

Property Litigation column: The registration gap and possession proceedings

by [Philip Sissons](#), Barrister, [Falcon Chambers](#)

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Philip Sissons, a barrister at Falcon Chambers, discusses whether a purchaser can serve a section 8 or section 21 notice under the Housing Act 1988, or start possession proceedings at court, in the period between the date of completion of a purchase and the time at which its application to be registered as the new proprietor at HM Land Registry has been completed.

Introduction

Property practitioners, especially conveyancers, will be familiar with the difficulties caused by the so-called "registration gap"; the period between the date of completion of a purchase and the date the purchaser is registered as proprietor of the relevant title at HM Land Registry. This article addresses one commonly encountered issue which, perhaps surprisingly, does not appear yet to have been the subject of direct judicial decision.

This issue is whether a purchaser can serve a valid notice pursuant to section 8 and/or section 21 of the Housing Act 1988 (HA 1988) and/or pursue possession proceedings against an assured or assured shorthold tenant before they are registered as proprietor?

The answer is, unfortunately, equivocal. The better view is that a purchaser probably is not competent to do so, though there are respectable arguments to the contrary. In the circumstances, the only safe course is for a party purchasing property which is subject to an existing tenancy to seek, as a term of the contract for sale, a provision appointing them as agent for the vendor until the date they are registered as proprietor.

The registration gap

It is a fundamental principle of the Land Registration Act 2002 (LRA 2002) that the register is conclusive as to the legal title to the registered estate. By section 58(1) of LRA 2002, where a person is registered as the proprietor, the legal estate is deemed to be vested in that proprietor, even if it would not otherwise be so.

In order for this principle to operate effectively, the LRA 2002 also provides that any registrable disposition of a registered estate must be completed by registration. If a disposition of a registered estate is required to be completed by registration, it does not operate at law, but merely in equity, until the relevant registration requirements are met (*section 27(1), LRA 2002*).

Accordingly, in the case of one of the most commonly encountered dispositions, a transfer of the freehold estate, the legal title to the property does not pass to the purchaser until the sale is completed by registration. Although, at common law, the execution of a transfer in the form of a deed is effective immediately to pass both the legal and beneficial title, by virtue of these provisions, in the case of registered land, the legal title does not pass until the purchaser is registered as the proprietor.

The purchaser is only registered as proprietor following an application to the Land Registry and there is no hard and fast rule as to how long this might take. There are no particular sanctions requiring the application to be made expeditiously. The date on

which the purchaser is recorded as registered proprietor (and therefore the date from which they hold the legal title) is backdated to the date on which the application is made, even if, as is invariably the case, the application is not processed for many months.

This creates what is known as "the registration gap", that is to say the gap between the date of the transfer and the date on which the purchaser is registered as proprietor. During this period the vendor continues to hold the legal title but, in almost all cases, the purchaser will have acquired the beneficial interest by virtue of having entered into the transfer and paid the purchase price.

The potential concern that during the registration gap a third party might be granted an interest by the vendor which could become binding on the purchaser is addressed by paragraph 2 of Schedule 3 to the LRA 2002. This provides that in order for a third party to have an overriding interest binding on the purchaser following registration, they must both own that interest and be in actual occupation of the property at the date of the disposition (the transfer) not the date of registration.

One problem created by the registration gap is that the purchaser, as equitable owner lacking legal title, would not, absent express provision, be competent to make a further transfer or grant a legal charge. Accordingly, the purchaser could not grant a valid legal charge to secure the monies advanced to fund the purchase until registration is completed.

This problem is addressed by sections 23 and 24 of the LRA 2002. By section 23(1), it is provided that the owner's powers in relation to a registered estate consist of the power to make a disposition of any kind permitted by the general law and a power to charge the estate at law with payment of money.

Section 24 of the LRA 2002 then states that a person is entitled to exercise owner's powers if they are either the registered proprietor or entitled to be registered as proprietor. The precise scope of these provisions remain the subject of some debate (see paragraphs 5.27 to 5.29 of *Law Commission Consultation Paper 227, Updating the Land Registration Act 2002*). However, whilst they appear to entitle a purchaser under a valid transfer to charge the property or enter into a sub-sale, section 23 and section 24 of the LRA 2002 are, as explained further below, subject to the important qualification that the powers conferred are limited to those permitted by the general law.

