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CHANCERY BAR

INTRODUCTION TO THE ENGLISH EXPERIENCE OF LAND REGISTRATION:

AND WHAT IF ANYTHING MIGHT BERMUDA LEARN FROM IT?

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1. Introduction

A system of title by registration has been a long time coming to Bermuda. Work commenced in 1999, when the then Government first took steps to implement a parcel-based land registration system. Even when enacted, the Land Title Registration Act 2011 ("the Act") took many years to come into force, experiencing implementation issues which were addressed through a series of amendments. Following the most recent of these, the Land Title Registration Amendment Act 2018, the Act finally went live on 27 August 2018, since when title registration has been compulsory in the case of conveyances on sale of real property, the grant or assignment of a lease for a term of 21 years or more, mortgages, and conveyances by Court Order.

The introduction of the Act was not without its critics, including, prominently, members of the Bermudian Conveyancing Bar. Voices were raised about, among other things, indicative boundaries, what was said to be a potentially inequitable and unconstitutional title classification system, and guarantee and indemnity provisions that were considered to be likely to expose Government (and ultimately the public purse) to unnecessary liability. But in converting to title by registration, Bermuda was joining the majority: there are few if any other jurisdictions that still operate a deeds registration system as the only system of land registration.

In England and Wales, the Land Registration legislation faced similar criticism and more besides in the 19th and early 20th centuries, as I show in Section 2 of this paper. Nevertheless, the system that was designed coped reasonably well with the swelling flood of title registrations, to the extent that more than 85% of the land in England and Wales in

terms of area is now registered (although it has taken 144 years so far). That process has in recent years been assisted by the enactment of the Land Registration Act 2002, upon which I believe the Bermudian system to be largely based, and which I examine briefly in Section 3 of this paper. I address the perceived shortcomings of that new registration system in Section 4 of this paper, before turning, perhaps ambitiously, to look in Section 5 at how blockchain technology may be used to facilitate the process.

I should mark my indebtedness to my friend and former Chambers colleague, Charles Harpum, LL.D (Cantab), the architect of the 2002 Act during his time at the Law Commission, for the assistance given to me in shaping this paper.

2. Land Registration in England and Wales – the early stages

The introduction of national land registration in England and Wales was hard fought. The real fight began with the Report of the Commissioners Appointed to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land in 1857. Speaking in the House of Lords debate on the Commissioners' Bill for simplifying titles to land, the former Lord Chancellor, Lord St Leonards (a highly regarded authority on property law) said:

> "So great was the anxiety of men to secure their right to their landed possessions that, in order to obtain a good title, it was not an uncommon thing for a person to raise an action at law with a view to bring his title before a court, and then to compromise the matter with his antagonist."

He also referred to the expense inherent in the unregistered system:

> "The expense of making out a title to land proceeded in a great degree from the circumstance that men were indisposed to place confidence in the respectable legal advisers by whom an abstract of title might but a few months previously have been investigated for the person from whom the purchase was about to be made."

Notwithstanding these telling points against a system of unregistered title, the noble Lord was *against* a registered replacement:

> "The promoters of that scheme [ie land registration], however, had never been able to carry it into effect, and he must, for his own part, say, that any such plan would be likely to be productive of much greater mischief and expense than the law even as it now stood. … Let noble Lords bear in mind that whatever share of the expenses may fall on any individual, the landed interest, as a body, must bear the whole of the vast expense of the proposed register if established."

He did not prevail: a national system of land registration was first attempted in England and Wales under the Land Registration Act 1862, a register having operated for the county of Middlesex (excluding the City of London) since 1709. This voluntary national system proved ineffective (there had been just 118 titles registered by 1885) and, following further attempts in 1875 and 1897, the present system was brought into force

by the Land Registration Act 1925, administered from headquarters in Lincoln's Inn Fields and regional registries.

Over time various areas of the country were designated areas of compulsory registration by order. The last order was made in 1990, so now virtually all transactions in land result in compulsory registration. One difference is land changing ownership after death, where land is gifted rather than sold; these became compulsorily registrable only in April 1998. Similarly, it became compulsory to register land when a mortgage is created on it in 1998.

The advantages of the new system (mirroring ownership interests in land in a transparent and conclusive way; simplifying conveyancing; curtaining minor interests that could be overreached; and providing State-backed insurance to anyone who lost property as a result of defects in the Register) were thought to trump the slow, expensive and fraught deeds system. Three advantages in particular are worth emphasising.

First, the register as it stands from time to time becomes all-important because it *is* the title. In England and Wales, it is a stated objective of the Land Registration Act 2002 that the register should be an accurate reflection of the title as it stands at any given time[1], and this point is underscored by the fact that a registered proprietor of land is given no indicia of title. Although the 2002 Act contains power to issue land certificates[2], it has not been exercised. In England and Wales, the register is wholly computerised and is accessible on-line by anybody on payment of a small fee. The fact that the register can be called up on-line enhances the perception that the register is the title.

