A Response to the Law Commission Consultation Paper 'Updating the Land Registration Act 2002' (Law Com CP No 227)

by

Property & Trusts Law Section of the Society of Legal Scholars

[1] The following response to the Law Commission Consultation Paper 'Updating the Land Registration Act 2002' (Law Com CP No 227) is prepared by the Property & Trusts Law section of the Society of Legal Scholars.

[2] The Society of Legal Scholars is a learned society whose members teach law in a University or similar institution or who are otherwise engaged in legal scholarship. Founded in 1909, and with around 3,000 members, it is the oldest as well as the largest learned society in the field. The great majority of members of the Society are legal academics in Universities, although members of the senior judiciary and members of the legal professions also participate regularly in its work. The Society's membership is drawn from all jurisdictions in the British Isles and also includes some affiliated members typically working in other common law systems. The Society is the principal representative body for legal academics in the UK as well as one of the larger learned societies in arts, humanities and social science.

[3] All members of the Property & Trusts Section were invited to contribute at a meeting convened specially for the purpose of developing a response to the consultation. The section is particularly grateful to those who led the discussion and drafting of the responses: Dr Aruna Nair (chapter 5), Ms Amy Goymour (chapters 6,7,8), Professor Martin Dixon (chapters 9,10), Dr Simon Cooper (chapter 13), Professor Peter Sparkes (chapter 17). The section is also indebted to all those who participated in the discussions and helped refine the collective response.

[4] Our response focuses on chapters 5, 6, 7, 8, 9, 10, 13 and 17. Our approach is to take the proposals in the Consultation Paper and for each one to note the particular proposal followed by our observations on it.

PART 2 POWERS OF REGISTERED PROPRIETORS

CHAPTER 5

A. Owners Powers and Nemo Dat

CP Proposal:

[5] The CP is rightly concerned with the problems arising out of the judicial interpretation of the current provisions on owner's powers.

> Section 23 - owner's powers in relation to a registered estate are powers to make any disposition *permitted by the general law* in relation to *an interest of that description*
>
> Section 24 - a person entitled to be registered proprietor is entitled to exercise owner's powers *in relation to the registered estate*

[6] In *King* and *Redstone*, section 24 was interpreted to mean that a person entitled to be registered as proprietor – even if she is not actually so registered – can validly grant legal estates and interests affecting the registered estate (and, according to *King*, bind the current registered proprietor by such grants). Two beneficial effects of this interpretation can be noted. First, it allows a purchaser to grant a legal mortgage before his own registration (under section 27 the mortgage will take effect at law only when itself completed by registration, but it does not require the prior registration of the purchaser). Second, it allows a purchaser to sell the legal estate on without registration (again, under section 27 the new purchaser will only get legal title on her own registration, but she does not have to wait for the old purchaser to be registered first).

[7] In *Scott*, the High Court and Court of Appeal rejected this analysis. It was stated that the person entitled to be registered as proprietor, as a holder of an equitable interest, could not grant legal estates because the 'general law' proviso in section 24 includes the principle *nemo dat quod non habet*. The same reasoning was followed in *Skelwith.*

[8] That aspect of *Scott* appears to have been driven by a concern raised by short leases and their interaction with owner's powers. Unlike dispositions to which section 27 applies (such as the mortgage and sub-sale), a short lease can arise immediately at law before its own registration. Section 29(4) then treats such as lease as if it were a registered disposition and gives it priority protection against unprotected interests. An acquisition mortgagee would be unprotected against the legal lease under this model, because the interest of the mortgagee is equitable until registered. By restricting the owner's powers under section 24, the judgments solve the interaction between owner's powers and short leases by ensuring that no short lease could arise at law before the registration of the grantor. Both lease and

mortgage would arise at law only on or after the registration of the mortgagee/landlord as proprietor, and *Cann* would then apply to confer priority on the acquisition mortgagee.

[9] However, as the CP recognises, the *Scott* solution creates problems. First, it makes section 24(b) effectively meaningless, since a person's entitlement to be registered proprietor adds nothing to her position as holder of some equitable entitlement. Second, it prevents section 24 from facilitating important transactions like acquisition mortgages and sub-sales. Parties must wait for the person entitled to be registered proprietor to actually become registered proprietor before transactions in their favour take effect at law. This eliminates the practical objective of enacting section 24 in the first place.

[10] The CP proposes to wipe out the *nemo dat* rule entirely in relation to registered land. Once a person is registered proprietor, or entitled to be registered proprietor, they can make *any* disposition - and the disponee is safe from her title being "questioned" - unless the limitation on the registered proprietor's powers appear on the register.

[11] The CP proposes the following:

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

[12] The CP proposal certainly sweeps away Etherton LJ's argument in the *North East Property Buyers* litigation and gets rid of the problem of short leases gaining priority over acquisition mortgagees contrary to the policy of *Cann*. It also deals with the possible persistence of the Ferris & Battersby effect in relation to overreaching.

Comment:

[13] We agree that the judicial interpretation of section 24 in *Scott* requires action. But we submit that the CP proposal would create a fresh risk to the scheme of the LRA as described below. Consequently we recommend a more limited intervention.

[14] The CP proposal carries some risks to the scheme of the whole LRA, because it is phrased in terms that wholly prevent the *nemo dat* principle from affecting any transaction involving an exercise of owners powers. This is an effective abolition of the *nemo dat* principle in the context of registered land. We think that *nemo dat* has continuing residual relevance to the structure of the LRA 2002, and that abolishing *nemo dat* in the manner proposed by the CP would have undesirable effects wider than those that are targetted by the CP proposals.

[15] In particular, the logic of *nemo dat* arguably underpins two fundamental rules on which the registration system currently depends:

- that interests granted earlier in time take priority over interests granted later in time. The difference between section 28 and section 29 depends on this rule;

- that a void disposition is ineffective to confer rights. The difference between section 27 LRA and section 58 depends on this rule.

[16] Neither of these rules are specifically enacted anywhere in the legislation. They depend on background assumption which are underpinned by *nemo dat*. *Nemo dat* is, therefore, the starting point for resolving questions of priority and title. The statutory adjustments, such as the priority promise in section 29 and the vesting guarantee in section 58, then operate as specific exceptions to *nemo dat*. The distinction between the background principle and its exception is important, even though the exceptions are very broad, because the statutory exceptions are qualified in certain circumstances. For instance, section 29 is qualified by the operation of overriding interests and section 58 is, in a sense, qualified by the availability of rectification. Where these qualifications apply, *nemo dat* continues to have relevance. It is therefore important to ensure *nemo dat* is not indiscriminately removed, as would occur under the CP proposal. To do so might have adverse implications for the priority promise and the vesting guarantee.

Priority and nemo dat:

[17] The CP proposals envisage the continued operation of section 28. But section 28 is wholly negative in its terms. It states only that registration is irrelevant to priority (unless section 29 applies). What currently governs priority is the common law doctrine that first in time prevails.