The provisions of the Housing Act 1988

Pursuant to the HA 1988, a tenancy under which a dwelling-house is let as a separate dwelling creates either an assured tenancy (if granted before 1996) or an assured shorthold tenancy (AST). The court must not make an order for possession against a tenant under an assured tenancy unless one or more of the grounds set out in Schedule 2 to the HA 1988 are established and the landlord has first served a notice pursuant to section 8 (or the court considers it just and equitable to dispense with that requirement). An order for possession can be obtained against a tenant under an AST, if the landlord has first served the requisite form of notice under section 21 of the HA 1988.

Notices under both section 8 and section 21 of the HA 1988 can only be served by "the landlord". It is expressly provided in each section, that if there are joint landlords, the requisite notice can be given by only one of them (*section 8(1)(a)* and *section 21(1)(b)*, HA 1988 respectively).

Section 45 of the HA 1988 provides the following definition of the term "landlord" in Part I of the Act (the Part which includes both section 8 and section 21):

"landlord" includes any person from time to time deriving title under the original landlord and also includes, in relation to a dwelling-house, any person other than a tenant who is, or but for the existence of an assured tenancy would be, entitled to possession of the dwelling-house.

This definition appears designed to capture any party that acquires the interest in reversion on the tenancy held by the original landlord. It would therefore include a party granted an intermediate lease and, plainly, a purchaser of the freehold or leasehold title, once that party is registered as proprietor of that title. The much more difficult question, however, is whether during the registration gap the purchaser is, by virtue of their equitable title, a person who would be entitled to possession of the dwelling-house, but for the existence of the assured tenancy.

The decided cases

There does not appear to be any reported authority in which the court has specifically considered whether a purchaser can serve a notice under HA 1988, or bring a claim for possession, prior to registration. There are, however, a number of instructive decisions which have considered analogous situations.

First, under the Landlord and Tenant Act 1954 (LTA 1954), a business tenancy to which that Act applies can be brought to an end by a process started by the landlord serving a notice under section 25 of the LTA 1954. The term "landlord" is defined in section 44(1) of the LTA 1954 to mean the person that owns the interest in the relevant property satisfying certain conditions. The definition does not say expressly whether the title held by the landlord must be a legal as opposed to an equitable interest. In *Pearson v Aloyo* (1990) 60 P & CR 56 it was held that a section 25 notice under LTA 1954 must be served by the owners of the legal estate and a notice served in the name of one of two joint landlords, was invalid. The definition in section 44 of the LTA 1954 was concerned only with legal (as opposed to beneficial) owners since otherwise, said Nourse LJ, the LTA 1954 would be unworkable. It follows that a section 25 notice under the LTA 1954 must be served by the party holding the legal, as opposed to beneficial, title to the interest in reversion on the lease in question.

Second, in *Stodday Land Ltd v Pye* [2016] EWHC 2454 (Ch), it was held by Norris J that during the registration gap, the purchaser could not serve a valid notice to quit under the Agricultural Holdings Act 1986 (AHA 1986). In this case, the judge pointed out that there is a considerable body of authority (most recently and authoritatively *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co* [2001] Ch 733) to the effect that at common law, a notice to quit must be served by the owner of the legal title to the reversion. As the judge observed, at paragraph 25, there is:

"a well-established and coherent body of law in support of the proposition that where a legal right to bring a tenancy to an end by notice to the tenant is being exercised, then it is the person in whom the reversionary estate is vested who must give the notice..."

In *Stodday*, the purchaser argued that the notices served by an unregistered purchaser of the reversion were nevertheless valid under the AHA 1986 because by section 96, the term "landlord" was defined to mean "any person for the time being entitled to receive the rents and profits of any land". This argument was rejected on the basis that a notice to quit under the AHA 1986 must also comply with the common law and, to achieve that, the notice could only be served by the party holding the legal title. The judge also rejected arguments that the right to serve a notice to quit was acquired by the (unregistered) purchaser pursuant to section 141(2) of the Law of Property Act 1925 and by virtue of section 24 of the LRA 2002. In relation to section 24 of LRA 2002, Norris J said at paragraph 37:

"The giving of a notice to quit is one of the instances in which, under the general law, the ownership of the equitable title does not suffice for the service of an effective notice, and where subsequent acquisition of the legal estate cannot validate the notice retrospectively."

