendations to that effect below.[180] However, we disagree with the first part of recommendation (5) that the words in section 70(1)(*g*), "save where enquiry is made of such person and the rights are not disclosed", perform no useful function. We consider that they provide a clear and certain test by which a purchaser can tell whether a person who is in actual occupation has an overriding interest, and we note that others have made the same point.[181] At present, there is no indication in the wording of the paragraph as to the nature of the enquiries that must be made. However, we agree with the assumption that such enquiries must be "appropriate" or "reasonable"[182] and we consider that this should be made explicit in the legislation.

Occupation of part

5.70 Recommendation (6) in the Third Report is that the legislation should state explicitly

[178] See above, paras 4.27 - 4.30.

[179] Obviously there would be no difficulty if the lease was itself an overriding interest having been granted for a term of 21 years or less: Land Registration Act 1925, s 70(1)(*k*); below, para 5.87.

[180] See para 5.108.

[181] See Roger J Smith, "Land Registration Reform - The Law Commission's Proposals" [1987] Conv 334, 338.

[182] See *Lloyds Bank Plc v Rosset* [1989] Ch 350, 403 - 406, *per* Purchas LJ.

what is already settled by judicial decision,[183] namely that "the rights of every person in actual occupation of the land" included the case where the person was in occupation of *part* of the land to which his rights related. We agree with this recommendation in principle. However, we consider that some care is needed in drafting the provision. It is important that where someone is in actual occupation of part of the land but they have rights over the whole of the land purchased, their rights protected by actual occupation should be confined to the part which they occupy.

Should the occupier's actual occupation be apparent?

5.71 Recommendation (2) of the Third Report was that actual occupation should not have to be apparent. Any requirement that it should be, it was said, would introduce into land registration the doctrine of notice.[184] We do not agree with this recommendation and we consider that, in principle, section 70(1)(*g*) should be limited to the rights of those whose occupation is apparent. While we entirely agree that the doctrine of notice should not be introduced into registered land,[185] we do not agree that limiting actual occupation to cases where it is apparent would have that effect.

5.72 Our starting point has been to examine certain principles of the law of conveyancing which, we believe, provide a way forward. Where a seller contracts to sell land, he or she is bound to disclose to the intending purchaser prior to contracting all latent defects in his or her title.[186] For these purposes, a defect is latent (as opposed to patent) if, on an inspection of the land, it does not arise "either to the eye, or by necessary implication from something which is visible to the eye".[187] A defect of title may be latent even though the purchaser has constructive notice of it.[188] The test is whether the right is apparent on a reasonable inspection of the land, not whether the right would have been discovered if the purchaser had made all the enquiries which ought reasonably to have been made. A seller can exclude liability[189] for not disclosing a latent defect in title only if it is one of which he or she neither knew nor ought to have known.[190]

5.73 While there will certainly be dispositions of registered land not preceded by a contract, to which these rules will not therefore apply,[191] there will be many others to which the

[183] "I would have no difficulty in deciding that 'the land' refers to 'the land or any part thereof'": *Hodgson v Marks* [1971] Ch 892, 916, *per* Ungoed-Thomas J. See too Russell LJ at p 931.

[184] Law Com No 158, paras 2.60 - 2.62.

[185] See above, para 3.44.

[186] See *Halsbury's Laws of England* (4th ed), Vol 42, para 61; *Reeve v Berridge* (1888) 20 QBD 523; *Re White and Smith's Contract* [1896] 1 Ch 637; *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666; *Peyman v Lanjani* [1985] Ch 457, 496 - 498. For the basis of the vendor's duty, see Charles Harpum, "Selling Without Title: a Vendor's Duty of Disclosure?" (1992) 108 LQR 280.

[187] *Yandle & Sons v Sutton* [1922] 2 Ch 199, 210, *per* Sargant J. He added that a purchaser was "only liable to take the property subject to those defects which are patent to the eye, including those defects which are a necessary consequence of something which is patent to the eye": *ibid.*

[188] *Ibid* at p 210; *Caballero v Henty* (1874) LR 9 Ch App 447, 450.

[189] By conditions of sale.

[190] *Becker v Partridge* [1966] 2 QB 155; *Rignall Developments Ltd v Halil* [1988] Ch 190. See Charles Harpum, "Exclusion Clauses and Contracts for the Sale of Land" [1992] CLJ 263, 294 *et seq.*

[191] Eg, a gift of land, where the land is mortgaged, or where there is an exchange of lease and counterpart without any prior agreement for a lease.

rules will be applicable. We consider that, as any purchaser of registered land will in practice need to determine whether the land is subject to patent defects in title, it is this test that should be adopted in relation to the rights of occupiers. In other words, a person would be in actual occupation for the purposes of the paragraph, only if that occupation was apparent on a reasonable inspection of the land.[192] It would not suffice that a purchaser might have constructive notice of that occupation[193] if it was not patent. The corpus of authority that exists on the distinction between latent and patent defects in title would provide guidance in cases of uncertainty or dispute.

Other matters

5.74 We have not commented on every aspect of section 70(1)(*g*). To the extent that we have not, it is because we are satisfied with workings of the paragraph. It may be that readers will take a different view and will consider that we should address some other aspects of it. We shall be glad to learn of any such matters, particularly if they are the cause of some practical difficulty.

5.75 **We therefore provisionally recommend that—**

(1) subject to the qualifications set out below, the rights of persons in actual occupation should continue to enjoy protection as overriding interests;

(2) for the purposes of this paragraph, persons would be in actual occupation of land only if they were physically present on the land and their occupation was patent, that is, apparent on a reasonable inspection of the land;

(3) section 86(2) of the Land Registration Act 1925 should be amended so that the rights of beneficiaries under a settlement (whether it was created under the provisions of the Settled Land Act 1925 or any other statute) should be capable of existing as overriding interests;

(4) the present exception by which rights that would otherwise be binding under section 70(1)(*g*) are not because they are not disclosed on inquiry, should be retained, and it should be made clear that the inquiry that is required is that which is reasonable in the circumstances; and

(5) where a person is in occupation of part only of the property in or over which he or she has rights, his or she rights should be an overriding interest within the paragraph, but only as regards the land which he occupies.

5.76 **We ask readers whether they think that the rights of persons who are in receipt of the rents and profits of land—**

[192] We do of course intend that this rule should apply even in cases where there is no contract preceding the transfer and therefore no obligation of disclosure on the part of the transferor or grantor.

[193] Which was the test considered in the Third Report: see Law Com No 158, para 2.62.

(1) should continue to be overriding interests; or

(2) should—

(a) continue to be overriding interests only if they were so at the time when the legislation came into force; but

(b) cease to have the status of overriding interests where those rights arose or were created after the legislation was brought into force.

If readers favour (2) (which we provisionally recommend), we ask whether in relation to those rights that remain overriding interests under (a), that status should permanently cease when the person is no longer in receipt of rents and profits, or whether it should revive if the person starts to receive them once more.

5.77 **Are there any other aspects of section 70(1)(*g*) that operate unsatisfactorily and which readers consider should be reviewed?**

Section 70(1)(h)

5.78 Most titles to registered land are absolute. However, there are other gradations of title, namely good leasehold title, possessory title and qualified title. Registration with one of these three titles has the same effect as registration with absolute title but subject to the following exclusions—

(1) *good leasehold title*: to any estate, right or interest which affects the lessor's title to grant the lease;[194]

(2) *possessory title*: to any estate, right or interest affecting the land at the time of registration;[195] and

(3) *qualified title*: where title can only be established for a limited period, to any estate, right or interest arising before a specified date or under a specified instrument.[196]

5.79 Section 70(1)(*h*) declares to be overriding interests—

> In the case of a possessory, qualified, or good leasehold title, all estates, rights, interests, and powers excepted from the effect of registration.

Thus, for example, where a squatter is registered with possessory title after twelve years' adverse possession, his title is subject to any estates, rights or interests adverse to those of the squatter that were in existence at the time of first registration, and these take effect as overriding interests. We agree with the conclusion which the Law Commission reached in the Third Report that the need for this provision is not apparent.[197] On any disposition of property with such a title, the Act expressly provides that the transferee takes subject to these estates, rights and interests in any event.[198] They operate outside the register and it is unnecessary to confer upon them the status of overriding interests.[199] Where the registrar amends the register to give effect to rights which are excluded from the effect of registration of land with a qualified or possessory title, this does not amount to "rectification" of the register, because it does not involve the correction of any error or omission. It follows that such an amendment to the register can never trigger the payment of an indemnity.[200] **We therefore provisionally recommend that the estates, rights, interests, and powers excepted from the effect of registration in cases of titles less than absolute should cease to be overriding interests. Do readers agree?**

[194] Land Registration Act 1925, s 10.

[195] *Ibid*, ss 6, 11.

[196] *Ibid*, ss 7, 12.

[197] Law Com No 158, paras 2.103 - 2.104.

[198] Land Registration Act 1925, ss 20(2), (3); 23(2), (3), (4).

[199] "[O]nce a matter has been expressly excepted by a class of title less than absolute, it stands and takes effect outside the register of title": Law Com No 158, para 2.104.

[200] For rectification, see below, Part VIII.

LOCAL LAND CHARGES

Section 70(1)(i)

5.80 Section 70(1)(*i*) provides that—

> Rights under local land charges unless and until registered or protected on the register in the prescribed manner

are to take effect as overriding interests. A local land charge is registrable at the local land charges register for the area in which the land in question is situated.[201] Such a land charge is however enforceable even if it has not been registered, though a purchaser who has made a proper search will be entitled to compensation in such circumstances.[202]

5.81 The function of section 70(1)(*i*) is two-fold—

(1) By making all local land charges overriding interests, it ensures that they are binding on any purchaser of the land affected.

(2) It recognises that some local land charges, although *binding* on any purchaser of registered land, will not be *enforceable* against him unless and until the charge is registered as a registered charge on the Land Register under the Land Registration Act 1925. The common factor that connects these charges is that they are charges on land to secure the payment of money. They include—

(a) a charge by a street works authority for the cost of executing street works;[203] and

(b) a charge to recover expenses incurred by a local authority because of non-compliance with a repair notice.[204]

5.82 In its Third Report, the Law Commission made two recommendations.[205] First, local land charges should cease to be overriding interests and should instead become general burdens. We have already explained why we do not support the creation of a category of general burdens.[206] Secondly, where a right was registrable as a local land charge, it should no longer be necessary to register it under the provisions of the Land Registration Act 1925. This proposal does at first sight appear attractive: a double registration requirement is both expensive and troublesome. However, we consider that it is necessary. The Land Registration Act 1925 confers on the proprietor of a registered charge "all the powers conferred by law on the owner of a legal mortgage".[207] Under a system of land registration it is desirable that if any person is to have a

[201] Local Land Charges Act 1975, s 4.

[202] Local Land Charges Act 1975, s 10.

[203] Highways Act 1980, s 212.

[204] Housing Act 1985, s 193; Schedule 10.

[205] Law Com No 158, para 2.94.

[206] See above, para 4.21.

[207] Section 34(1).

dispositive power over registered land, that fact should be apparent on the face of the register. The register must be as complete a statement of the title as is possible, particularly when there is a financial charge affecting the property. It should not be necessary to deduce such a fundamental matter from an entry on the local land charges register. Although the double registration requirement may be burdensome to registering authorities, we consider that it is the lesser of two evils.

5.83 We therefore believe that the substance of the present paragraph should be retained. However, we consider that as presently drafted, its effect is both unclear and misleading. **We therefore provisionally recommend that paragraph (*i*) should be recast in the following way—**

(1) local land charges should take effect as overriding interests, whether or not they are registered under the Local Land Charges Act 1975; but

(2) a local land charge that is also a charge over registered land to secure the payment of any sum of money should not be capable of being enforced until it is registered as a registered charge on the Land Register.

Do readers agree?

MANORIAL RIGHTS AND FRANCHISES

Section 70(1)(j)

Seignorial and manorial rights

5.84 When copyholds were enfranchised under the 1925 property legislation, certain siegnorial and manorial rights were preserved. These take effect as overriding interests in registered land (unless and until they are noted on the register) and are listed in section 70(1)(*j*) of the Land Registration Act 1925—

> Rights of fishing and sporting, seignorial and manorial rights of all descriptions (until extinguished)...[208]

A more precise list of such manorial rights is found in the Law of Property Act 1922,[209] and its effect is summarised in the Law Commission's Third Report.[210] They include—

(1) the lord's sporting rights;

(2) the lord's or tenant's rights to mines and minerals;

(3) the lord's right to hold fairs and markets;

(4) the tenant's rights of common; and

(5) the lord's or tenant's liability for the construction, maintenance and repair of

[208] The paragraph continues "...and franchises": see below, para 5.86.

[209] Schedule 12, paras (5) and (6).

[210] Law Com No 158, para 2.97

dykes, ditches canals and other works.[211]

5.85 Where enfranchised copyhold has been registered, these manorial rights are almost always apparent from the deeds affecting the property. Should the property in question be registered, they will therefore be entered on the register in most cases.[212] In practice therefore, few such rights will be overriding interests. However, because we cannot be completely confident that this is so, we consider that—

(1) they should be retained as overriding interests; but

(2) the wording should be simplified.

We therefore provisionally recommend that any subsisting manorial rights which have not been noted on the register should remain as overriding interests. Do readers agree?

Franchises

5.86 Also included in section 70(1)(*j*) are "franchises." In practice, these are of some importance. They arise by royal grant,[213] actual or presumed (ie by prescription). While some may fall within the scope of manorial rights, many will not.[214] We have asked readers whether they think that such rights should be capable of being registered estates.[215] If they were, they could be registered with their own titles, as well as being noted on the register of the title of the property burdened by them. In practice, it is unlikely that many franchises would be registered, particularly if they were in the hands of some corporation. As such rights are closely akin to customary rights and have usually been enjoyed for centuries, it is appropriate that they should remain overriding interests. **We therefore provisionally recommend that franchises should remain as overriding interests where they have not been noted on the register of the title of the land which they affect. Do readers agree?**

LEASES NOT EXCEEDING 21 YEARS

Section 70(1)(k)

Introduction

5.87 Section 70(1)(*k*)[216] provides that—

Leases granted for a term not exceeding twenty-one years

take effect as overriding interests. This paragraph, which is subject to certain

[211] We note however that this last category was made registrable as a Class A land charge in unregistered land: see Law of Property Act 1922, Schedule 12, para 6; Land Charges Act 1925, s 10(1).

[212] Ruoff & Roper, *Registered Conveyancing*, 6-24.

[213] "A royal privilege or branch of the royal prerogative subsisting in the hands of a subject, by grant from the King": Chitty, *The Prerogatives of the Crown* (1820), p 119. See *Spook Erection Ltd v Secretary of State for the Environment* [1989] QB 300, 305.

[214] See Law Com No 158, Appendix F, for a summary of the law on franchises.

[215] Para 3.20 above.

[216] As amended by Land Registration Act 1986, s 4(1).

exceptions under the right to buy legislation,[217] applies only to legal leases and not to agreements to grant such leases.[218]

The recommendations in the Third Report

5.88 In its Third Report, the Law Commission accepted that short leases should remain overriding interests and made six main recommendations[219] in relation to the paragraph—

(1) There was no real case for reducing the period of 21 years.[220]

(2) Reversionary leases[221] should be excluded, so that the only leases that would fall within the paragraph would be those which took effect in possession or within one month of the date of grant.[222] Reversionary leases granted for a term of 21 years or less would therefore have to be protected as minor interests.

(3) A discontinuous term of years, such as a time-share arrangement by which a tenant was entitled to occupy premises for a number of weeks each year for a certain number of years, should be excluded from the scope of the paragraph and should require substantive registration in the same manner as a reversionary lease.[223]

(4) The paragraph should continue to apply only to legal leases and not to agreements for leases as well.[224]

(5) It should be expressly stated in the Act that the ordinary rules governing the running of the benefit and the burden of lessees' and lessors' covenants should apply to such leases.[225]

(6) There should be no requirement that a lease should fall within the paragraph only if the lessee was in occupation of the property.[226]

These recommendations were incorporated in the Draft Bill contained in the Fourth Report.[227]

[217] See Housing Act 1985 (as amended), ss 154(6), (7), 171(G); Schedule 9A, para 3.

[218] *City Permanent Building Society v Miller* [1952] Ch 840.

[219] Which, in the following paragraphs, we refer to as "recommendation (1)" or "recommendation (4)" as the case may be.

[220] Law Com No 158, para 2.41.

[221] A reversionary lease is one which does not take place at the time of the grant but at some future date.

[222] Law Com No 158, para 2.44.

[223] *Ibid*, para 2.46.

[224] *Ibid*, para 2.48.

[225] *Ibid*, para 2.49.

[226] *Ibid*, paras 2.50 - 2.51.

[227] Law Com No 173, Draft Bill, cl 7(2)(b).

5.89 The Joint Working Group is in broad agreement with recommendations (2), (3), (4) and (6). However, we wish to propose one minor change to recommendation (2). We consider that recommendation (1) must be tested by consultation and our eventual decision will depend upon the views expressed by readers. Recommendation (5) is, in our view, unnecessary.

Reduction in length?

5.90 We have already explained that we consider that it would now be appropriate to consult on the possibility of reducing the length of leases which are registrable.[228] We have suggested some possible options in Part III of this Report, but without making any recommendations.[229] If, as a result of consultation, there were any reduction in the length of leases that were registrable, there would of course have to be a commensurate reduction in the length of leases which took effect as overriding interests under section 70(1)(*k*). However, we consider that it would be wrong to remove the overriding status of leases that had previously been granted for 21 years or less, and any legislation would have to contain a saving for such rights. This saving would itself be subject to one proviso. If any such lease were thereafter assigned and the number of years that it had still to run was more than that at which leases were registrable, in our view it should at that stage become registrable and would cease to be an overriding interest under section 70(1)(*k*).[230]

Reversionary leases

5.91 Although reversionary leases are rare, the implementation of recommendation (2) in the Third Report would constitute a minor but useful reform of the law. To require the substantive registration of reversionary leases would mark an advance on unregistered conveyancing, where no mechanism exists to make such leases readily apparent on the face of the title. However, we consider that it would be preferable for reversionary leases to be registrable if they were to take effect in possession more than *three* months after grant rather than one as originally proposed by the Law Commission, which is, in our view, too short.

Time-share leases

5.92 We agree with recommendation (3) that discontinuous terms should require substantive registration. Although it may lead to a substantial number of registrations, with computerisation, this can be accomodated by the Registry.

[228] See above, para 3.8.

[229] See above, para 3.10.

[230] Thus (for example), if it was decided to make leases of more than 14 years registrable and an existing lease that was an overriding interest and which had more than 14 years to run was assigned, the lease would become registrable on the assignment.

Transmission of covenants

5.93 We doubt whether recommendation (5) in the Third Report - that the ordinary rules governing the running of the benefit and the burden of lessees' and lessors' covenants[231] should apply to such leases - is necessary. We are not aware that it has ever been suggested that the rules on the transmission of covenants in leases might vary according to whether title to the land was or was not registered. It seems to have been assumed that those rules were regarded as matters of contract rather than of property law. We would not wish to do anything to cast doubt on this assumption (which we share) and we do not think that any express provision is needed.

5.94 **We therefore provisionally recommend that—**

(1) subject to the exceptions in the right to buy legislation contained in Part V of the Housing Act 1985 (as amended), a lease granted for a term not exceeding 21 years (or such lesser period as may be favoured on consultation) and taking effect in possession or within three months of the grant should be an overriding interest; but

(2) this would be subject to an exception in favour of a discontinuous term of years, such as a time-share arrangement, which would require substantive registration.

Do readers agree?

CERTAIN MINERAL RIGHTS WHERE TITLE WAS REGISTERED PRIOR TO 1926

Section 70(1)(l)

5.95 We have already explained some of the difficulties associated with mineral rights in registered land and the reasons for them.[232] Section 70(1)(*l*) preserves as overriding interests certain mineral rights in land registered prior to 1926. Where land was registered before 1898, *all* mineral rights created prior to that date are overriding interests. Where land was registered after 1897 but prior to 1926, *any mineral rights created before the land was registered* are overriding interests. The reasons for this are purely historical and reflect the different ways in which mineral rights were treated under the Land Transfer Acts of 1862, 1875 and 1897.[233]

5.96 In the course of our inquiries, we discovered that there are significant numbers of grants of mineral rights made before 1926 that are still being exploited or which may

[231] The rules of transmission differ according to whether the lease was granted before 1996 or after 1995. The former are governed by a mixture of common law and statutory rules, the latter by the provisions of the Landlord and Tenant (Covenants) Act 1995. That Act enacted in substantially modified form the recommendations made by the Law Commission in its Report, Landlord and Tenant Law: Privity of Contract and Estate (1988) Law Com No 174.

[232] See above, para 3.13.

[233] The Land Transfer Act 1862 (sometimes called the Land Registry Act 1862), s 9, provided that unless mineral rights were expressly mentioned as being within the description of the land to be registered, they were not included. The Land Transfer Act 1875, s 18(4) provided that transfers of registered land were subject to any third party rights to mines and minerals as what would now be called overriding interests. The Land Transfer Act 1897, Schedule 1 amended s 18(4) of the 1875 Act. Only mineral rights created prior to the registration of the land or the commencement of the 1897 Act (on January 1, 1898) took effect as overriding interests.

yet be exploited.[234] It would therefore clearly be wrong to assume that such grants have been worked out by now. Unfortunately it is not possible to identify those titles to land that were registered prior to 1926.[235] In these circumstances, we have concluded that there may still be mineral rights in existence that fall within this category of overriding interest.[236] It would therefore be inadvisable to repeal it. **We therefore provisionally recommend the retention of this category of overriding interests. Do readers agree?**

RIGHTS TO COAL

Section 70(1)(m)

5.97 It was formerly provided that all the rights and title to coal that were by statute vested in what became the British Coal Corporation, together with all ancillary rights, took effect as overriding interests, not under the Land Registration Act 1925, but by virtue of other statutory provisions.[237] The reason for these provisions was entirely practical. The Land Registry is aware that the British Coal Corporation and its predecessors did not wish to have to register in their respective names all the mineral rights that had become vested in them. This point was (perhaps understandably) not appreciated by the Law Commission, which was unable to explain why coal alone of the statutory and prerogative mineral rights,[238] should be designated an overriding interest. In its Third Report, the Commission therefore recommended that the right to coal should cease to be an overriding interest and should take effect as a general burden like the Crown's other prerogative mineral rights.[239]

5.98 Under the provisions of the Coal Industry Act 1994, by which the coal industry is privatised, a new paragraph (*m*) has been added to section 70(1) of the Land Registration Act 1925:

> Any interest or right which is an overriding interest by virtue of paragraph 1(1) of Schedule 9 of the Coal Industry Act 1994.

Paragraph 1(1) of Schedule 9 provides that:

> Any interest in land consisting in an interest in any coal or coal mine, the rights attached to any such interest and the rights of any person under

[234] A typical comment was that of the CBI Minerals Committee: "The value of these pre-1926 rights would be difficult to assess but is likely overall to be very substantial". We received a number of specific instances from those who kindly responded to our inquires.

[235] If the titles *had* been identifiable, it might have been possible to examine them individually in an attempt to discover what the position was in relation to mines and minerals. This might have enabled us to discover whether there were any existing mineral rights that fell within section 70(1)(*l*).

[236] We would be particularly grateful to receive evidence about the existence of such rights. None of those who responded to our inquiries was aware of any mineral rights that were overriding interests under s 70(1)(*l*).

[237] Coal Act 1938, ss 3, 41; Coal Industry Nationalisation Act 1946, ss 5, 8 and Schedule 1; Coal Industry Act 1987, s 1.

[238] The others are gold, silver, petroleum and uranium.

[239] Law Com No 158, para 2.102. We entirely accept that the statutory right to oil and the prerogative rights to gold and silver should not be overriding interests. These are rights to which all land is potentially subject: see para 4.36 above.

> section 38,[240] 49[241] or 51[242] of this Act shall, unless registered or otherwise entered on the register, be overriding interests for the purposes of the Land Registration Act 1925...[243]

The same paragraph also points to the reason for the provision. Unlike all the other categories of overriding interests except leases for 21 years or less,[244] the registrar cannot be required by virtue of section 70(2) or (3) of the Land Registration Act 1925[245] to enter any note or notice of any such interest, right or claim.[246] The rights in question are overriding interests precisely so that there is no necessity to register them, given both the complexity of many of the rights in question and the sheer number of them. In the light of Parliament's recently expressed intention, there would have to be a compelling reason for us to recommend any change to this provision and we have found none. **We therefore provisionally recommend that any interest in land consisting in an interest in any coal or coal mine and the other ancillary rights listed in the Coal Industry Act 1994, Schedule 9, para 1(1) should continue to be overriding interests. Do readers agree?**

SECTION 70(2) AND (3) OF THE LAND REGISTRATION ACT 1925

5.99 Section 70(2) and (3) of the Land Registration Act 1925 make provision for the noting on the register of certain overriding interests both at the time of first registration and subsequently. Neither subsection was considered by the Law Commission in its Third Report, nor was either replicated in the draft Bill contained in the Fourth Report. To omit these provisions would, in our view, conflict with what we consider should be one of the fundamental principles of land registration, namely that the register should fully and accurately reflect the state of the title of the property registered.[247] We propose to recast these subsections to reflect more accurately both their interaction with certain of the rules in the Land Registration Rules 1925 (which has been a cause of some difficulty) and the practice of the Land Registry. We also seek the views of readers as to whether the provisions can be made into a more effective means of securing the protection on the register of rights that would otherwise be overriding interests.

5.100 Section 70(2) of the Land Registration Act 1925 provides that—

> Where at the time of first registration any easement, right, privilege, or benefit created by an instrument and appearing on the title adversely affects the land, the registrar shall enter a note thereof on the register.

This subsection has been held to impose a mandatory *duty* on the registrar to enter a note of such rights on the register,[248] but that duty is confined to those *which appear on*

[240] Rights to withdraw support.

[241] Rights to work coal in former copyhold land.

[242] Additional rights in relation to underground land.

[243] This provision came into force on 31 October 1994: see SI 1994 No 2553.

[244] Section 70(1)(*k*); para 5.87 above.

[245] See below, paras 5.99 and following.

[246] Coal Industry Act 1994, Schedule 9, para 1(1).

[247] See above, para 1.14.

[248] *Re Dances Way, West Town, Hayling Island* [1962] Ch 490, 508.

the title. The registrar has a *discretion* on first registration to enter on the register a notice of an easement, right, privilege, or benefit created by an instrument which does *not* appear on the title.[249] The registrar is in fact under a duty to make appropriate entries on the register at the time of first registration of a number of rights which burden the title which is to be registered.[250] These include encumbrances, conditions and other burdens (including fee farm grants, or other grants reserving rents or services,[251] land charges[252] and restrictive covenants).[253] These obligations to note rights on the register are subject to one qualification provided by the Land Registration Rules 1925, that the registrar—

> shall not be required to enter notice of any liability, right, or interest which shall appear to him to be of a trivial or obvious character, or the entry of which on the register is likely to cause confusion or inconvenience.[254]

It is because of this rule that the registrar will not, for example, enter on the register a note of a right of way over a public road.[255]

5.101 Section 70(3) provides that—

> Where the existence of any overriding interest mentioned in this section is proved to the satisfaction of the registrar or admitted, he may (subject to prescribed exceptions) enter notice of the same or of a claim thereto on the register, but no claim to an easement, right or privilege not created by an instrument shall be noted against the title to the servient land if the proprietor of such land (after the prescribed notice is given to him) shows sufficient cause to the contrary.

This subsection therefore confers on the registrar a general discretion to note on the register any overriding interest (subject to prescribed exceptions) which is established to his satisfaction. It then places a specific restriction on the power in the case of an easement, right or privilege that arises other than by instrument.[256]

5.102 We have already explained that neither section 70(2) nor (3) applies to rights to any interest in coal within section 70(1)(*m*).[257] Furthermore, neither section will in practice apply to short leases which are overriding interests within section 70(1)(*k*), because

[249] Land Registration Rules 1925, r 41(1); *Re Dances Way, West Town, Hayling Island*, above, at p 508.

[250] See Ruoff & Roper, *Registered Conveyancing*, 3-12.

[251] Land Registration Rules r 40. An overriding interest is quite expressly *not* an encumbrance for these purposes: Land Registration Act 1925, s 70(1).

[252] Land Registration Act 1925, s 59(2).

[253] Land Registration Act 1925, s 50(1). Many restrictive covenants affecting unregistered land will be protected as a land charge, but those created prior to 1926 will not.

[254] Rule 199. The Land Registration Act 1925 s 144(2) provides that any rules made under the rule-giving power in s 144(1) of the Act "shall be of the same force as if enacted in this Act".

[255] Ruoff & Roper, *Registered Conveyancing*, 5-03.

[256] Eg, an easement arising by prescription or by implied grant or reservation.

[257] Land Registration Act 1925, s 70(4) (which was inserted by the Coal Industry Act 1994, Sched 9, para 1(2)); above, para 5.98.

these cannot be noted on the register.[258]

5.103 As we have indicated above, we consider that sections 70(2) and (3) should be recast in a more coherent form.[259] The subsections are not entirely satisfactory as they stand. For example, it is not clear why the registrar is under a duty to note on the register on first registration (but not on any subsequent occasion) easements, rights and privileges which are both created by instrument and appear on the title, but not other overriding interests the existence of which is undisputed. **The essentials of the scheme that we propose would be that—**

(1) the registrar would have a discretion to note on the register any overriding interest except short leases (within section 70(1)(*k*)) and rights to coal (within section 70(1)(*m*));

(2) this discretion would be exercisable both on first registration and at any time subsequently;[260]

(3) the mechanism for protecting such rights by notice would be the same as it would on an application to register such a right;[261] and

(4) the registrar would no longer be under a *duty* to note on the register certain specific overriding interests, but his decision either to note on the register or not would be subject to appeal to the court by any person interested in the land.[262]

By making the decision to note on the register discretionary, there would be no need to have express exceptions for trivial and obvious rights.[263] We ask whether readers agree with the scheme that we propose.

5.104 There is one other proposal that we make which may help to bring more overriding interests on the register. It is already the case that, on an application for first registration, the form requires the applicant to disclose whether the property is subject to any overriding interests.[264] We consider that this obligation should be made explicit in the Act and that there should be a similar obligation on any subsequent application to register any disposition of registered land. The obvious advantage of such a positive requirement is that it should lead to a reduction in the number of overriding interests. Provided that such a requirement could be made effective, it would therefore promote our objective of making the register as conclusive as possible as to the state of the title.

[258] Land Registration Act 1925, s 48(1).

[259] See above, para 5.99.

[260] Which in practice would mean when an application to register some disposition of the land was made to the Registry.

[261] For proposals for the protection of minor interests by notice, see below, paras 6.50 and following.

[262] An example might be if he failed to note on the register an overriding interest, the existence of which had been established.

[263] See Land Registration Rules 1925, r 199.

[264] See Land Registration Rules 1925, r 19 (as substituted); Form FR1 (introduced by the Land Registration Rules 1997).

There are however certain practical difficulties in imposing any such duty, and we accept that this proposal can only be a small element in achieving our objective.

5.105 The first difficulty is how to make such an obligation enforceable. The only obvious sanction is an indirect one. It lies in the requirement that when a person comes to sell land, they are obliged to disclose any latent defects in title of which they know or ought to have known, a duty which, as we have explained, cannot be excluded by the terms of any contract.[265] One effect of this rule is that if X applies to be registered as proprietor, it is in his or her interest to disclose to the registrar any overriding interests to which the property is subject, at least if they are latent defects in title. This is because, when X eventually comes to sell the land, he or she will have to disclose the right to any intending purchaser.[266] If the right is on the register, the obligation of disclosure is, in practice, much more readily discharged. Even if the applicant for registration is not an outright transferee, but a chargee, he or she should disclose any such overriding interest. This is because if they have to exercise their power of sale to realise their security, they will be under the same obligations as the registered proprietor to disclose to any purchaser latent defects in title.

5.106 The second difficulty in the path of an obligation to disclose overriding interests lies in providing guidance as to the quantum of evidence that the applicant must submit to support the application. Many applicants may be uncertain whether the facts known to them demonstrate the existence of an overriding interest or not, and whether they are expected to make further investigations before they can submit their application to register any transfer or disposition to them. This could lead to applicants for registration submitting inquiries to district land registries, which might place an unreasonable burden on their resources.[267] We do not consider that this need be an insuperable difficulty. The obligation to disclose an overriding interest when applying for registration could be limited to cases where the applicant's solicitor or licensed conveyancer was reasonably satisfied that, on the facts known to him or her, there was an overriding interest.[268] If there was any uncertainty or dispute, an application would be inappropriate. The primary purpose of seeking to secure the protection of overriding interests by noting them on the register is to ensure that rights *about which there is no dispute* are brought on to the register, thereby facilitating future dealings with that land. We accept that, where the applicant was unrepresented, it might not be possible to enforce this obligation in every case.

5.107 **We therefore seek the views of readers as to whether there should be an obligation on any person who is applying for the registration of a disposition of land, whether or not that land is already registered, to disclose to the registrar any overriding interests that he or she has discovered. Such an application would only be required if the applicant's solicitor or licensed conveyancer was reasonably satisfied that the right existed. The registrar**

[265] See above, para 5.72.

[266] If X fails to make such disclosure, the purchaser may either terminate the contract (if the non-disclosure relates to a matter that is substantial) or seek specific performance with compensation for the defect.

[267] On first registration the title is already scrutinised by the Registry. On subsequent dealings with registered land, issues of title do not normally arise in connection with absolute titles which make up the vast majority of those on the register.

[268] A limitation of this kind will be essential once electronic conveyancing is introduced.

would, as we have explained,[269] have a discretion whether or not to make the entry on the register.

GENERAL DEFENCES OF FRAUD AND ESTOPPEL

Defences to the assertion of all overriding interests

5.108 In its Third Report, the Law Commission proposed that there should be a general provision which explicitly subjected all overriding interests "to the jurisdiction of the courts to postpone them as against subsequent purchasers and lenders on the general grounds of fraud or estoppel".[270] This recommendation was duly included in the Draft Bill contained in the Fourth Report.[271] It was also proposed as a correlative of this that the qualification contained in relation to the rights of occupiers in section 70(1)(*g*), "save where enquiry is made of such person and the rights are not disclosed", would thereby become otiose and could be deleted.[272] We have already explained why we do not accept this subsidiary point.[273] However, we do accept the principal proposal. If (for example) an intending purchaser makes proper inquiry of a person who fails to disclose that he or she has an overriding interest over the land which is to be purchased, that encumbrancer should be estopped from asserting his or her interest after the transfer has been executed. Similarly, if the existence of an overriding interest is deliberately concealed by a person who has the benefit of it, that person should not be able to assert it against a purchaser who was misled by the concealment. **We therefore provisionally recommend that all overriding interests should be subject to the application of any rule of law relating to fraud or estoppel. Do readers agree?**

Waivers of priority

5.109 There is one aspect of this point that requires specific comment. Section 70(1) of the Land Registration Act 1925 provides that all registered land is subject to overriding interests "unless... the contrary is expressed on the register". It has become a commonplace for mortgagees, when lending on the security of occupied property,[274] to take a written waiver from any occupier, by which that person agrees to postpone his or her rights to those of the mortgagee. In *Woolwich Building Society v Dickman*,[275] a mortgagee took such a written waiver from an occupier who was a protected tenant under the Rent Act 1977, and who had an overriding interest. It was held by the Court of Appeal that this waiver was not effective because of the statutory restrictions on the circumstances in which a court could order possession against a protected or statutory tenant.[276] In relation to rights other than those enjoying such special statutory protection, the position was different. Such a waiver would not take away the status of the right as an overriding interest unless there was an express statement to that effect

[269] See above, para 5.103.

[270] Law Com No 158, para 2.75.

[271] Law Com No 173, cl 9(7).

[272] Law Com No 158, para 2.75.

[273] See para 5.69 above.

[274] The point usually arises in cases of second mortgages or remortgages.

[275] [1996] 3 All ER 204.

[276] See Rent Act 1977, s 98(1).

on the register.[277] However, the Court appeared to accept that it would estop the party who executed the waiver from asserting priority,[278] which as Morritt LJ explained, would have much the same effect as removing the right's overriding status.[279]

5.110 The reference in the judgments to the possibility that there might be an entry on the register to the effect that a particular right is not an overriding interest is, in our view, potentially misleading.[280] There are two forms of waiver in common use in relation to occupiers. In the first, a party confirms in response to the lender's inquiry, that he or she has "no rights, estate or interest in respect of the property or in the proceeds of sale".[281] As against the lender[282] there is in such a case no overriding interest where the occupier would otherwise be able to rely on the provisions of section 70(1)(*g*) (rights of persons in actual occupation).[283] This is because, under that paragraph, the lender has made inquiry of the occupier and his or her rights have not been disclosed. Under the second form of waiver, the occupier agrees that the lender's charge shall have priority over any estate, interest or right which the occupier may have.[284] This does not negate the existence of an overriding interest, but merely postpones it.

5.111 In neither of these cases is any entry required on the register in respect of the waiver. Indeed there is no viable mechanism for making entries on the register which negate the existence of an overriding interest.[285] Rule 197 of the Land Registration Rules 1925 provides for the making of an entry on the register that the property is free from an overriding interest. This procedure would in practice be employed only where there was evidence of the discharge of a particular overriding interest,[286] as where an easement arising by prescription had been extinguished either by agreement or because the dominant and servient tenements came to be owned and occupied by the same person. We do not consider that it is possible under the present law to make an entry

[277] See [1996] 3 All ER 204 at 211 (Waite LJ), 214 (Morritt LJ). The Court relied upon the words of s 70(1), quoted above, "unless... the contrary is expressed on the register".

[278] See [1996] 3 All ER 204 at 209, 211 (Waite LJ), 214 (Morritt LJ).

[279] [1996] 3 All ER 204 at 214.

[280] It has led one commentator to suggest that "in future, when taking a waiver or postponement of rights, the register of title of the land in question should be endorsed with a note of the consent and provide that the rights of those giving the consent are not to be overriding for the purposes of s 70 LRA": M Draper, "*Boland*'s back - and this time it means business" (1996) 140 SJ 1108, 1109. It will be apparent from what follows that we do not agree.

[281] Sir Peter Millett (ed), *The Encyclopaedia of Forms and Precedents* (5th ed 1993), vol 27, Form 60.

[282] But not as against any other person.

[283] See above, para 5.56. If the occupier were relying on some other paragraph of s 70(1), this form of waiver would not negative the existence of an overriding interest, but would estop the occupier from relying upon it.

[284] Sir Peter Millett (ed), *The Encyclopaedia of Forms and Precedents* (5th ed 1993), vol 27, Form 61. The waiver in *Woolwich Building Society v Dickman* [1996] 3 All ER 204 was of this variety. The tenant agreed that any right of occupation that he might have was postponed to the rights of the chargee.

[285] See Ruoff & Roper, *Registered Conveyancing*, 6-29.

[286] In *Re Dances Way, West Town, Hayling Island* [1962] Ch 490, 510, Diplock LJ suggested that an entry could only be made under r 197 if the overriding interest had previously been entered on the register (so that it ceased to be an overriding interest). There is no warrant for this suggestion in the wording of the paragraph. Indeed, once an overriding interest has been noted on the register, it is not easy to see why its subsequent discharge should be capable of being specially recorded. If it had been noted as a minor interest from its inception, this would not be the case.

on the register in respect of any waiver of priority. Nor do we consider that there should be. To avoid any possible doubt for the future, **we provisionally recommend that it should not be possible to make any entry on the register in respect of a waiver of priority by a person having the benefit of an overriding interest. Do readers agree?**

THE "REGISTRATION GAP"

5.112 One problem that was a source of uncertainty until comparatively recently was the so-called "registration gap" in relation to overriding interests. The question arises because there is at present an inevitable gap between the completion of a sale, lease of, or charge over registered land and the registration of the transfer or charge. Which is the appropriate date for ascertaining the existence of an overriding interest, the date of the transfer or the date of registration? The latter is the more logical in a system of title registration. A purchaser of registered land takes it *when registered* subject to entries on the register and overriding interests but free from all other estates and interests.[287] As one commentator has observed—

> The essence of any registration system lies in registration. If a purchaser fails to register then he cannot expect to assert priority over unprotected interests. Similarly, he should not be protected if he delays in registering. We should set out to encourage prompt registration. After all, registration might in some cases be delayed for years...[288]

However, the advantage of the transfer date is that it provides protection against overriding interests which are deliberately created between transfer and registration and which may therefore prejudice a chargee who has provided funding for the purchase. In its Third Report, the Law Commission recommended that the transfer date should be accepted as the relevant date for ascertaining the existence of an overriding interest.[289] To adopt this recommendation without more however, could lead to some very odd consequences. It would mean (for example) that if a local land charge were to arise between transfer and registration, the purchaser would take free of it for the reasons set out above.[290]

5.113 The Law Commission's proposals have, however, been overtaken by events. In *Abbey National Building Society v Cann*,[291] the House of Lords held that—

(1) the relevant date for ascertaining the existence of an overriding interest was *the date of registration*;[292] but

[287] Land Registration Act 1925, ss 20(1), 23(1).

[288] Roger J Smith, "Land Registration and Conveyancing Absurdity" (1988) 104 LQR 507, 509 - 510.

[289] Law Com No 158, para 2.77.

[290] See *Abbey National Building Society v Cann* [1991] 1 AC 56, 85. It should be noted that, in the Third Report, the Law Commission had recommended that local land charges should take effect as general burdens and bound all transferees: Law Com No 158, para 2.94. This particular oddity would not therefore have arisen under their proposals.

[291] [1991] 1 AC 56. See too *Barclays Bank Plc v Zaroovabli* [1997] Ch 321, 327, 328.

[292] Registration is deemed to take place when the application to register is delivered to the proper office: Land Registration Rules 1925, r 83.

(2) in relation to overriding interests under section 70(1)(*g*) - the rights of persons in actual occupation - the actual occupation had to be one "which preceded and existed at completion of a transfer or disposition",[293] because it was only at that date that the inquiry contemplated by the paragraph[294] could be made.

We consider that this rule achieves a fair balance between the principles of registration and the interests of encumbrancers on the one hand and the need to ensure security for the interests of purchasers and chargees on the other. **We provisionally recommend that this rule should be codified so that—**

(1) overriding interests that were in existence at the date of registration would bind any transferee; and

(2) where the overriding interest claimed was the right of an occupier, that person would have to have been in occupation at the date of the execution of the transfer or disposition of the registered land.

Do readers agree?

We note that, in time, the "registration gap" should become a thing of the past. If electronic transfer of land is introduced, transfers (and other dispositions of registered land) will be simultaneous with their registration.[295]

SUMMARY AND KEY ISSUES

5.114 In this Part we examine each of the existing categories of overriding interest and consider what reform, if any, might be appropriate, having regard to the criteria that we identified in Part IV. The principal objectives are to ensure—

(1) a high degree of security for registered titles; and

(2) that rights enjoy overriding status only where it is unreasonable or unrealistic to expect them to be registered.

In particular, rights which are expressly created should not normally enjoy the status of overriding interests unless there is some good reason for it (as there is in relation to some categories of overriding interests).

5.115 Subject to any information that may be revealed on consultation, we provisionally recommend that the following categories of overriding interests should be abolished because they are obsolete—

(1) liabilities having their origins in tenure;[296] and

(2) liability to make various payments in lieu of tithe or tithe rentcharge, other

[293] [1991] 1 AC 56 at 88, *per* Lord Oliver.

[294] "...save where enquiry is made of such person and the rights are not disclosed".

[295] Cf below, para 11.5.

[296] Land Registration Act 1925, s 70(1)(*b*).

than the liability to make payments known as corn rents.[297]

5.116 We ask for views upon the possibility of abolishing the overriding status of squatters' rights.[298] If that happened, such rights would be protected as an overriding interest only if and so long as the squatter was in actual occupation of the land.[299] This would bring about a change in the substantive law on adverse possession and would mean that the position in registered and unregistered land was different. However, this change can be justified on the basis of the greater security of title that it will give. Squatters will be a risk to purchasers of registered land only if they are in actual occupation and (if our recommendations are accepted) that occupation is apparent on a reasonable inspection of the land.

5.117 We provisionally recommend that interests excluded from the effect of registration where the proprietor was registered with a title other than absolute title[300] should cease to have the status of overriding interest, because it is not needed.

5.118 We provisionally recommend that the following categories of overriding interests should be retained either unchanged or with amendments which will clarify their scope—

(1) customary and public rights;[301]

(2) the liability to repair the chancel of a church;[302]

(3) liability in respect of embankments, and sea and river walls;[303]

(4) the liability to make payments in lieu of tithe that are commonly known as corn rents;[304]

(5) local land charges;[305]

(6) manorial rights and franchises;[306]

(7) leases granted for 21 years (or such lesser period as may be favoured on consultation);[307]

[297] *Ibid*, s 70(1)(*e*).

[298] *Ibid*, s 70(1)(*f*).

[299] Under *ibid*, s 70(1)(*g*).

[300] *Ibid*, s 70(1)(*h*).

[301] *Ibid*, s 70(1)(*a*).

[302] *Ibid*, s 70(1)(*c*).

[303] *Ibid*, s 70(1)(*d*).

[304] *Ibid*, s 70(1)(*e*).

[305] *Ibid*, s 70(1)(*i*).

[306] *Ibid*, s 70(1)(*j*).

[307] *Ibid*, s 70(1)(*k*).

(8) certain mineral rights in relation to property registered prior to 1926;[308] and

(9) rights in coal.[309]

5.119 We provisionally recommend that easements and profits *à prendre* should continue to be overriding interests[310] *except* where they are expressly granted, or where they arise out of a contract to grant them expressly. In practice this limitation will mean that the only easements and profits *à prendre* which will be overriding interests will be those which—

(1) arise by implied grant or reservation;

(2) are acquired by prescription;

(3) were not noted on the register at the time of first registration; or

(4) are appurtenant to an overriding interest.

Where such rights are expressly granted, they would have to be protected by registration.

5.120 We provisionally recommend that where an easement or profit *à prendre* takes effect as an overriding interest (but not where it is entered on the register), there should be a rebuttable presumption that the right had been abandoned if the party asserting it was unable to show that it had been exercised within the previous 20 years.

5.121 We provisionally recommend the retention of the overriding status of the rights of persons in actual occupation.[311] However, we consider that the legislation should be amended in a number of respects of which the following are the most important—

(1) it should restrict the protection given to situations where the occupier was physically present on the land and his or her occupation was apparent on a reasonable inspection of the land;

(2) it should confer protection on beneficiaries who were in actual occupation under a settlement for the purposes of the Settled Land Act 1925 (who are not presently protected);

(3) it should protect a person who is in actual occupation of part of a property, but only in respect of that part.

5.122 We provisionally recommend that the protection given to the recipients of rents and profits should not be retained in respect of rights that are created after any legislation is brought into force.

[308] *Ibid*, s 70(1)(*l*).

[309] *Ibid*, s 70(1)(*m*).

[310] *Ibid*, s 70(1)(*a*).

[311] *Ibid*, s 70(1)(*g*).

5.123 We provisionally recommend the introduction of a general power for the registrar to note overriding interests on the register.

5.124 We seek views on whether there should be an obligation for a person seeking to register a disposition to declare whether the property is subject to any overriding interests which he or she has discovered.

5.125 We provisionally recommend that if the existence of an overriding interest is either concealed or is not disclosed after a purchaser makes proper inquiry, this should preclude its assertion.

5.126 We provisionally recommend the codification of the present law by which—

(1) an overriding interest that is in existence at the date of the registration binds any transferee; and

(2) in the case of the rights of occupiers, the person claiming the right must be in actual occupation on the date of the execution of the transfer or disposition of the registered land.

PART VI
THE PROTECTION OF MINOR INTERESTS AND RESTRICTIONS ON DEALINGS WITH REGISTERED LAND

INTRODUCTION

6.1 It is an essential feature of an effective land registration system that it should provide not only for security of title for landowners but also for the proper protection of third party rights over that land by means of registration. In this Part we examine critically two related issues—

(1) the way in which minor interests may be protected on the register and the methods by which a registered proprietor's powers of disposition may be restricted or wholly inhibited; and

(2) the protection of interests in unregistered land against the title created on first registration of the land.

Our concern in this Part is with the protection of minor interests against registered dispositions. When we refer to "preserving the priority" of a minor interest, it is in relation to such dispositions. We are not concerned with the priority of minor interests *inter se*, which we address in Part VII.

6.2 In Part II of this Report we explained that minor interests constitute a residual category of interests in registered land.[1] Although a residual category, they are of the greatest importance to the whole scheme of the Act, because most third party rights over registered land will be minor interests. When a minor interest is protected by registration, the Registry does not guarantee the right that is so protected, as it does in the case of registered dispositions. The fact that a minor interest has been entered on the register provides no assurance of its inherent validity.[2] Under the Land Registration Act 1925 there are four methods by which minor interests may be protected - by a notice, a caution, a restriction or an inhibition.[3] Each of those four means of protection is intended to fulfil one or more functions which are not necessarily restricted to the protection of minor interests but may have other purposes as well. Indeed, in relation to some of the four, the function of protecting a minor interest may be a secondary rather than a primary purpose. In the following paragraphs we explain the manner in which each of these four methods of protection operates, its strengths and weaknesses and the other ways in which it can be used. We then summarise the principal criticisms of the present law and make proposals for reform.

[1] See above, para 2.19.

[2] This has implications for the issue of priorities as between competing minor interests as we explain in Part VII of this Report.

[3] See *Clark v Chief Land Registrar* [1994] Ch 370, 382.

THE PRESENT LAW

Notices

Nature of a notice

6.3 The entry of a notice on the Charges Register of the register of title[4] is the only one of the four methods of protecting a minor interest that ensures that it is binding on third parties who thereafter acquire interests in the land.[5] This is because once a minor interest has been protected by notice, every subsequent proprietor of the land affected and the persons deriving title under him or her are deemed to be affected with notice of the interest "as being an encumbrance on the registered land in respect of which the notice is entered".[6] As a consequence, there is no doubt that registration of a notice preserves the priority of the right protected.[7] Every disposition by the proprietor of the land affected by the right takes effect subject to it, provided of course that the right is valid[8] and is not overridden independently of the provisions of the Land Registration Act 1925.[9] One consequence of this is, that if a purchaser were to acquire registered land that was subject to a right validly protected by a notice, he or she would be bound by that right even though the notice was for some reason not disclosed on a search of the register.[10] Registration by notice does in fact provide the best protection that an encumbrance can have and is the appropriate method of providing permanent protection for a minor interest. It gives the right the equivalent protection to that which is enjoyed by a legal encumbrance in unregistered conveyancing.

What rights may be protected by notice?

6.4 The Land Registration Act 1925 does not lay down any general principle to determine which rights can be protected by notice. It is necessary to scour the provisions of both the Act and the Land Registration Rules 1925 to discover the circumstances in which a notice can - and cannot - be entered. The general effect of these rather complex provisions can be summarised by saying that both—

(1) minor interests that are not capable of being overreached on a disposition either of settled land or by trustees of land; and

[4] For the Charges Register, see Land Registration Rules 1925, rr 2, 7.

[5] See *Re White Rose Cottage* [1965] Ch 940, 949; *Clark v Chief Land Registrar* [1993] Ch 294, 310 (where Ferris J described such registration as being "very effective"); *Mortgage Corporation Ltd v Nationwide Credit Corporation Ltd* [1994] Ch 49, 54.

[6] Land Registration Act 1925, ss 48(1), 52(1). See too *ibid*, ss 49(1), 50(2).

[7] See *Clark v Chief Land Registrar* [1994] Ch 370, 382.

[8] Land Registration Act 1925, s 52(1). In *Mortgage Corporation Ltd v Nationwide Credit Corporation Ltd*, above, at p 56, Dillon LJ commented that "[n]otice is indeed notice, but it does not give validity, if validity is not otherwise there, and it does not give priority which would not, apart from the Act, have been there".

[9] A sale by a registered chargee under its overreaching powers would therefore override an interest protected by a notice to which the charge had priority, in the same way that a sale by a mortgagee of unregistered land in the same circumstances overreaches an interest protected by a land charge: see *Duke v Robson* [1973] 1 WLR 267.

[10] Such circumstances are in fact very rare and the purchaser would, in any event, have a claim to indemnity were they to occur: Land Registration Act 1925, s 83(3). This should be contrasted with the position where title is unregistered. A purchaser will take free of a land charge that is not revealed by an official search due to some error. This is because the certificate of search and not the registration is conclusive: Land Charges Act 1972, s 10(4).

(2) the burden of a registered disposition that in some way encumbers the land;

may be protected by notice. We explain in more detail in the following paragraphs the circumstances in which a notice may be entered on the register.

6.5 A notice of an interest may be entered on the register in the following circumstances—

(1) on first registration, in respect of an interest which is created by an instrument and which appears on the title, such as an expressly granted easement or a restrictive covenant;[11]

(2) where the right is an overriding interest[12] and it is sought to register it;[13]

(3) where a registered proprietor has the benefit of an easement, right or privilege over the land of another (whether by grant or reservation) and seeks to have that right registered as being appurtenant to his or her title;[14]

(4) where an owner of registered land makes some disposition out of his or her land (such as the grant of an easement) for the benefit of unregistered land, and the grantee seeks to register the burden of the right or interest against the servient title;[15]

(5) where a proprietor of registered land makes some disposition out of his or her land (whether by grant or reservation) in favour of land which is registered, and the proprietor of the land benefited applies to register the right or interest as an appurtenance to his or her title;[16]

(6) where there is an application to enter a notice in respect of an interest specified in section 49 of the Land Registration Act 1925 (which we explain in the next paragraph); and

(7) where an issue arises in relation to a caution[17] and the registrar makes an order that the caution should cease to have effect and that the right of the cautioner that is in issue should be protected by entry of a notice instead.[18]

6.6 The situation mentioned in (6) above requires further explanation. The Act makes provision for certain leases to be protected by notice and then lists other rights to which

[11] See Land Registration Act 1925, ss 50 (restrictive covenants), 51 (manorial incidents), 70(2) (easements, rights or privileges); Land Registration Rules, rr 40 (encumbrances), 41 (easements, rights or privileges).

[12] For example, where a person in actual occupation of the land has the benefit of an option to purchase the property.

[13] Land Registration Act 1925, s 70(3); Land Registration Rules 1925, r 197.

[14] See Land Registration Rules 1925, rr 252 - 255, especially r 253(2).

[15] See Land Registration Act 1925, ss 19 and 22.

[16] *Ibid*.

[17] See below, paras 6.13, 6.14.

[18] Land Registration Rules 1925, r 220(3).

such protection is to be extended.[19] As it happens, the provision relating to leases[20] is for practical purposes now obsolete, because it was confined to those that were neither overriding interests nor registered estates. Since 1987, such leases can no longer be created,[21] though subsisting registrations made before then are still effective.[22] The extension of the provision to other rights is not obsolete. Amongst the rights and interests that can be protected by notice in this way are the following—

(1) all land charges under the Land Charges Act 1972,[23] such as estate contracts, equitable easements and restrictive covenants;[24]

(2) charging orders under the Charging Orders Act 1979, the Criminal Justice Act 1988 and the Drug Trafficking Act 1994;[25]

(3) acquisition orders under the Landlord and Tenant Act 1987;[26]

(4) access orders under the Access to Neighbouring Land Act 1992;[27] and

(5) "creditors notices and any other right, interest or claim which it may be deemed expedient to protect by notice instead of by caution, inhibition, or restriction."[28]

The last of these categories ensures that those handful of rights which, in unregistered land still depend for their protection on the doctrine of notice,[29] are brought within the scheme of registered land and may be protected by the registration of a notice.[30]

[19] Land Registration Act 1925, ss 48 (certain leases); 49 (other rights, interests and claims) and 50 (restrictive covenants). See too Land Registration Rules 1925, rr 186 - 189 (leases); 190 and Sched, Form 59 (other rights, interests and claims).

[20] Land Registration Act 1925, s 48.