[18] It is arguable from case law that the first in time rule is a consequence of *nemo dat*. See, for only one example, *Philips v Philips* (1861) 31 LJ Ch 321 per Lord Westbury: “he can grant to the purchaser that which he has, namely, the estate subject to the mortgage or annuity, and no more. *The subsequent grantee takes only that which is left in the grantor. Hence* grantees and incumbrancers claiming in equity take and are ranked according to the date of their securities.” (emphasis added.) On this analysis, the first in time rule depends on the idea that each transaction by an owner diminishes her powers to dispose freely of the estate and that these limits on the owner’s powers disposition affect later disponees. Case law

on the first in time rule, in the context of equity, is often expressed in the language of *nemo dat*.

[19] *Nemo dat* potentially underpins, therefore, the underlying principle governing priorities in the registration system. It is excluded in favour of a registered disponee for value by section 29, but it is not excluded in other cases. So, for example, it continues to apply when title is acquired by donees. Under the CP proposal to eliminate *nemo dat* from constraining owner's powers, it is at least arguable that, because the title of donees (like other disponees) could not be questioned on the basis of *nemo dat*, they would effectively take free from unregistered interests / limits on the powers of registered proprietors that do not appear on the register. That would conflict with the current operation of section 28.

Section 58, section 27 and nemo dat:

[20] The CP proposals envisage that in the standard A-B-C scenario, rectification will continue to be available against C. C's registration will be mistaken because the title of B, the registered proprietor, could be challenged on the ground of mistake.

[21] Under the CP proposal to eliminate *nemo dat* from the interpretation of owners powers, so that the title of a recipient from a registered proprietor cannot be questioned by virtue of *nemo dat*, then it is arguable that there is no basis for holding that the entry of C was a mistake.

The principle that a void disposition, such as a forgery, confers no rights depends on the *nemo dat* principle. If B has forged A's signature on a transfer to himself of A's estate, title does not actually pass because B has no power to deal with A's estate. If B is A's agent, or the transfer is merely voidable rather than void, the law takes a different view on the nature of B's powers and allows title to pass on the basis that B actually has power to convey what her is trying to convey (*nemo dat*). When section 58 confers title on B despite this, and B then conveys to C, the problem with C's title is the same as the problem with B's title, namely *nemo dat*. Under the CP proposal, however, *nemo dat* could not be relied on for the purposes of questioning C's title under sched 4. *Nemo dat* currently feeds into the concept of mistake, therefore, and, if repealed in accordance with the CP proposal, it would be unclear on what basis it could be said that C's title was rectifiable. That would conflict with the current operation of rectification against C.

A more limited proposal

[22] The preferable route to reform would be to reverse *Scott* directly. Our proposal is that a person entitled to be registered proprietor should be entitled to exercise exactly the same powers *as if he were already registered proprietor of the registered estate*.

[23] On this approach, a normal disposition by a person entitled to be registered proprietor would be effective, once registered, under section 27. The consent of the

registered proprietor of the registered estate, coupled with compliance with the formality requirements of section 27, will give the legal title to the disponee. But the only title that the disponee will get is the title of the person on whose consent she is relying. She will be *prima facie* bound by interests that bound the previous registered proprietor unless she has a defence by section 29.

[24] On the other hand, where consent is missing or flawed, title does not pass under section 27, but is instead effective only by virtue of section 58. Under our proposal, a disponee who takes under a flawed transaction would be potentially susceptible to rectification according to the terms of sched 4.

[25] Our proposal would achieve the desired result of allowing the equitable owner to grant legal rights in the period between completion and registration. That is a limited exception to *nemo dat* and one which is familiar from elsewhere in the law. At the same time our proposal would not disrupt the provisions on priorities and mistaken registrations.

[26] Meanwhile, the Ferris & Battersby effect which concerns overreaching should be addressed separately through reforms to the LPA 1925 rather than the LRA 2002. A purchaser who complies with section 27 LPA should not have to worry about further limitations on the powers of the trustee, whether the land is registered or unregistered.

PART 3 PRIORITIES

CHAPTERS 6, 7, 8, 9, 10

A. Priority in Favour of Extended Class of Acquirers

CP Proposal:

[27] The CP (paras 6.7-6.15) identifies as a notable absence from the current law which requires reconsideration the protection of certain interests from earlier unrecorded rights. Under current law the protection of the 'priority promise' is afforded by section 29 to registrable dispositions for valuable consideration that are completed by registration, together with short unregistrable leases. The registrable dispositions are listed in section 27.

[28] The potential problem is that for competing equitable (and therefore non-registrable) interests, priority is governed by the order of acquisition under the first-in-time rule of section 28, even if the later acquirer protects his interest on the register prior to the earlier rightholder protecting his. This is perceived as a problem where, for example:

(1) the earlier rightholder has an option to purchase and the later acquirer subsequently enters a contract to buy the land. Until a disposition to the later acquirer takes place and is completed by registration, the later acquirer is at the mercy of section 28 and cannot benefit from section 29.

(2) the earlier rightholder has a restrictive covenant and the later acquirer subsequently acquires an option to purchase. Until the later acquirer exercises the option, there is no registrable disposition, and therefore the later acquirer is bound by the earlier rightholder's restrictive covenant whether or not it was on the register.

[29] In these examples, the CP suggests that it is unsatisfactory that the later acquirer cannot take priority: 'This can be problematic: Interests that are unregistrable may nonetheless be very valuable' (para 6.15). The proposal is therefore to extend protection to those who rely on the register even if they acquire only unregistrable interests in registered land.

Comment:

[30] Registrable dispositions (fictionally extended by section 29(4) to short legal leases) comprise only certain legal interests. It is arbitrary to perpetuate for no good reason the law-equity divide in this context. We support the reconsideration of the conditions which confer priority on later acquirers.

[31] The later acquirer for value of a beneficial interest under a trust would not be able to benefit from the CP proposal. To benefit, the later acquirer would have to enter a notice on the register, and this is not permitted for a beneficial interest under a trust. That result would depart from the policy expressed in the CP. All those who (a) pay valuable consideration (b) rely on the register and (c) do all they can within the machinery of the LRA to protect their right, should be able to benefit from section 29. There should be a mechanism for deeming such acquirers to gain the protection of section 29 along the same lines as section 29(4).

[32] The terms of section 29 currently require the earlier rightholder's interest to be protected at the time of the 'disposition' to the later acquirer. That will need to be amended to accommodate the CP proposal, in order to ensure that the time by which the earlier rightholder's interest must be protected will make sense under the new scheme.

[33] We support the availability of indemnity for the acquirer of an unregistrable interest noted on the register whose priority is adversely affected by alteration to correct a mistake.

[34] We support the extension of priority searches as needed to supplement the extension of priority protection.

