



# The Priority of Competing Interests in Registered Land

Sam Laughton  
Ten Old Square



## The doctrine of notice in unregistered land

*Legal rights are good against all the world; equitable rights are good against all persons except a bona fide purchaser of a legal estate for value without notice, and those claiming under such purchaser.*

Megarry & Wade, The Law of Real Property (9th edn) at 4-012



## The doctrine of notice in registered land

*The doctrine of notice – notice in the sense of knowledge, rather than in the sense of an entry on the register – has no place in registered conveyancing ...*

(Megarry & Wade at 4-080)

That statement appears to be unduly optimistic, since there are in fact areas where notice still plays a part, eg in deciding whether the interests of squatters or persons in actual occupation override registered interests.



## Land Title Registration Act 2011

The 2011 Act is largely modelled on the UK Land Registration Act 2002, and the equivalent sections are as follows:

Bermudian Act	UK Act
29	11
30	12
47	28
48	29
49	30



## First registration – freehold estates with absolute title

### *s.29*

*(4) The estate is vested in the owner subject only to the following interests affecting the estate at the time of registration*

...



## First registration – interests that affect the estate

*(a) interests which are the subject of an entry in the register in relation to the estate*

(i.e. interests that the Land Title Registrar discovers from an investigation of the unregistered title and therefore notes on the new registered title)



## First registration – interests that affect the estate

*(b) unregistered interests which fall within any of the paragraphs of Schedule 2*

(These ‘overriding interests’ include most short leases, interests of persons in actual occupation other than beneficial interests under a trust, legal easements and profits à prendre and public rights. NB this list does not entirely coincide with the position at common law: see Emmet & Farrand on Title at 5.103.)



## First registration – interests that affect the estate

*(c) interests acquired under the Limitation Act 1984 of which the owner has notice*

(The effect of this is that squatters' rights are significantly downgraded: see Emmet at 5.104. A squatter will only have priority under this provision if the limitation period has expired and if the owner has notice of his interest. 'Notice' for this purpose is undefined.)



## First registration – leasehold estates with absolute title

Interests that affect a leasehold estate are the same as for a freehold estate, with the addition of:

*... implied and express covenants, obligations and liabilities incident to the estate ...*

See s.30(4)(a)



## Dispositions of registered land – the basic rule

s.47

- (1) Except as provided by sections 48 and 49, the priority of an interest affecting a registered estate or a registered charge is not affected by a disposition of the estate or charge.*
- (2) It makes no difference for the purposes of this section whether the interest or disposition is registered.*



## Effect of the basic rule

*The effect of [the basic rule] is that the date of the creation of the interest determines its priority: the first of the competing interests to be created has priority.*

Megarry & Wade at 6-060



## Dispositions of registered estates for valuable consideration

*s.48(1)*

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



## Registrable dispositions: grants of leasehold estates

All grants of leasehold estates are treated for this purpose as if they were registrable dispositions, even if they are not in fact: s.48(4).



## Fraudulent dispositions

It has been held that a 'disposition' for the purpose of s.48 does not include transfers which are void, e.g. because of fraud.

Fitzwilliam v Richall Holdings Services Ltd [2013] EWHC 86 (Ch) following the Court of Appeal decision in Malory Enterprises Ltd v Cheshire Homes (UK) Ltd [2002] Ch 216

(NB The decision in Malory has been the subject of much controversy. But it seems that despite the criticisms in Swift 1<sup>st</sup> Ltd v Chief Land Registrar [2015 Ch 602, it has not been overruled on this point: Rashid v Nasrullah [2018] EWCA Civ 2685.)



## Valuable consideration: meaning

Valuable consideration does not include marriage consideration or a nominal consideration in money: s.3(1)



## Valuable consideration: burden of proof

The legal and evidential burden of proving a disposition was made for valuable consideration rests on the party asserting it. If the burden is not discharged, the basic rule applies.

Halifax plc v Curry Popeck (a firm) [2008] EWHC 1692(Ch)



## Effect of postponing an interest

Although strictly s.48 operates merely to postpone unprotected interests, its practical effect is destroy them as against a subsequent disponee.

See Ruoff & Roper: Registered Conveyancing at 15.039



## Protecting the priority of an interest – freehold & leasehold estates

The priority of an interest is protected if it falls into one of the following categories: s.48(2)(a).



**Interests whose priority are protected – freehold & leasehold estates**

**(1) Registered charges**



## Interests whose priority are protected – freehold & leasehold estates

### **(2) Interests which are the subject of a notice in the register.**

A notice is an entry in respect of the burden of an interest affecting a registered estate: s.50(1). However no notice may be entered in respect of any of the following:

- (a) an interest under a trust or settlement;
- (b) a leasehold estate for a term of three years or less from the date of the grant which is not required to be registered;
- (c) a restrictive covenant made between a lessor and lessee.



## Protecting the priority of an interest – freehold & leasehold estates

### (3) Interests falling within Schedule 5.

These ‘overriding interests’ include:

- (a) certain leasehold estates;
- (b) certain interests of persons in actual occupation;
- (c) certain easements and profits à prendre; and
- (d) public rights.

However, the priority of interests that have been the subject of a notice in the register at any time are not protected under this head: s.48(3).



## Sched 5 para 2: Interests of persons in actual occupation

An interest belonging at the time of the disposition to a person in actual occupation is an overriding interest, so far as relating to land of which he is in actual occupation, with certain exceptions, such as:

- (a) a beneficial interest under a trust or settlement, and
- (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so.



## Sched 5 para 2(c): non-obvious occupation

An important exclusion from overriding interests is an interest -  
*(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and*

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

This re-introduces the doctrine of notice into registered conveyancing: Emmet at 5.105. But the test in (i) is hypothetical: Thompson v Foy [2009] EWHC 1076 at [132].



## Protecting the priority of an interest – leasehold estates only

In the case of a disposition of a leasehold estate, the priority of an interest is protected if the burden of the interest is incident to the estate: s.48(2)(b)



## **Dispositions of registered charges for valuable consideration**

Similar provision is made in s.49 for the protection of interests where a registrable disposition of a registered charge is made for valuable consideration.