[21] Prior to 1987, leases which contained an absolute prohibition against assignment could not be registered with their own titles (if granted for more than 21 years). The law was changed by the Land Registration Act 1986: see Land Registration Act 1925, s 8(2)(as substituted by the Land Registration Act 1986, s 3(1)); Ruoff & Roper, *Registered Conveyancing*, 21-18.

[22] Land Registration Act 1986, ss 3(2), 4(4), 4(5); Ruoff & Roper, *Registered Conveyancing*, 21-18.

[23] Land Registration Act 1925, s 49(1)(*c*). See too s 59(2) (registration of a land charge, other than a local land charge, can be effected only by registering a notice, caution or other prescribed entry).

[24] Restrictive covenants are in fact specifically dealt with by separate provision: *ibid*, s 50.

[25] *Ibid*, s 49(1)(*g*) (inserted by the Charging Orders Act 1979, s 3(3); as amended by Criminal Justice Act 1988, s 170(1), Sched 15, para 6; Drug Trafficking Act 1994, s 65(1), Sched 1, para 1).

[26] Land Registration Act 1925, s 49(1)(*h*) (inserted by Landlord and Tenant Act 1987, s 61(1), Sched. 4, para 1).

[27] Land Registration Act 1925, s 49(1)(*j*) (inserted by Access to Neighbouring Land Act 1992, s 5(2)).

[28] Land Registration Act 1925, s 49(1)(*f*).

[29] Such as an equity arising by estoppel and an equitable right of re-entry.

[30] See Ruoff & Roper, *Registered Conveyancing*, 35-33.

6.7 A notice is not an appropriate method of protecting a right under a trust of land.[31] A notice cannot be registered in respect of any estate, right or interest which, independently of the provisions of the Land Registration Act 1925, is capable of being—

(1) overridden by the proprietor under either—

(a) a trust of land; or

(b) the powers conferred by the Settled Land Act 1925 or any other statute, or by a settlement; and

(2) protected by a restriction.[32]

The Land Registration Act 1925 also provides that the registration of a notice in respect of a right, interest or claim shall not prejudice the powers of disposition of personal representatives or trustees of land.[33] This is a puzzling provision, because there are no rights of which we can conceive that *could* be protected by notice[34] and which might prejudice these powers of disposition.

Procedure for the registration of a notice

6.8 The fact that a notice provides a means of protection for a minor interest that is both permanent and secure is reflected in the procedure governing an application to enter a notice. The procedure has two characteristics. First, subject to one exception, an entry will not be made unilaterally,[35] but only (a) with the concurrence of the registered proprietor; or (b) pursuant to an order of the court or the registrar. Secondly, the facts or documents upon which the claim to register is based must be set out or produced on application.[36] A notice can generally be entered on the register only if—

(1) the registered proprietor's land certificate is either produced to the registrar[37] or deposited at the Land Registry (which will be the case if there is a

[31] Such rights should be protected by the entry of a restriction if the land certificate is forthcoming, and by lodging a caution if it is not.

[32] Land Registration Act 1925, s 49(2). This general principle is subject to two qualifications. First, a notice may be lodged in respect of such an interest pending the appointment of trustees of land or of the settlement: *ibid*. Secondly, there is a power for a beneficiary under a trust of land or settlement to register a notice to require that there shall always be two trustees of land or trustees of the settlement (unless a trust corporation is acting as trustee): *ibid*, s 49(1)(*d*). In practice there are few applications for such notices. A restriction is entered on the Proprietorship Register instead: Ruoff & Roper, *Registered Conveyancing*, 35-29.

[33] Section 49(3).

[34] Given the effect of s 49(2), above.

[35] Unlike a caution, where the procedure for registration is *ex parte*: see below, para 6.11.

[36] Land Registration Rules, r 190; Sched, Form 59.

[37] Land Registration Act 1925, s 64(1)(*c*). There is an obligation under that subsection to produce the land certificate to the registrar when registering a notice "so long as the land certificate... is outstanding". Where the land certificate is not deposited with the Land Registry, it is considered to be "outstanding": see Ruoff & Roper, *Registered Conveyancing*, 3-29.

mortgage or charge registered against the land[38]), and he or she either makes or consents in writing to the application for registration;[39]or

(2) the registered proprietor's land certificate is deposited at the Land Registry, the Land Registry has notified the registered proprietor of the application, and he or she has not objected to the registration;[40] or

(3) the registered proprietor has granted the right in question but refuses to consent to the entry, pursuant to an order of the court[41] or a decision of the registrar[42] authorising the protection by notice on the register.

6.9 Although there are a number of situations in which, by statute, a notice can be entered on the register without the production of the land certificate,[43] in all but one of these, the registered proprietor will have had the opportunity either to object to the registration[44] or (in the case of orders of the court) to contest the matter prior to the making of the entry. The one exception is a charge in respect of a spouse's matrimonial home rights under the Family Law Act 1996.[45] The reason for this exception is to avoid marital disharmony. It enables spouses to protect their statutory rights of occupation without it coming to the attention of their husbands or wives.

[38] Land Registration Act 1925, s 65. In such a case, the certificate is not "outstanding": see Ruoff & Roper, *Registered Conveyancing*, 3-29. Even where there is no mortgage or charge, the registered proprietor may deposit the land certificate with the Registry if he chooses to do so: Land Registration Act 1925, s 63(1).

[39] See Land Registration Rules, r 266.

[40] Ruoff & Roper, *Registered Conveyancing*, 35-06.

[41] Land Registration Act 1925, s 48(2).

[42] Under Land Registration Rules, r 298(1).

[43] See Ruoff & Roper, *Registered Conveyancing*, 3-33. These are in respect of: (i) a lease at a rent without taking a fine (Land Registration Act 1925, s 64(1)(*c*), as interpreted in *Strand Securities Ltd. v Caswell* [1965] Ch 958); (ii) a creditor's notice (Land Registration Act 1925, s 64(1)(*c*)); (iii) a charge for inheritance tax (*ibid*, as amended by the Finance Act 1975, s 52(1), Sched 12; and the Finance Act 1986, s 100); (iv) a charge in respect of a spouse's matrimonial home rights under the Family Law Act 1996 (Land Registration Act 1925, s 64(5) (inserted by Matrimonial Homes and Property Act 1981, s 4(1); amended by Family Law Act 1996, s 66(1); Sched 8, para 45); Family Law Act 1996, s 31(10)); (v) any variation of a lease of a flat under the Landlord and Tenant Act 1987 (Land Registration Act 1925, s 64(6) (inserted by Landlord and Tenant Act 1987, s 61(1), Sched 4, para 2)); (vi) a public sector tenant's preserved right to buy under the Housing Act 1985, Sched. 9A, para 5(3) (inserted by Housing and Planning Act 1986, s 8(2), Sched 2); and (vii) an access order made under the Access to Neighbouring Land Act 1992 (Land Registration Act 1925, s 64(7) (inserted by Access to Neighbouring Land Act 1992, s 5(3))). The reasons for all these exceptions are not apparent. For example, it is odd that a lease at a rent without taking a fine can be registered as a notice without production of the land certificate, but a lease granted for a premium requires its production (or the concurrence of the registered proprietor): Ruoff & Roper, *Registered Conveyancing*, 21-14.

[44] Because he or she will have been notified of the application to enter the notice on the register before it is made.

[45] This exception is not new: it was first introduced by the Matrimonial Homes and Property Act 1981, s 4(1).

Cautions against dealings

Nature of a caution against dealings

6.10 The function of the provisions of the Land Registration Act 1925 which permit a caution against dealings to be lodged[46] is—

> to institute a procedure whereby a person interested in the land may ensure that he is warned of any proposed dealing and given an opportunity to assert priority for his interest.[47]

The objective of registering a caution is "very largely a purpose of obtaining notice of proposed dealings rather than a purpose of overriding purchasers".[48] The effect of lodging a caution is fundamentally different from that of entering a notice. As long as a caution remains on the register, it prevents the registration of any disposition of the land.[49] Provided that the registration system functions as it should, there is normally no possibility of completing a disposition by registration without the cautioner's rights in some way being addressed.[50] A notice, by contrast, does not inhibit dealing with the property in any way, but ensures that the right which it protects is binding on any person who acquires the land.

Procedure for lodging a caution

6.11 A caution provides protection for a minor interest that is limited in effect,[51] temporary,[52] and vulnerable to challenge by the registered proprietor.[53] This is reflected in two ways. First, the procedure for lodging a caution is *ex parte*.[54] Unlike a notice, a caution can be lodged without the need for the proprietor's consent, the production of his or her land certificate,[55] or a court order. The proprietor will not be

[46] Sections 54, 55; see below.

[47] *Clark v Chief Land Registrar* [1994] Ch 370, 383, *per* Nourse LJ. See too Ferris J at first instance: "a caution is essentially a procedure... not an interest in land": [1993] Ch 294, 314.

[48] *Clayhope Properties Ltd v Evans* [1986] 1 WLR 1223, 1231, *per* Dillon LJ. A caution resembles the caveat that is employed under Torrens systems of title. Thus in a case on appeal from Australia, *Abigail v Lapin* [1934] AC 491, 500, Lord Wright, commenting on the function of such a caveat, said that "the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim is disputed". In reliance upon this dictum, Brickdale & Stewart Wallace's *Land Registration Act, 1925* (4th ed 1939) p 158, stated (correctly it is suggested) that "the true purpose of a caution is to delay dealings *pendente lite*".

[49] "A caution prevents the registration of further dealings unless it has been warned off, withdrawn or vacated by the court or Chief Land Registrar": *Willies-Williams v National Trust* (1993) 65 P & CR 359, 362, *per* Hoffmann LJ.

[50] The right protected by the caution may, eg be protected by a more permanent form of protection. There may be exceptional cases where a caution is discharged but is allowed to continue: see below, para 6.14.

[51] See below, para 6.16.

[52] See below, para 6.12.

[53] For the "warning off" procedure, see below, para 6.15.

[54] See Land Registration Rules, r 215; Sched, Form 63.

[55] Land Registration Act 1925, s 64(1)(*c*).

notified of the application by the Registry until *after* the caution has been lodged.[56] Secondly, the applicant has only to satisfy the Registry that what is claimed is capable of being a cautionable interest.[57] A caution will then be entered. Neither the veracity of the declaration nor its legal merits will be investigated. As we explain below, to discourage abuse, there are sanctions against a person who lodges a caution without reasonable cause.[58] In practice, although no statistics are kept, the Registry's experience suggests that cautions are used primarily in two situations. The first is where the right is contested, so that the lodgement of the caution is a "hostile" form of registration. The second is where a right requires only temporary protection, as in the case of contract of sale.

Operation of a caution

6.12 Where a caution against dealings is lodged, no dealing with the land may be registered unless and until either—

(1) notice has been served on the cautioner;[59] or

(2) the cautioner consents to the dealing.[60]

In the absence of such consent, if an application is made to register any such dealing, the registrar is required to serve a notice on the cautioner, warning him that his caution will cease to have any effect after the expiration of fourteen days[61] following the date on which the notice is served,[62] unless the registrar makes an order to the contrary.[63] On receipt of such a notice, the cautioner may accede to the proposed transaction,[64] whether by consenting to it, [65] by withdrawing the caution, [66] or by allowing it to lapse.[67] Alternatively, the cautioner may object to the cancellation.

6.13 There is provision for the registrar either to delay the registration of the dealing or to

[56] HM Land Registry have a standard form for informing the proprietor that a caution has been lodged, which sets out the relevant details.

[57] This will be deduced from the statutory declaration that is made in support of the application: see Land Registration Rules 1925, r 215(4); Sched, Form 14.

[58] See below, para 6.22.

[59] Land Registration Act 1925, s 55(1).

[60] *Ibid*; Land Registration Rules 1925, r 217.

[61] Under special circumstances the registrar may direct that it should be some other period of not less than seven days: Land Registration Rules 1925, r 218(2).

[62] As a notice is deemed to have been received seven days after its issue, exclusive of the day of posting (see Land Registration Act 1925, s 79(2); Land Registration Rules 1925, r 313(1)), the cautioner does in practice have 21 days subsequent to the date on which the notice is posted.

[63] Land Registration Act 1925, s 55(1). In the absence of such a contrary order, the caution is cancelled: Land Registration Rules 1925, r 221.

[64] See Ruoff & Roper, *Registered Conveyancing*, 36-18.

[65] Consent may be conditional or unconditional. Although a transfer may be made conditional on the caution being carried forward to the new title, this will not protect the right against any subsequent third party encumbrancer: see Ruoff & Roper, *Registered Conveyancing*, 36-18.

[66] See Land Registration Rules 1925, r 222.

[67] *Ibid*, r 221.

make some other entry on the register if, within the fourteen day period, the cautioner (or his agent) appears before the registrar and—

(1) shows cause why the caution should continue to have effect;[68] and

(2) where required by the registrar, gives security for any damage that may be sustained by any party as a result of such delay.[69]

6.14 If the caution is challenged in this way, the registrar may either cancel the caution if he does not consider that the cautioner has made out a case,[70] or may hold a hearing.[71] Having heard the matter, the registrar then makes such order as he thinks just.[72] That order is likely to be one of the following—

(1) that the caution be cancelled and the transaction registered unconditionally;

(2) that the registration of the proposed transaction be refused;[73]

(3) that the transaction be registered subject to the prior protection of the cautioner's right or interest by some other more permanent means, such as a notice.[74]

What the registrar will not normally do is to allow the caution to continue.[75] This is because a caution, unlike a notice, is not intended to provide a means of permanent protection for a right or interest.[76]

Warning off

6.15 In practice, it could be highly inconvenient if a registered proprietor were not made aware that a caution had been lodged until the Registry had received an application to register a dealing with the land.[77] The Registry does in fact notify the registered

[68] Land Registration Rules 1925, r 219. For the manner in which cause may be shown, see *ibid*, r 220(1).

[69] Land Registration Act 1925, s 55(2).

[70] The cautioner has a right of appeal to the court in such a situation: Land Registration Act 1925, s 56(1).

[71] Land Registration Rules, r 220(2). Some cases are considered inappropriate for a hearing by the registrar - usually because they involve matters that are not concerned exclusively with land registration, but raise wider issues between the parties - and may be referred by him to the court: *ibid*, r 220(4); Ruoff & Roper, *Registered Conveyancing*, 36-21.

[72] Land Registration Rules, r 220(3).

[73] The refusal may be accompanied by an inhibition against registration at *any* future date: Ruoff & Roper, *Registered Conveyancing*, 36-20.

[74] *Ibid*.

[75] The registrar does have power to do so however: see Land Registration Rules 1925, r 220(3). In practice the only cautions that are normally allowed to continue are those entered "to protect writs and orders and pending actions, where the matter is or has been before the Court": Ruoff & Roper, *Registered Conveyancing*, 36-20. See further below, para 6.17.

[76] *Ibid*; and see above, para 6.11.

[77] Eg, a vendor might be on the brink of exchanging contracts, only to be told by the purchaser that a search of the register has revealed a caution against dealings.

proprietor if a caution against dealings has been entered, though it is not obliged to do so. The Land Registration Rules 1925 make provision for a "warning off" procedure.[78] Under these rules, a notice must be served on the cautioner, not only when some dealing is proposed, but at any time on the application in writing of the registered proprietor.[79] The proprietor may challenge the caution at that stage, though this does not invariably happen.

Effect of a caution

6.16 In *Barclays Bank Ltd v Taylor*,[80] Russell LJ summarised the effect of lodging a caution:

> [It] had no effect whatever by itself on priorities: it simply conferred on the cautioners the right to be given notice of any dealing proposed to be registered...[81] so that they might have the opportunity of contending that it would be a dealing which would infringe their rights and to which the applicants for registration were not as against them entitled. The limited function of such a caution is stressed by section 56(2), which enacts that a caution lodged in pursuance of this Act[82] shall not prejudice the claim or title of any person and shall have no effect whatever except as in this Act mentioned.

In that case it was held that a minor interest protected by a caution did not gain priority over another unregistered minor interest that was earlier in time.

6.17 It is also now clear that a caution will confer no priority as against a registered disposition. Indeed, it has been explained above that a disposition can normally be registered *only* if any caution has first been removed from the register.[83] In those rare cases in which a caution does remain on the register, then even if the cautioner assents to the registration of a disposition, that will not give the cautioner's interest priority over that disposition.[84] There have been very rare occasions when, due to some error in the Registry, a cautioner was not notified of the proposed transaction. Because he

[78] See Ruoff & Roper, *Registered Conveyancing*, 36-17.

[79] Land Registration Rules 1925, r 218(1).

[80] [1974] Ch 137, 147; footnotes added.

[81] See Land Registration Act 1925, ss 54(1), 55(1); above, paras 6.11, 6.12.

[82] Ie, the Land Registration Act 1925.

[83] See paras 6.12, 6.14. Cf *Parkash v Irani Finance Ltd* [1970] Ch 101, where a search by an intending chargee did not reveal the existence of a caution which protected a charging order. When the chargee attempted to register the charge, the cautioner was informed. It objected to the registration and it was held that its charging order took priority over the later charge, which, being unregistered, took effect only in equity and was therefore necessarily subordinate to the earlier minor interest: see the explanation of the case in *Clark v Chief Land Registrar* [1993] Ch 294, 312 - 3, *per* Ferris J; approved [1994] Ch 370, 385, *per* Nourse LJ.

[84] *Chancery Plc v Ketteringham* (1993) 69 P & CR 426, David Neuberger QC (sitting as a Deputy High Court Judge); [1994] Ch 370, CA. In that case, property developers contracted to grant the defendant a long lease of a flat in a block of flats which they were intending to develop. The defendant lodged a caution in respect of that estate contract. The developers charged the property to the plaintiffs in respect of a loan facility. That charge was registered, the defendant having given his consent to it. The plaintiffs sought to enforce the charge and the defendant claimed specific performance of the estate contract. It was held, both at first instance and on appeal, that the registration of the caution gave the defendant no priority over the plaintiffs' registered charge and his attempt to enforce the contract therefore failed.

or she was, as a result, in no position to object, the transaction was registered. In those circumstances, the purchaser took free of the cautioner's interest because the lodging of the caution had conferred no priority on that interest.[85]

6.18 The fact that a caution confers no priority on the interest in respect of which it is lodged, but just provides a means of notifying the cautioner of any dealing with the land, has only become fully apparent in recent years.[86] This limitation has undoubtedly come as a surprise to at least some practitioners. It means that a caution gives only limited protection to the rights of an encumbrancer who cannot obtain the consent of the registered proprietor to the registration of his right or interest. It also creates a paradox. Any person whose right is protected as an overriding interest, as for example where they are in actual occupation of the land,[87] who then lodges a caution in respect of that right, may actually *reduce* the protection that the right had hitherto enjoyed. Once so registered it will probably cease to be an overriding interest.[88] It will no longer automatically bind any person to whom a registered disposition of that land is made. The cautioner will merely be entitled to be informed of any disposition of that land and will then have to defend the right to ensure that it will bind the disponee. If a person may be worse off by registering a right than would have been the case if they had not done so, there is little incentive to register.

What rights may be protected by caution?

6.19 There are a number of provisions in the Land Registration Act 1925 and the Land Registration Rules 1925 which define what rights may be protected by a caution. Of these, two are particularly important.[89] First, section 54(1) lays down the general principle that—

> [a]ny person interested under any unregistered instrument, or interested as a judgment creditor, or otherwise howsoever in any land or charge registered in the name of any other person, may lodge a caution...

It is clear, both from this provision[90] and from the Land Registration Rules 1925, that a person - who must be someone other than the registered proprietor - can lodge a caution only in respect of an interest *in land*.[91]

[85] *Clark v Chief Land Registrar* [1993] Ch 294, Ferris J; affirmed [1994] Ch 370, CA.

[86] Specifically with the decision in *Clark v Chief Land Registrar* [1993] Ch 294 (Ferris J); [1994] Ch 370 (CA).

[87] Land Registration Act 1925, s 70(1)(*g*); above, para 5.56.

[88] By definition, an overriding interest is one that is "not entered on the register": see Land Registration Act 1925, s 3(xvi).

[89] Other examples include the protection of a mortgage that is not a registered charge: Land Registration Act 1925, s 106(3)(*c*), and the provision that, with the exception of local land charges (which take effect as overriding interests), the registration of a land charge can only be effected by means of a notice, caution or other prescribed entry: *ibid*, s 59(2). For these and other miscellaneous cases, see Ruoff & Roper, *Registered Conveyancing*, 36-05, 36-12.

[90] See *Elias v Mitchell* [1972] Ch 652, 659, 660 (examining both s 54(1) and its predecessor, Land Registry Act 1896, s 96).

[91] Land Registration Rules 1925, r 215(4) requires that, in the declaration that must be made in support of the caution when it is lodged, the cautioner must state the nature of the interest in the land or charge that is claimed.

6.20 The issue of whether a cautioner has a sufficient interest in land to lodge a caution under section 54(1) has arisen primarily in the context of trusts. This was generally because of the now-abolished doctrine of conversion, by which a beneficiary under a trust for sale was regarded, for some purposes at least, as having an interest in the notional proceeds of sale of the land rather than in the land itself.[92] These difficulties are unlikely to arise under the Trusts of Land and Appointment of Trustees Act 1996.[93] By virtue of this Act, all kinds of trust of property which consist of or include land[94] take effect as trusts of land.[95] Trusts for sale no longer have a distinct existence therefore, but are subsumed within the general umbrella of "trusts of land".[96] The doctrine of conversion in relation to trusts for sale is abolished.[97] Any person who is interested under a trust of land will necessarily be able to lodge a caution.

6.21 The second main provision of the Land Registration Act 1925 which concerns cautions is section 59(1). It enables certain rights to be registered that may not fall within the general principle that a caution can be lodged only in respect of an interest in land. The section provides that—

> [a] writ, order, deed of arrangement, pending action, or other interest which in the case of unregistered land may be protected by registration under the Land Charges Act [1972][98] shall, where the land affected or the charge securing the debt affected is registered, be protected only by lodging a creditor's notice,[99] a bankruptcy inhibition, [100]or a caution against dealings with the land or charge.

For present purposes, it is only cautions against dealings that require comment. What constitutes a writ, order, deed of arrangement, or pending action is determined by reference to the provisions of the Land Charges Act 1972.[101] Three points may be noted—

[92] *Elias v Mitchell*, above. See too *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 507.

[93] Implementing with some modifications the recommendations of the Law Commission in Transfer of Land: Trusts of Land (1989) Law Com No 181.

[94] Including trusts for sale and bare trusts.

[95] Section 1(2).

[96] Where a trust for sale is created, there is an overriding power for the trustees to postpone sale indefinitely: *ibid*, s 4.

[97] *Ibid*, s 3.

[98] The Act does of course refer to the Land Charges Act *1925*.

[99] It is the duty of the registrar, as soon as is practicable after a bankruptcy petition has been registered as a pending land action under Land Charges Act 1972, s 5, to register a creditors' notice against the title of any proprietor of any registered land or charge which appears to be affected. Such a notice protects the rights of all creditors and, unless cancelled by the registrar, remains in force until a bankruptcy inhibition is registered or the trustee in bankruptcy is registered as proprietor: Land Registration Act 1925, s 61(1). For the registration of the trustee in bankruptcy as proprietor, see *ibid*, s 42.

[100] The registrar is required, as soon as is practicable after a bankruptcy order has been registered in the register of writs and orders under Land Charges Act 1972, s 6, to enter a bankruptcy inhibition against the title of any proprietor of any registered land or charge which appears to be affected: Land Registration Act 1925, s 61(1).

[101] Namely, ss 5 (pending land actions); 6 (writs and orders affecting land); and 7 (deeds of arrangement).

(1) a pending land action may be registered only in respect of a claim to land or to a proprietary interest in or over it,[102] or where statute expressly provides;[103]

(2) a writ or order may be protected by a caution even where the writ or order does not create any interest in land, provided that it is falls within the categories that may be registered under section 6 of the Land Charges Act 1972;[104] and

(3) a *Mareva* injunction that is granted to restrain a defendant in interlocutory proceedings from removing from the jurisdiction or otherwise dealing with assets within the jurisdiction,[105] cannot be protected by a caution, even though it may involve (for example) the proceeds of sale of land. This is because such an injunction does not fall within the categories of writs and orders that are registrable under section 6 of the Land Charges Act 1972.[106]

Sanctions against lodging a caution without reasonable cause

6.22 It has been explained above that the procedure for the entry of a notice is *inter partes* in character in all save one exceptional case.[107] The registered proprietor will in virtually all cases have had the opportunity in some way or another to object to the registration. The Act therefore makes no provision for the improper registration of a notice because none is needed. The position in relation to *cautions* is necessarily different because they are lodged *ex parte* and there is, accordingly, some risk of abuse. It has been noted that—

> to effect registration of a... caution is an easy matter, and... to do so will usually effectually inhibit any disposition of the land so long as the registration remains effective. Registration may, therefore, become a weapon of considerable nuisance value...[108]

6.23 As a response to this potential for abuse, the courts have developed their inherent jurisdiction to vacate a caution on interlocutory motion.[109] There is an additional

[102] *Calgary and Edmonton Land Co Ltd* [1974] Ch 102; *Whittingham v Whittingham* [1979] Fam 9. See Ruoff & Roper, *Registered Conveyancing*, 36-06, where the authorities are reviewed.

[103] See Landlord and Tenant Act 1987, s 28(5) (acquisition order); Access to Neighbouring Land Act 1992, s 5(1) (access order); Leasehold Reform, Housing and Urban Development Act 1993, s 97(2)(*b*) (application for a vesting order); Ruoff & Roper, *Registered Conveyancing*, 36-06.

[104] *Clayhope Properties Ltd v Evans* [1986] 1 WLR 1223 (where the Court of Appeal upheld the registration of a caution in respect of an order appointing a receiver to manage a block of flats pending resolution of claim against the landlord for alleged breaches of repairing covenants).

[105] See Supreme Court 1981, s 37(3).

[106] *Stockler v Fourways Estates Ltd* [1984] 1 WLR 25.

[107] See para 6.8. For the one exceptional case - a spouse's matrimonial home rights under the Family Law Act 1996 - see para 6.9.

[108] *The Rawlplug Co Ltd v Kamvale Properties Ltd* (1968) 20 P & CR 32, 40, *per* Megarry J.

[109] In *Alpenstow Ltd v Regalian Properties Plc* [1985] 1 WLR 721, 728, Nourse J reviewed the authorities and summarised their effect as follows—

> An order vacating a caution... can and ought to be made on motion if there is no fair arguable case in support of registration which ought to go to trial. In this respect a certain robustness of approach is permissible. If the issues are defined and

sanction under section 56(3) of the Land Registration Act 1925, which provides that if any person lodges a caution with the registrar without reasonable cause, he shall be liable to compensate any person who may have sustained damage by the lodging of that caution.[110] The amount of such compensation is such "as may be just", and is recoverable as a debt.[111]

Cautions against first registration

Nature of a caution against first registration

6.24 The entry of a caution against first registration provides a mechanism by which an interested party can be informed of an application for the first registration of land. Whereas a caution against dealings necessarily applies to land with registered title, a caution against first registration applies, by definition, only to *unregistered* land.[112] Any person having or claiming to have an interest in unregistered land of a kind that entitles him to object to a disposition being made without his consent, may apply to lodge a caution with the registrar.[113] On the face of it, the range of persons who may register a caution against first registration is more limited than those who may register a caution against dealings.[114] Not only must they have an interest in the land, but it must be such that their consent must be required to any disposition. However, the latter requirement is interpreted "somewhat liberally" by the registrar.[115] This is because it is "manifestly desirable that cautions of this nature should be accepted in all reasonable cases".[116] This is achieved by interpreting the word "disposition" as meaning "a disposition free from encumbrances, leases and other interferences with absolute ownership",[117] thereby enabling virtually any person with an interest in land to apply for such a caution.[118] The provisions of the Act which provide for the payment of compensation by any person who lodges a caution without reasonable cause and causes damage by so doing[119] are of course applicable. They serve as a deterrent to improper applications to lodge such a caution.

> their resolution depends only on ascertained documents and affidavit evidence, they can and ought to be decided, even if they involve difficult questions of construction or law.

It should be noted that the same principles are applied in cases involving unregistered land, where a land charge has been improperly registered.

[110] It is noteworthy that there is *no* equivalent deterrent to the improper registration of a land charge in a case where title is unregistered.

[111] The right to claim damages under s 56(3) does not derogate from or displace the court's inherent jurisdiction to vacate a caution on motion: *Clearbrook Property Holdings Ltd v Verrier* [1974] 1 WLR 243, 246.

[112] Land Registration Act 1925, s 53(1).

[113] *Ibid*. For what amount to cautionable interests, see Ruoff & Roper, *Registered Conveyancing*, 13-04.

[114] Above, para 6.19.

[115] Ruoff & Roper, *Registered Conveyancing*, 13-04.

[116] *Ibid*.

[117] *Ibid*.

[118] This has in fact long been the practice: see Brickdale & Stewart-Wallace's *Land Registration Act, 1925* (4th ed 1939) p 157.

[119] Land Registration Act 1925, s 56(3); above, para 6.23.

6.25 The application for a caution must be supported by a statutory declaration stating the nature of the interest of the cautioner and the land which it affects.[120] The caution cannot be entered on the register itself (as the land is *ex hypothesi* not registered), but is made instead in the Land Registry index map.[121] It may therefore be discovered by a search of that map.[122]

6.26 Once a caution has been lodged, the cautioner is entitled to notice of any application to register an interest in the land which affects the interest of the cautioner.[123] There is no mechanism for "warning off" a caution against first registration as there is with a caution against dealings.[124] The cautioner will be required to defend his caution only when an application for first registration is made. The notice which the registrar serves requires the cautioner, if he intends to appear and oppose the registration, to enter an appearance for the purpose of lodging an objection within 14 days of its service.[125] If the parties do not settle the matter themselves, a hearing will be held and the registrar will either—

(1) cancel the application for first registration and order that the caution be continued; or

(2) order that the caution be cancelled and the application for registration completed.[126]

In the latter case, registration may be either unconditional or, if appropriate, conditional. For example, the registrar might order that the cautioner's right be protected by the entry of a notice against the title.

The function of a caution against first registration

6.27 Because the function of a caution against first registration is only to provide a means of delaying or preventing registration until the cautioner's claim is resolved, it cannot confer priority on any right which the cautioner may have, nor is there any reason why it should. If the cautioner does have an interest in the land in question he must protect it - if it needs protecting at all - in the manner appropriate in unregistered land. Clearly if the cautioner has a legal right or interest in the land, that will normally require no

[120] Land Registration Act 1925, s 53(2); Land Registration Rules 1925, r 64; Sched, Form CT 1 (as substituted). On the question whether a leaseholder should lodge a caution against application to register the freehold or merely against the registration of a leasehold, see Ruoff & Roper, *Registered Conveyancing*, 13-05.

[121] For this index map, see Land Registration Rules 1925, r 8; Ruoff & Roper, *Registered Conveyancing*, 4-06.The Registry does in fact keep a record, which is similar in format to a registered title, in respect of each caution against first registration: see Land Registration (Open Register) Rules 1991, r 1(2).

[122] See Land Registration (Open Register) Rules 1991, rr 9, 10; Form 96; Ruoff & Roper, *Registered Conveyancing*, 4-13, 12-38, 30-28.

[123] For the form of the caution, see Land Registration Rules 1925, r 64; Sched, Form 13.

[124] Ruoff & Roper, *Registered Conveyancing*, 13-07.

[125] Land Registration Rules 1925, r 67; Sched, Form 15.

[126] Ruoff & Roper, *Registered Conveyancing*, 13-09.

protection.[127] However, if the right is merely equitable, it may need to be registered as a land charge under the Land Charges Act 1972. It follows that the fact that a caution against first registration does not confer any priority on the interest of the cautioner is not a shortcoming as it is in the case of a caution against dealings.

Restrictions

Nature of a restriction

6.28 The function of a restriction is to record any limitation that may exist on the otherwise unlimited powers of disposition of the proprietor of registered land or of a registered charge.[128] The form of a restriction is very flexible[129] and the circumstances in which it may be entered are widely defined. The Land Registration Act 1925 states that a restriction may be entered in two quite specific circumstances, namely to prevent the registration of any transaction unless—

(1) notification of the application for registration is sent to a specified address; or

(2) the consent of one or more named persons is obtained to the disposition.[130]

However, the Act also permits such an entry to prevent registration "unless some other act or thing is done as may be required by the applicant and approved by the registrar".[131] A restriction can only be utilised to limit dispositions or dealings by the registered proprietor of either the land or the charge. It *cannot* be employed to restrict the disposition of any minor interest.[132] Thus, for example, a restriction could not be entered to restrain a beneficiary under a trust from assigning his or her beneficial interest, even if that person was also one of the registered proprietors.[133]

6.29 Although in theory a restriction may also be entered to prevent the deposit by way of security of the land certificate or the charge certificate,[134] such entries are in practice obsolete. This is because a lien by deposit of the land certificate or charge certificate can now be created only if there is a valid contract for a mortgage between the parties.[135]

[127] Cf Land Charges Act 1972, s 2(4)(i) (a puisne mortgage, although legal, should be registered as a land charge).

[128] Land Registration Act 1925, s 58(1).

[129] See Land Registration Rules 1925, r 235; and Sched, Form 75. The order usually provides that no disposition of the registered land is to take place unless some particular matter is complied with. The restriction is however framed in such a way that the registrar can register a transaction even if the restriction is not complied with, as where X's consent is required to a disposition and X has disappeared: see Ruoff & Roper, *Registered Conveyancing*, 38-13.

[130] Section 58(1)(*a*) and (*b*).

[131] Land Registration Act 1925, s 58(1)(*c*).

[132] *Ibid*, s 58(1) (proviso).

[133] Such an entry could of course be used to prevent the proprietor *creating* a minor interest. However, as a minor interest can be created without registration, a restriction in such terms might not be very effective.

[134] Land Registration Act 1925, s 58(1).

[135] See *United Bank of Kuwait Plc v Sahib* [1997] Ch 107; and Ruoff & Roper, *Registered Conveyancing*, 25-04 *et seq*.

6.30 Like a caution, a restriction can be employed to provide notice of an application for the registration of a dealing. However, unlike a caution, a restriction is not necessarily spent when such an intended dealing occurs, but remains on the register until it is withdrawn.[136] Furthermore, whereas a caution is operative in relation to *any* dealing with the land, a restriction can be confined to one or more types of such dealing.[137]

6.31 We give examples below of the wide range of purposes for which a restriction is in practice employed.[138] These include the protection of property rights. However, because a restriction operates merely to impose some limitation on the dispositive powers of a registered proprietor, it does not preserve the priority of any property right to which the entry relates. If the objective of registration *is* to preserve the priority of a minor interest, then the registration of a notice rather than the entry of a restriction is the correct method of achieving it.

Who may apply for the entry of a restriction?

6.32 The Land Registration Act 1925 makes specific provision for the entry of a restriction by the registered proprietor of the land or of the charge.[139] It also authorises the making of rules to enable persons other than the proprietor to apply for the entry of restrictions,[140] and such rules have been made.[141] The application for a restriction by a person other than the registered proprietor will, in practice, be made *inter partes*. This is so for the following reasons—

(1) the Land Registration Act 1925 provides that where the land certificate is not deposited with the Registry,[142] a restriction that adversely affects the title of the registered proprietor can be entered only on production of the land certificate to the registrar;[143] and

(2) in cases other than those involving interests under trusts of land,[144] the amended Land Registration Rules 1925 require that an application by a person other than the proprietor be accompanied by a signed consent from the proprietor.[145]

If an application to enter a restriction by a beneficiary under a trust of land[146] were opposed by the trustees, the registrar could hear and determine the matter and make

[136] Ruoff & Roper, *Registered Conveyancing*, 7-05, 38-05.

[137] *Ibid*, 38-02.

[138] See paras 6.34 *et seq*.

[139] Section 58(1).

[140] Land Registration Act 1925, s 58(5).

[141] See Land Registration Rules 1925, rr 235 (provision for an application with the proprietor's consent) and 236 (provision for application by beneficiaries and others interested under trusts of land).

[142] For the circumstances in which such a deposit must or may be made, see above, para 6.8.

[143] Section 64(1)(*c*).

[144] Trustees are under a duty to protect beneficiaries under a trust by applying for the appropriate form of restriction: Ruoff & Roper, *Registered Conveyancing*, 38-09.

[145] Rule 235(2) (as substituted).

[146] Under Land Registration Rules 1925, r 236 (as substituted).

such order as he thinks fit.[147]

6.33 In certain circumstances the Registrar either may or must enter a restriction on the register even though no application has been made to do so. These are explained below.[148]

In what circumstances may a restriction be entered?

6.34 The cases in which the registrar is required by either the Land Registration Act 1925 or the Land Registration Rules 1925 to enter a restriction include—

(1) on the first registration of land held by a charity;[149]

(2) in cases where the registered proprietors are trustees of land but do not hold the land on trust for themselves, so as to ensure that no disposition can be made by a sole proprietor[150] unless that person either can give a valid receipt or is a trust corporation.[151]

6.35 There are certain other cases where the registrar is expressly empowered by the amended Land Registration Rules 1925[152] to enter a restriction because the dispositionary powers of the registered proprietor are limited. These are where those powers are limited—

(1) by statute;

(2) in the case of a corporation, by its governing law, its incorporating charter or statute, or its public documents; and

(3) in the case of a personal representative, by the terms of his or her grant.

6.36 Although the use of restrictions to protect interests under trusts is well-known, they are also used for a wide variety of other purposes. They can (for example) be used as an indirect means of making positive covenants run with land.[153] A restriction is entered to the effect that no disposition is to be registered unless the transferee of the land enters into a fresh covenant with the covenantee.[154] It is also not uncommon for a chargee to place a restriction on the mortgagor's title, precluding any disposition of the property without the chargee's consent. The purpose of such a restriction is to ensure that the mortgagor can only make further secured borrowings from the chargee.

[147] Land Registration Rules 1925, r 298. The registrar's decision is subject to an appeal to the court.

[148] Paras 6.34 and following.

[149] Land Registration Rules 1925, rr 60(6), (7); Sched, Forms 12 - 12D.

[150] Except under an order of the court or the registrar.

[151] Land Registration Act 1925, s 58(3); Land Registration Rules 1925, r 213; Sched, Form 62 (both as substituted). See Ruoff & Roper, *Registered Conveyancing*, 32-08, 38-07.

[152] Rule 236A (as inserted).

[153] Positive covenants do not run with the land: *Rhone v Stephens* [1994] 2 AC 310.

[154] Cf Ruoff & Roper, *Registered Conveyancing*, 38-15 (instancing a *restrictive* covenant, but the same device is used in relation to a positive covenant).

Inhibitions

Nature of an inhibition

6.37 An inhibition is an order, made either by the court or the registrar, that inhibits the registration or entry of *any* dealing with registered land or a registered charge.[155] The order may be limited in time, or until the occurrence of an event, or it may be made generally.[156] The registration of an inhibition is of course draconian in its effect because it freezes the register. It has been said that the making of such an entry would seem "to be intended for cases in which none of the ordinary remedies are available".[157] It may therefore be registered in cases where it would in practice be too late to register either a caution[158] or a restriction. Obvious cases for the registration of an inhibition are those involving fraud or dishonesty of some kind where it is necessary to take swift action to frustrate the likely wrongdoing,[159] for example where—

(1) the registered proprietor's land certificate has been stolen or obtained by fraud;

(2) the signature of one of several registered proprietors has been forged on a purported transfer of the registered land;[160]

(3) a transferee of registered land who has applied for registration discovers that the registered proprietor has entered into a transaction that is inconsistent with that transfer.[161]

6.38 Under the present law, it is not clear whether the entry of an inhibition is subject to or overrides the priority which is accorded to a purchaser in good faith who has obtained an official search under the Land Registration (Official Searches) Rules 1993.[162] The effect of such a search is that, during the 30-day priority period which it confers, *any* entry which is made in the register is postponed to a subsequent application to register the instrument effecting the purchase.[163] However, the effect of issuing an inhibition is to inhibit "the registration or entry of *any* dealing with any registered land or registered charge".[164] There is no authority on how this conflict is to be resolved.

[155] Land Registration Act 1925, s 57(1).

[156] *Ibid*.

[157] Brickdale & Stewart Wallace's *Land Registration Act, 1925* (4th ed 1939) p 164.

[158] Which the registered proprietor has no power to seek in any event: see above para 6.19; below, para 6.41.

[159] "[P]otentially dangerous or volatile situations can occur where extremely rigorous precautionary measures need to be considered": Ruoff & Roper, *Registered Conveyancing*, 37-03.

[160] See, eg *Ahmed v Kendrick* (1987) 56 P & CR 120. Cf *Penn v Bristol & West Building Society* [1995] 2 FLR 938.

[161] An example given in Brickdale & Stewart Wallace's *Land Registration Act, 1925* (4th ed 1939) p 164.

[162] For an application for an official search with priority, see r 6. For the definition of a "purchaser" for these purposes, see r 2(1); *Smith v Morrison* [1974] 1 WLR 659, 676 (a purchaser is a purchaser in good faith if he acts honestly). See generally, Ruoff & Roper, *Registered Conveyancing*, Chapter 30, especially 30-10.

[163] Land Registration (Official Searches) Rules 1993, r 6.

[164] Land Registration Act 1925, s 57(1) (emphasis added).

6.39 Because an inhibition may need to be registered as a matter of urgency and may be hostile, production of the land certificate is not required where the application will adversely affect the title of the proprietor of the land or of the charge.[165] By contrast, if the registered proprietor applies, the registrar may require him or her to produce the certificate, provided that he or she has it.[166]

6.40 Application for an inhibition may be made to the court or to the registrar.[167] On such an application the court or the registrar has a discretion whether or not to register an inhibition and, if so, on what terms and conditions.[168] Furthermore, the court or registrar also has a discretion to discharge any inhibition "and generally act in the premises in such manner as the justice of the case requires".[169] There is also a discretion to register a notice or restriction in lieu of an inhibition.[170] The objective is evidently to confine the registration of an inhibition to cases where other entries will not secure the desired result.[171]

Who may register an inhibition?

6.41 An inhibition may be registered on the application of "any person interested".[172] Unlike the situation in relation to a caution, this description includes the registered proprietor himself.[173] In view of the circumstances in which an inhibition is likely to be sought and which have been explained above,[174] the reasons for including the proprietor are obvious. Furthermore, the range of those who are to be regarded as persons interested (and who may therefore seek to register an inhibition) has been given a wider and more extended meaning by a number of statutes.[175] For example, where a restraint order is sought in criminal proceedings to prohibit dealing with all realisable property held by a specified person, the prosecutor is regarded as a person interested for these purposes.[176]

6.42 In four situations the registrar is himself required to enter an inhibition.[177] These are—

[165] Land Registration Act 1925, s 64(1)(*c*).

[166] Land Registration Rules 1925, r 266.

[167] Land Registration Act 1925, s 57(1). Any person aggrieved by any act done by the registrar in respect of an application to register or discharge an inhibition has a right to appeal to the court: *ibid*, s 57(3).

[168] *Ibid*, s 57(2).

[169] *Ibid*.

[170] *Ibid*, s 57(4).

[171] See above, para 6.37.

[172] Land Registration Act 1925, s 57(1).

[173] A caution can only be entered in respect of "any land or charge registered *in the name of any other person*" than the person interested: Land Registration Act 1925, s 54(1). See above, para 6.19.

[174] Para 6.37.

[175] See Ruoff & Roper, *Registered Conveyancing*, 37-05.

[176] See Criminal Justice Act 1988, s 77(13); Drug Trafficking Act 1994, s 26(13).

[177] See Ruoff & Roper, *Registered Conveyancing*, 37-07 - 37-09.

(1) the entry of a bankruptcy inhibition;[178]

(2) where the incumbent of a benefice is (as corporation sole) registered as proprietor, the entry of an inhibition to prevent any disposition of the land without the consent of the Church Commissioners;[179]

(3) where the registrar has decided to hear a dispute, to prevent any dealing with the land or charge in the interim;[180] and

(4) where the registrar has upheld an objection to the registration of a dealing by a cautioner, in order to prevent a particular dealing in future.[181]

Only the first of these situations is much employed in practice.[182]

CRITICISMS OF THE PRESENT LAW

Introduction

6.43 The law which presently governs the protection of minor interests is in a number of respects thoroughly unsatisfactory. We do not believe that it meets the objective that we have set out at the beginning of this Part,[183] of providing an effective means of protecting third party rights over registered land. In the following paragraphs we set out what we consider to be its principal weaknesses.

Unnecessary complexity

6.44 The present system is unnecessarily complicated. There are four different methods of protecting minor interests.[184] These overlap with each other and it is often possible to protect a right by more than one means. Only one of these methods - the notice - protects a right over land in such a way that a transferee of the registered land or a grantee of a registered disposition will be bound by it automatically.[185] Furthermore, the way in which the Land Registration Act 1925 defines those rights which may be protected by notice is needlessly elaborate and its underlying principles can be ascertained only after a careful examination of both the Act and the Land Registration Rules 1925.[186]

[178] The registrar is required to enter a bankruptcy inhibition against the title of any proprietor of any registered land or charge that appears to be affected as soon as practicable after a bankruptcy order has been registered under the Land Charges Act 1972, s 6(1)(*c*): Land Registration Act 1925, s 61(3). See generally, Ruoff & Roper, *Registered Conveyancing*, Chapter 28.

[179] Land Registration Act 1925, s 99(1) (as amended by Endowments and Glebe Measure 1976); Land Registration Rules 1925, r 232; Sched, Form 73.

[180] Land Registration Rules, r 230(2). It is explained in Ruoff & Roper, *Registered Conveyancing*, 37-07, that "[i]n practice this machinery is seldom used, because the decision to have a hearing is itself treated as a pending application which will be revealed on a search of the register".

[181] Land Registration Rules, r 220(3).

[182] Ruoff & Roper, *Registered Conveyancing*, 37-03.

[183] See above, para 6.1.

[184] Cf Torrens systems of registered title which have only one, the caveat.

[185] The entry of a caution may of course indirectly achieve a similar outcome.

[186] See above, paras 6.4 - 6.7.

Inadequacy of cautions

6.45 If the consent of the registered proprietor cannot be obtained, or if the land certificate is not deposited at the Registry, the only method of protecting a minor interest is by lodging a caution.[187] A caution is not an effective means of protecting a proprietary interest because it does not preserve the priority of the right.[188] Furthermore, where a right is protected as an overriding interest and a caution is then lodged in respect of the right instead, it is possible that the protection enjoyed by the right may actually be diminished.[189]

Miscellaneous defects

6.46 In addition to these fundamental criticisms of the present system, there are a number of minor points where the present law does not function satisfactorily, fails to meet specific need, lacks clarity or could in some other way be improved. Four examples may be given. The first is the uncertainty as to how to protect a *Mareva* injunction by registration.[190] The second is the rather strained interpretation that has to be given as to who may register a caution against first registration in order to ensure that registration can be made in all cases where it is needed.[191] The third is the uncertainty as to whether an inhibition takes priority over a priority search by a purchaser or *vice versa*.[192] The fourth concerns the protection of interests under a trust of land. The objective of the registration system must be to make certain that such rights are overreached when there is any disposition of land. That is better achieved by the entry of a restriction rather than a caution.[193] However, cautions are commonly used, and are in practice sometimes employed by beneficiaries as a means of inhibiting dealings with the land, contrary to the intentions of the settlor.

THE RECOMMENDATIONS IN THE LAW COMMISSION'S THIRD REPORT ON LAND REGISTRATION

6.47 When the Law Commission considered the protection and priority of minor interests in its Third Report,[194] the fundamental weakness of cautions - that they conferred no priority on the interest protected - had not become apparent.[195] As a result, the proposals for reform which the Commission then made were, quite understandably, more at the level of technical detail rather than going to the fundamentals of how minor interests should be protected.[196] In the light of the criticisms that we have made

[187] Except in those unusual cases where the entry of an inhibition can be justified.

[188] Above, para 6.17.

[189] Above, para 6.18.

[190] See above, para 6.21.

[191] See above, para 6.24.

[192] See above, para 6.38.

[193] In its Third Report, the Law Commission made the same recommendation: see Law Com No 158, para 4.52.

[194] (1987) Law Com No 158, Part IV.

[195] It only became so in *Clark v Chief Land Registrar* [1993] Ch 294 (Ferris J); [1994] Ch 370 (CA). See above, para 6.18.

[196] It has been said that "[t]he Third Report recommended some useful reforms, though they were intended to clarify and develop existing procedures rather than to institute significant reforms": Roger J Smith, "Land Registration: Reform at Last", in Paul Jackson and David C Wilde (ed), *The Reform of Property Law* (1997) p 129 at p 135.

above, we consider that the system is in need of more radical reform. We do however adopt a number of the proposals made by the Commission in the Third Report.

PROPOSALS FOR REFORM

Introduction

6.48 Any options for reform must meet the shortcomings that have been identified, but it must also be capable of being engrafted on to the existing structure. We also have at the forefront of our minds that the nature of land registration will change profoundly over the coming decade or so. We have to have a scheme for the protection of minor interests that will be effective in a world where the registration of rights—

(1) is an integral part of their creation; and

(2) will normally be effected by electronic means.

6.49 We set out the principal options for reform in the following paragraphs. We begin by examining three possible ways in which notices and cautions might be reformed. Secondly, we make proposals in relation to restrictions and inhibitions. Thirdly, we make some suggestions for clarifying the rules which govern cautions against first registration. Fourthly, we consider sanctions for the improper entry of a minor interest on the register, and finally, we make proposals in relation to commencement.

Notices and cautions

The fundamental issue of principle

6.50 We consider that, in relation to notices and cautions there is one fundamental issue, and it is one of the most important that we address in this Report. **Do readers wish to see the retention of the present dual system under which there are two ways of protecting rights over property by notice or caution, or do they wish to see a new system with just one form of protection?** As we have seen, under the existing law, a right can be protected by a notice, which has proprietary effect, or by a caution which does not, but which merely entitles the cautioner to be notified of any proposed dealing.

6.51 There appear to us to be three possible options that could be adopted—

(1) We could leave the law unchanged. We have explained above why we regard the present law as unsatisfactory.[197] In the light of these criticisms, we are opposed to this option and we do not consider it to be viable.

(2) It would be possible to retain the present dual system of notices and cautions, but reform some of its main defects. The merits of this option would be that it did no more than was necessary to remove the defects in the present law, while retaining the essentials of a system that is familiar. In particular, the distinction would be retained between acknowledged rights (which would be protected by entry of a notice) and unacknowledged or temporary rights

[197] See above, paras 6.43 and following.

(which would be protected by lodging a caution).[198] However, there are objections to such a scheme. The principal defect in the present law is that cautions are merely a personal form of protection and do not give any priority to the right that is protected. If cautions are given priority, this necessarily requires fundamental changes to the way in which they operate. They are no longer the form of protection that they were. Indeed the only real difference between cautions and notices would then be that cautions could be warned off whereas notices could not. We are not convinced that this difference is sufficient to justify the retention of two different forms of protection.

(3) One new form of protecting minor interests could be created to replace notices and cautions which would have the best features of both. We consider that this would considerably simplify and improve the law. It is also likely to be the best system given the way in which land registration is likely to develop. We explain this scheme in the next paragraph.

An alternative scheme

6.52 The alternative scheme that we propose would have the following characteristics—

(1) Protection of the right or interest on the register would preserve its priority, in the same way as the entry of a notice does at present.

(2) It would be available for the protection of all minor interests except interests under a trust of land which would have to be protected by the entry of a restriction.

(3) It would be possible to make an entry either—

(a) with the consent of the registered proprietor or pursuant to an order of the court or registrar ("consensual notices"); or

(b) unilaterally ("unilateral notices").

(4) It would be stated on the register whether the notice was consensual or unilateral. It would not be possible to warn off a consensual notice. It would be possible to warn off a unilateral entry.

(5) Where a unilateral notice was entered, the registered proprietor would then be informed, and could challenge it at any time thereafter.

(6) Where there was an application to enter a consensual notice, the facts or documents upon which the claim to register was based would have to be set out or produced on application. This is because once entered, the right would be permanently on the register, and it would not be possible to warn off the right.

(7) Where there was an application to enter a unilateral notice, it would be incumbent on the applicant for registration to show that the right claimed was

[198] This is in accordance with the recommendation made by the Law Commission in its Third Report: see Law Com No 158, para 4.38(iv), (v).

capable of being a minor interest, but there would be no further investigation of the truth or the legal merits of the claim. This is because the protection afforded by registration is not permanent: the entry may be warned off.

(8) there would be a liability to pay damages and costs for lodging a unilateral notice without reasonable cause.

6.53 This is our preferred option. It would provide a single straightforward system for the protection of all minor interests other than interests under trusts. Entry of a notice would confer proprietary protection on the right. However, this option would retain the distinction between entries which had been made consensually and which could not thereafter be challenged by the registered proprietor, and unilateral entries which would be open to challenge by the registered proprietor.

6.54 **We ask readers whether they wish to see—**

(1) the retention without any change of the present law on notices and cautions;

(2) a reformed system in which the distinction between notices and cautions would be retained, but where the lodging of a caution would be a form of proprietary protection that conferred priority on the right in question, and where other defects in the present system would be eliminated; or

(3) a new system for the protection of minor interests (other than interests under trusts of land) which would combine in one form of protection the best features of notices and cautions in the manner outlined above in paragraph 6.52; or

(4) some other model and if so what?

Restrictions and inhibitions

The scheme in outline

6.55 The options for the reform of restrictions and inhibitions are more straightforward than those in relation to notices and cautions. An inhibition is simply one form of restriction in that it precludes any dealing with the land by preventing any entry on the register. We can see no reason for its retention. Our scheme is therefore one by which restrictions and inhibitions would be assimilated and a number of other changes would be made to simplify existing procedures.

When could a new restriction be entered?

6.56 The new restriction would be the appropriate form of entry whenever there was some reason to limit the dispositive powers of a registered proprietor of land or of a charge. This would include cases where—

(1) *all* dealings with the land were to be frozen;

(2) the registered proprietor's dispositive powers were limited;

(3) some precondition had to be satisfied before any disposition of the land could be made; or

(4) it was necessary to obtain one or more consents to a disposition.

Although restrictions could be employed to protect property rights - to ensure for example that, in the case of a trust of land, capital monies were paid to all of the trustees - it would not be the only function of such entries. As a corollary of this, the entry of a restriction would not confer priority on, or preserve the priority of, any right that it was entered to protect. Restrictions would also perform the function presently performed by inhibitions and could therefore be employed to prevent the registration of any dealings with property.

6.57 **We provisionally recommend that—**

(1) the registrar should be able to enter a restriction to restrict the powers of disposition of a registered proprietor, in whole or in part, whether or not subject to conditions or the obtaining of some consent;

(2) the entry of such a restriction should confer no priority on, nor preserve any existing priority of a right or interest in property, where it was entered to protect that right or interest; and

(3) inhibitions should be abolished.

Do readers agree?

It would remain the case that the registrar would be able to refuse to enter any restriction that he deemed to be "unreasonable or calculated to cause inconvenience".[199] When electronic conveyancing is introduced, it will be necessary to have in place procedures for handling certain types of restriction which are of a sensitive or potentially oppressive kind.[200]

Who could enter a restriction on dealings?

6.58 Because the primary function of the new restriction would be to control the dispositive powers of the registered proprietor, there is no reason to confine the range of persons who could apply for a restriction to those who have a proprietary interest in the land. In particular, we consider it important that it should be possible to register a restriction where a *Mareva* injunction has been issued that might affect registered land, even though such an injunction operates merely *in personam*.[201] However, we consider that the entry of a restriction once made should not be vulnerable to challenge: it should

[199] Land Registration Act 1925, s 58(2).

[200] See below, para 11.13.

