

Interrogate the inhabitants

Simon Rutman looks at the issues that need to be considered when determining whether a property is encumbered by rights of actual occupation

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The authors of the Land Registration Act 2002 (LRA 2002) saw overriding interests as one of the major blots on the conveyancing landscape. These interests are not protected in the land register but nonetheless bind the land, which means that they can be problematic for anyone investigating title. There are several types of overriding interests, one category of which protects the rights of people who occupy property. The law recognises that these people could potentially hold important (if unregistrable) interests in that land, and offers them protection in certain circumstances. A recent case, *Bank of Scotland v Hussain & anr* [2008], reminds practitioners that the onus is on the buyer to carry out careful property inspections and to make thorough enquiries of all occupiers in order to discover, or take the property free of, this type of overriding interest.

Overview of overriding interests under the LRA 2002

Prior to the implementation of the LRA 2002 there were quite a number of overriding interests that could seriously impact on a buyer's use and enjoyment of a property without appearing on the register of title, and that therefore represented a major obstacle to the aim of ensuring that the register should be as complete a record of the title as possible. The LRA 2002 dealt with this challenge by renaming overriding interests 'unregistered interests', distinguishing between those which override first registration (listed in Schedule 1) and those which override a registered disposition (listed in Schedule 3), and taking steps to lessen their scope and to bring as many of them as possible onto the register, including:

- Phasing out some of the more obscure overriding interests (such as manorial rights and the right to receive corn rents) by 2013 (s117).
- Introducing an obligation to notify the Land Registry on form D1 of any overriding interests of which the applicant is aware on acquisition or first registration (s71).
- Reducing the term of leases that require registration from 21 years to seven years (s 4), and stipulating that the only leases qualifying for overriding status will be those: (i) with a term of less than seven years; or (ii) granted before the Act came into force (para 1 of Schedules 1 and 3).
- Restricting the range of easements and profits that can be overriding to those that are legal (as opposed to equitable) and are also: (i) actually known to the buyer; or (ii) exercised within the one-year period prior to the sale (para 3 of Schedule 3).
- Narrowing the rights of persons in actual occupation – these rights will only be binding in relation to the land that they are actually occupying (para 2 of Schedules 1 and 3). This reverses one element of the judgment in one of the principal cases on this topic, *Ferrishurst Ltd v Wallcite Ltd* [1999]. There is a further refining of the scope of the interest in the case of a registered disposition of registered land, where an interest protected by occupation will not be overriding if: (i) it is not disclosed on reasonable enquiry; or (ii) a buyer who did not know about the third party interest would not have become aware of it by carrying out a reasonable inspection at the

'Under both the registered and the unregistered systems, the onus is on the buyer to inspect the land and to question all occupiers as to the nature of their interests in it.'

time of the purchase (para 2 of Schedule 3).

The rights of persons in actual occupation

The rights of persons in actual occupation is one of the most commonly encountered categories of overriding interests, and one of the most litigated. The *Ferrishurst* case referred to above was a major case under the Land Registration Act 1925 (LRA 1925), and one of a string of cases defining practice in this area. It concerned s70(1)(g) LRA 1925, which stated that all registered land was subject to the overriding interests of:

... every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed...

In this case, Ferrishurst Ltd (F) was granted a four-year sub-underlease of an office adjoining a garage. This sub-underlease contained an option to acquire the underlease, which demised the whole property including the garage. The underlease was registered at

the Land Registry but the sub-underlease was not registrable and F failed to register the option. Wallcite Ltd (W) bought the freehold in 1987 and the underlease in 1988, and when, in 1988, F served its option notice to acquire the underlease W refused to complete the sale and instead issued forfeiture proceedings. F claimed an overriding

an occupier of registered land had to be distinguished from the fact of its occupation, and that the capacity in which it occupied did not need to be indicative of the extent or nature of the rights it claimed. As part of this reasoning, the Court held that part occupation of premises did not preclude an occupier from exercising rights over the whole.

The concept of notice was central to the judgment in Ferrishurst, where it was held that there is no overlap between the two distinct systems of protecting occupiers against purchasers – the doctrine of notice in relation to unregistered land and s70 LRA 1925 in relation to registered land.

interest under s70(1)(g) LRA 1925. The court of first instance held that F's interest only extended to the office, and that as it was impossible to grant specific performance of the option agreement in respect of part only of the premises, F's claim was dismissed. However, the Court of Appeal held that the rights of

An important factor in this case was the evidence that W did know about the option – one of its directors had written to F in February 1988 asking whether F wanted to exercise it. The concept of notice was central to the judgment, following the House of Lords' judgment in *Williams & Glyn's Bank Ltd v Boland*



[1980], rather than that in *Ashburn Anstalt v Arnold* [1988], in holding that there is no overlap between the two distinct systems of protecting occupiers against purchasers – the doctrine of notice in relation to unregistered land and s70 LRA 1925 in relation to registered land. This was a rejection of the argument put forward by the bank's lawyers in *Williams & Glyn's Bank* that the purpose of s70(1)(g) LRA 1925 was to make applicable to registered land the

she sold the property to Mr Hussain, who had taken out a mortgage for the whole purchase price. She had completed a property information questionnaire and had confirmed in replies to requisitions that she lived alone at the property and that vacant possession would be provided. Ms Qutb appealed on the issue of whether the bank had made an adequate enquiry within the meaning of s70(1)(g) so as to trigger the proviso to that subsection. Her argument was upheld by the

Schedules 1, 3 or 12 to the Land Registration Act 2002.'

