Response to Law Commission Consultation Paper No 227
Updating the Land Registration Act

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1. In this response, I use the following abbreviations:

   (a) "LRA": Land Registration Act (whether 2002, 1997 or 1925 is indicated);
   (b) "LRR": Land Registration Rules (whether 2003, as amended, or 1925 is indicated);
   (c) "LPA": Law of Property Act (whether 1925 or 1922 is indicated);
   (d) "LTA": Landlord and Tenant Act (with year specified);
   (e) "CP": this Consultation paper;
   (f) "LC": the Law Commission for England and Wales;
   (g) "LR": the Land Registry;
   (h) "LC 271": Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*;
   (i) "LC 254": Law Commission Report No 254, *Land Registration for the Twenty-First Century: A Consultative Document*;
   (j) "FTT": the First-tier Tribunal;

2. In giving my replies, I refer both to the paragraph number in the CP where the issue arises and the paragraph in Chapter 22 where the Provisional Proposals and Questions are collected. I have set out the questions because it is easier to read. This response is my personal response and is given in no other capacity.

CHAPTER 3

Paras 3.14/22.1: LPA 1925, s 153

We invite consultees to share their experiences of Land Registry's new practice of allowing the landlord's freehold title to remain on the register following a lease enlargement under section 153 of the Law of Property Act 1925, and in particular any practical problems that have arisen out of this practice.

3. Issues about LPA 1925, s 153 have crossed my desk on a couple of occasions. In neither case was I satisfied that the requirements of the section were satisfied. The practical problem was, in each case, that a long lease had been granted several centuries ago, the lease was due to expire within the next 50 – 70 years, the ownership of the freehold was wholly unknown, and a developer was keen to develop the land. That is a practical problem which needs to be addressed at some stage by the Law Commission. In practice, the only way that it may be solved at present is if the local authority can be encouraged to exercise compulsory purchase powers. Otherwise it is a matter of title insurance and then to wait 12 years after the lease has expired. The problem with that "solution" is that there is no registered title that can be sold.

4. As regards land registration, there is, in principle, no objection in my opinion to retaining the original freehold title on the register, provided that it is crystal clear from the registered title that an enlargement has taken place under LPA 1925, s 153. I have not actually seen the form of entry that LR now makes in such case (though I have seen a registered title that was created after an enlargement under LPA 1925, s 153).

5. There is an aspect of this matter that is not considered in this report. If the new freehold estate created under LPA 1925, s 153, were to escheat, the escheat would presumably *not* be to the Crown (or in Cornwall/Lancashire to the relevant Duchy), but would be to the freeholder of the reversion on the long lease out of which the new freehold had been created under s 153. This is an additional reason why the original freehold title should be retained, with appropriate entries. Due to disclaimers on insolvency and the occurrence of land that, as a result of environmental liabilities, has a negative value, escheat is fairly common in practice. I see at least one a year and often more than that. Once again, that is an area that the LC needs to look at, as the arcane rules in relation to escheat give rise to all sorts of practical problems. In the 21st century we really ought to have a modern legal structure for dealing with ownership of last resort and not an obscure and uncertain medieval one.

Para 3.51/22.2: cautions against first registration and mines and minerals

We invite the views of consultees as to whether the law should be clarified so that it is possible for an owner of an estate in mines and minerals held apart from the surface to lodge a caution against first registration of the relevant surface title.

6. I consider that if a person has a registrable estate he should register it and should not be allowed to protect it by means of a caution against first registration.[1] The objective really ought to be to achieve total registration. The more comprehensive the register can be, the greater will be its utility. If a person claims mineral rights (other than manorial mineral rights, which are different in nature),[2] they ought to register them. Mineral rights are potentially very valuable and the concomitant of that is that if the surface owner does not own them, that fact should be clear on the register. It can significantly detract from the value of the surface owner's ownership.[3] Yes, the person claiming such rights will have to prove their title to the satisfaction of the LR. If that person cannot do that, he or she should not be allowed to cast any doubt on the title of the surface owner by means of a caution against first registration. In my opinion, the present law should not be changed.

Paras 3.59 – 3.60/22.3 – 22.4: severance of mines and minerals

We invite the views of consultees as to whether the provisions of section 4 of the LRA 2002 should be amended so that compulsory first registration of an estate in mines and minerals is triggered where mines and minerals are separated from an unregistered legal estate, and where an unregistered estate in mines and minerals held apart from the surface is transferred.

[1] I would personally welcome an extension of LRA 2002, s 15(3) to cover *all* cases where the estate could be registered with its own title. I have had recent experience where a solicitor was very puzzled that a caution against first registration could be lodged in relation to a *profit à prendre* in gross that affected registered land. The company that had registered the caution against first registration had not been able to persuade the Land Registry that it had title to the profit and had not been able to register it.

[2] In the absence of some special custom of the manor, manorial mineral rights are more akin to a *profit à prendre*: see *Eardley v Granville* (1876) 3 Ch D 816 at 832 – 833, *per* Jessel MR. A notice is therefore, in my opinion, the appropriate way to protect such rights.

[3] In practice, as I know from experience, surface landowners are very concerned about the issue of severed minerals.

We invite consultees to share their experiences of the extent to which the lack of compulsory registration of estates in mines and minerals is causing problems in practice.

7. In principle, there is much to be said for the proposal that, on a severance of mines and minerals by a transfer, the freehold estate in the mines and minerals should be required to be registered. The practical difficulty is for the person making the disposition to prove his or her title to the mines and minerals (in other words, what has always been the problem). Admittedly, a person is unlikely to purchase such mines and minerals unless he/she is reasonably confident that the seller does indeed have such a title. I assume that there would have to continue to be some qualification on the availability of indemnity should it transpire that the transferor did not own the minerals.

8. The issue of mines and minerals will remain intractable unless some positive step is taken. Thinking out loud, I wondered if something along the following lines might be workable. In *Bocardo SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380 at 399, [27], Lord Hope said that:

> "the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of it by a conveyance, at common law or by statute to someone else."

That is a definitive statement of the common law.

9. I wonder if thought might be given to a provision, which would take effect ten years after enactment, by which the surface owner, who was registered as the proprietor of the freehold title, would, in accordance with Lord Hope's presumption, be treated at the end of that period as the owner of both the surface and the minerals? Thereafter, registered ownership would include the ownership of the mines and minerals. That would give to those who claimed the mines and minerals a ten year period in which to register their rights. If they did not do so, and if subsequently they claimed to own the minerals, they would have to seek rectification of the register to record their rights, and the registered proprietor would enjoy the protections given to a proprietor in physical possession of the land under LRA 2002, Schedule 4. Although that could give rise to claims against LR for indemnity, a person seeking indemnity would have to run the gauntlet of LRA 2002,

Schedule 8, para 5(1)(b).[4] There could even be a rebuttable statutory presumption that a person who failed to register mineral rights within the 10-year period was to be regarded as negligent for the purposes of para 5(1)(b) unless the contrary could be shown. In my experience, most persons who have mineral rights, have them on a large scale, and are well-heeled and well-advised.

10. The suggestion is obviously analogous to LRA 2002, s 117. It is a proportionate response to the issue and would not, in my opinion, fall foul of ECHR, Art 1, Protocol 1.

Para 3.67/22.5: notification of application

We invite the views of consultees as to whether surface owners should be notified of an application to register title to the mines and minerals beneath their land, regardless of whether title is to be registered with qualified or absolute title.

11. While I see the force of the points that are very properly made in para 3.65, I strongly support the proposal that surface owners should be notified of an application to register mines and minerals regardless of the quality of title. In my opinion it follows logically from the common law presumption stated by Lord Hope in *Bocardo*.[5] If a person is asserting that the owner of the surface does not own the minerals, notwithstanding the common law presumption, the surface owner ought to be told of the application to register the minerals when it is made.

Paras 3.78 – 3.79/22.6 – 22.7: discontinuous leases

We provisionally propose that the requirement of registration should apply to the grant of a discontinuous lease out of a qualifying estate. Do consultees agree?

[4] No indemnity is payable under this Schedule on account of any loss suffered by a claimant–

…

(b) wholly as a result of his own lack of proper care."

[5] Above, para 8.

We provisionally propose that it should be possible to protect a discontinuous lease by notice on the register of title to the reversion, whatever the length of the discontinuous lease and whether or not it was compulsorily registerable. Do consultees agree?

12. I support both of these very sensible proposals.

Paras 3.94/22.8: length of registrable leases

We provisionally propose that there should be no change to the threshold of the length of lease which is registrable under the LRA 2002. Do consultees agree?

13. I do not agree with this. I consider that the time has come for leases granted for more than 3-years to be made registrable. Domestic lettings are not affected by this, as they are normally granted as ASTs for a year at a time. However, business leases increasingly tend to be granted for terms of 5 years nowadays.[6] This is rather misleading, because they often continue for a significantly longer period under the continuation provisions of Part II of LTA 1954. Because in my experience business leases almost invariably continue longer than their contractual terms, I consider that they should be registered if they are granted for more than 3 years. One of the objectives of bringing shorter leases on to the register was to catch most business leases: see LC 271, para 3.16. The trend by which the average length of business leases has been falling over the years has continued since the enactment of LRA 2002. If the view that I have expressed in this paragraph is not accepted, I would urge that LR should keep this matter under review. It is also very helpful from a conveyancing perspective if leases are noted against the freehold title and the details of them can be readily obtained from the register. It does further the objective that was set out in para 1.5 of LC 271 (about which I comment further below), which drove the logic of LRA 2002.

CHAPTER 4

Paras 4.34 – 4.35/22.9 – 22.10: dealings prior to first registration

[6] For the record, the process of renewing a business tenancy is a very considerably more onerous burden than the simple task of registering it.

We invite consultees to provide evidence of difficulties they have encountered when undertaking conveyancing in the twilight period.

We invite the views of consultees as to the form of protection that should be provided in respect of dispositions that take place in the twilight period.

14. I have encountered this problem in practice just once. It was shortly after LRA 2002 came into force and I cannot now recall the details. I do recall that the matter was fully discussed by LC and LR when the LRA 2002 was in preparation. The LR lawyers did not want any special provisions in the Act, because they were concerned that, when there was a dealing which triggered compulsory registration, it should be registered as quickly as possible.

15. Where there is a disposition of unregistered land, which triggers compulsory first registration, issues as to priorities in relation to existing rights must necessarily dealt with according to the rules of unregistered conveyancing. In my opinion, the rules as to priorities in relation any other dealing with the land, whether that dealing occurs at the same time as the triggering disposition or after it has been made, but before it is registered, should be those applicable to registered land. That is the only logical position. These transactions could not have been made if there had been no triggering disposition and as that compels compulsory first registration, the registered regime should apply. That may give rise to particular practical issues, but I am not personally aware of them.

Para 4.39/22.11: cautions against first registration

We provisionally propose that it should be made clear that a person with a derivative interest under a trust may apply for a caution against first registration of the legal estate to which the trust relates. Do consultees agree?

16. I support this proposal, which is very sensible. I must admit that I would have thought that a person with a beneficial interest fell squarely within the words of LRA 2002, s 15(1)(b) ("if he claims to be … entitled to an interest affecting a qualifying estate"). That

was certainly the intention: see LC 271, para 3.55(1). As there is apparently thought to be a doubt about the matter, it should be resolved as suggested.

CHAPTER 5

Para 5.30/22.12: person entitled to be registered

We provisionally propose that express provision should be made in the LRA 2002 that a person who has a transfer or grant of a registrable estate or charge in his or her favour is "entitled to be registered as the proprietor" of that estate or charge. Do consultees agree?

17. I was slightly surprised that there was thought to be a doubt about this. What is suggested here is certainly what had been intended in LRA 2002 and I strongly support it.

Para 5.65/22.13: owner's powers

We provisionally propose that, for the purpose of preventing the title of a disponee being questioned, the exercise of owner's powers of disposition by both registered proprietors and persons entitled to be registered as the proprietor should not be limited by:

> **(1) the common law principle that no one can convey what he or she does not own (*nemo dat quod non habet*);**
> **(2) other limitations imposed by the common law or equity or under other legislation; or**
> **(3) any limitation other than those reflected by an entry on the register or imposed under the LRA 2002.**

Do consultees agree?

18. It is disappointing to find that the owner's powers provisions have been misunderstood. I did think that LC 271, at paras 4.2 – 4.11 made the points clear. A person who is entitled to be registered should be able to make any dispositions of a registered estate in the same

way as if he/she were already registered. Purchasers should not be concerned with whether trustees, who are registered proprietors, may be acting in breach of trust. No inquiry should be necessary. If a purchaser is privy to that breach of trust, he or she may find themselves liable in equity after the disposition on the basis of liability for knowing receipt. But none of this should go to the issue of the validity of the disposition.

19. Accordingly, I strongly support the proposal.

CHAPTER 6

Paras 6.30/22.14: Priority of interests which are not registrable dispositions

We provisionally propose that if an unregistrable interest is noted on the register, that interest should be subject only to the interests set out in section 29(2) of the LRA 2002. Do consultees agree?

20. This proposal would obviously be a very fundamental change to the existing priority rules. However, it does have to be considered now that the anticipated system of electronic conveyance will not happen.

21. I have one immediate concern about the proposal. It will prejudicially affect certain interests which in reality will not be protected by an entry in the register. The obvious example, which arises quite often in practice, is the interest of a person with an equity by estoppel, where that person's interest is not protected as an overriding interest by actual occupation. While such an interest is of course already vulnerable to a registered disposition for valuable consideration, I am concerned that its vulnerability should not be increased.

22. There are, undoubtedly counter-arguments. For example, one particular practical problem is that, nowadays, any second charge over property other than a further charge from the first mortgage lender will, in practice, have to be protected as an equitable and not as a legal charge.[7] This is because the first lender will invariably take a covenant from the

[7] This is a point to which I return elsewhere in this response.

mortgagor that requires the first lender's consent to the registration of any subsequent registrable disposition by the mortgagor. That covenant will be protected by a restriction. First lenders do not in practice consent to the registration of a second charge, which is therefore protected by a notice and, accordingly, only takes effect in equity. While that notice protects the second chargee against any subsequent registered disposition, it gives no protection against a prior interest that is not a registrable disposition and has not been protected by a notice in the register – which could include a prior equitable charge. The only protection that the second lender can obtain is by means of a warranty from the borrower. A personal warranty is not worth much.