[35] We invite the Law Commission to give consideration to priority searches by the acquirers of short legal leases protected under section 29(4). Currently that is unclear. The problem is that a priority search provides protection for 30 days up to the date of applying for registration (or a notice under the CP proposals). By definition, those relying on section 29(4) do not apply for any entry, and therefore it is not clear whether they have acted in time to qualify for the priority search protection.

[36] We invite the Law Commission to give consideration to whether a forged disposition should count as a registrable disposition for the purpose of section 29. The point is of practical importance and not discussed in the CP.

B. Valuable Consideration

[37] We raised the CP issues relating to valuable consideration but did not reach a consensus on the answer. Views ranged across the entire spectrum. Some contributors supported the protection of donees on the basis that reliance on the register was the dominant factor. Some contributors supported only the protection of those who pay substantial consideration in order to limit the threat to static security and on the basis that only the payment of substantial consideration would be a significant moral factor in favour of purchasers. In the light of that range of views, we do not propose any particular answer to the proposals, but draw the differing viewpoints to the Law Commission for consideration.

C. Postponement

CP Proposal:

[38] The CP (chapter 8) inquires about the extent to which notices should continue to be accepted for entry on the register to protect earlier rightholders following a registered disposition to which the earlier rightholder may have been postponed.

[39] The CP proposes that where a person applies for a unilateral notice in respect of an interest that was formerly overriding before 13 Oct 2013, and the register indicates a registered disposition since that date, the applicant should be required to give reasons why the interest still binds the estate.

Comment:

[40] We support the CP proposal. It strikes an acceptable balance between the desire to process applications expeditiously and the desire to prevent the register being cluttered with notices which purport to protect interests that do not in fact bind the estate.

[41] The CP proposal is restricted to interests that were formerly overriding interests before 13 Oct 2013. But the reasons justifying the CP proposal are equally applicable

to all manner of interests that are liable to be postponed. We therefore suggest that CP proposal be extended to all interests liable to be postponed.

D. Priority Searches and Unregistrable Leases

CP Proposal:

[42] The CP discusses a particular problem relating to the deeming provision of section 29(4) and the operation of priority searches. Section 29(4) allows grantees of short legal leases to gain the protection of section 29 as if they had been registrable and registered.

[43] The problem arises when a prospective acquirer (a mortgagee) makes a priority search. An unregistrable lease is then granted by the prospective mortgagor. The mortgagor then grants the mortgage which is registered within the priority period. The priority search appears to have the effect under section 72 of postponing the lease to the mortgage. The CP is concerned that the priority search rule therefore undermines the protection of the unregistrable lease as an overriding interest.

Comment:

[44] We agree with the concerns expressed in the CP. We agree that an unregistrable lease should take priority over an interest granted subsequently to the lease, despite having been protected before the grant of the lease by a priority search. We propose that this subordination of the priority search rule to the rule protecting unregistrable leases should be made clear in an amendment to the legislation.

E. Overriding Interests

CP Proposal:

[45] The CP discusses the potential meaning of 'unregistered interest' in the description of overriding interests in sched 1 and 3. The issue is that the benefit of an interest may be registered, but not the burden (a scenario which is not unlikely where the benefitted land is registered before the burdened land). To prevent the person who registers the benefit of an easement from being in a worse position from than a person who altogether fails to do so, and other reasons, the CP proposes that the fact of the benefit having been registered should not preclude the interest from being an 'unregistered interest' with overriding status.

Comment:

[46] We agree for the reasons given in the CP.

F. Notices

CP Proposal:

[47] The CP responds to stakeholder concerns over the lodging of unilateral notices to protect rights that may already have been postponed under section 29. This arose in the context of the former overriding interests that lost that status on 13 Oct 2013.

[48] Under the current law, the land registry does not inquire into the validity and priority of such rights when a unilateral notice is lodged, and the rightholder need produce no supporting evidence for those matters, but only asserts a right capable of being protected by notice. The land registry does not inquire into whether a registered disposition for value has occurred since the loss of overriding status.

[49] In relation to the former overriding interests, the CP proposes that, at the time of lodging the unilateral notice, the rightholder must state the basis for his belief that the current proprietor is bound. Alternatively, the CP proposes that there will continue to be no evidence of validity and priority required at the time of lodging the unilateral notice, but that the rightholder must state the basis of his belief that the current proprietor is bound if proprietor seeks to cancel the application.

Comment:

[50] We agree that the burden of proof that an unprotected right has had its priority postponed to a proprietor under section 29 should ultimately be borne by the proprietor and not the rightholder. In order to reduce the risk of an unwarranted and significant blot on title, however, we also agree that steps should be taken to filter applications for the entry of unilateral notices in circumstances when the right lodged may have lost priority.

[51] We would support either model proposed by the CP: whether the rightholder must pre-emptively state the basis for believing the proprietor to be bound in the unilateral notice application (the pre-emptive model), or whether the rightholder need only react to a land registry requisition on the point (the requisition model).

[52] If the requisition model emerges as the preferred option ahead of the pre-emptive model, we observe that it involves heavy reliance on forms passing between rightholder and the land registry. There would be an application to lodge the unilateral notice, a land registry requisition instructing the rightholder to disclose the basis for belief, the rightholder would then in all likelihood order a copy of the register and a copy of the transfer to the current proprietor to find the necessary information, and the rightholder would then respond to the land registry. We invite the Law Commission to consider whether these cumbersome processes, with their attendant risk of forms lost in the post or deadlines missed, might be short circuited by the land registry itself taking information from the register and transfer forms at least in certain cases. We also invite the Law Commission to consider whether the question of valuable consideration could be inquired into by the land registry directly communicating with the current proprietor. While we recognise the importance of administrative efficiency in the system of land registry, we are concerned that reforms should not be subservient to a policy of shifting all responsibility onto

applicants in order that the land registry may adopt a merely ministerial approach towards handling applications.

[53] The CP makes its proposal in response to stakeholder comments raised in the context of the former overriding interests that lost that status on 13 Oct 2013. We invite the Law Commission to consider whether there is any good reason not to extend the proposal to all unilateral notices so as to forestall similar issues from arising in analogous contexts in future.

G. Eligibility for Protection

CP Proposal:

[54] The CP makes no proposal to alter the current law on what rights are eligible for protection by notice under section 32 and what are excluded from protection by notice under section 33.

Comment:

[55] We invite the Law Commission to consider the desirability of explicitly permitting the protection of awards under the Party Wall etc Act 1996 by way of Notice. The position is not explicitly covered in the Party Wall etc Act 1996, unlike analogous orders under the Access to Neighbouring Land Act 1992 section 5. It appears that certain aspects of awards are capable of binding third parties who acquire the land, yet there is authority under the LRA 1925 that at least certain obligations under an award would not sustain protection by way of caution (*Observatory Hill v Camtel Investments* [1997] 1 EGLR 140).