[201] "[A] *Mareva* injunction is not a form of pre-trial attachment but relief *in personam* which prohibits certain acts in relation to the assets in question": *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1981] QB 65, 72, *per* Robert Goff J. Although in its Third Report, the Law Commission supported the retention of the inhibition - even though, as it acknowledged, a restriction could be employed to prevent any dealing with the land (Law Com No 158, para 4.29) - it recommended that it should be possible for an inhibition to be used to protect a *Mareva* injunction: Law Com No 158, para 4.58.

not be capable of being "warned off" in the manner of a caution.[202] The procedure for entering a restriction should therefore provide for any objections by the registered proprietor to be resolved except where there was an order of the court or registrar.[203] It would remain the case that the registrar would have power to enter a restriction and might be required to do so in certain circumstances.[204]

6.59 In the light of these considerations, **we provisionally recommend that—**

(1) the registrar should continue to have the power and in some cases the duty to enter a restriction on the same basis as at present;

(2) the following should be entitled to apply for a restriction—

(a) the registered proprietor;

(b) any person who had the written consent of the registered proprietor;

(c) any person applying pursuant to an order of the court or registrar; or

(d) any person who could demonstrate that he or she had the benefit of a right or interest that should be protected by a restriction (such as an interest under a trust of land or the rights of a trustee in bankruptcy);

(3) if the applicant fell within (2)(d), no restriction would be entered before a notice had been served on the registered proprietor, giving him or her the opportunity to object to the entry and—

(a) the period for objection had expired;

(b) the proprietor had consented; or

(c) any objection by the proprietor had been resolved.

Do readers agree?

Discretion to override a priority search?

6.60 As we have indicated above, there is at present some uncertainty whether, if an inhibition is entered on the register, that will prevail over the priority given to an

[202] It would of course remain the case that the proprietor would be able to apply to have a restriction cancelled where it had become spent: see Land Registration Act 1925, s 46; Land Registration Rules 1925, r 16 (as substituted). At present, a restriction may also be set aside by order of the court: Land Registration Act 1925, s 58(4). We propose that this should continue and that the registrar should have a similar power: see below, para 6.68.

[203] The registrar might have to enter a restriction that prevented any dealings or to give effect to a *Mareva* injunction that had been granted *ex parte*.

[204] See above, paras 6.34, 6.35.

intending purchaser under an official search.[205] We consider that this point needs to be clarified one way or the other in relation to the new type of restriction that we propose, which could be employed to prevent any dispositions of the registered land. There is a conflict of principles in issue here. First, the function of giving an intending purchaser the ability to obtain priority by means of an official search is of course to enhance the security of title that the land registration system offers. That security should not be lightly undermined. Secondly, however, there is the countervailing consideration that an order to prevent any entry of any dealing with registered land will be made only in exceptional circumstances, such as where the land certificate has been stolen or obtained by fraud.[206] We note that in some cases at least where it would be appropriate to "freeze" the register by means of a restriction, an interested party would also, and in any event, be able to obtain an interlocutory injunction restraining any disposition of the land. We consider that if there is to be any mechanism for conferring priority on a restriction, it should not be inflexible or over-prescriptive. In our view, only a discretionary approach is likely to be workable. We also consider that if there is to be any power to override a priority search, it should be confined to cases where the court (and not the registrar) makes the appropriate order.

6.61 We deliberately make no provisional recommendation on this issue. However, we would welcome the views of our readers as to whether they consider that this is a problem, and if they do how they would resolve it.

(1) Do readers consider that the court should have power, when ordering that a restriction be placed on the register, to designate it as having absolute priority?

(2) If they do, do they think that a restriction so designated should take precedence over the protection given to an intending purchaser by an official search, so that no disposition of the land should then take place until the court or the registrar should so direct? [207]

Cautions against first registration

6.62 Although we have recommended the abolition of cautions against dealings, we consider that cautions against first registration should remain in much the same form as at present, subject to certain minor changes. However, we consider that it would be helpful to clarify and rationalise the incidents of such cautions. In particular, we consider that only a person having an 'interest', as defined in Part III of this Report[208] should be able to apply for a caution. This would have the effect of codifying the present practice and would obviate the need to give a liberal interpretation to the wording of the statute[209] to achieve this desired result. The caution would take the form

[205] See above, para 6.38.

[206] It should be noted that although our proposed restriction is not intended to confer priority on any property rights protected by it, the effect of an order freezing the register could, in reality, profoundly affect property rights and the priority of claims.

[207] See below, para 6.68, where we recommend that the court and the registrar should have power to order the discharge of a notice or a restriction.

[208] Above, para 3.2.

[209] Which as presently drafted requires the applicant to have an interest which "entitles him to object to any disposition" Land Registration Act 1925, s 53(1); see above, para 6.24.

(as now) of an entry on the Land Registry index map and the creation of a caution title. It would be to the effect that the person lodging the caution should be notified of any application to register an interest in the land which affects his interest. Such a caution would, as now, have no effect on the priority of the interest.

6.63 We consider that the power to "warn off" such cautions should be introduced so that, on discovery of the caution, the landowner (or any other person having a legal estate in or legal charge over the land) can take immediate steps to challenge the caution and to have it removed from the register. It would no longer be the case (as it is at present[210]) that the landowner would have to wait until the application for first registration before he could mount such a challenge.

6.64 **We therefore provisionally recommend that—**

(1) any person having an interest in the unregistered land in question should be entitled to register a caution against first registration;

(2) a caution against first registration should not preserve the priority of the applicant's interest;

(3) the landowner (or any other person having a legal estate in or legal charge over the land) should be entitled to challenge the registration of a caution at any time unless he or she had consented to it; but

(4) in all other respects, a caution against first registration should operate in the same manner as it does under the present law.

Do readers agree?

MAKING ENTRIES WITHOUT REASONABLE CAUSE

Introduction

6.65 We have provisionally concluded that there should be a more comprehensive regime for dealing with the making of any form of entry without reasonable cause. In practice this would obviously be most likely to apply in those cases where an entry could be made unilaterally. The precise circumstances in which that would be possible will depend upon which of the options for the replacement of notices and cautions is favoured by readers.[211] However, even in those cases where the registered proprietor will have been notified prior to the making of the entry, there may be cases where he or she decides not to object at that stage, but to deal with the matter later. It is therefore conceivable that such an entry could be made without reasonable cause. We consider that there should be safeguards to protect registered proprietors in any event, and that there should be—

(1) effective sanctions to discourage improper applications for registration; and

(2) a power for the registrar or the court to remove or modify entries, and to be able to do so expeditiously.

[210] See above, para 6.26.

[211] See above para 6.54.

Sanctions against improper registration

6.66 To achieve the first of these objectives, we consider that the power that presently exists to award damages for the registration of a caution without reasonable cause[212] should be made applicable to any entry in respect of a minor interest, whether it is a caution, a notice or a restriction. At present, compensation is assessed according to the rather vague standard of what "may be just".[213] We consider that it should be placed on a more principled footing. A person who lodges an entry on the register without reasonable cause is guilty of a form of wrongdoing. He or she has either acted deliberately or negligently. Such conduct should, in our view, be treated as a tort for the purposes both of assessing compensation and limitation.[214] **We therefore provisionally recommend that—**

(1) where any person suffered loss in consequence of the entry without reasonable cause of a caution (if after consultation these are retained), a caution against first registration, a notice, or a restriction, the court should have power to award compensation against the person making the entry; and

(2) for the purposes of assessing compensation and limitation, such a claim to compensation would be treated as an action in tort.

We ask whether readers agree.

Unreasonably resisting the removal of an entry on the register

6.67 Cases do arise where a person unreasonably resists the removal of an entry on the register that had been made quite properly. This might be the case where, for example, there was some dispute over a right which the parties have then resolved, but where an entry remained on the register. An example would be a contract for the sale of the registered land which has terminated effectively according to its terms, but where the party having the benefit of the entry seeks to deny that the contract is at an end and refuses to co-operate in its removal. We consider that the liability to pay damages for making an entry on the register without reasonable cause should be extended to cases where a person causes loss by resisting the removal of that entry without having reasonable grounds for so doing. **We therefore provisionally recommend that the power to award compensation set out in paragraph 6.66 above, should also apply where loss is caused because a person resists the removal of an entry on the register without reasonable cause. Do readers agree?**

Power to remove entries

6.68 As regards the second objective, under the present law—

(1) the registrar has powers under the Land Registration Act 1925 and the Land Registration Rules 1925 to cancel entries on the register which are in some

[212] Land Registration Act 1925, s 56(3); above para 6.23.

[213] Land Registration Act 1925, s 56(3).

[214] Being unliquidated, any such sum would no longer be recoverable as a debt as is presently the case: see Land Registration Act 1925, s 56(3), above, para 6.23.

way spent or unnecessary;[215]

(2) the court or registrar has a power to discharge or cancel an entry in relation to inhibitions;[216]and

(3) the courts have developed their inherent jurisdiction to enable them to vacate a caution on interlocutory motion.[217]

We consider that these powers should be rationalised and should be contained in one statutory provision. Both the court and the registrar would have jurisdiction to discharge or vary a caution,[218] notice or restriction. This jurisdiction should be exercisable by the court on motion. **We therefore provisionally recommend that there should be a power to discharge or vary a caution, notice or restriction and that it should be exercisable either by the court on motion or by the registrar. Do readers agree?**

TRANSITIONAL ARRANGEMENTS

6.69 We consider that our proposals should operate only from the date on which any legislation was brought into force. They would be prospective only. Existing entries on the register would be unaffected and would continue to be governed by the previous law. **We therefore provisionally recommend that any changes proposed in this Part should have prospective effect. Do readers agree?**

SUMMARY AND KEY ISSUES

6.70 In this Part we examine in turn each of the four methods of protecting minor interests under the Land Registration Act 1925 - notices, cautions, restrictions and inhibitions. We also consider cautions against first registration. We explain the defects in the present law and make recommendations for reform. Our recommendations would be merely prospective and not retrospective in their effect.

6.71 We have identified two main defects in the law—

(1) its unnecessary complexity;

(2) the inadequate protection that is given by the entry of a caution, because it does not preserve the priority of a right.

We also draw attention to a number of other shortcomings in the present law.

6.72 We examine options for the reform of the system of notices and cautions. The fundamental issue for readers is whether they wish to retain the present dual system of notices and cautions, or whether they would prefer to see just one form of protection. We ask whether readers want—

(1) to leave the present law on notices and cautions unchanged;

[215] See Land Registration Act 1925, s 46; and Land Registration Rules 1925, r 16 (as amended).

[216] Land Registration Act 1925, s 57(2); see above, para 6.40.

[217] See above, para 6.23.

[218] Whether a caution against first registration or, if retained, a caution against dealings.

(2) to retain a dual system of notices and cautions, but to reform some of its main defects so that the lodging of a caution would confer priority on the right that it was entered to protect and would no longer merely be a personal form of protection; or

(3) to replace the existing system with a new one, under which minor interests, other than interests under trusts, were protected by the entry of a notice which might be either—

(a) consensual (and could not therefore be warned off); or

(b) unilateral (which could be warned off in the same way as a caution can be at present).[219]

Our preferred option is (3). Cautions would therefore be abolished. Interests under trusts would have to be protected by the entry of a restriction.[220]

6.73 We consider restrictions and inhibitions and provisionally recommend that—

(1) restrictions should be retained but inhibitions should be abolished and their functions subsumed by restrictions;

(2) the registrar should be able to enter a restriction to restrict the powers of disposition of a registered proprietor, in whole or in part, whether or not subject to conditions or the obtaining of some consent;

(3) the entry of such a restriction should confer no priority on, nor preserve any existing priority of a right or interest in property, where it was entered to protect that right or interest.

6.74 Under our preferred scheme, the registrar should continue to have the power and in some cases the duty to enter a restriction on the same basis as at present. However, others would be able to as well, namely—

(1) the registered proprietor or any person who had his or her consent;

(2) any person applying pursuant to an order of the court or registrar; or

(3) any person who could demonstrate that he or she had the benefit of a right or interest that should be protected by a restriction (such as an interest under a trust of land).

If the applicant fell within (3), no restriction would be entered before a notice had been served on the registered proprietor, giving him or her the opportunity to object to the entry and the period for objection had expired, the proprietor had consented, or any objection by the proprietor had been resolved.

6.75 We raise a difficult issue as to whether a restriction of the kind that we provisionally

[219] For a summary of the proposed scheme, see above, para 6.52.

[220] See below, para 6.73.

propose should ever be able to override the priority that is obtained from a priority search by an intending purchaser. We make no provisional recommendation, but ask whether a court should have power, when ordering that a restriction be placed on the register, to designate it as having absolute priority. This would mean that the restriction took precedence over the protection given to an intending purchaser by an official search, and that no disposition of the land could then take place until the court or the registrar so directed.

6.76 We examine cautions against first registration which provide a means whereby an interested party can be informed of an application for first registration of land. We consider that the present system should be retained, but we provisionally recommend that there should be some amendments to it.

(1) The legislation would make clear what is already the present practice, namely that any person having an interest in the unregistered land in question would be entitled to register such a caution against first registration.

(2) Such a caution would not preserve the priority of the applicant's interest.

(3) The landowner (or any other person having a legal estate in, or legal charge over, the land) should be entitled to challenge the registration of a caution at any time unless he or she consented to it.

6.77 We consider that there should be effective sanctions to discourage improper applications for registration and that the registrar or the court should have power to remove or modify entries expeditiously. To achieve these objectives, we provisionally recommend that—

(1) where any person had suffered loss in consequence of the entry without reasonable cause of a caution,[221] a caution against first registration, a notice, or a restriction, the court should have power to award compensation against the person making the entry;

(2) any such compensation should be assessed on the basis that the person making the entry had committed a tort;

(3) the same right to compensation should exist where loss was caused because a person resisted the removal of an entry on the register without compensation; and

(4) there should be a power, exercisable by the court on motion or by the registrar, to discharge or vary a caution, notice or restriction.

[221] If after consultation these are retained.

PART VII
PRIORITIES

INTRODUCTION

7.1 In this Part we examine the rules which determine the priority of competing interests in registered land and consider what reform, if any, is needed in relation to them. There are a variety of interests that may be in competition—

(1) registered dispositions as against overriding interests and minor interests;

(2) registered charges as against other registered charges;

(3) overriding interests as against registered dispositions and minor interests; and

(4) minor interests as against other minor interests.

The Land Registration Act 1925 lays down rules which regulate the first and second of these matters, but not (with one minor exception) the third and fourth. This reflects an implicit but very important feature of the land registration system as it presently stands. *It is concerned first and foremost with the protection of registered dispositions.* Not only are these guaranteed by the Registry, but a system exists for searches to preserve priority in the course of such a disposition. The fundamental issue for readers is whether there should be any change to that position, and if so what those changes should be.

7.2 We begin with a brief statement of the present law in relation to each of the four situations mentioned in the previous paragraph. We then examine the recommendations that were made by the Law Commission in its Third and Fourth Reports. In the light of both of these, we comment on the state of the present law, outline the options for reform, and make a number of recommendations.

THE PRESENT LAW

The priority of registered dispositions

7.3 The priority of registered dispositions is laid down by the Land Registration Act 1925 and it can be summarised as follows—

(1) On a registered disposition[1] for valuable consideration,[2] the transferee or grantee takes subject to two matters, namely "the encumbrances and other entries... appearing on the register", and overriding interests, "but free from all

[1] See Land Registration Act 1925, s 3(xxii). For the transactions which will, when registered, be registered dispositions, see above, para 2.21.

[2] "'Valuable consideration' includes marriage, but does not include a nominal consideration in money": Land Registration Act 1925, s 3(xxxi). For our provisional recommendations as to the meaning of "valuable consideration", see above, paras 3.44; 3.50.

other estates and interests whatsoever".[3] In addition to these, where the disposition consists of the assignment of a lease or the grant of an underlease, the transferee or underlessee takes the land subject to "all implied and express covenants, obligations, and liabilities incident to the estate transferred or created".[4]

(2) On a registered disposition that is made without valuable consideration, in addition to the matters mentioned in (1), the transferee or grantee also takes the land subject to any minor interests which bound the transferor or grantor.[5]

(3) There are provisions dealing with dispositions for valuable consideration of registered estates with qualified, possessory or good leasehold title. When registered, the transferee, grantee or lessee takes the property—

(a) subject to the matters mentioned in (1); and

(b) any right or interest excepted from the effect of registration by virtue of that class of title.[6]

7.4 The normal case is that set out in the preceding paragraph at (1). Where the registered disposition is the transfer of a freehold, its effect will be to extinguish any minor interest that is not protected by registration. Where the registered disposition is something less than that - say the creation of a registered charge - then an unprotected minor interest will not be extinguished. It will still bind the freeholder, but will be postponed to the interest of the chargee (or other disponee).[7]

The priority of registered charges

Priority according to registration not creation

7.5 Although the creation of a registered charge is a registered disposition for the purposes of the rules set out in the previous paragraphs,[8] the Land Registration Act 1925 makes specific provision for the priority of registered charges between themselves. Subject to any entry to the contrary on the register,[9] they are to rank "according to the order in which they are entered on the register, and not according to the order in which they are created".[10] This is, of course, in conformity with the general rule, explained

[3] See Land Registration Act 1925, ss 19(2), 20(1), 22(2), 23(1). A disposition by the proprietor of a registered charge under his or her paramount powers has a similar effect to a registered disposition by the proprietor of the land: see *ibid*, s 34(4). The transferee or grantee takes the estate, right or interest subject to any overriding interests and encumbrances protected on the register *which have priority to the charge*: Land Registration Rules 1925, r 148; Ruoff & Roper, *Registered Conveyancing*, 24-11. For leases made by chargees under their statutory powers, see Land Registration Act 1925, s 104.

[4] *Ibid*, s 23(1). See too Landlord and Tenant (Covenants) Act 1995, s 3(5) (which ensures that restrictive covenants in a lease are binding on any underlessee).

[5] Land Registration Act 1925, ss 20(4), 23(5).

[6] See *ibid*, ss 20(2), (3), 23(2), (3), (4).

[7] See Transfer of Land: Land Registration (Fourth Paper), Working Paper No 67, para 101.

[8] See *ibid*, s 3(xxii).

[9] For such cases, see Ruoff & Roper, *Registered Conveyancing*, 23-39.

[10] Land Registration Act 1925, s 29.

above,[11] that a registered disposition takes subject to encumbrances protected by entry on the register and overriding interests, but nothing else.

7.6 Where registered land is purchased with the aid of a mortgage and the charge is registered at the same time as the transfer of the legal estate, both the disposition of the estate and the registered charge take effect simultaneously.[12] In the decision of the House of Lords in which this was established, *Abbey National Building Society v Cann*, Lord Oliver explained that—

> in the vast majority of cases, the acquisition of the legal estate and the charge are not only precisely simultaneous but indissolubly bound together.[13]

There is no "*scintilla temporis*" between the two dispositions as there was formerly thought to be.[14] This means that if the transferee had, say, granted a short lease[15] after going into possession but before he or she was registered as proprietor, it would not take priority over but subject to the registered charge.[16]

Protection for charges for securing further advances

7.7 The Land Registration Act 1925 makes special provision for the tacking of further advances. The typical case in which tacking is important is where a bank executes a charge over a client's property to secure his or her overdraft. Every time the overdraft is increased, the bank makes a further advance. Another case would be where a bank undertakes to advance money in a series of tranches, secured on the borrower's land, perhaps to finance a development. In such a case, the bank is actually *required* to make the further advances.

7.8 Under the Act,[17] where a registered charge is made for securing further advances, the registrar is required to give notice to the proprietor of the charge before he makes any entry on the register which would prejudicially affect the priority of any further advance. Any such entry will only affect a further advance made by the proprietor of the charge "after the date when the notice ought to have been received in due course of post".[18] Once the proprietor receives notice of such an entry, he or she can, of

[11] See para 7.3.

[12] *Abbey National Building Society v Cann* [1991] 1 AC 56. See too *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381.

[13] Above, at p 92.

[14] See *Church of England Building Society v Piskor* [1954] Ch 553, overruled by *Abbey National Building Society v Cann*, above.

[15] Which would take effect as an overriding interest under Land Registration Act 1925, s 70(1)(*k*).

[16] If, as was formerly thought, there had been a moment of time between the transfer of the legal estate and the registered charge taking effect, the acquisition of the legal estate would have "fed the estoppel" and what had been a tenancy by estoppel (because the landlord did not have a legal title) would have become a legal estate. See Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) pp 662, 663.

[17] See s 30(1).

[18] *Ibid*. See, eg, *Lloyd v Nationwide Anglia Building Society* [1996] EGCS 80.

course, refuse to make further advances thereafter.[19]

7.9 In the case where the proprietor of the charge is under an *obligation* to make further advances, and this is noted on the register,[20] any subsequent registered charge takes effect subject to any further advance which the proprietor is required to make.[21] The Law Commission has noted that this provision on its face only protects the registered proprietor of the charge against "a subsequent registered charge". The Commission has commented that—

> it is not made clear that subsequent charges that are not registered will also take subject to the further advances. For the sake of clarity and completeness, we recommend that this should be made clear.[22]

It is our intention, both in relation to this point, and to certain other drafting points that we have noted in the course of our examination of the present provisions, to make the effect of the legislation clearer for the future.

The priority of overriding interests

Short leases: creation

7.10 It is a necessary consequence of the provisions governing the priority of registered dispositions[23] that an overriding interest takes priority to a subsequent registered disposition of the land. However, with one exception, the Land Registration Act 1925 is silent as to the priority of overriding interests as against other overriding interests or minor interests. The exception concerns leases granted for a term of 21 years or less, which take effect as overriding interests and cannot be noted on the register. The Act provides that such leases "nevertheless take effect as if they are a registered disposition immediately on being granted".[24] Although the effect of these words has been criticised by some writers on the grounds of their lack of clarity,[25] their meaning is now settled. The grantee of the lease takes the property subject to prior overriding interests and encumbrances protected by registration in the same way as if the lease were a registered disposition.[26] This is so, even though such a lease is not guaranteed by the Registry as a registered disposition would be. Although a registered disposition is only accorded such priority on registration, a lease of this kind is equated to such a disposition "immediately on being granted".[27]

[19] For the proprietor's right to indemnity if the notice is not delivered because of any failure on the part of the registrar or the post office, see Land Registration Act 1925, s 30(2).

[20] See Land Registration Rules 1925, r 139A.

[21] Land Registration Act 1925, s 30(3) (as inserted).

[22] Transfer of Land - Land Mortgages, (1991) Law Com No 204, para 9.5. See the draft Bill attached to that Report, Cl 10, substituting the words "mortgage or charge, whether or not registered" for "registered charge" in Land Registration Act 1925, s 30(3).

[23] See above, para 7.3.

[24] Land Registration Act 1925, ss 19(2) (lease), 22(2) (underlease).

[25] See, eg, Roger J Smith, *Property Law* (2nd ed 1998) p 261.

[26] *Barclays Bank Plc v Zaroovabli* [1997] Ch 321, 327, where Scott V-C refers to "[t]he clear effect of these provisions".

[27] Land Registration Act 1925, ss 19(2) (lease), 22(2) (underlease).

Short leases: assignment

7.11 Although a lease granted for 21 years or less is equated to a registered disposition *when it is granted*, the Land Registration Act 1925 says nothing about the situation where such a lease is subsequently *assigned*. However, the Act expressly preserves the right of a person entitled to an overriding interest to dispose of it.[28] It would seem to follow therefore, that as such interests operate outside the system of registration, they "can.. be disposed of as unregistered interests in the customary manner".[29] In other words, *dispositions of overriding interests are treated as dispositions of unregistered land and are subject to the same rules*.[30] If, for example, L, the lessee under a lease granted for 21 years, contracted to assign the term to A, but then in fact assigned it to B for valuable consideration, B should take the lease free of A's estate contract unless A had previously registered it as a Class C(iv) land charge on the Land Charges Register against L's name.[31]

Other overriding interests

7.12 It is by no means certain what rules govern the priority of overriding interests other than short leases at the time when they are created. There are two clues as to what the principles might be. First, as a registered disposition takes subject to interests protected on the register and overriding interests,[32] it seems reasonable to infer that overriding interests will do so as well. It seems hardly credible that an overriding interest is in a *better* position than a registered disposition. Secondly, as we explain below,[33] the priority of *minor* interests is governed by the same rules as where title is unregistered, *except* for the provisions relating to land charges. If that is so, there seems no obvious reason why the same should not be true in relation to overriding interests. This would suggest that, in practice, any overriding interest will, on creation, take subject to existing overriding interests and minor interests, whether or not those are protected on the register. The only overriding interest that can be created that is a legal estate is a short lease, and for that specific provision is made.[34] Although some overriding interests take effect as legal interests, such as easements and analogous rights,[35] they are unlikely to give rise to any issues of priority. Those overriding interests that may

[28] See s 101(6).

[29] Ruoff & Roper, *Registered Conveyancing*, 6-32. The rules of unregistered conveyancing apply to the deduction of title on such an assignment: see Mark Thompson, *Barnsley's Conveyancing Law and Practice* (4th ed 1996) p 482, n 17.

[30] The suggestion that a disposition of a lease which is an overriding interest will be "subject only to such incumbrances and interests as were binding on the lessee when granted" (Mark Thompson, *Barnsley's Conveyancing Law and Practice* (4th ed 1996) p 482), would appear to be incorrect. It would be strange if the lessee were able to convey the lease free from encumbrances which he or she had created over it, even if they were of a kind that did not require registration as a land charge in order to bind a purchaser.

[31] See Land Charges Act 1972, s 4(6). It is only in relation to dealings with the overriding interest itself that registration of a land charge could be an issue. It is obviously not possible to register a land charge in relation to the registered land which is subject to the overriding interest. Any registration would have to be on the register of title under the provisions of the Land Registration Act 1925.

[32] See above, para 7.3.

[33] See para 7.19.

[34] See above, para 7.10.

[35] See Land Registration Act 1925, s 70(1)(*a*).

generate conflicts - such as the rights of persons in actual occupation - take effect in equity only and should in principle be bound by prior minor interests (in the absence of fraud or estoppel).[36]

7.13 The analysis given above is subject to one rider. Although an overriding interest may take subject to an earlier minor interest that has not been protected by an entry on the register, that overriding interest may subsequently attain priority over the minor interest. This will happen if the land is the subject of a later registered disposition. On such a disposition, the transferee or grantee takes the land free from minor interests not protected on the register.[37] As a result, the person having the benefit of the overriding interest thereupon ceases to be bound by the minor interest.

The absence of conflict in most cases

7.14 It is not entirely surprising that the Land Registration Act 1925 lays down no general principles governing the priority of overriding interests. In relation to many such interests, it is difficult to see how any issue of priority could ever arise because of the nature of the right.[38] For example, there will be few situations in which there can be a conflict involving one of those categories of overriding interests that existed prior to 1926 but can no longer be created, such as manorial rights or the liability to repair the chancel of a church.[39]

The priority of minor interests

7.15 The rules which govern the priority of minor interests in registered land are now largely settled as a result of the judicial interpretation of the relevant provisions of the Land Registration Act 1925. They are in fact fairly simple. A distinction must be drawn between competing assignments under a trust and issues of priority as between other minor interests (of whatever kind).

Competing assignments under a trust

7.16 The problem here arises where a beneficiary under a trust assigns or charges his or her interest under the trust more than once. The matter is governed by the so-called Rule in *Dearle v Hall*.[40] The order in which the assignments are made is irrelevant. The priority of competing assignments is determined instead by the order in which the trustees receive written notice of the assignment from the respective assignees. This rule was extended to competing assignments of land by the Law of Property Act 1925.[41]

Other cases

7.17 As we have already explained,[42] the Land Registration Act 1925 provides no guidance

[36] See below, para 7.17.

[37] See above, para 7.3.

[38] Cf above, para 7.12.

[39] See above, paras 4.7 and following.

[40] (1828) 3 Russ 1; 38 ER 475.

[41] See s 137 (as amended).

[42] See above, para 7.1.

as to the priority of competing minor interests. However, the courts have filled this void. The starting point has been that minor interests take effect in equity only.[43] From this the courts have deduced that the usual rules for competing equitable interests should apply, namely that where the equities are equal, the first in time should prevail.[44] It follows that the priority of minor interests is determined by reference to the time of their creation, subject only to the exceptions of what are commonly described as gross carelessness or inequitable conduct.[45] The courts have also held that the order of priority of a minor interest is unaffected by its protection on the register, whether by means of a caution[46] or a notice.[47] Consistently with this, they have also held that it is not negligent for a person to fail to protect his or her minor interest by entry on the register, so as to deprive the minor interest of the priority that it would otherwise enjoy.[48] There is no authority as to the priority of mere equities [49] in registered land. However, the usual rules presumably apply. If that is so, then somewhat incongruously (given that title is registered), a mere equity will be defeated by the purchaser in good faith of a later equitable interest for value without notice of that equity.[50] This is subject to one exception. The right to seek rectification of the register is sometimes described as a mere equity.[51] However it is clear from the Land Registration Act 1925 itself that such a right will not be defeated even by a subsequent transfer of a registered estate.[52]

7.18 Although the priority of minor interests between themselves is unaffected by whether or not they are protected by an entry on the register, a subsequent registered disposition can change those priorities. This is because the transferee or grantee will take subject to a minor interest that is protected on the register but free of one that is not,[53] and this has already been explained in relation to overriding interests.[54] This can be seen most graphically in the case of a disposition which takes effect as a minor

[43] See Land Registration Act 1925, ss 2(1), 101(3).

[44] See *Barclays Bank Ltd v Taylor* [1974] Ch 137, 147; *Mortgage Corporation Ltd v Nationwide Credit Corporation Ltd* [1994] Ch 49, 54; *Freeguard v Royal Bank of Scotland* (1998) 95/13 LS Gaz 29. It should be noted that it is always open to those with rights over another's property to agree to vary the priority of their interests, even without the consent of the owner of the property: see *Cheah v Equiticorp Finance Group Ltd* [1992] 1 AC 472.

[45] For a discussion of these exceptions, see RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and Remedies* (3rd ed 1992), §§ 806 - 818 (some of the exceptions that are considered there are, however, applicable only in Australia).

[46] See *Barclays Bank Ltd v Taylor*, above. The decision was reached in part because of the wording of Land Registration Act 1925, s 56(2) ("A caution lodged in pursuance of this Act shall not prejudice the claim or title of any person and shall have no effect whatever except as in this Act mentioned") and the now repealed s 102(2) ("...priorities as between persons interested in minor interests shall not be affected by the lodgement of cautions..."). The latter provision was concerned with the now-abolished class of mortgage cautions. See too *Clark v Chief Land Registrar* [1994] Ch 370, 384, 385.

[47] See *Mortgage Corporation Ltd v Nationwide Credit Corporation Ltd*, above.

[48] *Ibid*, at p 56.

[49] Such as a right to set aside a transfer on grounds of fraud, duress or misrepresentation.

[50] See, eg *Cave v Cave* (1880) 15 ChD 639, 647; *Westminster Bank Ltd v Lee* [1956] Ch 7, 18; and *Mid-Glamorgan County Council v Ogwr Borough Council* (1993) 68 P & CR 1, 9.

[51] See *Berkeley Leisure Group Ltd v Williamson* [1996] EGCS 18.

[52] See Land Registration Act 1925, s 82(2); below, para 8.32.

[53] See above, para 7.3.

[54] See above, para 7.13.

interest until registered, but then as a registered disposition. The example may be given of X, a registered proprietor, who executes a charge in favour of A and then a second charge in favour of B. Neither A nor B protects his or her interest by registration initially. Both take effect in equity as minor interests, and A's charge being the first in time of creation, has priority over B's. However, some time later, B registers her charge as a registered charge. That is a registered disposition, and B thereupon ceases to be bound by A's earlier but unprotected charge.[55]

7.19 It should perhaps be emphasised that the priority of minor interests in registered land is *not* identical to the priority of competing equitable interests where title to land is unregistered. The provisions of the Land Charges Act 1972[56] and Law of Property Act 1925[57] which affect the latter[58] do not apply to the former. Nor is it true to say that the principles of law which regulate the priority of minor interests in registered land are the same as those which governed competing equitable interests prior to 1926.[59] Such changes as were made to the law on priorities by the 1925 legislation[60] apply to registered land *except* for the provisions on land charges and their effect.[61]

Priority searches

7.20 The Land Registration (Official Searches) Rules 1993 enable an intending purchaser to search the register and thereby obtain priority for a certain period. The main features of the procedure may be summarised in the following way.[62] It is available only to a "purchaser".[63] This is defined to mean—

> any person (including a lessee or chargee) who in good faith and for valuable consideration acquires or intends to acquire a legal estate in land.[64]

This will include most but not all dispositions which, when registered, will take effect

[55] See Land Registration Act 1925, s 27(3); *Mortgage Corporation Ltd v Nationwide Credit Corporation Ltd*, above, at pp 54, 55; Ruoff & Roper, *Registered Conveyancing*, 8-09.

[56] And before it the Land Charges Act 1925.

[57] See s 97 (as amended), which is concerned only with the priority of mortgages not protected by a deposit of documents. Such mortgages rank according to the date of their registration as land charges under what is now the Land Charges Act 1972.

[58] See Land Charges Act 1972, s 4(5). This provides that specified land charges, of which the most important are Classes C(i) (puisne mortgages) and C(iii) (general equitable charges) are void for non-registration against a purchaser of either the land so charged or of *any* interest in such land (including necessarily an equitable interest), unless registered in the appropriate register. There is an obvious difficulty in reconciling this provision with Law of Property Act 1925, s 97 (above): see Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) p 996 - 1003.

[59] Cf Transfer of Land: Land Registration (Fourth Paper), Working Paper No 67, para 103, where this error is made.

[60] Such as the extension of the Rule in *Dearle v Hall*, above, para 7.16, to land by Law of Property Act 1925, s 137.

[61] Whether those provisions are in the Land Charges Act 1972 or the Law of Property Act 1925 (such as ss 97, 198).

[62] For a much fuller account, see Ruoff & Roper, *Registered Conveyancing*, Ch 30.

[63] Land Registration (Official Searches) Rules 1993, r 3(1).

[64] *Ibid*, r 2(1).

as registered dispositions.[65] It will also include the grant of leases for 21 years or less,[66] which are overriding interests.[67] It follows that there is, at present, no system of priority searches available in relation to—

(1) some registered dispositions;

(2) the creation or transfer of most overriding interests; and

(3) the creation and disposition of any minor interests.

7.21 The effect of such a search is to confer priority on the applicant purchaser for a period of 30 working days from the delivery of the application.[68] What this means is that any entry which is made during the priority period is "postponed to a subsequent application to register the instrument effecting the purchase".[69]

THE RECOMMENDATIONS IN THE LAW COMMISSION'S THIRD AND FOURTH REPORTS ON LAND REGISTRATION

Background: the Fourth Working Paper on Land Registration and the protection of financial charges

7.22 The Law Commission's proposals in the Third and Fourth Reports on the priority of minor interests were amongst the most radical of its recommendations. The issue had been considered by the Commission on an earlier occasion, in its Fourth Working Paper on Land Registration.[70] In that Paper, it had noted that conflicts between competing minor interests were not generally a cause of difficulty except in relation to financial charges.[71] It was concerned that, if priority of all minor interests came to depend upon the order of protection on the register, it would lead to an increase in the number of entries "merely as a precaution designed to ensure priority",[72] in cases where it was not really needed. However, the Commission considered that—

> [i]t is wrong... in a system of registration of title that a person proposing to lend money to a registered proprietor on the security of an equitable mortgage is unable to establish by searching the register that there are no charges, other than those there protected, which may rank ahead of him.[73]

7.23 In the light of this, it provisionally recommended that, as between competing financial charges, priority should depend upon the registration of a notice. In other words, a financial charge which was protected by a notice would be protected against one which

[65] It would not, eg, include the grant of an easement. For registered dispositions, see above, para 2.21.

[66] Provided that they are for valuable consideration.

[67] Land Registration Act 1925, s 70(1)(*k*).

[68] Land Registration (Official Searches) Rules 1993, rr 2(3), 6.

[69] *Ibid*, r 6.

[70] Working Paper No 67.

[71] *Ibid*, paras 105, 106.

[72] *Ibid*, para 106.

[73] *Ibid*, para 107.

was not.[74] The Commission acknowledged that, as a concomitant of this, it would be necessary to extend the system of priority searches to such charges, even though they operated only in equity.[75] The concerns of the Commission have in fact been overtaken by events. It is the normal practice of lenders to create a registered charge unless the terms of an earlier charge make that impossible.

The recommendations in the Third Report on Land Registration

7.24 The approach suggested in the Fourth Working Paper was rejected by the Law Commission in its Third Report on Land Registration, principally because of the complexities that would follow from it.[76] The Commission expressed the view that—

> the only proposal which can be defended in the context of registration is that all minor interests, not merely financial ones, should rank for priority according to the date of their entry on the register.[77]

At least part of the thinking that lay behind this was to encourage those with the benefit of minor interests to enter them on the register.[78]

7.25 Under the scheme proposed by the Commission—

(1) priority of all minor interests created after any legislation was brought into force should depend upon the date of registration;

(2) this priority could be upset only where there had been fraud or estoppel on the part of an earlier protected interest holder;

(3) priority of all minor interests in existence at the time when any legislation was brought into force should continue to be governed by the same principles as before;

(4) the system of priority searches should be extended to minor interests;

(5) overriding interests would "continue to take priority according to their date of creation or the date they become overriding interests, whichever is later".[79]

The draft Bill in the Fourth Report

7.26 Clause 9 of the draft Bill contained in the Law Commission's Fourth Report on Land Registration[80] was intended to give effect to the recommendations in the Third Report. It is unnecessary to set out the clause or comment on it in detail. However, as drafted,

[74] *Ibid*, paras 110, 111.

[75] *Ibid*, para 113.

[76] (1987) Law Com No 158, para 4.97.

[77] *Ibid*.

[78] *Ibid*, para 4.98(iii), (iv).

[79] *Ibid*, para 4.98.

[80] See (1988) Law Com No 173, p 40.

it does give rise to a significant number of technical problems.[81] One reason for this is that the Bill, rather courageously, attempts to deal with *all* issues of priority in one all-embracing clause, rather than dealing with them individually. Clause 9 could not be enacted as it stands, even if the policy which it embodies were thought to be the correct one. Indeed, we suspect that there are likely to be considerable problems in drafting *any* provision that would regulate priority according to the date of registration.

CRITICISMS OF THE PRESENT LAW

7.27 Much of the present law on priorities works perfectly well and there is no obvious reason to change it. This is certainly the case in relation to the priority of registered dispositions. The one area of difficulty is in regard to the priority of minor interests. There is no doubt that the issues raised in both the Law Commission's Fourth Working Paper on Land Registration and its Third Report on Land Registration are important ones. The present law is unsatisfactory if it is judged by what it is reasonable to expect of a system of registered title. It appears to suffer from three principal defects—

(1) It is uncertain. The rules which regulate the priorities of overriding interests and minor interests are nowhere clearly defined.

(2) It provides no security for minor interests. This is because—

(a) protection on the register confers no priority over existing but unprotected minor interests, which may not be readily discoverable; and

(b) there is no system of priority searches available in relation to the creation of minor interests which it is intended to register.

(3) It can lead to anomalies. In particular, an unprotected minor interest which has priority to a later minor interest can lose that priority if either—

(a) the later minor interest is registered as a registered disposition; or

(b) the later minor interest is protected by an entry on the register, and there is then a registered disposition of the land which has the effect of extinguishing the unprotected minor interest.

There are a number of ways in which these problems can be addressed, of which a scheme of priority by registration is one, but, in the view of the Joint Working Group, not necessarily the best.

PROPOSALS FOR REFORM

Likely developments in land registration and their implications

7.28 There are two developments that are in contemplation by the Land Registry that have a fundamental impact on the solution to the problems of priority. The first is the move to a system by which registered land may be transferred and rights created in or over it by electronic means, which we explain more fully in Part XI of this Report. The

[81] It was subjected to a detailed analysis by the Land Registry.

second is the possible extension of official searches with priority to protect a wider range of transactions than are capable of being protected at present.[82] Neither of these could have been foreseen at the time when the Law Commission published its Third and Fourth Reports on Land Registration.

7.29 The effect of these developments in the long term is likely to be as follows—

(1) Registration would become an essential part of the process of creating most rights over land. Registration and creation would therefore be conterminous.[83] It follows that registration would necessarily confer priority on the right even if a "first in time of creation" rule is retained. It also means that, for the great majority of rights over land, the register would provide an accurate picture as to priorities. If our proposals in Part V of this Report are accepted, this would be assisted by a reduction in the number of overriding interest that could be created.

(2) It would only be those rights that were not expressly created, but which arose informally, such as an equity arising by estoppel, that would not derive their priority from registration.[84] Such rights are not particularly common and, so far as we are aware, do not appear to give rise to difficult issues of priority with any frequency.

(3) The introduction of a system of priority searches in respect of minor interests, coupled with the requirement of registration to create rights over land, should provide a high level of security for those who wished to lend on the security of an equitable charge or enter into other commercial transactions concerning land which create minor interests (such as options).

7.30 A system of this kind would achieve most if not all of the objectives of the scheme proposed by the Law Commission in its Third Report. It has a number of additional advantages over that scheme—

(1) It would be fairer. Under the scheme proposed by the Commission in the Third Report, minor interests that arose informally and were not, therefore, protected by registration, would be defeated by any subsequent minor interest that was so protected. That would not be the case in the scheme set out above, because priority between minor interests would still depend upon the order of creation.

(2) It would be simpler. There are really two aspects to this. First, to introduce a "first in time of registration" scheme would require some immensely complicated transitional provisions, to regulate priority in relation to existing but unregistered minor interests. Secondly, it would not be easy to draft a provision to introduce such a scheme that would actually work and would not

[82] At present, only a "purchaser" may apply for an official search with priority: Land Registration (Official Searches) Rules 1993, r 3(1). For these purposes, a "purchaser" is defined as "any person (including a lessee or chargee) who in good faith and for valuable consideration acquires or intends to acquire *a legal estate* in land": *ibid*, r 2(1) (emphasis added).

[83] See below, paras 11.8 and following.

[84] Trusts would be unaffected by the introduction of electronic conveyancing: see below, para 11.12.

create anomalies. The difficulties thrown up by Clause 9 of the Bill contained in the Fourth Report,[85] as well as the problems that exist in relation to the priority of mortgages in unregistered land as a result of the 1925 property legislation,[86] serve as a cautionary warning.

The fundamental issue: priority of minor interests

7.31 A system of electronic conveyancing will not be in place for some time to come. That means that the existing law with all its deficiencies will continue to apply until then. In the light of this, we return to the fundamental question that we posed at the beginning of this Part.[87] It will be apparent that the likely developments that we have explained will lead to a fundamental change in the character of land registration. Its primary concern will no longer just be the protection of registered dispositions. Although the level of protection for minor interests will not be the same as that for registered dispositions, it will be much enhanced.

7.32 In the light of these comments, we believe that there is a fundamental issue on which we seek the views of readers—

(1) Do readers favour the introduction of a first in time of registration system for the priority of minor interests of the kind proposed in the Law Commission's Third Report on Land Registration; or

(2) Would they prefer to leave the present law unchanged and await the introduction of a system of electronic conveyancing (explained in Part XI of this Report) under which it is envisaged that most rights in or over registered land could only be created expressly by entering them on the register, so that a "first in time of registration" system would in fact be introduced?

Our preference is strongly in favour of (2). However, if readers favour (1), would they please indicate why they prefer this method and how they consider it might be integrated with the present law.

7.33 We would emphasise that both—

(1) developments in the area of priority searches for the protection of minor interests; and

(2) a system for the electronic transfer of and creation of rights over land;

are likely to be brought in whichever option is favoured by readers. The latter would, when fully operational, make any system of "first in time of registration" unnecessary.

7.34 Our preferred view would have the effect of preserving the existing rules on the priority

[85] See above, para 7.26.

[86] See Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) p 996 - 1003.

[87] See above, para 7.1.

of minor interests as between themselves.[88] We consider that it would, however, be helpful if this could be indicated by statute. This may not be entirely easy to achieve for two reasons. The first is that the general principle, that where the equities are equal, the first in time prevails, is subject to a number of exceptions which are themselves rather fluid, though they are broadly described as being cases where there is gross carelessness or inequitable conduct.[89] Secondly, there may be a problem of defining exactly what the relevant principles are, having regard to the changes that have been made to them by statute. As we have indicated, the principles are *not* those which applied prior to 1926, but include the modifications that were made to them by the 1925 property legislation, other than those provisions which relate to land charges.[90] **We provisionally recommend that the principles which determine the priority of minor interests should be stated in statutory form (but without codifying them), provided that it is possible to identify them with sufficient clarity. Do readers agree?**

Priority of overriding interests

7.35 The main difficulty with the rules which govern the priority of overriding interests as against other overriding interests and minor interests is to know precisely what they are. We are not aware of any other obvious defects in them. In the light of this, we have concluded that the most helpful reform would be to set out in statutory form what we think that the principles are.[91] **We provisionally recommend that the priority of overriding interests should be as follows—**

(1) the grant of a lease for a term of 21 years (or such lesser period as may be agreed on consultation) should continue to have the same priority as if it were a registered disposition;

(2) any other overriding interest should, on creation, continue to take effect subject to prior overriding interests and minor interests (whether or not such interests are protected on the register); and

(3) dealings with an overriding interest should continue to be governed by the rules of unregistered conveyancing.

We ask whether readers agree with us.

Other issues

7.36 There may be other aspects of the law governing priorities which are in need of reform which we have not canvassed. We would welcome comments on this from readers. One which we have specifically identified arises out of the decision of the Court of Appeal in *Orakpo v Manson Investments Ltd*.[92] This case suggests that if a vendor of registered

[88] See above, paras 7.15 - 7.19.

[89] See above, para 7.17.

[90] See above, para 7.19.

[91] So far as we understand them, the Law Commission's proposals for the priority of overriding interests in its Third and Fourth Reports were not intended to change the existing law: see (1987) Law Com No 158, para 4.98(vii). We are not completely certain that the law *would* have been left unchanged had Clause 9 of the draft Bill in the Fourth Report been enacted.

[92] [1977] 1 WLR 347 (affirmed on appeal but without discussion of this point: [1978] AC 95).

land does not receive the whole of the purchase price from the purchaser but retains an unpaid vendor's lien over the property for the balance, that lien will be lost (in the absence of some entry on the register) when the purchaser is registered as proprietor.[93] This is because a disposition of registered land for valuable consideration takes effect subject only to entries on the register and overriding interests.[94] Although the court would have been able to overcome this particular difficulty by ordering rectification of the register,[95] it is intrinsically unsatisfactory that a transferee of registered land can take free of a charge to which he or she is a party.[96]

7.37 **We therefore provisionally recommend that where there is a disposition of a registered estate or registered charge, the transferee or grantee shall take the land subject to minor interests to which he or she is a party.[97] Do readers agree?**

7.38 We have already mentioned that there are certain drafting points relating to the priority of further advances that it is intended to rectify in any new legislation.[98]

7.39 **Are there any other aspects of the law governing the priority of interests which readers have identified as unsatisfactory and where they consider reform is necessary?**

SUMMARY AND KEY ISSUES

7.40 In this Part we set out the rules which determine the priority of competing interests in registered land. We consider what reform, if any, is needed to them, particularly in the light of the likely development of electronic conveyancing.[99] The Land Registration Act 1925 is primarily concerned with the protection and priority of registered dispositions and registered charges. It says little about the priority of overriding interests and nothing about the priority of minor interests. There is no judicial authority as to the priority of overriding interests. The priority of minor interests has been settled by the courts according to the usual rules applicable to equitable interests.

7.41 We can see no reason to change the rules relating to the priority of registered dispositions and registered charges which are clear and work well. Our concerns are with the priority of minor interests and overriding interests.

[93] See [1977] 1 WLR 347, 360, 369.

[94] Land Registration Act 1925, s 20(1); see para 7.3 above.

[95] The issue did not arise because the lien was barred for other reasons.

[96] See the comments on the *Orakpo* case by Professor D C Jackson in "Security of Title in Registered Land" (1978) 94 LQR 239. We note that there is a provision that deals with an analogous problem in relation to the effects of first registration. Where "the first registered proprietor is not entitled for his own benefit to the registered land", he or she takes it subject to the minor interests of which he or she has notice: Land Registration Act 1925, ss 5(*c*), 9(*d*).We are not certain that the wording of the Act is wide enough to cover all cases of minor interests to which the proprietor is a party. For example, if there is an unpaid vendor's lien for part of the price, it is not clear whether the proprietor can be said to be "not entitled for his own benefit to the registered land".

[97] Although it is not strictly an issue of priority, the position on first registration of the first registered proprietor should also be clarified to make it clear that he or she is bound by any minor interest to which he or she is a party.

[98] See para 7.9.

[99] See Part XI of this Report.

7.42 As regards minor interests, the principal question for readers is whether—

(1) they would favour the introduction of a first in time of registration system for the priority of minor interests of the kind proposed in the Law Commission's Third Report on Land Registration; or

(2) they would prefer to leave the present law as it is and await the introduction of a system of electronic conveyancing (explained in Part XI of this Report) by which most rights in or over registered land could only be created expressly by entering them on the register, so that a "first in time of registration" system would in fact be introduced?

Our preferred option is strongly in favour of (2). We would welcome the views of those who favour (1), but we can foresee considerable difficulties in integrating any such system into the present law. If option (2) is accepted, then we consider that the principles which determine the priority of minor interests should be stated in statutory form (but without codifying them), provided that they can be identified with sufficient clarity.

7.43 We provisionally recommend that the principles that govern the priority of overriding interests under the present law should be set out in statutory form as follows—

(1) the grant of a lease for a term of 21 years (or such lesser period as may be agreed on consultation)[100] should continue to have the same priority as if it were a registered disposition;

(2) any other overriding interest should, on creation, continue to take effect subject to prior overriding interests and minor interests (whether or not such interests are protected on the register); and

(3) dealings with an overriding interest should continue to be governed by the rules of unregistered conveyancing.

7.44 We have identified a number of other miscellaneous defects in the law in relation to which we make provisional recommendations for reform. In particular, we provisionally recommend the reversal of the effect of part of the decision of the Court of Appeal in *Orakpo v Manson Investments Ltd*,[101] which suggested that a transferee of registered land could take land free of a charge (or other minor interest) to which he or she was party.

7.45 We are keen to learn of any other aspects of the law governing the priority of interests that cause difficulties in practice, where it is thought that reform is needed.

[100] See above, paras 3.7 and following.

[101] [1977] 1 WLR 347, 360, 369 (affirmed on appeal but without discussion of this point: [1978] AC 95).

PART VIII
RECTIFICATION OF THE REGISTER

INTRODUCTION

8.1 In this Part, we examine the circumstances in which the register may be rectified to correct mistakes. We begin by explaining the nature of rectification under the Land Registration Act 1925, and give an account of the present law and practice. We then consider the recommendations made by the Law Commission in its Third and Fourth Reports. We go on to identify what we consider to be the principal defects in the present law. We conclude that the existing law and practice in relation to rectification are largely sound, and that the main deficiencies lie in the way in which the legislation is drafted. In the light of this, we make recommendations for reform which are primarily clarificatory rather than substantive.

8.2 Although rectification is commonly considered in conjunction with the right to indemnity for loss suffered as a result of errors and omissions in the register, we make no recommendations in this Report for the amendment of the provisions on indemnity. This is because the subject was considered in the First Report of the Joint Working Group,[1] and the recommendations there made were implemented by the Land Registration Act 1997.[2] However, we anticipate that, in the Land Registration Bill that will be drafted to reflect the responses to this Report, there may be a handful of minor amendments to reflect more clearly the current practice in relation to the payment of indemnity. These will not entail any change of substance.

THE NATURE OF RECTIFICATION

8.3 The Land Registration Act 1925 and the Land Registration Rules 1925 make provision for the register to be rectified in certain circumstances. There is no definition of rectification in the Act, but it can probably best be described as "any amendment to the register or its plan for the purpose of putting right any substantive error of omission or commission, or any legally recognised grievance".[3] Rectification is, therefore, concerned with the correction of mistakes in the register.[4] This is reflected in the corresponding provisions in the Land Registration Act 1925 for the payment of indemnity.[5] The statutory jurisdiction to award indemnity in cases where the register either is or is not rectified arises only where loss has been suffered as a result of some error or omission in the register.[6] It is of course true that the provisions on rectification and indemnity are not exact correlatives.[7] Nevertheless, it is a pointer to the true nature of rectification and one which we consider should be clarified in any new

1 (1995) Law Com No 235, Part IV.

2 See s 2, substituting a new Land Registration Act 1925, s 83.

3 Ruoff & Roper, *Registered Conveyancing*, 40-04.

4 "Where the register is wrong, it may be rectified": *Proctor v Kidman* (1985) 51 P & CR 67, 72, *per* Croom-Johnson LJ.

5 See s 83 (substituted by the Land Registration Act 1997, s 2).

6 Land Registration Act s 83(1), (2).

7 Thus, for example, a claim to indemnity may lie where there is no issue of rectification, as where there is an error in an official search (*ibid*, s 83(3)). Conversely, the register may be rectified to correct a mistake where no indemnity is payable, because no loss is suffered as a result of the rectification: see *Re Chowood's Registered Land* [1933] Ch 574.

legislation.

THE PRESENT LAW

The grounds on which the register may be rectified

Rectification only on the specified grounds

8.4 There are ten grounds on which the register may be rectified. These are set out in section 82(1) of the Land Registration Act 1925 and in rules 13 and 14 of the Land Registration Rules 1925. Of these grounds, two may be exercised by the court alone,[8] six by either the court or registrar,[9] and two by the registrar alone.[10] Neither the court nor the registrar has power to order rectification unless one of these grounds is established.[11] There is no general residual discretion to rectify.[12]

Rectification discretionary

8.5 Both the Act and the Rules provide that the register "may" be rectified or corrected, and the courts have, on a number of occasions, emphasised that rectification is always discretionary.[13] It follows that, even if one of the grounds for rectification exists, it may not be ordered. Furthermore, as we explain below,[14] the circumstances in which the register may be rectified against a proprietor who is in possession are restricted.

Rectification by order of the court

GROUND 1: WHERE A PERSON IS ENTITLED TO AN ESTATE, RIGHT OR INTEREST

8.6 The first ground on which the register may be rectified is—

> [s]ubject to any express provisions of this Act to the contrary,[15] where a court of competent jurisdiction[16] has decided that any person is entitled to any estate right or interest in or to any registered land or charge, and as a consequence of such decision such court is of opinion that a rectification

[8] See Land Registration Act 1925, s 82(1)(*a*), (*b*).

[9] *Ibid*, s 82(1)(*c*) - (*h*).

[10] Land Registration Rules, rr 13, 14.

[11] *Norwich & Peterborough Building Society v Steed* [1993] Ch 116, 132.

[12] *Ibid*, at p 139.

[13] See, eg, *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071, 1078, 1079 ("...the power of rectification never ceases to be discretionary...": *per* Templeman J); *Argyle Building Society v Hammond* (1984) 49 P & CR 148, 158 ("...since the jurisdiction given to the court by section 82(1) is discretionary, there may be cases where, even though an error or omission in the register has occurred, the register is not rectified": *per* Slade LJ); *Norwich & Peterborough Building Society v Steed*, above at p 132 ("[t]here is a sense in which the power to rectify under section 82 is undoubtedly discretionary": *per* Scott LJ).

[14] See para 8.23.

[15] This is thought to be a reference to s 82(3), considered below, para 8.23.

[16] Which includes the county court: see *Watts v Waller* [1973] QB 153; *Proctor v Kidman* (1985) 51 P & CR 67, 73. This is so, even though in most matters arising under the Land Registration Act 1925, the High Court alone has jurisdiction: see Ruoff & Roper, *Registered Conveyancing*, 40-05. Cf Land Registration Act 1925, s 138 (as substituted), which enables the jurisdiction to be extended to the county court to the extent prescribed. Such an extension has not yet occurred.

of the register is required, and makes an order to that effect.[17]

The registrar is required to give effect to the court's order when a copy of it is served on him.[18]

8.7 This ground is available where a court decides *as a matter of substantive law*, that A is entitled to B's land or to a right or interest in or over B's land.[19] Examples of this ground which have arisen or have been canvassed in the cases include—

(1) where the court sets aside a disposition of registered land on the ground of fraud, misrepresentation or undue influence;[20]

(2) where, in court proceedings, a squatter successfully establishes title by adverse possession;[21]

(3) where a trustee has refused or neglected to transfer the land to the beneficiary within 28 days of being required to do so, and the court makes an order vesting the title to the land in the beneficiary instead;[22] and

(4) where the court orders the *removal* of an entry on the register because it has established that the proprietor is entitled to the land or to a charge free from the alleged right that had been entered.[23]

This ground of rectification does not itself "give any substantive cause of action where none before existed".[24] It merely enables the court to make an order reflecting a person's entitlement to an estate, right or interest, determined according to the principles of real property law as they apply to registered land.