23. The arguments are finely balanced. On the basis that a positive case has to be made for changing the law, particularly where there is change as fundamental as this, that case has not been made so to convince me and I therefore do not support the proposal.

24. If, contrary to my views, the proposal at paras 6.30/22.14 is accepted, the recommendation at para 6.38, which is not the subject of a question, must follow with it. The proposal at paras 6.30/22.14, if accepted, should only apply to noted unregistrable interests that are made for valuable consideration.

Paras 6.36 – 6.37/22.15 – 22.16: registrable interests that could have been registered

We provisionally propose that a person who takes an interest under a registrable disposition, but who fails to complete that disposition by registration, should not be able to secure priority against prior interests through the noting of that interest on the register. Do consultees agree?

We provisionally propose that a person who takes an interest under a disposition which is of a type which would have been registrable if all proper formalities for its creation had been observed, but who fails to observe those formalities, should not be able to secure priority against prior interests through the noting of that interest on the register. Do consultees agree?

25. Both these proposals assume that the proposal at paras 6.30/22.14 is accepted. As I have indicated, I do not support that proposal. If my view on that proposal is not accepted, I would support both of the proposals set out above.

Paras 6.49/22.17: home rights

Do consultees believe that home rights should be excluded from the effects of our proposal that noting an interest (such as a sale contract) on the register should secure priority against prior unregistered rights (which would otherwise include home rights)?

26. Once again, this assumes that the proposal at paras 6.30/22.14 is accepted. I answer it on that basis. Home rights are something I seldom, if ever, encounter. I am agnostic about this proposal and express no preference one way or another. The proposal is slightly messy and leads to more complex law, but it may have little practical consequence.

Para 6.54/22.18: transitional

We provisionally propose that the priority of unregistrable interests created pre-reform should remain unchanged. Do consultees agree?

If consultees disagree, please state what period of time consultees consider should be allowed in order for holders of existing rights to note them on the register, before the rights become vulnerable to subsequent interests.

27. In the event that the proposal at paras 6.30/22.14 is accepted, I would support the first proposal at paras 6.54/22.18. The second issue ("if consultees disagree") does not therefore arise on the view that I take.

6.57/22.19: indemnity for unregistrable interests

We provisionally propose that the holder of an unregistrable interest which has been noted on the register, whose priority is adversely affected by alteration of the register to correct a mistake, should be able to apply for an indemnity from Land Registry. Do consultees agree?

28. Para 6.56, in terms, would cover a situation in which the controversial decision of the Court of Appeal in *Gold Harp* will stand. I consider that the reasoning (though on the facts not the decision) in *Gold Harp* was wrong. It was quite explicitly the intention of the LC and the LR that rectification of the register should only have prospective effect. That was stated in terms in LC 271 at 10.8, but the Court of Appeal in *Gold Harp* held otherwise. I accept that the comments in para 6.56 could cover other situations and I assume that they are not intended to preclude a statutory reversal of *Gold Harp*.

29. My assumption is that the intention of the principle at paras 6.57/22.19 is to cover alterations in the register which are not rectification as defined by LRA 2002, Schedule 4, para 1. Where there is rectification, the matter is obviously already covered by LRA 2002 Schedule 8, para 1(1)(a). While I strongly advocate the reversal of the ratio of *Gold Harp*, I also support the proposal at paras 6.57/22.19.

6.57/22.19: examples

We invite consultees to submit examples of situations in which the holder of an unregistrable interest has suffered loss as a result of the discovery of a prior unregistrable interest with priority.

30. I regret that I have no examples to give to the LC in response to this question. However, I would draw attention to the point made above at para 22 in relation to second charges, where this problem could undoubtedly arise.

6.63/22.21: Increase in registrations?

We believe that our proposals on the relative priority of unregistrable interests will not lead to a material increase in the number of unregistrable interests being noted on the register, and therefore will not increase the burden on those entering into transactions for the grant of these interests, nor result in any additional resource requirements for Land Registry. Do consultees agree?

31. This is very odd question. I cannot see how anyone can really know the answer to it. My experience arising out of LRA 2002 is that some things that were thought likely to have

only marginal consequences did not in fact have such a limited effect. For example, on the basis of the LR's experience, it was not thought that there would be many case of opposed applications for registration coming to a hearing. What actually happened was quite different (see later). No one can give a properly informed answer to this question in my opinion.

Paras 6.71/22.22: official searches in relation to unregistrable interests

We provisionally propose that it should be possible to make an official search with priority in relation to an application to note an unregistrable interest. Do consultees agree?

32. If the proposal at paras 6.30/22.14 is accepted, contrary to my views, this proposal would appear to follow inevitably and I would in those circumstances support it.

Paras 6.79/22.23: official searches in relation to ancillary applications

We provisionally propose that a priority search should also protect any ancillary applications arising out of the document which effects the registrable disposition which is the subject of the priority search, provided those ancillary applications are specified on the application form for the priority search. Do consultees agree?

33. Once again, this proposal seems to pre-suppose acceptance of the proposal at paras 6.30/22.14. If, but only if, that proposal is supported, I would support this recommendation.

CHAPTER 7

"VALUABLE CONSIDERATION"

Introductory comments

34. The issue of "valuable consideration" was considered and consulted upon in LC 254. The discussion begins at para 3.42. The LC and LR followed the provisions of LRA 1925, ss 20 and 23, except that it was proposed that marriage consideration should be abandoned as a form of valuable consideration. This was because, in reality, transfers in

consideration of marriage were wedding gifts. That proposal was unanimously accepted on consultation. The view of LC and LR was that the meaning of "valuable consideration" should be any consideration that was not a nominal consideration. The meaning of both "valuable consideration" and "nominal consideration" was taken by LC and LR as having been definitively settled by Lord Wilberforce in *Midland Bank Trust Co Ltd v Green* [1981] AC 513. That, after all, is what the case was all about. It was a fairly recent decision of the House of Lords. The relevant passages in Lord Wilberforce's judgment are quoted in the CP at 7.20 and 7.39. Valuable consideration was an advantage conferred or a detriment suffered. Reverse premiums and a transfer of land with a negative value would appear to fall squarely within that definition. According to Lord Wilberforce, nominal consideration was a sum or consideration which can be mentioned but not necessarily paid.

35. Those remarks by Lord Wilberforce are very well known. With that guidance, it is open to the parties to make their own choices. If parties want to be sure that a consideration is nominal they can specify a peppercorn. If they want to make it clear that a disposition is made for valuable consideration it is not very difficult for them to do so. If the parties want to be sure that a transfer is for valuable consideration, they should specify a figure about which there can be no doubt. That figure may change as the value of money falls. However, at the present, £50, for example, is not a consideration which is mentioned but is not paid. It *is* paid and it is unquestionably valuable consideration. I do not consider that the law has to spoon-feed and cater for those not willing to acquaint themselves with the law. The parties should make their intentions clear and it is not difficult for them to do so. Cases in which there is an issue about whether the consideration is nominal or valuable are likely to be few in number (I am not aware of any cases on the point under LRA 2002). As I have indicated above, it is not difficult for the parties to deal with this problem (if problem it be). The issue is raised of transfers for £1. There is little difficulty in regarding that as nominal consideration, and it is expressly so treated in at least one statute: see Inheritance Tax 1984, s 186A(1). There is also case law to the same effect, see *e.g.*, two recent examples, *Hamilton v Hamilton* [2016] EWHC 1132 (Ch) at [191] (Henderson J); and *Purewal v Countrywide Residential Lettings Ltd* [2016] 4 WLR 31 at [6] (Patten LJ). Where is the uncertainty?

36. I do not recall any difficulties surfacing in the responses to LC 254 as to the meaning of "valuable consideration".

37. Analogies with the position on first registration are not illuminating. LRA 1925, s 123(1), as originally enacted, applied to a "conveyance on sale" of freehold land and to an "assignment on sale" of certain leasehold land. In s 123(3), it was stated that such transfers:

> "include a conveyance or assignment by way of exchange where money is paid for equality of exchange, but do not include an enfranchisement or extinguishment of manorial incidents, whether under the Law of Property Act, 1922, or otherwise, or an assignment or surrender of a lease to the owner of the immediate reversion containing a declaration that the term is to merge in such reversion."

It is hardly surprising in the light of those provisions that LRA 1997 spelt out in some detail what the new triggering dispositions were to be. The net was being cast wide.

38. I have noted para 7.49. It is well settled that the fact that a transfer recites that a sum of money has been received does not prevent evidence being adduced to show that it was never in fact paid. I have had to address that point once or twice in practice, including in one case which turned on it.

Paras 7.68/22.24

We provisionally propose that the requirement of valuable consideration in section 29 of the LRA 2002 should be retained, but should be clarified. Do consultees agree?

39. Yes, I agree that the requirement of valuable consideration should be retained. I do *not* think it needs to be clarified in the light of *Midland Bank Trust Co Ltd v Green*, which gave the highest judicial guidance as to its meaning. As I have indicated above, there are other cases which provide guidance. While I do not doubt that the intentions are the best, with great respect, I regret to say that I do not consider that the proposals put forward by the LC do much to clarify the matter. I think they are more likely to confuse than to illuminate. The present law has been in place for 90 years and has given rise to little, if any, litigation (*Midland Bank* was of course a decision on unregistered land).

Paras 7.69/22.25

We provisionally propose that the definition of valuable consideration in section 132 of the LRA 2002 be amended so that "a nominal consideration in money" is no longer excluded from the definition of valuable consideration. Do consultees agree?

40. I do not agree with this proposal, given the guidance in *Midland Bank Trust Co Ltd v Green* and other case law. Under LPA 1925, s 205(1)(xxi), the definition of "purchaser" also includes a similar definition of "valuable consideration" – it "does not include nominal consideration". The same is true in many other Acts: see, *e.g.*, Administration of Estates Act 1925, s 55(1)(xviii) and the Inheritance Tax Act 1984, s 272. Why is it a problem unique to registered land?

Paras 7.70/22.26

We do not believe that it is necessary to make any special provision for a reverse premium in the LRA 2002. Do consultees agree? If consultees disagree, we invite consultees to share any examples of transactions for which no form of consideration is given other than the reverse premium.

41. I agree.

Paras 7.71/22.27

We provisionally propose that where an interest has a negative value, a disposition of that interest is to be regarded as being made for valuable consideration for the purposes of section 29 of the LRA 2002. Do consultees agree?

42. As a conveyance of land which has negative value involves the incurrence of a detriment by the transferee, I am not convinced that this is needed. If it really is felt to be necessary to do something, would it not be better to spell out the meaning of "valuable consideration" by codifying what Lord Wilberforce said? The same could be done for nominal consideration (*e.g.*, "a token sum of money or the giving of a peppercorn that the

parties do not anticipate will be paid or made"). As will be clear, I would much rather nothing was done.

Paras 7.72/22.28

We invite consultees' views as to whether it would be beneficial to clarify the effect of a disposition for which a peppercorn is the only consideration. We invite consultees to provide examples of dispositions which may be structured in this way. If consultees agree that clarification would be beneficial, we invite consultees' views as to whether a peppercorn should engage the protection of section 29 of the LRA 2002.

43. This really did cause me to raise an eyebrow. It should be common knowledge to any lawyer that a peppercorn is not valuable consideration and that it is the paradigm case of nominal consideration. It should not be necessary to say so. The consideration of a peppercorn should most emphatically *not* engage the protection of LRA 2002, s 29. I adhere strongly to the present definitions which are in line with the other property Acts which define valuable consideration (LPA 1925 and Administration of Estates Act 1925).

Paras 7.73/22.29

We invite consultees' views as to whether there are any other types of bargain, not covered above, where consultees believe that it is unclear whether the disposition is made for valuable consideration for the purposes of section 29. Please explain in each case whether it is believed that the disposition should be included within, or excluded from, the priority protection of section 29.

44. I have no comments on **paras 7.73/22.29**.

Paras 7.75/22.30: interests and dispositions affected

We provisionally propose that our proposals on reform of the requirement for valuable consideration under section 29 should apply both to registrable dispositions and unregistrable interests which are noted on the register in accordance with our earlier proposals. Do consultees agree?

45. If, contrary to my view, the LC still thinks it necessary to redefine the meaning of "valuable consideration", then it should apply as suggested in these paragraphs.

Paras 7.78/22.31: section 30

We invite consultees' views as to whether any amendments are necessary to the definition of "valuable consideration" as it applies to section 30 of the LRA 2002.

46. I find it very strange indeed that it could even be contemplated that there might be different definitions of "valuable consideration" in two successive sections of an Act that are similarly worded. Far from leading to clarity, this will have quite the opposite effect. It will sow the seeds of doubt and will cause confusion. All of this confirms my own strong view that the LC should leave well alone and not alter the definition of "valuable consideration". It was an article of faith when I was Commissioner that law reform ought to lead to clearer, simpler law. These proposals have the opposite effect.

Paras 7.81/22.32; section 86

We invite consultees' views as to whether any difficulties would arise if the proposed amendments to the meaning of valuable consideration were also to apply for the purposes of section 86 of the LRA 2002 (bankruptcy of the registered proprietor).

47. It would be sensible for the LC to check this point: LRA 2002, s 86(5) was drafted against the background of s 284(4) of the Insolvency Act 1986 and must harmonise with it. That subsection refers to "value". I cannot find a definition of "value" in the relevant part of the Insolvency Act 1986. Nor can I find any relevant case law on this sub-section.

Para 7.83/22.33, Schedule 8, para 5(3)

We believe that our proposals to clarify the meaning of "valuable consideration" for the purposes of section 29 can be applied equally to the meaning of that phrase in paragraph 5 of schedule 10 to the LRA 2002 (indemnity). Do consultees agree?

48. There is a mistake in the question, which refers to Schedule 10, rather than to Schedule 8. I have no comment on this question because I do not consider that the definition of "valuable consideration" should be changed.

CHAPTER 8

49. **Para 8.2:** the use of the language of postponement came out of the blue from Parliamentary Counsel. It had its origins in the priority search provisions that then existed: see Land Registration (Official Searches) Rules 1993, r 6 (1993 SI No 3276), which it follows.[8] The draftsman considered that "postponement" was accurate because the interest having priority might not defeat the unregistered right for ever (even though in many cases it would). An unregistered interest affecting the freehold would be postponed to a lease granted by the freeholder, but once that lease expired, the freehold would continue to be bound. I have never been particularly enamoured of the way this was done, because although "postponement" can in fact mean "postponed in perpetuity", that is not the usual meaning or connotation of the word.[9] Although I consider that, as a matter of interpretation, the subsection does have its intended effect (the key words are "postponing to the interest under the disposition"), with the inestimable benefit of hindsight, I would prefer to see a provision which made it clear that a purchaser for valuable consideration under a registrable disposition took free of an unprotected interest.