Thirdly, in *Sackville UK Property Select II (GP) No. 1 Ltd v Robertson Taylor Insurance Brokers Ltd* [2018] EWHC 122, Fancourt J reached the same conclusion in relation to the validity of a break notice served by a tenant. In that case, a lease contained a break option entitling the tenant to terminate on giving nine months' notice. The leasehold estate was registered. The term of the lease was assigned (with consent from the landlord) and the assignee served a break notice before it had been registered as leasehold proprietor. The judge concluded the break notice was invalid. The provisions of the Landlord and Tenant (Covenants) Act 1995 (which provide for the transmission of the benefit of landlord and tenant covenants on assignment) did not lead to the conclusion that an equitable assignee was entitled to exercise the right to break. The judge also applied the same reasoning as in *Stodday* in holding that section 23 and section 24 of the LRA 2002 did not save the notice from invalidity.

Finally, there is *Appleton v Aspin* [1988] 1 WLR 410, which is the only case that appears to point in the opposite direction. This is a case which concerned the entitlement of a purchaser to pursue a claim for possession against a tenant protected by the Rent Act 1977 (RA 1977).

In *Appleton*, a purchaser agreed to buy a freehold title with vacant possession and the tenant, who had a protected tenancy, agreed not to assert any right of possession against the purchaser. The tenant reneged on that agreement and failed to vacate. The contractual completion date passed without possession being given to the purchaser. The purchaser, who held an equitable interest by virtue of the contract for sale, sought orders for specific performance and possession. The tenant defended the claim on the basis that pursuant to section 98(1) of the RA 1977, the court lacked jurisdiction to make an order for possession against her.

The Court of Appeal agreed with the tenant. By section 152(1) of RA 1977, the term "landlord" was defined to include "any person from time to time deriving title under the original landlord" and also, in relation to any dwelling house "any person other than the tenant who is, or but for [RA 1977] would be, entitled to possession of the dwelling-house." This definition is therefore materially identical to the corresponding definition in section 45 of the HA 1988.

In *Appleton*, it was held that the purchaser fulfilled this definition. Nourse LJ said:

“...it is not in my view correct to say that he would only become a person deriving title under the vendor on completion. That is certainly true so far as the legal estate is concerned. But the equitable interest passed to the plaintiff under the contract at one and the same time as the tenant agreed to join in giving him vacant possession. He had derived the equitable title from the vendor. I therefore conclude that at the date of the agreement the plaintiff was a person deriving title under the original landlord. Whether on that ground alone or on a general view of the relationship between the parties, I think that he was a person who may fairly and properly be described as the tenant's landlord...”

Can a purchaser bring a claim for possession during the registration gap?

Although the point does not appear to have been specifically decided, it appears clear that during the registration gap a purchaser could bring a claim for possession against a third-party trespasser.

In *Manchester Airport Plc v Dutton* [2000] QB 133, it was held that a party with a contractual licence to enter and occupy land to carry out work had a sufficient interest to maintain an action for possession against trespassers. This decision is controversial, since the traditional position is that in order to have standing to pursue a possession claim, a claimant must have a proprietary interest conferring a right to possession, whereas a licensee only generally has a contractual right of occupation. However, it remains good law; see *Global 100 Ltd v Laleva* [2022] 1 WLR 1046.

If a bare contractual licensee is entitled to maintain an action for possession, then it must follow that a purchaser under a completed (but unregistered) contract for sale also has sufficient standing to pursue a claim against third parties who have entered the land **without consent**. In this scenario, all the court is concerned with is that the claimant (the unregistered purchaser) has a better right to possession than the occupier. The right conferred by the completed contract for sale, together with the right of a beneficiary under a trust of land to occupation (conferred by section 12 of the Trusts of Land and Appointment of Trustees Act 1996) is surely sufficient to establish this where the occupier is a trespasser.

The position under the Housing Act 1988

None of this, however, directly answers the question of whether an unregistered purchaser can serve notices and pursue a claim for possession under the HA 1988. The court cannot make an order for possession against an assured or assured shorthold tenant save in the circumstances specified in the HA 1988 and, accordingly, this question turns entirely on the proper interpretation of the relevant statutory provisions, specifically the definition of "landlord" provided in section 45 of the HA 1988.

