Editor's Notebook

When the experts get it wrong

Academic lawyers; Charges; Church chancels; Courts' powers and duties; Interpretation; Land registration; Land Registry; Rectification; Repairs

Now and again, I pass up the chance to inflict my opinions on the readers of The Conveyancer by inviting a Guest Editorial. This is such an issue. Peter Williams writes below on a matter of concern to practitioners and academics and which has already generated a significant amount of comment. But, while the particular issue of chancel repair liability has been well analysed, the general point—the meaning of "priority" under the Land Registration Act 2002 and HM Land Registry's view of its role in land transactions concerning priority—has been less well exposed. As always, should any reader wish to reply, that would be most welcome.

Martin Dixon

Who decides what the law is? Like the infamous question to an accountant "What is 2+2?", the answer is "why are you asking?". Probably the correct answer is "the courts".[1] However, in everyday life, practitioners do not have the luxury of asking the courts for guidance every time a new problem is identified.[2] The courts do not like to decide on abstract points of law. They prefer resolving genuine disputes between two or more litigants.[3]

So where does that leave practitioners who need guidance on the law or on what procedures to follow? Traditionally there are two approaches: textbooks or the organisations tasked with operating or enforcing the relevant area of law (think HMRC or the Land Registry). Both have their limitations. Textbooks tend to explain what the law is. They are often not too helpful identifying lacunae, or exploring the implications of lacunae. Organisations tend to have a much better idea of appropriate procedures to follow (unsurprisingly, since they tend to operate them, and in many cases were involved in drawing them up in the first place). But they still have their limitations, and on rare occasions they can be wrong. This editorial first considers two recent cases in which the courts disagreed with the experts, and then considers a possible third area of law where one organisation—the Land Registry—may be interpreting a key provision in the Land Registration Act 2002 in an unexpected manner.

[1] Even then there may be exceptions, such as in the case of EU law or cases involving the European Convention on Human Rights.

[2] It has always irritated me that there are some legal questions that have not yet been answered—such as (to raise just one) whether a lease is within or outside the protection of the Landlord and Tenant Act 1954 where the reversion changed hands between the serving of the landlord's notice and the grant of the lease).

[3] A rare recent exception is *Pavilion Property Trustees Ltd v Permira Advisers LLP* [2014] EWHC 145 (Ch); [2014] 1 P. & C.R. 21.

The effect of an unregistered charge

The first case is *Swift 1st Ltd v Colin*.[4] The facts read like an examination question, but can be simplified to the following. Swift had taken a legal charge over a property, which had been noted, not substantively registered, at the Land Registry. It was accordingly merely an equitable mortgage. Swift sold the property to Mr and Mrs Colin, using a transfer in form TR2.[5] The Land Registry declined to register the transfer on the basis that, having merely an equitable mortgage, Swift was not able to transfer legal title to the property.

The court (Judge Purle QC sitting as a High Court judge) held that the Land Registry's concerns were unfounded[6]:

> "The power of sale derives not from the niceties of the land registration legislation, but from the Law of Property Act 1925, and all that is required is a mortgage by deed. For section 88 [Law of Property Act 1925] to be engaged, all that is required, so far as relevant to the present case, is a charge by way of legal mortgage. The fact that this charge by way of legal mortgage was in the event unregistered, is, in my judgment, neither here nor there."

Accordingly the court ordered the Land Registry to register the transfer to Mr and Mrs Colin.[7]

Rectification of the register "for the future"

The facts of the second case cannot be summarised so succinctly, but fortunately do not need to be understood in order to appreciate the legal issue in question. The case is *Gold Harp Properties Ltd v MacLeod*.[8] The Court of Appeal was being asked to consider the ambit of para.8 of Sch.4 to the Land Registration Act 2002. This is part of the machinery relating to rectification of the register, and para.8 reads as follows:

> "The powers under this Schedule to alter the register, so far as relating to rectification, extend to changing *for the future* the priority of any interest affecting the registered estate or charge concerned." [Emphasis added.]

In this case, the court was being asked to rectify the register to restore the note of a lease that had been removed from it (by mistake, it was decided in this case). However, a later lease had subsequently been granted. The issue was whether the court had power to restore the note of the earlier lease so as to give it priority over the later lease. The tenant under the later lease claimed that this went beyond that which was permitted by para.8. It was not changing the priority "for the future", as the priority of the later lease had been established in the past and was now being varied.

[4] *Swift 1st Ltd v Colin* [2011] EWHC 2410 (Ch); [2012] Ch. 206.

[5] Transfer of registered title(s) under power of sale.

[6] *Swift 1st Ltd* [2011] EWHC 2410 (Ch) at [13]. The judge also held that an equitable mortgagee has power to sell the legal interest in the charged property.

[7] The judge recorded at [5] that the application to the court had not been actively opposed by the Land Registry, and that the Land Registry had been invited to intervene but had declined to do so.

[8] *Gold Harp Properties Ltd v MacLeod* [2014] EWCA Civ 1084.