8.8 This ground of rectification is available where the court "has decided" a person's entitlement to an estate, right or interest in registered land.[25] It has been held that this means that the court has reached a final decision (subject to any appeal), and that this ground of rectification cannot be invoked on an interlocutory application for, say, the vacation of a caution.[26]

[17] Land Registration Act 1925, s 82(1)(*a*).

[18] Land Registration Act 1925, s 82(5).

[19] *Norwich & Peterborough Building Society v Steed* [1993] Ch 116, 132.

[20] *Ibid*, at p 133.

[21] *Ibid*.

[22] *Ibid*. See Trustee Act 1925, s 44(vi).

[23] *Calgary & Edmonton Land Co Ltd v Discount Bank (Overseas) Ltd* [1971] 1 WLR 81, 84, 85; *Watts v Waller* [1973] QB 153, 171.

[24] *Norwich & Peterborough Building Society v Steed*, above, at p 133, *per* Scott LJ.

[25] See Land Registration Act 1925, s 82(1)(*a*); above.

[26] *Lester v Burgess* (1973) 26 P & CR 536, 541. However, in *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, 156, Lord Denning MR commented, obiter, that "[i]f a caution is entered when it ought not to be, the court can order the register to be rectified by vacating the entry (see section 82(1)(*a*) and (*b*) of the Land Registration Act 1925)".

GROUND 2: WHERE A PERSON IS AGGRIEVED BY AN ENTRY ON THE REGISTER

8.9 The second ground is—

> [s]ubject to any express provision of this Act to the contrary,[27] where the court,[28] on the application in the prescribed manner[29] of any person who is aggrieved by any entry made in, or by the omission of any entry from, the register, or by any default being made, or any unnecessary delay taking place, in the making of any entry in the register, makes an order for the rectification of the register.[30]

8.10 We have already explained that the High Court has an inherent jurisdiction to vacate a caution on motion where "there is no fair arguable case in support of registration which ought to go to trial".[31] The main use of this second ground of rectification is as an alternative to that inherent jurisdiction.[32] Indeed it has been said that "the inherent jurisdiction of the court and the wide discretion conferred by section 82(1) seem to me to be very much the same thing",[33] and an order to vacate a caution may be made under both the inherent and statutory jurisdictions.[34] However, there is one difference between the two powers. An order for rectification necessarily operates *in rem* because the registrar must be in a position where he can act upon it without risk of challenge. An order under the inherent jurisdiction can take one of two forms. It will often be in an impersonal form, "upon which the registrar can safely act" and so akin to an order for rectification.[35] However, it may be worded so that it operates only *in personam* against the cautioner if the circumstances make that more appropriate.[36]

8.11 Unlike the first ground of rectification, this second ground can be (and usually is)

[27] See Land Registration Act 1925, s 82(3); below, para 8.23.

[28] Which is confined to the High Court, as it does not refer to "a court of competent jurisdiction" unlike s 82(1)(*a*); see above, para 8.6.

[29] There are no rules as such which prescribe the manner in which such an application should be made. This caused some puzzlement to Scott LJ in *Norwich & Peterborough Building Society v Steed*, above, at p 133, who thought that it must have been intended that "some form of summary procedure would be prescribed in order to enable speedy relief to be given in clear cases" (see to like effect *Lester v Burgess* (1973) 26 P & CR 536 at 541). However, this assumption may not be correct, and the reference to the "prescribed manner" may simply have been to the general provisions of the Land Registration Act 1925 as to applications to the court. The effect of those provisions as they now stand is that any application to the High Court must be made in the Chancery Division: Land Registration Act 1925, s 138(2) (as substituted). By rules of court, and subject to any rules to the contrary, that application should be made by summons: RSC Ord 5, r 3. In its original and unamended form, s 138(2) also provided that actions should be assigned to the Chancery Division of the High Court, but stated additionally that "every application to the court under this Act shall, except where it is otherwise expressed and subject to any rules of court to the contrary, be by summons at chambers".

[30] Land Registration Act 1925, s 82(1)(*b*).

[31] *Alpenstow Ltd v Regalian Properties Plc* [1985] 1 WLR 721, 728, *per* Nourse J; above, para 6.23.

[32] See, eg, *Lester v Burgess*, above; *Price Bros (Somerford) Ltd v J Kelly Homes (Stoke-on-Trent) Ltd* [1975] 1 WLR 1512.

[33] *Price Bros (Somerford) Ltd v J Kelly Homes (Stoke-on-Trent) Ltd*, above, at p 1518, *per* Buckley LJ.

[34] See, eg *Hynes v Vaughan* (1985) 50 P & CR 444, 462.

[35] *Calgary & Edmonton Land Co Ltd v Dobinson* [1974] Ch 102, 111, *per* Megarry J.

[36] See *Lester v Burgess*, above, at 543; Ruoff & Roper, *Registered Conveyancing*, 36-24. That case was decided when the inherent jurisdiction was still in its infancy.

invoked in interlocutory proceedings.[37] However, like the first ground of rectification, it can only be employed to reflect the parties' substantive rights. It creates no new cause of action that would entitle a person to seek the removal of an entry on the register in circumstances in which they could not according to the principles of real property law otherwise applicable to registered land.[38]

ARE THESE TRUE INSTANCES OF RECTIFICATION?

8.12 It has been said that the first two grounds of rectification[39]—

> give power to the court to make orders of rectification in order to give effect to property rights which have been established in an action or which are clear.[40]

It may be doubted whether these grounds are in fact true cases of rectification. Where the court makes an order that does, in some way, give effect to the substantive rights of the parties, it is not necessarily correcting any mistake that had been made in the register. It may simply be changing the register to give effect to rights that have arisen since the proprietor was registered, as where, in a dispute over an alleged right of way, a neighbour establishes that she has acquired an easement by prescription over the proprietor's land and the right is noted on the register pursuant to the order of the court.

8.13 We have seen that rectification is regarded as discretionary, but it seems inconceivable that the court, having determined the substantive rights of the parties, would then decline to rectify the register accordingly. As Scott LJ explained in *Norwich & Peterborough Building Society v Steed*,[41] where the only grounds on which the register can be rectified are the first or the second, "it is difficult to construct any scenario in which rectification could be withheld".[42] If it *can* be withheld, the position is anomalous, as a simple example will demonstrate. Where A has adversely possessed for 12 years land of which B is the registered proprietor, A may apply to the registrar to be registered as proprietor of that land instead of B.[43] The Land Registration Act 1925 provides that—

> [t]he registrar *shall*, on being satisfied as to the applicant's title, enter the

[37] *Lester v Burgess*, above; *Price Bros (Somerford) Ltd v J Kelly Homes (Stoke-on-Trent) Ltd*, above; *Chancery Lane Developments Ltd v Wades Departmental Stores Ltd* (1986) 53 P & CR 306.

[38] *Norwich & Peterborough Building Society v Steed* [1993] Ch 116, 133. Scott LJ's remarks have been interpreted to mean that this issue is to be judged according to the principles of *unregistered* land, because of his comparison with the position "if the land had not been registered": see Roger J Smith, "Rectification of Registered Titles" (1993) 109 LQR 187, 188. However, we suspect that our statement in the text may more accurately reflect what Scott LJ actually meant by his shorthand expression.

[39] See Land Registration Act 1925, s 82(1)(*a*), (*b*).

[40] *Norwich & Peterborough Building Society v Steed* [1993] Ch 116, 134, *per* Scott LJ.

[41] [1993] Ch 116, 139.

[42] It should be noted that one of the four situations in which the register can be rectified against a proprietor who is in possession is to give effect to an order of the court: see Land Registration Act 1925, s 82(3); below, para 8.23.

[43] Land Registration Act 1925, s 75(2). The law on adverse possession and its application to registered land is considered in detail, below, Part X.

applicant as proprietor...[44]

In other words, *the registrar is under a mandatory duty to register A* if he is so satisfied. If, instead, the issue had come before a court in proceedings by B to eject A, and the court found that A had indeed adversely possessed the land for 12 years, it is not easy to see why it should have a discretion as to whether or not it orders A to be registered as proprietor of the disputed land in place of B.

Rectification by order of the court or registrar

GROUND 3: WHERE INTERESTED PARTIES CONSENT

8.14 The third ground on which the register may be rectified is—

> [i]n any case and at any time with the consent of all persons interested.[45]

In practice, this is by far the most common ground of rectification. Normally, if a mistake occurs, the parties have the good sense to agree to the rectification of the register. It may at first sight appear odd that this ground of rectification should be discretionary. However, there is a risk that parties may attempt to disguise as rectification what is in reality a sale and transfer of land, and the discretionary nature of rectification provides some safeguard against this.[46]

GROUND 4: WHERE AN ENTRY ON THE REGISTER HAS BEEN OBTAINED BY FRAUD

8.15 The fourth ground of rectification is—

> [w]here the court or registrar is satisfied that any entry in the register has been obtained by fraud.[47]

This ground is available *only* where the *registration* itself has been obtained by fraud, *not* merely the *transaction* that is registered.[48] If A induces B to transfer land to him or her by fraud,[49] and A registers that transfer before B has avoided it, rectification of the register cannot be made under this head of rectification.[50] There is no mistake in the register to be rectified: the register correctly reflects the position at the time of registration. What B must do is to seek a court order setting aside the transfer, and for the register then to be rectified to give effect to that order.[51] If, by contrast, registration of the transfer were obtained on the basis of, say, a forged transfer, the register *could* be rectified on this ground, because the entry would itself have been obtained by

[44] See s 75(3) (emphasis added).

[45] Land Registration Act 1925, s 82(1)(*c*).

[46] See (1987) Law Com No 158, para 3.7. Cf D G Barnsley, "Rectification, Trusts and Overriding Interests" [1983] Conv 361, 362, 363.

[47] Land Registration Act 1925, s 82(1)(*d*).

[48] *Norwich & Peterborough Building Society v Steed* [1993] Ch 116, 136.

[49] Eg, by fraudulently inducing B to sign the transfer.

[50] *Norwich & Peterborough Building Society v Steed*, above, at pp 136 - 138, explaining *Re Leighton's Conveyance* [1936] 1 All ER 667, and not following dicta in *Argyle Building Society v Hammond* (1984) 49 P & CR 148, 157 and following.

[51] Under Land Registration Act 1925, s 82(1)(*a*); above, para 8.6.

fraud.[52] That entry would then have been a mistake, because the transfer was a nullity and should not have been registered.

GROUND 5: WHERE TWO PERSONS ARE REGISTERED AS PROPRIETORS OF THE SAME ESTATE OR CHARGE

8.16 The fifth ground of rectification is—

> [w]here two or more persons are, by mistake, registered as proprietors of the same registered estate or of the same charge.[53]

This is self-explanatory and calls for no comment.

GROUND 6: WHERE A MORTGAGEE IS REGISTERED AS PROPRIETOR OF THE LAND

8.17 The sixth ground of rectification is—

> [w]here a mortgagee has been registered as proprietor of the land instead of as proprietor of a charge and a right of redemption is subsisting.[54]

The reason for specifically including this type of mistaken entry may lie in the fact that, prior to 1926, mortgages were effected by an outright transfer of the legal estate, subject to a proviso for redemption.[55]

GROUND 7: WHERE THE PROPRIETOR WOULD NOT HAVE BEEN THE ESTATE OWNER HAD TITLE BEEN UNREGISTERED

8.18 The seventh ground of rectification is—

> [w]here a legal estate has been registered in the name of a person who if the land had not been registered would not have been the estate owner.[56]

This ground of rectification covers a number of situations where a transfer of *unregistered* land would have been void and would not have vested a legal estate in the transferee. Obvious examples include—

(1) where B was mistakenly registered as proprietor of more land than was actually comprised in the transfer from A;

(2) where A purported to transfer land to B which A no longer owned, either

[52] Cf *Hayes v Nwajiaku* [1994] EGCS 106.

[53] Land Registration Act 1925, s 82(1)(*e*).

[54] *Ibid*, s 82(1)(*f*). The reference to a subsisting equity of redemption is to make it clear that a mortgagee *could* be registered as proprietor of a legal estate pursuant to an order for foreclosure.

[55] This became impossible: see Law of Property Act 1925, ss 85, 86.

[56] Land Registration Act 1925, s 82(1)(*g*).

because A had already transferred the land to C,[57] or because C had acquired title to it by adverse possession;[58]

(3) where the transfer from A to B was itself a nullity, because, for example, it was a forgery, or where A could plead *non est factum*,[59] though rectification would commonly be under Ground 1;[60] and

(4) where the transfer by A to B was *ultra vires*,[61] though again, rectification would commonly be under Ground 1.[62]

8.19 Because of the reference to the position in unregistered land, this ground of rectification has been much criticised. There is a concern that it may import the law on notice and land charges - the very things which the registered system was meant to obviate.[63] In practice this has not happened, and by far the commonest reason for rectification under this head is the case exemplified in para graph 8.18(1) above.

GROUND 8: OTHER ERRORS AND OMISSIONS

8.20 The eighth ground of rectification is—

> [i]n any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register.[64]

It is now clear that this ground is confined to the two situations listed in it, namely, where there has been an error or omission in the register, and where a mistaken entry has been made in the register.[65] In *Norwich & Peterborough Building Society v Steed*,[66] Purchas LJ explained that "it was impossible to extract a general discretion to rectify the register" from this ground, "beyond that necessary to cover some unusual error" that did not fall within the fourth to the seventh grounds of rectification explained

[57] See, eg *Re Sea View Gardens, Warden* [1967] 1 WLR 134; *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071. Cases of this kind that fall within Land Registration Act 1925, s 82(1)(*g*) will be increasingly uncommon due to the spread of registration of title. If two persons are each registered as proprietor of the same piece of land, the appropriate ground of rectification will be s 82(1)(*e*); above, para 8.16.

[58] *Chowood Ltd v Lyall (No 2)* [1930] 1 Ch 426, 437 (Luxmoore J); [1930] 2 Ch 156, 165, 168 (CA).

[59] *Norwich & Peterborough Building Society v Steed* [1993] Ch 116, 132 (*non est factum* - though this was not established on the facts); *Hayes v Nwajiaku* [1994] EGCS 106 (forgery - though the report does not indicate on which ground the register was rectified).

[60] See above, para 8.6.

[61] *London Borough of Hounslow v Hare* (1990) 24 HLR 9 (transfer by charity void as contravening Charities Act 1960, s 29(1)).

[62] See above, para 8.6.

[63] For criticisms see David C Jackson, "Security of Title in Registered Land" (1978) 94 LQR 239, 243, 244; David J Hayton, *Registered Land* (3rd ed 1981) pp 169, 170 (commenting specifically on s 82(1)(*g*)); Roger J Smith, "Rectification of Registered Titles" (1993) 109 LQR 187, 188; Roger J Smith, *Property Law* (2nd ed 1998), p 246.

[64] Land Registration Act 1925, s 82(1)(*h*).

[65] *Norwich & Peterborough Building Society v Steed* [1993] Ch 116, 135.

[66] *Ibid*, at p 139.

above.[67] What the court must do in any case, is to determine "whether there has been a mistake in the registration of the title, and if so, whether justice requires that the register should be rectified".[68] It has been invoked (for example) to delete a notice in respect of an easement that had been erroneously entered on the register.[69]

Rectification by order of the registrar

GROUND 9: CORRECTION OF CLERICAL ERRORS

8.21 The Land Registration Rules 1925 confer on the registrar the power to correct "any clerical error or error of a like nature" in the register or any plan or document to which it refers.[70] This ground of rectification is confined to cases where the correction of the error can be made "without detriment to any registered interest".[71]

GROUND 10: REGISTRATION IN ERROR

8.22 The Land Registration Rules 1925 also empower the registrar to cancel in whole or part a registration where it is proved that either "the whole of the land comprised in a title", or too large a part to be properly dealt with as a clerical error,[72] has been registered in error.[73] It has been held that, under this rule—

> the registrar has express power to rectify where there is an error in the registration owing to a mistake, and no limitation is placed on that power.[74]

Restrictions on the power to rectify

The protection of proprietors who are in possession

8.23 The Land Registration Act 1925 imposes significant restrictions on the power to rectify the register in one situation. Section 82(3) provides that "the register shall not be rectified... so as to affect the title of the proprietor who is in possession" except in four cases.[75] Those four cases are—

(1) for the purpose of giving effect to an overriding interest;

(2) for the purpose of giving effect to an order of the court;

[67] See Land Registration Act 1925, s 82(1)(*d*) - (*h*); above, paras 8.15 - 8.18. This ground of rectification has in fact sometimes been invoked together with one or more of the other grounds, when a court has considered whether it might order rectification: see, eg *Chowood Ltd v Lyall (No 2)* [1930] 1 Ch 426, 437 (Luxmoore J); [1930] 2 Ch 156, 165, 168 (CA).

[68] *Chowood Ltd v Lyall (No 2)* [1930] 2 Ch 156, 168, *per* Lawrence LJ.

[69] *Re Dances Way, West Town, Hayling Island* [1962] Ch 490. For other examples, see Ruoff & Roper, *Registered Conveyancing*, 40-07.

[70] See r 13.

[71] *Ibid*.

[72] That is, under r 13, above para 8.21.

[73] See r 14. The rule lays down the procedure for consulting interested parties.

[74] *Chowood Ltd v Lyall (No 2)* [1930] 1 Ch 426, 439, *per* Luxmoore J.

[75] See s 82(3) (as amended by Administration of Justice Act 1977, s 24).

(3) where "the proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care";

(4) where "for any reason, in any particular case, it is considered that it would be unjust not to rectify the register" against the proprietor.

The restriction on the power to rectify contained in section 82(3) is of considerable conceptual importance in the scheme of the Land Registration Act 1925, because it confers on proprietors who are in possession a form of qualified indefeasibility of title. There is no doubt that, as a result of it, a registered proprietor may have greater security of title than does an owner of unregistered land.[76]

Who is a "proprietor who is in possession"?

8.24 The Land Registration Act 1925 provides little guidance as to who will be "the proprietor who is in possession" for these purposes. Clearly it was meant to exclude *some* registered proprietors. There are two relevant provisions, but these are not easily reconcilable.[77] First, there is an express provision in section 82(4) of the Act that a person who is "in possession of registered land in right of a minor interest" is deemed to be in possession as agent for the proprietor.[78] Persons falling within this description would include a beneficiary under a trust of land, or a tenant in occupation under either an agreement for a lease or a lease which was capable of substantive registration that had not yet been registered. By contrast, a licensee, a tenant at will, or a tenant holding under a lease for 21 years or less which took effect as an overriding interest, would not appear to fall within it. It is not clear from this whether a registered proprietor will still be "in possession" in these latter cases, even though the possession of the occupier cannot be attributed to him or her under agency principles.[79]

8.25 Secondly, the Act contains a general definition of "possession". It "includes receipt of rents and profits and the right to receive the same".[80] That definition applies "unless the context otherwise requires".[81] It has been suggested that, for the purposes of section 82(3) of the Act, even if "possession" is taken to include "the receipt of rents and profits", it cannot include "the right to receive the same". This is because—

[76] For a striking example see *London Borough of Hounslow v Hare* (1990) 24 HLR 9, where the court declined to rectify the register against a proprietor in possession when she had been registered pursuant to a transfer by a charity that was *ultra vires* and therefore void. Had the title been unregistered, she would have acquired no title and would have had no defence to the claim to recover the land from her.

[77] For discussion, see D J Hayton, *Registered Land* (3rd ed 1981) pp 171 - 173.

[78] There is an oddity about this provision. The definition of "minor interest" in Land Registration Act 1925, s 3(xv) - which applies "unless the context otherwise requires" - specifically excludes rights which are overriding interests. However, in most situations in which a person "is in possession of registered land in right of a minor interest", he or she will in fact have an overriding interest under s 70(1)(*g*) of the Act (the rights of persons in actual occupation): see above, para 5.56. If that is so, either the context *does* require that the definition of "minor interest" in s 3(xv) should be inapplicable, or s 82(4) applies only to those presumably rare cases where a person is in possession but not in actual occupation of the land. We assume that the former is much more likely and our comments are made on that basis.

[79] Cf below, para 8.26.

[80] Land Registration Act 1925, s 3(xviii).

[81] See the opening words of s 3.

> *all* registered proprietors have this right by virtue of their registration and section 82(3) is clearly intended to apply not to all but just to *some* registered proprietors.[82]

Indeed, if it did apply to all registered proprietors, the deemed agency provision in section 82(4)[83] would appear to be redundant.

8.26 There is some authority as to the meaning of "proprietor who is in possession". First, the expression undoubtedly includes a registered proprietor who is in *physical* possession of the land.[84] Conversely, where the party claiming rectification of the register in his or her favour is in physical possession of the land in dispute,[85] the registered proprietor will *not* be a proprietor who is in possession.[86] Even these propositions must be regarded as subject to some qualification: the registered proprietor might be in possession only because he or she has ousted the claimant or *vice versa*.[87] Secondly, in an obiter dictum in *Freer v Unwins Ltd*,[88] Walton J expressed the view that, where land had been let on a 21 year lease, "the freehold owners were in possession by receipt of the rents and profits through their tenant". This suggests that whenever land has been leased or, presumably granted for some consideration by way of a licence or tenancy at will, the registered proprietor will be in possession for these purposes. The situation that remains unresolved is where the registered proprietor allows a person into possession of the land *gratis*. It may be that, where the person is in occupation as agent for the registered proprietor (such as a caretaker), the proprietor *would* be regarded as being in possession, but not otherwise.[89] Thirdly, a mortgagee who is the proprietor of a registered charge, and who has exercised his or her right to take possession of the premises, is *not* a proprietor who is in possession for the purposes of section 82(3).[90]

The four exceptional cases

8.27 As we have indicated above,[91] there are four situations in which the register may be rectified even against the proprietor who is in possession.[92] These are listed, in

[82] D J Hayton, *Registered Land* (3rd ed 1981) p 173 (emphasis added).

[83] Above, para 8.24.

[84] See *Re 139 Deptford High Street* [1951] Ch 884, 889; *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071, 1077, 1078.

[85] Such a person may have an overriding interest under Land Registration Act 1925, s 70(1)(*g*): see *Epps v Esso Petroleum Co Ltd*, above, at p 1078.

[86] *Chowood Ltd v Lyall (No 2)* [1930] 2 Ch 156, 166; *Epps v Esso Petroleum Co Ltd*, above, at p 1078.

[87] See *Epps v Esso Petroleum Co Ltd*, above, at pp 1077, 1078.

[88] [1976] Ch 288, 294.

[89] Cf *Strand Securities Ltd v Caswell* [1965] Ch 958, 981, 984 (on the meaning of "actual occupation" in Land Registration Act 1925, s 70(1)(*g*)).

[90] *Hayes v Nwajiaku* [1994] EGCS 106.

[91] See para 8.23.

[92] Even if one of the four grounds exists, rectification remains discretionary: see *Re Sea View Gardens, Warden* [1967] 1 WLR 134, 141; *Argyle Building Society v Hammond* (1984) 49 P & CR 148, 161.

amended form, in section 82(3).[93]

TO GIVE EFFECT TO AN OVERRIDING INTEREST

8.28 The first is to give effect to an overriding interest. An example would be where the land was subject to an easement that had been acquired by prescription[94] and the register was rectified to record it. It should be noted in this context that section 82(3) applies *only* where the proprietor is in possession.[95] It will therefore generally be inapplicable where rectification is sought to give effect to the rights of either—

(1) an adverse possessor;[96] or

(2) a person who is in actual occupation;[97]

and the person having the overriding interest is in possession of the land, as will generally be the case.[98] In practice, this is unlikely to make very much difference, as the register will normally be rectified to give effect to an overriding interest whether or not the proprietor is in possession.[99]

TO GIVE EFFECT TO AN ORDER OF THE COURT

8.29 The power to order rectification of the register against a proprietor who is in possession "for the purpose of giving effect to... an order of the court" was added by the Administration of Justice Act 1977.[100] The legislative history of the provision sheds no light on the reason for it.[101] However, it appears to have been intended to ensure that there were no restrictions on the powers of the court to order rectification under the first or second grounds of rectification,[102] where the order gives effect to the substantive rights and entitlements of the parties.

[93] The amendments were made by Administration of Justice Act 1977, s 24.

[94] See Land Registration Act 1925, s 70(1)*a*); above, para 5.2.

[95] See *Chowood Ltd v Lyall (No 2)* [1930] 2 Ch 156, 162; *Re Sea View Gardens, Warden* [1967] 1 WLR 134, 138.

[96] Land Registration Act 1925, s 70(1)(*f*); above, para 5.42.

[97] Land Registration Act 1925, s 70(1)(*g*); above, para 5.56.

[98] An adverse possessor *could* seek rectification against a proprietor who was in possession. This would be the case if he or she had extinguished the rights of the proprietor, but had then abandoned the land for some period of less than 12 years. The same could happen where the claimant had been in actual occupation at the time when the registered proprietor had acquired the land (so that his or her overriding interest bound the proprietor), but had subsequently left the premises.

[99] *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071, 1078.

[100] See s 24.

[101] What became s 24 was introduced by way of an amendment during the passage of the Bill through Parliament: see *Hansard* (HC) 22 July 1977, vol 935, cols 2117 - 8. The remainder of s 24 implemented recommendations made in 1972 by the Law Commission in Transfer of Land: Land Registration (Third Paper) Working Paper No 45.

[102] See above, paras 8.6 (where a person is entitled to any estate, right or interest) and 8.9 (person aggrieved by an entry). In the Third Report, Law Com No 158, para 3.13, the Law Commission explained what it understood to be the reason for the amendment, namely, "that it was the intention that the powers of the court in relation to conveyances made with a view to defeating the rights of a trustee in bankruptcy should not be affected by other amendments...".

FRAUD OR LACK OF PROPER CARE

8.30 The third exceptional case in which the register can be rectified against a proprietor who is in possession is where he or she "has caused or substantially contributed to the error or omission by fraud or lack of proper care".[103] This exception was cast in its present form in 1977[104] to implement a recommendation made by the Law Commission.[105] The previous version of the exception had been interpreted in such a way that the register would be rectified against the proprietor in possession if, on first registration, the transfer that he or she had lodged with the Land Registry happened to contain incorrect particulars. This was so however innocently that mistake had come about.[106] The result was criticised because it defeated the intentions of the legislature.[107] The present version of the exception restricts it to cases where the error arises wholly or substantially from the fraud or negligence of the registered proprietor. This ground of rectification most commonly arises where a third party, B, forges a transfer from A, the registered proprietor, to him or herself.

UNJUST NOT TO RECTIFY

8.31 The final exception to the general principle that the register should not be rectified so as to affect the title of a proprietor who is in possession, is where—

> for any reason, in any particular case, it is considered that it would be unjust not to rectify the register against him.[108]

The scope of this exception has been considered in a number of cases. Each has necessarily turned upon its own facts and the extent to which any general principles can be extracted from them is limited. However, two factors do seem to emerge as relevant in exercising the discretion. First, a person may be estopped from seeking rectification, as where "the true owner, having learnt that the registered proprietor is doing work upon the land, stands by and allows him to do the work before he intervenes with an application for rectification".[109] Secondly, financial considerations will be taken into account. The fact that if rectification is ordered, the registered proprietor will recover no indemnity because his claim would be time-barred[110] has not been considered a bar to rectification,[111] though such cases are now much less likely

[103] Land Registration Act 1925, s 82(3)(*a*).

[104] By Administration of Justice Act 1977, s 24.

[105] See Transfer of Land: Land Registration (Third Paper) Working Paper No 45, paras 86 - 87.

[106] See, eg *Re Sea View Gardens, Warden* [1967] 1 WLR 134, 141, where Pennycuick J summarised the effect of the decisions.

[107] See Stephen Cretney and Gerald Dworkin, "Rectification and Indemnity: Illusion and Reality" (1968) 84 LQR 528.

[108] Land Registration Act 1925, s 82(3)(*c*). This exception remains as originally enacted.

[109] *Re Sea View Gardens, Warden* [1967] 1 WLR 134, 141, *per* Pennycuick J.

[110] See Land Registration Act 1925, s 83(12) (as substituted by Land Registration Act 1997, s 2).

[111] *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071, 1082.

to arise.[112] On the other hand, where indemnity would be available, but would not adequately compensate a person either for having the register rectified against him or her, or for not having the register rectified in his or her favour, that is a significant factor in deciding whether it would be unjust not to rectify. Thus in *London Borough of Hounslow v Hare*,[113] the court declined to rectify the register against a leaseholder under what turned out to be a void lease, who had been in possession of the house for many years under earlier tenancies, and who could not possibly have known that the transfer was *ultra vires* the grantor.[114] Similarly, in *Epps v Esso Petroleum Co Ltd*, [115] rectification of the register was refused where a property had been purchased for use as a commercial garage on the assumption that it included the disputed strip in question.[116] The registered proprietors required the land for their commercial purposes and would have been unable to "have all the facilities which a modern garage requires" (specifically a car-wash) without it.[117] Templeman J commented that—

> The defendants bought the land... to exploit for their commercial purposes; they did not buy it in order to sell a strip for [its current] value,[118] which in real terms will not... adequately indemnify them.[119]

[112] This is because the provision which barred most claims to indemnity after 6 years from the time when they arose (formerly Land Registration Act 1925, s 83(11)) has been significantly amended, and time now runs from the time when the claimant knows, or but for his own default might have known, of his claim to indemnity: see Land Registration Act 1925, s 83(12) (as substituted by Land Registration Act 1997, s 2).

[113] (1990) 24 HLR 9.

[114] The leaseholder had been granted a 125 year lease under the local authority "right to buy" scheme, having been a tenant of the property for 16 years prior to the grant. At 24 HLR 9, 27, Knox J commented that "when one is dealing with a person's home the change from the near equivalent of a freehold that a 125 year lease gives to somebody of the age of nearing 40 to that of a tenant... is one of very considerable significance. That feature does... far outweigh any financial considerations that there may be the other way".

[115] Above.

[116] The case arose out of a double conveyance of the strip. The defendant garage owners were the registered proprietors of the disputed strip, but, if title had been unregistered, the land would have belonged to the plaintiffs.

[117] [1973] 1 WLR 1071, 1083, *per* Templeman J.

[118] The sum they would have received by way of indemnity had the register been rectified against them: see what is now Land Registration Act 1925, s 83(8) (as substituted by Land Registration Act 1997, s 2).

[119] [1973] 1 WLR 1071, 1082, 1083.

The effect of rectification

8.32 Rectification may, of course, take a number of different forms.[120] For example—

(1) A may be registered as proprietor of the land in place of B, leaving B to his or her claim (if any) for indemnity;

(2) where the wrong person has been registered as the owner of land, the registration may be cancelled in whole or part; or

(3) a right may be entered on or deleted from the charges register of a title.

Whatever may be the form of the rectification, section 82(2) of the Land Registration Act 1925 provides that—

> [t]he register may be rectified under this section, notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by entry on the register, or otherwise.

If, therefore, the register is rectified against a registered proprietor, that rectification can affect any other registered estate, any registered charge, minor interest or overriding interest which binds the land in question.[121] In ordering rectification, the court or registrar can specify in the order that it is to have such effect. If, as a result, any person suffers loss, he or she is entitled to claim indemnity.[122]

8.33 There have, however, been cases where the register has been rectified against a registered proprietor, but not so as to affect those with derivative interests in the land. In those circumstances, those interests were unaffected by the rectification.[123] This situation, which may have arisen because section 82(2) was overlooked, could at the time have had adverse consequences on the party seeking rectification,[124] although this shortcoming has been remedied by a recent change in the law.[125] There were attempts in two cases to persuade the courts that rectification of the register - like rectification of a document - was retrospective to the time when the mistake was made, so that any derivative interest created after the time of the error or omission would be affected by

[120] See the discussion in Ruoff & Roper, *Registered Conveyancing*, 40-15.

[121] See *Norwich & Peterborough Building Society v Steed* [1993] Ch 116, 137, 138, explaining remarks in *Argyle Building Society v Hammond* (1984) 49 P & CR 148, 157. The position in relation to overriding interests is not completely certain.

[122] Land Registration Act 1925, s 83(1)(*a*) (as substituted).

[123] See *Freer v Unwins Ltd* [1976] Ch 288; *Clark v Chief Land Registrar* [1993] Ch 294, 314 (Ferris J - not considered on appeal).

[124] Prior to the Land Registration Act 1997, a person could only recover indemnity if he or she suffered loss "by reason of any rectification of the register": Land Registration Act 1925, s 83(1) (as originally enacted). If, therefore, a claimant succeeded in obtaining rectification of the freehold title of a property, so that, say, a restrictive covenant was entered on the register, but that rectification did not affect a lessee of the property, the claimant might still suffer loss, notwithstanding rectification in his or her favour, because the lessee could continue to act in a way prohibited by the covenant. However, no indemnity was payable in such a case, because the claimant would not suffer loss by reason of the rectification: see *Freer v Unwins Ltd*, above, at pp 295, 296, 298, 299.

[125] The new Land Registration Act 1925, s 83(1)(*b*), which is substituted by Land Registration Act 1997, s 2, enables indemnity to be awarded where a person suffers loss as a result of an error or omission, notwithstanding that the register is rectified in his or her favour.

the rectification.[126] In neither case was the court willing to sanction such a rectification, and in the second of them, the court doubted whether it had power to do so.[127] In the light of section 82(2), we consider that any power to rectify the register retrospectively is unnecessary.

THE RECOMMENDATIONS IN THE LAW COMMISSION'S THIRD AND FOURTH REPORTS

Grounds for rectification

8.34 There were two principal recommendations in the Third Report in relation to rectification. The first was as to the grounds of rectification. It was that—

> [w]here the register does not reflect, whether through error or omission, the title to the land according to rules of land law which prevail apart from registration of title then, if it is just to do so, the register may be rectified on application either to the registrar or the court.[128]

It was clear that there was some uncertainty as to what these "rules of law" might be.[129] It appears to have been some indeterminate mixture of the principles of registered and unregistered land. This uncertainty was not reflected in the draft Bill, contained in the Fourth Report, which was intended to implement the recommendations in the Third Report. Under it, the essential prerequisite to rectification was to have been "that there was an error on or omission from a register".[130]

Restrictions on rectification

8.35 The second main recommendation in the Third Report was that—

> there is to be no rectification against a registered proprietor who has taken the care of a prudent purchaser and who is a bona fide purchaser in actual occupation of the land unless the rectification is in favour of a trustee in bankruptcy.[131]

This recommendation was fully reflected in the draft Bill contained in the Fourth Report.[132] The reference to a bona fide purchaser follows from the view taken in the Third Report - which we have provisionally decided not to follow[133] - that "purchaser" should be defined as a purchaser in good faith.[134]

CRITICISMS OF THE PRESENT LAW

[126] *Freer v Unwins Ltd*, above; *Clark v Chief Land Registrar*, above.

[127] *Clark v Chief Land Registrar*, above, at p 318.

[128] Law Com No 158, para 3.34(1).

[129] See *ibid*, paras 3.6 and 3.34(2).

[130] Law Com No 173, draft Bill, Cl 44(1)(a).

[131] Law Com No 158, para 3.34(4).

[132] Law Com No 173, draft Bill, Cls 44(3), (4).

[133] See above, paras 3.42, 3.50.

[134] See Law Com No 158, para 4.15.

8.36 The present law governing rectification works without undue difficulty in practice. Its defects lie primarily in the way it is drafted. These defects, which are summarised in the following paragraphs, are of a kind which suggest that those who conceived the Land Registration Act 1925 may not always have felt completely certain as to what they were seeking to achieve.

8.37 No clear distinction is drawn between the *rectification* of an error or omission in the register (which is discretionary) and an *amendment* of the register because the court determines that A is entitled to an estate, right or interest in or over land of which B is the registered proprietor. The latter is not intrinsically different from an amendment to the register to indicate that, say, a lease has terminated.[135] The first two grounds of rectification[136] are situations where the court has determined the substantive rights of the parties and there is in practice no true element of discretion in its order that the register should be rectified to give effect to those rights.

8.38 The yardstick for determining whether there is an error or omission is, in some cases, the position that would have existed had title not been registered.[137] There are a number of objections to this. First, there is the risk that it may bring into play aspects of unregistered land, such as the doctrine of notice and the registration of land charges, which the registered system was meant to supersede. The difficulty with this approach is to know just how much of the unregistered system is brought into play. Secondly, as the great majority of titles are now registered, it is inappropriate, particularly as the principles of unregistered conveyancing are becoming unfamiliar to practitioners. Thirdly, it is unnecessary. The existence of an error or omission can be readily defined according to the principles of registered conveyancing.

8.39 There is uncertainty as to the ambit of the restrictions on rectification that exist in favour of a proprietor who is in possession. Although this has not so far been the cause of much difficulty in practice, it could be, and it would be better to address the matter.

PROPOSALS FOR REFORM

The essentials of an effective scheme of rectification

8.40 Any rectification scheme must overcome the deficiencies outlined above. To achieve this we regard as the essentials of any viable scheme the following features, which should be made clear in the legislation—

(1) The only function of the power to rectify is to provide a discretionary mechanism which enables errors and omissions in the register to be remedied. It should remain the case that indemnity is available for any loss that is caused as a result of rectification or where, as a matter of discretion, rectification is not ordered, its refusal.

(2) In the absence of any error or omission in the register, where a court makes a determination of substantive rights in or over registered land, it should do so in accordance with the principles of registered land. The principles governing unregistered land should come into play *only* if there is some issue which arises

[135] See Land Registration Act 1925, s 46.

[136] *Ibid*, s 82(1)(*a*); (*b*); see above, paras 8.6 - 8.13.

[137] See above, para 8.18, and compare para 8.11.

from the time prior to first registration. Following any such determination, the register should be amended to reflect its outcome. That amendment, unlike rectification, should not be a matter of discretion.

(3) Normally, the register should be rectified to give effect to an overriding interest, though as it is an application of the power to rectify, it should remain a matter for discretion.

(4) The existing principle of qualified indefeasibility which applies to a proprietor who is in possession should be retained but its scope should be clarified.

Grounds for rectification

8.41 As we have indicated, rectification is an issue where the register is in some way incorrect.[138] We consider that rectification should be confined to that situation. The consequences of this view are as follows—

(1) It would no longer be appropriate to provide for rectification of the register to give effect to a court order that a person is entitled to an estate, right or interest in any registered land or charge.[139] Where the court determines the substantive rights of the parties, the register should be amended to give effect to the order which it makes. There should be no element of discretion about it. Any determination would, of course, be undertaken in accordance with the principles applicable to registered land. This should preclude any possible argument that the principles of unregistered land are in some way relevant.

(2) We have recommended in Part VI of this Report that both the court and the registrar should be given a power to discharge or vary a caution, notice or restriction.[140] The introduction of this general jurisdiction would obviate the need for the present power to rectify the register on the application by a person aggrieved by an entry.[141] The exercise of this power to amend the register should cease to be regarded as rectification.

(3) There would be no need to have a list of grounds upon which rectification might be ordered as there are at present in section 82(1) of the Land Registration Act 1925. They would all be encompassed within the one general principle that the register could be rectified, as a matter of discretion, where there was an error or omission in it.

8.42 In the light of this, **we provisionally recommend that, subject to the qualifications that we explain below,[142] the court and the registrar should have a power to rectify the register whenever there has been an error or omission in it. Do readers agree?**

8.43 That power would encompass all the cases presently included in section 82(1)(*c*) - (*h*)

[138] See above, para 8.3.

[139] See Land Registration Act 1925, s 82(1)(*a*) (Ground 1); above, para 8.6.

[140] See above, para 6.68.

[141] Land Registration Act 1925, s 82(1)*a*); above, para 8.9.

[142] See paras 8.48 and following.

of the Land Registration Act 1925 (Grounds 3 - 8 above),[143] as well as the ground listed in rule 14 of the Land Registration Rules 1925 (Ground 10 above).[144] None of these would need to be replicated in the new legislation. As regards the correction of clerical errors, for which provision is made in rule 13 of the Land Registration Rules 1925 (Ground 9 above),[145] we consider that it should be retained, but that it should not be regarded as rectification. The correction of clerical errors that cause no detriment to any registered interest cannot give rise to any claim for indemnity. However, there is no obvious reason why this important power should remain in the Rules. The legislation should set out comprehensively the circumstances in which the register can be changed in order to correct errors in it. For this reason we consider that it should be placed on a statutory footing. **We therefore provisionally recommend that—**

(1) the power for the registrar to correct clerical errors in the register or any plan or document to which it refers, where there is no detriment to any registered interest, should be made statutory; and

(2) such a correction should not be regarded as "rectification" for the purposes of the legislation.

Do readers agree?

8.44 There are two situations for which specific provision needs to be made. The first arises where, as a matter of discretion, the court or registrar decides not to rectify the register, even though there has been an error. Such a decision may sometimes require a correlative amendment to be made to the register of *another* registered title. Two examples may be given of this—

(1) The first is the simple case of a double registration - where A was by mistake registered as proprietor of land of which B was already the registered proprietor. If it was decided *not* to rectify A's title because he was a proprietor in possession, then it would be necessary to rectify B's. This would be so, even though there was no *error* in B's title - B had been correctly registered as proprietor of it.

(2) The second is where A was granted an easement over B's land, the extent of which was wrongly described on A's title,[146] but where the register was not rectified against A, because he or she was a proprietor in possession. In this case, B's title must be rectified to ensure that it reflects the easement that A enjoys as a result of his or her title *not* being rectified.

8.45 We consider that there should be no doubt as to the power of the court or registrar to order the rectification of B's title in such circumstances.[147] **We therefore**

[143] See paras 8.14 to 8.20.

[144] See para 8.22.

[145] See para 8.21.

[146] As where it was recorded as a right of way for all purposes, whereas it was in fact a right of way on foot only.

[147] Cf *Racoon Ltd v Turnbull* [1997] AC 158, where precisely this difficulty arose in relation to the Registered Land Ordinance 1970 of the British Virgin Islands.

provisionally recommend that where, notwithstanding an error or mistake in the register, the register is not rectified—

(1) the court or registrar should have power to make any correlative amendment to any other registered title that is necessitated by that non-rectification, even though there was no mistake in that other title; and

(2) any such amendment shall constitute "rectification" for the purposes of the legislation, so that a claim for indemnity will lie if the registered proprietor suffers loss in consequence.

Do readers agree?

8.46 The second situation for which specific provision is required concerns land which is registered with possessory, qualified or good leasehold title. We have explained in Part V of this Report that, in such a case, "all estates, rights, interests and powers excepted from the effect of registration" presently take effect as overriding interests.[148] Should some matter come to light that is excluded from the effect of registration, the register will be amended to give effect to it. Such an amendment is not, in our view, a "rectification" of the register, because it does not involve the correction of any mistake.[149] However, even if this is not the case, and such an amendment is to be regarded as rectification, it can be ordered even against a proprietor who is in possession, because the right or interest is an overriding interest.[150] If our recommendations for reform are accepted, such rights and interests will cease to be overriding interests. There is therefore a possibility that, if the register were amended to record some interest or right that had been excluded from the effect of registration, that change *might* be regarded as rectification. As that amendment would no longer be to give effect to an overriding interest, it could not be ordered against a proprietor who was in possession. To avoid any possible argument of this kind, **we provisionally recommend that an amendment of the register to give effect to any estate, right, interest or power which is excepted from the effect of registration should not be regarded as "rectification" for the purposes of the legislation. Do readers agree?**

Rectification against a proprietor who is in possession

8.47 At present, by virtue of section 82(3) of the Land Registration Act 1925,[151] the register can only be rectified against a proprietor who is in possession in certain limited circumstances. We consider that this principle of qualified indefeasibility should be retained, but that its ambit should be clarified, and some guidance should be given as to the exercise of the discretion to rectify the register. **Do readers agree with our provisional view that some form of qualified indefeasibility should be retained? If they do not, would they please give their reasons.**

[148] Land Registration Act 1925, s 70(1)(*h*); above, paras 5.78, 5.79.

[149] See above, para 5.78.

[150] See Land Registration Act 1925, s 82(3); above para 8.28.

[151] See above, para 8.23.

Qualified indefeasibility

8.48 The first and most difficult question is as to the extent of the limitation that the register should not be rectified against a proprietor who is in possession. At present, there is considerable uncertainty as to who falls within the exception, and the wording of the legislation is unsatisfactory.[152] The Joint Working Group considers that this is an issue where it would be inappropriate to make any recommendation. There appear to us to be two options, and we would welcome the views of readers as to which they prefer.

OPTION 1: ALL CASES OF LAWFUL POSSESSION

8.49 The first option is to apply the principle of qualified indefeasibility[153] very widely indeed. It would be applicable whenever—

(1) the registered proprietor;

(2) any tenant (whether for a term of years or at will);

(3) any licensee (whether gratuitous or for value, and including any agent or employee);

(4) any beneficiary under a trust of land or settlement; or

(5) any mortgagee;

was in physical possession of the land. In other words, the protection given to a proprietor in possession would apply in all cases where there was any form of lawful physical possession under the registered title. This would extend the protection further than does the present law, in that it would protect a mortgagee in possession.[154] The case of the mortgagee in possession is not a clear cut one. In most cases, his or her interest can be regarded as a purely financial one that could be compensated by an award of indemnity, but this will not always be so.[155] It is also not at present certain whether a proprietor is still in possession for the purposes of section 82(3) where he or she has granted possession to a gratuitous licensee.[156] Under Option 1, the proprietor *would* be in possession. This option is perfectly logical and is simply an extension of the present position by which qualified indefeasibility applies where the proprietor and many other lawful occupiers are in physical possession of the land.

OPTION 2: SOME CASES OF LAWFUL POSSESSION

8.50 The second option would be to confer qualified indefeasibility on a registered title in *some* but not all cases where persons were in lawful physical possession of the land. The drawback of this approach is that it could lead to anomalies. For example, if the registered proprietor in possession was protected but a tenant was not, and the proprietor leased part of the land for, say, a year, the register might be rectified against

[152] See above, paras 8.24 and 8.26.

[153] For this principle, see above, para 8.23.

[154] See above, para 8.26.

[155] A mortgagee normally takes possession as a prelude to exercising his or her power of sale, but this is not invariably the case.

[156] *Ibid*.

the part leased but not the part retained by the proprietor.

8.51 **If readers agree with our provisional view in paragraph 8.47 above, do they prefer Option 1 (qualified indefeasibility in all cases of lawful possession) or Option 2 (qualified indefeasibility in some cases of lawful possession)? If readers favour Option 2, which of the following categories of persons in lawful possession of registered land should be protected—**

(1) the registered proprietor;

(2) any tenant for a term of years;

(3) any tenant at will;

(4) any licensee (whether gratuitous or for value, and including any agent or employee);

(5) any beneficiary under a trust of land or settlement; or

(6) any mortgagee who had exercised his or her right to take possession?

Exceptions to indefeasibility

8.52 In view of our earlier proposals,[157] it would be unnecessary to retain one of the four exceptions to indefeasibility - to give effect to an order of the court.[158] However, we consider that the three remaining exceptions should be retained,[159] as there seems to be no obvious reason why they should be abolished. However, as now, even if one of these three grounds were established, although there would be a presumption in favour of rectification, the court or registrar would still have a discretion as to whether or not to rectify the register.[160] **We provisionally recommend that where the principle of qualified indefeasibility applied, it should remain the case that the register might be rectified against a proprietor who is in possession (however defined)—**

(1) to give effect to an overriding interest;

(2) where that proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care; or

(3) where it is considered that it would be unjust not to rectify the register against him or her.

Where one of these grounds existed, there would be a presumption in favour of rectification, but the matter would still be discretionary. We ask whether

[157] See above, para 8.41.

[158] See above, para 8.29.

[159] See above, paras 8.30 and 8.31.

[160] The strength of the presumption may vary. In particular, it is almost always the case that the register will be rectified to give effect to an overriding interest. That is not necessarily the situation in relation to the other exceptions.

readers agree with our view.

Rectification against a proprietor who is not in possession

8.53 The position is that, where the proprietor is *not* in possession for the purposes of section 82(3) the Land Registration Act 1925, there is a presumption that the register *will* be rectified against him or her, if one of the grounds for rectification exists. We consider that this presumption is the right one, and that it should be stated in statutory form. **We provisionally recommend that where the proprietor is not in possession (however that may be defined), there should be a presumption in favour of rectification where a ground for rectification exists, though it would still be a matter of discretion whether or not the court or registrar ordered rectification.[161] We ask whether readers agree with our view.**

Rectification and derivative interests

8.54 We consider that the substance of section 82(2) of the Land Registration Act 1925, which enables the register to be rectified, "notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by entry on the register, or otherwise", should be retained.[162] However, we consider that the legislation should make it clear that when the register is rectified against a registered proprietor, the court or registrar may direct that the rectification should be binding on any person having an overriding interest in the land (such as a tenant under a lease granted for 21 years or less, or a person in actual occupation who has some proprietary right in the land). At present there is some doubt about this.[163] As a correlative of this, we consider that it should remain the case that rectification is effective from the date of the application for rectification and cannot be made retrospective.

8.55 **We provisionally recommend that—**

(1) the register might be rectified even though this might affect any estates, rights, charges, or interests acquired or protected by registration, or by an entry on the register, or any overriding interest; and

(2) any rectification of the register should be effective from the date of the application for rectification, and should not have retrospective effect.

We ask whether readers agree with us.

SUMMARY AND KEY ISSUES

8.56 In this Part, we examine the situations in which the register can be rectified to correct mistakes. After considering the present law, we conclude that it is for the most part sound, and that it does not require fundamental change. The main objective of any reform should be to clarify the law.

8.57 We consider that the essentials of any viable scheme should clearly set out on the face of the legislation the following features—

[161] See *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071, 1078.

[162] See above, para 8.32.

[163] *Ibid*.

(1) The only function of the power to rectify is to provide a discretionary mechanism which enables errors and omissions in the register to be remedied. It should remain the case that indemnity is available for any loss that is caused as a result of rectification or where, as a matter of discretion, rectification is not ordered, its refusal.

(2) In the absence of any error or omission in the register, where a court makes a determination of substantive rights in or over registered land, it should do so in accordance with the principles of registered land. The principles governing unregistered land should come into play *only* if there is some issue which arises from the time prior to first registration. Following any such determination, the register should be amended to reflect its outcome. That amendment, unlike rectification, should not be a matter of discretion.

(3) Normally, the register should be rectified to give effect to an overriding interest, though as it is an application of the power to rectify, it should remain a matter for discretion.

(4) The existing principle of qualified indefeasibility which applies to a proprietor who is in possession should be retained but its scope should be clarified.

8.58 To achieve these objectives, we make a number of provisional recommendations of which the following are the most important—

(1) that, subject to the qualifications that we explain at (4) - (8) below, the court and the registrar should have a power to rectify the register whenever there has been an error or omission in it;

(2) where, notwithstanding an error or mistake in the register, the register is not rectified—

(a) the court or registrar should have power to make any correlative amendment to any other registered title that is necessitated by that non-rectification, even though there was no mistake in that other title; and

(b) any such amendment shall constitute "rectification" for the purposes of the legislation, so that a claim for indemnity will lie if the registered proprietor suffers loss in consequence;

(3) an amendment of the register to give effect to any estate, right, interest or power which is excepted from the effect of registration should not be regarded as "rectification" for the purposes of the legislation;

(4) some form of qualified indefeasibility to protect certain specified categories of proprietor from rectification should be retained;

(5) we offer two possible models of qualified indefeasibility: qualified indefeasibility in all cases of lawful possession, or qualified indefeasibility in some cases of lawful possession;

(6) as regards the second of those options, we seek the views of those who favour it as to which of the following categories of persons in lawful possession of registered land should be protected—

(a) the registered proprietor;

(b) any tenant for a term of years;

(c) any tenant at will;

(d) any licensee (whether gratuitous or for value, and including any agent or employee);

(e) any beneficiary under a trust of land or settlement; or

(f) any mortgagee who had exercised his or her right to take possession;

(7) where the principle of qualified indefeasibility applied, it should remain the case that the register might be rectified against a proprietor who is in possession (however defined)—

(a) to give effect to an overriding interest;

(b) where that proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care; or

(c) where it is considered that it would be unjust not to rectify the register against him or her;

(8) where one of these grounds existed, there would be a presumption in favour of rectification, but the matter would still be discretionary;

(9) where the proprietor is not in possession (however that may be defined), there should be a presumption in favour of rectification where a ground for rectification exists, though it would still be a matter of discretion whether or not the court or registrar ordered rectification;

(10) the register might be rectified even though this might affect any estates, rights, charges, or interests acquired or protected by registration, or by an entry on the register, or any overriding interest; and

(11) any rectification of the register should be effective from the date of the application for rectification, and should not have retrospective effect.

PART IX
MORTGAGES AND CHARGES

INTRODUCTION

9.1 In this Part we examine a number of miscellaneous aspects of the law governing both legal and equitable mortgages and charges of registered land where some reform is either necessary or desirable.[1] Our proposals are not intended to be a substitute for the thorough reform of the law of mortgages which is undoubtedly required.[2] However, this Report does provide an opportunity for some rationalisation of the law both to reflect developments that have taken place in the law since 1925 and to make certain consequential changes that flow from other recommendations in this Report. It is unnecessary to give any detailed account of the law, but simply to explain the handful of points that are in issue. We begin by examining three points relating to registered charges. We then consider one matter relating to equitable mortgages and charges.

REGISTERED CHARGES

Definition of "registered charge"

9.2 A mortgage has been described as—

> a conveyance of land... as a security for the payment of a debt or the discharge of some other obligation.[3]

The first matter that requires consideration follows from that description. The only form of legal mortgage of registered land is a registered charge. At present, the Land Registration Act 1925 defines "registered charge" to include—

> a mortgage or encumbrance registered as a charge under this Act.[4]

It is clear from section 25(1) of the Act that a registered charge must charge the land to secure "any principal sum of money".[5] We consider that the present definition of a

[1] "A mortgage is conceptually different from a charge: a mortgage involves some degree of transfer of the mortgaged property to the mortgagee, with a provision for re-transfer on repayment of the loan, whereas a charge merely gives the chargee a right of recourse to the charged property as security for the loan. However, in English law the distinction is blurred and the terms are often used interchangeably, sometimes as if they were synonymous and sometimes as if one was a generic term including the other": Transfer of Land - Land Mortgages (1991) Law Com No 204, para 2.14.

[2] In 1991, the Law Commission published a Report, Transfer of Land - Land Mortgages (1991) Law Com No 204, which made recommendations for sweeping changes to the law on mortgages. That Report was not accepted by the Government because is was not supported sufficiently widely, and there was some concern that it would not fit in with the land registration scheme: Written Answer, *Hansard* (HC) 19 March 1998, vol 308, col 709.

[3] *Santley v Wilde* [1899] 2 Ch 474, *per* Lindley MR. In that case, one of the obligations secured was to pay a share of the profits of a theatre.

[4] Section 3(xxiii).

[5] Section 25 also permits the land to be charged "in favour of any building society... in accordance with the rules of that society" without reference to any obligation to pay the principal sum. As regards mortgages other than registered charges, there is again no requirement that they should secure any principal sum: see Land Registration Act, s 106 (as substituted).

registered charge, if read literally, is too narrow to accommodate all modern financial dealings that are secured on land. First, it is not clear that it includes statutory charges[6] (although it is assumed to do so). Secondly, it appears to be confined to money that is presently owed and does not include money that may become due, so that it might not (for example) cover the case of a charge to secure an overdraft which may fluctuate in amount. We note that most mortgages nowadays cover sums that may become due as well as monies already outstanding. Thirdly, the definition does not encompass a charge to secure the performance of an obligation other than the repayment of the principal.[7] In the light of these matters, we have concluded that the scope of what constitutes a registered charge should be widened to make it clear beyond doubt that it encompasses all these matters.