H. De-Registered Notices

CP Proposal:

[56] The CP addresses the effect of section 29(3). In particular, it questions the legal result when X's interest is protected by notice, it is then mistakenly removed from the register, and the registered estate is transferred to a transferee for value at a time when X is in actual occupation. The transferee might have bought at reduced price believing X to have an overriding interest yet under the current law X has no overriding interest due to section 29(3). In these circumstances it is queried whether the transferee gains an improper windfall through gaining more than anticipated.

Comment:

[57] The current existence and application of section 29(3) prompts questions over the status of an entitlement that was formerly an interest which was the subject of a notice. Does its de-registration cause it resume the status as an equitable interest? If mistakenly de-registered, does it become merely a entitlement to seek rectification? In the latter case the provision would be redundant as it would be covered by the

rectification provisions of sched 4. It is not made explicit whether the effect of section 29(3) applies to voluntarily and mistakenly de-registrations alike. On balance, we suggest that section 29(3) causes more problems than it solves. Bearing in mind the vagaries of the interpretation and application of 'actual occupation' test, we doubt whether abolishing section 29 would be likely to operate as a significant disincentive to register. We therefore support the abolition of section 29(3).

PART 4 INDEFEASIBILITY

CHAPTER 13

A. No Action

CP Proposal:

[58] In many respects the CP accepts the status quo, and with many of these we concur.

[59] The CP accepts the approach taken in *Knights Construction v Roberto Mac* and *Gold Harp v McLeod* that rectification is available against successors to the mistaken title. We support this view.

[60] The CP accepts the approach taken in *Swift 1st v Chief Land Registrar* that, upon the mistaken registration of a new proprietor, the old proprietor does not retain a beneficial interest. We support this view.

[61] The CP accepts the approach taken in *Parshall v Hackney* that in cases of conflicting double registrations the dispute should be resolved through rectification and not adverse possession. We tentatively support this view, but we refer to the discussion below (paras 112-126) where we advert to the need to decide the basis for adverse possession.

[62] The CP preserves the judicial discretion in rectification proceedings through the tests of 'exceptional circumstances' and 'unjust not to rectify'. We support this view.

[63] The CP accepts the approach taken in *Gold Harp v McLeod* that rectification may operate 'retrospectively' in the sense that a de-registered derivative interest may be reinstated with priority over an intervening interest acquired for valuable consideration on the faith of a clear register. We support this view.

B. Excluding the right to rectify from being an overriding interest

CP Proposal:

[64] The CP identifies as a major problem in the current law the Court of Appeal's recognition in *Malory Enterprises v Cheshire Homes* (2002) that the right to rectify might constitute an overriding interest if supported by actual occupation. The CP gives two reasons why that would be unsatisfactory.

First, it would create a claim to an overriding interest where this was not envisaged by the LRA 2002.

Second, it would preclude indemnity following alteration of the register because no indemnity is available where the alteration merely gives effect to an overriding interest.

[65] Where an innocent transferee has intervened it would be unsatisfactory to deny indemnity. Even if the de-registered proprietor (A) were in discoverable actual occupation, it would be 'unrealistic' to expect that the transferee should ask A as occupier what interest he holds, since the transferee believes he has been dealing with A and is expecting to A to be in occupation. 'There was no reason for the [transferee] to knock on the door and ask A questions when [the transferee] believed it was corresponding with A.' For those reasons, the Law Com proposes to exclude the right to rectify from being an overriding interest.

Comment:

[66] The rules concerning the reach of rectification are currently unsatisfactory and in need of clarification. There is case law which treats the issue in different, conflicting ways.

- Some cases treat it as governed exclusively by schedule 4 (which imposes no explicit restrictions on its reach);

- Some cases treat rectification as setting up a 'right to rectify' which is then processed as an 'interest' (which would limit its reach according to the special priority rules of ss.29, 30 LRA);

- Some cases treat rectification as setting up a 'right to rectify' which is then processed as a 'mere equity' (which would control its reach according to s.116 LRA which effectively applies the special priority rules of ss.29, 30 LRA *mutatis mutandis*).

[67] The CP proposal, which would prevent recognition as an overriding interest, does not go far enough. It is only piecemeal exclusion. It does not comprehensively answer the underlying question of the reach of rectification as against third parties. The better solution would be to answer the underlying question by declaring explicitly and exclusively which of the three approaches in the case law is correct.

[68] That would have advantages:

- it would prevent questions arising whether the right to rectify was an 'interest' capable of being protected by notice on the register;

- it would eliminate any doubts as to whether the title of a successor to a mistaken title could be rectified. That is important because the matter is not beyond argument, since the decision to that effect in *Roberto Mac* by the First-tier Tribunal is not binding under the principle of *stare decisis*, and the decision to that effect in *Gold Harp* by the Court of Appeal is restricted to derivative interests (the priority guarantee) and not proprietorship cases (the title guarantee).

[69] The danger of piecemeal exclusion without solving the underlying question are evident from the CP text itself. The CP suggests that the right to rectify is not 'proprietary', adding that 'It is hard to imagine that such a right is could be sold or devised by will.' But this is erroneous. First, the right to rectify is transmissible: *Rossetti Ltd v Thresher Wines Acquisitions* REF/2008/0633. Secondly, transmissibility is neither a necessary nor sufficient condition for 'proprietary' quality. Thirdly, the CP later indicates (para 13.100(2)) that the right to rectify can be passed to successors. The error illustrates the difficulty of slotting the so-called right to rectify into the existing categories. It illustrates the need for clarification of the answer to the underlying question of the reach of the rectification power.

[70] The CP gives several reasons for excluding the right to rectify from overriding interests. One reason, given in para 13.63, was that it would be 'unrealistic' for a purchaser to make inquiries of A (the mistakenly de-registered proprietor who was in discoverable actual occupation) on the ground that the purchaser believed he had been dealing with A and would be expecting to find A there. That may or may not be the case depending on the manner in which the identity fraud had been perpetrated. Take the facts of *Swift 1st v Chief Land Registrar*. Had Swift 1st (the purchaser) sent an inspection agent to speak to any occupiers at the home of Mrs Rani (the registered proprietor), then surely any conversation between the inspection agent and Mrs Rani would have immediately prompted Mrs Rani to ask why she was being questioned, which would have immediately brought to light the identity fraud. The actual occupation rule can sometimes serve not only to warn prospective acquirers of occupiers, but also to warn occupiers of prospective acquirers. Despite the provisional view expressed by the CP, therefore, the factual scenario is not a reason for suggesting that making inquiry of actual occupiers is entirely pointless and consequently ought to be excluded from overriding interests. The better approach is to strike at the cause and not at the symptom, and that involves an unequivocal statutory answer to the underlying question of the reach of rectification.