Paras 8.48/22.34: unilateral notices in respect of former overriding interests

We provisionally propose that where a person applies for a unilateral notice in respect of an interest which was formerly overriding until 12 October 2013, and the title indicates that there has been a registered disposition of the title since that date, the applicant should be required to give reasons why the interest still binds the title. The notice will only be entered if the reasons given are not groundless. Do consultees agree?

[8] A provision that was invented by the LR lawyers.

[9] There was a good deal of heart-searching at both LR and LC when Parliamentary Counsel came forward with the proposal.

50. I support this proposal. This is a sensible response to a situation that was not foreseen by LC or LR when LRA 2002, s 117, was devised.

Paras 8.49/22.35

We invite consultees to provide evidence of the extent to which applications are being made for unilateral notices on registered titles where there has been an intervening disposition which engaged section 29, resulting in the postponement of the interest which is the subject of the notice to the interest under the intervening disposition.

51. This issue has been much debated. It has not yet crossed my desk in terms, but it has certainly arisen in cases handled by solicitors for whom I act or for whom I give continuing education talks. They have raised it with me in rather indignant terms. It is the chancel repair liability issue that has caused the most concern because of the potentially huge sums that can be required from a lay rector to pay for repairs to a pre-Reformation church. The profession feels let down because LRA 2002, s 117, was intended to solve the problem of chancel repair liability as a conveyancing trap by making its existence apparent on the registered title. If it was not on the registered title after 13 October 2013, it was assumed that a purchaser for valuable consideration would take the land free of it. That is how it should be.

52. **Paras 8.51 and following**. The point made at para 8.63 is important. LRA 2002, s 29(4) was not a novelty. It replicated the effect of the proviso to LRA 1925, s 19(2). Furthermore, the priority to be given to the grant of a lease that was an overriding interest was the subject of consultation: see LC 254, para 7.35. No change in the law was recommended and no one seems to have raised any problems that were caused by the provision (so far as I can recall). Because registration takes effect from the receipt by LR of an application to register a disposition (LRA 2002, s 74), there is only a problem if the sequence of events is something along the lines of the following:

(a) Monday: Joan transfers Blackacre to Karen on sale and Karen executes a charge in favour of Lender Plc to secure the purchase price that was loaned by Lender Plc.
(b) Tuesday: Karen applies to LR to register the transfer of the freehold.

(c) Wednesday: LR receives Karen's application to register the transfer and it is entered on the day list.
(d) Thursday: Karen grants a seven year lease of Blackacre to Marjorie.
(e) Friday: Lender Plc submits its charge to LR to be registered which is received the following Monday.

53. I do not know how big a problem this is in practice. There are various ways of tackling it if it is thought to be worth tackling. For example, provision could be made by which:

(a) Where there had been a priority search that was still in force when the unregistrable lease was granted, the lease was, for the purposes of LRA 2002, s 29, taken to be granted on the expiry of that priority search;[10] or
(b) Where LRA 2002, s 29(4) states that the unregistrable lease is made "out of a registered estate" that should only have the priority effect given by the subsection from the time when the grantor of the lease was registered as proprietor.[11] If, therefore, the lease was granted by X to Y after a transfer of the freehold to X, but before X had submitted that transfer to LR for registration, Y's lease would only have the priority conferred by s 29(4) once the transfer had been registered.

Paras 8.65/22.36

We invite consultees to provide evidence of the extent to which section 29(4) has operated to confer priority on an unregistrable lease over an interest which is protected by a priority search.

54. My comments are above are as much as I can contribute in relation to **paras 8.65/22.36**.

[10] Priority searches are designed to protect the applicant from *entries in the register*, during the priority search period: see LRA 2002, s 72. Overriding interest leases are by definition leases that are not entered in the register.

[11] This would not prevent a person *granting* a lease under owner's powers after they had become entitled to be registered but before registration. The lease would be validly granted, but it would not have the priority conferred by LRA 2002, s 29(4) *until* the moment after the grantor was registered as proprietor of the estate out of which the lease was granted.

CHAPTER 9

55. **Para 9.23:** The inherent jurisdiction of the High Court to order the removal of notices and restrictions that should not be on the register, which was discussed by Morgan J in *Nugent v Nugent* [2015] Ch 121, should not be a mere footnote in the CP. In practice, if a client needs to get rid of an improper entry in the register quickly, he or she will take advantage of this jurisdiction, which usually secures the removal of the offending entry within a week. Such applications are not uncommon: I have made several. This summary jurisdiction was not affected by the LRA 2002 and was not meant to be.[12] There is much to be said for putting the summary jurisdiction on a statutory basis and extending it to the county court. There does need to be a simple and very quick way of securing the removal of inappropriate entries in the register. The issue invariably arises where a sale or other disposition is pending. The LC should look at this again. The solutions offered in Chapter 9 do not amount to much and will not solve the problem on their own.

56. At the time when the policy for LRA 2002 was developed, disputed applications, which in those days were dealt with by District Land Registrars, were uncommon. No one foresaw the way in which the procedure laid down in LRA 2002, s 73, would lead to an explosion of hearings before what is now the FTT. It should be noted that the policy on disputed applications was driven by LR not LC. There is force in the point made at **para 9.26** about the low threshold in LRA 2002, s 73(6) (the matter must be referred to the FTT unless the registrar considers that the objection is groundless). See further below, at para 59.

57. **Paras 9.30 – 9.33:** LRA 2002, s 77, was a section that was meant to have teeth and was intended to be a real deterrent, in much the same way as s 4 of the Landlord and Tenant Act 1988. The latter Act has been robustly applied and substantial damages awards have been given: see *Design Progression Ltd v Thurloe Properties Ltd* [2004] 2 P & CR 31. There is no doubt that that tough approach has had an effect in practice. The courts have

[12] In *Nugent v Nugent*, although Morgan J correctly concluded that the inherent jurisdiction had not been abolished by LRA 2002, he did not (with all due respect) seem to appreciate that the function of legislation is to change the law and that if existing rules of law are not changed, they remain.

not given the same deterrent effect to LRA 2002, s 77: see, *e.g.*, *Fitzroy Development Limited v Fitzrovia Properties Limited* [2011] EWHC 1849 (Ch) at [144], Morgan J. Had they done what the LC and LR had intended, I suspect that many of the tactical registrations of unilateral notices would not have been made. While the CP alludes to this at **para 9.36**, I do not see anything in the CP that proposes any sharpening up of LRA 2002, s 77. I would respectfully suggest that it should. Perhaps the LC might consider a re-wording of s 77 that would enhance its deterrent effect. There might, for example, be a presumption by which, if an objection was not upheld by the FTT, it was presumed to have been made without reasonable cause unless the contrary can be shown by the objector.

58. **Para 9.50:** The objectives that are set out here are very much in line with the original objectives that lay behind unilateral notices. The problem with unilateral notices as they stand is that they do not meet the concerns that are set out at para 9.50(4). I do not think that many people (if any) would attempt to defend the present situation. There must be clear and quick procedures for getting rid of unilateral notices that should not have been entered in the register.

59. **Para 9.109:** I think that it is worth exploring whether there is some intermediate point between the beneficiary of a notice (1) having to show the validity of the interest and (2) merely having to show that the objection is not groundless. The "real prospect of success" test, which is employed, for example, in CPR 52.3, and is mentioned in footnote 93, is one possible test, but it may not be the only one. The issue is whether the beneficiary of a notice has an interest that justifies the entry of that notice. What should be required therefore is evidence that the beneficiary does have an interest and which thereby shows the basis for the beneficiary's claim. It should be evidence that satisfies the registrar that there is a genuine issue to be determined between the parties. There will have been no such evidence before the registrar when the unilateral notice was entered. This matter is something that a registrar *should* be able to decide, as he or she sees applications to register interests every day. This is the background to my response set out below at paras 62 – 63.

Paras 9.116/22.37: two types of notice

We provisionally propose that it should be possible to protect a right by one of two kinds of notice: a full notice and a summary notice. Do consultees agree?

60. No, I do not agree if and in so far as it means changing the names of the existing types of notice. Despite the length of Chapter 9, the reform proposals that are made in it are in fact very modest. In substance a summary notice is simply a slightly amended form of a unilateral notice and a full notice is simply an agreed notice.[13] The legal profession will not thank the LC if it changes the names for the sake of it (which appears to be exactly what is proposed). If it does so, it will cause confusion. There will be numerous queries about the inter-relationship between the existing types of notice and the new types of notice. It will also be necessary, by way of clarification, to make substantial transitional provisions, many of which could probably be avoided if, for the future, the requirements for unilateral and agreed notices were simply altered. As I have mentioned above at para 46, I consider that law reform ought to lead to clearer, simpler law. Re-naming types of notice that are now familiar does not achieve that objective and does not strike me as being wise. In what follows, I am treating the comments about "summary notices" as referring to unilateral notices and those about "full notices" as being references to agreed notices.

Paras 9.117/22.38

We provisionally propose that an application for a summary notice should not need to be accompanied by any evidence to support the interest claimed. Do consultees agree?

61. I agree that, as now, an application for a unilateral ("summary") notice, should not have to be accompanied by any evidence to support it.

Paras 9.118 – 9.119/22.39 – 22.40

We provisionally propose that, if a registered proprietor applies to cancel a summary notice, the beneficiary of the summary notice will be required to make an initial

[13] Judging by para 9.95, a full notice is indistinguishable from an agreed notice. I am still trying to work out how a "summary" notice differs in substance from a unilateral notice.

response within 15 business days (subject to an extension of up to a maximum of 30 business days). The response must demonstrate a case for the retention of the notice which is not groundless. Do consultees agree?

We provisionally propose that, in the event that the beneficiary submits an initial response objecting to cancellation of the notice, the beneficiary must produce evidence to satisfy the registrar of the validity of the interest claimed. Evidence must be provided within a maximum of 40 business days of the original notification of the application to cancel. Do consultees agree?

62. While I appreciate that it is sometimes the case that a unilateral (summary) notice has to be registered quickly because of particular circumstances, a person who claims an interest in property ought to be in a position to provide evidence of that claim at the time of the registration or at least shortly afterwards. If the beneficiary of the notice does not have the requisite evidence at this time, he or she should not be registering a notice. He or she does not have reasonable grounds to do so.

63. In my opinion, the two distinct stages, at paras 9.118/22.39 and 9.119/22.40, should be elided. I would suggest instead the following proposal:

> *If a registered proprietor applies to cancel a unilateral (summary) notice, the beneficiary of the unilateral notice will be required to respond within 15 business days (subject to an extension of up to a maximum of 30 business days). That response must include evidence to satisfy the registrar of the validity of the interest claimed.*

I infer that what is meant by "validity of the interest claimed" in paras 9.119/22.40 is that the beneficiary of the notice must show that he or she has credible evidence that he or she does have the interest claimed. It would in my opinion be going too far to say that the beneficiary had to prove on the balance of probabilities that he or she has the interest claimed.

64. The telescoped procedure, which I have suggested in the previous paragraph, provides the sort of timescale that is in practice required. It also provides a way of abandoning the test of whether the objection is or is not groundless.

Paras 9.121/22.41

We provisionally propose that where an application is made to cancel a unilateral notice following implementation of our reforms, the beneficiary of that notice should (following an objection to cancellation) be required to produce evidence to satisfy the registrar of the validity of the interest claimed. Do consultees agree?

65. In this context, the reference to a "unilateral notice" means a unilateral notice entered in the register before this reform came into place. As I am struggling to discern very much difference between a "summary notice" and a unilateral notice, I would regard it as axiomatic that the new procedure should apply to existing unilateral notices. If unilateral notices were not renamed, a provision of this kind would not be needed: *cf* para 60 above. As I have already indicated, a more telescoped procedure, such as I have suggested above at para 63, should in my opinion apply.

66. As will be clear, I regard these changes as a very modest and limited reform. I consider that it would be desirable to do more. I refer back to my comments in paras 55 and 57, above, as well as my suggestion in para 63.

Paras 9.141 – 9.142/22.42 – 22.43: Who can apply for the cancellation of a unilateral notice?

We provisionally propose that it should be clarified that an insolvency practitioner appointed in respect of an insolvent registered proprietor is able to apply to cancel a unilateral notice on behalf of the registered proprietor. Do consultees agree?

We provisionally propose that it should be clarified that attorneys acting under a power of attorney may apply to cancel a unilateral notice on behalf of a registered proprietor who is the donor of the power. Do consultees agree?

67. I support both of those proposals. I would have thought that the second must be the law already.

Paras 9.144/22.44

We invite consultees to share with us other situations in which they believe the persons who can make applications to Land Registry are unnecessarily limited.

68. I cannot think of any.

Paras 9.153 – 9.154/22.45 – 22.46

We invite consultees' views on what benefits would accrue if an agreed notice could identify the beneficiary of that notice, in a similar way to the entries made in relation to a unilateral notice? Would there be any disadvantages to identifying the beneficiary of an agreed notice in this way?

If consultees support identifying the beneficiary of an agreed notice on the register, should this be mandatory or optional?

69. As regards para 9.153, I am not quite sure where this proposal is going and what it is seeking to achieve. As the CP makes clear, there is a good reason why the beneficiary of a unilateral notice should be recorded in the register.

70. I note that, had the system of electronic conveyance in LRA 2002 been implemented, the benefit of estate contracts and other such rights would have been transmissible on the face of the register: see LRA 2002, s 93.

CHAPTER 10

71. **Para 10.12:** The situation discussed here is a commonplace and I have already referred to it: see above, para 22. In practice, the second charge is invariably protected by a notice as an equitable charge. As the charge is made by deed, the chargee has all the remedies conferred by s 101 of LPA 1925 (plus any additional powers in the charge itself). The

main drawback in practice is that the second chargee does not obtain the special priority conferred by LRA 2002, s 29, over unprotected interests, which it would have obtained if its charge had been registered as a registered charge.