Underhill LJ gave the only judgment in the Court of Appeal, and allowed the mistake to be corrected. He held that "for the future" means[9]

> "… the beneficiary of the change in priority — that is, the person whose interest has been restored to the Register — can exercise his rights as owner of that interest, to the exclusion of the rights of the owner of the competing interest, as from the moment that the order is made, but that he cannot be treated as having been entitled to do so up to that point".

For our purpose, the importance of this decision is that it differed from the analysis of para.8 contained in two of the leading land law textbooks, *Ruoff & Roper* and *Megarry & Wade*. The authors of both books advanced the view that rectification of the register in this manner would not constitute changing the priority of an interest affecting a registered estate "for the future".[10] It is not the purpose of this article to consider the analysis of these differences, but it is worth noting that the judge commented that differing from those authors' views "naturally concerned" him.[11] Practitioners will feel the same way, given that these books are treated as authoritative by the legal profession.

Attempting to phase out chancel repair liability

On now to the third example of where guidance from the experts does not necessarily provide the certainty that practitioners are seeking. This concerns chancel repair liability ("CRL").[12]

In 1985 the Law Commission proposed[13] the urgent[14] abolition of CRL. The government of the day did not take up this invitation[15]. In 1998 the Law Commission and the Land Registry consulted[16] on a proposed new Land Registration Bill, and tentatively suggested that CRL should be retained as an overriding interest. However, by the time the Land Registration Bill was prepared, it was proposed that certain interests, not including CRL,[17] should cease to constitute overriding interests[18] 10 years after the new law took effect. It would therefore be necessary for the owners of such interests to protect them by notice on the land register before the ten year period had elapsed, or risk losing them.

[9] *Gold Harp Properties Ltd* [2014] EWCA Civ 1084 at [96].

[10] C. Harpum, S. Bridge and M. Dixon (eds), *Megarry & Wade: The Law of Real Property*, 8th edn (London: Sweet & Maxwell), para.7–136.

[11] *Gold Harp Properties Ltd* [2014] EWCA Civ 1084 at [99].

[12] According to the Land Registry, doubts have been expressed as to whether or not CRL constitutes an interest that affects a registered estate for the purpose of s.132(3)(b) Land Registration Act 2002—Landnet issue 38, October 2013, p.11, available at *https://www.gov.uk/government/publications/landnet-38* [Accessed September 2, 2014]. For the purpose of this article (only), it is assumed that CRL does constitute such an interest.

[13] Law Commission, *Property Law: Liability for Chancel Repairs* (HMSO, 1985) Law Com. No.152.

[14] "…we favour the liability being abolished in ten years' time. To perpetuate the uncertainty within the conveyancing system for any longer period would not be tolerable", Law Commission, *Property Law: Liability for Chancel Repairs*, para.418.

[15] However, a private members' bill to abolish Chancel Repair Liability in accordance with the recommendation of the Law Commission in 1985 was given its first reading on July 16, 2014.

[16] Law Commission, *Land Registration for the Twenty-First Century* (1998), Law Com. No.254, Cm.4027.

[17] A franchise, a manorial right, a crown rent, a non-statutory right in respect of an embankment or a river or sea wall and a corn rent—Law Commission, *Land Registration for the Twenty-First Century* (The Stationery Office, 2001), Law Com. No.271, HC Paper No.114, paras 8.35 and 8.36.

[18] More properly "Unregistered interests which override registered dispositions" (heading of Sch.3 to Land Registration Act 2002).

It seems likely that the Law Commission intended to treat CRL in the same way, but shortly before the publication of its report the Court of Appeal held[19] that chancel repair liability contravened the European Convention on Human Rights and was therefore unenforceable. CRL did not therefore feature in the list of interests that would constitute overriding interests for only ten years. However, after the Land Registration Act 2002 had been passed, but before it came into force, the House of Lords reversed[20] the Court of Appeal's decision, upholding the enforceability of CRL. CRL was therefore added[21] into the list of interests that would constitute overriding interests for only 10 years.

The intention[22] was that a buyer of registered land for valuable consideration after the expiration of the 10-year period would take free from CRL if it was not by then protected by a notice on the register. In that way, it was thought that CRL would cease to be an issue for conveyancers as soon as that ten year period had elapsed (i.e. from October 13, 2013). For three reasons, this has not succeeded.

First, the legislation assists only buyers of land, and then only after the expiration of the 10-year period. It does not assist landowners who acquired their property before the expiration of the 10-year period (during which CRL still constituted an overriding interest)—including those[23] who acquired their property long before the Land Registration Act 2002 was even thought of. It is therefore not a complete solution to the uncertainties caused by CRL.[24]

Secondly, there is a "registration gap" problem[25] that the authors of the LRA 2002 had not foreseen. Even after the expiration of the 10-year period, a buyer who exchanges contracts to buy a property runs the risk that a notice to protect CRL may be put on the register after exchange of contracts but before completion. As the current means of protection against unknown CRL is insurance, this means that a buyer has to be advised of the need to buy insurance to cover the period between exchange and completion even where there is no notice protecting CRL on the register on the day when contracts are exchanged.