C. Imposing a long-stop on rectification claims of 10 years and according explicit significance to the fact of possession of the land

CP Proposal:

[71] Under the current law, successors in title are susceptible to rectification, no matter how far removed from the mistaken transaction and no matter what length

of time has passed since the mistake. The CP regards this as a major problem. However, the CP recognises not only the interests of finality in rectification proceedings, but also the interests of fact-sensitivity in resolving the problems caused by a mistake in the register.

[72] It proposes the following outcomes:

- so long as A (the de-registered proprietor or interest-holder) or his successors is in possession at the date of proceedings, then A or his successors should be reinstated unless there are exceptional circumstances;

- if B or C (the immediate or remote transferee) is registered proprietor in possession, then initially they will be immune from rectification unless it would be *unjust not to rectify* or they contributed to the mistake *by fraud or lack of proper care*; but after 10 years they will become immune from rectification unless they contributed to the mistake by *fraud or lack of proper care*;

- if neither A nor B nor C is in possession, then initially A should be reinstated unless there are exceptional circumstances; but after 10 years they will be immune from rectification unless they contributed to the mistake by fraud or lack of proper care. In many cases this proposal would align with the outcomes achieved under current law.

[73] The CP wishes to retain a judicial discretion. It is currently inherent in the 'exceptional circumstances' test and 'unjust not to rectify' test. The CP agrees that any discretion should be set at a high bar, though it leaves open whether the current language should be retained.

Comment:

[74] The CP proposals strike one of many possible acceptable balances between finality and fact-sensitivity.

[75] However, we invite the Law Commission to consider whether 10 years is unnecessarily long in cases where B or C has taken possession, and that a very much shorter period of continuous possession by B or C should be enough to serve the dual purposes of warning the de-registered proprietor of a rival claim and of establishing a sufficiently settled existence that ought to be protected.

[76] The current language expressing the judicial discretion has scope for rationalisation. Both the 'exceptional circumstances' test and 'unjust not to rectify' tests are intended to create a strong presumption. The type of factors relied on in the 'exceptional circumstances' test are also applied in the 'unjust not to rectify' test. Unification of the tests is therefore desirable. The 'exceptional circumstances' test is well known in other legal contexts and for that reason might be assumed to be the preferred option. However, it should be noted that there is a danger that 'exceptional circumstances' test will be understood as an inquiry into whether the

circumstances are common or familiar. That is unsatisfactory. The test should focus not on whether the circumstances are of a common type, but on their significance to the parties. The court should be able to displace the usual rule if the consequences are of a common type but happen to have disastrous effect on a party. Currently, the exercise of discretion takes account not only of the impact that rectification or non-rectification would have on the parties, but also on the history of their dealings, such as their degree of carelessness in failing to take precautionary steps. In any reform to the discretionary tests, assuming this principle is to be carried forward, the language would have to be broad enough to refer not only to future effects but also past dealings. The unified test should therefore be one which displaces the presumption wherever the usual rule would cause serious injustice.

D. Barring mortgagees from opposing rectification claims

CP Proposal:

[77] The CP accepts that the mortgagee has an interest that is financial only. In the event of a mistake in the registered title of a mortgagee, therefore, the mortgagee should be able to claim only an indemnity. Currently, the mortgagee might prolong litigation by arguing that exceptional circumstances exist which justify not rectifying the register. To avoid that possibility, the matter could be put beyond doubt. The CP proposes that the mortgagee should not be permitted to oppose rectification.

Comment:

[78] In the vast majority of mortgages, the security is indeed designed to support the payment of a sum of money, and the interest of the mortgagee is financial only. We therefore support the CP proposal. However, we also invite the Law Commission to address explicitly the point that some mortgages are designed to support the performance of obligations of a non-financial nature. Mortgagees under these will be prejudiced under the CP proposals insofar as they will have no forum in which to argue that they ought to remain on the register.

[79] Mortgagees will be directed straight into an indemnity claim. There is an issue over quantification in the case of rectified mortgages. If the mortgagee has no valid contractual entitlement to repayment, as where the mortgage was created by an imposter, then the indemnity will be the amount necessary to discharge. But if the mortgagee has a valid contractual entitlement to repayment, and the rectification merely has the effect of diminishing the security, then there will be a problem of quantifying the loss. If, for example, the mortgage was created by a registered proprietor, and later the register is rectified to the detriment of the mortgagee by inserting an omitted long lease, then the indemnity fund will have to put a figure on the diminution of the security. At that point it is not known whether or not the mortgagor is going to be solvent and repay the loan. The indemnity payment will have to factor in that uncertainty by discounting to reflect the likelihood of repayment by the mortgagor. That calculation may turn out incorrect and leave the mortgagee out of pocket if mortgagor goes insolvent. In consequence, there may be

significant prejudice to the mortgagee by not having the opportunity to oppose the rectification claim. We invite the Law Commission to address the point explicitly.

E. Removing protection for a proprietor at first registration

CP Proposal:

[80] The CP is concerned about the guarantee of title given to first registered proprietors against unregistered interests. The concern relates to cases where B buys and takes a conveyance of unregistered land and is bound by some interest (such as a restrictive covenant protected on the land charges register); B then seeks first registration, and becomes first registered proprietor, but the interest is omitted by mistake. Here, the CP proposes to preserve the discretionary power to rectify by inserting the restrictive covenant against the first registered proprietor, but it proposes to remove the first registered proprietor's entitlement to indemnity as it would be a 'windfall'.

Comment:

[81] This proposal is of particular concern to the Property Section. It requires considerable further development.

[82] The award of indemnity to B is perceived as a 'windfall'. But the CP proposal indicates that any rectification proceedings against B would be discretionary, and so B might conceivably retain the registered estate without the burden of the omitted restrictive covenant. That would confer on B greater wealth than he had immediately before first registration. In that sense, it is a windfall to B in the same way as indemnity would be, except that the increase in wealth is expressed in terms of land rather than money. The idea of a 'windfall' does not distinguish between rectification and indemnity, yet the CP perceives it as justifying withholding indemnity alone.

[83] To retain discretionary rectification, while removing indemnity, would encourage B to sell the land as soon as he discovered the omission. He would keep the full proceeds of sale and they could not be clawed back by the registry (assuming that the omission was not attributable to B's fraud or lack of proper care). In that way, he would keep the wealth represented by his registration of title without the restrictive covenant.

[84] In exercising the judicial discretion in rectification cases, the availability of indemnity is adverted to as a discretionary factor. If indemnity is to be withdrawn from B, that fact may weigh in favour of B when the rectification claim is being determined.

[85] In previous reforms, it was understood that the first registered proprietor, having paid the registration fee, should be entitled to take advantage of the state guarantee of title just as much as any later registered proprietors.

[86] This proposal therefore represents a significant policy change. The desirability of that policy change is not adequately addressed by concentrating exclusively on the 'windfall' for B, but requires fuller consideration of in what circumstances and in whose favour the register ought to be treated as reliable.