72. **Para 10.19:** In practice, one of the principal and very practical uses of restrictions in a conveyancing context is to provide a mechanism by which the burden of positive covenants can be made to run with the land. It is used a very great deal (every month I am likely to see several such provisions). I hope that the law may change in that regard in the near future (*viz* the Queen's Speech).[14] However, given the inadequacy of the law on positive covenants, even if for no other reason, it is essential that it should continue to be possible to employ restrictions to protect contractual arrangements.

Paras 10.25/22.47: Restrictions to protect contracts

We have provisionally formed the view that it should continue to be possible to protect contractual obligations by means of a restriction. Do consultees agree?

73. Yes, most emphatically.

Paras 10.29/22.48

We invite the views of consultees as to whether there are any particular types of contractual obligation which should not be capable of protection by way of a restriction. If so, please explain why these obligations should be treated differently from other contractual obligations.

74. I very much hope that there will be no attempt to bar the protection of particular types of contractual arrangements by restriction. That would be likely to lead to incoherence and confusion.

[14] In the announcement accompanying the recent Queen's Speech there was the following: "The Government will bring forward proposals to respond to the recommendations of the Law Commission's Report [the 2011 report on easements, covenants and profits] to simplify the law around land ownership".

75. **Para 10.38** misses the point. LRA 2002, s 42(1)(b) provides that the registrar may enter a restriction in the register if it appears to him that it is necessary or desirable to do so "for the purpose of securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached". The concept of overreaching balances the need for trustees to be able to sell land and confer a good title on a purchaser on the one hand, with the protection for beneficiaries that payment to two trustees carries with it. The protection of beneficiaries by payment to two trustees is a vital part of overreaching. The problem with the standard Restriction K is that it locks the stable door after the horse has bolted. The person with the charging order finds out about the sale only after the sale. The monies have been paid over by then, and all too often, I suspect, paid away so as to be irrecoverable. The sort of restriction that I always advise in relation to charging orders instead of Restriction K is that the required notification should *precede* the disposition, perhaps by two weeks. In that way, the person with the benefit of the charging order can put in place mechanisms to ensure that he or she receives his or her share of the sale proceeds. I do not understand how that represents a "'stranglehold' on the legal estate" and circumvents overreaching. This amended form of restriction does no such thing and, with great respect, that sentence in the CP has not been properly thought through. The amended from of restriction ensures that overreaching achieves the intended result of protecting the person entitled to the beneficial interest. The Rules Committee should give urgent consideration to Restriction K. The profession has long despaired of it. The problem mentioned above arises frequently. It needs to be addressed <u>now</u>.

Paras 10.41/22.49

We provisionally propose:

> **(1) that it should continue to be possible to enter restrictions in Form K in relation to charging orders over beneficial interests; but**
> **(2) that the ability to enter restrictions should not be extended to holders of other derivative interests under trusts.**

Do consultees agree?

76. I agree with the proposal but my agreement is qualified. Something *must* be done about the Form K restriction to make it effective, by ensuring that the person with the charging order receives prior notification of the disposition and can therefore put into place arrangements to ensure that he or she receives a proper proportion of the proceeds of sale.

Paras 10.52/20.50

We provisionally propose that it should be made clear that a court may order the entry of a restriction to protect a charging order relating to an interest under a trust, but that such a restriction must be in Form K. Do consultees agree?

77. This is astonishing. How can the LC of all bodies defend the Form K restriction when everyone in practice knows that it is utterly useless? I will not agree to this unless and until Form K has been rewritten to provide the person who has a charging order over a beneficial interest with adequate *prior* notification of the disposition that will cause the purchase monies to arise.

CHAPTER 11

Paras 11.30/12.51

We believe that it should continue to be possible for an estate contract to be protected as an overriding interest where the beneficiary of the contract is in actual occupation. Do consultees agree?

78. I consider that such estate contracts should now lose their overriding status. While I acknowledge the arguments that are put in the CP, on balance I would prefer it if such expressly created rights could no longer be overriding interests, as with easements. I do not therefore agree. Now that electronic conveyance of the kind visualised in LC 271 is not going to happen, it is appropriate to follow the model of easements and require the protection of estate contracts by notice.

Paras 11.41/22.52

We believe that the fact that the benefit of an interest has been registered should not preclude that interest from being an "unregistered interest" (and so overriding) for the purposes of schedules 1 and 3 to the LRA 2002. Do consultees agree?

79. This must surely be the law already and I am surprised that it is thought to be in any doubt. The registration that is contemplated in LRA 2002, s 29 must plainly be the registration of the burden of an interest against the burdened title.

80. **Paras 11.47 and following**. It is quite clear that the LC has not understood the double function of LRA 2002, s 29(3). The effect of s 29(2)(a)(ii) is that a purchaser of registered estate for valuable consideration takes it subject to any overriding interest that is listed in LRA 2002, Schedule 3. Section 29(3) then provides that:

> "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."

81. There are two important points about this provision.

(a) First, LC 271 was guided by a very clear vision of where land registration should go and it was set out in para 1.5 (to which I shall revert). That vision was essentially the well-known "mirror principle". A consequence of that was that the effect of overriding interests should be limited as far as possible. That was the stated reason for LRA 2002, s 29(3): see LC 271, para 5.12.

(b) Secondly, the provision does not cause injustice. If a notice has been entered in respect of a former overriding interest and, by mistake, that notice is removed, the provisions of LRA 2002 on rectification and indemnity are engaged. That may lead to the reinstatement of the notice in the register (though that is unlikely). If it does not, the party who had the benefit of the former overriding interest will obtain an indemnity from the LR. That is right in principle. If the LR makes a mistake, it should pay indemnity for any loss caused.

82. The situation that LRA 2002, s 29(3) is intended to cover can be illustrated by an example:

(a) Blackacre is subject to an overriding interest of some kind.
(b) On a disposition of Blackacre the overriding interest is disclosed as required by LRA 2002, s 71, and it is protected by a notice.
(c) At some later date, by mistake, LR removes the notice from the register.
(d) Blackacre is then sold to a purchaser for valuable consideration.

83. Let us assume that the purchaser was really diligent. She was told about the former overriding interest. She therefore asked her solicitor to apply for an historic copy of the register pursuant to LRA 2002, s 69.[15] That search revealed that the former overriding interest had been registered. The purchaser therefore reasonably concluded that the LR must have removed it for a good reason. The purchaser completed, relying on LRA 2002, s 29(3).

84. In those circumstances, under the present law, as I have indicated above, the purchaser may be confronted with a rectification claim. The chances are that, as a proprietor in physical possession, she will have little difficulty in defending that application. The LR will then pay indemnity to the person whose noted interest was lost due to the LR's mistake. That, in my opinion, is entirely as it should be.

85. If LRA 2002, s 29(3) were repealed, and the interest reverted to its overriding status, the purchaser on the facts set out above would be bound by it. She would also be unable to obtain any indemnity (under the *Chowood* principle) and the LR would escape any liability notwithstanding its mistake. I find that totally unacceptable and contrary to the indemnity principle. I do not see any of this discussed in the CP even though it is obvious and should have been considered.

Paras 11.54 – 11.57/22.53 – 22.55: LRA 2002, s 29(3)

We invite consultees' views as to whether section 29(3) of the LRA 2002 serves a useful purpose and should be retained.

[15] Having regard to fn 57 in para 11.50, I wish to record that, like many other members of the Bar to my knowledge, I frequently advise that historic copies of the register be obtained. This procedure is often used, typically, but by no means exclusively, in dealing with questions about restrictive covenants and easements.

We invite consultees to provide examples of situations where section 29(3) has either created a problem in practice, or conversely performed a useful function.

We invite consultees' views as to whether any transitional provisions are necessary in the event of the abolition of section 29(3).

86. Quite apart from the principled reason for including LRA 2002, s 29(3) as part of the strategy for minimising the effect of overriding interests that was an essential objective of that Act, s 29(3) produces a just result. It means that the LR has to pay indemnity for its mistake. The outcome appears to me to be the just one. It may be said that there is an element of fortuity in this. However, that is an argument that works both ways. If LR removes an entry in the register by mistake, why should LR be excused from paying indemnity just because the right was at some stage an overriding interest? There is no good answer to that question.

87. One of the main criticisms that I have of the CP (apart from its formidable length) is that it has no coherent picture of where the LC considers that land registration should be going. If the LC considers that there are reasons for going back on the principle set out in LC 271, para 1.5, which included within it the policy of limiting overriding interests, it should say so, and it should say why it takes that view. Given the logic of title registration, the principle at para 1.5 of LC 271 might be thought to be axiomatic.

88. My conclusions are therefore that LRA 2002, s 29(3) serves a useful purpose and its repeal would benefit only the LR because it would reduce its indemnity bill. It would not be in the public interest to repeal it. The issue of transitional provisions does not therefore arise.

CHAPTER 12

89. **Para 12.21** is clearly correct and it is a view that I have always taken. The issue did cause some interest in the period immediately following the coming into force of LRA 2002.

Paras 12.40/22.56: Lease variations

We provisionally propose that express provision should be made to permit the recording of a variation of a lease on either the landlord's registered title, or the tenant's registered title, or both. Do consultees agree?

90. Yes, I do support this, for the reasons given in the CP. In practice it already happens.

Paras 12.44/22.57:

We invite the views of consultees as to whether express provision should be made to permit the recording of any other documents which are ancillary to a lease on either the landlord's registered title, or the tenant's registered title, or both.

91. On balance, I am against this proposal because of the problem of cluttering the register.

Paras 12.48/22.58: Problems with Landlord and Tenant (Covenants) Act 1995

We invite the views of consultees on the severity and extent of problems with the Landlord and Tenant (Covenants) Act 1995. We invite consultees to provide evidence in support of their views.

92. In what is already an extremely long consultation paper, I consider that it is unreasonable to ask this question. I can well see that the LC may wish to review the workings of the 1995 Act, but this is not a reliable way of obtaining the material the LC needs. The amount of work required to respond adequately to the CP is enormous and frankly exhausting. I suggest that if the LC wants to obtain critical comments on the 1995 Act, it should undertake a proper scoping study and should approach specialists, such as a number of chambers (including my own), to obtain the necessary information. Time simply does not permit me to respond to this question.

CHAPTER 13

Para 13.79: "Mistake" in the context of LRA 2002, Schedule 4, paras 2(a) and 5(a) must have the meaning given in this paragraph. I for one, consider that it would cover both the AB

and ABC situations. In the ABC situation, you assume that the registrar knows that the previous AB transfer was void. If he knows that, he would not register the BC transfer/disposition, but would investigate the consequences of the AB transfer first. See further, below, para 95, where this point is developed by reference to whether the AB transaction was void or voidable.

Paras 13.87/22.59: status of the right to seek rectification

We provisionally propose that the ability of a person to seek alteration or rectification of the register to correct a mistake should not be capable of being an overriding interest pursuant to paragraph 2 of schedule 3 to the LRA 2002. Do consultees agree?

93. Sometimes the blindingly obvious is missed even when it is in plain sight. If the right to seek rectification could be an overriding interest, it must follow that it can also be noted in the register and if it is not noted and not protected as an overriding interest, it would not bind a purchaser for valuable consideration of the land to which the claim relates.[16] Stated that way it becomes clear that the idea that the right to seek rectification can be an overriding interest is nonsense. People do not register their right to seek rectification because they do not know they have the right. It is ludicrous to suggest that the right is registrable, because it would be readily defeated. The right to seek alteration/rectification of the register is a statutory right that is engaged when the conditions set out in LRA 2002, Schedule 4 are met. That statutory right is not qualified in any way in Schedule 4 by reference to rules of priority. The fact that land has changed hands since the right to seek rectification/alteration may be relevant to the issue of discretion and there is, of course, the fractious question of whether rectification can be retrospective. Issues of priority are wholly irrelevant.

94. I do of course agree with this proposal, therefore. In my opinion, it must be the present law, even if better minds then mine have in the past been led astray to think otherwise.

Paras 13.95/22.60: The position of mortgagees

[16] I claim no originality for this point. Others have commented on it.

We provisionally propose that a chargee who has been registered by mistake, or the chargee of a registered proprietor who has been registered by mistake, should not be able to oppose rectification of the register so as to correct that mistake by removing its charge. Do consultees agree?

95. That proposal covers both the AB situation (where the AB transaction is the charge) and the ABC situation (where the charge is the BC transaction).

96. As regards the ABC situation, the position under LRA 1925 and, as it has now been interpreted, under LRA 2002 (see *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] 2 EGLR 123), the outcome of the BC transaction turns upon whether the AB transaction is void or voidable.[17] If the AB transaction is void, the BC transaction must also be void, and its registration must therefore be a mistake and susceptible to rectification. If, however, the AB is merely voidable, at the time of the BC transaction has not been avoided, the BC is valid and its registration is not a mistake. It must also follow that, in an AB case, where the transaction between A and B is merely voidable, but had not been avoided when the transaction was registered, that transaction is not a mistake so as to entitle A to seek rectification. A would have to apply to the court to set aside the transaction and then seek an order that B's charge (or other estate or interest) should be removed from the register in consequence.

97. My assumption as to the proposals at paras 13.95/22.60 are that they are directed in each case to the situation where the AB transaction is void. I see the force of the view that a mortgagee's interest is normally financial (I have once or twice seen mortgages that were in place to secure the performance of obligations rather than the payment of money).[18] That said, I am somewhat wary of blanket solutions of the kind proposed. Suppose that

[17] Sometimes it is not understood that the purpose of legislation is to change the law. The relevant principles of law dealing with the AB and ABC situations under the case law on LRA 1925 were addressed in LC 254 at para 8.15. No doubt was cast upon those cases or the results in them. LC 271 was silent on the matter because it was a commentary on the Bill that became LRA 2002. LRA 2002 contains nothing that changes the principles set out in LC 254 at para 8.15, or is inconsistent with them. Logically, therefore, the inference must be that the prior law remained unchanged. However, with the benefit of hindsight, LC 271 would have been better had it said so in terms.

[18] For the record, there is an error in para 13.93. The reference should be to LRA 2002, s 131, not s 133.

the mortgagee wants to contest the alleged invalidity, either of the charge in its favour or of the AB transfer upon which the mortgagor's title depends. Suppose (for example) in the ABC case, B has disappeared or for some other reason is prepared to let the matter go by default. Is it really right that C, the mortgagee, should be debarred from contesting the invalidity of the AB transfer? Suppose that, in the AB situation, A alleges forgery or *non est factum*, and B, the mortgagee, wishes to contest that?

