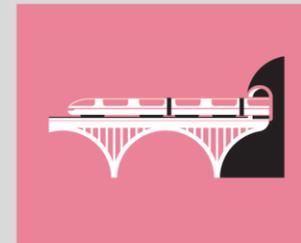


# Priorities of Interests in Registered Land...

Kester Lees  
Falcon Chambers



Falcon Chambers

[www.falcon-chambers.co.uk](http://www.falcon-chambers.co.uk)

# OVERVIEW

This seminar will cover:

1. How to protect an interest on the Register of Title.
2. The rules under Land Registration Act 2002 (LRA 2002) governing the priority of such proprietary interests (13 October 2003).
3. The methods of altering the priorities of interests.
4. Scenarios.

NB the seminar will not cover: (i) unregistered land (or first registration of such land), or (ii) the rules under the Land Registration Act 1925



# The Register of Title

## The Basics

The Register of Title is divided into three sections:

1. **The Property Register:** two functions: to describe the registered estate and to give details of the rights benefiting the registered estate; NB Key lease terms for leasehold property (same with registered rentcharge, franchise or profit à prendre in gross)
1. **The Proprietorship Register:** three functions: to identify the class of title, to identify the proprietor and to list any restrictions or cautions on dealing



# The Register of Title

**3. The Charges Register:** contains details of leases, charges and any other interests (e.g. easements) which adversely affect the registered estate

Essentially the 'debit entries'



# Priority of Interests – the basic rule

The basic rule: s.28 LRA 2002:

*“(1) Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.*

*(2) It makes no difference for the purposes of this section whether the interest or disposition is registered”.*



# Priority of Interests – the basic rule

1. A disposition of the estate or charge does not affect the priority of an interest affecting it.
2. Subject to the exceptions provided in the LRA 2002, the interest which previously bound the estate or charge will continue to take priority over any interest which is transferred or created by the disposition.
3. The practical effect of s.28 is to establish a basic or general rule of **“first in time” priority**.
4. Earlier interests generally take priority over later interests which are transferred or created by the disposition.
5. Under the basic priority rule it makes no difference whether or not the disposition is completed by registration.
6. It makes no special difference in applying the rule whether the interests are legal or equitable.



# Priority of Interests – the special rule

s.29 LRA 2002:

*“(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 affecting the estate immediately before the disposition whose priority is not protected at the time of registration.*

*(2) For the purposes of subsection (1), the priority of an interest is protected—*

*(a) in any case, if the interest—*

*(i) is a registered charge or the subject of a notice in the register,*

*(ii) falls within any of the paragraphs of Schedule 3, or*

*(iii) appears from the register to be excepted from the effect of registration, and*

*(b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.*

*(3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section.*

*(4) Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition, this section has effect as if—*

*(a) the grant involved such a disposition, and*

*(b) the disposition were registered at the time of the grant.”.*



# Priority of Interests – the special rule

s.30 LRA 2002:

*“(1) If a registrable disposition of a registered charge is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the charge immediately before the disposition whose priority is not protected at the time of registration.*

*(2) For the purposes of subsection (1), the priority of an interest is protected—*

*(a) in any case, if the interest—*

*(i) is a registered charge or the subject of a notice in the register,*

*(ii) falls within any of the paragraphs of Schedule 3, or*

*(iii) appears from the register to be excepted from the effect of registration, and*

*(b) in the case of a disposition of a charge which relates to a leasehold estate, if the burden of the interest is incident to the estate.*

*(3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section”.*



# Priority of Interests – the special rule

The effect of ss.29 and 30 LRA 2002:

1. Once the disposition has been completed by registration, the priority of an interest which affected the estate or charge immediately before the disposition is postponed to the interest transferred or created by the disposition, unless the priority of the earlier interest has been protected in one of the ways specified in ss.29 and 30.
2. Without that protection, the interest transferred or created by the disposition will take priority over the other interest which affected the estate or charge before the disposition.
3. However, if the priority of the interest is protected, its priority will remain unchanged by the later registered disposition of the estate or interest.



# Priority of Interests – the special rule

## *Applicable dispositions*

### *Type:*

1. Registered estate: these dispositions include the entire transfer of the estate, or the grant of a lesser interest out of the estate, such as the grant of a registrable lease, a legal charge, or the express grant or reservation of a legal easement or rentcharge.
2. Registered charge: transfer of it, or the grant of a sub-charge.
3. All of these dispositions must be completed by registration if they are to operate at law (s.27 LRA 2002). Until the relevant registration requirements are met, they will not take priority over unprotected interests affecting the estate or charge.