F. Topics not mentioned in the Consultation Paper

FRAUD

[87] There is a provision relating to indemnity in para 1(2)(b) of sched 8 which applies only to the special case of forgery. It declares that a person claiming in good faith under a forged disposition is to be regarded as having suffered loss by reason of rectification. But the provision is entirely superfluous. If a title vested by registration is rectified, then there is a genuine loss. There is no point to a provision which deems any loss. The fact that the provision is unnecessary does not provide a particularly strong reason for removing it. But there is a further, strong reason for removing it: it is the source of a danger. It could easily lead a reader to conclude that without the clause there would have been no indemnity. That suggests that registration does not give a state guarantee against defects in the immediate transaction to the proprietor; in other words, it suggests that the system operates deferred indefeasibility rather than immediate indefeasibility. That conclusion would be in conflict with the fundamental policy of the structural reforms that occurred in the transition from the Land Transfer Act 1897 to the Land Registration Act 1925. The whole scheme of modern land registration is based on 'title-by-registration' and any argument that registration does not confer title when the immediate transfer is defective must be nipped in the bud. The fraud provision provides support for that argument. It is unnecessary and it is dangerously misleading. It should be removed.

DOUBLE REGISTRATIONS

[88] In a case of conflicting double registrations, there is currently a power to alter only the entry which is mistaken. However, there may be occasions when the fairer outcome would be to alter that which is not mistaken. A bespoke provision could confer the necessary power. We invite the Law Commission to consider the desirability of this option.

DAY LIST

[89] The court has found that it has power to alter the day list (*Franks v Bedward* [2012] 1 WLR 2428) under a generic power contained in the Civil Procedure Rules. It may be used to amend the order of transactions in the queue for registration by restoring an application that had been wrongly cancelled against the applicant's wishes. This CPR power can be seen as sharing functional effects with rectification of the register since it may adjust the relative priority of competing registered entitlements. However, it operates outside of the protections built into the rectification scheme. Although it is unlikely to invoked frequently, and although the

power is unlikely to be exercised to the prejudice of third parties, we believe it merits action and we invite the Law Commission to consider the desirability of a bespoke provision dealing with alteration of the day list.

PART 6 ADVERSE POSSESSION

CHAPTER 17

A. Acceptance of the LRA 2002 reform of adverse possession

[90] The CP assumes that the 'emasculation' of adverse possession by the LRA 2002 should be accepted.

[91] Continental registers usually apply the general limitation principles, but these are often in practice so restrictive that title cannot really be obtained by possession: *usucapio* may only operate in favour of a party who is acting *bona fide* so there is no possibility of hostile acquisition. In systems which operate extraordinary limitation, it is possible to acquire title in a hostile manner, but limitation periods are much longer than in England. A few systems recognise the *actio Publiciana* and hence an 'ownership' in a person who is on his way to acquiring title extraordinarily and these systems are quite similar to the limitation system operating in unregistered land. Continental systems do not, therefore, in general support a specific regime for registered land based on the primacy of the register, though German law may be an exception.

[92] It seems fair to conclude from the case law that the reform in 2002/2003 has proved workable in the short term. New applications by adverse possessors have dropped to a trickle and the reform has been sufficiently attractive to encourage many voluntary registrations, for example of local authority housing stock (both points according to Dixon. *Modern Land Law,* 9th edn, 462, 463, 484). In the short term no really major problems have emerged. So there is no immediate case for a reversal of the reform in the context of the current limited tidying operation.

[93] The mandate for the change was small – 60% of respondents: Law Com 271 [14.4]. The reform was opposed by one school of thought in the academic community. That position is maintained as in course of time it will become common for boundary structures to be placed in the wrong position (often simply because of the lie of the land) and there is now no mechanism to make the ownership correspond to the realities on the ground even over one hundred or two hundred years.

[94] It is interesting that *the* test case for the merits of the reform arose in the courts immediately after the consultation, that is *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30; only the first instance decision could be considered in the final report: Law Com 271 [14.1]. Proponents of the reform need to be able to say that Pye Ltd should

have been allowed to keep its land after inaction for more than 12 years - and, in the future, after a much longer period of inertia.

[95] Opinion within the section and the wider academic community remains divided.

B. Reform of the substantive law

[96] If the adverse possession reform is an accomplished fact, some reforms of substantive law would be desirable.

[97] **The October 1991 cut off.** Pre-abolition law should be made redundant as soon as possible. Particularly if an adverse possessor is in occupation (and so may override the register) the title can be just as uncertain as before the reform. The cut-off point of October 1991 is not based on clear cut facts so a number of reported cases have turned on fine factual distinctions. The large element of uncertainty introduced is shown by permutating the facts of *Trustees of Grantham Christian Fellowship v Scouts Association Trust Corporation* [2005] EWHC 209 (Ch) in which a registration application in 2000 turned on the grant of an oral licence granted in 1959 between parties who could no longer be traced. The same issue would have arisen had the application been made after the LRA 2002 came into force. This suggests that cases can continue to arise for generations in which the entire validity of the title depends upon a commencement date that will be increasingly difficult to prove. Either a deadline should be set to register title or a period of reverse prescription based on registration of the title should be introduced. People who have given up possession are a trap, but people in possession are more important in relation to certainty.

[98] **Changes to substantive law**. The objective of securing certainty of registered titles would be greatly enhanced by some minor changes to the substantive law of adverse possession. The law has been confused by changes designed to limit claims to adverse possession which are no longer needed now that adverse possession is limited anyway. Changes to the rules on licences would help. The rule introduced in 1833 was that any periodic tenancy or tenancy at will or licence would terminate after the first year unless renewed in writing or by payment of a rent or licence fee. This remains true for periodic tenancies but not for tenancies at will or licences. The *Grantham* case shows the degree of uncertainty introduced. The function of the licence in negating the claim of an adverse possessor is redundant. It would now be better for it to be clear when a former licensee comes to possess adversely after a year (subject to written renewal or payment), since the registered proprietor can always reject the claim to be registered.

[99] Similarly there seems to be no justification for allowing the Crown longer for foreshore, other extensions based on disability, nor preserving a trustee's title until a life tenant dies.

C. Objection to a sch 6 application

[100] An adverse possessor of ten years' standing can apply to be registered as proprietor of the estate of which he is in possession, but notice is given to the registered proprietor who has a right to serve a counter notice objecting to, and usually blocking, the registration. This procedure is set out in LRA 2002 sch 6.

[101] The sch 6 procedure is judged by the Law Commission to be working well and only a minor reform is proposed. We propose that if an applicant applies for registration and that claim is rejected after objection by the registered proprietor, it should be made clear that the applicant should be precluded from making a second application for registration within the two year period. This would provide an amendment to the rules on restrictions on renewed applications LRA 2002 sch 6 para 8 [CP 17.24].