9.3 **We therefore provisionally recommend that the definition of "registered charge" should make it clear that—**

(1) it is a legal mortgage of or charge over registered land to secure either—

(a) the payment of money that is or may become payable; or

(b) the performance of some other obligation; and

(2) it includes any statutory charge;

which is created and registered as a charge in accordance with the provisions of the Act. We ask whether readers agree.

Registered charges as charges by way of legal mortgage

9.4 At present, there are two ways of creating a legal mortgage, whether of registered or unregistered land.[8] The first method is a mortgage by demise (in the case of freeholds) or subdemise (where the property is leasehold). Such a mortgage operates as a lease (or, in the case of leasehold property, a sub-lease) by the mortgagor to the mortgagee. The second method is a charge by way of legal mortgage, which gives the mortgagee the same rights as if he or she had been granted a mortgage term under a mortgage by demise or subdemise.[9] In practice, a charge by way of legal mortgage is invariably used, and mortgages by demise are virtually obsolete.[10] There are a number of reasons for this. For example, a charge by way of legal mortgage is a simpler transaction than a mortgage by demise or subdemise, and can be employed to charge both freehold and leasehold properties in one document. If a mortgage by demise is employed, the freeholds and leaseholds have to be charged separately.

[6] An obvious example of a statutory charge is a charge under Legal Aid Act 1988, s 16(6) (charge on property recovered by legally aided litigant). For other examples, see Ruoff & Roper, *Registered Conveyancing*, 23-33.

[7] An example might be that of a guarantor of a lease, who undertook to take an assignment of the lease if the tenant defaulted, where his or her obligations were secured by a charge on his or her property.

[8] Law of Property Act 1925, ss 85(1), (3); 86(1), (3).

[9] *Ibid*, s 87. A charge by way of legal mortgage takes effect as a legal interest by virtue of *ibid*, s 1(2)(*c*).

[10] See Transfer of Land - Land Mortgages (1991) Law Com No 204, para 2.13.

9.5 Under the Land Registration Act 1925, there is, in effect, a presumption that a registered charge takes effect as a charge by way of legal mortgage. It will have such effect unless—

(1) there is a provision to the contrary; or

(2) it is made or takes effect as a mortgage by demise or subdemise.[11]

Given that mortgages by demise or subdemise are so seldom employed, there seems little point in retaining the option of employing them in any new legislation.[12] **We therefore provisionally recommend that a registered charge should always take effect as a charge by way of legal mortgage and that it should no longer be possible to create a mortgage of registered land by demise or subdemise. Do readers agree?**

The powers of a registered chargee

9.6 Under the provisions of the Law of Property Act 1925, a mortgagee is given certain powers in cases "where the mortgage is made by deed", namely powers of sale, to insure, to appoint a receiver and to cut and sell timber.[13] In Part XI of this Report, we provisionally recommend that the Registry should have power to dispense with the formal requirements for the creation and disposition of legal and equitable estates, rights and interests so that it can introduce a system of electronic conveyancing.[14] It is also conceivable that, even before such a system of electronic transfer and creation is introduced, the Registry may wish to introduce (in consultation with lenders) standardised documentation that could be scanned into a computer, and which might not be in the form of a deed.[15]

9.7 To avoid any possible risk that this might pose for mortgagees of registered land, **we provisionally recommend that the powers conferred on mortgagees by the Law of Property Act 1925 to sell or to appoint a receiver should be exercisable by the proprietor of a registered charge, whether or not the charge was created by deed, and we ask whether readers agree.** We consider that this proposal is logical. In unregistered land, a mortgage takes effect from the date when the deed of mortgage is executed, or, if it is delivered in escrow, when the condition on which it was delivered is fulfilled. Where title is registered, the charge takes effect when registered. It should, therefore, be the *fact* of registration rather than the method by which the charge was executed in documentary form prior to registration that determines the rights of the parties.

[11] See s 27(1).

[12] We note that in the Draft Bill in the Law Commission's Fourth Report, it was provided that "[a] registered charge shall, whether or not it would otherwise do so, take effect as a charge by way of legal mortgage...": Law Com No 173, Draft Bill, Cl 18(1). According to the accompanying Explanatory Notes, this provision was intended to reproduce the effect of the existing provision of the Land Registration Act 1925, s 27(1) (see above) "without substantive change" - which would not, of course, have been the case.

[13] See s 101. A proprietor of a registered charge enjoys such powers: see Land Registration Act 1925, s 34(1).

[14] See below, para 11.21.

[15] Cf below, para 11.22.

Liens arising from a deposit of the land certificate

9.8 We do not propose any changes to the manner in which equitable mortgages and charges over registered land are now created.[16] We do, however, propose the repeal of one method of creating an equitable lien that has become obsolete. Under the Land Registration Act 1925, provision is made for the creation of a lien by deposit of the land certificate or charge certificate.[17] Such a lien is equivalent to a mortgage by deposit of title deeds where title is unregistered.[18] Prior to April 2, 1995, the Land Registration Rules 1925 made provision for notice of such a deposit to be given to the Registry.[19] However, it is not now possible to create such a charge, and the relevant rules have been revoked.[20]

9.9 This change has come about as a result of the decision in *United Bank of Kuwait Plc v Sahib*.[21] The reasoning of that decision can be summarised as follows—

(1) The basis of an equitable mortgage by deposit of title deeds was contractual: it took effect as a contract to grant a mortgage.

(2) Prior to the enactment of the Law of Property (Miscellaneous Provisions) Act 1989, such a mortgage could be created orally, because the deposit of the title deeds and (perhaps) the payment of the money by the lender were acts of part performance.

(3) There was therefore a valid contract that was enforceable because it was outside the requirements of evidential writing that then governed contracts for the sale or other disposition of an interest in land.[22]

(4) After the Law of Property (Miscellaneous Provisions) Act 1989 was brought into force on September 27, 1989, it was only possible to create a contract for the sale or other disposition of land if it was made in writing, signed by both parties and contained all the terms of the contract.[23]

(5) It followed therefore, that a mortgage by deposit of title deeds (and therefore a lien by deposit of the land or charge certificate) could not be created orally, but only in accordance with the formal requirements of the 1989 Act. The mere deposit of title deeds or of a land or charge certificate could not, of itself, create a mortgage or charge.

[16] We envisage that the substance of Land Registration Act 1925, s 106 (though not its wording) is likely to be retained in any new legislation.

[17] Land Registration Act 1925, s 66.

[18] *Ibid*.

[19] See Land Registration Rules 1925, rr 239 - 243 (now replaced or revoked).

[20] By Land Registration Rules 1995, r 4.

[21] [1997] Ch 107 (Chadwick J and CA).

[22] See Law of Property Act 1925, s 40 (now repealed).

[23] See Law of Property (Miscellaneous Provisions) Act 1989, s 2. The section enacted (in modified form) the recommendations made by the Law Commission in Transfer of Land - Formalities for Contracts for Sale etc of Land (1987) Law Com No 164. The Report was largely the work of Professor Julian Farrand, who was then Commissioner.

9.10 It was in the light of the decision at first instance in this case that the Lord Chancellor decided to revoke the relevant rules which allowed for such liens to be protected by notice of intended deposit.[24] It is of course still possible to create a contract to grant a mortgage, which may be supported by the deposit of the land or charge certificate. Such a contract must, however, comply with the requirements of the 1989 Act and may be protected by the entry of a notice.[25] The provision for the creation of liens by deposit of certificates[26] still remains on the statute book.

9.11 The Joint Working Group considers that it would not be appropriate to re-introduce a system that allowed for registered land to be charged by some informal method. We have already mentioned, and will explain in more detail in Part XI of this Report, that it is intended to move to a system by which registered land would be transferred and rights created in or over it by electronic means.[27] To allow for the express but informal creation of rights in registered land would run directly counter to the objective of that system, which is to ensure that no right or interest in registered land could be expressly created except by registering it. It would of course remain the case that, as now, any person who wished to create an equitable charge by means of a contract to grant a mortgage would be able to do so. If minor interests were to be protected in accordance with our preferred option for reform,[28] the lender would not require the production of the land certificate to protect his or her interest. **We therefore recommend that the statutory power to create a lien over registered land by depositing the land certificate should be abolished, and ask whether readers agree.**

SUMMARY AND KEY ISSUES

9.12 In this Part we examine a number of miscellaneous points concerning mortgages and charges where some reform is either necessary or desirable—

(1) to reflect developments that have taken place in the law since 1925; or

(2) as a result of the reforms which we propose elsewhere in this Report.

9.13 We recommend that—

(1) the definition of "registered charge" be widened;

(2) a registered charge should always take effect as a charge by way of legal mortgage, and that it should not be possible to create such a charge by demise or subdemise;

(3) the powers to sell and to appoint a receiver conferred on mortgagees by the Law of Property Act 1925 should be exercisable by the proprietor of a registered charge, whether or not the charge was created by deed; and

[24] Entry of such a notice operated as a caution: see Land Registration Rules 1925, r 242(1) (now revoked). For the previous law, see Ruoff & Roper, *Registered Conveyancing*, 25-04 - 25-06.

[25] See Ruoff & Roper, *Registered Conveyancing*, 25-07.

[26] Land Registration Act 1925, s 66.

[27] See above, para 7.28; and below, paras 11.08 and following.

[28] See above, para 6.52.

(4) the statutory power to create a lien over registered land informally by depositing the land certificate with the lender should be abolished.

PART X
ADVERSE POSSESSION AND PRESCRIPTION

INTRODUCTION

10.1 In the leading modern decision on adverse possession, *Buckinghamshire County Council v Moran*,[1] Nourse LJ explained that—

> [u]nder most systems of law a squatter who has been in long possession of land can acquire title to it in place of the true owner. The Scots and continental systems, more faithful to the Roman law, have opted for prescription, a doctrine founded on the fiction that the land has been granted to the squatter. In England, prescription, although a shoot well favoured by the common law, was stunted in its lateral growth by the statutes of limitation, being confined in its maturity to the acquisition of easements and profits *à prendre* over another's land. Limitation, so far from being founded on some fictional grant, extinguishes the right of the true owner to recover the land, so that the squatter's possession becomes impregnable, giving him a title superior to all others.
>
> The essential difference between prescription and limitation is that in the former case title can only be acquired by possession as of right. That is the antithesis of what is required for limitation, which perhaps can be described as possession as of wrong.[2]

10.2 We have already touched upon one aspect of the law on adverse possession in the context of overriding interests.[3] In this Part we consider the law of adverse possession of land more fully and we also examine the principles which govern the prescription of easements and profits *à prendre* as it applies to registered land.[4] We begin by examining the nature of adverse possession. We conclude that while the present law can be justified as regards unregistered land, it cannot in relation to registered title. We examine the way in which the law of adverse possession applies to registered land and show that it is unsatisfactory. We then put forward proposals for a wholly new substantive system of adverse possession that would apply only to registered land,[5] and which is consistent with the principles of title registration. This would offer much greater security of title for a registered proprietor than exists under the present law, and would confine the acquisition of land by adverse possession to cases where it was necessary either in the interests of fairness or to ensure that land remained saleable. We also propose a new mechanism for applying the principles of adverse possession to

[1] [1990] Ch 623, 644.

[2] See too *Sze To Chun Keung v Kung Kwok Wai David* [1997] 1 WLR 1232, 1235.

[3] See above, para 5.42.

[4] The Law Commission has recently considered the whole subject of limitation of actions: see Limitation of Actions, Consultation Paper No 151. In that paper, the Commission provisionally recommended a 10 year limitation period for actions for the recovery of land (instead of the present 12), and that this should apply to claims against the Crown and the Church of England (which are presently subject to a 30 year period in most situations): see paras 13.114 - 13. 127.

[5] And indeed could not be made to apply to unregistered land at all easily.

registered land. We go on to examine the law governing the prescription of easements and profits *à prendre*. It is not possible to undertake a comprehensive reform of the law of easements as part of this review of land registration. However, we conclude that, as an interim measure, it should cease to be possible to acquire an easement or profit *à prendre* over registered land except under the Prescription Act 1832. Prescription at common law or by lost modern grant cannot be justified in relation to such land. All three methods of prescription would continue to apply to unregistered land.

10.3 In its Third Report on Land Registration, the Law Commission commented that—

> [t]he acquisition of rights by adverse possession under the general law must be regarded as outside the scope of the present report: any substantive reform of the topic should be undertaken separately and ought not to be conditioned purely by registered conveyancing considerations.[6]

It will be apparent that we have taken a different view. For the reasons that we explain in this Part, we consider that the policy considerations which justify the present system of adverse possession in relation to unregistered land have far less weight in relation to registered title. This is because unregistered title is possession-based whereas the basis of registered title is the fact of registration. The principles of adverse possession should in our view reflect this fundamental difference. Even if readers disagree with our proposal for different substantive principles of adverse possession, there is still a need for a better mechanism for applying the law of adverse possession to registered land than exists at present.

ADVERSE POSSESSION

The nature and function of adverse possession

What is adverse possession?

10.4 For there to be adverse possession two elements have to be satisfied. First, there must be factual possession. A squatter may acquire such possession either by dispossessing the paper owner (which will usually be the case), or by taking possession of land that the owner has abandoned.[7] The possession that is required is "an appropriate degree of physical control"[8] and the type of conduct which indicates possession "must vary with the type of land".[9] Where land has been abandoned, slight acts by a squatter may amount to a taking of possession.[10] It follows therefore that there is no requirement that

[6] Law Com No 158, para 2.36.

[7] *Buckinghamshire County Council v Moran* [1990] Ch 623, 635, 636. Abandonment ("discontinuance") will not be lightly presumed. "[T]he slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance": *Powell v McFarlane* (1977) 38 P & CR 452, 472, *per* Slade J. To establish abandonment something more than mere non-user is required: see *Red House Farms (Thorndon) Ltd v Catchpole* [1977] 2 EGLR 125, 127 (one of the rare cases where abandonment was in fact established).

[8] *Powell v McFarlane*, above, at p 470, *per* Slade J.

[9] *Wuta-Ofei v Danquah* [1961] 1 WLR 1238, 1243, *per* Lord Guest.

[10] *Ibid*. See, eg *Red House Farms (Thorndon) Ltd v Catchpole*, above. In that case, the property in question was open land which was marshy and overgrown. Shooting wildfowl on the land regularly was held to suffice. The authorities suggest that such acts would be insufficient to establish adverse possession in a case of dispossession, because they would be equivocal. A person could be granted shooting rights without being granted possession. Cf *Powell v McFarlane*, above (grazing a cow not sufficient to establish adverse possession in a case of dispossession).

adverse possession should be apparent to anybody inspecting the land.[11] Secondly, the squatter must have the necessary intention to possess.[12] That will be satisfied if he or she can show "an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title".[13] Once a squatter has acquired title by adverse possession for the period prescribed by the Limitation Act 1980,[14] that title will not be lost merely because the squatter then goes out of possession. He or she will remain the owner of the land unless and until some other person acquires title to the property by adverse possession.[15]

What is the justification for adverse possession?

10.5 It is, of course, remarkable that the law is prepared to legitimise such "possession of wrong"[16] which, at least in some cases, is tantamount to sanctioning a theft of land. So sweeping a doctrine requires strong justification. Of the reasons that are often given for it, four are particularly cogent, and of these the fourth is the most compelling.[17]

10.6 First, because adverse possession is an aspect of the law of limitation, it is of course customary to account for it, in part at least, in terms of the policy of limitation statutes generally, namely to protect defendants from stale claims and to encourage plaintiffs not to sleep on their rights.[18] However, adverse possession does not merely bar claims. Its effect is positive: "a squatter does in the end get a title by his possession and the indirect operation of the [Limitation] Act and he can convey a fee simple".[19] This can only be justified by factors over and above those which explain the law on limitation. In this context it should be noted that a landowner may be barred even where he or she is quite blameless.[20] As we have explained above, adverse possession can take place without it being readily detectable.[21] In any event, this particular justification has much greater force in relation to unregistered land than it does for land with registered title. Unregistered title ultimately depends upon possession. It therefore behoves a landowner to be vigilant to protect that possession and not to sleep on his or her

[11] See above, para 5.46.

[12] Generally referred to as "*animus possidendi*".

[13] *Buckinghamshire County Council v Moran* [1990] Ch 623, 643, *per* Slade LJ.

[14] Which will usually be twelve years (see Limitation Act 1980, s 15(1): Sched 1, Part 1), but not always (eg there are special rules as regards the Crown and where adverse possession is taken against a limited owner).

[15] The situation is different if the squatter abandons possession *before* the limitation period has elapsed. The squatter's period of adverse possession prior to abandonment is ignored. If he or she subsequently re-enters, the owner's title will not be extinguished until the squatter has adversely possessed for the full limitation period: Limitation Act 1980, Schedule 1, para 8(2); below, para 10.49.

[16] *Buckinghamshire County Council v Moran* [1990] Ch 623, 644, *per* Nourse LJ; above, para 10.1.

[17] We are indebted to the excellent discussions by Professor Martin Dockray, "Why Do We Need Adverse Possession?" [1985] Conv 272, and by Roger J Smith, *Property Law* (2nd ed 1998) pp 62 - 64.

[18] Martin Dockray, "Why Do We Need Adverse Possession?", above, at pp 272 - 274.

[19] *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, 535, *per* Lord Radcliffe.

[20] See Roger J Smith, *Property Law* (2nd ed 1998) p 62.

[21] See para 10.4.

rights.[22] We explain below why the position is different where title is registered.[23]

10.7 Secondly, if land ownership and the reality of possession are completely out of kilter, the land in question is rendered unmarketable if there is no mechanism by which the squatter can acquire title. This situation can easily happen, as for example where—

(1) the true owner has disappeared and the squatter has assumed the rights of ownership for a substantial period;[24] or

(2) there have been dealings with registered land "off the register", so that the register no longer reflects the "true" ownership of the land.

10.8 Thirdly, in cases of mistake, the law of adverse possession can prevent hardship. For example, a squatter may have innocently entered land, mistakenly believing that he or she owned it, perhaps due to uncertainty as to the boundaries. He or she may have incurred expenditure under the mistaken belief of ownership. Although in some cases the squatter may have a claim based upon principles of proprietary estoppel, because the true owner knew of and acquiesced in the squatter's mistake, that will not always be true.

10.9 Fourthly, title to *unregistered* land is relative and depends ultimately upon possession. The person best entitled to land is the person with the best right to possession of it. The fact that adverse possession can extinguish earlier rights to possess facilitates and cheapens the investigation of title to *unregistered* land. The length of title[25] that a vendor is required to deduce is and always has been closely linked to the limitation period.[26] Indeed, the principal reason for having limitation statutes in relation to real property appears to have been to facilitate conveyancing.[27]

10.10 This fourth reason is undoubtedly the strongest justification for adverse possession. However, it can normally have no application to registered land. Where title is registered, adverse possession facilitates deduction of title only in relation to those matters on which the register is not conclusive. These are explained below.[28]

In what circumstances can adverse possession be justified in relation to registered land?

10.11 Where title is registered, the basis of title is primarily the fact of registration rather than possession. Registration confers title because the registration of a person as proprietor of land of itself vests in him or her the relevant legal estate (whether freehold or

[22] In practice this will often be an impossible counsel of perfection, particularly where the landowner's estates are large.

[23] See para 10.11.

[24] See Roger J Smith, *Property Law* (2nd ed 1998) p 64.

[25] And with it of course the consequent cost and the difficulty or otherwise of making title.

[26] This is clearly demonstrated by Martin Dockray, "Why Do We Need Adverse Possession?" [1985] Conv 272 at pp 277 - 284. At present the limitation period is usually 12 years: Limitation Act 1980, s 15(1); and the period for which title has to be deduced under an open contract for the sale of freehold land is 15 years: Law of Property Act 1969, s 23.

[27] Martin Dockray, "Why Do We Need Adverse Possession?", above, at pp 278 and following.

[28] See paras 10.12 and following.

leasehold).[29] The ownership of the land is therefore apparent from the register. Only a change in the register can take that title away, and the circumstances in which that can happen are significantly limited by the principle of qualified indefeasibility that we have explained in Part VIII of this Report.[30] The main weakness of the present law is that the principles which determine whether a registered proprietor will lose his or her title by adverse possession were developed for a possession-based system of title and not one founded on registration.[31] If a system of registered title is to be effective, those who register their titles should be able to rely upon the fact of registration to protect their ownership except where there are compelling reasons to the contrary. All that should be required of them is to keep the Registry informed of their address for service.[32] As we explain below,[33] the land registration system enables registered proprietors to be protected against adverse possession in ways that would be very much harder to achieve where title is unregistered.

10.12 In what circumstances should it be possible for the fact of registration to be overridden by possession because the grounds for doing so are sufficiently compelling? Having regard to the reasons which justify adverse possession that we have explained above,[34] we consider that there are just four situations.

WHERE THE REGISTERED PROPRIETOR HAS DISAPPEARED AND CANNOT BE TRACED

10.13 It sometimes happens that a registered proprietor abandons his or her land, or dies in circumstances in which no steps are taken to wind up his or her estate. A squatter then takes possession of the land. Here adverse possession fulfils a useful role, even if the adverse possessor is (as will commonly be the case) a "land thief". However distasteful such situations may be, the doctrine of adverse possession does at least ensure that in such cases land remains in commerce and is not rendered sterile.[35]

WHERE THERE HAVE BEEN DEALINGS "OFF THE REGISTER"

10.14 There may be cases where there are dealings with land that are never registered. In such cases the register does not reflect the reality of the title, and there is every reason why the person in occupation should be registered as proprietor. Such cases do not involve "land theft" and to deny registration could render the land unsaleable. Again,

[29] See Land Registration Act 1925, s 69(1).

[30] See above, para 8.23.

[31] We have been interested to note that this point has been explicitly acknowledged elsewhere in the Commonwealth. For example, the Tasmanian Law Reform Commissioner has commented that "[t]here is a fundamental difference between unregistered land (with ownership based on possession) and registered land (where information in the Register is presumed conclusive). While adverse possession may still have a place in respect of unregistered land, it may be argued to have no place in relation to modern registered title. The rule of adverse possession is in conflict with the fundamental principle of indefeasible title established under the land registration system. Registration is the key to ownership under the Torrens system, which has removed the importance of possession as the basis for title to land": Report on Adverse Possession and Other Possessory Claims to Land (1995).

[32] See Ruoff & Roper, *Registered Conveyancing*, 3-10.

[33] See para 10.45.

[34] See paras 10.6 - 10.10.

[35] See above para 10.7.

as we have already explained, adverse possession fulfils a useful function.[36] The sorts of cases that might arise include those—

(1) where a farmer agrees to a land swop with his neighbour under a "gentleman's agreement" but does not register the change;

(2) where the registered proprietor dies and the property is taken over by her daughter who was to inherit it, but where no steps are ever taken to register the title; or

(3) where one property comprises two registered titles - typically a house and a separate garage - and where on a sale of the whole property, the transfer of one of the two titles (the garage) is inadvertently not registered.

IN SOME CASES WHERE THE REGISTER IS NOT CONCLUSIVE

10.15 There are certain matters upon which the register is not conclusive.[37] There are two obvious examples of this. The first is where (as is usual) the boundaries are left undetermined.[38] The second is where there is a lease of 21 years or less which takes effect as an overriding interest.[39]

(1) *Boundaries*. Most cases of adverse possession are in fact boundary disputes. Some are straightforward cases of "land theft", which should not in our view be accommodated by any revised principles of adverse possession for registered land. However, many others arise as a result of a mistake, commonly because of the disappearance of some boundary feature. These cases fall within the situation explained below in paragraph 10.16.

(2) *Short leases*. Leases which take effect as overriding interests are, for most purposes, treated as if they were unregistered land. The justifications that exist for adverse possession in relation to unregistered land are equally applicable to them.

ENTRY INTO POSSESSION UNDER A REASONABLE MISTAKE AS TO RIGHTS

10.16 It is not uncommon for a person to enter into adverse possession under a mistaken belief that he or she owns the land. This may happen because (for example) of the features of the land which suggest that the boundaries are different from the actuality, or because entry is made under a transaction that is invalid.[40] As we have explained,[41] in such cases—

[36] *Ibid*.

[37] Cf above, para 10.10.

[38] See Land Registration Rules 1925, r 278.

[39] Land Registration Act 1925, s 70(1)(*k*); see above, para 5.87. Cases of adverse possession against such leases cannot be common. They are likely to become rarer still if there is support for shortening the length of leases which are capable of registration: see above, para 3.10.

[40] Such situations may increase as and when rights over registered land can only be created by registration: see below, para 11.16.

[41] See above, para 10.8.

(1) adverse possession can be justified on the grounds of hardship; and

(2) there are obvious parallels (and in some cases an overlap) with the principles of proprietary estoppel in cases where the squatter has incurred detriment in the mistaken belief that he or she owns the land.[42]

Adverse possession in other legal systems which have title registration

10.17 We have tested this analysis by examining the position in other common law jurisdictions which have systems of title registration. We have been fortified to discover that the sorts of considerations that we have outlined above are reflected in the rules on adverse possession that have been adopted in them.[43] Although some jurisdictions have retained the same rules as those which apply to unregistered title,[44] others have either abolished adverse possession outright,[45] or have placed restrictions upon it to reflect the different issues that apply where title is registered.[46] We have paid particular attention to those states which have adopted a restricted system of adverse possession. Although we have not adopted any specific model, such systems have influenced our provisional recommendations.[47]

Conclusions

10.18 Our provisional conclusion is that the principles of adverse possession have an essential role to play in relation to unregistered land, principally because they facilitate conveyancing. However, we consider that their unqualified application to registered land cannot be justified. There are of course obvious disadvantages in adopting a different system of adverse possession for registered land. First, it will sometimes happen that a squatter adversely possesses against a number of titles, some of which are registered and some unregistered. Our proposed reforms (if accepted) could lead to the situation where he or she will acquire title to the unregistered land but not the registered. However, although such a result is apparently anomalous, we regard this as a reflection of the fact that there are two systems of land ownership in this country which rest upon wholly different foundations. Secondly, it will be necessary for practitioners to be familiar with two different systems. However, as we explain below,[48] the application of the principles of adverse possession to registered land already differs in a number of significant respects from unregistered land. We doubt that the new principles that we propose will be difficult to grasp.

[42] If the registered proprietor was aware of the squatter's mistaken belief and took no steps to correct it, the elements of proprietary estoppel will undoubtedly be established: see, eg, *Willmott v Barber* (1880) 15 ChD 96 at 105.

[43] For summaries of the law, see Limitation of Actions, Consultation Paper No 151, paras 10.59 (Australia), 10.79 (New Zealand); 10.99 (Canada).

[44] See, eg Tasmania, Victoria and Western Australia.

[45] See, eg, Australian Capital Territories, Northern Territories (Australia); Alberta (Canada). From 1875 - 1925, adverse possession of registered title was not possible in England and Wales: see below, para 10.20.

[46] See, eg, New South Wales, Queensland, South Australia (Australia); New Zealand, British Columbia (Canada).

[47] See below, para 10.44. As we explain in that paragraph, we took the Queensland system as our starting point, but the end result is very different.

[48] See paras 10.27 - 10.39.

10.19 These disadvantages are, in our view, heavily outweighed by the advantages. Our proposals will greatly strengthen registered title by enhancing the protection that it offers against squatters. This will provide a strong incentive to landowners to register their land voluntarily. It should bring much land on to the register that would never otherwise be registered because it is unlikely to be the subject of a disposition that falls within the triggers for compulsory registration.[49] It will be particularly attractive to landowners - such as local authorities - which own numerous (and perhaps widely scattered) parcels of land for which they may have no present use, and which they cannot easily keep under regular scrutiny.[50] At present, the application of the law of adverse possession to registered land produces harsh results that are not counterbalanced by the advantages that exist in relation to unregistered land.[51] The system we propose will, we believe, strike a fairer balance between landowners and squatters where title is registered, because it is formulated to reflect the principles of registered land. **We therefore provisionally recommend that—**

(1) the law of adverse possession as it applies to registered land should be recast to reflect the principles of title registration; and

(2) its application should be restricted to those cases where it is essential to ensure the marketability of land or to prevent unfairness.

We ask whether readers agree with us, and if they do not, if they will tell us their reasons for disagreeing. We make detailed provisional recommendations below, at paragraphs 10.65 to 10.69, as to how our proposals would be implemented.

Adverse possession and registered land: the present law

The recognition of adverse possession in registered land

10.20 The role of adverse possession has changed as land registration legislation has developed. Under the Land Transfer Act 1875,[52] adverse possession of registered land was impossible. It was first permitted under the provisions of the Land Transfer Act 1897,[53] which enabled a squatter to obtain rectification of the register against a registered proprietor and to be registered as proprietor instead. However, the squatter's rights could be defeated if at any time before he or she was registered, there was a disposition of the land for valuable consideration.[54] Once the limitation period had elapsed, the squatter could apply for a caution against dealings to protect his or her interest prior to seeking rectification.[55] This position was criticised both by Benjamin

[49] For these triggers, see Land Registration Act 1925, s 123 (as substituted by Land Registration Act 1997, s 1).

[50] See, eg *Buckinghamshire County Council v Moran* [1990] Ch 623 (where the land acquired by the squatter - a wealthy and well-known businessman - was a parcel purchased by the County Council for the purpose of possible future road construction).

[51] For those advantages, see above, para 10.9.

[52] Section 21.

[53] Section 12.

[54] *Ibid*. In one situation a squatter's rights were what would now be called an overriding interest. This was where they were in existence at the time of first registration: see Land Transfer Act 1875, s 18 as amended by Land Transfer Act 1897, Sched 1. See B L Cherry & H W Marigold, *The Land Transfer Acts 1875 & 1897* (1899), p 49.

[55] See B L Cherry & H W Marigold, *The Land Transfer Acts 1875 & 1897*, p 190.

Cherry, the draftsman of the 1925 legislation,[56] and by the Royal Commission on the Land Transfer Acts.[57] Each thought that the Statutes of Limitation "should operate with regard to registered land in the same manner as with regard to unregistered land",[58] and this intention is in fact enshrined in the Land Registration Act 1925.[59] Neither Cherry nor the Commission considered whether there was the same justification for adverse possession in each system. What actually emerged in the Land Registration Act 1925 is not in fact identical to the unregistered system and is, as we shall explain, unsatisfactory. We set out briefly the relevant principles of adverse possession as they apply to unregistered land, and then explain how those principles have been adapted to registered land.

The treatment of adverse possession where title is unregistered

RELATIVITY OF TITLE AND THE PROTECTION OF POSSESSION

10.21 Title to unregistered land in England and Wales is relative and it is based upon possession. In *Perry v Clissold*,[60] Lord Macnaghten explained that—

> a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title.

In proceedings for possession or trespass brought by or against a squatter, it is not open to the other party to raise the *jus tertii*, in other words, to show that the land is in fact owned by a third person, unless that other party either derives title or has acted under licence from that third person.[61]

A SQUATTER HAS A LEGAL FEE SIMPLE

10.22 A squatter who commences adverse possession has, from the very beginning, a fee simple absolute in possession, albeit one that is defeasible by a person with a better right to possess.[62] This is so, even though the squatter is adversely possessing against

[56] *Ibid* at pp. 190, 191.

[57] Second and Final Report (1911) Cd 5483, paras 32, 81.

[58] *Ibid*, para 81.

[59] See s 75(1) of that Act which begins: "[t]he Limitation Acts shall apply to registered land in the same manner and to the same extent as those apply to land not registered...". This is subject to a very significant exception that we explain below, para 10.28.

[60] [1907] AC 73, 79.

[61] See *Lord Fitzhardinge v Purcell* [1908] 2 Ch 139, 145; *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84, 86.

[62] See *Asher v Whitlock* (1865) LR 1 QB 1, 6; *Leach v Jay* (1878) 9 ChD 42, 44, 45; *Rosenberg v Cook* (1881) 8 QBD 162, 165; *Wheeler v Baldwin* (1934) 52 CLR 609, 632; *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 209.

a leaseholder.[63] The squatter can at once deal with his or her estate in all respects as owner, and can sell it[64] or devise it by will.[65]

10.23 There is a well-known dispute as to whether the estate of the squatter is legal or equitable.[66] It is thought by some that since the Law of Property Act 1925,[67] only one legal fee simple absolute can exist at any given time, and that a squatter's estate, being liable to defeasance is not a fee simple absolute and must, therefore, be equitable. Some ingenious solutions have been put forward to resolve this conundrum,[68] but the answer to it may be very straightforward.[69] As we have indicated above,[70] title to land is relative, and "even a fee simple is only good as long as no better title can be shown".[71] Because of this relativity, *no* fee simple in unregistered land can be regarded as "absolute", in the sense that it is indefeasible. It is *always* subject to a risk of extinction by an adverse possessor. However, both the respective *estates* of the squatter on the day that he or she enters into adverse possession and that of the true owner on the day before the squatter bars his or her title by adverse possession are absolute in the correct technical meaning of that word because they *may* endure in perpetuity.[72] In each case, however, the respective *titles* of the parties are very weak. In other words, the view that there can only be one legal fee simple at any given time rests on a fallacy:

[63] *Cf Re Atkinson and Horsell's Contract* [1912] 2 Ch 1, 9, where Cozens-Hardy MR commented that, "whenever you find a person in possession of property that possession is prima facie evidence of ownership in fee, and that prima facie evidence becomes absolute when once you have extinguished the right of every other person to challenge it". Where a squatter adversely possesses against a leaseholder it will necessarily take longer for his or her fee to become absolute in this way, because he or she must bar the rights of both the leaseholder, and then, on the determination of the lease, the freeholder: see *St Marylebone Property Co Ltd v Fairweather* [1962] 1 QB 498, 513. It is because a squatter has to bar the rights of both the tenant and the landlord that he or she "is more vulnerable than a trespasser on property occupied by the freeholder": *Chung Ping Kwan v Lam Island Development Co Ltd* [1997] AC 38, 47, *per* Lord Nicholls.

[64] *Rosenberg v Cook* (1881) 8 QBD 162.

[65] *Asher v Whitlock* (1865) LR 1 QB 1.

[66] See Bernard Rudden, "The Terminology of Title" (1964) 80 LQR 63; Elizabeth Cooke, "Adverse Possession - Problems of Title in Registered Land" (1994) 14 LS 1, 4, 5.

[67] See s 1(1).

[68] See, eg Bernard Rudden, "The Terminology of Title", above. There is a considerable body of authority which holds that where a squatter has taken adverse possession, the true owner has a right of entry to recover the land: see, eg *Leach v Jay* (1878) 9 ChD 42, 45 (the history of such rights of entry is in fact both lengthy and highly technical). On the basis of this, Professor Rudden argues that a freehold acquired by a squatter is a fee simple subject to a right of entry within Law of Property Act 1925, s 7(1) (as amended by Law of Property (Amendment) Act 1926), and can therefore be a fee simple absolute - and therefore a legal estate - for the purposes of s 1 of the 1925 Act.

[69] We are very grateful to both Professor Graham Battersby and Mr Edward Nugee, TD, QC, for their kind assistance on this point. Since this Report was approved, an essay by Professor Battersby has been published which gives strong support both to the analysis adopted in this Part and to a number of the provisional conclusions that we have reached: see "Informally Created Interests in Land" in S Bright and J Dewar (ed), *Land Law: Themes and Perspectives* (1998) p 487 at pp 490 - 494.

[70] See para 10.21.

[71] *St Marylebone Property Co Ltd v Fairweather* [1962] 1 QB 498, 513, *per* Holroyd Pearce LJ (affirmed on appeal: [1963] AC 510).

[72] In the former case, the squatter may remain in adverse possession long enough to bar all other estates. In the latter case, the true owner may commence possession proceedings that very day, and thereby prevent the squatter extinguishing his or her title.

it confuses the weakness of a person's title with the potential duration of that person's estate in land.

10.24 It is the squatter's fee simple that ripens into ownership when the rights of the true owner have been extinguished under the Limitation Act 1980. There is no "parliamentary conveyance" of the true owner's estate to the squatter.[73] The latter has a wholly new estate,[74] but one that is subject to those rights that burdened the estate of the former owner that have not been barred by lapse of time, such as easements[75] or restrictive covenants.[76] Where the squatter is a leaseholder, there is a presumption that he or she has adversely possessed the land on behalf of the landlord as part of the holding and not for his or her own benefit.[77] When the tenancy ceases, the landlord becomes the owner of the land so acquired.[78] This presumption can be rebutted by some communication by the tenant to the landlord which indicates that he or she has acquired it on his or her own account.[79] It appears that the presumption does not apply to land that is remote from the property comprised in the tenancy.[80]

ADVERSE POSSESSION AGAINST THOSE WITH LIMITED INTERESTS

Leaseholds

10.25 There are certain special rules which govern the situation where a squatter adversely possesses against a person with a limited interest, such as a tenant under a lease, or a life tenant under a settlement or trust of land. Where a squatter adversely possesses for 12 years against a leaseholder—

(1) the leaseholder's estate is extinguished; but

(2) the reversioner's interest[81] is not barred until a further period of 12 years has

[73] *Titchborne v Weir* (1892) 67 LT 735.

[74] See, eg, *St Marylebone Property Co Ltd v Fairweather* [1962] 1 QB 498, 533 (CA); and on appeal, *sub nom Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, 543. Cf *Tickner v Buzzacott* [1965] Ch 426, 434.

[75] *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, 536.

[76] *Re Nisbet and Potts' Contract* [1906] 1 Ch 386.

[77] A tenant, who necessarily has possession with the landlord's consent, can never adversely possess against his or her landlord during the period of the lease: see Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) pp 108, 1038. There is, however, no such bar to a landlord, who is not estopped from showing that he or she has barred the tenant's title by adverse possession. This is because he or she has *not* entered with the tenant's consent: see *Sze To Chun Keung v Kung Kwok Wai David* [1997] 1 WLR 1232, 1235.

[78] See *Kingsmill v Millard* (1855) 11 Exch 313; 156 ER 849; and the judgment of Pennycuick V-C at first instance in *Smirk v Lyndale Developments Ltd* [1975] Ch 317, where that decision was followed and the authorities reviewed and rationalised. On appeal, Pennycuick V-C's judgment was partially reversed on another ground, but the Court of Appeal accepted his statement of the law on that point as being correct: *ibid* at 337. For a recent application of this principle, see *Long v Tower Hamlets London Borough Council* [1998] Ch 197, 203, 204.

[79] *Smirk v Lyndale Developments Ltd*, above, at p 324.

[80] *Lord Hastings v Sadler* (1898) 79 LT 355, as explained in *Smirk v Lyndale Developments Ltd*, above, at p 328. In the *Lord Hastings* case, the subject of the tenancy was an island, and the parcels of land which the tenant adversely possessed were on the mainland between half a mile and a mile from the island.

[81] Whether freehold or leasehold.

elapsed from the time when the lease terminates,[82] and this is so however long the squatter may have been in adverse possession against the leaseholder.[83]

A lease that still has some time to run when the leaseholder's title has been barred, may be determined prematurely in certain circumstances. This will enable the reversioner to recover possession at once. First, the reversioner may forfeit the lease for breach of any covenant.[84] Secondly, it has been held by the House of Lords that a leaseholder, whose estate has been barred by a squatter, can surrender his or her lease to the freehold reversioner.[85] This "controversial decision" [86] has been criticised [87] and, although arguments have been advanced in its defence,[88] its correctness has been left open by the Privy Council.[89]

Successive interests under trusts

10.26 The provisions of the Limitation Act 1980 apply to equitable interests in land in the same way as they apply to legal estates.[90] It follows that where land is held in trust for successive interests, adverse possession for 12 years by a squatter will bar only the interest of the life tenant. The interest of a remainderman will be barred by adverse possession 12 years after the squatter takes adverse possession or six years after the remainderman's interest falls into possession, whichever is longer.[91] If, for example,

[82] Limitation Act 1980, s 15(1), (6); Schedule 1, para 4.

[83] *Chung Ping Kwan v Lam Island Development Co Ltd* [1997] AC 38, 46.

[84] *Tickner v Buzzacott* [1965] Ch 426. Although the squatter does not acquire the lease and does not therefore become subject to its obligations as such, the landlord will invariably have reserved a right of re-entry for breach of covenant. That right of re-entry is a legal proprietary right (see Law of Property Act 1925, s 1(2)(*e*)) and is plainly binding on the squatter. It can be exercised if any breach of covenant occurs *even though the squatter is under no contractual obligation to perform such a covenant*.

[85] *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510.

[86] *Chung Ping Kwan v Lam Island Development Co Ltd*, above at p 47, *per* Lord Nicholls.

[87] See in particular H W R Wade, "Landlord, Tenant and Squatter" (1962) 78 LQR 541. The basis of Professor Wade's criticism is that the decision creates an important exception to the principle *nemo dat quod non habet*, because it means that "a tenant with a bad title (as against the adverse possessor) can nevertheless confer a good title on the landlord by the surrender": *ibid*, at p 542.

[88] In *Fairweather*, both Pearson LJ in the Court of Appeal ([1962] 1 QB 496, 530) and Lord Radcliffe in the House of Lords ([1963] AC 510, 540) justified it on the following basis. The *nemo dat quod non habet* principle was, they thought, irrelevant. The lease was an incumbrance that was an impediment to the landlord's immediate entitlement to possession. The surrender by the tenant simply removed that obstacle. Although this argument has found favour with some commentators (see, eg, the very important article by Elizabeth Cooke, "Adverse Possession - Problems of Title in Registered Land" (1994) 14 LS 1, 7), it begs the question as to how the tenant, whose title had been extinguished, *could* make an effective surrender. It is of course true that *as a contract*, the lease remained on foot as between lessor and lessee, and the tenant could clearly surrender those obligations. But that could not affect the leasehold *estate*, which continued to exist, even though nobody actually owned it or could deal with it (the squatter of course had an independent freehold and had no title to the lease as such). It was for precisely this reason that the Irish Supreme Court declined to follow the *Fairweather* case in *Perry v Woodfarm Homes Ltd* [1975] IR 104.

[89] *Chung Ping Kwan v Lam Island Development Co Ltd*, above, at p 47, where Lord Nicholls referred to Professor Wade's "powerful critique".

[90] See s 18(1).

[91] Limitation Act 1980, s 15(2).

a squatter took adverse possession of the land three years before the life tenant died, the remainderman would then have nine years to recover possession before his or her interest was extinguished. If, however, the period of adverse possession commenced 15 years before the life tenant died, the remainderman would then have six years to recover the land. There is no authority as to whether a life tenant whose interest had been extinguished by adverse possession could surrender that interest to the remainderman, so that he or she could at once start proceedings to recover the land from the squatter. However, the position in relation to leaseholds suggests that such a surrender would be effective, at least as the law presently stands.[92]

The treatment of adverse possession in the Land Registration Act 1925

EXTINCTION OF TITLE AND REGISTERED LAND

10.27 We have already explained that the stated intention of the Land Registration Act 1925 is, on its face, to apply the principles of adverse possession to registered land "in the same manner and to the same extent" as they apply to unregistered land.[93] However, as the draftsman went on to acknowledge, that was technically an impossibility. Title to registered land is conferred by registration, and unless and until the register is changed, the person registered as proprietor will have the legal estate to the land vested in him or her.[94] It follows that adverse possession *cannot* of itself extinguish the registered proprietor's estate while he or she remains on the register as its proprietor. This need not have mattered. As we have explained, the squatter has a legal fee simple absolute in possession[95] which is protected as an overriding interest, and therefore binds all persons who acquire the property or any interest in it.[96] This, it might have been thought, would have been a sufficient solution to the problem. All that was required was to provide - as the Land Registration Act 1925 does[97] - that once the limitation period had expired, the squatter should be entitled to be registered as proprietor of the land (and, by implication, that the title of any existing proprietor which had been barred should be closed).[98]

THE STATUTORY TRUST AND THE PROBLEMS ARISING FROM IT

10.28 Unfortunately, this simple solution was not adopted. Instead, the draftsman added a further and (in our view) quite unnecessary layer of complexity to his scheme. Section 75(1) of the Land Registration Act 1925 provides that—

92 See above, para 10.25.

93 See s 75(1); above, para 10.20.

94 See Land Registration Act 1925, s 69.

95 See above, paras 10.22 - 10.24.

96 At present squatters' rights are themselves overriding interests under Land Registration Act 1925, s 70(1)(*f*): see above, paras 5.42 and following. This is so, even though (i) such rights are not readily discoverable on a reasonable inspection of the land, and (ii) the squatter has abandoned the land after having barred the rights of the registered proprietor, who has then resumed possession of the property. Because of these difficulties, we have provisionally recommended that this category of overriding interest should be abolished, and that a squatter's rights should be protected as an overriding interest only if he or she is in actual occupation of the land claimed: see above, para 5.55.

97 See s 75(2), below, para 10.32.

98 Cf *BP Properties Ltd v Buckler* (1987) 55 P & CR 337, 342, where Dillon LJ analysed the effect of adverse possession in precisely this way.

> where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the [Limitation] Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by those Acts.

10.29 This provision gives rise to many difficulties,[99] not the least of which is whether the "trust" imposed on a registered proprietor by section 75(1) of the Land Registration Act 1925 can be regarded as having the normal characteristics of a trust. We explain below that there is considerable doubt on this point.[100] If the trust does have its usual attributes, it gives rise to a number of odd consequences.[101] It is enough to mention three of these, of which the third is the most important.

10.30 First, if the registered proprietor sells the land to a purchaser, not realising that a squatter has acquired title to it, the squatter can presumably elect either to assert his or her rights in the land against the purchaser[102] or to proceed against the former proprietor for the proceeds of sale, which will be traceable in his or her hands.[103] It has been pointed out that the squatter who opts for the latter may gain a windfall.[104] If the squatter had been registered as proprietor of the land which he or she had adversely possessed, it would normally have been with a mere possessory title.[105] Such a title is likely to be less valuable than the absolute title which the purchaser will normally have acquired from the former proprietor. It follows that the amount that the squatter will be able to claim will be more than the land would have been worth to him or her.

10.31 Secondly, if there were two or more registered proprietors of land and a squatter had barred their rights by adverse possession, it is arguable that any sale by those proprietors of the land affected would overreach the interest of the squatter. Prior to such a sale, the proprietors would have held the land on a bare trust for the squatter. As such they would have been trustees of land,[106] and, because the purchase price would have been paid to all of them, the transfer would have overreached the squatter's interest.[107] The proprietors would therefore hold the proceeds of sale on trust for him

[99] In what follows, we are indebted to Elizabeth Cooke's illuminating article, "Adverse Possession - Problems of Title in Registered Land" (1994) 14 LS 1.

[100] See para 10.33.

[101] See Elizabeth Cooke, "Adverse Possession - Problems of Title in Registered Land", above, at p 2.

[102] Who will be bound by them because the squatter has an overriding interest.

[103] The assumption that a squatter will have such an election is not wholly free from doubt. It is not settled whether a beneficiary, whose interest under a trust has not been overreached by a disposition of trust property, is restricted to claiming the trust property from the transferee, or whether he or she can claim its product in the hands of the trustees. In principle the beneficiary should be able to affirm the transaction and proceed against the trustees if he or she chooses to do so.

[104] Elizabeth Cooke, "Adverse Possession - Problems of Title in Registered Land", above, at p 3.

[105] Though it need not be: see Land Registration Act 1925, s 75(3), below, para 10.32. See too Andrew Pain, *Adverse Possession* (1992) p 149.

[106] See Trusts of Land and Appointment of Trustees Act 1996, s 1(1), (2).

[107] See Law of Property Act 1925, s 27(2) (as amended).

or her, but the purchaser would take free of his or her interest.

10.32 Thirdly, the trust device does give rise to difficult conveyancing issues. Under the trust, the registered proprietor becomes trustee of his or her estate for the squatter. This means that if the registered proprietor is a leaseholder, he or she will hold that leasehold estate on trust for the squatter. That squatter, however, has a quite separate and distinct legal fee simple by virtue of his or her adverse possession.[108] It is unclear how these two estates interrelate. This uncertainty is heightened by sections 75(2) and (3) of the Land Registration Act 1925 which provide respectively that—

> (2) Any person claiming to have acquired a title under the Limitation Acts to a registered estate in the land may apply to be registered as proprietor thereof.
>
> (3) The registrar shall, on being satisfied as to the applicant's title, enter the applicant as proprietor either with absolute, good leasehold, qualified, or possessory title, as the case may require, but without prejudice to any estate or interest protected by any entry on the register which may not have been extinguished under the Limitation Acts, and such registration shall, subject as aforesaid, have the same effect as the registration of a first proprietor; but the proprietor or the applicant or any other person interested may apply to the court for the determination of any question arising under this section.

10.33 In *Fairweather v St Marylebone Property Co Ltd*,[109] Lord Radcliffe commented that—

> I am not at all satisfied that section 75(1) does create a trust interest in the squatter of the kind that one would expect from the words used. So to hold would raise difficulties which I do not now explore; and the trust of the dispossessed owner's title under subsection (1) must somehow be reconciled with the provision under subsection (2) for the squatter to apply to register his own title, which would presumably be his independent possessory title acquired by adverse possession.

Lord Radcliffe's understanding that the squatter is registered with his or her own title acquired by adverse possession is consistent with principle. The extent to which his view is supported by the wording of section 75(2)[110] is perhaps less clear, as it appears to visualise the registration of the squatter as proprietor of "a *registered* estate", that is, one that is already registered, rather than his or her newly acquired freehold estate.[111]

10.34 The language of section 75(1) (and on one view that of section 75(2) as well) seems to hark back to the discredited "parliamentary conveyance" theory of adverse possession by which the Limitation Act "by its own force, not only extinguished any right which the [owner] could have had, but... transferred the legal fee simple to the

[108] See above, paras 10.22 - 10.24.

[109] [1963] AC 510, 542.

[110] Above, para 10.32.

[111] Cf below, para 10.36.

party in possession".[112] Yet that view had been finally laid to rest by the Court of Appeal more than 30 years prior to the Land Registration Act 1925.[113] It may be that the way to reconcile subsection (1) of section 75 with subsections (2) and (3) is to treat the supposed "trust" as nothing more than an obligation on the part of the registered proprietor to give effect to the rights of the adverse possessor and submit to that person's registration as proprietor.[114] This would be consistent with the tendency of the courts to treat the trust arising under section 75(1) as no more than "machinery so as to apply the Limitation Acts to registered land".[115]

10.35 However, the decision in *Spectrum Investment Co v Holmes*[116] casts some doubt upon this interpretation, and, as we explain below, there is another approach to the issue.[117] In that case, the defendant had been in adverse possession of land held on a registered 99-year lease for more than 17 years. She then applied to be registered as proprietor of the leasehold interest in the property. She was duly registered with a possessory title and a new title number, and the former leasehold title was closed. Subsequently the former registered proprietor of the lease purported to surrender that lease to the plaintiff landlord,[118] which thereupon commenced proceedings for a declaration that the defendant's title be deleted from the register. The basis of the landlord's case was, that where a tenant's title had been barred by adverse possession, he or she could still surrender the lease to the landlord, giving the latter the immediate right to possession. This was the position where the title to land was unregistered,[119] and the landlord contended that it was the same where title was registered. Browne-Wilkinson J held that this was not the case. When the defendant was registered as proprietor of the lease, the term was vested in her,[120] and she alone could deal with it. The former tenant had no title to that term and could not, therefore, surrender it. He left open what the position would have been if the defendant had acquired title by adverse possession but

[112] *Scott v Nixon* (1843) 3 Dr & War 388, 407, *per* Sugden LC (Ireland).

[113] *Titchborne v Weir* (1892) 67 LT 735; above, para 10.24.

[114] There are many situations where a trustee of an implied, resulting or constructive trust is not subject to the full incidents of express trusteeship, see, eg *Berkley v Poulett* [1977] 1 EGLR 86, 93; *Target Holdings Ltd v Redferns* [1996] AC 421, 435.

[115] *Fairweather v St Marylebone Property Co Ltd*, [1963] AC 510, 548, *per* Lord Denning. See too *Jessamine Investment Co v Schwartz* [1978] QB 264, 275; *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078, 1089. Since this Report was approved (and as we go to press), the eagerly-awaited decision in *Central London Commercial Estates Ltd v Kato Kagaku Ltd* [1998] EGCS 117; *The Times* 27 July 1998 (Sedley J sitting as an additional Judge of the Chancery Division) has been handed down. Our remarks are based on those reports and not on the transcript. Sedley J held that, after 12 years' adverse possession, a squatter of registered leasehold land was entitled to be registered as proprietor *of that lease*. In other words, s 75 does indeed operate as a "Parliamentary conveyance". Furthermore, because the former lessee held his or her estate on trust for the squatter, if he or she surrendered the lease to the freeholder, the latter took the land subject to the trust. The freeholder was bound by the interest of the squatter because it was an overriding interest under either Land Registration Act 1925, s 70(1)(*f*) or (*g*). Although we were unable to amend the text to this Report because of the late stage at which the case appeared, it has not changed our conclusions or detracted from the need for reform.

[116] [1981] 1 WLR 221.

[117] See para 10.38.

[118] Under the title number which it had formerly had.

[119] See *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510; above, para 10.25

[120] See Land Registration Act 1925, s 69.

had not been registered as proprietor of the lease.[121]

10.36 Two specific and related points in the judgment call for comment. First, Browne-Wilkinson J considered that a squatter who seeks to be registered under section 75(2) of the Land Registration Act 1925 should apply to be registered as proprietor *of the estate which he or she had barred*, in that case a leasehold.[122] We have explained that, in relation to *unregistered* land, a squatter has a legal fee simple absolute in possession from the day that he or she takes adverse possession, and that this is so even where such possession is taken against a lessee.[123]

10.37 Secondly, Browne-Wilkinson J expressly rejected the possibility that there could be two concurrent registered titles to the same estate. That contention—

> seems to have no warrant in any provision of the Act and... runs contrary to the whole scheme of the Act, which is intended to ensure that there shall be one title for any interest in registered land and anyone dealing with that land can treat the registered proprietor of that interest as owner of that interest.[124]

It is indeed the case that the Land Registry will not register two persons with concurrent titles to the same estate because of the confusion to which that could give rise. If a squatter applies to be registered as a *freeholder*, the Registry will inform the registered proprietor of the freehold because if they register the squatter with a freehold, they will necessarily close the existing title.

10.38 There is no settled practice on the part of the Land Registry in relation to applications for registration by a squatter who has adversely possessed against a registered leasehold title.[125] An approach that is adopted by some registrars is to register the squatter with a *qualified* freehold title. We explain below the significance of such a registration.[126] Under the present practice, the necessary correlative of this is, as we have explained in the previous paragraph, that the registrar also *closes* the existing freehold title, which

[121] The situation that Browne-Wilkinson J left open was in fact precisely that which arose in *Fairweather v St Marylebone Property Co Ltd*, above. However, it was only in the Court of Appeal that the fact that the land was registered was perceived to be a possible issue, and the effect of Land Registration Act 1925, s 75 was therefore left undecided: see [1963] AC 510, 541. If the registered proprietor of the lease holds it on trust for the squatter under s 75(1) and then surrenders the lease to his or her landlord, it is at least arguable that the surrender constitutes a breach of trust. But see now *Central London Commercial Estates Ltd v Kato Kagaku Ltd*, above.

[122] See [1981] 1 WLR 221, 230. This conclusion was based upon his interpretation of Land Registration Act 1925, s 75(2), above, para 10.32. Browne-Wilkinson J considered that the words "[a]ny person claiming to have acquired a title under the Limitation Acts *to a registered estate in the land* may apply to be registered as proprietor thereof" meant that the squatter should seek to be registered as proprietor of the estate the title to which he or she had barred by adverse possession. See above, para 10.33. Cf Elizabeth Cooke, "Adverse Possession - Problems of Title in Registered Land" (1994) 14 LS 1, 9 - 12. See now *Central London Commercial Estates Ltd v Kato Kagaku Ltd*, above.