- Question 16.1 of CPSE 1 asks: 'Please give the names of anyone in actual occupation of the Property or receiving income from it. Except where apparent from the title deeds, please explain what rights or interests they have in the Property.'
- Question 9 of TA11 and question 8 of SPIF both ask the seller: whether anyone else lives at the property; how old those occupiers are, if under 18; whether they have any right to stay there without the seller's permission; whether any of the occupiers are tenants or lodgers; and finally whether all the occupiers have agreed to sign the contract to say that they will vacate on completion.

First registration has no effect on priorities between interests, which have already been determined according to the rules of unregistered conveyancing,

same rules as had previously been held to apply to unregistered land.

The Court acknowledged that the burden on the buyer to make proper enquiries was greater under the registered system, citing the now-famous example of a tenant in a small flat in the Barbican who also happened to have an option to purchase the freehold of the entire Barbican complex, neither lease nor option being registered at the Land Registry. So long as he was in occupation, any purchaser of the freehold and also all his fellow tenants and all future tenants would be bound by his option, and yet how, in practice, are these would-be purchasers and tenants to discover his interest?

Bank of Scotland v Hussain & anr

In the recent case of *Bank of Scotland v Hussain & anr* the High Court has restated the need to properly question occupiers. There is no official transcript as yet, but the initial case report is interesting reading. The case was instigated by the bank's attempt to repossess the property and was complicated by an undue influence claim by the second defendant against the first defendant, reported separately as *Qutb v Hussain & anr* [2005], but the crux of the matter was that the second defendant, Mrs Qutb, claimed an overriding interest under s70(1)(g) LRA 1925 that, if successful, would have defeated the bank's possession action.

At first instance the court found for the bank, on the basis that it relied on the enquiries made of Mrs Qutb in November 2000 before in January 2001

High Court, stating that the bank should have found out who was in actual occupation, and then questioned her to find out the nature and extent of her interest in the property. In the related case the judge said that there was no question that the bank had constructive notice of any undue influence, which is why the charge remained on the register notwithstanding that the sale to Mr Hussain was set aside. When we get the full transcript it will be useful to see:

- (i) what form of enquiries Mrs Qutb had completed;
- (ii) whether the bank raised any enquiries with Mr Hussain; and
- (iii) exactly what actions the judge felt the bank should have taken, and at what stage, to further investigate Mrs Qutb's interests.

What this means for buyers

What practitioners do in practice

In practice, prospective buyers usually make enquiries of the seller/landlord under the Commercial Property Standard Enquiries (CPSE) for commercial property and either the Law Society's Transaction Form TA11 or the Seller's Property Information Form (SPIF) for residential land:

- Question 4.5 of CPSE 1 asks: 'Unless full details appear from the copy documents already supplied, please supply details of any interests to which the Property is subject under

The onus is on the buyer

It is not enough merely to make enquiries of the seller, whether you are dealing with registered land or unregistered interests that will require registration as a result of your transaction. Under both the registered and the unregistered systems, the onus is on the buyer to inspect the land and to question all occupiers as to the nature of their interests in it. Looking at both systems in detail:

Dealing with unregistered land

On first registration, paragraph 2 of Schedule 1 to the LRA 2002 defines an unregistered interest that overrides first registration as 'an interest belonging to a person in actual occupation, so far as relating to land of which he is in actual occupation...' and does not refer to the need to make enquiries. This is because first registration has no effect on priorities between interests, which have already been determined according to the rules of unregistered conveyancing, ie a bona fide purchaser of the legal estate for value without notice takes free of any third-party rights. Notice can be:

- (i) actual;
- (ii) imputed (eg from something discovered by the buyer's agent); or
- (iii) constructive.

This last category requires the buyer to carry out all usual and proper searches and enquiries, including inspecting the

land and investigating title. In the context of the rights of an occupier, the predominant reasoning is that as possession is *prima facie* evidence of title, a buyer is deemed to have notice of the rights of any occupier – *Holmes v Powell* [1856], and *Kingsnorth Finance Co Ltd v Tizard* [1986]. A buyer therefore needs to ascertain whether anyone other than the seller is in occupation (or at least whether there is anything which might lead a reasonable person to infer this) and then to question that occupier rather than relying on any explanation given by the seller – *Hodgson v Marks* [1971].

Dealing with registered land

On a registered disposition, an unregistered interest which overrides a registered disposition, is defined in paragraph 2 of Schedule 3 as:

An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for –

[...]

- (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;
- (c) an interest –

interests with the objective on the other hand to reduce as far as possible the need to look beyond the register. Here, unlike on first registration, this is a matter of determining priorities. Will the registration vest the legal title in the

The need to ascertain the existence and interests of occupiers is still a substantial due diligence task, especially in multi-let buildings such as shopping centres.

- (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.

buyer free of the rights of the occupier or not? If either:

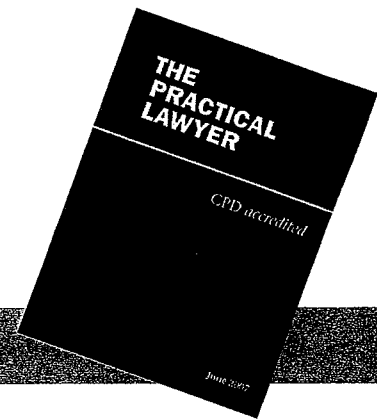
- (i) the buyer has made appropriate enquiries of the occupier prior to the transaction; or
- (ii) there were no reasonably apparent signs of the occupation,

This drafting balances on the one hand the need to protect unregistrable

then the occupier will be in effect estopped from asserting its right. As yet

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