Example: If the owner of a registrable charge failed to register or otherwise protect it, and merely relied on his rights as an equitable chargee, then the priority of the charge over the estate would be postponed to any later registered disposition made for valuable consideration.



# Priority of Interests – the special rule

## *Consideration:*

Only registered dispositions made for valuable consideration. The priority of an interest affecting the registered estate or charge will not therefore be affected by a gratuitous registered disposition.

Example: The usual rule of “first in time priority” will apply and preserve its priority over the interest created or transferred by the disposition: R1, the registered proprietor of a freehold estate holds it subject to an equitable charge by way of mortgage to M1, the priority of which is not protected. R1 dies. His personal representatives transfer the land by way of assent to R2, the person entitled under R1’s will. R2 is registered as proprietor. Unless the personal representatives first discharged M1’s charge, R2 will take subject to it.

NB LRA 2002 provides that “valuable consideration” does not include marriage consideration or nominal consideration in money.



# Priority of Interests – the special rule

## Methods of protection

The ways in which the priority of the interest can be protected against a subsequent registered disposition for value are if:

1. The interest is a registered charge or the subject of a notice in the register
2. The interest falls within any of the paragraphs of Schedule 3 to the 2002 Act as an unregistered interest which will override a subsequent registered disposition
3. The interest appears from the register to be excepted from the effect of registration
4. (in the case of a disposition of a leasehold estate) the burden of the interest is incident to the estate (e.g. covenants between Lessor and Lessee)



# Priority of Interests – Protection by notice (s.32 LRA 2002)

- Equitable charge
- Contract for sale/estate contract
- Leases (agreements for leases)
- Options
- Notices under enfranchisement legislation
- Charging order
- Pending land actions
- Other equitable rights (e.g. equitable easement)

NB1 – not interests under a trust (only restriction)

NB2 – registration of notice does not guarantee validity (c.f. ss.31 and 58 LRA 2002 for registration as proprietor of charge or estate).



# Priority of Interests – Protection by restriction

- A restriction is an entry in the register regulating the circumstances in which a disposition of a registered estate or charge may be the subject of an entry: s.40 LRA 2002.
- A restriction may prevent any disposition of a registered estate or registered charge, or any disposition of a specified kind, from being completed by registration.
- The prohibition may operate indefinitely or may be limited to a specific period or until the occurrence of a specified event.
- Where a restriction is entered, no entry in respect of a disposition to which the restriction applies may be made otherwise than in accordance with the terms of the restriction.
- A restriction may be made in relation to either a registered estate or a registered charge – recorded on proprietorship and charges Registers respectively.



# Priority of Interests – Protection by restriction

- NB If a restriction is expressed to prevent the registration of dispositions of the registered estate by the proprietor of the registered estate or the proprietor of any registered charge, it will only “catch” dispositions of the registered estate by a chargee exercising his power of sale **if the charge was registered after the entry of the restriction**



# Priority of Interests – Protection as overriding interest

In order to take effect as an overriding interest:

1. There must be a pre-existing and valid proprietary interest (NB s.116 LRA 2002).
1. It must be an interest protected in accordance with Sch.3 LRA 2002.
2. Such interests include:
  - a. The grant of a leasehold not exceeding 7 years.
  - b. An interest protected by actual occupation (next slide).
  - c. *Legal* easements and profits save where not within actual knowledge and not obvious upon careful inspection (unless used within last year).



# Priority of Interests – Protection as overriding interest

Protected by actual occupation: paragraph 2 of Sch.3 LRA 2002:

*“An interest belonging at the time of the disposition to **a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—***

*(a) an interest under a settlement under the Settled Land Act 1925 (c. 18);*

*(b) an interest of a person of **whom inquiry was made before** the disposition and who **failed to disclose** the right when he could reasonably have been expected to do so;*

*(c) an interest—*

*(i) which belongs to a person whose occupation would **not have been obvious on a reasonably careful inspection** of the land at the time of the disposition, **and***

*(ii) of which the person to whom the disposition is made **does not have actual knowledge at that time...**”.*



# Priority of Interests – Protection as overriding interest

Actual occupation requires a degree of physical presence (NB not necessarily possession) and is assessed by reference to the nature of the land in question

*Bustard v Link Lending: Mummery LJ: 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...*

Examples include: (i) furniture in house whilst on holiday, (ii) cannot occupy by use of an easement of fire escape (c.f. parking space or storage shed).

NB time for assessment of actual occupation is **date of execution** and not date of registration (nor anytime after)



# Priority of Interests – the special rule

## Time of protection – when interest affects

The interest must affect the estate immediately before the disposition under s.29

Therefore, not where the interest only affects afterwards; e.g. P purchases a registered freehold property by means of a loan from M who wishes to take an equitable charge over the property.