[102] The CP does not address the issue of which parties should be entitled to notice of an adverse possessor's application. At present this is (for freeholds): the proprietor, a registered chargee, a person registered for this purpose (LRA 2002 sch 6 para 2, LRR 2003 r 194). The power to add categories by rules has not been exercised (except for land of dissolved companies), but this could now be done. The most likely situation in which a notice will be issued but not responded to is where the registered proprietor has died. Indeed, just this occurred in *Best v Chief Land Registrar,* resulting in the registration of the squatter Best. It would be very unsatisfactory if titles were left insecure on the death of the proprietor, a situation in which the personal representatives are not required to register themselves (see also subheading 'Equitable Interests' below). A possible solution is to allow the (putative) personal representatives to enter the death or enter a practitioner dealing with the estate without registering their title but merely to record their entitlement to receive a notice in this situation. No doubt the *Best* notification hole can be filled without legislation, but it appears to us to be the major practical defect to have emerged in the sch 6 procedure.

[103] We agree that a landlord who acquires title through his tenant's encroachment should have standing to apply for registration under sch 6 for the reasons stated by Dr Emma Lees [2015] *Conveyancer* 110, 114. [CP 17.86]. This could also apply to a trustee after adverse possession by a beneficiary (Jourdan & Radley-Gardner [20-79]).

D. Grounds for a successful application under sch 6 – conditions 1 and 2

[104] A sch 6 application for registration will be accepted in three circumstances, the first two being loosely estoppel and other property right (called in sch 6 para 5 the First and Second Conditions). The CP questions the need for these first two grounds.

[105] *Equity by estoppel.* The first condition is where the claim of the applicant is supported by an equity by estoppel so that it would be unconscionable for the registered proprietor to dispossess the applicant. In addition it must be shown that the applicant ought to be registered. This is said to reflect the doctrine of proprietary estoppel subject to minimum equity theory (Law Com 271 [14-36]). The discussion in the CP refers throughout to proprietary estoppel whereas the statue refers to an 'equity by estoppel' – and it seems possible therefore that claims might fall within sch 6 which are not proprietary in character, and as such outside existing registry procedures.

The CP suggests [CP 17.34] that each of these cases should be handled under other registry procedures and their existence in sch 6 is leading to poorly drafted claims. However, we suggest that it may be preferable to adjudicate such claims in the Tribunal rather than requiring full litigation: Jourdan & Radley-Gardner [22-77].

[106] *Other entitlement to be registered*. It is suggested that cases of this kind should be handled under other registry procedures and the statement of the second condition in sch 6 is leading to poorly drafted claims. The CP [17.34] suggests the schedule would be cleaner without this Condition. However, again we suggest that it may be preferable to adjudicate such claims in the Tribunal rather than requiring full litigation: Jourdan & Radley-Gardner [22-77].

[107] The commonest group of claims under the second condition are claims by an adverse possessor who completed 12 years before October 2003 and therefore is entitled to a s 75 trust under LRA 1925. A new procedure would be needed, possibly by amendment to sch 6, but we would suggest more conveniently by providing a new rule making power in the schedule of transitional provisions, schedule 12. We would not agree that any application for registration of an adverse possessor of land claimed under LRA 1925 should be made under sch 6, as this would require considerable surgery to the careful crafting of sch 6 [CP 17.71].

E. Grounds for a successful application under sch 6 – condition 3

[108] Boundary adjustment by adverse possession. A sch 6 application is also allowed where it meets the 'third condition' (sch 6 para 5(4)(c)). It applies in applications for land adjacent to the applicant's land with a general boundary where-

> '(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant … reasonably believed that the land to which the application relates belonged to him.'

This condition is 'tightly drawn' (M&W [35-083]; *Crosdil v Hodder*) - indeed too much so.

[109] A relatively minor amendment is proposed by the CP to this condition to make clear when the possessor must make an application after becoming aware of his mistaken belief. The applicant will be disabused of his belief before applying to be

registered (but see *Zarb v Parry* [2011] EWCA Civ 1306 at [77-80]. Is it sufficient for the applicant to have held his belief for:

- Any ten years? That is certainly the intended meaning (Megarry & Wade, 8th edn, [35-083]) and is the only possible meaning of the wording?]; or

- A recent period of ten years, requiring him to act promptly after becoming aware that he is not in fact the owner? (*Zarb v Parry* [2011] EWCA Civ 1306 at [58], Arden LJ, *IAM Corp v Chowdrey* [2012] EWCA Civ 505).

The CP [17.47] now proposes a six month time limit should be enacted. We propose that the literal meaning of the paragraph be restored to reflect the original intention as stated in Megarry & Wade.

[110] We invite the Law Commission to consider the desirability of a wider ranging reform. Until detailed and accurate plans accompany registered titles, there is merit in allowing adverse possession to support the position on the ground. Non-lawyers are often uncomfortable with the concept of a legal boundary varying from the physical boundary, and physical boundaries are often erected for reasons of practicality away from the legal line. In many cases it is clear from the land registry plan that the boundary is in the wrong place, and the simplest thing is to allow the possession to have legal effect in determining the boundary. That would justify removing all reference to the applicant's reasonable belief. We therefore invite the Law Commission to consider the possible reform of removing the requirement of reasonable belief.

F. First registration of an extinguished title

[111] The CP proposes to deal with cases where an unregistered title extinguished by Limitation Act 1980 s 17 is accepted for first registration. The issue does not appear to have arisen in practice since *Re Chowood's RL* [1933] Ch 574. It would require the applicant to state falsely in his application for first registration that he was and had been in undisputed possession of the land, which appears unlikely if he has been out of possession long enough to be barred. The position of the registered proprietor can therefore be left to the existing alteration/rectification/indemnity regime. We do not agree with the approach of the CP [17.62] that would isolate specific instances of rectification. We think the better approach is to leave this to the development of a coherent concept of rectification (see Jourdan & Radley-Gardner at [21-48ff] who regard this as important.)

G. Sch 6 adverse possession and more general adverse possession

[112] The major problem with the LRA 2002 reforms to the law of adverse possession is that it has not made the law simpler. It has simplified one aspect of law - where adverse possession is used to seek registration as proprietor of a registered estate. Student texts (such as Dixon) quite properly focus on sch 6 to the

exclusion of all other aspects of adverse possession, so we are breeding a generation of students who see adverse possession exclusively in terms of a squatter against a registered proprietor. The reports written before 2002 seemed to assume an identity between adverse possession and limitation, except in one Explanatory Note (Law Com 271 [EN 436]) – the source for texts such as Gray & Gray and Megarry & Wade. Once limitation is separated from adverse possession, it cannot be said that sch 6 has clarified the law.

(1) What is possessed?