Secondly, and following from this changed perception, there are consequential effects for other doctrines. In particular, the justification for allowing the acquisition of title by adverse possession is significantly weakened, because the basis of title to registered land is not possession (as it is in unregistered land), but the fact of registration. In virtually every common law jurisdiction that has adopted registration of title, the principles of adverse possession are either disapplied completely (as in New Zealand) or substantially modified (as in England and Wales and in many Australian states). Under the 2002 Act, the law of adverse possession applies to registered land only in limited circumstances. If, as a result of the registration of title, it is not possible to acquire land by adverse possession, or only in limited circumstances, registration provides additional protection to the registered landowner. That is a significant benefit of title registration. It has undoubtedly encouraged the voluntary registration of title in England.

Thirdly, it is inevitable that, in time, the transfer of land will move from a paper-based system to an electronic system. Without a title registration system, it would be impossible to develop a system of electronic transfer. I examine this when I consider the 2002 Act in Section 3 below.

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[1] See *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001) Law Com No 271, para 1.5. The point has been remarked upon on a number of occasions by the Court of Appeal: see, *e.g.*, *Chaudhary v Yavuz* [2013] Ch 249 at 256, [19]; *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305 at 333, [105].

[2] See Land Registration Act 2002, Sch 10, para 4.

3. The Land Registration Act 2002

The Land Registration Act 1925 had a number of shortcomings. A great number of overriding interest categories were recognised, which impacted the conclusivity and dependability of the Register[3]. The law relating to adverse possession meant that the Register could not be treated as sacrosanct. And dissatisfaction with the system of land registration meant that few landowners applied voluntarily to register their estates.

Following a lengthy joint project by the Law Commission and the Land Registry[4], the 1925 Act was replaced by the current legislation, the Land Registration Act 2002, which came into force on 13 October 2003.

One of the primary purposes of the 2002 Act was to create a legislative framework for the introduction of electronic conveyancing. The 2002 Act leaves the 1925 system substantially in place, but enables the future compulsory introduction of electronic conveyancing, using electronic signatures to transfer and register property. Although that move to electronic transfer is in abeyance due to the recession and other factors which currently absorb our every waking minute in England, it is almost certain to proceed. In the system visualised in England and Wales, a disposition would be simultaneously made and registered, thereby avoiding one of the difficulties of a registered system – the so-called registration gap that exists between the making of dispositions and their registration. Most registration systems devise protective mechanisms to protect the priority of a disposition pending registration[5], but it would be much better if it could be avoided altogether.

There has been a very significant increase in the number of registered titles since the 2002 Act was passed, many of them voluntary registrations, and about 88% of the land in England and Wales is now registered.

4. The Land Registration Act 2002 - shortcomings

Speaking in the Bermudian House of Assembly on June 15 2018, the Minister of Public Works Lt Col David Burch said,

[3] The breadth of this category of overriding interests undermines the whole concept of title registration. It means that the register cannot fulfil one its basic functions, which is to provide a comprehensive and accurate reflection of the title. In practice, because sales in England and Wales are invariably made with vacant possession, this category of overriding interest has usually arisen where land has been mortgaged or remortgaged and it is claimed that the rights of the occupier take priority over the mortgagee. The collapse of the re-mortgage market in the global recession means that there have been very few such cases in recent years. The rights of such occupiers have also been defeated by lenders on grounds of estoppel and consent: see the principle summarised in *Skipton Building Society v Clayton* (1993) 66 P & CR 223 at 238 – 9.

[4] For the final Report, see *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001) Law Com No 271. This was the outcome of 6 years' work.

[5] In England and Wales, the mechanism is by means of a priority search of the register: see Land Registration Act 2002, s 70 and Land Registration Rules 2003, rr 147 – 150.

> "From July 2, 2018 Bermudians will finally be able to register their land on the Land Title Register, and when they do so, their real estate will be secure. The land that they worked so hard to obtain, their 'piece of the rock' that they want their children and grandchildren to inherit and maintain after they are gone, their legacy, will forever be safe. No one will be able to take it from them saying 'I have the Deeds.'"

But this was never necessarily the case under the 1925 Act, and the position has not improved under the 2002 Act.

As I pointed out in Section 2 above, one of the principal advantages of a system of registration of title is, or should be, its dependability. But dependability has never been absolute under the English system: although the act of registration vests title, that title may be rectified in the event of mistake. Two situations should be distinguished. The first is where the Registrar mistakenly registers a person as owner of all or part of some land which should not have been so registered. The second is where a person impersonates the true owner and forges a transfer to an innocent purchaser or chargee. The easier it is to alter the register, the weaker the protection that registered title offers.

Under the 2002 Act, both the Registrar and the court have a discretionary power to order rectification of the register in any case where there is a mistake in the register[6]. That discretion will not be exercised against a proprietor who is in physical possession of the land. The concept of who is a proprietor in physical possession is very widely defined. It will include not only the case where the owner himself is in physical possession, but also those where a lessee, licensee or mortgagee is in physical possession, or where the land is held in trust, a trust beneficiary is in such possession[7]. However, a proprietor in physical possession will not escape rectification if he has by fraud or lack of proper care caused or substantially contributed to the mistake or if it would for some other reason be unjust for the alteration not to be made.