98. My response is therefore that I accept in principle that a mortgagee, C, should not be able to object to rectification by the removal of its charge in a case where C accepts that either:

    (a) The charge is void (in AB situation); or
    (b) The disposition from A to B is void (in the BC situation).

    However, where C does *not* accept the relevant invalidity, it must be open to C to challenge the invalidity of either relevant transaction. In so doing, C will be resisting rectification of the register. It may be that this is intended to be met by the comments in para 13.96, but that paragraph is not clear on the point. In practice, these issues are seldom clear-cut. Commonly there will be an issue as to invalidity. It is only once that issue is determined that questions of rectification fall to be resolved.

99. **Para 13.100** sets out the LC's stall, and again uses A, B and C in the ABC situation. In this case, A is the original proprietor who is removed from the title when he or she should not have been, commonly because of some fraud by another, which brings about a vesting of the legal title in B. Paras 13.104 – 13.114 are concerned with the position of A.

Paras 13.109 – 13.110/22.61 – 22.62

We provisionally propose that where the proprietor of a registered estate [A] has been removed or omitted from the register by mistake, the proprietor [A] should be restored to the register if he or she is in possession of the land, save in exceptional circumstances. Do consultees agree?

We provisionally propose that a successor in title to that proprietor [A] should be restored to the register if he or she took over possession of the land, save where there are exceptional circumstances. Do consultees agree?

100. Under LRA 2002, the concept of the proprietor in possession is used as shield rather than a sword. As I understand it, what is being proposed is that, if A was a proprietor in physical possession as explained in LRA 2002, s 131, A would be able to use that status as a sword to recover possession. I wonder if this is really needed. If A seeks rectification in the circumstances set out paras 13.109/12.61, B/C will not be able to defend that claim on the basis that he or she is a proprietor in possession within LRA 2002, Schedule 4, paras 3 and 6. That being so, the court or registrar *must* order rectification under paras 3(3) or 6(3) respectively. I do not therefore see why this provision is needed. I infer that it is because of the issue of double registration that is considered at paras 13.128 and following. The matter would be for Parliamentary Counsel, but I suspect that the approach that he or she might adopt would be to leave the existing provisions unchanged and to create new provisions to deal with the situation of double-registration.

101. As to 13.110/22.62, if a successor in title took over the physical possession of a former registered proprietor, A, they would be in the same position as A had been and the reasoning in the previous paragraph would apply equally to him or her.

Paras 13.114/22.63

We provisionally propose that:

> **(1) The protection afforded to the proprietor of a registered estate [A] who has been removed or omitted from the register by mistake should not be confined to when he or she is personally in possession, but should apply where a proprietor would be considered a proprietor in possession within section 131 of the LRA 2002.**
>
> **(2) The protection afforded to the proprietor of a registered estate [A] who has been removed or omitted from the register by mistake should not be confined to situations where his or her possession of the land has been continuous, as long as**

he or she is the proprietor in possession when Schedule 4 is applied. Do consultees agree?

102. Once again, I consider that these matters are covered by the present law as explained in relation to the two preceding questions.

103. Paras 13.115 – 13.127 are concerned with the positions of B and C. In the situations in question, A is *not* in possession and either B or C is the proprietor in possession. These proposals are concerned with imposing what is, in effect, a limitation period on claims for rectification. At present there are no such provisions, though there are limitations on claims to indemnity.[19] These would undoubtedly bring about a change in the law.

Paras 13.120/22.64

We provisionally propose that the register should not be rectified to correct a mistake so as to prejudice the registered proprietor who is in possession of the land without that proprietor's consent, except where:

(1) the registered proprietor caused or contributed to the mistake by fraud or lack of proper care; or
(2) less than ten years have passed since the original mistake and it would be unjust not to rectify the register.

Do consultees agree?

104. All that this provision does is to amend LRA 2002, Schedule 4, paras 3(2)(b) and 6(2)(b) and impose a 10-year limitation on bringing a rectification claim in those circumstances. I comment on this below at para 105.

Paras 13.123 and 13.126/22.65 and 22.66

[19] I am quite often asked if there is a time limit for bringing rectification claims.

We provisionally propose that after ten years from the mistaken removal of the former registered proprietor from the register, the register should not be rectified to correct the mistake so as to prejudice the new registered proprietor even where that proprietor is not in possession of the land. Exceptions should be provided only for where the new registered proprietor consents to the rectification or where he or she caused or contributed to the mistake by fraud or lack of proper care. Do consultees agree?

We provisionally propose that the period of time after which the register becomes final should be ten years. Do consultees agree?

105. The last three questions – 13.120/22.64 – 13.126/22.66 – could be summarised by saying that no claim for rectification of the register may be brought more than 10 years after the mistake occurred. As I understand it, there is one exception to that 10-year period, which is illustrated by the following facts. A is a proprietor in possession. A's title is by fraud transferred to B by means of a transfer forged made by B. B is registered as proprietor. A is oblivious of this fact. B does nothing for 10 years and A never discovers what has happened. After 10 years B applies to be registered. He will fail because he has caused the mistake by fraud and therefore the 10-year period does not apply.[20] I assume that that is not watered down by the proposal at para 13.126/22.66. Provided that it is not, I support the three proposals.

Paras 13.151/22.67: Double registration

We provisionally propose the following:

> **(1) Cases of double registration should be resolved through the application of our proposals in respect of indefeasibility. Therefore, in a case of double registration, a claim to adverse possession should not be possible.**
> **(2) Where as a result of the operation of the long stop a double registration remains on the register, the party who does not benefit from the long stop should have their title amended accordingly to remove the double registration. The**

[20] The same should be true if B came to be registered due to negligence that he had either caused or contributed to.

party whose title is amended in such circumstances should be entitled to an indemnity.

Do consultees agree?

106. As regards paragraphs 13.128 – 13.151 on the issue of double-registration (prompted by *Parshall v Hackney* [2013] Ch 568), the LC's proposals come to this. In a case where both A and B have been registered as proprietors of the same land:

(a) Where A is in physical possession, the principle set out in para 13.120 of the CP would apply, so that B could not obtain rectification of the register against A unless A had caused or contributed to the mistaken double registration by fraud or lack of proper care, or less than 10 years have passed since the mistaken double-registration had occurred.
(b) Where after 10 years, both A and B remained registered as proprietors of the same land of which A was in physical possession, A would be entitled to apply for the removal of B's title from the register, but B would be entitled to indemnity.

107. That is a fair solution and I support it.

108. Paragraphs 13.152 – 13.188 are concerned with the subject of derivative interests. Some difficult issues arise. The issues are considered under three headings:

(a) Registered dispositions;
(b) First registration; and
(c) Interests that have ceased to be overriding interests under LRA 2002, s 117.

(a) Registered dispositions

109. The first problem is where for some reason an entry in the register of title of Blackacre either should have been made by the LR in respect of an interest but, by mistake, was not, or where the LR removed a notice of an interest from the register of Blackacre by mistake. I will call the beneficiary of the interest Joan. The owner of Blackacre then sells it to Kevin for valuable consideration. If Joan's interests had been on

the register, as they should have been, Kevin would have taken subject to them. Can Joan obtain rectification of the register?

110. I am not sure why this is thought to be an issue of priority at all. Exactly the same situation existed under LRA 1925, and until the deeply wrong decision in *Malory*, nobody thought about it in terms of priority. There is a statutory right to rectification, and for reasons I have already given above at para 93, that statutory right is not a property right and does not require any form of protection. The right to seek rectification is triggered in the circumstances provided for in LRA 2002, Schedule 4. The grounds upon which a claim for alteration or rectification can be resisted are also set out in Schedule 4. Issues of priority are not mentioned in the Schedule, though the fact that the land against which the claim is made may have passed might perhaps in some circumstances, where paragraphs 3(3) or 6(3) of Schedule 4 apply, amount to exceptional circumstances that would justify a refusal of rectification. It is clear from para 8 of Schedule 4 that rectification can extend to derivative interests.[21]

111. I assume that the reason why commentators have started to think about issues of priority is because they look at facts of the kind set out above at para 109 and say "but surely Kevin has taken free of Joan's rights because they were not protected for the purposes of LRA 2002, s 29". The short to answer to that question is that Kevin is bound by the provisions of LRA 2002, and Schedule 4 gives Joan a right to seek rectification of the register. This right, as I have indicated, operates independently of any rules of priority.

Paras 13.169 – 13.170/22.68 – 22.69: Rectification and priority

We provisionally propose that section 29 should be subject to Schedule 4. This means that where, through a mistake, a derivative interest has been omitted or removed from the register, the holder of the interest should be able to apply for alteration or rectification of the register to have the priority of the interest over the registered proprietor restored. The outcome of the application should be determined by the same

[21] I leave aside the issue of retrospectivity for the moment.

principles that apply when the application for alteration or rectification relates to the title to the estate, including the operation of the long stop. Do consultees agree?

We provisionally propose that, where the application for alteration or rectification relates to a derivative interest, the ten year long stop on alteration of the register should run from the time that, as a result of the mistake, the holder of the derivative interest lost priority, not from the time of the mistake. Do consultees agree?

112. I have considerable sympathy with the thinking that lies behind these proposals, but, as will be clear, I consider that they rest on a false premise. The desired outcome is that Schedule 4 should operate independently of and regardless of LRA 2002, s 29. How that outcome is best achieved is a matter for Parliamentary Counsel. While I support the intended outcome, I do not therefore support the first proposal.

113. It would be perfectly possible to place a different 10-year limitation period on a claim for rectification relating to a derivative interest. The problem that I have with the proposal is that it also rests on false premise. It assumes that Joan's interest lost priority when Kevin purchased Blackacre. As I have pointed out, possible issues of priority are completely irrelevant to the issue of rectification. Logically, the 10-year period should apply from the date of the mistake. After that 10-year period, Joan should continue to have a claim to indemnity. Accordingly, I do not support this second proposal either.

(b) First registration

114. Similar but not identical issues arise in relation to first registration. Two issues are raised.

Paras 13.180/22.70

We provisionally propose that section 11 should be subject to Schedule 4. This means that where, through a mistake, a derivative interest has been omitted from the register, the holder of the interest should be able to apply for alteration or rectification of the register to have the priority of the interest over the registered proprietor restored. The outcome of the application should be determined by the same principles that apply

when the application for alteration or rectification relates to the title to the estate, including the operation of the long stop. Do consultees agree?

115. My response to this is the same as with registered dispositions, above, para 112. I support the principle that LRA 2002, Schedule 4 should operate independently of LRA 2002, s 11. I do not support the actual proposal, because it assumes, in my view wrongly, that a priority issue arises.

Paras 13.181/22.71

We provisionally propose that where a first registered proprietor was bound by an interest through the operation of priority rules in unregistered land, but obtains priority over the interest on registration as a result of section 11, no indemnity should be payable on rectification of the register to include the interest at a time when the estate is still vested in the first registered proprietor. Do consultees agree?

116. The concern here arises out of the fact that, on a transaction that triggers first registration, the rules of unregistered conveyancing operate. Thus, on a conveyance of a parcel of unregistered land, Blackacre, to Kevin, Kevin takes it subject to a restrictive covenant in favour Joan because that covenant was protected by means of a land charge in the Land Charges Register. On first registration, that restrictive covenant is not noted against the title to Blackacre. Joan applies to have the register altered to record the burden of her covenant. The question is whether Kevin is entitled to an indemnity in those circumstances. Under the present law, he is not entitled to indemnity and there is no need to change the law. There is entitlement to indemnity where the register is *rectified*, but not where it is altered. Under LRA 2002, Schedule 4, para 1, rectification is an alteration which involves the correction of a mistake, *and* prejudicially affects the title of a registered proprietor. As Kevin was subject to the restrictive covenants when he purchased Blackacre, he is not prejudicially affected by the alteration of the register which simply restores the position to what it was when he first acquired Blackacre.

117. It follows that the proposal at para 13.181 is unnecessary as the matter is already covered by the present law.

(c) Interests that ceased to be overriding interests

118. By reason of LRA 2002, s 117, certain overriding interests lost their overriding status on 13 October 2013, ten years after LRA 2002 came into force. The question is posed whether, if such an interest was not protected by a caution against first registration (where land was unregistered) or a notice (if title was registered), it should still be possible to obtain rectification of the register to bring such interests on the register where first registration or a registered disposition took place after 13 October 2013.

Paras 13.188/22.72

We provisionally propose that alteration or rectification of the register should not be possible in respect of an interest that ceased to be overriding on 13 October 2013, where first registration or a registered disposition of the affected estate takes place on or after that date. An exception should be made, however, where on first registration Land Registry omitted a notice in relation to that interest that should have been entered under rule 35 of the LRR 2003, or overlooked a caution against registration. Do consultees agree?

119. This situation will not arise very often, if at all. I support the proposal.

Retrospective rectification?

120. The final issue at paras 13.189 – 13.197 is one of the most contentious in the whole of the CP. It is whether rectification can be retrospective. It was not intended that it should be. Instructions to Parliamentary Counsel on LRA 2002 were quite clear. He was instructed to give effect in the Bill to the objective that "any rectification of the register shall not have retrospective effect". The result was a somewhat Delphic provision, LRA 2002, Schedule 4, para 8:

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

It is the underlined words that have caused the interpretative problems.

121. In *Gold Harp Properties Ltd v MacLeod* [2015] 1 WLR 1249, the Court of Appeal held that Schedule 4, para 8 did not prevent retrospective rectification. I do not intend to dwell on this at length, because I have sent the LC a copy of a forthcoming article of mine on *Gold Harp* ("*Can Rectification be Retrospective?*") and that is incorporated by reference into this response.

122. Before considering the proposals, there was a comment in para 13.194 that surprised me, namely, "it is difficult to understand what schedule 4, paragraph 8 is intended to do if retrospective rectification is not permitted".[22] This was not perhaps a wise comment to make. Other, very experienced lawyers, have not interpreted the paragraph that way and have not had that problem of understanding. There were two cases before the Adjudicator in which the tribunals (both with experienced full-time judges) had no difficulty in holding that rectification under Schedule 4, para 8 was not retrospective. Thus, for example, in *Piper Trust Ltd v Caruso (UK) Ltd* REF 2009/0623, Deputy Adjudicator Michell said:

> "It is implicit in paragraph 8 that the powers under Schedule 4 to rectify the register do not extend to changing retrospectively the priority of an interest affecting the registered estate."