[123] See above, para 10.22.

[124] [1981] 1 WLR 221, 228.

[125] The situation is not very common and practice varies between different District Land Registries.

[126] See para 10.42.

then continues to exist, but off the register.[127] Although this approach can be regarded as logical, it produces the unattractive result that a registered freehold proprietor can find that his or her title has been removed from the register, even though he or she has no right to challenge the registration of the squatter. It is not clear how the proprietor can then deal with his or her reversion, given that it is no longer on the register.

10.39 The more usual course is for the registrar to register the squatter with a title to a leasehold estate, as happened in *Spectrum Investment Co v Holmes*.[128] Although at first sight this might seem illogical, given that the squatter has a freehold title, it can be justified both practically and theoretically. The practical justification is that it obviates the need to close the reversioner's freehold title with the difficulties to which we have alluded above. The theoretical justification is that a squatter's title remains vulnerable until such time as he or she has barred all those who have a better to title to the land. Although a squatter who has barred a leaseholder is, in no sense, the "successor" to the leaseholder's estate, registration with *a* leasehold title (and not *the* leasehold title that has been closed) does reflect his or her progress towards barring all better titles.[129]

CRITICISMS OF THE PRESENT LAW

10.40 The most fundamental criticism of the present law is the uncertainty and confusion that is created by the introduction of the concept of a trust into the law of adverse possession. We are unable to see why such a trust is necessary, because we consider that it would be perfectly possible to reflect the way in which adverse possession operates in unregistered land without having recourse to it.[130] To achieve that end, it would be necessary to accept that there could be *two* (or more) registered freehold titles to the same piece of land. We do not regard this as a fundamental objection, notwithstanding Browne-Wilkinson J's strictures in *Spectrum Investment Co v Holmes*.[131] If a squatter adversely possessed against a leasehold title, he or she *could* in principle be registered with a *qualified* freehold title. We explain this point in the following paragraphs.

10.41 By virtue of section 75(3) of the Land Registration Act 1925,[132] an application by a squatter to be registered is treated as an application for first registration. Under that subsection the adverse possessor can be registered with absolute, good leasehold, qualified or possessory title. In practice, most squatters are registered with *absolute* title, because they have adversely possessed against an absolute freehold title.[133] They will therefore take the land subject to overriding interests and entries on the register which affect the land.[134] Where there is some doubt, the squatter will be registered with a

[127] See Elizabeth Cooke, "Adverse Possession - Problems of Title in Registered Land" (1994) 14 LS 1, 11.

[128] [1981] 1 WLR 221; above, para 10.35.

[129] See above, para 10.22. This must now be read subject to *Central London Commercial Estates Ltd v Kato Kagaku Ltd* [1998] EGCS 117; *The Times* 27 July 1998, above, para 10.34, n 115.

[130] See above, para 10.27.

[131] [1981] 1 WLR 221, 228; above, para 10.37.

[132] Above, para 10.32.

[133] The squatter is therefore able to show that he or she has barred all adverse interests. Compare the analogous position where title is unregistered: *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1.

[134] Land Registration Act 1925, s 5.

possessory title. The Act provides that such registration—

> shall not affect or prejudice the enforcement of any estate, right or interest adverse to or in derogation of the title of the first proprietor, and subsisting or capable of subsisting at the time of the registration of that proprietor...[135]

The Act also provides for the automatic upgrading of a possessory title to absolute after 12 years.[136] It is obviously inappropriate that a squatter who has adversely possessed against a *leasehold* title should be registered with either an absolute or possessory *freehold* title. To do either could[137] or would[138] lead to the extinction of the estate of the reversioner whose right to evict the squatter had not even arisen, let alone been barred by adverse possession.

10.42 By contrast, if the squatter were registered with a *qualified* freehold title,[139] there can be excepted from the effect of registration—

> any estate, right or interest—
>
> (a) arising before a specified date, or
>
> (b) arising under a specified instrument or otherwise particularly described in the register.[140]

A qualified title can be upgraded to absolute title only on a specific application to the registrar. He must be satisfied as to the title before he can register it as absolute (or good leasehold).[141] It would, therefore, be open to the registrar to register the squatter with a qualified title subject to the specific exception of the estate and right of the reversioner (or reversioners, if there were more than one). The squatter would not be able to secure registration with an absolute title unless and until he could show that he or she had also barred the reversioner's title by adverse possession.

ADVERSE POSSESSION: PROPOSALS FOR REFORM

Introduction

10.43 In making our proposals for reform we have two objectives. The first is to accept that the system of land registration is "not a system of registration of title but a system of

[135] See s 6.

[136] See s 77(2) (as substituted by Land Registration Act 1986).

[137] In the case of a possessory title. This would happen if the leasehold title did not determine within the period of 12 years from the date on which the squatter was registered. We have explained that the reversioner has 12 years to evict the squatter after his or her interest falls into possession on the determination of the lease: see above, para 10.25.

[138] In the case of an absolute title.

[139] The registrar can register a title as qualified "where an absolute title is required, and on the examination of the title it appears to the registrar that the title can be established only for a limited period, or only subject to certain reservations": Land Registration Act 1925, s 7(1).

[140] *Ibid*, s 7(1). Such titles are, in practice, seldom given: "[p]erhaps one in a hundred thousand registered titles": Ruoff & Roper, *Registered Conveyancing*, 5-08.

[141] Land Registration Act 1925, s. 77(3).

title by registration".[142] The basis of title should therefore be the register. As we have indicated, the title that registration confers should be capable of being overridden by adverse possession only where it is essential to ensure the marketability of land or to prevent unfairness.[143] We have already explained the four situations in which we consider that to be the case,[144] namely—

(1) where the registered proprietor cannot be traced;

(2) where there have been dealings "off the register";

(3) in some cases where the register is not conclusive; and

(4) where an adverse possessor has entered into possession under a reasonable mistake as to his or her rights.

Because possession could still be the basis of title in some cases, the principle of relativity of title[145] would be unaffected.[146] The second objective is to ensure that the application of the principles of adverse possession to registered land is technically sound and coherent, and is free from the faults that mar the present law. We address each of those concerns in turn.

[142] *Breskvar v Wall* (1971) 126 CLR 376, 385, *per* Barwick CJ.

[143] See our provisional recommendation, above, para 10.19.

[144] See above, paras 10.13 - 10.16.

[145] See above, para 10.21.

[146] The point would be made clear by the fact that a squatter would always be registered with a *freehold* title: see below, para 10.71(2).

Adverse possession of registered land: a new scheme of substantive law

The scheme in outline

10.44 The new scheme for adverse possession in relation to registered land which we provisionally propose rests on the premise that registration should in itself protect the proprietor from the claims of an adverse possessor. That would be subject to exception in the four situations listed in the previous paragraph. As we have already indicated, we examined the treatment of adverse possession in a number of other jurisdictions to see how they treated adverse possession of land with registered title.[147] As a result of this survey, we took as the starting point for the scheme which we propose the system of adverse possession that is applicable to registered land in Queensland.[148] However, what we propose differs significantly from that system.

10.45 The essence of our scheme is that a squatter could apply to be registered as proprietor after 10 years' adverse possession. However, except in limited circumstances, he or she could not be registered as proprietor of land if the existing registered proprietor, on being given notice of the application, objected to it. If the application to register was rejected because of such an objection, but the squatter nonetheless remained in adverse possession for two more years, then the squatter would be entitled to be registered as proprietor of the land and the title of the former registered proprietor *would* be extinguished. In other words, before losing his or her title, a registered proprietor would generally have ample opportunity either to evict the squatter or otherwise regularise his or her possession.[149] We explain in some detail in the following paragraphs the way in which our scheme would work. It is of course necessary for the scheme to accommodate two situations, namely—

(1) where the squatter applies to be registered as proprietor; and

(2) where the registered proprietor takes proceedings for possession against the squatter.

We explain each in turn. It will be noted that the scheme is built on the principles and practice of land registration. Many cases could be dealt with by the Registry and would not have to go to court.[150] It would not be easy to replicate such a system in relation to unregistered land, and to the extent that it could be, it would require court proceedings.

Where there was an application by the squatter to be registered as proprietor

THE SQUATTER WOULD HAVE THE RIGHT TO APPLY TO BE REGISTERED AFTER TEN YEARS' ADVERSE POSSESSION

10.46 A person who had adversely possessed against land with registered title would be

[147] See above, para 10.17.

[148] See the Queensland Land Titles Act 1994, ss 98 and following.

[149] Under the Queensland Act of 1994, it is not clear what happens if the registered proprietor objects to the squatter's application for registration, other than that no registration will take place.

[150] Just as is the case at present in relation to many adverse possession claims.

entitled to apply to be registered as proprietor of the land[151] after ten years.[152] On making such an application, the adverse possessor would have to satisfy the registrar that he or she had indeed been in adverse possession of the land for that period.[153] If the registrar was satisfied, he would notify the registered proprietor of the claim at his or her address for service.[154] The registrar would inform the proprietor that unless he or she objected within two calendar months, the applicant would be registered as proprietor of the land, and the registered proprietor's title would be closed. We consider that the registrar should also notify—

(1) the proprietor of any registered charge affecting the registered proprietor's estate, because the chargee will, as against that proprietor, have the right to possession; and

(2) any person who, from any entry on the register might have a right to possession of the land.[155]

This is because, in each case, the person entitled to possession may wish to take steps to protect his or her interest in the property.

10.47 We would emphasise that the registrar would, in accordance with his usual practice, take such steps as were necessary to ensure that any person on whom such a notice was served did actually receive it. It often happens that the proprietor is away and the notice is therefore returned to the Registry. The registrar then serves the notice afresh or authorises substituted service.[156] A person will not be at risk of losing their land just because they are away temporarily. The requirement of service on registered chargees and others appearing to have a right to possession should also reduce any risk that the land may be lost by default.

IF THE PROPRIETOR FAILED TO OBJECT, THE SQUATTER WOULD BE REGISTERED AS PROPRIETOR INSTEAD

10.48 If the registered proprietor, any proprietor of a charge, or any person who appeared to have a right to possession failed to respond to the notification by lodging an objection within two months, the adverse possessor would be registered as proprietor with a new title, and the title of the registered proprietor would be closed. The justification for this

[151] As to the type of title for which the applicant could apply, see below, paras 10.72 and following.

[152] We have selected a period of ten (rather than twelve) years in conformity with the provisional recommendations made by the Law Commission in its recent Consultation Paper, Limitation of Actions, Consultation Paper No 151, para 13.121. In that Paper, the Commission recommended that the longer limitation periods that presently apply to adverse possession claims against both the Crown and any spiritual or eleemosynary corporations sole should cease to do so: see para 13.126. Given the nature of the scheme which we propose, we can see no obvious reasons why the Crown and such corporations should be treated differently, but we would be glad to learn the views of readers.

[153] The position would be exactly the same as it is now, on an application by a squatter to be registered under Land Registration Act 1925, s 75(2). See Ruoff & Roper, *Registered Conveyancing*, 29-07.

[154] See Land Registration Act 1925, s 79; Ruoff & Roper, *Registered Conveyancing*, 3-10.

[155] The sort of entry we have in mind would include a restriction on the register which required the consent of a named person to any disposition of the land.

[156] Land Registration Rules 1925, r 314.

is, of course, that if the registered proprietor has disappeared, there is no person who has a better claim to possession of the land than the squatter.

TIME OF ITSELF WOULD NOT BAR THE PROPRIETOR'S TITLE

10.49 It should be noted that the registered proprietor's title would not be extinguished unless and until it was closed. *It would be the fact of registration rather than the effluxion of time by itself that would cause the proprietor's title to determine*. There are four important consequences of this—

(1) If the squatter did not apply to be registered for (say) 20 or 30 years, the proprietor would still have an opportunity to object to the squatter's application even after that (or any other) length of time.

(2) Unless and until the squatter secured registration as proprietor, then subject to one significant qualification explained below,[157] the registered proprietor would be free at any time to take proceedings against the squatter to recover possession of his or her land.[158]

(3) While the registered proprietor remained as such, he or she would have the power to dispose of the land, though it would be subject to any overriding interest that the squatter might have. However, once the squatter had been registered with a new title, and the former registered proprietor's title had been closed, the latter's estate would cease to exist for all purposes, and he or she would be unable to make any further disposition of it.[159] The extinction of the registered proprietor's estate would not affect any contractual obligations to which he or she might be subject under any lease, even though that lease had been extinguished *as an estate*.

(4) If the squatter abandoned possession at any stage, even after more than 10 years' adverse possession, the land would cease to be in adverse possession. If the squatter were to re-enter, he or she would have no right to apply to be registered as proprietor unless and until he or she had remained in adverse possession for a further 10 years.[160] Again this is subject to one significant qualification explained below.[161]

[157] See paras 10.59, 10.60.

[158] Though the squatter would have certain defences to that action: see below, para 10.61.

[159] This may *not* be the case under the law as it stands: see Elizabeth Cooke, "Adverse Possession - Problems of Title in Registered Land" (1994) 14 LS 1, 8 - 10. She suggests that if a squatter who had adversely possessed against a leaseholder were to be registered with a *freehold* title, the lease would continue to exist, albeit outside the registered system, and could be dealt with accordingly.

[160] Cf Limitation Act 1980, Schedule 1, para 8(2), codifying the effect of the decision of the Privy Council in *The Trustees, Executors and Agency Co Ltd v Short* (1888) 13 App Cas 793. In that case, Lord Macnaghten explained that "if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place": *ibid*, at p 798. He went on to add that the intruder's possession, once abandoned, "does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant": *ibid*, at p 799.

[161] See paras 10.59, 10.60.

IF THE PROPRIETOR OBJECTED, THE SQUATTER'S APPLICATION WOULD BE REJECTED EXCEPT IN THREE SITUATIONS

10.50 If the registered proprietor objected to the adverse possessor's application, his or her application would fail. To this general principle, there would be three exceptions which, if established, would normally result in the registration of the squatter as proprietor—

(1) where the registered proprietor was estopped from objecting to the squatter's application because it would be unconscionable for him or her to do so;

(2) where the squatter could show that he or she had some independent right to the land that entitled him or her to be registered as proprietor; or

(3) where the squatter could show that he or she had entered into adverse possession under a mistaken belief as to his or her rights and that mistake was a reasonable one to have made.

These exceptions are not discrete: there might be situations that would fall within more than one of them. Quite apart from these three exceptions, a refusal to register the squatter would not prejudice or preclude any claim that he or she might have to some right or interest in the land, such as a claim based upon proprietary estoppel.[162]

10.51 If any of these three matters were raised by the squatter in response to the registered proprietor's objection, the matter could be resolved in a hearing before the registrar. The registrar could refer it to the court, on his own volition, at any time before he made a final adjudication in the matter.[163] There would be a right of appeal to the court from the registrar's decision in the usual way.[164] The burden of proof in relation to each of these exceptions would rest on the adverse possessor. We explain in more detail these three exceptions and how each would work in the following paragraphs.

EXCEPTION 1: WHERE THE REGISTERED PROPRIETOR WAS ESTOPPED FROM OBJECTING

10.52 There may be situations in which it would be unconscionable for the registered proprietor to object to the squatter's application for registration. The sort of case that we have in mind is where the squatter had entered into possession of the land pursuant to some informal and legally ineffective transaction - typically some form of dealing with the land "off the register". For example, A might have "sold" the land to B for valuable consideration under an agreement that was not effective as a contract, because it did not comply with the necessary formal requirements. To deny B registration in such circumstances would be unjust. Cases of this kind may become more common

[162] An obvious example would be where the squatter had entered the land and acted to his or her detriment under the mistaken belief that he or she owned the property, and the true owner, knowing of the mistake, has acquiesced in this conduct. In such a case, a court might, in giving effect to the equity, hold that the squatter should be entitled to be registered as proprietor of the land. It should be noted that in many cases where an equity arises by proprietary estoppel the possession of the party asserting it will not have been adverse, because he or she will have been in possession of the land with the consent of the registered proprietor. Cf Mary Welstead, "Proprietary Estoppel and the Acquisition of Possessory Title" [1991] Conv 280.

[163] It is easy to envisage a situation in which the registrar starts to hear a case and discovers that it raises difficult evidential or legal questions that are more appropriate for decision by the court.

[164] See Land Registration Rules 1925, r 299.

as and when registration becomes an essential element in the creation of rights over registered land.[165]

EXCEPTION 2: WHERE THE SQUATTER HAD SOME OTHER RIGHT TO THE LAND

10.53 The second exception is an obvious one. There are occasions where a person has an independent right to the land, and where, under the present law, his or her adverse possession does no more than to extinguish the title of the holder of the legal estate. This will be the situation where the squatter is a beneficiary under a bare trust, as for example where he or she is a purchaser who has entered into possession under a contract to buy the land and has paid the whole of the purchase price.[166] A squatter who could establish an independent right to the land of this kind should be entitled to be registered as proprietor, notwithstanding that the registered proprietor objected.

EXCEPTION 3: ENTRY UNDER A REASONABLE MISTAKE

10.54 The third exception - which we expect to be the most frequently invoked - would arise in the common case where a person entered into possession of land under the mistaken belief, reasonably held, that he or she was the owner of the land. The type of situation that this exception is intended to cover include cases where—

(1) the boundary between the squatter's land and that of the registered proprietor was uncertain;[167]

(2) there had been some misrepresentation to the applicant as to the extent of his or her land; or

(3) the natural features of the land had led him or her to believe that the disputed land was his or hers.

As we have mentioned,[168] the burden of proof would be on the squatter to show both that he or she had entered under a mistake *and* that the mistake was a reasonable one to have made. In general, the longer the squatter had been in adverse possession of the land, the easier it would be for him or her to discharge this onus. If the squatter had not entered under a reasonable mistake, the registered proprietor would usually have appreciated that his or her possession was adverse and taken steps to terminate it.

10.55 If the squatter discharged this onus, the registrar or court would have a power (but not a duty) to register him or her as proprietor in place of the existing registered proprietor. Although only a power, the discretion would normally be exercised in favour of the squatter in the absence of factors which might make it inequitable or otherwise

[165] See below, para 11.10.

[166] See *Bridges v Mees* [1957] Ch 475. Where a purchaser who is in possession has *not* paid the entirety of the price, he or she will not be in adverse possession. The purchaser's possession is attributable to the contract and not to his or her absolute equitable interest (as it is where the price has been paid): cf *Hyde* v. *Pearce* [1982] 1 WLR 560 (a case that is open to doubt on its facts because the vendor had expressly revoked the purchaser's right to stay in possession a few months after it had commenced). If it were otherwise, the validity of agreements for leases as a substitute for legal leases would be undermined.

[167] This might be because the registered proprietor had failed either to maintain some boundary feature or to construct one: cf *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071, 1080.

[168] Above, para 10.51.

inappropriate to do so. There is an obvious parallel with proprietary estoppel[169] and, following that model, registration could (and usually would) be on terms.[170] Indeed the case for imposing terms is stronger than it is in cases of proprietary estoppel because there may be no element of representation or acquiescence in mistaken squatting cases. The sort of conditions that might be imposed would include one that the squatter—

(1) pay the former registered proprietor a sum of money as compensation for the loss of the land;

(2) grant an easement (such as an easement of light, or a right of way) to the former registered proprietor for the benefit of his or her retained land; or

(3) enter into a positive or restrictive covenant with the former registered proprietor.[171]

10.56 Factors that we would expect to be taken into account by the court or registrar in determining what conditions if any, were appropriate, might include—

(1) the value of the land in question and any other benefits that it might confer or have conferred on the squatter;

(2) whether the registered proprietor ought to have discovered the mistake before 10 years had elapsed;

(3) any hardship that would be suffered by the registered proprietor;

(4) any detriment incurred by the squatter in the mistaken belief that he or she was the owner of the land; and

(5) the length of time that the squatter had been in possession of the land.

10.57 Although the registered proprietor would normally lose his or her land to the squatter in this situation, he or she could obtain some form of recompense for that loss from the squatter, something which does not happen at present. This exception is an attempt to strike a fairer balance between the registered proprietor and the squatter who behaves honestly and reasonably than does the present law.

[169] It is anticipated that the principles of proprietary estoppel would provide a guide as to how the discretion might be exercised by the registrar or the court.

[170] Cf *Crabb v Arun District Council* [1976] Ch 179.

[171] Such as a covenant to construct and maintain a fence, or not to obstruct the view.

WHERE THE REGISTERED PROPRIETOR OBJECTED BUT THE SQUATTER REMAINED IN ADVERSE POSSESSION

10.58 There may be cases where—

(1) the registered proprietor objected to the registration of the squatter;

(2) the squatter could not bring him or herself within any of the three exceptions outlined above; but

(3) the registered proprietor took no steps either to commence proceedings to evict the squatter, or to regularise his or her possession (by, for example, granting him or her a lease of the land in question), so that the squatter remained in adverse possession.

10.59 In these circumstances, we consider that if the squatter were to remain in adverse possession for two years from the date of the refusal of his or her first application to be registered, he or she would be entitled to re-apply to be registered as proprietor of the land. Provided that the registrar was satisfied of these facts by the evidence submitted to him, he would be required to register the squatter as registered proprietor in place of the former proprietor, whose title would thereupon be extinguished. It is important that the marketability of land should be upheld, and if a registered proprietor fails to take steps to vindicate his or her title within two years of being given a clear warning to do so, we consider that it should be extinguished and that the squatter should obtain the land. Were this not so, possession and title could remain permanently out of kilter.

10.60 It may be helpful to spell out the consequences of what we propose. Once two years had elapsed from the refusal of the squatter's first application to be registered, he or she—

(1) would be entitled to apply to be registered as proprietor of the land;

(2) would have a complete defence to any proceedings brought by the registered proprietor to recover possession of the land,[172] and in such circumstances, the court would order that the squatter be registered as proprietor in place of the registered proprietor; and

(3) would not lose his or her right to be registered as proprietor *even if he or she abandoned possession or was dispossessed*.

However, as regards (3), if the squatter either ceased to be in possession, or remained in possession but ceased to be in actual occupation,[173] he or she would no longer have an overriding interest that was capable of binding any purchaser of the land.[174] Furthermore, unless and until the squatter was registered, the existing registered proprietor would remain as such, and would therefore be able to deal with the land in the usual way. His or her title would only be extinguished by the registration of the squatter as proprietor, either on the squatter's application or as a result of a court order in the squatter's favour in possession proceedings. As we have already indicated, the squatter would in such circumstances have a claim in damages against the registered

[172] It would, however, be incumbent on the squatter to raise the defence.

[173] See above, para 5.50.

[174] That is, if our provisional recommendation at para 5.55 is accepted by readers.

proprietor for trespass.[175]

Where the registered proprietor took possession proceedings against the squatter

10.61 We now explain briefly how our proposed scheme would apply where the issue of adverse possession arose not on an application by the squatter to register his or her title, but in proceedings by the registered proprietor to recover the land from the squatter after he or she had been in adverse possession for more than 10 years. The position would be as follows. Ten or more years' adverse possession would not of itself afford a defence to the proprietor's claim. However, the squatter would be entitled to raise any of the three exceptions outlined above,[176] and if any of them were established, the court would dismiss the proprietor's action. It would also order that the squatter should be registered as proprietor in place of the registered proprietor. Where the squatter established that he or she had entered into possession under a reasonable mistake,[177] the court could (and usually would) order that the registration of the squatter should be on terms.[178]

10.62 If the registered proprietor obtained judgment for possession against the squatter, but failed either to enforce it for more than two years or to bring fresh possession proceedings within that time, it would cease to be enforceable and, as we have explained above,[179] the squatter who had remained in adverse possession for this period would be entitled to be registered as proprietor of the land.[180] Again, as we have explained above, the registered proprietor would remain as such unless and until such registration took place.[181] However, if he did dispose of the land, he or she would be liable to a claim in damages for trespass brought by the squatter.[182]

Leases which are overriding interests

10.63 As we have explained,[183] leases granted for 21 years or less take effect as overriding interests.[184] We seek views elsewhere in this Report as to whether this period should be reduced to 14 years.[185] Cases of successful adverse possession against such leases are

[175] See above, para 5.51.

[176] See paras 10.52 - 10.57.

[177] See above, para 10.54.

[178] See above, para 10.55.

[179] See para 10.59.

[180] This accords with what we consider that the position should be where a registered proprietor had brought possession proceedings more than two years after the squatter's application to be registered had been rejected because of the proprietor's objection to it: see above, para 10.60. Under the Limitation Act 1980, s 24, there is at present a six year limitation period for the enforcement of judgments. It is open to the plaintiff to bring new proceedings within that six year period rather than enforcing the judgment, even though those proceedings are commenced more than 12 years after the squatter commenced his or her adverse possession: see *BP Properties Ltd v. Buckler* (1987) 55 P & CR 337 (a case decided under the Limitation Act 1939).

[181] See para 10.49.

[182] See above, para 10.60.

[183] See above, paras 3.7, 5.87.

[184] Land Registration Act 1925, s 70(1)(*k*); above, para 5.87.

[185] See above, para 3.10.

not likely to be very common, given their short duration. For most purposes, dealings with such leases are treated in the same way as a lease of unregistered land. We consider that this should be the case as regards adverse possession. The scheme that we propose would not therefore apply to such leases, which would be subject to the relevant rules applicable to unregistered land.

Transitional provisions

10.64 We consider that the new scheme which we propose could not apply to situations where a person had already barred the rights of a registered proprietor by adverse possession at the time when any legislation implementing our proposals was brought into force. To do so would be to strip them of vested rights which would almost certainly contravene the ECHR.[186] There would therefore be a saving for the rights of such adverse possessors. However, we consider that the onus of proving that they had barred the rights of the registered proprietor before the legislation came into force would rest upon the person alleging it.

Summary of provisional recommendations

10.65 **We provisionally recommend that—**

(1) adverse possession should no longer of itself bar the title of a registered proprietor;

(2) only the closure of that proprietor's title on the register would have that effect, and it would do so for all purposes; and

(3) the principles of adverse possession applicable to registered land should be as set out in the following paragraphs.

10.66 **First, there should be a new system to enable an adverse possessor to seek registration as proprietor, and it should operate as follows—**

(1) Where a person had been in adverse possession of land with a registered title for more than 10 years, he or she would be entitled to apply to be registered as proprietor of that land.

(2) On receipt of that application, the Registry would be required to serve a notice on the registered proprietor, any proprietor of a registered charge affecting the title in question, and any person who, from any entry on the register, appears to have a right to possession of the land, informing each of them of the application for registration.

(3) If the registered proprietor, chargee or person entitled to possession failed to object within two months of service of the notice, the registrar would register the adverse possessor as registered proprietor and would close the title of the existing proprietor.

[186] Article 1 of the First Protocol, above, para 4.27. The relevant words are "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law...".

(4) If the registered proprietor or chargee objected to the registration, the application would be dismissed unless the adverse possessor could show that—

(a) the proprietor was estopped by his or her conduct from objecting to his or her registration;

(b) he or she had some independent right to the land that entitled him or her to be registered as proprietor; or

(c) he or she had entered into adverse possession under a mistaken belief, reasonably held, as to his or her rights.

(5) If the adverse possessor raised any of these matters, the issue would be resolved by the registrar, unless he referred it to the court at any time prior to his making a final adjudication. There would be a right of appeal from his decision.

(6) If the adverse possessor established that he or she had entered under a mistaken belief as to his or her rights (above, (4)(c)), the court or registrar would order that the adverse possessor be registered as proprietor of the land unless in the circumstances it was inequitable or otherwise inappropriate to do so. Where the court or registrar ordered such registration, it would be on such terms (if any), whether as to payment or otherwise, as were equitable between the parties having regard to all the circumstances. In particular, the squatter could be required to grant the former registered proprietor an easement over his or her land, or to enter into a positive or restrictive covenant for his or her benefit.

(7) Where the adverse possessor's application to be registered was rejected and he or she subsequently remained in adverse possession for two years from the date of that rejection, he or she could re-apply to be registered as proprietor of the land.

(8) On such re-application, the registrar would, on being satisfied of the facts set out in (7), register the adverse possessor as proprietor of the land and close the title of the registered proprietor. The registered proprietor would remain as such unless and until such an application were made. He or she could therefore deal with the land, but subject to any overriding interest (if any) as the adverse possessor might have, and subject to that person's rights to bring a claim in damages for trespass.

10.67 **Secondly, corresponding provision should be made for the situation where a registered proprietor sought possession in legal proceedings against the adverse possessor.**

(1) Where a registered proprietor brought proceedings for possession against a person who had been in adverse possession of the proprietor's land for more than 10 years, the proprietor would be entitled to recover the land unless the adverse possessor could show that—

(a) the proprietor was estopped by his or her conduct from objecting to his or her registration;

(b) he or she had some independent right to the land that entitled him or her to be registered as proprietor; or

(c) he or she had entered into adverse possession under a mistaken belief, reasonably held, as to his or her rights.

(2) If the adverse possessor established (a) or (b), the court would order that the claim for possession should be dismissed and that he or she should be registered as proprietor of the land. If (c) were established, the court would dismiss the claim unless circumstances made it inequitable or otherwise inappropriate to do so, and would order that the adverse possessor be registered as proprietor. Such an order would be on such terms (if any), whether as to payment or otherwise, as were equitable between the parties having regard to all the circumstances, as explained above, at paragraph 10.66(7).

(3) Where the registered proprietor failed either to enforce the judgment or to commence new proceedings for possession within two years of it being given, he or she would thereafter be unable to recover the land from the adverse possessor, who would be entitled to be registered as proprietor of the land. Unless and until that happened, the registered proprietor would remain as such, and could deal with the land, but subject both to any overriding interest (if any) as the adverse possessor might have, and to that person's rights to bring a claim in damages for trespass.

10.68 **The scheme which we propose above would not apply—**

(1) in a case of adverse possession against a short lease which was an overriding interest (which would be subject to the same principles as if it were unregistered land); or

(2) to an adverse possessor who could show that he or she had barred the rights of a registered proprietor before any legislation implementing that scheme was brought into force.

10.69 **We seek the views of readers on this scheme, and in particular whether—**

(1) they agree with it in principle, or would prefer to retain the existing law on adverse possession even though it is founded on principles that were devised for a possession-based rather than a registration-based system of title; and

(2) if they agree with it in principle, whether they have comments on all or any details of the scheme.

The machinery for giving effect to adverse possession where title to land is registered

10.70 Whether readers accept our provisional recommendations for a new scheme for adverse possession in relation to registered land, or would prefer to retain one system for both registered and unregistered land, it is necessary to have in place a mechanism for applying whatever may be the relevant principles to registered land. We have explained above that we regard the present mechanism of the trust as unsatisfactory because of the many uncertainties and anomalies which it creates.[187] As we have indicated, we are unable to understand why it is necessary to have such a trust. The scheme which we provisionally recommend should ensure that the effect of adverse possession - when it applies - will be very much the same in registered land, as it is where title is unregistered. This scheme could apply whether or not our other proposals on adverse possession outlined above[188] were accepted or rejected.

10.71 The elements of the scheme would be as follows.

(1) An adverse possessor would have an overriding interest, either—

(a) if the recommendations made in paragraph 5.55 are accepted by readers, where he or she was in actual occupation of the land;[189] or, if it were not,

(b) as at present, in all cases of adverse possession.[190]

(2) Where the squatter satisfied the registrar (or the court) that he or she was entitled to be registered as proprietor of the land,[191] he or she would be registered with a new freehold title. This would be so whether adverse possession had been taken against a freeholder, a leaseholder or a beneficiary in possession under a trust. Whether that title should be absolute, possessory or a qualified freehold would depend upon the title against which adverse possession had been taken. That point is explained below.[192]

(3) It would be explicitly recognised that there could be more than one registered freehold title in registered land, just as there can be more than one legal fee simple where title is unregistered.

(4) It would remain the case that an adverse possessor who was registered as proprietor would take subject to estates, rights and interests that had not been barred by adverse possession.

It is necessary to explain in more detail how the scheme would work in relation to different estates.

[187] See para 10.40.

[188] See paras 5.42 - 5.55; and 10.65 - 10.69.

[189] That is, under the equivalent of what is now Land Registration Act 1925, s 70(1)(*g*); above, para 5.56.

[190] That is, under the equivalent of what is now Land Registration Act 1925, s 70(1)(*f*); above, para 5.42.

[191] Whether under the scheme which we have proposed above, or if that is not accepted, after the rights of the registered proprietor had been barred by adverse possession in accordance with the present law.

[192] See paras 10.72 and following.

Adverse possession against a registered freeholder

10.72 Where a squatter was entitled to be registered as proprietor in place of a person who had been registered with a freehold title, we would anticipate that he or she would normally be registered with a possessory title, though the registrar would, as now, have a discretion to register him or her with an absolute (or very occasionally) a qualified title. The existing freehold title would be closed.

Adverse possession against a registered leaseholder

10.73 Where a squatter was entitled to be registered as proprietor in place of a proprietor who was registered with a leasehold title (whether good leasehold or absolute), he or she would normally be registered with a qualified freehold title. The qualification to which registration would be made expressly subject would be all superior leasehold and freehold estates, whether those were registered or not.[193] Where a reversioner was already registered with a freehold title, that title would remain unaffected by the creation of the new qualified freehold title and would not be closed, as is presently the case. The leaseholder's title would, however, be closed. The effects of such closure would depend upon whether readers accepted the new scheme of adverse possession that we have proposed above.[194] It would be important in the situation where the squatter is registered with a freehold title and the former registered proprietor of the lease then purports to surrender the lease.

10.74 If the new scheme of adverse possession were to apply, then once the squatter had been registered as proprietor, the leaseholder would be unable to surrender the lease to his or her landlord. This is because his or her title would have been closed and the leases *as an estate* would therefore have been extinguished for all purposes.[195] The result would replicate the result of the decision in *Spectrum Investment Co v Holmes*,[196] though not its reasoning.[197] By contrast, if the substantive principles of adverse possession were retained, and only the new machinery under discussion were introduced, the registration of the squatter with a freehold title would *not* extinguish the lease. It would remain in existence, albeit unregistered. The former leasehold proprietor could therefore surrender it. The outcome would therefore be exactly the same as it is at present where title is unregistered.[198] The decision in *Spectrum Investment Co v Holmes*[199] would be reversed.

10.75 What would be the effect of the introduction of the new machinery which we propose if the leaseholder surrendered the lease *before* the adverse possessor applied to be registered as freehold proprietor? Once again, it is necessary to explain what the position would be if the new scheme of adverse possession which we propose were accepted by readers, and contrast it with the situation if the substantive law on adverse

[193] For the significance of this, see above, para 10.42.

[194] See paras 10.65 - 10.69.

[195] See above, para 10.49.

[196] [1981] 1 WLR 221; above, para 10.35.

[197] In *Spectrum*, the former leaseholder could not surrender the lease because the *lease* had been vested in the squatter, and only the squatter could, therefore, deal with it: see [1981] 1 WLR 221, 228.

[198] See *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, above, para 10.25.

[199] Above.

possession were left unchanged. As it happens, as the law stands, the answer would be the same in each case.

10.76 If the new scheme were to be accepted, the leaseholder would still have a valid lease which he or she could surrender. The title to that lease would not have been closed and the lease itself would not therefore have been extinguished. If, however, readers prefer to leave the substantive law of adverse possession unchanged, the position would be the same as it is at present where title is *unregistered*. As the law stands, the ousted tenant would be able to surrender the lease, even though his or her title had been extinguished by adverse possession.[200] In each case therefore, the reversioner's interest would fall into possession, and he or she could at once commence possession proceedings against the squatter.

Successive interests

10.77 We have explained that certain special rules exist where land is held in trust for successive interests and adverse possession is taken against the person entitled in possession.[201] Although the squatter may bar the life tenant's interest, he or she will not extinguish the rights of the remainderman for at least six years after the termination of the life tenant's interest. To accommodate such cases within the machinery which we propose, where a squatter applied to be registered as proprietor of land which was registered—

(1) in the names of two or more persons and which might therefore be held on a trust of land for successive interests; or

(2) in the name of a single proprietor but where a restriction had been entered in a form which indicates that the land is settled;[202]

on satisfying the registrar as to his or her right, he or she should be registered with a qualified title,[203] unless he or she could demonstrate to the registrar that the land was not held for successive interests. The qualification would be for the rights of any persons who might be entitled in remainder.

[200] See *Fairweather v St Marylebone Property Co Ltd*, above, para 10.25.

[201] See above, para 10.25.

[202] See Land Registration Act 1925, s 86(3); Land Registration Rules 1925, rr 58, 171.

[203] For the significance of this, see above, para 10.42.

The machinery for giving effect to adverse possession: summary of recommendations

10.78 **We provisionally recommend that—**

(1) the trust should no longer be used as a means of giving effect to the rights of an adverse possessor who has barred the estate of the registered proprietor;

(2) where an adverse possessor is entitled to be registered as proprietor, he or she should be registered with an absolute, possessory or qualified title;

(3) where the title barred is that of a tenant under a lease or a life tenant under a settlement or trust of land—

(a) the adverse possessor should normally be registered with a qualified freehold title;

(b) the qualification should be that he or she takes subject to the estate or interest of any person or persons entitled on the termination of the lease or the life interest; and

(4) where the title barred is that of a tenant under a lease, the freehold (or other) title of any person entitled to the reversion on that or any superior lease should not be closed or otherwise affected by the registration of the adverse possessor with a freehold title.

We ask whether readers agree with us.

PRESCRIPTION

Introduction

10.79 As we have indicated, in relation to easements and profits *à prendre*, acquisition through long user is based upon *prescription* - an assumption that the user had a lawful origin - rather than adverse possession, which accepts that a person may acquire title by a wrongful possession. The "lawful" character of prescription is reflected in the requirement that user must be of right and, in particular, that it must not be forcible, secret or permissive.[204] Whereas adverse possession extinguishes the former owner's title leaving the squatter with title by default,[205] prescription operates to create a wholly new right in favour of the claimant.[206] Prescription can only be asserted "by or on behalf of a fee simple owner against a fee simple owner".[207]

10.80 English law indulges in the extraordinary luxury of having not just one, but three, distinct methods of acquiring easements and profits *à prendre* by prescription. Those three methods are—

[204] "An enjoyment must neither be *vi*, *precario* nor *clam*, it must be open": *Solomon v Mystery of Vintners* (1859) 4 H & N 585, 602; 157 ER 970, 977; *per* Bramwell B.

[205] Because no other person has a better right to possess the land.

[206] See Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 875.

[207] *Simmons v Dobson* [1991] 1 WLR 720, 723, *per* Fox LJ.

(1) prescription at common law;

(2) prescription under the Prescription Act 1832; and

(3) prescription under the doctrine of lost modern grant.

Prescription other than under the Act of 1832 rests on a succession of fictions.[208] Like any body of law which is based upon fictions, the principles which govern prescription are neither logical nor rational. Once reality is disregarded for some purposes, its retention in relation to other issues is necessarily arbitrary.

Prescription at common law

10.81 At common law a right will be presumed to have a lawful origin only if user has been from time immemorial,[209] which in law, means from 1189.[210] In practice, the rigour of this rule has long been softened by a rebuttable presumption of immemorial user from 20 years' user as of right. There is no requirement that the person claiming the easement should be exercising it at the time when it is called in issue. Although usually pleaded, a claim to prescription at common law is vulnerable. For example, it will be rebutted if it can be shown that "at some time since 1189 the right could not or did not exist",[211] or that there had been unity of both ownership and occupation of the dominant and servient tenements at some time since 1189.[212] In practice, claimants will normally base a prescriptive claim upon the doctrine of lost modern grant, explained below,[213] if they cannot rely upon the Prescription Act 1832. Although it has been said that the claim to prescription at common law "adds nothing to the claim of presumed lost grant", and that "they stand or fall together",[214] this is not strictly correct. As we explain below, a claim based on lost modern grant cannot be challenged because it can be shown that the right did not exist at some date after 1189.[215]

Prescription under the Prescription Act 1832

10.82 For the purposes of this Report, it is unnecessary to comment in any detail on the

[208] As Cockburn CJ explained in his celebrated account of the development of the law in *Bryant v Foot* (1867) LR 2 QB 161, 181, "as parliament failed to intervene to amend the law, the judges set their ingenuity to work, by fictions and presumptions, to atone for the supineness of the legislature...".

[209] See Sir Thomas Littelton's *Tenures*, § 170, "from time whereof the memory of men runneth not to the contrary" (quoted from the edition of E Wambaugh (1903), p 82).

[210] For accounts of the law on common law prescription, see Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) pp 875 - 876; J Gaunt & P Morgan, *Gale on Easements* (16th ed 1996) paras 4-03 - 4-05.

[211] Sir Robert Megarry & Sir William Wade, *The Law of Real Property*, above, at p 876.

[212] *Ibid*. Unity of ownership without unity of possession will not, it seems, suffice: see J Gaunt & P Morgan, *Gale on Easements*, above, para 4-05.

[213] See para 10.84.

[214] *Mills v Silver* [1991] Ch 271, 278, *per* Dillon LJ.

[215] See para 10.84.

Prescription Act 1832.[216] The manner in which the Act operates can be exemplified by the provisions on rights of way or to any watercourse. If a person can show that he or she has enjoyed a right of way as of right and without interruption[217] for *20 years*, his or her claim to an easement cannot be defeated by proof that user of the right did not commence until after 1189. However, it can be defeated in any other way, such as proof that the owner of the servient tenement lacked the capacity to grant such an easement.[218] If the claimant can prove user of the right and without interruption for *40 years*, the right "shall be deemed absolute and indefeasible", and can be defeated only by proof that the right was enjoyed by written consent.[219] It is therefore immaterial that (for example) there was no capable grantor during that period. There are similar provisions for profits *à prendre*, where the corresponding periods of user are 30 and 60 years respectively,[220] and special provisions dealing with rights of light.[221]

10.83 There is a striking feature about the Act. The fact that a person has exercised the right without interruption for the period laid down by the statute does not of itself confer on him or her any title to it.[222] A person who seeks to avail themselves of the Act must—

(1) be a party to some proceedings in which the right is called into issue;[223] and

(2) show that he or she has enjoyed the right for the requisite statutory period prior to those proceedings.[224]

What is important about this is that a claim brought under the Prescription Act 1832 will not lie if the right has at any time ceased to be used in the relevant period prior to the bringing of such action.[225] It has been said of the prescription of a right of way or watercourse under the Act[226] that—

[216] For accounts of the Act, see Sir Robert Megarry & Sir William Wade, *The Law of Real Property*, above, pp 878 - 889; J Gaunt & P Morgan, *Gale on Easements*, above, paras 4-17 and following. In its 14th Report, The Acquisition of Easements and Profits by Prescription (1966) Cmnd 3100, para 40, the Law Reform Committee commented that "[t]he Prescription Act 1832 has no friends. It has long been criticised as one of the worst drafted Acts on the Statute Book".

[217] For these purposes, "interruption" has a highly technical meaning, which it is unnecessary to consider in any detail here: see Prescription Act 1832, s 4. Interruption of the right for a year (but not for less than a year) is fatal to a claim under the Act. For accounts of the law, see Sir Robert Megarry & Sir William Wade, *The Law of Real Property*, above, at p 880; and J Gaunt & P Morgan, *Gale on Easements*, above, paras 4-32 - 4-34.

[218] Prescription Act 1832, s 2.

[219] *Ibid*.

[220] *Ibid*, s 1.

[221] *Ibid*, s 3: a mere 20 years' enjoyment of light gives an absolute and indefeasible right.

[222] "There is what has been described as an inchoate right": *Colls v Home and Colonial Stores* [1904] AC 179, 190, *per* Lord Macnaghten. See above, paras 3.37, 3.38.

[223] For these purposes, a hearing before the registrar under Land Registration Rules 1925, r 298, is treated as a suit or action, and rights acquired under the Prescription Act 1832 can therefore be established in such a hearing. It is intended to clarify this point in any legislation.

[224] This is the result of the words "the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question" in the Prescription Act 1832, s 4.

[225] This is subject to the technical doctrine of "interruption": see above, para 10.82.

[226] That is, under s 2.

> no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory period (whether acts of user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended.[227]

It follows that the servient owner ought always to be aware of conduct amounting to prescription of such a right under the Act.

Prescription by lost modern grant

10.84 The doctrine of lost modern grant was developed "because of the unsatisfactory nature of common law prescription",[228] and in particular, to prevent any challenge to the claim on the basis that the right must have come into existence after 1189. Although the doctrine was finally established by the House of Lords in *Dalton v Henry Angus & Co*,[229] because of the differing views that were expressed during the passage of that case, its precise basis was, and to some extent remains, unclear. The doctrine was clarified by the Court of Appeal in *Tehidy Minerals Ltd v Norman*,[230] in which the Court stated that—

> where there has been upwards of 20 years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason such as incapacity on the part of the person or persons who might at some time before the commencement of the 20-year period have made a grant, the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made.[231]

The Court went on to hold that the legal fiction applied to profits *à prendre* in the same way as it did to easements and that it could no more be rebutted by circumstantial evidence that no grant was made than it could by express evidence.

10.85 There are several striking features about the doctrine. First, the presumption of lost modern grant cannot be rebutted by proof that no grant was made, however improbable such a grant might have been. However, it can be rebutted by showing that any grant was impossible because the presumed grantor lacked capacity, or because it would have contravened a statute.[232] There are, in other words, limits to the fiction. The court will not, for example, "presume a lost Act of Parliament".[233] However, as

[227] *Hollins v Verney* (1884) 13 QBD 304, 315, *per* Lindley LJ (giving the judgment of the Court of Appeal).

[228] *Simmons v Dobson* [1991] 1 WLR 720, 723, *per* Fox LJ.

[229] (1881) 6 App Cas 740.

[230] [1971] 2 QB 528.

[231] *Ibid*, at p 552, *per* Buckley LJ giving the judgment of the Court.

[232] See *Neaverson v Peterborough Rural District Council* [1902] 1 Ch 557; *Hanning v Top Deck Travel Group Ltd* (1993) 68 P & CR 14.

[233] *Neaverson v Peterborough Rural District Council*, above, at p 574, *per* Collins MR.

these limits are not defined by any obvious logic, they cannot be defined with any certainty.

10.86 Secondly, one of the main reasons why claimants have recourse to the doctrine (rather than proceeding under the Prescription Act 1832) is because they cannot show that the right has not been in uninterrupted use in the 20 years prior to the proceedings in which it was in issue.[234] This may result in a purchaser of land discovering that he or she is bound by an easement or profit *à prendre*, already prescribed, that has not been used for many years and the existence of which is not apparent from an inspection of the land. While he or she may have a claim in damages against the vendor of the land on the implied covenants for title,[235] this may be an inadequate substitute for the land free of the incumbrance. We have explained in Part V of this Report that although an easement can be established by 20 years' user, the mere non-user of the right for a period of 20 years thereafter will not raise any presumption that the easement has been abandoned.[236]

Why the present law needs to be changed to accommodate reform of the land registration system

10.87 We doubt whether any informed person would suggest that the present law on prescription - or indeed on easements and profits *à prendre* more generally - is satisfactory.[237] A full review of the law necessarily lies outside the scope of the present Report. However, we consider that it is necessary (or at least highly desirable) to make some modifications to the law on prescription as it applies to registered land to accommodate the changes that will result from the introduction of electronic conveyancing. We would emphasise that our proposals can be no more than interim measures until the reform of the law of easements and profits *à prendre* can be considered more fully.

10.88 We have already provisionally recommended that—

(1) the status of easements and profits *à prendre* acquired or in the process of acquisition by prescription as overriding interests should be made explicit;[238]

(2) easements which are expressly created should not be capable of existing as overriding interests;

[234] See, eg *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528; *Mills v Silver* [1991] Ch 271.

[235] Assuming that full title guarantee is given: see Law of Property (Miscellaneous Provisions) Act 1994, s 3(1). Even if s 3(1) is applicable, the vendor may not be liable if he or she did not know of the right and could not reasonably have done so: *ibid*. If an easement or profit has not be asserted for many years, this could be the case.

[236] See above, para 5.21. We have provisionally recommended that there should be a presumption of abandonment as regards an easement or profit *à prendre* which is an overriding interest and which cannot be shown to have been exercised for 20 years: see above, para 5.22.

[237] The Law Reform Committee, in its 14th Report, The Acquisition of Easements and Profits by Prescription (1966) Cmnd 3100, recommended that it should cease to be possible to acquire easements and profits *à prendre* by prescription. In the alternative, it proposed a new system for the acquisition of easements by prescription which would have eliminated many of the unsatisfactory features of the present law. The recommendations were not implemented.

[238] See above, paras 5.17, 5.24.

(3) in the short term, easements which were expressly created would have to be registered, and would otherwise take effect as minor interests which would not bind a purchaser taking under a registered disposition of the land burdened; and

(4) in the longer term, it would be impossible to create easements expressly except by registering them.[239]

The further recommendations that we make are intended both to complement these proposals and to be consistent with the provisional recommendations that we have made in relation to adverse possession.

10.89 The principal concerns that underlie our proposals are as follows—

(1) If registration is to be an integral part of the creation of easements and profits *à prendre*, we cannot see how the doctrine of lost modern grant could continue to apply. Nor do we think that it should. The concept of "a lost modern registration" is one that we cannot contemplate with equanimity. Indeed its existence would undermine one of the principal objectives of this Report, which is to ensure the registration of rights that are expressly created. While we think that the courts would almost certainly reach such a conclusion, we consider that the point should be put beyond doubt.

(2) Purchasers may find themselves bound by rights which they could not have discovered by reasonable enquiries and inspections. This is because, as we have explained above,[240] it is possible to claim an easement or profit *à prendre* on the basis of prescription at common law or by lost modern grant even though the right is not being exercised at the time of the claim and has not been for many years.

Proposals for reform

10.90 We consider that the most logical way to deal with these concerns is as follows—

(1) Any rights acquired by common law prescription must necessarily have been acquired already. They should therefore be dealt with as vested rights in the manner proposed below.[241] However, although no new claim could be brought on the basis of common law prescription, this would be without prejudice to any claim brought under the Prescription Act 1832. It is necessary to make that saving. As a matter of form, the Act of 1832 could be regarded as removing possible objections to a claim based upon common law prescription, rather than as creating a free-standing statutory form of prescription.

(2) Subject to a saving for vested rights, it should cease to be possible for the future to acquire any rights by lost modern grant over registered land. Although the introduction of a system under which rights have to be registered to create them is still some way off, we consider that this exercise presents an

[239] See above, paras 5.14, 5.24.

[240] See paras 10.81 and 10.86.

[241] See para 10.93.

appropriate opportunity to disapply the doctrine to registered land, and obviates the need for primary legislation at some later date.

10.91 It follows that the only way in which an easement or profit *à prendre* could be acquired by prescription over registered land after any legislation was brought into force would be under the Prescription Act 1832. Although this Act has numerous unsatisfactory features, rights acquired or in course of acquisition under this Act are more readily discoverable by any intending purchaser of the land burdened by them. First, the servient owner should normally be aware of the exercise of the right (and should therefore disclose it to any purchaser unless it is obvious on a reasonable inspection of the land). Secondly, subject to the comparatively limited doctrine of interruption,[242] the right claimed must be asserted up to the time that it is in issue in court proceedings or in a hearing before the registrar.[243] Rights that were at one time exercised but have ceased to be for more than a year will not ground a claim under the Act. We would stress that this provisional recommendation is in no sense an endorsement of the Prescription Act 1832. It can only provide a stop-gap until the law of prescription can be reviewed as a whole.

10.92 The approach which we provisionally recommend is therefore similar in effect (though not precisely analogous) to that which we have proposed in relation to adverse possession. Under our provisional proposals on adverse possession, even where a squatter had extinguished the rights of the registered proprietor, his or her rights would not be binding on a purchaser unless he or she was in actual occupation of the land in question.[244] A person claiming an easement or profit *à prendre* by prescription would be unable to assert that right unless he or she were exercising it up to the time of the claim, subject only to the limited doctrine of interruption. In most (if not all) cases, an intending purchaser would be aware of the right, either because it would be apparent on a reasonable inspection of the land, or because the vendor would have disclosed the existence of the right.[245] A failure to disclose the right might entitle the purchaser to terminate the contract prior to completion on the grounds of a substantial non-disclosure,[246] or after completion, by an action for damages on the covenants for title.[247]

10.93 Where a prescriptive right had already been acquired by common law prescription or lost modern grant at the time when any legislation is brought into force, it would be unaffected by our provisional recommendations. The onus of proving that the right had

[242] See above, para 10.82.

[243] For hearings before the registrar, see above, para 10.83. It should be noted that public rights of way follow a similar model to that of the Prescription Act 1832. Under the Highways Act 1980, s 31, there is a presumption that a right of way has been dedicated to the public as a highway if it has been used without interruption for 20 years. That period of 20 years "is to be calculated retrospectively from the date when the right of the public to use the way is brought into question...": *ibid*, s 31(2).

[244] See above, paras 5.49 and following.

[245] A vendor is obliged to disclose a latent defect in title, which can include an easement: see *Yandle & Sons v Sutton* [1922] 2 Ch 199.

[246] *Ibid*. If the disclosure were not substantial, then subject to the terms of any conditions of sale, the purchaser might be entitled to some abatement of the price: see, eg *Shepherd v Croft* [1911] 1 Ch 521.

[247] See above, para 10.86.

been acquired by that date would rest on the claimant. This proposal is, however, subject to the qualification that we have already provisionally recommended in Part V of this Report, namely, that in relation to an easement or profit *à prendre* that took effect as an overriding interest, there should be a rebuttable presumption of abandonment, if the party asserting the easement or profit could not demonstrate that he or she had exercised the right within the previous 20 years.[248] This reflects one of our main concerns about prescription at common law and under the doctrine of lost modern grant. The usual reason why a claimant relies upon them is because he or she has not been exercising the right for an uninterrupted period prior to the matter coming before a court. They may therefore be undiscoverable by any purchaser of the land. The practical effect of our provisional recommendations taken together would be that few (if any) claims based upon lost modern grant or common law prescription would be asserted within 20 years of the legislation coming into force.

10.94 **We therefore provisionally recommend that—**

(1) after the coming into force of any legislation, it should not be possible to claim an easement or profit *à prendre* by prescription except under the provisions of the Prescription Act 1832;

(2) without prejudice to such a claim, it would cease to be possible to assert or claim an easement or profit *à prendre* on the basis of common law prescription or lost modern grant; but

(3) these proposals would be without prejudice to any easement or profit *à prendre* that could be shown by the claimant to have been acquired by common law prescription or lost modern grant prior to the coming into force of the legislation.

We ask whether readers agree.

SUMMARY AND KEY ISSUES

10.95 In this Part we consider both the law of adverse possession of land and the principles which govern the prescription of easements and profits *à prendre* as these apply to registered land.

[248] See above, para 5.22.

Adverse Possession

The application of principles of adverse possession to registered land

10.96 We begin by examining the nature of adverse possession and the justifications given for it. The four most important justifications for adverse possession are—

(1) it protects defendants from stale claims and encourages plaintiffs not to sleep on their rights;

(2) it prevents land ownership and the reality of possession becoming wholly divorced;

(3) in cases of mistake, it can prevent hardship; and

(4) it means that there can be a short root of title for dealings in *unregistered* land (where title is relative and depends ultimately upon possession), which facilitates and cheapens the investigation of title to such land.

The fourth reason is the primary justification for adverse possession. However, it can normally have no application to registered land.

10.97 Our provisional conclusion is that the principles of adverse possession have an essential role to play in relation to unregistered land, principally because they facilitate conveyancing. However, we consider that their unqualified application to registered land cannot be justified. We state that where title is registered, the basis of title is primarily the fact of registration rather than possession. Registration confers title because the registration of a person as proprietor of land of itself vests in him or her the relevant legal estate (whether freehold or leasehold). The main weakness of the present law is that the principles which determine whether a registered proprietor will lose his or her title by adverse possession were developed for a possession-based system of title and not one founded on registration.