If the "proprietor in possession" exception does not apply, the court or Registrar must order the alteration of the register in the absence of exceptional circumstances.

As a result of a number of recent judicial decisions, which my colleague Nat Duckworth will examine in more detail, problems with the rectification provisions of the 2002 Act have been exposed, particularly in cases of forged dispositions. There have been other instances of fraud which have led to calls for reform of the 2002 Act.

In addition to this specific (and growing) problem, other frustrations have been expressed with the 2002 Act, and in particular with the failure of its promise to revolutionise land registration with the introduction of electroinic conveyancing.

The latest reform proposals were set out in a Law Commission report - Updating the Land Registration Act 2002, published on 24 July 2018[8]. Its introduction says:

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[6] The provisions on alteration of the register are set out in Schedule 4 of the Act.

[7] Land Registration Act 2002, s 131.

[8] Updating the Land Registration Act 2002 (2018) Law Com No 380.

> "In recent years, the landscape in which land registration operates has changed. There has been an increase of incidents of fraud relating to registered land, the legal consequences of which have been difficult to resolve. And technology has not developed in the way that was predicted at the time the legislation was drafted."

The recommendations in its Report that tackle fraud include:

- enabling HM Land Registry to set the reasonable steps that conveyancers must undertake to verify the identity of their clients, to help root out fraudsters;
- imposing a duty of care on conveyancers with respect to identity checks, based on the directions issued by HM Land Registry;
- if a conveyancer fails to meet his or her duty with respect to identity checks, ensuring that HM Land Registry has a right of recourse against the conveyancer to recover the amount HM Land Registry paid for the loss caused by the fraud. Conveyancers who follow the required steps won't be responsible if fraud still happens.

Other recommendations include:

- preventing the register from being changed once a mistake has been on the register for 10 years, to make the register more accurate and final;
- requiring evidence of interests that people want to protect with a unilateral notice at an earlier stage, preventing disputes at the Tribunal;
- bringing mines and minerals onto the register;
- creating a new power to introduce electronic conveyancing that does not require completion and registration to happen simultaneously, to facilitate electronic conveyancing;
- beefing up the powers of Land Registration Division of the First-tier Tribunal (Property Chamber) – including an express statutory power to determine where a boundary lies, so that parties do not have to re-litigate the same issue.

The Government provided an interim response on 31 January 2019, and is yet to publish its Final Response, apparently having other matters on its mind.

5. Blockchain

Blockchain has growing purchase in land title recording systems across the globe[9]. The technology is being piloted in Sweden, the USA, and Haryana state in India. If successfully introduced, it could solve many of the problems inherent in the current system of land registration in England and Wales, by eliminating the registration gap (because changes on the ledger would be instantaneous); reducing delay (in that title could be transferred upon receipt of funds); minimising fraud (because of the enhanced

[9] See the fascinating article summarising the involvement in blockchain in countries ranging from the USA through Dubai to Sweden at https://coincentral.com/blockchain-land-registry/.

security inherent in the use of private keys and verification of user information); and reducing the potential for mistakes (because of the extent to which transactions will be visible to many viewers with the potential to notice errors.)

On October 1, 2018, the UK's land registry released a public statement regarding a new partnership named Digital Street with the blockchain-based firm Methods[10]. On its launch, Graham Farrant, Chief Executive of HM Land Registry, said:

> "Our ambition to become the world's leading land registry for speed, ease of use and an open approach to data requires HM Land Registry to be at the forefront of global innovation in land registration. By working with Methods on Digital Street we are taking another step toward that goal, as we explore how new technologies like blockchain can help us to develop a faster, simpler and cheaper land registration process."

On 12 April 2019, the first trial of blockchain involving the digital transfer of title to a house in Gillingham, Kent was successfully completed by HM Land Registry. However, the trial was simply a "proof of concept" to ensure the registry was up to speed with the potential of distributed ledger technology. The Registry has no plans to adopt the emerging technology itself any time soon: it has given itself a long time window – until 2030 – to familiarise itself with likely technologies the front-runners in the conveyancing industry might adopt. As its spokesperson said:

> "It was more to look at emerging technologies [rather] than technology we could currently use. It's making sure we are ready for the property market of the future. … Land Registry is often cited as a potential use case of blockchain, so we thought we should be doing thorough due diligence [and] seeing what it can actually bring to the property market in the UK."

Bermuda announced its intention to transfer its registry to blockchain as long ago as 24 January 2018[11]. It is too early to establish whether its intention is any more capable of actual implementation than that of the UK.

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[10] See https://www.gov.uk/government/news/hm-land-registry-to-explore-the-benefits-of-blockchain.

[11] http://www.royalgazette.com/business/article/20180628/bermudas-land-registry-to-go-on-blockchain