I was counsel in the other case, *DB UK Bank Ltd v Santander* REF 2011/1169, where Deputy Adjudicator Hargreaves reached the same conclusion after extensive argument on the point. From my own skeleton argument in that case I see that I put my case against retrospective rectification in a very similar way to the *Piper Trust* case, of which I was ignorant until after the hearing, when the Deputy Adjudicator sent a copy to both counsel.

Paras 13.196 – 13.197/22.73 – 22.74

We provisionally propose that in the case of competing derivative interests, rectification should operate retrospectively. Do consultees agree?

[22] This creates the unfortunate impression that the LC has already made up its mind and is not serious about consulting on this point.

We invite consultees to share with us any practical difficulties that consultees have experienced following the decision in *Gold Harp*.

123. I strongly oppose the proposal above.

124. The reason why the LC and the LR decided that rectification should be prospective only was two-fold. First, it was the way in which the courts had, whether rightly or wrongly, interpreted the equivalent provisions of LRA 1925. Secondly, and much more important, it was consistent with the strong emphasis on the mirror principle set out in para 1.5 of LC 271, which guided much of the policy of LRA 2002. That passage was as follows:

> "The fundamental objective of the Bill is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional inquiries and inspections."

125. Although electronic conveyancing in the form visualised in LRA 2002 will not now happen, that principle does in fact reflect the reality of everyday conveyancing. In practice, the register is treated as the title and is always relied upon. Overriding interests are frankly obnoxious because they are not on the registered title and detract from it. They add to transaction costs. The provisions on rectification are designed to give primary protection to the proprietor in possession. Rectification is a necessary evil to deal with mistakes. It becomes far more damaging if it can be retrospective, because registered dispositions may have taken place on the basis of, and in reliance upon the register as it then stood. It is hardly surprising that the LC and the LR wanted to prevent retrospective rectification – something that had never happened until *Gold Harp*.

126. I am frankly puzzled that the LC should now be endorsing a case that damages one of the key principles of LRA 2002, namely the principle of the register as the mirror of title, a document that can be relied upon. The LC offers no reason for its endorsement. It does not explain why it considers that a weakening of the principle of indefeasibility is justifiable. As I have already mentioned at para 87, my main concern about the CP is that it appears to lack a clear vision of where the law of land registration should be going and

what it should be trying to achieve. If the LC is going to change the fundamental principles that underpin LRA 2002, then it should provide coherent reasons for doing so. There may be coherent and principled reasons but I have not heard them. They should have been set out in the CP.

127. *Gold Harp* is already giving rise to practical problems. I have provided examples of this in the article mentioned above at para 121. One example, drawn from reality but suitably disguised, will demonstrate my concern. The LR fails to enter accurately a restriction on the powers of a registered proprietor X, by which the consent of Y is required to certain dispositions by X. X then enters into a transaction that should have required Y's consent in favour of Z (say, a charge), but on which, because of LR's mistake, there is no restriction. If it is possible to rectify the register retrospectively, Y may be able to require the determination of Z's interest. But that runs headlong into another principle. Z is entitled to rely on the owner's powers provisions in LRA 2002, ss 26(1) and (3):

> "(1) … a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition.
>
> …
>
> (3) This section has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of a disposition)."

128. I do not know how this conflict will eventually be resolved, though it will no doubt arise again. If rectification could not be retrospective, there would be no problem. It was the plain intention of LRA 2002 that Z should prevail and there should be no doubt about Z's title. The register could be rectified against X's title and that would prevent further dispositions in future by X without Y's consent.

CHAPTER 14

129. **Paras14.00 – 14.51:** I found the explanation of the current situation in relation to indemnity illuminating and helpful. I note with some disappointment just how little is being recovered by the LR under its rights of recourse.

Paras 14.60 – 14.61/22.75 – 22.76

We invite consultees' views as to whether there should be a cap on the indemnity that can be paid to a claimant following rectification of the register (or where rectification is available but is not ordered), except where the mistake that leads to rectification is attributable to fault by Land Registry.

We invite consultees' views as to the level at which any cap should be set.

130. I do not support a cap on the amount of indemnity that is payable.

131. In relation to the matters addressed in the questions at **paras 22.77 – 22.84**, I do not consider that I can make an informed contribution that will help the LC and I do not therefore address them. As these proposals will affect solicitors and licensed conveyancers, it is their views that will obviously be important and should be given the greatest weight.

Para 14.133/22.85: Limitation in indemnity claims

We invite consultees to provide evidence in respect of the following issues:

> **(1) the incidence in practice of questions concerning the limitation period applicable to indemnity claims; and**
> **(2) how their practice has been affected by questions concerning the limitation period applicable to indemnity claims.**

132. The language of what is now LRA 2002, Schedule 8, para 8, is substantially the same as LRA 1925, s 83(11). I do not see how, on any basis, it could be said, as a matter of construction of para 8, that the limitation period only arises at the time of the rectification decision. A person would know that he or she might have a claim for indemnity as soon as a claim for rectification of the register was made against that person. That claim would usually precede the application for rectification.

133. As to para 14.131, after 20 years, I cannot recall exactly why the recommendation in LC 158 (1987) at paras 3.31 – 3.32 was not taken forward in LC 235 (1995). Although paras 4.8 – 4.9 of LC 235 imply that there was to be some change in the law, there was not in fact any such change. This issue was not the main concern in LC 235, because, in practice, it never seems to have arisen. The other matters addressed in relation to indemnity were considerably more pressing.

134. The issue of limitation under LRA 2002, Schedule 8, para 8 has crossed my desk once, but I do not recall that it was ever a serious issue that threatened any claim to indemnity that my client might have. The fact that there is no authority at all on para 8 suggests that in practice it is not causing any difficulties and never has. That said, the wording of LRA 2002, Schedule 8, para 8 does not perhaps fit comfortably with Schedule 8, para 1(3), which provides that:

> "No indemnity under sub-paragraph (1)(b) is payable until a decision has been made about whether to alter the register for the purpose of correcting the mistake; and the loss suffered by reason of the mistake is to be determined in the light of that decision."

135. It is slightly odd that a claim to indemnity could, in principle, be time barred even when it had not become payable, which is one possible effect of that paragraph on conceivable facts.

Paras 14.136 and 14.138/22.86 and 22.87

We provisionally propose that for indemnity claims under schedule 8, paragraph 1(a) and (b) the limitation period should start to run on the date of the decision as to rectification. Do consultees agree?

We provisionally propose that for indemnity claims under schedule 8 paragraph 1(c) to (h) the limitation period should start to run when the claimant knows, or but for their own default would have known of the claim. Do consultees agree?

136. These proposals would enact what was proposed as Cl 45(12) of the draft Land Registration Bill in LC 173. I have no objections to them. The first of the proposals will give a longer limitation period in cases where the register either is or could have been rectified. That seems desirable in principle.

Paras 14.146/22.88: Rights of recourse

We provisionally propose that the registrar's rights of recourse under schedule 8, paragraph 10(2) ought to be subject to the following statutory limitation periods:

> **(1) In a case within schedule 8, paragraph 10(2)(a), Land Registry should have the longer of (i) the remaining limitation period applicable to any cause of action the indemnity claimant would have had if an indemnity had not been paid; or (ii) 12 months from the date the indemnity is paid.**
> **(2) In a case within schedule 8, paragraph 10(2)(b), Land Registry should have the longer of (i) the remaining limitation period applicable to any cause of action the person in whose favour rectification has been made would have had if the rectification had not been made; or (ii) 12 months from the date the register is rectified. Do consultees agree?**

137. The provisions on rights of recourse in LRA 2002 originated from and were driven by the LR. I do not know to what extent the limitation issues raised have actually been a cause of difficulty to the LR. Nothing in terms is said about any such difficulty in the CP. Nevertheless, there is everything to be said for clarifying the issue and I can see the sense of what is proposed, which I support.

Paras 14.159 and 14.160/22.89 – 22.90

We provisionally propose that where an indemnity is payable in respect of the loss of an estate, interest or charge following a decision not to rectify, the value of the estate, interest or charge should be regarded as not exceeding the current value of the land in the condition the land was in at the time of the mistake.

We invite the views of consultees as to any difficulties that might arise in determining the current value of land in the condition the land was in at the time of the mistake.

138. At the time of LRA 2002, a party seeking indemnity to which Schedule 8, para 6(b) applied, was reasonably compensated because interest was payable on the sum of indemnity due from the time of the mistake (para 9), together with any consequential loss (which is unaffected by para 6(b): see LC 271, para 10.43(1)). At that time, the Bank of England base rate was 4%. The house price index only began in February 2002 (which happened to be the date of the enactment of LRA 2002), so I have not been able to undertake a comparison of the position then and now.

139. This matter was fully debated by the LC with the LR in relation to both LRA 1997 and LRA 2002. It was the LR that did not want to change what is now LRA 2002, Schedule 8, para 6. The justifications that were given were the availability of both interest and indemnity for consequential loss. That is why the law remained unchanged. It may be that the LR is content to take a different view now. I support what is proposed in para 22.89.

140. As regards para 22.90, I do not know whether a surveyor would have any difficulty in making a calculation as to the value of the land on the assumption that it had remained unchanged since the date of the mistake. The LC should seek evidence from RICS about that. I shall be surprised if there is a difficulty, but I am not a surveyor.

CHAPTER 15

Paras 15.35 – 15.36/22.91 – 22.92

We provisionally propose that there should be a non-exhaustive list of factors which may be used to distinguish boundary and property disputes. This list could include factors such as:

(1) the relative size of the contested land in comparison to other land clearly within the remainder of the registered proprietor's title;
(2) the importance of the land to the registered proprietor;

(3) the application of any of the common law presumptions; and

(4) the manner in which the error in the boundaries shown on the title plan came about.

Do consultees agree?

We invite the views of consultees as to the type of factors which should be given consideration when distinguishing boundary and property disputes.

141. The factors listed in para 22.91 are not controversial and would generally be considered in any event if an issue about the general boundaries rule arose. The factor at para 22.91(3) was listed in LRR 1925, r 278(2) (as para 15.32 makes clear). I have always worked on the assumption that it was implicitly carried forward to LRA 2002, because s 60 of that Act was not intended to change the law. As always, the problem with guiding factors lies in their application to particular facts. I have a dispute on my desk at the moment that exactly touches on these issues and I am not sure how much assistance I shall be able to obtain from applying the factors listed above.

142. I am not opposed to the proposal, especially as many judges find the concept of general boundaries baffling. How much it will actually help, I am not sure. The one factor that it not mentioned is the factor of possession. If one party can clearly show that he or she is in possession of the disputed land, that should be a relevant factor, particularly having regard to the importance that LRA 2002 (and indeed the CP) attaches to possession, in my view rightly.

CHAPTER 16

143. I do not agree with paras 16.11 and 16.12. If a tenant is in possession of Blackacre under a short lease, which is not required to be registered, and he or she is granted a right of way over Whiteacre, any purchaser of Whiteacre should be able to ascertain readily whether that land is subject to third party rights, such as easements, which may not be

obvious. The best way to achieve that objective is to register those third party rights.[23] The matter is perhaps different in relation to Blackacre itself. Anybody buying the freehold should of course be told of any unregistrable leases, but even if he or she is not, the tenant will be in possession, which is likely to be obvious. Even so, it is in fact in everyone's best interest that the easements are registered, because there is always the risk – perhaps not a very great one given the wording of LRA 2002, Schedule 3, para 3 – that they might be defeated by a purchaser. The thinking that lies behind these paragraphs of the CP is flawed. Given the fact that registered land is by a large margin the norm, it really is not unreasonable to expect parties to register their interests, any more than it is unreasonable to expect someone to apply for a driving licence or a TV licence.[24]

144. The case of the lease that is created orally for a term of three years or less is unlikely in practice to involve any easements. If a person occupies under a short term lease of all or part of Blackacre – typically an AST that is the landlord's standard written form – he or she is unlikely to be granted an easement over Whiteacre (which requires a deed). All he or she is likely to obtain is a licence, because in practice, no deed of easement will be granted in such circumstances. In a case where Blackacre and Whiteacre are already in separate ownerships, the position is much more likely to be that the freeholder of Blackacre will already have been granted an easement over Whiteacre, which his or her tenants may exercise. That easement will have been registered and there will be no problem. I am not sure that it really makes sense to talk in terms of "efficiency savings" in the factual context of short-term leases. There are other factors at work that favour the registration of easements. I consider below at para 148, the case where X, the owner of Blackacre, grants a short tenancy of part of the property to Y with rights over the part retained by X, and where X then sells the freehold of Blackacre to Z.

145. Para 16.24: There was in fact a good reason for this change of policy. It was because of the adoption of the clear guiding principle for LRA 2002, embodied in LC 271, para 1.5 (above, para 124). Admittedly, this was based on the assumption that, within a comparatively short period of time, electronic conveyancing would be introduced, which

[23] This situation does arise in practice. I have been informed of such a case by a member of Chambers in the last few days.

[24] The example is not mine, but was given by a colleague in Chambers.

would combine the execution of a transaction with its registration. While this has not happened, the basic point remains. The register should be as conclusive as it can be made. As I have already explained, in practice, overriding interests are a conveyancing nightmare (above, para 125), and the reality is that everybody dealing with land relies very heavily on the register. It really is in everyone's interests to make the register as conclusive as it possibly can be. The existence of overriding interests increases conveyancing costs. The more there are the greater that cost. That does not seem to have been taken into account by the LC.

146. **Para 16.31**. I am not persuaded by this paragraph. I very much regret the way in which this CP steps back in quite a number of ways (of which this is just one) from what I believe to have been the correct policy in LC 271, para 1.5. As I have indicated, I cannot really discern what the policy of the CP is, if indeed there is one at all.

Paras 16.32/22.93

We provisionally propose that, where the grant of a lease is not a registrable disposition, easements which benefit that lease and which are created within the lease itself should not be required to be completed by registration in order to operate at law. Do consultees agree?