P cannot rely on s.29 to claim that he takes free of the equitable charge on the ground its priority was not protected when the disposition of the freehold was registered. Section 29 did not postpone the priority of the charge to the registered estate because the charge did not affect the estate before the disposition.



# Priority of Interests – the special rule

## Registration Gap

To enjoy priority the interest must be *protected* **at the time that the disposition is registered**: *Thompson v Foy Thompson v Foy [2009] EWHC 1076 (Ch)*; *Ruoff & Roper* @ 15.009ff. Query whether needed both date of disposition and date of registration? C.f. *Link Lending v Bustard*

NB In general, an entry in the register takes effect from the time when the applicant applies for it to be made (.74(b) LRA 2002; Rule 20(1)).

But NB: potential Registration Gap (*Abbey National Building Society v Cann*; *Scott v Southern Pacific Mortgages Ltd [2014] UKSC 52*).



## Priority of Interests – Timing of entries

- LRA s.74(b) 2002 Act provides that an entry made in pursuance of an application to register a registrable disposition takes effect from the time when the application is made.
- The Registrar keeps a computer record known as “**the day list**” which shows the date and time at which every pending application against each affected title is made.
- Applications for **official searches** with priority and outline applications, which are considered below, also appear on the day list.

NB An official search with priority goes beyond showing the state of an individual register of title at the time of the search. It effectively “freezes” the register during a priority period.

NB or ‘outline application’ may be made for non- valuable consideration applications.



# Priority of Interests – where priority rules do not apply

1. The priority rules do not apply to a disposition of a registered estate or charge which is subject to a charge for unpaid tax: s.31 LRA 2002.
2. Priority disputes between a trustee in bankruptcy and a person to whom the bankrupt makes a disposition of a registered estate or charge are not governed by the priority rules in ss.28, 29 and 30 of the 2002 Act.



# Priority of Interests – equitable interests

*As between themselves*

s.28 LRA 2002 applies:

- The priority of competing equitable interests affecting a registered estate or charge is determined by the order in which they were created.
- A later disposition which creates a subsequent equitable interest will not affect the priority of a prior equitable interest which affected the registered estate or charge.



# Priority of Interests – equitable interests

*Vis-à-vis registered dispositions:*

**ss.28 and 29 LRA 2002 govern as above.**

NB: Rights of pre-emption, Proprietary estoppel and mere equities: s.116  
LRA 2002 – all capable of being overriding interests



# Priority of Interests – altering priorities

The priorities between competing interests can be altered (other than by s29 LRA 2002):

1. Subrogation – Bank subrogates to earlier charge where unjust enrichment (*Menelaou v Bank of Cyprus Plc* [2016] A.C. 176).
2. Overreaching – where two trustees receive consideration then the proprietary interest is converted into an interest in the proceeds of sale: s.2 LPA 1925. NB *Baker v Craggs* [2017] Ch. 295 (c.f. appeal).
3. Rectification of the Register – e.g. where a mistake: *Gold Harp Properties Ltd v McLeod* [2014] EWCA Civ 532; Sch. 4 LRA 2002.
4. Most commonly: deed of priority or postponement.



# Scenarios - 1

Under the doctrine of estoppel, A has an equitable easement across land of which R1 is the registered freehold proprietor. R1 dies. His personal representatives, R2 and R3, apply to be registered as joint proprietors of R1's registered estate in the land.



# Scenarios - 1

Answer:

The disposition of the registered estate to R2 and R3 by operation of law is **not for valuable consideration** so the **basic priority rule** in s.28 applies. The equity arising by estoppel is an interest capable of binding successors in title (s.116 LRA 2002). The priority of A's estoppel interest is not affected by the disposition of the estate to R2 and R3. They hold the land subject to A's estoppel interest.



## Scenarios - 2

O has an option to purchase the land of which R1 is the registered freehold proprietor. O does not protect the option by entering a notice in the register, nor is he in actual occupation. R1 transfers the land to R2 for a valuable money consideration which is more than nominal, but which is far below the market value of the land. R2 is registered as the proprietor of the estate.



## Scenarios - 2

Answer:

Under the special priority rule in s.29, O's option is postponed to R2's title to the estate. The disposition to R2 was for valuable consideration. Even though the consideration paid was below the market value of the property, it was not nominal. If it had been nominal, the basic priority rule would have applied. R2 would have taken the estate subject to O's option.