[113] The Land Registration Act 2002 treats possession as operating against a registered estate but muddles this concept with the view that possession is held against the land (whereas limitation worked against particular interests). This has profound consequences.

[114] On the one hand, a successful sch 6 application effects a Parliamentary conveyance, so someone occupying a boundary strip becomes subject to his neighbour's mortgage (!). This conception necessarily sees registration as related to a particular estate. On the other hand there is the view in *Parshall v Hackney* [2013] EWCA Civ 240 that a proprietor registered with one title cannot be in adverse possession against a proprietor registered with a quite separate title. This seems to envisage both possession and limitation as attaching to the land.

[115] Since the registered estate is now transferred to the adverse possessor, it would be beneficial to make clear the effect of a restriction on the register (cf Jourdan & Radley-Gardner [20-08]) and also the question of whether easements can be impliedly granted when strips of land move from one title to another.

[116] Some provision is also needed to deal with dissolved companies, since the dissolution of a company will effect an escheat, and so it might be logical to require a new period of adverse possession against the land itself. (LRR 2003 r 188A now requires notice of the sch 6 application to be given to the Crown etc.)

(2) Possession too short to make a sch 6 application

[117] What of possession by someone building up to a sch 6 application? Before 2003 the title from short possession was an overriding interest (in the sense that it occurred off the register). An application for a freehold title could be made by 'any estate owner holding an estate in fee simple' LRA 1925 s 4. An absolute title could be granted on proof of title to the registrar's satisfaction (s 4 proviso (i)) and a possessory title on 'giving such evidence of title … as may for the time being be prescribed' (proviso ii)). This required proof of possession for twelve years. Effectively therefore to secure a full land registry guarantee it was necessary to have possession for two 12 year periods, the first to give entitlement to be registered and the second to upgrade the possessory title to absolute. This was logical to restrict indemnity claims. Possessory titles were once granted after shorter periods, but current practice is to require twelve years' standing.

[118] The LRA 2002 states that title to any legal estate may (s 3) and sometimes must (ss 4, 6) be registered. But current registry practice is to continue the pre-2003 practice of refusing registration depending on duration of possession. It appears that either those provisions of the Act are defective in unconditionally allowing registration, or the current practice is based on a misreading of the provisions.

[119] That said, it must be queried whether a possessory interest can be a legal estate, since it is a fee simple, but liable to be determined if the possessor is registered with the estate possessed against: sch 6 para 9. If it is equitable it could not be registered. A solution would be to restore it to the overriding category.

[120] Obviously there are two policies in tension: the comprehensiveness of the register and restraint in issuing guaranteed titles. One is the desire to have a comprehensive land register. It is desirable to get as much land as possible registered so that adverse interests can be protected by notice. The land registry practice means that there is some land which cannot be registered because the paper title has been barred by a squatter who is no longer in possession and the current possessor does not have long enough standing to be registered.

On the other hand, it is perfectly reasonable to require two times ten/twelve years' standing before attracting a land registry guarantee and a buyer should be warned just how tenuous a title is before the first ten years.

We suggest that three solutions are possible:

to recognise two classes of possessory title;

to register land without a proprietor; or

to treat short possessory titles as overriding once more.

[121] It is submitted, therefore, that the best solution is to treat the possessor's interest as an overriding interest. This is to depart from the provisional proposal in the CP [17.70].

(3) Equitable interests

[122] The application of LRA 2002 s 96 to trusts really needs clarification. The Law Commission made it perfectly clear what was intended, and yet it is evident from the drafting that that the legislation does not achieve what was intended.

[123] With unregistered title (or LRA 1925 title) possession creates an estate and the possessor then had to bar adverse rights separately using the Limitation Act 1980. Very often, A's life interest would be barred without time having started against B's remainder nor against the legal title of the trustees.

[124] There is no doubt that this was not supposed to happen under the LRA 2002.

> 'Because the effluxion of time does not of itself have any effect, there can be no concept in our scheme of the barring of the rights of those with mere *equitable interests* in land.' (Law Com 271 [14.92])

[125] The explanatory notes to the draft Bill make clear for the first time (Law Com 271 [EN 436]) that there are very many situations where limitation continues to apply to registered titles, though the list given is by no means comprehensive. Limitation continues to operate against rights which are not registered estates. Since adverse possession operates against the registered estate (not the land), there is no reason why equitable interests cannot be barred outside sch 6.
Suppose RP1 and RP2 hold on trust for A for life, remainder to B absolutely. No limitation period runs against the trustees (LRA 2002 disapplies Limitation Act 1980 s 15), adverse possession cannot run against B until A dies, and the trustees (RP1 and RP2) cannot be barred until B is barred (sch 6 para 12). But there is nothing to say that A could not be barred. For the purpose of barring A, A is deemed to have an action for the recovery of land (s 18 Limitation Act 1980). This s 18 limitation period is not disapplied by LRA 2002 s 96. It therefore seems to leave open the possibility that A's beneficial interest can be barred by the adverse possessor. The moral for squatters is: choose land limited in succession.

[126] Generally speaking, we suggest that the Birkenhead reforms of legal estates need to be reflected in the limitation regime.

H. Summary of answers to points raised in CP

CP [17.24] Legislate to prevent second application within 2 years.
CP [17.34] Conditions 1 and 2 should be retained to give the cheaper tribunal procedure where property rights are supported by long possession.
CP [17.47] Condition 3 – a six month time limit from becoming aware of the mistake is not appropriate for an adverse possessor who for ten years has been mistaken about his boundary.
CP [17.62] It is unnecessary to legislate about the first registration of an extinguished title.
CP [17.70] Titles of short possessors need to be made non-registrable, and returned to the overriding category. They should not be substantively registrable.
CP [17.71] Claims by pre-October 1991 occupiers should be dealt with under new rules under sch 12.

I. Summary of other points

[A] Action is needed to remove the uncertainty caused by pre-October 1991 possessors.
[B] Substantive law of adverse possession should be stripped of rules designed to limit the effect of adverse possession, especially the use of licences to deny the adverse character to possession.

[C] LRA 2002 needs thorough review to take a consistent line on whether possession is of the land or a registered estate, to remove future confusions like that in *Parshall v Hackney.*
[D] Sch 6 needs minor amendment to ensure that beneficial interests are properly barred.
[E] A short provision is needed to deal with the land of dissolved companies.
[F] A legislative solution is required to provide for the notification gap which arises when registration of adverse possession is sought against unregistered personal representatives of a deceased proprietor as in the *Best* litigation.

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We thank the Law Commission for the invitation to respond to the consultation. We recognise the effort and skill that go into undertaking such a review and we appreciate the great advantage of having the issues presented in such a clear and accessible consultation paper. If the Property & Trusts Law Section could assist in any way, we would be happy to host or facilitate further discussion on any issues the Law Commission might wish to pursue.

Property & Trusts Law Section
Society of Legal Scholars
28 June 2016