147. As will be clear, I do not agree with this proposal.

148. **Para 16.36**: This is no doubt the theoretical position, but it would only happen in real life if C was, say, an intending developer, who had purchased Blackacre, including the reversion on any short-term leases, and who was looking for a way to get rid of the tenants of Blackacre very quickly, and before their ASTs expired. As I have already indicated, where there are short-term ASTs, the tenant, is in practice, likely to be given a licence (perhaps not even expressly) to go over the retained land of the landlord. C will have purchased Blackacre subject to and with the benefit of the ASTs. If she tried to prevent the tenants from egress from or access to their flats, on the basis that she was not bound by their permission to go over the retained part of Blackacre, a court would find ways of dealing with her. One way would be under the doctrine of non-derogation from grant. Despite the use of the word "grant", that doctrine does not require a grant by deed,

but applies very widely: see *Johnston & Sons Ltd v Holland* [1988] 1 EGLR 264 at 267. Another way would be to imply *an easement* arising by common intention (see *Pwllbach Colliery Co v Woodman* [1915] AC 634 at 646 – 7). If the AST is a legal estate, as it will be, any implied easement will also be legal and will take effect as an overriding interest in any event, of which C will be well aware (and so within LRA 2002, Schedule 3, para 3(1)(a)).

149. Para 16.37: Once again, I regret this departure from the principles that informed the policy of the LRA 2002. The point is probably academic for the reason given in the previous paragraph.

Paras 16.40/22.94

We provisionally propose that all easements granted by or implied in leases which are not required to be created by deed by virtue of section 52(2)(d) of the Law of Property Act 1925, including equitable easements, should be capable of being overriding interests. Do consultees agree?

150. No, I do not. Some easements might well be overriding interests already as explained above, but those which are expressly created should be registered in accordance with the guiding policy of LC 271 and the LRA 2002. I repeat the point that overriding interests of themselves generate conveyancing costs and that it is in everybody's interests that they should be avoided by requiring registration wherever it is practically possible. Registration is *not* an onerous requirement.

Paras 16.44/22.95

We provisionally propose that:

> **(1) easements benefiting a lease which is not required to be created by deed by virtue of section 52(2)(d) of the Law of Property Act 1925, where those easements are created separately from the lease, should be capable of being overriding interests; but**

(2) the grant of an easement benefiting any other lease which is created outside of the lease document should remain a disposition which must be completed by registration to take effect at law.

Do consultees agree?

151. I am struggling to comprehend clearly the situation that (1) is intended to cover: I find para 16.42 difficult to understand in this regard. Because I cannot really understand it, I cannot agree to it. But to the extent that I do understand the idea behind it, I am in principle against it. Expressly created easements should, in my opinion, be registered.

152. I agree with (2).

CHAPTER 17

Paras 17.24/22.96: Adverse possession and second applications

We provisionally propose that a claimant to title to land through adverse possession should be prevented from making a second application for registration when an application for registration has been rejected under schedule 6, paragraph 6, unless the conditions in that paragraph under which a second application is currently permitted are fulfilled. Do consultees agree?

153. Strongly agreed.

154. The last two sentences of para 17.29 appear to me to be wrong as a matter of law. They confuse acquiescence with permission, an error that has often been laid bare in prescriptive claims: see, *e.g.*, *Mills v Silver* [1991] Ch 271. Some form of acquiescence lies at the core of adverse possession.[25] While there will be many cases where a person has an estoppel claim, but is not in adverse possession, it does not follow that a person

[25] "…a squatter does not acquire possession for the purposes of the Limitation Act 1980 *unless there has been something like acquiescence on the part of the true owner*": Jourdan & Radley-Gardner, *Adverse Possession*, 2nd ed, 2011, p 122, para 7-31. Acquiescence is a factor in all cases of adverse possession and in many involving proprietary estoppel.

who may have an equity by estoppel in relation to land is not in adverse possession. If A builds his house partially on B's land, and B knowing this, acquiesces in it, A is in adverse possession, but the elements that give rise to an equity by estoppel might well also be satisfied. The right to go to court to vindicate such an equity is not equivalent to a licence by B. The court may not give effect to the equity by granting A the land, but may make some other order.

Paras 17.33 – 17.34/22

We invite consultees to provide evidence relating to the use of the first two conditions in paragraph 5 of schedule 6.

We invite consultees' views as to whether the first two conditions in paragraph 5 of schedule 6 should be removed.

155. As regards the first of those two questions, I have certainly had a case where I pleaded the second and third grounds in the alternative. Quite what the Adjudicator would have done, I do not know, because the case settled a few days before the hearing. I have on my desk at the moment a case where the facts are exactly those set out in para 17.28(2).

156. The background to the first two grounds in LRA 2002, Schedule 6, paras 5(2) and 5(3), is as follows. At the time of LC 271, the LR, which had pressed for the creation of the jurisdiction of what was then the Adjudicator, on human rights grounds, assumed that the new jurisdiction would be very much like the jurisdiction that had been exercised by the Solicitor to the LR and Land Registrars under LRA 1925 in dealing with disputed applications (they were usually adverse possession disputes – I did in fact successfully resist such an application). That jurisdiction was informal and speedy. No one foresaw the cottage industry that the Adjudicator in fact became. It was thought that if a person had been in adverse possession of land for 10 years, and he or she fell within the first or second categories in LRA 2002, Schedule 6, para 5, they could use this procedure rather than having to go to court.

157. As things have turned out, proceedings before what is now the FTT are not always quicker or cheaper than those brought in the county court, though they usually are. The

one real advantage that the FTT does have in my experience is that it is a specialist tribunal and the judges are very familiar with both land and land registration issues. Much less has to be explained to the tribunal judge than would have to be explained to a non-specialist county court judge. That undoubtedly shortens hearings in my experience.

158. The first and second categories rest to some extent on an element of fortuity. If a squatter has been in adverse possession for 10 years in circumstances in which he or she could claim an equity by estoppel or make a claim to the land on some other ground, which in either case would usually involve a court hearing,[26] he or she can apply instead under LRA 2002, Schedule 6.[27] In relation to the first category, there is however a conceptual link between adverse possession and proprietary estoppel in the context in which it would arise, namely acquiescence by the landowner.

159. I do not consider that the first condition should be removed, though I am not sure how much it is used in practice. The reasons for this are those that I have set out above in para 157. The applicant is likely to get better informed justice more cheaply than if he or she has to go the county Court. There is a benefit in the present provisions and I consider that it should not be taken away.

160. I accept that the case for retaining the second ground in para 5(3) is weaker. According to the information provided by the LR (para 17.30), it has not been used in the sort of cases that it was intended to meet (though, as I have indicated, I have had cases that fall within it). If it is not meeting a need and in particular, if it is not furthering the interests of justice, then it could be repealed.

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[26] I do not understand the sentence in 17.29: "A claimant to estoppel may be better placed to establish the elements of the claim if it is made directly, rather than indirectly through an application (wrongly) founded on adverse possession." The word "wrongly" puzzled me. It is a pre-condition to a claim under LRA 2002, Schedule 6, para 5(2) that the applicant has been in adverse possession for at least 10 years ending on the date of his application. I assume that the point that is being made is that an application might be made under para 5(2) and then it turns out at the FTT hearing that the applicant had not been in adverse possession for 10 years. The application would, in those circumstances, have to be rejected. That is a risk that the applicant takes if he or she wishes to go down this route.

[27] The suggestion in para 17.29 that a person who has an equity by estoppel might enter a notice in respect of his or her claim is not one that I can take seriously. It never happens in practice, so far as I am aware. Nor would I expect it to.

Paras 17.47/22.99: Schedule 5, para 4

We provisionally propose that where an applicant relies on the condition in schedule 6, paragraph 5(4), his or her reasonable belief that the land belonged to him or her must not have ended more than six months from the date of the application. Do consultees agree?

161. The LC and LR set out in very considerable detail in LC 271 how Schedule 5, para 4 should operate and what it was intended to achieve: see 14.44 – 14.52. I am disappointed that nobody has studied that passage carefully, because it was intended to provide a clear road map for the provisions. To come within the exception, the squatter would have to prove that he or she had been in adverse possession for more than 10 years and that for 10 years of his/her adverse possession, he or she believed on reasonable grounds that he owned the land. Given the initial burden of proof, a sensible squatter should apply promptly because if he or she does not, he or she may have a difficult task in persuading the FTT (or the court) that he/she had the requisite belief for 10 years. It is reasonably clear, especially from LC 271, paras 14.50 – 14.52, that LC and LR intended the provisions to bear the second interpretation set out in 17.38(2) of the CP. In particular, the case that most concerned the LR was that given at LC 271, para 14.46(1)(b):

> "where an estate was laid down, the dividing fences or walls were erected in the wrong place and not in accordance with the plan lodged at the Land Registry."

162. I am implacably opposed to the proposal at para 17.47 because it will defeat claims that para 5(4) was meant to assist. It would mean that as soon as a landowner realises that there is a disparity between his or her title plan and where the fence or wall is, he or she must act within 6 months to put the matter right (assuming that he or she has been there 10 years). The reality is that he or she will not do so. Sleeping dogs will be left to lie. No sane person wishes to initiate a boundary dispute. The person who makes the discovery will do nothing and will wait until his or her neighbour makes a fuss. The person probably will not know that he or she must apply as soon as he or she becomes aware of the claim. Why should the person appreciate the need to take action? If this thoroughly unreasonable proposal goes through, that person, who quite reasonably allows sleeping

dogs to lie, will in such circumstances lose his or her land unless he or she can rely on the general boundaries rule. This is certainly *not* what LC or LR intended. As I have stressed, the second interpretation at para 17.38(2) of the CP was the one that the LC and LR plainly intended.

163. An objection to this is made in para 17.41:

> "The second interpretation would not encourage the resolution of boundary claims, but would instead enable the matter to continue unresolved at the risk of causing costs, delay and litigation at a later stage."

That statement is incorrect. The actual dichotomy in practice is between leaving sleeping dogs to lie and initiating a boundary dispute: see above, para 162. It is not inevitable that the matter will *ever* become a boundary dispute as most people are likely to accept the physical boundaries as coinciding with the legal boundaries, particularly when they are of long standing. That is the logic of para 5(4) and what it was intended to protect and uphold.

164. Perhaps the LC can explain how ordinary people are supposed to know that they must make an application to the LR within six months of discovering the mistake? There is no other provision in LRA 2002 that requires action within a specified period and that leads to a permanent loss of land that a person thought that he or she owned. Why is the LC so keen to promote and encourage boundary disputes when everyone else is trying to stop them?

165. The proposal at para 17.47 has not been properly thought through and is one that should be abandoned.

Paras 17.62/22.100

We provisionally propose that where a person becomes the first registered proprietor of title to land which has in fact been extinguished by an adverse possessor, where (i) the registered proprietor did not have notice of the adverse possessor's claim and (ii) the adverse possessor is not in actual occupation of the land at the time of registration, an

application for alteration of the register should be classed as a rectification. Do consultees agree?

166. I find this very strange and it rests to my mind on a failure to construe correctly LRA 2002, s 11(4). The intention of the provision was that if a first registered proprietor took the land without notice of the fact that a squatter had acquired title by adverse possession, he or she was to be regarded as being akin to a statutory bona fide purchaser without notice. The proprietor would take free of the interest. No element of mistake comes into it in those circumstances: the prior estate has been defeated and no longer exists. The very act of registering the proprietor without notice of the squatter's title extinguishes it and thereby precludes any claim that there is a mistake in the register. This is made clear by the Explanatory Notes (as well as by LC 271, para 3.47), which say at para 41:

> "This provision is new and is designed to meet the following situation. A takes adverse possession of unregistered land belonging to B. After 12 years' adverse possession, B's title is extinguished and A becomes owner of the land. A then abandons the land and B resumes possession of it. Before B has been back in possession of the land for 12 years he sells it to C. B sells as paper owner in accordance with the title deeds, but A is in fact the true owner. The sale triggers compulsory registration and C applies to be first registered proprietor. Subject to the transitional provisions contained in Schedule 12 paragraph 7, the rights of a squatter will not under the Act take priority on first registration or on a registered disposition without the need for registration, as they presently do. By virtue of section 11(4)(c), C will take free of A's rights unless, at the time of registration, he had notice of them. If C is registered as proprietor even though he has notice of A's rights, A will be able to seek alteration of the register. C is bound by her rights and so alteration of the register will not involve rectification. As the register is inaccurate it may be altered to give effect to her rights by registering her as proprietor in place of C, as provided in Schedule 4, paragraphs 2 and 5."

It was, for the record, a provision that was debated fully in Parliament in the Lords debates on what became LRA 2002.

167. At para 17.58, the LC now says the fact that the person has been registered, when the land in fact belonged to the squatter (which of course contradicts the words of the statute), means that that person is registered by mistake and therefore the squatter can seek alteration of the register. If that is correct, s 11(4)(c) is redundant and confers no benefit whatever. On that basis the squatter's position would be the same whether or not the first

registered proprietor had notice of the squatter's rights. Even though the first registered proprietor is stated to take free, he or she does not and is at risk of an alteration of the register. Worse still, it is proposed to highlight this apparently pointless provision (which might as well be repealed if the view is correct) by saying that the squatter can apply to be registered and that his application will amount to rectification.

168. It is inconceivable that a court would construe LRA 2002, s 11(4)(c) in the way that the LC now seems to suggest. The court would plainly give the provision a purposive interpretation. If there thought to be need for a provision to deal with the situation, it should be to make it clear that in the circumstances in s 11(4)(c), a squatter cannot seek alteration of the register.

169. I am very surprised indeed that the LC have included this proposal at para 17.62. It is a serious error of judgment. It suggests that the LC cannot interpret statutes and is deliberately setting out to defeat a provision that enhances the protection offered by registration. Once again, it calls into very serious question exactly what the LC thinks it is doing in this CP in relation to registration of title. As there is no evidence whatever that this has caused any problems at all, why is the LC addressing a non-issue? I had understood that the point of this CP was to deal with pinch points that had arisen. I am surprised that this proposal has found its way into the CP.

Paras 17.70/22/101

We provisionally propose that an adverse possessor of unregistered land should not be able to apply for registration with possessory title until title has been extinguished under the Limitation Act 1980. Do consultees agree?

170. I did once have the temerity to run an argument on LRA 2002, s 9(5) along the lines that my client was entitled to be registered even though he had not been in adverse possession for 12 years. The Adjudicator gave it the short shrift that it richly deserved. I support the proposal.

Paras 17.71/22/102

We provisionally propose that an adverse possessor of registered land should not be able to apply for registration except through the procedure in schedule 6. Do consultees agree?

171. This is already the law – see *Swan HA Ltd v Gill* [2013] 1 WLR 1253 – and that case certainly reflects the intention of LR and LC in the adverse possession provisions. I have had this situation in court and have relied on *Swan*. Although I consider that *Swan* does no more than spell out what is clearly implicit in the legislation, it would do no harm to make the point explicit. Parliamentary counsel may take a different view, as legislation is meant to change the law.