## Scenarios - 3

R1 is the registered proprietor of a registered freehold estate in land which he holds subject to a one-year oral lease to L. R1 makes a registered disposition of the freehold estate to R2 for valuable consideration



## Scenarios - 3

Answer:

Such an oral 1 year lease is incapable of registration and it may not be protected by entry of a notice against the lessor's title. Nonetheless R2 takes the freehold subject to the unexpired term of the lease. The priority of L's lease was protected against the registered disposition for value of the freehold estate. A leasehold estate in land granted for a term not exceeding seven years from the date of grant is an unregistered interest which will override a registered disposition for value. It appears on the list at para.1 of Sch.3 to the 2002 Act as an interest whose priority may be protected in this way.



## Scenarios - 4

R1 and R2 are joint registered proprietors of a registered freehold estate in land. They hold it under a trust of land for themselves and B as joint beneficial owners. At all relevant times, the three beneficiaries occupy the property. Their occupation would be obvious on a reasonably careful inspection of the land. A restriction recording limitations on the equitable powers of dealing of the trustees has not been entered in the register. In breach of trust, R1 and R2 grant a legal charge over the freehold to M1, who registers his charge.



## Scenarios - 4

Answer:

The priority of the beneficiaries' interest in the property is **overreached** in favour of the registered charge, even though the beneficiaries were in actual occupation when the disposition to M1 was completed.

NB if only R1 had been the registered proprietor (holding on trust for R1 and B1 and B2) then there could be no overreaching and in that case B1 and B2's beneficial interests under the trust would bind M1.



## Scenarios - 5

R1 is the registered proprietor of a registered freehold estate in land. He executes successive charges by way of mortgage to M1 and M2 respectively. The charges are not completed by registration. M2 protects his charge by entry of a notice in the register.



## Scenarios - 5

Answer:

M1's equitable charge would take priority over that of M2. The disposition which created M2's mortgage charge was not completed by registration so the special priority rule in s.29 would not apply.

It would make no difference to the priority between the unregistered interests that M2 protected his charge with a notice, while M1 did not. M2's notice would not affect the priority of the interests affecting the estate unless R1 were to make a registered disposition of the estate for valuable consideration. The effect of the notice is only to record the burden of an interest affecting the land, and to protect its priority against a later registered disposition for value. It does not prevent the basic rule of priority from applying when the two interests whose priority is in dispute are unregistered.



# Scenarios - 6

As above but M2 registers its charge.



## Scenarios - 6

Answer:

If M2 registered his mortgage charge, then the special priority rule in s.29 would apply. The priority of M1's unprotected charge would be postponed to M2's registered charge.

NB had M1 protected his charge by entry of a notice prior to the registration of M2's charge, this would have displaced the special rule of priority from applying in favour of M2's charge.



## Scenarios - 7

R1 is the registered proprietor of a registered freehold estate in land. He executes successive charges by way of mortgage to M1 and M2 respectively. The charges are not completed by registration. M2 protects his charge by entry of a notice. R1 makes a registered disposition for valuable consideration of the freehold to R2, without first discharging the mortgages.

R2 does nothing to discharge the charges. R2 then makes a registered disposition of the freehold to R3 by way of gift.



## Scenarios - 7

Answer:

When the disposition to R2 is completed by registration, R2 takes subject to M2's charge because he protected its priority with a notice, while M1's charge was unprotected. R2 is not bound by M2's charge as it was unprotected.

Although the later disposition (by gift) to R3 is not made for valuable consideration, the priority of M1's charge does not revive so as to take priority over the registered estate. This follows from the basic rule of priority in s.28. The previous disposition from R1 to R2 postponed the charge to the freehold. Once postponed in this way, its priority could not be affected by any later disposition of the freehold to R3. Although strictly ss.29 and 30 operate to postpone unprotected interests, their practical effect is to destroy them as against a subsequent disponee.

NB c.f. not necessarily if transferred back: see *Rosefair v Butler* and *Curzon v Wolstenholme*



# Conclusion

ANY QUESTIONS?



**Falcon Chambers**

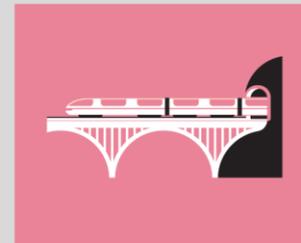
Falcon Court  
London  
EC4Y 1AA

**T:** 020 7353 2484

**F:** 020 7353 1261

**Email:** [clerks@falcon-chambers.com](mailto:clerks@falcon-chambers.com)

**DX:** 408 Lond/Chancery Lane



Falcon Chambers

[www.falcon-chambers.co.uk](http://www.falcon-chambers.co.uk)