

UPDATE ON THE ACTUAL OCCUPATION OVERRIDING INTEREST

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Introduction: Reminder of the context in which the question of overriding interests arises

1. The basic rule is found in s 28 LRA 2002: priority is not affected by a disposition UNLESS it falls within s 29 (or s 30 for a registered charge), so the old rules (first in time wins) apply, even in registered land.
2. When does s 29 apply?
 - S 29 requires consideration. If no consideration is paid, you'll be bound by all prior equitable interests
 - s 29 is triggered by completion by registration. Unless and until registered, you are bound by all prior equitable interests.
 - BUT s 29 only applies to postpone interests affecting the estate immediately before the disposition. So, subsequently created interests won't bind SAVE those which are themselves registrable dispositions completed by registration. Registrable dispositions are specified in s 27: transfers, long leases (though shorter leases are brought within it for these purposes, by s 29(4)), express grants of legal easements and profits a prendre, and legal charges. Any other subsequently created interest won't bind you even if registered before you are.

Examples:

A executes a legal charge in favour of B.

B does not register within the priority period.

A subsequently grants an equitable charge to C, and C registers its charge immediately.

B subsequently registers its charge.

B has priority even though it registered second. C could not take advantage of s 29, so first in time wins.

BUT,

A executes a legal charge in favour of B.

B does not register within the priority period.

A subsequently grants a legal charge to C, and C registers its charge immediately.

C takes free of B's charge, because C can rely on s 29.

AND:**A executes an equitable charge in favour of B****A then executes a legal charge in favour of C**

If C registers, then it takes free of B's charge if B has not registered it; but unless and until C registers, B has priority.

3. The effect of s 29: Completion by registration of a registrable disposition allows you to take free of all interests other than (i) those noted on the register; and (ii) overriding interests.

Overriding interests

4. These have priority, even if s 29 applies and even if they are not registered.

So in eg 2:

A executes a legal charge in favour of B.**B does not register within the priority period.****A subsequently grants a legal charge to C, and C registers its charge immediately.**

C takes free of B's charge, because C can rely on s 29

BUT if B is in actual occupation (and none of the exceptions apply), then C does not take free.

5. Once someone has taken free of your interest, it cannot be revived against that person or a successor.

So, if B was not in actual occupation, and C takes free, if B later resumes occupation this is of no effect. Likewise, if B manages to get his interest registered after C has been registered, C will be entitled to priority.

What is actual occupation?

6. What do we get from the language?
 - The word used is "occupation", not "possession", so there is no need for exclusivity or the sort of control that is necessary to establish possession
 - Occupation must be "actual". What does this mean?
7. *Baker v Craggs [2016] EWHC 3250 (Newey J, 15 December 2016)* contains a good summary of the authorities on the meaning of "actual occupation" (para 12):

The authorities seem to me to support the following propositions as regards "actual occupation":