In the absence of authority directly on the point, there are respectable arguments pointing in either direction.

On the one hand, if the definition in section 45 is read literally, then an unregistered purchaser would appear to be both a "person ... deriving [equitable] title under the original landlord" and a "person other than a tenant who is, or but for the existence of an assured tenancy would be, entitled to possession of the dwelling-house."

Appleton, decided under the materially identical definition of landlord in the RA 1977, appears to be authority for the proposition that an unregistered purchaser holding an equitable interest is a person deriving title under the original landlord. Furthermore, in the great majority of cases where there is a transfer of a reversionary interest subject to and with the benefit of an AST, the purchaser will, by virtue of the contract for sale and transfer, be entitled to possession of the property against the vendor and, by virtue of their equitable interest, against the world at large, but for the existence of the tenancy in question. On the face of it, therefore, the unregistered purchaser would appear to satisfy the inclusive definition in section 45 of the HA 1988.

On the other hand:

- As the above discussion demonstrates, the courts have consistently held that both at common law and in other statutory contexts, only a party holding the legal title in reversion is entitled to serve the requisite form of notice. It would be odd and inconsistent if a different conclusion applied under the HA 1988.
- The facts of *Appleton* are unusual and, in any event, this case did not address the question of whether a party with an equitable interest was entitled to serve a valid notice, only whether the tenant was entitled to the protection of the RA 1977 at all. In the situation under consideration here, the question is not whether the tenant is entitled to the protection of the HA 1988, merely which party is competent to operate the statutory mechanism. *Appleton* can, therefore, easily be distinguished.
- The fact that an unregistered purchaser derives their (equitable) title from the original landlord, merely begs the question whether an equitable, as opposed to legal, title is sufficient to bring a party within the definition in section 45 of the HA 1988.
- A conclusion that a party with an equitable interest in the reversion can serve notices and/or pursue a possession claim under the HA 1988 might cause considerable practical problems because if this is correct:
 - a potentially unlimited number of beneficial owners might be in a position to serve notices and pursue possession claims, independently of one another and regardless of the wishes of their co-beneficiaries or trustees;

- the tenant would have no means of discerning whether a notice is valid since they might have had no prior contact from a party serving the notice and claiming to fulfil the definition of landlord on the basis of a beneficial interest and no independent means of verifying the status of the party serving the notice.
- Related to the previous point, under section 3 of the Landlord and Tenant Act 1985 (LTA 1985), where the interest of a landlord under a tenancy of premises which consist of or include a dwelling is assigned, the new landlord is under a duty to give the tenant written notice of the assignment. The obvious purpose of this provision is to ensure that the tenant knows the identity of their landlord. That purpose would be frustrated if a party with an equitable interest in the reversion could pursue a claim for possession. Furthermore, it is clear from section 3(2) of the LTA 1985 that where the landlord's interest is held on trust, there is no obligation to disclose the identity of the beneficiaries. It appears that the assignment for these purposes only occurs on the transfer of the legal estate (that is, from the date of registration).

These arguments appear fairly finely balanced. However, it is suggested that the better view (and the approach the court will most likely take if and when the matter is tested) is that an unregistered purchaser is not within the definition of landlord in section 45 of the HA 1988.

The policy reasons for limiting the definition of landlord to the party holding the legal title appear to be powerful. The language of section 45 of the HA 1988 is not so unequivocal as to compel the conclusion that an unregistered purchaser is within the definition, despite all of these considerations. Nevertheless, until there is authority directly addressing the point, the matter is clearly arguable either way.

A practical solution

Given this considerable uncertainty, any purchaser of residential property taking subject to and with the benefit of an existing tenancy (and who may wish immediately to serve a section 8 or section 21 notice) would be well advised to obtain express authority to act as agent for the vendor in connection with the property, pending registration of their purchase. This was the relatively simple, practical solution to the problem proposed by Norris J in *Stodday*.

If the purchaser is appointed agent in this way, then any notice can be served (and any proceedings issued) in the name of the vendor, as the registered proprietor. If the registration is completed before any proceedings reach a conclusion it is a relatively simple matter to apply to substitute the purchaser as claimant.

If this step is not taken, then as matters stand, the purchaser will face a difficult argument in persuading the court that a section 8 or section 21 notice under the HA 1988 served prior to the date of their registration is valid.

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