10.98 We consider whether there are any circumstances which are so compelling that it should be possible for the fact of registration to be overridden by possession. Having regard to the reasons which justify adverse possession that we have explained above, we conclude that there are just four—

(1) where the registered proprietor has disappeared and cannot be traced;

(2) where there have been dealings "off the register";

(3) in some cases where the register is not conclusive (such as in relation to boundaries and short leases which take effect as overriding interests); and

(4) where entry into possession has come about under a reasonable mistake as to rights.

10.99 We therefore provisionally recommend that—

(1) the law of adverse possession as it applies to registered land should be recast to reflect the principles of title registration; and

(2) its application should be restricted to those cases where it is essential to ensure the marketability of land or to prevent unfairness.

A new scheme of adverse possession

10.100 We then make detailed proposals for a new scheme of adverse possession. We provisionally recommend that—

(1) adverse possession should no longer, of itself, bar the title of a registered proprietor;

(2) only the closure of that proprietor's title on the register would have that effect, and it would do so for all purposes; and

(3) the principles of adverse possession applicable to registered land should be as set out in the following paragraphs.

10.101 First, there should be a new system to enable an adverse possessor to seek registration as proprietor, and it should operate as follows—

(1) Where a person had been in adverse possession of land with a registered title for more than 10 years, he or she would be entitled to apply to be registered as proprietor of that land.

(2) On receipt of that application, the Registry would be required to serve a notice on the registered proprietor, any proprietor of a registered charge affecting the title in question, and any person who, from any entry on the register, appears to have a right to possession of the land, informing each of them of the application for registration.

(3) If the registered proprietor, chargee or person entitled to possession failed to object within two months of service of the notice, the registrar would register the adverse possessor as registered proprietor and would close the title of the existing proprietor.

(4) If the registered proprietor or chargee objected to the registration, the application would be dismissed unless the adverse possessor could show that—

(a) the proprietor was estopped by his or her conduct from objecting to his or her registration;

(b) he or she had some independent right to the land that entitled him or her to be registered as proprietor; or

(c) he or she had entered into adverse possession under a mistaken belief, reasonably held, as to his or her rights.

(5) If the adverse possessor raised any of these matters, the issue would be resolved by the registrar, unless he referred it to the court at any time prior to his making a final adjudication. There would be a right of appeal from his decision.

(6) If the adverse possessor established that he or she had entered under a

mistaken belief as to his or her rights (above, (4)(c)), the court or registrar would order that the adverse possessor be registered as proprietor of the land unless in the circumstances it was inequitable or otherwise inappropriate to do so. Where the court or registrar ordered such registration, it would be on such terms if any, whether as to payment or otherwise, as were equitable between the parties having regard to all the circumstances. In particular, the squatter could be required to grant the former registered proprietor an easement over his or her land, or to enter into a positive or restrictive covenant for his or her benefit.

(7) Where the adverse possessor's application to be registered was rejected and he or she subsequently remained in adverse possession for two years from the date of that rejection, he or she could re-apply to be registered as proprietor of the land.

(8) On such re-application, the registrar would, on being satisfied of the facts set out in (7), register the adverse possessor as proprietor of the land and close the title of the registered proprietor. The registered proprietor would remain as such unless and until such an application were made. He or she could therefore deal with the land, but subject to any overriding interest (if any) as the adverse possessor might have, and subject to the rights of the squatter to bring a claim in damages for trespass.

10.102 Secondly, corresponding provision should be made for the situation where a registered proprietor sought possession in legal proceedings against the adverse possessor.

(1) Where a registered proprietor brought proceedings for possession against a person who had been in adverse possession of the proprietor's land for more than 10 years, the proprietor would be entitled to recover the land unless the adverse possessor could show that—

(a) the proprietor was estopped by his or her conduct from objecting to his or her registration;

(b) he or she had some independent right to the land that entitled him or her to be registered as proprietor; or

(c) he or she had entered into adverse possession under a mistaken belief, reasonably held, as to his or her rights.

(2) If the adverse possessor established (a) or (b), the court would order that the claim for possession should be dismissed and that he or she should be registered as proprietor of the land. If (c) were established, the court would dismiss the claim unless circumstances made it inequitable or otherwise inappropriate to do so, and would order that the adverse possessor be registered as proprietor. Such an order would be on such terms if any, whether as to payment or otherwise, as were equitable between the parties having regard to all the circumstances, as explained above.

(3) Where the registered proprietor failed either to enforce the judgment or to commence new proceedings for possession within two years of its being given, he or she would thereafter be unable to recover the land from the adverse

possessor, who would be entitled to be registered as proprietor of the land. Unless and until that happened, the registered proprietor would remain as such, and could deal with the land, but subject both to any overriding interest (if any) as the adverse possessor might have, and to the rights of the squatter to bring a claim in damages for trespass.

10.103 The scheme which we propose above would not apply—

(1) in a case of adverse possession against a short lease which was an overriding interest (which would be subject to the same principles as if it were unregistered land); or

(2) to an adverse possessor who could show that he or she had barred the rights of a registered proprietor before any legislation implementing that scheme was brought into force.

10.104 We seek the views of readers both on this scheme as a whole and its details. It is a free-standing scheme, and even if it were rejected on consultation, it would not affect other recommendations that we make in this Report, including other recommendations that we make in relation to adverse possession.

10.105 The scheme that we propose would not apply to leases that are overriding interests, which would be subject to the relevant rules applicable to unregistered land.

The machinery for giving effect to adverse possession where title to land is registered

10.106 We explain that we regard the present mechanism of the trust as unsatisfactory because of the many uncertainties and anomalies which it creates, and that we are unable to understand why it is necessary to employ a trust. The scheme which we provisionally recommend is intended to ensure that the effect of adverse possession (when it applies) will be very much the same in registered land, as it is where title is unregistered. This scheme could apply whether or not our other proposals on adverse possession outlined at paragraph 10.100 above were accepted or rejected.

10.107 Our provisional recommendations are that—

(1) the trust should no longer be used as a means of giving effect to the rights of an adverse possessor who has barred the estate of the registered proprietor;

(2) where an adverse possessor is entitled to be registered as proprietor, he or she should be registered with an absolute, possessory or qualified title;

(3) where the title barred is that of a tenant under a lease or a life tenant under a settlement or trust of land—

(a) the adverse possessor should normally be registered with a qualified freehold title;

(b) the qualification should be that he or she takes subject to the estate or interest of any person or persons entitled on the termination of the lease or the life interest; and

(4) where the title barred is that of a tenant under a lease, the freehold (or other) title of any person entitled to the reversion on that or any superior lease should not be closed or otherwise affected by the registration of the adverse possessor with a freehold title.

Prescription

10.108 We consider the acquisition of easements and profits *à prendre* in registered land by prescription. Unlike adverse possession prescription is based upon an assumption of lawful user. We consider the three different methods of prescription that exist in English law—

(1) prescription at common law;

(2) prescription under the Prescription Act 1832; and

(3) prescription under the doctrine of lost modern grant.

10.109 The principal concerns that underlie our provisional proposals for reform are as follows—

(1) If registration is to be an integral part of the creation of easements and profits *à prendre*, we cannot see how the doctrine of lost modern grant could continue to apply. To do so would involve inventing a concept of "a lost modern registration". Any such concept would undermine a primary objective of this Report: to ensure the registration of rights that are expressly created.

(2) There is a danger that purchasers may find themselves bound by a right which they could not have discovered by reasonable enquiries and inspections. This is because an easement or profit *à prendre* may be claimed on the basis of prescription at common law or by lost modern grant even though the right is not being exercised at the time of the claim and has not been for many years.

10.110 We consider that the most logical way to deal with these concerns is as follows—

(1) Any rights acquired by common law prescription must necessarily have been acquired already and should be dealt with as such.[249] However, although no new claim could be brought on the basis of common law prescription, this would be without prejudice to any claim brought under the Prescription Act 1832.

(2) Subject to a saving for vested rights, it should cease to be possible for the future to acquire any rights by lost modern grant over registered land.

10.111 We therefore provisionally recommend that—

(1) after the coming into force of any legislation, it should not be possible to claim an easement or profit *à prendre* by prescription except under the provisions of the Prescription Act 1832;

[249] See below, para 10.111(3).

(2) without prejudice to such a claim, it would cease to be possible to assert or claim an easement or profit *à prendre* on the basis of common law prescription or lost modern grant; but

(3) these proposals would be without prejudice to any easement or profit *à prendre* that could be shown by the claimant to have been acquired by common law prescription or lost modern grant prior to the coming into force of the legislation.

10.112 Once again, we seek the views of readers on the proposed scheme and its details. Our proposals on prescription, like our provisional recommendations on adverse possession, are free-standing. If readers were to reject them, it would not affect other proposals in the Report.

PART XI
CONVEYANCING ISSUES

INTRODUCTION

11.1 In this Part we consider two matters—

(1) the manner in which registered land may be transferred and rights and interests may be created over such land; and

(2) the obligations of a vendor in deducing title when making a disposition of registered land.

In relation to each we make provisional recommendations which reflect the fundamental changes that either have taken place or are likely to do so over the next decade or so. It is not going too far to say that they presage a revolution in conveyancing that is unprecedented. Although many of the developments that we foresee lie some way into the future, it is important to have the necessary legislative framework in place to allow them to occur.

THE CREATION AND TRANSFER OF ESTATES, RIGHTS AND INTERESTS IN OR OVER REGISTERED LAND

Introduction: the move to electronic conveyancing

11.2 As we have explained,[1] what has become the single most important reason for the reform of the land registration system is the move towards a system of electronic conveyancing.[2] We begin by explaining the present system and its defects. In the light of this, we indicate what we regard as the eventual objective that any system of electronic conveyancing should seek to bring about, and the reasons for adopting that particular goal. We then explain briefly the progress that has been made towards its attainment to date. Finally, we set out what legislative changes will be needed to provide the necessary framework for its eventual achievement. We note that many jurisdictions now have computerised systems of land registration, and that some, notably Ontario,[3] have already introduced electronic transfer of land. Indeed, we regard the electronic transfer of land as an inevitability. We note that an electronic system for trading securities on the London and Dublin stock exchanges - CREST - has already been successfully introduced.[4] There are also other electronic systems for trading securities such as gilt-edged securities.[5]

[1] See above, paras 1.2, 2.47.

[2] We use this phrase to include what, in another Act of Parliament, is described as "a telecommunication system or any other information technology... used for effecting transactions": see Carriage of Goods by Sea Act 1992, s 1(5).

[3] See Land Registration Reform Act, RSO 1990, c L4. For a valuable summary of the present position in Ontario, see Ian Burdon, *Automated Registration of Title to Land* (1998) pp 69 - 79. We are indebted to Mr Burdon and to the Registers of Scotland Executive Agency for a copy of this book, which provides an excellent overview of current developments.

[4] It was introduced in 1996.

[5] See the valuable account of these systems in Joanna Benjamin, *The Law of Global Custody* (1996).

A brief summary of the present system

11.3 At present, where there is a transfer of registered land, the following steps have to be taken.

(1) A transfer document must be made in the form prescribed in the Land Registration Rules 1925 and executed by the transferor as a deed.[6]

(2) That transfer is lodged with the appropriate district land registry.[7] On receipt, the application for registration is allocated a reference number and dated on the day on which, under the Land Registration Rules 1925, it is deemed to have been delivered.[8]

(3) The application is then processed by the Registry and the appropriate entries made on the register.[9] When registration has been completed,[10] the transfer will be treated as having been registered on the day on which it was deemed to have been delivered.[11]

The pattern for the registration of registered dispositions and for the protection on the register of minor interests is similar. In each case it involves the execution of a document in the prescribed form, its lodgement with the appropriate district land registry, and its subsequent entry on the register.

11.4 There are several striking characteristics of the present system.

(1) There is a period of time between the transfer or other disposition and its eventual registration. This so-called "registration gap" necessarily weakens the protection which title registration can offer and gives rise to a number of difficulties that we explain below.[12] In particular, it is necessary to make provision for the protection of dispositions by means of an official search. This confers priority on the applicant over any applications for any entry on the register that may be made during the period of protection (which is 30 days).[13]

(2) Pending its registration, a disposition takes effect in equity as a minor interest. As such, it may be defeated by a registered disposition for valuable consideration, unless protected by an official search with priority.[14] There is at present no requirement that a disposition of or the creation of an interest in

6 See Land Registration Rules 1925, rr 98, 115 and 116 and the forms prescribed in them.

7 Cf Land Registration Act 1925, s 132(1).

8 See rr 83, 85. The Rules make provision for determining the priority of two or more applications which are deemed to have been delivered at the same time: see r 84.

9 85% of registered titles are now computerised and so, in the vast majority of cases, the entries will be made on the computer.

10 In the year 1996 - 1997, the average processing time for such applications was 13 working days: HM Land Registry, Annual Report and Accounts 1996 - 1997, p 6.

11 Land Registration Rules 1925, rr 83(3), 85.

12 See para 11.5.

13 For details, see Ruoff & Roper, *Registered Conveyancing*, Chapter 30; Land Registration (Official Searches) Rules 1993.

14 Land Registration Act 1925, s 101; Land Registration (Official Searches) Rules, r 6.

registered land must be registered,[15] though given the vulnerability of an unregistered interest or right, it is plainly desirable that it should be.[16]

(3) A right which has been expressly created and which is capable of registration but not registered, may be protected as an overriding interest if the person having the benefit of it is in actual occupation of the land.[17]

The defects in the present system

The "registration gap"

11.5 The fact that there is a period of time between the execution of a transfer or other disposition and its subsequent registration gives rise to a number of difficulties. We have mentioned one of these above, namely that it is necessary to have in place a system of official searches which offer priority protection.[18] It is in practice not uncommon for applications to register a disposition to be made long after the period of protection has passed, thereby placing the transferee at risk. In any event, the official search procedure applies only to a *purchaser*, who is defined as "any person (including a lessee or chargee) who in good faith and for valuable consideration acquires or intends to acquire a legal estate in land".[19] There is no equivalent protection available, at least at present, for those who are intending to acquire some lesser interest in the property, such as an equitable chargee or the grantee of an option.[20]

11.6 Official searches which offer priority protection will of course still be needed even if a system is introduced under which property is transferred or rights are created by electronic means so that there is no "registration gap". However, the existence of that gap has given rise to other difficulties which include the following—

(1) it has led to uncertainty as to the date at which an overriding interest must exist if it is to bind a purchaser,[21] though this particular problem has now been resolved;[22] and

(2) because the legal title does not pass until the transferee of a legal estate has been registered,[23] the transferor (and not the transferee) has the rights that go

[15] Cf *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd* (1996) 75 P & CR 223, 228, where, perhaps due to an oversight, Mummery LJ suggested that there was a *duty* - and one that fell upon the *transferor* - to secure the registration of the transfer of an estate.

[16] Ruoff & Roper, *Registered Conveyancing*, 17-45. Compare the position where there is a disposition of unregistered land which is required to be registered (because it falls within the compulsory triggers) but is not: see Land Registration Act 1925, ss 123, 123A (as substituted).

[17] Land Registration Act 1925, s 70(1)(*g*); see above, paras 5.56, 5.62.

[18] See para 11.4.

[19] Land Registration (Official Searches) Rules 1993, r 2(1).

[20] This may, however, change: see above, para 7.28.

[21] See above, para 5.112.

[22] See *Abbey National Building Society v Cann* [1991] 1 AC 56.

[23] The transfer may be effective in equity: see *Mascall v Mascall* (1984) 50 P & CR 119; *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd* (1996) 75 P & CR 223, 230.

with the legal estate, such as the right to exercise a break clause in a lease,[24] or (presumably) to enforce any positive covenant.[25]

Duplication of effort and the risk of error

11.7 Under the present system, the information that is contained in the transfer document or other application has to be entered on the register at the district land registry to which it has been sent. This involves not only a wasteful (and costly) duplication of effort, but also necessarily increases the risk of error. There are obvious and very considerable advantages in terms of cost, speed and accuracy in eliminating the execution of a transfer (or other document) and proceeding directly to the registration of the transaction.

The proposed system

11.8 The transition to a system of paperless transfer of land is a very major one[26] and it must be emphasised that it will not be completed for quite some time. Not only will the appropriate technology have to be developed, but there will have to be significant operational changes both in the Registry and amongst those who are authorised to conduct conveyancing.[27] There is, and will continue to be, co-ordination between the Registry and those bodies which are working on the development of electronic documents and commerce.

11.9 As any system is likely to be introduced in stages, we regard it as essential that the eventual goal that we wish to achieve should be clear from the outset. Only in this way can developments be properly directed. That eventual goal is to eliminate so far as possible the present three-stage process by which a document is executed, lodged with the Registry and then registered. The only way to achieve this is to provide that the transaction should be executed electronically by registration. Thus any transfer would be completed by registering it, and any right that it was intended to create over registered land would not be created until it was registered. This is only possible with an electronic system. These elements require further explanation. Although we are clear as to the system that we wish to achieve in the long term, our comments as to *how* it might work must necessarily be both speculative and tentative. It is impossible to foresee with complete accuracy how the proposed scheme will operate when it has been finalised because we cannot predict how information technology will develop over the next decade or so. What follows is merely a provisional view of how any system of electronic conveyancing *might* work. It is likely that details will change as the system evolves.

[24] See *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd*, above. We consider this point more fully, below, para 11.26, 11.66. Where a lease granted after 1995 is assigned, even an equitable assignment will pass the benefit and burden of the covenants, because the Landlord and Tenant Covenants Act 1995 defines "assignment" to include an equitable assignment: see: ss 3(1), 28(1).

[25] It appears that a positive covenant made with the owner of a legal estate can only be enforced by a person having a legal estate in that land, whether as successor in title to the covenantee, or by reason of some derivative title, such as a lease: see Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 766.

[26] See Ian Burdon, *Automated Registration of Title to Land* (1998) Chapter 6.

[27] It will also be necessary for changes to be made to the law governing stamp duty to ensure that duty can be levied effectively on paperless transactions.

11.10 Subject to what is said below, the transactions which we envisage would be required to be effected electronically by registration would be—

(1) the transfer of registered estates;

(2) all registered dispositions;

(3) the creation of any registered charge;

(4) the express creation of any right which was entered as a notice on the charges register.[28]

In relation to any of the above, there would, of course, normally be a document. In time that document would no doubt be generated in electronic form. Only parts of it would be entered on the register. For example, an estate contract might incorporate a number of special and general conditions of sale and other terms. The only entry on the register would be a notice protecting the estate contract on the charges register. What is important is that there would be no binding contract until the agreement was entered on the register. In time, it might well prove to be possible to ensure that both the exchange of the parts of the contract and its registration were effected electronically and would be simultaneous. Clearly it will be necessary to provide detailed guidance on certain specific types of transaction, such as where there is a disposition of part of a registered title and the consequent creation of a new title. These would be addressed as part of any scheme.

11.11 We anticipate that there would be certain special cases, and in particular the following[29]—

(1) *Court orders.* When a court ordered that a right over land should be created or that land be transferred from one person to another, that would not be effective until registered, and it would be necessary to take steps to have it registered. This is the position under the present law.

(2) *Persons who conduct their own conveyancing.* In many cases, dispositions of registered land would be conducted by those who were authorised by the Registry to do so.[30] These would, no doubt, be solicitors and licensed conveyancers,[31] and financial institutions acting on their own behalf. However, we are concerned that it should remain possible for persons to conduct their own conveyancing without having to employ an authorised conveyancer. Such persons would be able to do so, by lodging documents for registration with a district land registry. However, because the transfer or right would not take effect until it had been registered, they would not therefore be able to enjoy the full benefit that electronic conveyancing would offer.

11.12 The following would *not* be subject to the requirement of registration explained

[28] This is on the presupposition that readers support our provisional recommendation that cautions should be abolished: see above, para 6.54. If they do not, this matter will have to be revisited.

[29] This may not be an exhaustive list.

[30] See below, para 11.15.

[31] Cf Solicitors Act 1974, s 22 (as amended); Courts and Legal Services Act 1990, s 36.

above,[32] but would have the same effect as they do at present—

(1) *Rights that can arise without any express grant or reservation.* This would include an equity arising by proprietary estoppel,[33] a right to be registered as proprietor as a result of adverse possession,[34] an easement arising by prescription or by implied grant or reservation,[35] or a mere equity (such as a right to set aside a transfer on grounds of fraudulent misrepresentation). Such rights would take effect either in equity as minor interests[36] or as overriding interests (if they fell within one of the categories of such interests). As and when such rights were established, it would of course be both possible and desirable to protect them by an appropriate entry on the register.

(2) *Dispositions taking effect by operation of law.* Those dispositions that take effect by operation of law, such as the vesting of—

(a) a deceased's property in his or her executors or in the Public Trustee;[37] or

(b) an insolvent's property in his or her trustee in bankruptcy;[38]

would continue to do so. The executor, Public Trustee or trustee in bankruptcy would be able to apply to be registered as proprietor of the land in question.

(3) *Interests under trusts.* Although it is at present possible to protect interests under trusts by means of a caution, under our provisional recommendations this would cease to be the case.[39] The appropriate form of protection - whether to ensure overreaching, stipulate for some consent to any disposition by the trustees, or to indicate some limitation on their powers - would be a restriction. However, a trust of land could be created, as now, without any entry on the register. This is, of course, consistent with the policy of the Land Registration Act 1925 that references to trusts should so far as possible be excluded from the register.[40]

(4) *Leases which were overriding interests.* By definition, those short leases which take effect as overriding interests and cannot be registered[41] would be outside the registration requirements outlined above. The creation of such leases, their assignment, and the creation of any rights in or over them would, as now, be

[32] Once again, this list can only be tentative.

[33] See above, para 3.33.

[34] See above, paras 10.66(7), (8); 10.67(3).

[35] See above, paras 5.16, 5.17 and 10.79.

[36] Which, as now, would be liable to be defeated by a registered disposition for valuable consideration.

[37] See Ruoff & Roper, *Registered Conveyancing*, 27-01.

[38] See *ibid*, 28-20.

[39] See above, para 6.54.

[40] See s 74.

[41] See Land Registration Act 1925, s 70(1)(*k*); above, paras 3.7, 5.87.

conducted in the same way as if title were unregistered.

11.13 The scheme which we have tentatively outlined above is concerned with the substantive registration of proprietary rights. There are, of course, at present other forms of entry on the proprietorship register - restrictions, inhibitions and cautions - which serve another function, namely to restrict in whole or part either the powers of the registered proprietor to deal with his or her land, or the manner in which such powers may be exercised. Under the proposals which we make in Part VI of this Report, the only form of such entry would in future be a restriction.[42] We envisage that it would be possible for such entries to be made electronically under any system of electronic transfer. However, there may be certain types of restriction which it would only be possible to lodge with the Registry's approval, such as one which had the effect of freezing the register.[43]

What will be the likely benefits of the system proposed?

11.14 When the system which we propose is eventually in operation it should offer a number of advantages, including the following—

(1) it should make conveyancing transactions both quicker and substantially cheaper for buyers and sellers, and should reduce the risks of error;

(2) it should eliminate the problems caused by the registration gap;[44]

(3) it should mean that the priority of most minor interests will be apparent from the register;[45]

(4) as a paperless system, it should (for example) obviate the need for substantial and costly storage facilities on the part of large lending institutions and other bodies.

Are there possible drawbacks?

11.15 There are three obvious concerns about moving to a paperless electronic system of conveyancing of this kind. The Registry regards the satisfactory resolution of them as an essential pre-requisite to the introduction of any such system.

(1) *Security*. It will be necessary to ensure that the only institutions, firms or persons who would be able to input material on to the register are those which have met the criteria that have been laid down by the Registry. It is not possible at this juncture to state what those criteria will be, but they would be likely to include requirements that any such body or person had in place appropriate safeguards to prevent fraud, to verify information from clients, to control access to the register and to ensure compliance with the Registry's training requirements. At another level, it will be necessary to have safeguards to

[42] See paras 6.55 and following.

[43] Cf above, para 6.57.

[44] See above, para 11.5.

[45] See above, para 7.29.

prevent unauthorised access to the system from outside.[46] There are already a number of ways in which this can be achieved, and HM Land Registry will select the method that is the most appropriate for its operational requirements.

(2) *Ensuring accuracy*. The accuracy of data input by institutions, solicitors and persons other than the Registry will be extremely important if the full benefits of electronic conveyancing are to be realised. Once again, it is not at this stage possible to give a precise answer to how this accuracy will be achieved. However, it is likely that the Registry will, as will others, make provision for computer-based training (including regular up-dating and refresher training). The Registry will wish to explore the creation of expert systems and is likely to make available its information database[47] as part of such packages.

(3) *Provision for technology failures*. The third concern is that the system would be "technology dependent". The system will depend on multiple computer links, in particular the computers which provide the financial settlement systems and the Registry's own computer systems. Clearly the network will have to be robust and will need to incorporate fault-tolerant computer systems and data links to ensure that complete failure is avoided. The Registry's own experience is that its systems are robust and have sufficient back-up to ensure that it could participate in an electronic conveyancing process without problems.

11.16 In additional to these three issues, there is another matter that may be of concern. There is a danger that persons will attempt to create rights in or over property without registering them. Whereas rights and interests can at present be created off the register, in relation to the matters that are outlined in paragraph 11.10 above, this would cease to be the case. Such "transactions" would be ineffective unless registered. We do not consider that this will in practice be a major cause of difficulty or injustice for the following reasons—

(1) Significant formal requirements already exist for the creation of rights in or over land. A deed[48] or a written contract[49] will normally be required. It will therefore be uncommon for such transactions to be conducted without legal advice, except by those who attempt to carry out their own conveyancing. We therefore consider that it is unlikely that the substitution of the requirement of registration for the requirement of a deed or a written contract will lead to any great increase in invalid transactions.

(2) Where such invalid transactions do occur, the grantee or transferee will commonly have other rights. A person who acts to his or her detriment on the

[46] Modern encryption techniques make it possible for the recipient of the information to be sure both as to the identity of the sender and that it has not been tampered with. The proposed European Parliament and Council Directive on a Common Framework for Electronic Signatures, COM(1998)297 final, 13.05.98, will not, when it is implemented, affect any system that the Land Registry may create, because it is inapplicable to closed systems: see Explanatory Memorandum, para 4.

[47] The database holds information, eg, about standard mortgage documentation, major users of land registration services, large-scale transactions, relevant legislation, and delegated authorities to officers and others by large corporate owners.

[48] See Law of Property Act 1925, s 52.

[49] See Law of Property (Miscellaneous Provisions) Act 1989, s 2.

basis of a representation that he or she has acquired a proprietary right will generally have an equity by estoppel, which can be vindicated.[50] Furthermore, under the proposals which we have made in Part X of this Report, if such a person was in adverse possession of the property in issue for a period of 10 years, he or she would normally be able to secure his or her registration as owner.[51]

(3) The introduction of electronic conveyancing is still some way off, and the Registry will endeavour to raise public awareness of the need to register transactions in advance of its coming.[52] There is also likely to be a transitional period in which both the present paper-based and the new electronic systems will operate side by side.

What has happened to date?

11.17 The Land Registry has taken three main steps so far towards the electronic transfer of land. First, almost all titles are now computerised. Secondly, it is now possible for an intending purchaser to make an official search of the register with priority by direct access from a remote terminal to the Registry's computer system.[53] The number of users of the direct access service is steadily increasing and is presently in excess of 800. Thirdly, the Registry has just commenced a trial with a lending institution of a system of electronic requests for the discharge of registered charges.[54] This trial has the support of The Law Society and the Council of Mortgage Lenders and it is expected that the lessons learned from it will assist the development of systems applicable to other types of registered dispositions.

[50] See above, para 3.33. Rights arising by estoppel would necessarily be outside the proposed registration requirements: see above, para 11.12.

[51] See above, paras 10.50 - 10.57, 10.66(4).

[52] HM Land Registry already publishes a number of explanatory leaflets for users and these are available on the Internet. It is anticipated that the range of such materials will be extended when electronic conveyancing is introduced. The Registry also has an extensively used telephone inquiry service.

[53] See the Direction of the Chief Land Registrar of 12 May 1997, Direct Access Office Copy Service, Ruoff & Roper, *Registered Conveyancing*, Appendix, F-12; made under Land Registration (Open Register) Rules 1991, r 13.

[54] The Stroud & Swindon Building Society. The trial began on 1 September 1998.

What legislation will be required to enable electronic conveyancing to be introduced?

The form of the legislation

11.18 There is already on the statute book a legislative model for the institution of a form of electronic trading. To enable the introduction of a computer-based system of electronic transfer and trades in securities, the Companies Act 1989 gave power to the Secretary of State to "make provision by regulations for establishing title to securities to be evidenced and transferred without a written instrument".[55] The Act laid down a framework for those regulations[56] and provided (for example) that such regulations might "modify or exclude any provision of any enactment or instrument, or any rule of law".[57] Although these provisions were intended for a system of trading that was eventually abandoned in 1993,[58] they provided the foundation for the CREST system that was introduced in 1996.[59]

11.19 Much of the detail of how land registration is conducted is dealt with by rules, and the technique is therefore long familiar to conveyancers in this field. The advantage of proceeding by rule is that it gives the Registry the flexibility necessary to introduce electronic conveyancing by stages (and after proper public consultation). There could also be changes to the rules from time to time as and when it was necessary. However, as we have explained,[60] rules made under the Land Registration Act 1925 merely have to be laid before Parliament. We consider that it would be more appropriate that any rules introducing electronic conveyancing should be subject to a higher degree of Parliamentary scrutiny, and that any statutory instrument making such rules should be subject to annulment in pursuance of a resolution of either House of Parliament.[61]

11.20 **We provisionally recommend that—**

(1) the Lord Chancellor should have power to make rules from time to time to enable title to registered land to be transferred and rights over registered land to be created without a written instrument; and

(2) any such rules should be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

We ask whether readers agree.

[55] See s 207(1). Cf Carriage of Goods by Sea Act 1992, s 1(5).

[56] Which were required to be made under the affirmative resolution procedure: see Companies Act 1989, s 207(9). Cf Carriage of Goods by Sea Act 1992, s 1(6) (regulations made by the Secretary of State making that Act applicable to cases where a telecommunication system or any other information technology is used for effecting certain transactions take the form of a statutory instrument that is subject to annulment). The use of affirmative resolution procedure is unusual: see J A G Griffth and M A J Wheeler-Booth, *Parliament: Functions, Practice and Procedures* (1989) pp 245, 246.

[57] *Ibid*, s 207(7)(*a*).

[58] Known as "TAURUS".

[59] See Uncertificated Securities Regulations 1995, SI 1995 No 3272.

[60] See above, para 3.12.

[61] On this "negative procedure", see J A G Griffth and M A J Wheeler-Booth, *Parliament: Functions, Practice and Procedures* (1989) pp 245, 246.

Other specific issues

FORMAL REQUIREMENTS

11.21 One of the essential features of the system of electronic conveyancing which is proposed is that it is, of course, paperless. This means that property rights will be created without deeds or writing and that the existing formal requirements of a deed for conveyances of land[62] or signed writing for contracts for the sale or other disposition of an interest in land[63] will be superseded. There are two consequences of this. First, it will be necessary to disapply the formal requirements for the transfer and creation of estates, rights and interests in land.[64] Secondly, there are many references in the property legislation which refer to a transaction that has been made by deed.[65] It will be necessary to apply those provisions to transactions effected by registration. We have already made some specific recommendations in this regard in relation to mortgages of registered land.[66] However, it will be necessary to have a more general power which will enable these provisions to be disapplied. We consider that it would once again be appropriate to follow the model that was adopted in the Companies Act 1989 in relation to the introduction of electronic trading in shares.[67] That Act conferred power on the Secretary of State, in making regulations for the introduction of paperless trading in securities, "to modify or exclude any provision of any enactment or instrument or any rule of law".[68]

11.22 There are good reasons why the introduction of the powers proposed in the previous paragraph should not be postponed until the introduction of electronic conveyancing, but should be effective from the date of any new legislation. Any system of paperless conveyancing will necessarily have to be conducted according to a specified format, with electronic documents made to a standard form. Indeed the Registry has already embarked on the process by introducing more modern forms that can be computer generated. Paperless conveyancing will be the final outcome of a period of evolution in conveyancing practice, the last of a series of steps. We consider that it would be undesirable for this process of evolution to be impeded by existing formal requirements that will be increasingly inappropriate.

11.23 **We provisionally recommend that—**

(1) the Lord Chancellor should have power to make rules to modify or exclude any provision of any enactment or instrument or any rule of law to the extent that is necessary to facilitate conveyancing transactions in regard to land with registered title; and

(2) the power should be exercisable by statutory instrument subject to annulment by resolution of either House of Parliament.

[62] Law of Property Act 1925, s 52.

[63] Law of Property (Miscellaneous Provisions) Act 1989, s 2.

[64] Cf the Ontario Land Registration Reform Act, RSO 1990, c L4, s 21, which is to this effect.

[65] We have compiled a list of such provisions.

[66] See above, para 9.7.

[67] See above, para 11.18.

[68] Companies Act 1989, s 207(7)(*a*); above, para 11.18.

We ask whether readers agree.

TRANSITIONAL ARRANGEMENTS

11.24 We have already indicated that, under the Land Registration Act 1925, rights and interests can be validly created and transferred "off the register", but are normally vulnerable because they can be defeated by a registered disposition for valuable consideration.[69] Until paperless conveyancing becomes the only means of dealing with registered land, it will be necessary to retain the present position by which the transactions set out in paragraph 11.10 above, can be validly effected in equity and take effect as minor interests even though they have not been registered. Even after paperless conveyancing becomes mandatory, as we have already indicated, it will remain possible to create certain rights off the register.[70] We consider that one of the rules that the Lord Chancellor would have power to make in order to introduce paperless conveyancing, should be one that specifies which transactions can only be effected by registration.

11.25 **We provisionally recommend that—**

(1) the existing power by which interests in registered land may be created or transferred "off the register" and then take effect as minor interests should be retained; but

(2) under the provisional recommendation in paragraph 11.20 above, the Lord Chancellor should have power to override (1) and to specify that certain transactions could be effected only by registration.

We ask whether readers agree.

A specific problem: the assignment of leases

11.26 There is one final and very specific matter concerning the transfer of registered land where we consider there may be a case for reform. In *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd*,[71] a tenant under a 25-year lease, of which it was the registered proprietor, had a personal and non-assignable right to terminate the lease at the end of the seventh year. Clause 8.4 of the lease provided that the break clause should "cease to have effect upon the assignment of the lease by the lessee". The lease was assigned with the landlord's consent and all rent demands were thereafter made to and paid by the assignee. The assignment was not, however, registered. Some nine months later, the assignor purported to exercise the break clause. The landlord disputed the validity of the exercise. The Court of Appeal, reversing the trial judge,[72] held that the lease had been validly terminated. The issue was whether the lease had been assigned within the meaning of clause 8.4 of the lease. In the view of the court,

[69] See s 101; above, para 11.4(2). Such rights will be secure if they are protected by actual occupation as overriding interests: see above para 11.4(3).

[70] See above, para 11.12.

[71] (1996) 75 P & CR 223.

[72] See [1996] Ch 51; Judge Paul Baker QC, sitting as a High Court judge.

whatever might have been the position between the assignor and the assignee,[73] as between the assignor and the landlord, there had been no "assignment" for these purposes. Clause 8.4 required that there should be an assignment of the *legal* estate.[74] Until the assignee was registered, the legal estate did not pass.

11.27 The decision highlights the problems of the "registration gap" that we have explained earlier.[75] It has been much criticised[76] and its consequences could be considerable. We are aware that it has caused some disquiet within the property industry and, that in certain quarters at least, it may have created a negative image of title registration. Although in leases granted after 1995, the benefit and burden of covenants will pass on an assignment of a lease even if it has not been registered,[77] this is not the case as regards leases granted prior to that date. In such cases, although the right to enforce the landlord's covenants will pass to the assignee, the burden of the tenant's covenants will remain with the assignor.[78] Furthermore, as the *Brown & Root* case itself demonstrates, the assignor may retain the power to determine the lease even *after* executing a transfer of the lease to the assignee, unless he or she is estopped from doing so.[79]

11.28 Although these difficulties will largely disappear when paperless conveyancing is introduced, they will remain in relation to assignments that take effect by operation of law and which will, therefore, be outside the registration requirements.[80] In any event, as we have indicated, paperless conveyancing will not be introduced for some time. There are a number of possible solutions to the problem, both direct and indirect. It would, for example, be possible to provide that, as regards the rights and liabilities of the parties whose position would be affected by any assignment of a lease, namely the assignor, assignee, landlord, any guarantors, and any persons with derivative interests under the lease, the assignment should be effective from the date of the transfer.[81] The drawback with this solution is that it might encourage parties not to register the

[73] An unregistered transfer of a lease will operate in equity, and the assignor will hold the lease on a bare trust for the assignee: see Land Registration Act 1925, s 101(2), (3).

[74] The court relied upon *Gentle v Faulkner* [1900] 2 QB 267, where the Court of Appeal held that a covenant against assignment or subletting without the landlord's consent was not broken by a declaration of trust of the lease for a third party who was to administer the assets of the (insolvent) tenant for the benefit of his creditors. In the course of his judgment, Romer LJ commented that "a covenant in a lease against assigning the demised premises, in the absence of any context showing that the covenant is to have an extended meaning, covers only a legal assignment": *ibid*, at p 276. Those remarks were obiter.

[75] See above, para 11.5.

[76] See, eg Legal Notes, "Defining Assignment" [1997] 19 EG 151; Paul Clark, "The *Brown & Root* Assignment, or who's your tenant?" (1997) 141 SJ 498; "The Right to Serve Notices" (1997) 17 PLB 57.

[77] The benefit and burden of covenants passes on an equitable assignment of such a lease: see Landlord and Tenant (Covenants) Act 1995, ss 3(1), 28(1). This view has not convinced all commentators, and some have seen considerable difficulties under the 1995 Act: see, eg Paul Clark, "The *Brown & Root* Assignment, or who's your tenant?" (1997) 141 SJ 498, 499.

[78] See Sir Robert Megarry & Sir William Wade, *The Law of Real Property* (5th ed 1984) p 748.

[79] Such an estoppel will be raised if the assignee has acted to his or her detriment in reliance upon the assignment. There was no such detriment in *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd*: see (1996) 75 P & CR 223, 230.

[80] See above, para 11.12.

[81] Or, where the transfer was executed in escrow, the date upon which the conditions were fulfilled.

assignment.[82] A more indirect approach might be to provide that, if any transfer of a registered estate were not completed by registration within (say) two months of its effective date, the Registry would charge a higher fee for its registration. This (it might be hoped) would encourage the prompt registration of all transfers.[83]

11.29 We have decided to make no provisional recommendations on this issue, but to ask readers what they regard as the most satisfactory solution. **We seek the views of readers as to which one or more of the following options they would prefer—**

(1) leave the law unchanged, so that where a registered lease is assigned, it should operate merely as an equitable assignment of the lease pending its registration;

(2) provide that on an assignment of a registered lease, as between the persons whose rights and liabilities are affected by that assignment, it should take effect as if it were a legal assignment even though it has not been registered (thereby replicating the position where title to a lease is unregistered);

(3) provide that where a transfer of any registered estate is not completed by registration within (say) two months, the Registry should charge an additional fee for its registration; or

(4) some other option (please specify).

THE OBLIGATIONS OF A VENDOR IN DEDUCING TITLE WHEN MAKING A DISPOSITION OF REGISTERED LAND

Introduction

11.30 A landowner who is minded to sell his or her land is under three quite distinct obligations in relation to the purchaser as regards the title to that land—

(1) to disclose latent defects in title prior to contracting;

(2) to convey to the buyer on completion a title that is in accordance with the contract; and

(3) to prove that title.

The second and third of these obligations are often elided, and are not always easy to distinguish in practice.[84] The seller is said to be under an obligation "to make title" to

[82] However, given that an equitable assignment of a lease made after 1995 is effective to transmit the benefit and burden of covenants (see above, para 11.27), any concern about this point may be something of a lost cause.

[83] Compare the position on first registration where a disposition that is subject to the requirement of compulsory registration becomes void after two months: see land Registration Act 1925, s 123A (inserted by Land Registration Act 1997, s 1).

[84] But they are clearly distinct obligations: see *Barclays Bank Plc v Weeks Legg & Dean (a firm)* [1998] 3 All ER 213, 221.

the land.[85]

11.31 We consider each of these obligations in turn, and make certain recommendations for reform in relation to the third of them.[86] These proposals are primarily intended to reflect the fact that the register of title is now open (which was not the case when the legislation was drafted).

The obligation to disclose latent defects in title prior to contracting

11.32 A seller must disclose to the buyer prior to the contract any latent irremovable defects in his or her title of which the buyer is unaware.[87] A latent defect is one which is not patent, and a patent defect is one which is obvious[88] - "a defect which arises either to the eye, or by necessary implication from something which is visible to the eye".[89] A defect will not be patent just because the buyer might have discovered it by inquiry. The courts have long rejected any equation between the patency of a defect in title and the fact that the buyer might have constructive notice of it.[90] Liability to disclose latent defects is apparently strict and is not confined to defects known to the seller,[91] though a seller can exclude his or her liability for defects in title but only if they are ones of which he or she neither knows nor ought to have known.[92] The precise nature of the seller's obligation to disclose irremovable latent defects in title prior to contracting has never been definitively settled. However, it is probably best regarded as an open contract obligation that the property is either free of such defects, or that they have been disclosed.[93] If a seller fails to make such disclosure, the buyer may terminate the contract.[94]

11.33 This obligation to disclose latent defects in title applies as much to registered land as it does to unregistered. There is no intrinsic reason why it should not. In practice, a purchaser will normally see an office copy of the register of the seller's title prior to the exchange of contracts, and this will amount to disclosure of any irremovable

[85] The matter was perhaps best summarised by Selden J in the New York Court of Appeals in *Burwell v Jackson* 9 NY 535, 543 (1854). After reviewing the English authorities, he commented that "in England, there is, in every executory contract for the sale of lands, whatever may be the language in which the agreement is couched, an implied undertaking to make a good title, unless such an obligation is expressly excluded by the terms of the agreement".

[86] We anticipate that any legislation will make it clear that certain rules applicable to the deduction of title to unregistered land have no application where title is registered: see below, para 11.34.

[87] See *Peyman v Lanjani* [1985] Ch 457, 496, 497. For discussion of the nature of this duty, see Charles Harpum, "Selling without Title: a Vendor's Duty of Disclosure?" (1992) 108 LQR 280.

[88] *Ashburner v Sewell* [1891] 3 Ch 405, 408.

[89] *Yandle & Sons v Sutton* [1922] 2 Ch 199, 210, *per* Sargant J.

[90] *Ibid*. The leading case is *Caballero v Henty* (1874) LR 9 Ch App 447.

[91] See, eg *Becker v Partridge* [1966] 2 QB 155, 171, 172.

[92] *Ibid*; *Rignall Developments Ltd v Halil* [1988] Ch 190. For a discussion of the authorities, see Charles Harpum, "Exclusion Clauses and Contracts for the Sale of Land" [1992] CLJ 263, 298 and following. There is an interesting parallel with the obligations of a seller under the covenants for title implied by a full title guarantee: see Law of Property (Miscellaneous Provisions) Act 1994, s 3 (a provision that was cast in its present form as a result of an amendment in the course of the Bill's passage through Parliament).

[93] Cf Charles Harpum, "Selling without Title: a Vendor's Duty of Disclosure?" (1992) 108 LQR 280, 332. On the nature of open contract obligations, see *ibid*, at p 282.

[94] See *Peyman v Lanjani* [1985] Ch 457, 496, 497.

incumbrances (such as easements or restrictive covenants) which are entered on the register. Where the registered estate is a lease, a copy of the lease itself will also invariably be produced for inspection by the intending assignee prior to any contract.[95] Where the property is subject to any overriding interests, they must be disclosed unless the buyer already knows of them or they are patent. The rights of any occupiers are *not* considered to be patent.[96] We can see no reason to change the rules which govern a seller's obligations of pre-contractual disclosure as they apply to registered land, and we therefore make no recommendations for reform.

The obligation to convey to the buyer on completion a title that is in accordance with the contract

11.34 A seller of land is under an obligation, arising from the contract of sale itself, to convey the land to the buyer with the title that he or she contracted to show. Unlike the seller's obligation to disclose latent defects in title *prior to contracting*, the obligation to convey the land in accordance with the contract arises only *on completion*. The effect of this obligation is that the buyer will take the land subject to—

(1) any irremovable defects in title[97] which were either—

(a) patent; or

(b) latent, but were known to the buyer at the time of the contract (whether from the seller or otherwise);[98] and

(2) any defects in title to which the contract was made expressly subject.[99]

We see no grounds for changing this fundamental and well known obligation and we therefore make no recommendations for reform.[100]

A seller's obligation to prove that he or she has a title that accords with the contract

Section 110 of the Land Registration Act 1925

INTRODUCTION

[95] Such production satisfies the seller's obligation to disclose all those covenants in the lease that are not "usual covenants" (and which are therefore latent defects in title): see eg, *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666, 668, 669.

[96] See *Caballero v Henty* (1874) LR 9 Ch App 447.

[97] An irremovable defect in title is one which the seller has no right to remove (such as restrictive covenant), though he or she may in fact be able to secure its removal.

[98] The buyer will not take subject to such rights if the seller expressly contracted to sell the land free from them: see, eg *McGrory v Alderdale Estate Co* [1918] AC 503, 508.

[99] Generally worded conditions of sale to the effect (for example) that "the buyer takes subject to all easements", will not avail the seller in respect of incumbrances of which he or she either knew or ought to have known: see above, para 11.32.

[100] It is anticipated that, in the legislation, there will be clarification of the extent to which Law of Property Act 1925, s. 45 applies to registered land. This section implies a series of statutory conditions of sale, most (but not all) of which are inappropriate to land with registered title. We do not intend to change what we understand the law to be, but merely to clarify it.

11.35 The common law set great store on the seller's obligation to *prove* that his or her title was in accordance with the terms of the contract. Given the considerable difficulties that existed in relation to making title until comparatively recently,[101] this is easy to understand.[102] This thinking was carried through to the Land Registration Act 1925. Section 110 of that Act contains elaborate provisions defining the seller's obligations in this regard.[103] These provisions require detailed consideration. The section applies "[o]n a sale or other disposition of registered land to a purchaser *other than a lessee or chargee*".[104] They will therefore apply to the sale of a registered freehold estate, or the *assignment* of a registered lease, but not to the *grant* of a lease,[105] or the creation of a charge. As Morritt LJ recently explained, the first four subsections of section 110 deal with "the obligation of the vendor concerning the documents of title he must, initially, produce".[106]

PROOF OF REGISTERED TITLE

11.36 Section 110(1)[107] provides that—

> The vendor shall notwithstanding any stipulation to the contrary, at his own expense furnish the purchaser..., if required, with a copy of the subsisting entries in the register and of any filed plans and copies or abstracts of any documents or any part thereof noted on the register so far as they respectively affect the land to be dealt with (except charges or incumbrances registered or protected on the register which are to be discharged or overridden at or prior to completion)...

This provision is subject to two provisos of which the first is material.[108] The costs of the copies and abstracts mentioned in the subsection are, in the absence of any stipulation to the contrary, to be met by the buyer, "unless the purchase money exceeds one thousand pounds". That figure has never been uplifted, so that the seller will in practice always be obliged to meet the costs unless the contract otherwise provides.

11.37 Section 110(1) lays down a mandatory requirement, and one which the parties cannot,

[101] The simplification of title has been the direct result of the reforms of property law in the 1925 property legislation.

[102] In transactions of any great value, it was not uncommon for the matter to be resolved by proceedings for specific performance. Such proceedings were not hostile, but were intended to enable the title to be tested in an inquiry before a Master in Chancery: see Charles Harpum, "Selling without Title: a Vendor's Duty of Disclosure?" (1992) 108 LQR 280, 292 and following.

[103] For a consideration of Land Registration Act 1925, s 110, see M P Thompson, *Barnsley's Conveyancing Law and Practice* (4th ed 1996) pp 335 and following.

[104] Emphasis added.

[105] To the extent that section 110 does not override it, the provisions of Law of Property Act 1925, s 44 will apply. The section, which can be ousted or varied by an expression of contrary intention (see s 44(11)), lays down what title an intending lessee or underlessee may require in the absence of other provision: see s 44(2) - (5).

[106] *Urban Manor Ltd v Sadiq* [1997] 1 WLR 1016, 1022.

[107] As amended by Land Registration Act 1988.

[108] The second provides that a buyer has no right to a copy or abstract of a settlement filed at the Registry. Cf Land Registration Act 1925, s 88.

by agreement, vary or modify. The only element of flexibility which the subsection permits - and this is more apparent than real - is that the buyer may decide not to *require* the production of the matters set out in the subsection.[109] In practice, the requirements of the section are invariably applied in conveyancing transactions, and a buyer *will* require the seller to meet the requirements of the subsection.[110] It is also most unlikely that a buyer would be content with anything other than *office copies* from the Registry itself, even though the subsection provides merely for *copies*.[111] It may even be that a buyer has a *right* to office copies.[112]

11.38 Section 110(2) deals with the proof of title on matters upon which the register is not conclusive. It provides that—

> [t]he vendor shall, subject to any stipulation to the contrary, at his own expense furnish the purchaser with such copies, abstracts and evidence (if any) in respect of any subsisting rights and interests appurtenant to the registered land as to which the register is not conclusive, and of any matters excepted from the effect of registration as the purchaser would have been entitled to if the land had not been registered.

This subsection enables the buyer to require evidence on what might be described as both the "credit" and "debit" side of the title on which the register is not conclusive. On the "credit side" this will encompass the benefit of appurtenant rights (such as easements) which are not recorded in the proprietorship register of the title.[113] On the "debit" side it will include such matters as any overriding interests to which the property is subject, or where the property is registered with some title less than an absolute one (such as a qualified title), with matters excluded from the effect of registration.[114] In practice, a seller should disclose to the buyer, prior to contracting, any overriding interests which are not patent.[115] He or she may well lack evidence of the origins of any such interest, as for example, where the right is a public right of way,

[109] This has been described as "a puzzling limitation", because "it is difficult to imagine a situation where a purchaser will be happy to contract, let alone complete, without wanting to see copies of [subsisting entries on the register and documents noted on the register]": M P Thompson, *Barnsley's Conveyancing Law and Practice* (4th ed 1996) p 335.

[110] Thus, Standard Conditions of Sale (3rd ed 1995), c 4.2.1 provides that "[t]he evidence of registered title is office copies of items required to be furnished by section 110(1) of the Land Registration Act 1925 and the copies, abstracts and evidence referred to in section 110(2)". Section 110(2) is explained in the next paragraph.

[111] See *Wood v Berkeley Homes (Sussex) Ltd* (1992) 64 P & CR 311, 317, where the reasons for this are explained in detail. Cf Land Registration Act 1925, s 113 (making office copies evidence in all actions to the same extent as the originals would have been).

[112] See *Wood v Berkeley Homes (Sussex) Ltd*, above, at p 321, where Sir Christopher Slade thought that the point was "at least arguable".

[113] Where the Registrar is not satisfied as to an appurtenant right that was claimed by a registered proprietor, he will enter notice of that claim: see Ruoff & Roper, *Registered Conveyancing*, 17-05.

[114] At present, matters which are excluded from the effect of registration take effect as overriding interests: see Land Registration Act 1925, s 70(1)(*h*); above, para 5.78. We have provisionally recommended the abolition of such overriding status, because it is unnecessary: see above, para 5.79.

[115] See above, paras 11.32, 11.33. Any overriding interests that were in existence and disclosed at the time of first registration will have been entered on the register in any event, and will not fall within this provision. It is only those that were not then recorded or which have since arisen that will be in issue. Cf Ruoff & Roper, *Registered Conveyancing*, 17-06, 17-07.

or an easement acquired by prescription. As regards matters which are excluded from the effect of registration, the seller is likely to have to rely upon a special condition of sale in the contract with the buyer. If the seller could adequately prove his or her title, he or she would normally have submitted the evidence to the Registry to secure registration with absolute title.

11.39 Section 110(3) preserves the conclusiveness of the register, and precludes inquires "behind the register". It provides that—

> [e]xcept as aforesaid, and notwithstanding any stipulation to the contrary, it shall not be necessary for the vendor to furnish the purchaser with any abstract or other written evidence of title, or any copy or abstract of the land certificate, or any charge certificate.

It has been held that this subsection does not invalidate a provision in a contract by which the seller is obliged to produce office copies of the documents stipulated in section 110(1) of the Land Registration Act 1925.[116]

11.40 Section 110(4) provides that—

> [w]here the register refers to a filed abstract or copy of or extract from a deed or other document such abstract or extract shall as between vendor and purchaser be assumed to be correct, and to contain all material portions of the original, and no person dealing with any registered land or charge shall have a right to require production of the original, or be affected in any way by any provisions of the said document other than those appearing in such abstract, copy or extract, and any person suffering loss by reason of any error or omission in such abstract, copy or extract shall be entitled to be indemnified under this Act.

This subsection therefore bolsters the three previous subsections in three ways. First, it creates an irrebuttable presumption of conclusiveness as between the buyer and the seller as to the content of any documents that the buyer is entitled to require from the seller under those subsections. Secondly, it prevents anyone dealing with registered land or a registered charge from either requiring the production of, or being affected by the contents of the original of any document except to the extent that they are set out or abstracted on the register. Thirdly, as a correlative of this, any person who suffers loss because the Registry made a mistake as to the matters it chose to place on the register, is entitled to an indemnity.

WHERE THE SELLER IS NOT THE REGISTERED PROPRIETOR

11.41 If the first four subsections of section 110 are concerned with the documents of title which a seller of registered land must produce, subsection (5) "deals with the situation in which those documents do not show the vendor as the registered proprietor".[117] The sort of situations in which this can arise include the following—

[116] *Wood v Berkeley Homes (Sussex) Ltd* (1992) 64 P & CR 311. Under the Standard Conditions of Sale (3rd ed 1995), c 4.2.1, office copies of entries are required.

[117] *Urban Manor Ltd v Sadiq* [1997] 1 WLR 1016, 1022, *per* Morritt LJ.

(1) where, after the death of the registered proprietor, the executors contract to sell his or her land;[118] and

(2) where the registered proprietor either holds the land as a nominee for, or has contracted to sell it to, the seller and can therefore be required to transfer the property to the seller or at his or her direction.

11.42 Subsection (5) provides that—

> [w]here the vendor is not himself registered as proprietor of the land or the charge giving a power of sale over the land, he shall, at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary, either procure registration of himself as proprietor of the land or of the charge, as the case may be, or procure a disposition from the proprietor to the purchaser.

It has been said that "[i]t would be inconsistent with the concept of compulsory registration to allow the vendor to throw on the purchaser by means of conditions of sale the expense of repairing his omission in not keeping up to date his registered title".[119] The subsection is concerned with what will normally be "a matter of conveyance" rather than "a matter of title". A matter of conveyance is a defect in title which the seller can remove as of right.[120] A person is unlikely to enter into a contract to sell land of which he or she is not the registered proprietor unless he or she is in a position to compel its transfer.[121]

11.43 There are a number of features about the subsection. First, it cannot be ousted by contrary stipulation.[122] However, there may be circumstances where the buyer will be unable to insist that the seller complies with the subsection. It has, for example, been suggested that a buyer, who indicated that he or she would not insist upon compliance with it, would be estopped from doing so if the seller had thereafter altered his or her position.[123] It has also been held that where, in accordance with the conditions of sale, a buyer is deemed to have accepted title, he or she cannot thereafter insist that the seller should meet the requirements of the subsection.[124] The time limit imposed by the condition of sale is not a "stipulation to the contrary" within the subsection. Secondly, it is unclear from the subsection whether the decision whether the seller should procure his or her own registration or should procure a disposition from the registered proprietor to the buyer rests with the buyer or the seller. Can the buyer insist on one

[118] It is not common for executors to have themselves registered as proprietors of the land pending its disposition.

[119] Ruoff & Roper, *Registered Conveyancing*, 17-12. It appears that, before this provision was first introduced by the Land Transfer Act 1897, s 16, the ability of a seller to throw the costs of registration on to the buyer "had been found to have a prejudicial effect": Brickdale & Stewart Wallace's *Land Registration Act, 1925* (4th ed 1939) p 260.