- i) The word “actual” in “actual occupation” “emphasises that what is required is physical presence, not some entitlement in law” (*Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 , at 505, per Lord Wilberforce);
- ii) The nature of the relevant property can matter. “Occupation”, Lord Oliver explained in *Abbey National Building Society v Cann* [1991] AC 56 (at 93), is a “concept which may have different connotations according to the nature and purpose of the property which is claimed to be occupied”. In a similar vein, Arden LJ observed in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, [2002] Ch 216 (at paragraph 80), “What constitutes actual occupation of property depends on the nature and state of the property in question”;
- iii) “Occupation” involves “some degree of permanence and continuity which would rule out mere fleeting presence” (to quote again from Lord Oliver in *Abbey National Building Society v Cann* , at 93). Lord Oliver went on to say (at 93), “A prospective tenant or purchaser who is allowed, as a matter of indulgence, to go into property in order to plan decorations or measure for furnishings would not, in ordinary parlance, be said to be occupying it, even though he might be there for hours at a time”. On the other hand, “[r]egular and repeated absence” can be consistent with “actual occupation”: see *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783 , at 788;
- iv) “Occupation” does “not necessarily ... involve the personal presence of the person claiming to occupy” (Lord Oliver in *Abbey National Building Society v Cann* , at 93). In the *Cann* case, Lord Oliver expressed the view (at 93) that a “caretaker or the representative of a company can occupy ... on behalf of his employer”. In *Lloyds Bank plc v Rosset* [1989] Ch 350 , Nicholls LJ (in the Court of Appeal) considered that “the presence of a builder engaged by a householder to do work for him in a house is to be regarded as the presence of the owner when considering whether or not the owner is in actual occupation” (see 378). In *Kling v Keston Properties Ltd* (1983) 49 P&CR 212 , Vinelott J considered the plaintiff to have been in “actual occupation” of a garage in which his wife's car had been confined because the door was blocked and thought that the result would probably have been the same even if the car had not been physically trapped: the plaintiff, Vinelott J suggested (at 219), “should be treated as being in continuous occupation of the garage while he was using it in the ordinary course for the purpose for which the licence was granted, that is, for garaging a car as and when it was convenient to do so”;
- v) In contrast, “actual occupation” by a licensee on his own behalf does not represent “actual occupation” by the licensor (see *Strand Securities Ltd v Caswell* [1965] Ch 958 , at 980–981 and 984, and *Lloyd v Dugdale* [2001] EWCA Civ 1754, [2002] 2 P&CR 13 , at paragraph 45). Nor does receipt of rents and profits now suffice to give protection. Section 70(1)(g) of the Land Registration Act 1925 , the predecessor of paragraph 2 of schedule 3 to the 2002 Act, referred to the rights of a person “in actual occupation of the land or in receipt of the rents and profits thereof”. Nothing comparable to the italicised words is to be found in the 2002 Act;
- vi) Even in the case of a house, “occupation” need not involve residence. In *Lloyds Bank plc v Rosset* , Nicholls LJ said (at 377) that he could “see no reason, in principle or in practice, why a semi-derelict house ... should not be capable of actual occupation whilst the works proceed and before anyone has started to live in the building”. See too *Thomas v Clydesdale Bank plc* [2010] EWHC 2755 (QB) ;
- vii) Occupation needs to be distinguished from mere use. In *Chaudhary v Yavuz* [2011] EWCA Civ 1314, [2013] Ch 249 , use of a metal staircase and landing for the purpose of passing and repassing between some flats and the street was held not to amount to “actual occupation”. Such activity, Lloyd LJ said (at paragraph 30), is “use, not occupation”;
- viii) As Mummery LJ observed in *Link Lending Ltd v Hussein* [2010] EWCA Civ 424 (at paragraph 27), when determining whether a person is in “actual occupation”:

“The degree of permanence and continuity of presence of the person concerned, the intentions and wishes of that person, the length of absence from the property and the reason for it and the nature of the property and personal circumstances of the person are among the relevant factors”;

8. The facts of that case were:
 - A owned a farm.
 - In Jan 2012, A completed the sale of part of the farm, including the yard, to B
 - B failed to register within his priority period.
 - In Feb 2012, A completed the sale of another part of the farm to C, purporting to grant C a right of way over the yard.
 - C registered immediately.
9. It was common ground that C took free of B's equitable interest in the yard (ie would get their right of way) unless B was in actual occupation (subject to another point we'll come back to).
10. In the month between completion of his purchase and completion of C's purchase, B had demolished a barn, and constructed stables on his land. He and his partner had been there most days during this period. He had used the yard for access, parking and for storage of builders' materials. The work finished the day before C completed his purchase, and B was not there on that particular day. Was this actual occupation?
11. The judge held yes.
12. Another recent case is *AIB Group v Turner* [2015] EWHC 3994. Here the facts were as follows:
 - A owned a large property.
 - A agreed to renovate a 3 bedroomed cottage in the grounds to be a home for B. B paid over what appears to have been her only assets to A. B asserted a common intention constructive trust / proprietary estoppel.
 - B subsequently bought a home in Barbados, but did not have a visa to reside in Barbados, and she returned occasionally to England. The cottage was her home while she was in England. Her possessions remained in it at all times, and she asserted that she regarded it as her permanent home. No one else had occupied the Cottage, apart from her son who was at boarding school in England.
 - A subsequently mortgaged its property to C.
13. The claim to an equitable interest was rejected on the facts, but the Court also considered the actual occupation question.
14. Held: she was not in actual occupation.
15. Both cases suggest that you don't look at the actual day on which completion occurs, rather you look at the overall position in the weeks running up to the disposition. In the first case, absence on the day of completion did not mean he was not in occupation; in the second case, occasional visits did not mean that she was in occupation. BUT much depends on the nature of the land in question – presumably

this means that much more frequent presence will be required for occupation of a house than of open land.