Paras 17.79/22.103

We provisionally propose that where an adverse possessor in unregistered land is registered with possessory title in the reasonable (but incorrect) belief that the prior title has been extinguished, the period of adverse possession should continue to run, while the possessory title is open. Do consultees agree?

172. This is a rare situation as Tribunal Judge Rhys observed in *Sexton v Gill* at [12] ("the present situation is an unusual one and unlikely to be repeated very often"). A person, who has been in adverse possession of unregistered land for less than 12 years, applies to be and is registered with a possessory title when they should of course not have been (para 17.70). Once registered, they continue in possession for a period of 12 years from the date when they first went into possession. Can they rely upon the period of possession since their first registration to bar the rights of the unregistered owner? This situation has to date arisen a number of times (including a case in which I was involved), though I suspect that it will not do so much in the future.

173. The case for time continuing to run is that registration with a possessory title takes effect subject to the rights, if any, of the paper owner, whose own title was unregistered (LRA 2002, s 11(7)). The squatter has a separate legal estate from the paper owner and it is that which is registered. There is no reason, it is said, why the fact that the squatter has been registered should affect the rights of the squatter as against the unregistered paper owner.

174. I have struggled with this issue, which is very difficult, and I have constructed a number of examples which I have worked through for my own understanding. I continue to have a fundamental conceptual difficulty about the idea that a person can be in adverse possession of land of which he or she is the registered proprietor. That contradicts the logic of land registration whatever the theory of concurrent legal estates may be. Quite apart from those conceptual difficulties (which have not worried two of my colleagues in Falcon Chambers), the proposal as worded is an invitation to uncertainty. How do you ascertain whether a squatter has acted reasonably in applying to be registered? My personal preference would have been to follow the principles and logic of registered land and I would have left it up to the unregistered paper owner to seek alteration of the register, by closing the squatter's title.[28] No time limits are proposed in the CP for alteration of the register as opposed to rectification. Nor should they be, in my opinion. Obviously, once the squatter's title has been closed, the paper owner can recover possession. In reality, the application to close the register would simply be pleaded as part of the proceedings for possession.

175. Accordingly, I do not agree with this proposal.

Paras 17.86/22.104

We provisionally propose that where a tenant is in adverse possession of land (other than land belonging to the landlord) and the presumption that the tenant is acting on behalf of his or her landlord is not rebutted, the landlord should be able to make an application under Schedule 6 based on the tenant's adverse possession. Do consultees agree?

176. I do not support this (to put it mildly). The reforms in LRA 2002 were intended to cut back very substantially on the scope and impact of adverse possession. The idea that because something has developed in relation to the adverse possession of unregistered land, it should therefore be carried through to registered land, misses the point of the

[28] As against the original squatter, it would be alteration, not rectification. The original squatter, registered with a possessory title, would always be subject to any rights that the paper owner might still have.

reforms, particularly when the rule in question is archaic and incoherent. If a person who happens to be a tenant of adjoining land, is in adverse possession for 10 years, he or she is entitled to apply to be registered under LRA 2002. Why should this anachronistic and very questionable presumption of accrual to the landlord be carried through and infect LRA 2002 so to enable the landlord to gain the land? I entirely agree with Laddie J's comments quoted in para 17.80. Why on earth should the landlord get it?

CHAPTER 18

Paras 18.7/22.105

We invite the views of consultees as to whether the Law Commission should conduct a project reviewing the law of mortgages as it applies to land. If consultees consider a project should be so conducted, we invite consultees to share examples of areas that such a project should cover. Please include evidence as to the problems that the law is creating in practice and the potential benefits of reform.

177. I am not going to respond to this for the same reason that I have given above at para 92 in relation to the Landlord and Tenant (Covenants) Act 1995. That does not mean that the law of mortgages is not in need of reform. It quite plainly is (it is the one major area of the law of real property that remains unreformed since 1925), but this sort of question in an over-long CP is not the best way to determine the main issues. If the LC does undertake a project on mortgages, I would respectfully suggest that it will need a substantial input from lawyers who are familiar with modern lending practices across the spectrum of lending transactions. One size fits all does not work for mortgages any more I suspect.

178. As to the questions at paras 18.15/22.106 – 18.31/22.110, I do not think I can add anything of value.

Paras 18.41/22.111

As part of our call for evidence in relation to a separate project on mortgage law, we invite consultees to share their experiences of any benefits or difficulties caused by the

principle that an equitable chargee may serve notice on a prior legal chargee and thereby prevent the legal chargee's right to tack.

179. Paras 18.32 – 18.41: I am rather surprised to see a query about this. The change embodied in LRA 2002, s 49(1) was intentionally made so that *any* subsequent chargee could give notice. That implemented a recommendation in the LC's ill-fated report on mortgages: see LC 271, para 7.22. It is also, in my opinion, very necessary. Virtually all second charges are now equitable, because the first chargee almost always places a restriction on the register to prevent the registration of any subsequent charge without its consent, which is never forthcoming. Second charges have to be protected by notice instead. The change was also in line with LPA 1925, s 94, which applies to unregistered land. I am afraid that I do not see the problem.

Paras 18.58 – 18.59/22.112 – 22.113

We invite the views of consultees on the extent to which lenders are relying on section 49(4) to stipulate a maximum amount for which a charge is security.

We invite consultees to provide any evidence that reliance on section 49(4) in this way is preventing borrowers from obtaining further finance elsewhere.

180. LRA 2002, s 49(4) was included after very extensive consultation with mortgage lenders. There is open warfare between the primary and secondary lenders and it was the secondary lenders who wanted s 49(4). It comes as no surprise that the primary lenders should object to it. My answer to it is that s 49(4) is permissive. It may be used if the parties agree to use it. Nobody has to use it. The matter is one for the market.

181. The criticisms of s 49(4) smack of motes and beams.[29] In my 15 years in practice, I have never seen a charge that employed s 49(4) and there have been no cases on it.[30] By contrast, what I see virtually every single day are first legal "all-money" charges by

[29] And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye?" Matthew, 7:3.

[30] The only case on s 49 of which I am aware is *Re Black Ant* [2014] EWHC 1161 (Ch), which is discussed at para 18.19.

primary lenders, with restrictions that prevent any subsequent legal charge of the property without the consent of the first mortgagee. Such consent is never forthcoming. This form of anti-competitive practice is infinitely more pernicious than s 49(4). It is also virtually the norm. It is not s 49(4) that is preventing borrowers from obtaining further finance elsewhere. It is the practice I have just mentioned. The present practice, outlined in this paragraph, has in fact made issues concerning further advances a dead letter (hence the dearth of authority). This is obviously not a matter for an amended LRA, but it is a matter for a mortgages project.

CHAPTER 19

182. I do not have anything that I can add of value in relation to sub-charges. The provisions of LRA 2002 are explained in LC 271. They essentially followed the law under LRA 1925 and LRR 1925. I have never encountered a sub-charge in practice. There is a striking lack of authority on them (other than the *Credit & Mercantile* case). I am not sure how important they are in practice.

CHAPTER 20

183. It is a source of great sadness to me that electronic conveyance as it was visualised in LRA 2002 has not come to pass. The provisions on electronic conveyancing were the most difficult in LRA 2002 and a very great deal of effort went into them.[31] The outcome was a coherent and principled approach. The principles influenced the rest of the Act and were a key factor in the legislation being taken forward. At the time, there really was only one model on the table. Under it, solicitors and licenced conveyancers effectively became registrars.

Paras 20.25/22.118

We provisionally propose that:

[31] There are only four sections in LRA 2002 (ss 91 – 95) that deal with electronic conveyancing, plus the complex Schedule 5. Their brevity belies the effort that lay behind them.

(1) simultaneous completion and registration should no longer be required in a system of electronic conveyancing implemented under the LRA 2002; and
(2) equitable interests should be capable of arising in the interim period between completion and registration.

Do consultees agree?

184. The change proposed is quite a minor one in terms of drafting. Section 93(2)(b) would go. I see the force of what is being said and I have no objection to the proposals *provided that* there is a new subsection that would mean that, at a future date, it would be possible by rules to require simultaneous completion and registration. If the LC really means what it says in the first sentence of para 20.16, it must, I assume, agree with that objective. If there is no provision in the Act which would at a future date compel simultaneous completion and registration, it will never happen. I am therefore prepared to support these proposals but *only* on that basis.

Paras 20.35/22.119

We provisionally propose that:

(1) the decision to enable electronic conveyancing and the subsequent decision to end paper-based conveyancing should be vested in the Secretary of State, to be enacted through secondary legislation;
(2) following the enactment of such secondary legislation, the timetable for the introduction of electronic conveyancing and for ending paper-based conveyancing, in each case on a disposition by disposition basis, should be delegated to the Chief Land Registrar; and
(3) the Secretary of State and the Chief Land Registrar should be required to consult with stakeholders before exercising their powers in respect of electronic conveyancing.

Do consultees agree?

185. Para 20.30 is rather vague and I am not sure precisely what "the time-consuming and cumbersome process" is, to which it refers. I assume that it must be a reference to s LRA 2002, s 128(5)

> "Rules under section 93 or paragraph 1, 2 or 3 of Schedule 5 shall not be made unless a draft of the rules has been laid before and approved by resolution of each House of Parliament."

That is indeed the very highest degree of scrutiny that can be required for secondary legislation.

186. I infer that a less demanding form of Parliamentary scrutiny is being proposed, though the details of which particular model of Parliamentary scrutiny are unfortunately not given. This high degree of Parliamentary scrutiny was included to provide reassurance to major stakeholders such as The Law Society and the Council of Licensed Conveyancers. As I have explained, under the system of electronic conveyancing that was envisaged (and indeed still is), their members would in effect become registrars.

187. Provided the major stakeholders who will be most affected will be fully and carefully consulted, I am perfectly happy to support this proposal. The LC does need to decide precisely what form of scrutiny the secondary legislation will require. The possible menu is in LRA 2002, s 128.

Paras 20.47/22.120

We provisionally propose that the following propositions of law should be confirmed:

> **(1) trustees may collectively delegate their power to sign an electronic conveyance and give receipt for capital monies to a single conveyancer under section 11 of the Trustee Act 2000;**
> **(2) a beneficiary's interest in a trust of land will be overreached when trustees collectively delegate their power to a single conveyancer to sign an electronic conveyance and give receipt for capital monies; and**

(3) a beneficiary's interest in a trust of land will be overreached when two or more trustees, by power of attorney, grant to a single conveyancer the power to sign an electronic conveyance and give receipt for capital monies.

For overreaching to take place it will remain necessary for the disposition that follows the delegation to be one with overreaching effect. Do consultees agree?

188. Whether these are strictly needed I am not sure and Parliamentary Counsel may take some persuasion to draft what are essentially declaratory provisions. However, the sense of them is plainly sound and I support the idea that these matters should be clarified in an appropriate way.

CHAPTER 21

Para 21.12: Challenging decisions by the LR

189. I am not insensitive to the points made in paras 21.12 and 21.13. There is, however, a real problem. While there are some excellent lawyers at the LR, there are some who are not. Many of us in practice have encountered cases where LR has taken an indefensible position and refused to shift from it. I have had a number of examples of this. I had a particularly appalling case, where the LR lawyer would not even listen when a Chancery Master (a specialist in property law as it happens) had said that the LR had got it wrong and that the view I had advised was clearly right (it was quite an elementary point). The LR only backed down under threat of judicial review. It caused great practical, financial and emotional problems for my client.

190. The LR complaints procedure, good though it is, does not always provide a solution in practice. For most people, judicial review is simply out of the question. A simple system by which the FTT could *review* LR decisions would be less intimidating. In other words, instead of a party having to go through the hurdles of judicial review, they would be able to apply to the FTT to review the decision of the LR. The FTT judges would initially consider on paper whether, on the application there were genuine grounds for review, and would probably reject most cases at that stage. In the cases that went forward, the FTT would function in a manner akin to an administrative court and would review the decision

of the LR on the same basis as the Administrative Court would on a judicial review application. It would *not* be an appeal, but it would provide a simpler and less daunting procedure of judicial review and it would have the advantage of enabling specialist judges to deal with the issues.

191. I have not found an up-to-date list of judges who can sit in the Administrative Court. When the list was last published there was only one Chancery Division Judge (now a Lord Justice of Appeal) and he did not have land law experience. I would respectfully suggest that the LC takes another look at this. For the FTT to have a jurisdiction to review LR decisions would make sense. The LR is well used to the FTT and it would know that the matter had been considered by specialists who understood land registration issues.

Paras 21.24/22.121: determined boundaries

We provisionally propose that the Land Registration Division of the First-tier Tribunal (Property Chamber) should be given an express statutory power to determine where a boundary lies when an application is referred to it under section 60(3) of the LRA 2002. Do consultees agree?

192. I support this proposal. In the light of Judge Cooke's decision in *Bean v Katz* [2016] UKUT 168 (TCC), which came after the publication of the CP, this matter needs to be settled definitively. What is proposed is, in my opinion, the right solution.

Paras 21.28/22.122

We invite the views of consultees as to whether the jurisdiction of the Land Registration Division of the First-tier Tribunal (Property Chamber) should be expanded to include an express statutory jurisdiction in cases that come before it to allow it to:

(1) determine how an equity by estoppel should be satisfied; and
(2) determine the extent of a beneficial interest.

193. I have no strong views on this issue. The FTT has jurisdiction to deal with issues of estoppel in one case already (which, ironically, the LC wishes to take away from it),

which is readily justifiable on conceptual grounds (see above, para 158). I can see that the specialist skills of the FTT judges would enable them to deal with issues concerning estoppel. I am less convinced about disputes concerning beneficial interests, which are often dealt with by family judges. They look to me more like the exercises of discretion that are the everyday business of family judges.

194. It is obviously important that the LC takes soundings from the Judges of the Chancery Division (and the specialist circuit judges who deal with chancery work) to see how they feel about this matter.[32] I am aware of some judicial disquiet on this issue and the LC may already have made these enquiries. I am also aware that there are already steps being taken by way of a pilot scheme to bring about an interaction between the FTT and the county court, though I am not familiar with the finer details.

29 June 2016

[32] The obvious judge to speak with, if he is willing to assist, is Mr Justice Morgan, who is a land law specialist.