[120] Such as a mortgage, or where the seller is a single trustee of land, the appointment of a co-trustee to enable an overreaching conveyance to be made.

[121] Cf *Re Hucklesby and Atkinson's Contract* (1910) 102 LT 214.

[122] See *Walia v Michael Naughton Ltd* [1985] 1 WLR 1115, 1122.

[123] *Ibid*.

[124] *Urban Manor Ltd v Sadiq* [1997] 1 WLR 1016. See A J Oakley, "The Conveyancing Problems of Rapid Resales - A Reprise" [1998] CLJ 26.

of the two alternatives or merely that the seller should bring about one or the other?[125] Thirdly, compliance with the subsection can give rise to serious practical difficulties and delay conveyancing, particularly where the land that the seller has contracted to subsell is merely part of a larger title.[126] In practice, we understand that buyers often do not insist on their rights under the subsection.

OTHER PROVISIONS

11.44 It is unnecessary to comment in detail on the two remaining subsections of section 110. Section 110(6) is concerned with the buyer's entitlement to the land certificate and the seller's obligation to produce it to complete the buyer's registration. It is anticipated that the provisions which relate to land and charge certificates are likely to be dealt with by rules made under any legislation rather than in the legislation itself. Section 110(7), which is echoed elsewhere in the Land Registration Act 1925,[127] is concerned to ensure that a buyer of registered land is not affected by any matter registered under what is now the Land Charges Act 1972, in the belief that the land has unregistered title. It is anticipated that any new legislation would contain similar provisions.

Defects in the law

11.45 Section 110 of the Land Registration Act 1925 does, of course, reflect the state of the law at the time when it was enacted. A number of significant developments have taken place since then which have fundamentally altered the premises upon which it rests. First, the register is now open.[128] It is no longer necessary for an intending buyer to obtain the seller's consent to search the register, or to obtain copies of documents referred to in the register. Secondly, the system of searching the register has become very much simpler and cheaper than was formerly the case. For example, an inspection of the register or an official search with priority by means of the direct access system[129] costs a mere £2. An inspection or official search in any other form costs just £4.[130] Thirdly, registered conveyancing is now overwhelmingly the norm - indeed conveyances of unregistered land are becoming uncommon. There seems little likelihood that conveyancers would suddenly start to make unreasonable demands for documents and evidence of title beyond what the Land Registration Act 1925 presently allows them to do, if its restrictions were removed. Fourthly, section 110 is highly prescriptive and can create unnecessary difficulties for parties by its inflexibility.

11.46 As a result of these developments, a buyer no longer has to depend on the seller in order to investigate title to the land. He or she can discover the seller's title (at least to the extent that it appears from the register) without the latter's consent, and can do so quickly, easily and cheaply.

Proposals for reform

[125] See J T Farrand, "Compelling Sub-Purchasers" [1979] Conv 1, 2.

[126] See M P Thompson, *Barnsley's Conveyancing Law and Practice* (4th ed 1996) p 337.

[127] See s 59(6).

[128] See Land Registration Act 1925, s 112 (substituted by Land Registration Act 1988, s 1).

[129] For the direct access system, see above, para 11.17.

[130] See The Land Registration Fees (No 2) Order 1997, Schedule 3, Parts II, III.

11.47 We consider that, in the light of these developments, the correct way forward is as follows. We identified above[131] the three primary obligations of a seller of land, namely—

(1) to disclose latent defects in title prior to contracting;

(2) to convey to the buyer on completion a title that is in accordance with the contract; and

(3) to prove that title.

In relation to the first two of these, the parties are free to make their own bargain, subject to certain overriding rules of law or equity.[132] We can see no good reason why the same should not be true of the third. We have therefore provisionally concluded that the first five subsections of section 110 of the Land Registration Act 1925 should not be replicated in any new legislation. However, we consider that there should be a safeguard, in case it transpires that the freedom which this offers is abused, and buyers make excessive requests for evidence of title, or sellers impose terms which unreasonably preclude inquiries on matters upon which the register is not conclusive. This can be achieved by a power to make land registration rules as to the proof of title which a buyer may require. Any rules so made would override the terms of any contract which conflicted with them. It is hoped that this power would not have to be exercised.

11.48 **We provisionally recommend that—**

(1) subject to (2) and (3) below, on a disposition of registered land (including a subsale), there should be no restrictions on the rights of the parties to make their own arrangements as to—

(a) the evidence of title that the proprietor or seller should be required to deduce; or

(b) the steps that the seller who is not the registered proprietor should be required to take to perfect his or her title; but

(2) the Lord Chancellor should have power to make rules specifying—

(a) the evidence of title that might be required on a disposition of registered land; and/or

(b) the steps which a seller who is not the registered proprietor might be required to take to perfect his or her title; and

(3) any rules made under (2) would override the terms of any agreement that might have been made by the parties.

[131] See para 11.30.

[132] For example, as we have explained, a seller cannot exclude liability for failing to disclose a latent defect in title of which he or she knew or ought to have known: see para 11.32.

We ask whether readers agree.

Converting good leasehold title to absolute title

11.49 There is one final matter which we have considered where a difficulty sometimes arises. However, in the end, we have decided to make no recommendations for reform, because any cure is likely to be worse than the disease. In cases involving the sale or mortgage of registered leasehold property, it is common nowadays for buyers and mortgagees to insist that the assignor or mortgagor should show an absolute title to that lease. Registration with absolute title is possible only where the freehold or other superior title or titles are either registered or have been deduced to the Registry.[133] If this is not the case, any lease will be registered with a good leasehold title.[134] Should the leaseholder be required by a prospective buyer or mortgagee to deduce an absolute title, he or she will have to negotiate with those holding superior reversionary titles to persuade them to deduce their titles. Because most new leases are now registered with absolute title, this problem tends to relate to older leases.[135]

11.50 We consider it to be important that registered leaseholders should be able to deduce an absolute title to their leaseholds wherever possible. This accords with one of the primary aims of this Report, which is to enhance the quality of title which registration can offer. A balance must, however, be struck between their interests and those of the reversioners, who may be put to some expense and trouble to meet a request of this kind from a tenant.[136] We are not certain just how widespread a problem this is, or to what difficulties it does in practice give rise.[137] In preparing this Report, the Joint Working Group considered two possible schemes which would have enabled a tenant, registered with a good leasehold title, to compel those with a superior reversionary title to deduce it, so that he or she could be registered with absolute title instead. Both schemes were necessarily heavy-handed, because they had to contain coercive provisions which would have been enforceable by a mandatory injunction, a decree of specific performance or an action for damages. We have concluded that to give tenants such a draconian power would be wholly disproportionate to the problem in issue. We consider that the matter should be left (as it is now) to negotiation between the leaseholder and those with superior titles, even if this does, on occasions, lead to difficulties for the leaseholder. **We have therefore provisionally concluded that there should be *no* statutory right for a tenant who is registered with a good leasehold title to compel the deduction of superior reversionary titles, so that**

[133] There is no *right* to have any superior title deduced. It is a matter for negotiation between the parties. This is because of Law of Property Act 1925, ss 44(2) -(4). The effect of those subsections has been summarised as follows: "an intending lessee or purchaser of an existing lease is entitled to call for the lease under which the other contracting party holds, but not the freehold or other superior title": M P Thompson, *Barnsley's Conveyancing Law and Practice* (4th ed 1996) p 290. These provisions may be ousted or modified by express contrary provision: Law of Property Act 1925, s 44(10).

[134] By Land Registration Act 1925, s 10 the effect of registration with good leasehold title has the same effect as registration with absolute title, *except* that it is subject to any estates, rights or interests affecting the superior title or titles.

[135] Under the Standard Conditions of Sale (3rd ed 1995), on the *grant* of a lease, the grantor is required "to deduce a title which will enable the buyer [the grantee] to register the lease at HM Land Registry with absolute title": c 8.2.4.

[136] Including a tenant with whom they are not in privity.

[137] We are aware of cases where it has led to difficulties.

he or she can be registered with an absolute title. We ask whether readers agree with us, or whether they consider that this is a sufficiently serious problem in practice that some kind of right should be given.

OTHER CONVEYANCING ISSUES

11.51 There may be other conveyancing issues which trouble readers in practice. If there are, we would be glad to learn of them. **We ask whether there are any other conveyancing issues affecting registered land where readers consider that reform would be desirable, and if so what they are.**

SUMMARY AND KEY ISSUES

11.52 In this Part we make provisional recommendations on a number of conveyancing issues concerning registered land. We do so against the background of the move to electronic conveyancing that is likely to take place over the next decade or so. This will revolutionise the conveyancing system.

The creation and transfer of estates, rights and interests in or over registered land

11.53 First we consider the manner in which registered land may be transferred and rights and interests may be created over such land. We draw attention to the following features of the present system—

(1) There is a period of time between the transfer or other disposition and its eventual registration. This "registration gap" weakens the protection which title registration can offer.

(2) There is at present no *requirement* that a disposition of, or the creation of an interest in, registered land must be registered. However the vulnerability of such dispositions until registered makes registration highly desirable.

(3) A right which has been expressly created and which is capable of registration but not registered, may still be protected as an overriding interest if the person having the benefit of it is in actual occupation of the land.

11.54 The present system suffers from two principal defects. The first is the "registration gap" which has given rise to a number of difficulties and which has necessitated the employment of a system of official searches. The second is the wasteful duplication of effort, and the concomitant risk of error, caused by paper transactions which must be entered on to the register.

11.55 The proposed system of electronic transfer and creation of rights is likely to be introduced in stages. The eventual goal is to eliminate the present three-stage process by which a document is executed, lodged with the Registry and then registered. We put forward what must necessarily be a very tentative view of how any system of electronic conveyancing *might* work. It is of course impossible to predict accurately the final scheme, given the likely developments in information technology over the next decade or so.

11.56 The transactions which we envisage would be required to be effected electronically by registration would be—

(1) the transfer of registered estates;

(2) all registered dispositions;

(3) the creation of any registered charge;

(4) the express creation of any right which was entered as a notice on the charges register.

11.57 We anticipate that there would be certain special cases, and in particular the following—

(1) *Court orders*. These would not be effective until registered, and it would be necessary to take steps to register them.

(2) *Persons who conduct their own conveyancing*. It would continue to be possible for persons to conduct their own conveyancing. Such persons would be able to do so, as now, by lodging documents for registration with a district land registry.

11.58 The following would *not* be subject to the requirement of registration explained above, but would have the same effect as they do at present—

(1) Rights that can arise without any express grant or reservation.

(2) Dispositions taking effect by operation of law.

(3) Interests under trusts.

(4) Leases which were overriding interests.

11.59 The likely benefits of the proposed system include the following—

(1) it should make conveyancing transactions both quicker and substantially cheaper for buyers and sellers, and should reduce the risks of error;

(2) it should eliminate the problems caused by the registration gap;

(3) it should mean that the priority of most minor interests will be apparent from the register; and

(4) as a paperless system, it should remove the need for substantial and costly storage facilities on the part of large lending institutions and other bodies.

11.60 We examine three possible concerns about the move to paperless conveyancing - security, the need to ensure accuracy and provision for technology failures - and explain how it is expected that these will be met.

11.61 We also consider the risk that there may be attempts to create rights in or over property without registering them, which will necessarily be ineffective. We explain why we do not regard this as a major problem, and outline some of the steps that will be taken to overcome it.

11.62 Following the precedent that was adopted to introduce electronic trading in securities,[138] we consider that the new system of electronic conveyancing should be introduced by rules made under a wide statutory enabling power. Our provisional recommendation is that the Lord Chancellor should have power to make rules from time to time to enable title to registered land to be transferred and rights over registered land to be created without a written instrument. Any such rules should be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

11.63 Because any system of electronic conveyancing will be paperless, there will have to be provision—

(1) to enable property rights to be created and transferred without the need to comply with the existing formal requirements of deeds or writing applicable to such transactions; and

(2) where a statute requires a transaction to be made by deed, to substitute a requirement of registration instead.

We consider that such powers should be introduced in advance of the introduction of electronic conveyancing, to enable the Registry to prescribe that transactions are conducted in accordance with standard formats.

11.64 In the light of this, we provisionally recommend that the Lord Chancellor should have power to make rules to modify or exclude any provision of any enactment or instrument, or any rule of law, to the extent that is necessary to facilitate conveyancing transactions in regard to land with registered title. This power would be exercisable by statutory instrument subject to annulment by resolution of either House of Parliament.

11.65 By way of transitional provisions, we provisionally recommend that the existing power by which interests in registered land may be created or transferred "off the register" and then take effect as minor interests should be retained. However, once electronic conveyancing had been introduced, we consider that the Lord Chancellor should have power to override this principle, and should be able to require that certain transactions could be effected only by registration.

11.66 We consider the problems thrown up by the decision of the Court of Appeal in *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd.*[139] This held that until an assignment of a lease had been registered, it remained open to the assignor to exercise a break-clause that was personal to him or her. Although the effect of this decision will largely disappear when a system of paperless conveyancing is introduced, we seek views on whether anything should be done in the interim. One answer might be to provide that on an assignment of a registered lease, as between the persons whose rights and liabilities are affected by that assignment, it should take effect as if it were a legal assignment even though it has not been registered. Another might be to impose an additional fee on any transfer that was not registered within (say) two months.

[138] See Companies Act 1989, s 207.

[139] (1996) 75 P & CR 223.

The obligations of a vendor in deducing title when making a disposition of registered land

11.67 We examine the three obligations that a landowner who intends to sell his or her land owes to the intending buyer. These are—

(1) to disclose latent defects in title prior to contracting;

(2) to convey to the buyer on completion a title that is in accordance with the contract; and

(3) to prove that title.

We make no recommendations in relation to (1) and (2), because no reform appears to be needed. However, we consider that the rules which govern (3) are in need of review.

11.68 As regards the proof of title to registered land, section 110 of the Land Registration Act 1925 lays down in detail the seller's responsibilities as regards the production of copies of the register and other matters.[140] The section also deals with the situation where a seller is not a registered proprietor, as where he or she has merely contracted to purchase the land and has then entered into a subsale.[141] Section 110 reflects the state of the law when it was enacted. However, the register is now open so that it is no longer necessary to obtain a seller's consent to search the register, or to obtain copies of documents referred to in the register. Furthermore, the system of searching the register is now much simpler and cheaper. In practice, the prescriptive character of section 110 and its inflexibility, can create unnecessary difficulties for the parties.

11.69 We provisionally conclude that the first five subsections of section 110 of the Land Registration Act 1925 should not be reproduced in any new legislation. Parties would be free to make their own contractual arrangements as to the title which the buyer could require. As a safeguard, in case this freedom were to be abused, we provisionally recommend that the Lord Chancellor should have a power to make rules—

(1) specifying the evidence of title that might be required on a disposition of registered land; and/or

(2) the steps which a seller who is not the registered proprietor might be required to take to perfect his or her title.

It is not intended that such rules should be made in the absence of evidence of abuse. If made, they would override the terms of any agreement between the parties.

Converting good leasehold to absolute title

11.70 We consider - and reject - any possible power by which a leaseholder who is registered with good leasehold title might compel those with superior titles to deduce them, so that the title to the lease might be upgraded to absolute. The heavy-handed sanctions that would be needed to make any such power effective would, in our view,

[140] See s 110(1) - (4).

[141] See s 110(5).

considerably outweigh the advantages of such a power.

PART XII
SUMMARY OF ISSUES FOR CONSULTATION

INTRODUCTION

12.1 In this Part we summarise the issues on which we seek the views of readers. Some readers may not wish to comment on all issues: their remarks are no less welcome. We would also welcome comments not only on the issues specifically listed below but on any others that are raised by this Report, or which concern land registration but have not been addressed in this paper.

DEFINITIONS AND CONCEPTS

Leases

12.2 At present, only leases with more than 21 years to run may be registered. Do you think—

(1) that the present law should remain unchanged;

(2) that leases granted for a term of more than 14 years should be required to be completed by registration;

(3) that leases granted for a term of 21 years would, as now, be required to be registered, but leases of a term of more than 14 years could be registered if the tenant (or some other person having the power to register) so wished but would otherwise take effect as overriding interests; or

(4) that there should be some other requirements for the registration of leases (please specify)?[1]

12.3 Do you agree with our provisional recommendations that—

(1) there should, in any event, be a power for the Lord Chancellor by rule to reduce the duration of leases that—

(a) may be registered as registered estates, both on first registration and in relation to dealings by a registered proprietor; and (commensurately with such a change)

(b) can exist as overriding interests and cannot be noted on the register; and

(2) any such rule should be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament?[2]

[1] See above, para 3.10.

[2] See above, paras 3.11, 3.12.

Incorporeal rights over land

Incorporeal rights in gross

12.4 At present, incorporeal rights in gross (such as fishing or shooting rights) and franchises (such as the right to hold a market) are not capable of being registered with their own titles. Do you consider that—

(1) profits *à prendre* in gross; and/or

(2) franchises;

should be capable of being registered with their own titles?[3]

Manors

12.5 At present, manors can be registered with their own titles. Do you agree with our provisional recommendation that this should cease to be so, and that manors should cease to be regarded as land for the purposes of the Land Registration Act?[4]

12.6 If you do, do you also agree with our provisional recommendation that, in consequence, the exception from compulsory registration of "corporeal hereditaments which are part of a manor and are included in the sale of a manor as such"[5] should be repealed?[6]

Registered dispositions

12.7 Do you consider that there are any rights over or interests in land, the creation or transfer of which ought to be registered dispositions when completed by registration, but which at present are not? If you do, on what basis do you think that they should be registered dispositions?[7]

Rights of uncertain status

12.8 We examine three particular rights, where there is some uncertainty as to the status of the right. We provisionally recommend in each case that, where such rights affect registered land, the matter be clarified in such a way that the right is to be regarded as an interest in the land, so that it is capable of protection as an overriding interest (if it falls within one of the categories of overriding interests) or as a minor interest.

Rights of pre-emption

12.9 Do you agree with our provisional recommendation that, for the purposes of determining priorities, a right of pre-emption should take effect as an interest in registered land from the time when it is created?[8]

[3] See above, para 3.19.

[4] See above, para 3.20.

[5] See Land Registration Act 1925, s 123(3)(*c*).

[6] See above, para 3.23.

[7] See above, para 3.27.

[8] See above, para 3.32.

Rights arising by estoppel or acquiescence

12.10 Do you agree with our provisional recommendation that an equity arising by estoppel or acquiescence in relation to registered land should be regarded as an interest from the time at which it arises?[9]

Rights arising by prescription

12.11 Do you agree with our provisional view that rights acquired or in the course of being acquired by prescription over registered land, whether or not such rights are inchoate, should be regarded as an interest in that land?[10]

"Purchasers"

12.12 Do you agree with our provisional recommendations that—

(1) "purchaser" should be defined to mean "any person (including a mortgagee or lessee) who, for valuable consideration takes an interest in land or in a charge on land";

(2) "valuable consideration" should for these purposes be defined to mean money or money's worth but should not include marriage or a nominal consideration in money;

(3) a transfer of land (whether registered or unregistered) for marriage consideration should take effect as a gift for the purposes of the Act;

(4) it should be made clear in the Act that the doctrine of notice shall not apply to dealings with registered land except in those cases where the Act expressly provides to the contrary.

If you disagree, what is your preferred approach to each of these issues?[11]

OVERRIDING INTERESTS

General issues

Indemnity for overriding interests?

12.13 In its Third Report on Land Registration, the Law Commission recommended that certain overriding interests should cease to be so, but should become a new type of right called "general burdens".[12] As regards the remaining overriding interests, it recommended that indemnity should be payable in certain circumstances where the register was rectified to give effect to an overriding interest. We have expressed our concerns about these proposals, and, in particular, about the unquantifiable but potentially considerable cost of meeting them (which would have to be met by all users

[9] See above, para 3.36.

[10] See above, para 3.38. Rights claimed under the Prescription Act 1832 are regarded as inchoate: see above, para 3.37.

[11] See above, para 3.50.

[12] These were public rights, chancel repair liability, local land charges, certain pre-1926 mineral rights, and franchises.

of the Land Registry).[13] In the light of these concerns, do you agree with our provisional recommendation that—

(1) the rule that no indemnity should be payable where the register is rectified to give effect to an overriding interest should be retained; and

(2) in consequence that there should be no new category of "general burdens"?[14]

No overriding status for rights under the general law

12.14 Do you agree with our provisional recommendation that the statutory provisions governing overriding interests should be redrafted to make it clear that—

(1) only proprietary rights could subsist as overriding interests; and

(2) rights and liabilities that were—

(a) merely potential and not actually in existence; or

(b) imposed in relation to property generally;

would bind a transferee of registered land under and to the extent that is provided by the general law.[15]

The specific categories of overriding interests

Introduction

12.15 We set out below our provisional recommendations as to what should be done in relation to each of the existing categories of overriding interest. In some cases we provisionally recommend abolition, on the ground that the right is, to the best of our knowledge, obsolete. In relation to such rights, we are particularly anxious to learn whether our information is correct. If apparently obsolete rights are in fact still enforced, their overriding status must be retained. We would therefore be grateful for information about specific instances of such rights and the details of them.

Easements and analogous rights: Land Registration Act 1925, s 70(1)(a)

12.16 Do you agree with our provisional recommendation that—

(1) all easements and profits *à prendre* should be overriding interests except where—

(a) they have been expressly granted; or

(b) they arise from a contract to grant such a right expressly;

(2) without prejudice to the generality of that rule, the following easements and

[13] See above, paras 4.19 - 4.21.

[14] See above, para 4.22.

[15] See above, para 4.36.

profits *à prendre* (whether legal or equitable) should be overriding interests unless and until they are noted on the register of the servient title—

(a) those arising by implied grant or reservation, including rights arising by the operation of section 62 of the Law of Property Act 1925;

(b) those that are acquired or are in the course of being acquired by prescription;

(c) those to which a property was subject at the time of its first registration, which were legal rights but were not noted on the register; and

(d) those which are appurtenant to an overriding interest;

(3) to the extent that there was any conflict between the principles in (1) and (2), those in (2) should prevail;

(4) rule 258 of the Land Registration Rules 1925 should be revoked;

(5) where an easement or profit *à prendre* takes effect as an overriding interest, there should be a rebuttable presumption that the right had been abandoned if the party asserting it was unable to show that it had been exercised within the previous 20 years; and

(6) there should be transitional provisions by which easements and profits *à prendre* which are—

(a) in existence when the legislation comes into force; and

(b) overriding interests immediately prior to that date even if they would not be created thereafter;

should retain their status as overriding interests?[16]

Customary rights: Land Registration Act 1925, s 70(1)(a)

12.17 Do you agree with our provisional recommendation that—

(1) as customary rights arising by tenure have ceased to exist they should no longer be listed as overriding interests; and

(2) unless and until they are noted on the register, customary rights that are exercisable by all or some of the inhabitants of a particular locality (other than those arising by tenure) should be a separate and distinct category of overriding interests?[17]

Public rights: Land Registration Act 1925, s 70(1)(a)

12.18 Do you agree with our provisional recommendation that—

[16] See above, para 5.24.

[17] See above, para 5.29.

(1) "public rights" should remain as a category of overriding interest in cases where the rights have not been noted on the register; and

(2) they should be defined as rights exercisable by any member of the public over land under the general law?[18]

Liabilities having their origin in tenure: Land Registration Act 1925, s 70(1)(b)

12.19 On the information available to us, we believe that all such rights are now obsolete. Do you agree with our provisional recommendation that—

(1) section 70(1)(*b*) should be repealed; and

(2) any tenurial liabilities within the paragraph that may still exist should cease to be overriding interests and should take effect as minor interests instead?[19]

If you know of any rights within this category that are still in existence, please provide us with details of them.

Liability to repair the chancel of any church: Land Registration Act 1925, s 70(1)(c)

12.20 Do you agree with our provisional recommendation that chancel repair liability should remain an overriding interest?

Liability in respect of embankments, and sea and river walls: Land Registration Act 1925, s 70(1)(d)

12.21 Do you agree with our provisional recommendation that—

(1) the liability in respect of embankments, and sea and river walls should remain as an overriding interest; and

(2) that it should be confirmed by any legislation that such liability is limited to that arising by prescription, grant, covenant (supported by a rentcharge), custom or tenure?[20]

Payments in lieu of tithe, and charges or annuities payable for the redemption of tithe rentcharges: Land Registration Act 1925, s 70(1)(e)

12.22 Do you agree with our provisional recommendation that liability to make payments (commonly known as corn rents) by any Act of Parliament other than one of the Tithe Acts, out of or charged upon any land in respect of the commutation of tithes, should continue to be an overriding interest, but that section 70(1)(*e*) should otherwise be repealed?[21]

[18] See above, para 5.31.

[19] See above, para 5.36.

[20] See above, para 5.39.

[21] See above, para 5.40.

Squatters' rights: Land Registration Act 1925, s 70(1)(f)

12.23 At present squatters' rights constitute an overriding interest under this paragraph, whether or not the squatter is still in occupation of the land. Do you consider that—

(1) the existing law should remain unchanged; or

(2) section 70(1)(*f*) should be repealed and rights acquired or in course of being acquired under the Limitation Acts—

(a) should no longer be overriding interests unless the adverse possessor was in actual occupation for the purposes of section 70(1)(*g*); and

(b) should otherwise take effect as minor interests unless and until the adverse possessor was registered as proprietor?

If you favour (2)—

(1) do you consider that there should be transitional arrangements by which, where a person was in adverse possession at the time when any legislation came into force, their rights should remain an overriding interest for a period of three years, even if they were not in actual occupation?; and

(2) do you agree that a squatter should be able to claim damages for trespass against a registered proprietor who sold land to which the squatter was entitled to be registered as proprietor?[22]

The rights of occupiers: Land Registration Act 1925, s 70(1)(g)

12.24 Do you agree with our provisional recommendation that—

(1) subject to the qualifications set out below, the rights of persons in actual occupation should continue to enjoy protection as overriding interests;

(2) for the purposes of this paragraph, persons would be in actual occupation of land only if they were physically present on the land and their occupation was patent, that is, apparent on a reasonable inspection of the land;

(3) section 86(2) of the Land Registration Act 1925 should be amended so that the rights of beneficiaries under a settlement (whether created under the provisions of the Settled Land Act 1925 or any other statute) should be capable of existing as overriding interests;

(4) the present exception by which rights that would otherwise be binding under section 70(1)(*g*) are not because they are not disclosed on inquiry, should be retained, and it should be made clear that the inquiry that is required is that which is reasonable in the circumstances; and

(5) where a person is in occupation of part only of the property in or over which he or she has rights, his or her rights should be an overriding interest within the

[22] See above, para 5.55.

paragraph only as regards the land which he or she occupies?[23]

12.25 Do you think that the rights of persons who are in receipt of the rents and profits of land—

(1) should continue to be overriding interests; or

(2) should—

(a) continue to be overriding interests only if they were so at the time when the legislation came into force; but

(b) cease to have the status of overriding interests where those rights arose or were created after the legislation was brought into force?

If you favour (2) (which we provisionally recommend), in relation to those rights that remain overriding interests under (a), do you think that status—

(1) should permanently cease when the person is no longer in receipt of rents and profits; or

(2) should revive if the person starts to receive them once more?[24]

12.26 Are there any other aspects of section 70(1)(*g*) that operate unsatisfactorily and which you would wish to be reviewed?

Interests excluded from the effect of registration: Land Registration Act 1925, s 70(1)(h)

12.27 Do you agree with our provisional recommendation that the estates, rights, interests, and powers excepted from the effect of registration in cases of titles less than absolute should cease to be overriding interests?[25]

Local land charges: Land Registration Act 1925, s 70(1)(i)

12.28 Do you agree with our provisional recommendation that paragraph (*i*) should be recast in the following way—

(1) local land charges should take effect as overriding interests, whether or not they are registered under the Local Land Charges Act 1975; but

(2) a local land charge that is also a charge over registered land to secure the payment of any sum of money should not be capable of being enforced until it is registered as a registered charge on the Land Register?[26]

Manorial rights and franchises: Land Registration Act 1925, s 70(1)(j)

[23] See above, para 5.75.

[24] See above, para 5.76.

[25] See above, para 5.79.

[26] See above, para 5.83.

12.29 Do you agree with our provisional recommendation that—

(1) any subsisting manorial rights; and

(2) franchises;

which have not been noted on the register of the title which they affect should remain as overriding interests?[27]

Leases not exceeding 21 years: Land Registration Act 1925, s 70(1)(k)

12.30 Do you agree with our provisional recommendation that—

(1) subject to the exceptions in the right to buy legislation contained in Part V of the Housing Act 1985 (as amended), a lease granted for a term not exceeding 21 years (or such lesser period as may be favoured on consultation)[28] and taking effect in possession or within three months of the grant should be an overriding interest; but

(2) this would be subject to an exception in favour of a discontinuous term of years, such as a time-share arrangement, which would require substantive registration?[29]

Certain mineral rights where title was registered prior to 1926: Land Registration Act 1925, s 70(1)(l)

12.31 Do you agree with our provisional recommendation that certain mineral rights in land that were registered prior to 1926 should remain overriding interests?[30]

Rights to coal: Land Registration Act 1925, s 70(1)(m)

12.32 Do you agree with our provisional recommendation that any interest in land consisting in an interest in any coal or coal mine and the other ancillary rights listed in the Coal Industry Act 1994, Schedule 9, para 1(1) should continue to be overriding interests.[31]

Noting overriding interests on the register: Land Registration Act 1925, s 70(2) and (3)

12.33 Do you agree with the following scheme which we provisionally propose—

(1) the registrar would have a discretion to note on the register any overriding interest except short leases (within what is presently section 70(1)(*k*)) and rights to coal (within what is presently section 70(1)(*m*));[32]

[27] See above, paras 5.85, 5.86.

[28] See above, para 12.2.

[29] See above, para 5.94.

[30] See above, para 5.96.

[31] See above, para 5.98.

[32] By making the decision to note on the register discretionary, there would be no need to have express exceptions for trivial and obvious rights.

(2) this discretion would be exercisable both on first registration and at any time subsequently;

(3) the mechanism for protecting such rights by notice would be the same as it would on an application to register such a right; and

(4) the registrar would no longer be under a *duty* to note on the register certain specific overriding interests, but his decision either to note on the register or not would be subject to appeal to the court by any person interested in the land?[33]

12.34 Do you think that there should be an obligation on any person who is applying for the registration of a disposition of land, whether or not that land is already registered, to disclose to the registrar any overriding interests that he or she has discovered? Any such application would only be required if the applicant's solicitor or licensed conveyancer was reasonably satisfied that the right existed.[34]

General defences of fraud and estoppel

Defences to the assertion of all overriding interests

12.35 Do you agree with our provisional recommendation that all overriding interests should be subject to the application of any rule of law relating to fraud or estoppel?[35]

Waivers of priority

12.36 Do you agree with our provisional recommendation that it should not be possible to make any entry on the register in respect of a waiver of priority by a person having the benefit of an overriding interest?[36]

The "registration gap"

12.37 Do you agree with our provisional recommendation that the rule laid down by the House of Lords in *Abbey National Building Society v Cann*[37] as to the date upon which overriding interests must exist should be codified so that—

(1) overriding interests that were in existence at the date of registration would bind any transferee; and

(2) where the overriding interest claimed was the right of an occupier, that person would have to have been in occupation at the date of the execution of the transfer or disposition of the registered land?[38]

THE PROTECTION OF MINOR INTERESTS AND RESTRICTIONS ON DEALINGS WITH REGISTERED LAND

[33] See above, para 5.103.

[34] See above, para 5.107.

[35] See above, para 5.108.

[36] See above, para 5.111.

[37] [1991] 1 AC 56.

[38] See above, para 5.113.

Notices and cautions

12.38 Do you wish to see—

(1) the retention without any change of the present dual system under which there are two ways of protecting rights over property by notice or caution;

(2) a reformed system in which the distinction between notices and cautions would be retained, but where the lodging of a caution would be a form of proprietary protection that conferred priority on the right in question, and where other defects in the present system would be eliminated; or

(3) a new system for the protection of minor interests (other than interests under trusts of land) which would combine in one form of protection the best features of notices and cautions in the manner outlined in the following paragraph; or

(4) some other model and if so what?

Our preferred option is (3).[39]

12.39 The alternative scheme that we propose in paragraph 12.38(3) would have the following characteristics—

(1) Protection of the right or interest on the register would preserve its priority, in the same way as the entry of a notice does at present.

(2) It would be available for the protection of all minor interests except interests under a trust of land which would have to be protected by the entry of a restriction.

(3) It would be possible to make an entry either—

(a) with the consent of the registered proprietor or pursuant to an order of the court or registrar ("consensual notices"); or

(b) unilaterally ("unilateral notices").

(4) It would be stated on the register whether the notice was consensual or unilateral. It would not be possible to warn off a consensual notice. It would be possible to warn off a unilateral entry.

(5) Where a unilateral notice was entered, the registered proprietor would then be informed, and could challenge it at any time thereafter.

(6) Where there was an application to enter a consensual notice, the facts or documents upon which the claim to register was based would have to be set out or produced on application. This is because, once entered, the right would be permanently on the register, and it would not be possible to warn off the right.

[39] See above, para 6.54.

(7) Where there was an application to enter a unilateral notice, it would be incumbent on the applicant for registration to show that the right claimed was capable of being a minor interest, but there would be no further investigation of the truth or the legal merits of the claim. This is because the protection afforded by registration is not permanent: the entry may be warned off.

(8) There would be a liability to pay damages and costs for lodging a unilateral notice without reasonable cause.

Restrictions and inhibitions

12.40 Do you agree with our provisional recommendation that—

(1) the registrar should be able to enter a restriction to restrict the powers of disposition of a registered proprietor, in whole or in part, whether or not subject to conditions or the obtaining of some consent;

(2) the entry of such a restriction should confer no priority on, nor preserve any existing priority of, a right or interest in property, where it was entered to protect that right or interest; and

(3) inhibitions should be abolished?[40]

12.41 Do you agree with our provisional recommendation that—

(1) the registrar should continue to have the power and in some cases the duty to enter a restriction on the same basis as at present;

(2) the following should be entitled to apply for a restriction—

(a) the registered proprietor;

(b) any person who had the written consent of the registered proprietor;

(c) any person applying pursuant to an order of the court or registrar; or

(d) any person who could demonstrate that he or she had the benefit of a right or interest that should be protected by a restriction (such as an interest under a trust of land or the rights of a trustee in bankruptcy);

(3) if the applicant fell within (2)(d), no restriction would be entered before a notice had been served on the registered proprietor, giving him or her the opportunity to object to the entry and—

(a) the period for objection had expired;

(b) the proprietor had consented; or

[40] See above, para 6.57.

(c) any objection by the proprietor had been resolved?[41]

12.42 Do you consider that the court should have power, when ordering that a restriction be placed on the register, to designate it as having absolute priority? If you do, do you think that a restriction so designated should take precedence over the protection given to an intending purchaser by an official search, so that no disposition of the land should then take place until the court or the registrar should so direct?[42]

Cautions against first registration

12.43 Do you agree with our provisional recommendation that—

(1) any person having an interest in the unregistered land in question should be entitled to register a caution against first registration;

(2) a caution against first registration should not preserve the priority of the applicant's interest;

(3) the landowner (or any other person having a legal estate in, or legal charge over, the land) should be entitled to challenge the registration of a caution at any time unless he or she had consented to it; but

(4) in all other respects, a caution against first registration should operate in the same manner as it does under the present law?[43]

Making entries without reasonable cause

12.44 Do you agree with our provisional recommendation that—

(1) where any person suffered loss in consequence of the entry without reasonable cause of a caution (if after consultation these are retained),[44] a caution against first registration, a notice or a restriction, the court should have power to award compensation against the person making the entry; and

(2) for the purposes of assessing compensation and limitation, such a claim to compensation would be treated as an action in tort?[45]

12.45 Do you agree with our provisional recommendation that the power to award compensation set out in the previous paragraph, should also apply where loss is caused because a person resists the removal of an entry on the register without reasonable cause?[46]

Power to remove entries

[41] See above, para 6.59.

[42] See above, para 6.61.

[43] See above, para 6.64.

[44] See above, para 12.38.

[45] See above, para 6.66.

[46] See above, para 6.67.

12.46 Do you agree with our provisional recommendation that there should be a power to discharge or vary a caution, notice or restriction and that it should be exercisable either by the court on motion or by the registrar?[47]

Transitional arrangements

12.47 Do you agree with our provisional recommendation that any changes proposed in relation to the protection of minor interests should have prospective effect only?[48]

PRIORITIES

Priority of minor interests

12.48 Would you—

(1) favour the introduction of a first in time of registration system for the priority of minor interests of the kind proposed in the Law Commission's Third Report on Land Registration;[49] or

(2) prefer to leave the present law unchanged and await the introduction of a system of electronic conveyancing (explained in Part XI of this Report), under which it is envisaged that most rights in or over registered land could only be created expressly by entering them on the register, so that a "first in time of registration" system would in fact be introduced?

Our preference is strongly in favour of (2). However, if you favour (1), would you please indicate why you prefer this method and how you consider it might be integrated with the present law.[50]

12.49 Do you agree with our provisional recommendation that the principles which determine the priority of minor interests should be stated in statutory form (but without codifying them), provided that it is possible to identify them with sufficient clarity?[51]

Priority of overriding interests

12.50 Do you agree with our provisional recommendation that the priority of overriding interests should be as follows—

(1) the grant of a lease for a term of 21 years (or such lesser period as may be agreed on consultation) should continue to have the same priority as if it were a registered disposition;

(2) any other overriding interest should, on creation, continue to take effect subject to prior overriding interests and minor interests (whether or not such interests are protected on the register); and

[47] See above, para 6.68.

[48] See above, para 6.69.

[49] Explained above at paras 7.24 - 7.26.

[50] See above, para 7.32.

[51] See above, para 7.34.

(3) dealings with an overriding interest should continue to be governed by the rules of unregistered conveyancing?[52]

Other issues

12.51 Do you agree with our provisional recommendation that where there is a disposition of a registered estate or registered charge, the transferee or grantee shall take the land subject to minor interests to which he or she is a party?[53]

12.52 Are there any other aspects of the law governing the priority of interests which you have identified as unsatisfactory and where you consider reform to be necessary?[54]

RECTIFICATION OF THE REGISTER

Grounds for rectification

12.53 Do you agree with our provisional recommendation that, subject to the qualifications that we explain in paragraphs 12.57 - 12.59 below, the court and the registrar should have a power to rectify the register whenever there has been an error or omission in it?[55]

12.54 Do you agree with our provisional recommendation that—

(1) the power for the registrar to correct clerical errors in the register or any plan or document to which it refers, where there is no detriment to any registered interest, should be made statutory; and

(2) such a correction should not be regarded as "rectification" for the purposes of the legislation?[56]

12.55 Do you agree with our provisional recommendation that where, notwithstanding an error or mistake in the register, the register is not rectified—

(1) the court or registrar should have power to make any correlative amendment to any other registered title that is necessitated by that non-rectification, even though there was no mistake in that other title; and

(2) any such amendment shall constitute "rectification" for the purposes of the legislation, so that a claim for indemnity will lie if the registered proprietor suffers loss in consequence?[57]

12.56 Do you agree with our provisional recommendation that an amendment of the register to give effect to any estate, right, interest or power which is excepted from the effect of registration should not be regarded as "rectification" for the purposes of the

[52] See above, para 7.35.

[53] See above, para 7.36. The effect of this recommendation is to reverse one point in *Orakpo v Manson Investments Ltd* [1977] 1 WLR 347 (CA).

[54] See above, para 7.39.

[55] See above, para 8.42.

[56] See above, para 8.43.

[57] See above, para 8.45.

legislation?[58]

Rectification against a proprietor who is in possession

Qualified indefeasibility

12.57 Do you agree with our provisional view that some form of qualified indefeasibility should be retained? If you do not, would you please give your reasons.[59]

12.58 If you agree with our provisional view in paragraph 12.57 above, do you prefer Option 1 (qualified indefeasibility in all cases of lawful possession)[60] or Option 2 (qualified indefeasibility in some cases of lawful possession)?[61] If you favour Option 2, which of the following categories of persons in lawful possession of registered land should be protected—

(1) the registered proprietor;

(2) any tenant for a term of years;

(3) any tenant at will;

(4) any licensee (whether gratuitous or for value, and including any agent or employee);

(5) any beneficiary under a trust of land or settlement; or

(6) any mortgagee who had exercised his or her right to take possession?[62]

Exceptions to indefeasibility

12.59 Do you agree with our provisional recommendation that where the principle of qualified indefeasibility applied, it should remain the case that the register might be rectified against a proprietor who is in possession (however defined)—

(1) to give effect to an overriding interest;

(2) where that proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care; or

(3) where it is considered that it would be unjust not to rectify the register against him or her?

Do you agree that, where one of these grounds existed, there would be a presumption in favour of rectification, but the matter would still be discretionary?[63]

[58] See above, para 8.46.

[59] See above, para 8.47.

[60] See above, para 8.49.

[61] See above, para 8.50.

[62] See above, para 8.51.

[63] See above, para 8.52.

Rectification against a proprietor who is not in possession

12.60 Do you agree with our provisional recommendation that, where the proprietor is not in possession (however that may be defined), there should be a presumption in favour of rectification where a ground for rectification exists, though it would still be a matter of discretion whether or not the court or registrar ordered rectification?[64]

Rectification and derivative interests

12.61 Do you agree with our provisional recommendation that—

(1) the register might be rectified even though this might affect any estates, rights, charges, or interests acquired or protected by registration, or by an entry on the register, or any overriding interest; and

(2) any rectification of the register should be effective from the date of the application for rectification, and should not have retrospective effect?[65]

MORTGAGES AND CHARGES

Registered charges

Definition of "registered charge"

12.62 Do you agree with our provisional recommendation that the definition of "registered charge" should make it clear that—

(1) it is a legal mortgage of, or charge over, registered land to secure either—

(a) the payment of money that is or may become payable; or

(b) the performance of some other obligation; and

(2) it includes any statutory charge;

which is created and registered as a charge in accordance with the provisions of the Act?[66]

Registered charges as charges by way of legal mortgage

12.63 Do you agree with our provisional recommendation that a registered charge should always take effect as a charge by way of legal mortgage and that it should no longer be possible to create a mortgage of registered land by demise or subdemise?[67]

The powers of registered chargees

12.64 Do you agree with our provisional recommendation that the powers conferred on mortgagees by the Law of Property Act 1925 to sell or to appoint a receiver should be exercisable by the proprietor of a registered charge, whether or not the charge was

[64] See above, para 8.53.

[65] See above, para 8.55.

[66] See above, para 9.3.

[67] See above, para 9.5.

created by deed?[68]

Equitable mortgages and charges

Liens arising from a deposit of the land certificate

12.65 Do you agree with our provisional recommendation that the statutory power to create a lien over registered land by depositing the land certificate, which has in practice been obsolete since April 1995,[69] should be abolished?[70]

ADVERSE POSSESSION AND PRESCRIPTION

Adverse possession

The fundamental issue of principle

12.66 Do you agree with our provisional recommendation that—

(1) the law of adverse possession as it applies to registered land should be recast to reflect the principles of title registration; and

(2) its application should be restricted to those cases where it is essential to ensure the marketability of land or to prevent unfairness?

If you disagree, please tell us your reasons for doing so.[71]

The proposed scheme of adverse possession for registered land

12.67 We ask for your views on the scheme that we set out in the following paragraphs.

12.68 We provisionally recommend that—

(1) adverse possession should no longer of itself bar the title of a registered proprietor;

(2) only the closure of that proprietor's title on the register would have that effect, and it would do so for all purposes; and

(3) the principles of adverse possession applicable to registered land should be as set out in the following paragraphs.

12.69 First, there should be a new system to enable an adverse possessor to seek registration as proprietor, and it should operate as follows—

(1) Where a person had been in adverse possession of land with a registered title for more than 10 years, he or she would be entitled to apply to be registered as proprietor of that land.

[68] See above, para 9.7.

[69] See above, para 9.8.

[70] See above, para 9.11. We draw particular attention to the reasons given in that paragraph for such abolition.

[71] See above, para 10.19.

(2) On receipt of that application, the Registry would be required to serve a notice on the registered proprietor, any proprietor of a registered charge affecting the title in question, and any person who, from any entry on the register, appears to have a right to possession of the land, informing each of them of the application for registration.

(3) If the registered proprietor, chargee or person entitled to possession failed to object within two months of service of the notice, the registrar would register the adverse possessor as registered proprietor and would close the title of the existing proprietor.

(4) If the registered proprietor or chargee objected to the registration, the application would be dismissed unless the adverse possessor could show that—

(a) the proprietor was estopped by his or her conduct from objecting to his or her registration;

(b) he or she had some independent right to the land that entitled him or her to be registered as proprietor; or

(c) he or she had entered into adverse possession under a mistaken belief, reasonably held, as to his or her rights.

(5) If the adverse possessor raised any of these matters, the issue would be resolved by the registrar, unless he referred it to the court at any time prior to his making a final adjudication. There would be a right of appeal from his decision.

(6) If the adverse possessor established that he or she had entered under a mistaken belief as to his or her rights (above, (4)(c)), the court or registrar would order that the adverse possessor be registered as proprietor of the land unless in the circumstances it was inequitable or otherwise inappropriate to do so. Where the court or registrar ordered such registration, it would be on such terms, if any, whether as to payment or otherwise, as were equitable between the parties having regard to all the circumstances. In particular, the squatter could be required to grant the former registered proprietor an easement over his or her land, or to enter into a positive or restrictive covenant for his or her benefit.

(7) Where the adverse possessor's application to be registered was rejected and he or she subsequently remained in adverse possession for two years from the date of that rejection, he or she could re-apply to be registered as proprietor of the land.

(8) On such re-application, the registrar would, on being satisfied of the facts set out in (7), register the adverse possessor as proprietor of the land and close the title of the registered proprietor. The registered proprietor would remain as such unless and until such an application were made. He or she could therefore deal with the land, but subject to any overriding interest (if any) as the adverse possessor might have, and subject to that person's rights to bring a claim in damages for trespass.

12.70 Secondly, corresponding provision should be made for the situation where a registered

proprietor sought possession in legal proceedings against the adverse possessor.

(1) Where a registered proprietor brought proceedings for possession against a person who had been in adverse possession of the proprietor's land for more than 10 years, the proprietor would be entitled to recover the land unless the adverse possessor could show that—

(a) the proprietor was estopped by his or her conduct from objecting to his or her registration;

(b) he or she had some independent right to the land that entitled him or her to be registered as proprietor; or

(c) he or she had entered into adverse possession under a mistaken belief, reasonably held, as to his or her rights.

(2) If the adverse possessor established (a) or (b), the court would order that the claim for possession should be dismissed and that he or she should be registered as proprietor of the land. If (c) were established, the court would dismiss the claim unless circumstances made it inequitable or otherwise inappropriate to do so, and would order that the adverse possessor be registered as proprietor. Such an order would be on such terms, if any, whether as to payment or otherwise, as were equitable between the parties having regard to all the circumstances, as explained above, at paragraph 12.69(7).

(3) Where the registered proprietor failed either to enforce the judgment or to commence new proceedings for possession within two years of its being given, he or she would thereafter be unable to recover the land from the adverse possessor, who would be entitled to be registered as proprietor of the land. Unless and until that happened, the registered proprietor would remain as such, and could deal with the land, but subject both to any overriding interest (if any) as the adverse possessor might have, and to that person's rights to bring a claim in damages for trespass.

12.71 The scheme which we propose above would not apply—

(1) in a case of adverse possession against a short lease which was an overriding interest (which would be subject to the same principles as if it were unregistered land); or

(2) to an adverse possessor who could show that he or she had barred the rights of a registered proprietor before any legislation implementing that scheme was brought into force.

12.72 We seek your views on this scheme, and in particular whether—

(1) you agree with it in principle, or would prefer to retain the existing law on adverse possession even though it is founded on principles that were devised for a possession-based, rather than a registration-based system of title; and

(2) if you agree with it in principle, whether you have comments on all or any

details of the scheme.[72]

The machinery for giving effect to adverse possession where title is registered

12.73 Do you agree with our provisional recommendation that—

(1) the trust should no longer be used as a means of giving effect to the rights of an adverse possessor who has barred the estate of the registered proprietor;

(2) where an adverse possessor is entitled to be registered as proprietor, he or she should be registered with an absolute, possessory or qualified title;

(3) where the title barred is that of a tenant under a lease or a life tenant under a settlement or trust of land—

(a) the adverse possessor should normally be registered with a qualified freehold title;

(b) the qualification should be that he or she takes subject to the estate or interest of any person or persons entitled on the termination of the lease or the life interest; and

(4) where the title barred is that of a tenant under a lease, the freehold (or other) title of any person entitled to the reversion on that or any superior lease should not be closed or otherwise affected by the registration of the adverse possessor with a freehold title?

We would emphasise that our proposals in relation to the machinery are free-standing and do not depend upon the introduction of a new system of adverse possession of the kind proposed in paragraphs 12.68 to 12.71.[73]

[72] See above, paras 10.65 - 10.69.

[73] See above, para 10.78.

Prescription

12.74 In anticipation of the introduction of electronic conveyancing, we consider that it is necessary to make some changes to the law governing prescription of easements and profits *à prendre* over registered land. Do you agree with our provisional recommendation that—

(1) after the coming into force of any legislation, it should not be possible to claim an easement or profit *à prendre* by prescription except under the provisions of the Prescription Act 1832;

(2) without prejudice to such a claim, it would cease to be possible to assert or claim an easement or profit *à prendre* on the basis of common law prescription or lost modern grant; but

(3) these proposals would be without prejudice to any easement or profit *à prendre* that could be shown by the claimant to have been acquired by common law prescription or lost modern grant prior to the coming into force of the legislation?[74]

CONVEYANCING ISSUES

The creation and transfer of estates, rights and interests in or over registered land

The move to electronic conveyancing

12.75 HM Land Registry intends to move to a system of electronic conveyancing over the coming decade or so. In Part XI of this Report, we have tentatively set out how such a scheme might operate. What is required at present is the legal framework that will enable electronic conveyancing to be introduced in an orderly manner.

12.76 Do you agree with our provisional recommendation that—

(1) the Lord Chancellor should have power to make rules from time to time to enable title to registered land to be transferred and rights over registered land to be created without a written instrument; and

(2) any such rules should be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament?[75]

Formal requirements

12.77 To facilitate the introduction of paperless conveyancing, it will be necessary to disapply the existing formal requirements for the transfer and creation of estates, rights and interests in land. There are many provisions in the property legislation which apply only to transactions made by deed. These will also have to be amended to enable electronic conveyancing to be introduced. Even in advance of the introduction of paperless conveyancing, it is likely to be desirable to move towards the conduct of conveyancing according to standardised formats and computer generated documents.

[74] See above, para 10.94.

[75] See above, para 11.20.

12.78 In the light of this, do you agree with our provisional recommendation that—

(1) the Lord Chancellor should have power to make rules to modify or exclude any provision of any enactment or instrument, or any rule of law, to the extent that is necessary to facilitate conveyancing transactions in regard to land with registered title; and

(2) the power should be exercisable by statutory instrument subject to annulment by resolution of either House of Parliament?[76]

Transitional provisions

12.79 Do you agree with our provisional recommendation that—

(1) the existing power by which interests in registered land may be created or transferred "off the register" and then take effect as minor interests should be retained; but

(2) under the provisional recommendation in paragraph 12.76 above, the Lord Chancellor should have power to override (1) and to specify that certain transactions could be effected only by registration?[77]

A specific problem: the assignment of leases

12.80 We explain above the problems that have been created by the decision of the Court of Appeal in *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd*.[78] We seek your views as to which one or more of the following options you would prefer as a response to that decision—

(1) leave the law unchanged, so that where a registered lease is assigned, it should operate merely as an equitable assignment of the lease pending its registration;

(2) provide that on an assignment of a registered lease, as between the persons whose rights and liabilities are affected by that assignment, it should take effect as if it were a legal assignment even though it has not been registered (thereby replicating the position where title to a lease is unregistered);

(3) provide that where a transfer of any registered estate is not completed by registration within (say) two months, the Registry should charge an additional fee for its registration; or

(4) some other option (please specify).

[76] See above, para 11.23.

[77] See above, para 11.25.

[78] (1996) 75 P & CR 223. See paras 11.26 and following.

The obligations of a vendor in deducing title when making a disposition of registered land

Proof of title

12.81 We examine the operation of section 110 of the Land Registration Act 1925.[79] Do you agree with our provisional recommendation that—

(1) subject to (2) and (3) below, on a disposition of registered land (including a subsale), there should be no restrictions on the rights of the parties to make their own arrangements as to—

(a) the evidence of title that the proprietor or seller should be required to deduce; or

(b) the steps that the seller who is not the registered proprietor should be required to take to perfect his or her title; but

(2) the Lord Chancellor should have power to make rules specifying—

(a) the evidence of title that might be required on a disposition of registered land; and/or

(b) the steps which a seller who is not the registered proprietor might be required to take to perfect his or her title; and

(3) any rules made under (2) would override the terms of any agreement that might have been made by the parties?[80]

Converting good leasehold title to absolute title

12.82 We are aware that a person registered with good leasehold title sometimes needs to upgrade his or her title to absolute in order to sell or mortgage the lease. This requires those with superior titles to deduce them to the Registry. Sometimes it may be difficult to secure their co-operation. Although this may be a problem in some cases, our provisional view is that any effective solution would be excessively draconian. Do you agree with our provisional conclusion that there should be *no* statutory right for a tenant who is registered with a good leasehold title to compel the deduction of superior reversionary titles, so that he or she can be registered with an absolute title, or do you consider that this is a sufficiently serious problem in practice that some kind of right should be given?[81]

Other conveyancing issues

12.83 Are there any other conveyancing issues affecting registered land where you consider that reform would be desirable? If so, what are they?[82]

[79] See above, paras 11.35 and following.

[80] See above, para 11.48.

[81] See above, para 11.50.

[82] See above, para 11.51.

APPENDIX

A list of persons who responded to a consultation carried out by the Law Commission regarding potentially obsolete overriding interests within the Land Registration Act 1925, s70(1)

Association of County Councils

Association of Drainage Authorities

Association of London Authorities

Association of London Government

Association of Metropolitan Authorities

British Aggregate Construction Materials Industries

British Ball Clay Products Federation Ltd

The Confederation of British Industry

China Clay Association

The Church Commissioners

Cornish Chamber of Mines

Country Landowners Association

The Crown Estate

Duchy of Cornwall

Duchy of Lancaster

A Duncan Esq, Grimley JR Eve, International Property Consultants

Durrad Davies & Co, Solicitors

Farrer & Co, Solicitors to the Duchy of Cornwall

Forestry Commission

Fowler, Langley & Wright, Solicitors

Aden, Stretton, Slater, Miller, Solcitors

I Hoddy Esq, RMC Group Services Ltd

N K Jeans Esq, Tregothan, Truro

Manby & Steward, Solicitors

Matthews & Son

Mining & Mineral Law Group

Ministry of Agriculture, Fisheries and Food (Legal Department and Flood and Coastal Defence Division)

P Morgan Esq, Wardell Armstrong, Mining, Minerals, Engineering and Environmental Consultants

National Rivers Authority

Pickering & Butters, Solicitors

The Royal Institute of Chartered Surveyors

Rutherfords, Solicitors

Sand and Gravel Association

Silica and Moulding Sands Association

Smith Whittingham, Solicitors

Stephenson Harwood, Solicitors

Talbot & Co, Estate Agents

The Mining Association of the United Kingdom

United Kingdom Onshore Operators Group

I C Waite Esq, Stephens & Scown, Solicitors

Ward Williams, Chartered Surveyors, Land Agents & Valuers

Wilsons, Solicitors

WE ARE ALSO GRATEFUL TO THE FOLLOWING WHO ASSISTED US IN OUR INQUIRIES ON THE EXTENT OF CORN RENTS:

Dr J A Farrer

N R B Robinson Esq, Agent and Receiver, The Shrewsbury Hospital Estate Office

Smiths Gore, Chartered Surveyors