Extent of protection acquired

16. Your right is only protected over land you are actually occupying. Occupying one corner of large site isn't occupation of the whole.

Exceptions

17. On a disposition of a registered estate (but not on a first registration), there are circumstances where, despite having an interest and being in actual occupation, you will not have an overriding interest.
18. First, if the potential "purchaser" asks you what right or interest you have and you do not disclose it when you could reasonably have been expected to do so, they will take free.
19. But, in what circumstances is it reasonable to expect a lay person to disclose a right? If you have written lease or legal charge, that is one thing, but if its an estoppel type interest and someone asks you how you come to be there, you might simply say I'm here with the permission of A, without necessarily mentioning that there was an agreement you'd have it, and you relied on that. Expect more litigation about that. And, the circumstances in which the enquiry is made might affect whether it is reasonable for you to disclose your interest: in *Begum v Issa (2014)*, CC it was held that it was not unreasonable not to have disclosed the interest during an informal family discussion at Eid.
20. Second, you won't have an overriding interest if the purchaser did not know of your interest AND your occupation would not have been obvious on a reasonably careful inspection at the time of the disposition.
21. This fits in with the first one: if you can find out (by a reasonably careful inspection) that someone is in actual occupation, then you should ask them what right, if any, they assert: if they don't tell you, then they are deprived of the overriding interest under the first exception (subject to the reasonableness point); if they do tell you, they aren't deprived of an overriding interest but you can decide whether to go ahead and purchase with that knowledge.

22. What is a reasonably careful inspection? Guidance was given in the FTT in *Trevallion v Watmore*, 30 June 2016. There B kept canoes and cement mixers on a triangle of land, of which they had an unregistered underlease. C suggested that B did not have an overriding interest because they had not known of their interest when they purchased (which was accepted), and they could not have discovered the occupation on a reasonably careful inspection, because the triangle was fenced off from the rest of the land C was buying, and the fence was hidden behind a fuschia bush. The judge held that looking at the fuschia bush itself was not a reasonably careful inspection; C should have compared the shape of the garden with the shape on the plan, and if she had done so she would have noticed the difference. The Judge also said that she expected a reasonably careful inspection to involve looking at the boundaries, and that would include parting branches of shrubs and looking through holes in fences to see what was behind.

Time

23. Actual occupation at the date of the disposition is required.
24. But, the interest must exist immediately before the registration of the disponee. This means that it must survive overreaching.
25. This occurs where there is a trust of land, and the purchase money is paid to 2 or more trustees. Until last year, one might have been forgiven for thinking that overreaching only affected trust interests, and not interests held by third parties who were not beneficiaries of the trust and which had nothing to do with the trust. But in *Mortgage Express v Lambert* [2016] 3 WLR 1582, the Court of Appeal held that any equitable interest is capable of being overreached.
26. This means that in any case where the vendor is two or more people, the purchaser does not need to worry about overriding interests.
27. The same conclusion was reached in *Baker v Craggs*, referred to above. B (Mr Craggs) was in actual occupation of the yard, so C (the Bakers)'s right of way was, prima facie, subject to his interest under the purchase contract – ie subject to his right to the freehold of the yard unencumbered by C's easement. But, the vendors, A, were a couple, so when C paid them, B's equitable interest was overreached, and C took free of it.
28. This occurred notwithstanding that by s 2(3)(iv) of the LPA estate contracts are excepted from being overreached. The problem, for B, here was that B's contract had been completed. He did not have an estate contract any more.

29. It is perhaps curious that it should make such a difference to the outcome in such a case that the property happened to be registered in the name of a couple, rather than in the name of man (or woman) alone, or a company.

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