Thirdly, and presumably also unforeseen by the Law Commission, the Land Registry has said that it will not itself make a decision on whether an application to register a notice to protect CRL is valid or invalid[26]. It has stated[27] that it will enter a notice to protect CRL onto the register even after a transfer for valuable consideration on or after October 13, 2013, and leave the landowner to apply to cancel the unilateral notice in the normal fashion by lodging a UN4, if he or she believes that the notice is invalid. If this is resisted, then the dispute will need to be referred to the Land Registration division of the Property Chamber, First-tier Tribunal in accordance with s.73 Land Registration Act 2002.

[19] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2001] EWCA Civ 713; [2002] Ch. 51.

[20] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 A.C. 546.

[21] Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 (SI 2003/2341).

[22] Law Commission, *Land Registration for the Twenty-First Century*, paras 8.38 and 8.39.

[23] Such as the writer.

[24] In fairness, the Law Commission was not suggesting that this would be a complete solution.

[25] This is not the same "registration gap" relating to the period between completion of a purchase and registration of the purchaser as proprietor as was identified in, for example, *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [2001] Ch. 733; [2000] 2 W.L.R. 566.

[26] i.e. invalid because there has already been a disposition of the property for value on or after October 13, 2013.

[27] Landnet issue 38, October 2013, p.10, available at *https://www.gov.uk/government/publications/landnet-38* [Accessed September 2, 2014].

I have to admit that I have some sympathy for the Land Registry's approach here, since the registration of a notice is an administrative act, and one would not expect it to be overseen by someone with legal training. Having said that, it is unlikely that it is what the Law Commission, when drafting the Land Registration Act 2002, expected to happen. The aim was that a buyer of registered land after the expiry of the 10-year period would not need to be concerned about CRL. Yet under the current system, the Land Registry states that it will register a notice to protect CRL in exactly those circumstances.

I can think of two possible reasons for this approach. The first is that the Land Registry believes that it ought not to be deciding on the validity of an application to register a notice to protect CRL. It has stated in Landnet:

> "Land Registry cannot require evidence that the interest claimed validly affects the property; all we can require is that the nature of the interest claimed is an interest capable of being protected by notice."

There is some logic in this. As the Land Registry becomes more process-driven, is it right to require it to develop a system to reject an ostensibly valid application to register a notice? On the other hand, it would not be too difficult to design a process that identifies notices that relate to CRL, and stipulate that they have to be dealt with by someone more senior.

This leads us to my second reason that the Land Registry is perhaps refusing to cancel the application to register the notice protecting CRL, and instead insisting that the issue is determined by the First Tier Tribunal. Could it be that the Land Registry in fact believes that the notice protecting the CRL could be valid to protect the priority of the CRL in some way? This possibility was first suggested by the Editor of this publication back in 2007,[28] but it was brought to practitioners' attention more recently in an article in Law Society's Gazette[29] and continues to be the subject of rumours.

One suggestion made in the article in the Law Society's Gazette was that

> "[t]he PCC[30] has lost priority against the buyer (and lender), *but not against a future owner*, and therefore the notice is a valid entry on the title". [Emphasis added.]

The context of this was CRL but the issue is not confined to CRL. If correct, it would affect the priority of all types of interest.

This suggestion is clearly unsupportable. Section 29 Land Registration Act 2002 states:

> "(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest

[28] See M. Dixon, "Protecting Third-Party Interests Under the Land Registration Act 2002: To Worry or Not to Worry, That is the Question" in M. Dixon and G. Griffiths (eds), *Contemporary Perspectives on Property, Equity and Trusts Law* (Oxford: OUP, 2007), pp.19–39; and M. Dixon, "Priorities under the Land Registration Act 2002" (2009) 125 L.Q.R. 401–408.

[29] J. Slade, "Chancel repair changes" (March 31, 2014), *The Law Society Gazette*, *http://www.lawgazette.co.uk/law/practice-points/chancel-repair-changes/5040583.article* [Accessed September 2, 2014].

[30] Parochial Church Council, the executive body of a Church of England parish and the body that would register the notice at the Land Registry in relation to CRL.

> affecting the estate immediately before the disposition whose priority is not protected at the time of registration."

In our case, the purchase of the freehold property for valuable consideration means that the CRL is "postponed" to the freehold interest. There was no doubt about this in the case of the Land Registration Act 1925, which used the phrase "free from all other estates and interests whatsoever".[31] However, no less a work than *Ruoff & Roper*[32] states that

> "[a]lthough strictly ss.29 and 30 operate to postpone unprotected interests, their practical effect is to *destroy* them as against a subsequent disponee". [Emphasis added.]

The possibility that an interest that has been postponed to a buyer can in some way re-appear to affect a subsequent owner of the property would undermine the entire system of land registration. However, it is difficult to banish the suspicion that the Land Registry believes that this might be the effect of s.29, and that this is the underlying reason for its refusal to cancel an application to register a notice in the circumstances set out above.

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[31] Section 20 Land Registration Act 1925.
[32] *Ruoff & Roper: Registered Conveyancing*, (London: Sweet & Maxwell), para.15.039.
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