Legal Studies (2025), **45**, 22–39
doi:10.1017/lst.2024.41

S·L·S
The Society of Legal Scholars

RESEARCH ARTICLE

100 years of actual occupation as an overriding interest in English & Welsh land law: challenging the rationale and making the radical case for abolition

Chris Bevan

Durham University, UK
Email: christopher.w.bevan@durham.ac.uk

(Accepted 01 August 2024)

Abstract
It is 100 years since the rights of those in 'actual occupation' joined the statute book as interests capable of binding transferees of land despite not appearing on the register. This paper seizes the opportunity to investigate and excavate the overlooked and under-examined historical origins of the actual occupation concept and to revisit the oft-touted rationales for the principle's recognition. In so doing, the paper rejects the commonly-rehearsed justifications for the concept and makes the radical case for abolition of actual occupation.

Keywords: land law; actual occupation; overriding interests; land registration; Land Registration Act 2002; property law reform

Introduction

It is 100 years since the rights of those in 'actual occupation' joined the statute book as interests which, despite not appearing on the register, are capable of binding transferees of land. First governed by section 70(1)(g) of the Land Registration Act 1925 (LRA 1925), now Schedule 3 para 2 to the Land Registration Act 2002 (LRA 2002), the 'actual occupation' provisions are highly controversial yet have a longer history than many appreciate. With registered land now the established norm in English and Welsh property law, and with over 88% of titles registered,[1] this paper takes the opportunity of the centenary of the actual occupation concept to re-examine its origins and the justifications for and potential reform of this contentious provision. Despite the provision's infamy, the foundations and rationales for actual occupation have been subjected to very little searching, academic treatment.[2] This paper redresses this by exposing the surprising and somewhat shaky early foundations of the provision through archival research into the work of the Royal Commission of 1909–1911 and by drawing on Law Commission reports from the 1970s to today. In so doing, it locates, challenges and rejects the commonly-rehearsed justifications for its operation and proposes radical reform of the law by advocating for the abolition of actual occupation – land law's 'most notorious and most litigated'[3] principle.

[1] HM Land Registry *Annual Report and Accounts 2022–23.*

[2] Most academic discussion has been centred on specific aspects of the operation of 'actual occupation': see for example L Tee 'The rights of every person in actual occupation: an enquiry into section 70(1)(g) of the Land Registration Act 1925' (1998) 57(2) Cambridge Law Journal 328; C Bevan 'Overriding and over-extended?: actual occupation: a call to orthodoxy' (2016) Conveyancer and Property Lawyer 104; B Bogusz 'The relevance of "intentions and wishes" to determine actual occupation: a sea change in judicial thinking?' (2014) Conveyancer and Property Lawyer 27.

[3] Law Commission 'Land registration for the twenty-first century: a consultative document' (1998) Law Com No 254 at [5.56].

© The Author(s), 2025. Published by Cambridge University Press on behalf of The Society of Legal Scholars. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

The paper proceeds in three parts. Part 1 excavates the historical foundations of the actual occupation concept, exposing the overlooked, thus far under-analysed and yet surprising origins of the law in this area. Whilst acknowledging that the business of law-making is contested, historically-rooted and multifaceted, this part argues that the work and influence of one man, Charles Brickdale – Chief Registrar of Land Registry from 1900 to 1923 – has to date been understated in accounts of the creation and development of actual occupation and he and his work should be emphasised more strongly as a key architect of the concept. Part 2 revisits and challenges the traditional and more contemporary justifications for the existence and continued recognition of actual occupation. Finally, in Part 3, the paper moves to identify the principal deficiencies of the modern law and the 'harms' that, it is argued, are inflicted by actual occupation on the broader land registration project. Ultimately, it is contended, this opens up the space to make the radical case for abolition of the actual occupation concept.

1. Excavating and exposing the historical foundations of actual occupation

The actual occupation provisions are perhaps the single most recognisable and controversial statutory provision in English and Welsh land law both to students and practitioners alike. Since the late 1880s, if not earlier, land law in England and Wales has been on an unassailable, uni-directional journey towards near-universal registration of titles. Today, with over 88% of titles registered at Land Registry,[4] registration is the dominant force and the established culture in our law.[5] Despite the incontestable place of registration and its core, driving principle that rights in land must be registered if they are to be protected and enforceable, there has, for 100 years always been a significant chink in the registration armour and major concession at the heart of the registration project, 'a crack in the mirror'[6] of the register: namely, a category of overriding interests comprising rights that are binding on purchasers despite them not appearing on the register. The most incendiary and divisive of the overriding interests has always been the rights of those in 'actual occupation'.[7] The effect of the 'actual occupation' provisions is that a purchaser of registered land can find itself bound by the rights of occupiers over that land despite there being no mention or evidence at all of them on the register.

Despite their controversy, however, little academic commentary has ever sought to meaningfully expose and examine the early origins of our 'actual occupation' law. This section fills that gap. Avner Offer classically traced the movements and machinations, both practical and political, that shaped our land law legislation from 1910 to 1925 in his work.[8] As Offer points out, throughout the nineteenth century, there had been a continuous pressure for the establishment of an efficient system of land registration, especially from property owners who bemoaned the expensive and slow title deeds conveyancing process but also significant tensions existed with conveyancing solicitors eager to protect their monopoly on land transactions. Registration was also heavily favoured by the political classes with both major political parties supporting registration since at least 1885.[9] From 1893, a majority in the House of Lords also backed registration. Lord Herschell, as Lord Chancellor from 1885 to 1905, was a central proponent and offered his fulsome support for registration.[10] Traditional accounts of the

[4]See above 1 .

[5]Compulsory registration was extended to the whole of England and Wales from 1 December 1990.

[6]See Ruoff's 'mirror principle' underpinning our registered land system: TBF Ruoff *An Englishman Looks at the Torrens System* (Law Book Co of Australasia, 1957).

[7]For a general account, see the work of Tee, Bevan and Bogusz, above 2 ; S Bridge et al (eds) *Megarry & Wade: The Law of Real Property* (Sweet & Maxwell, 9th edn, 2019) ch 6.

[8]A Offer 'The origins of the Law of Property Acts 1910–25' (1977) 40(5) MLR 506.

[9]See for example the comments of third Marquess of Salisbury as Prime Minister: 299 HLDeb, 3d series, 9 July 1885, cols 108–109; Halsbury Papers, British Library Additional MSS 56370 [BLAddMSS], KM Mackenzie [Permanent Secretary of the Lord Chancellor's Office] to Lord Halsbury, Sept 25, 1885, f 19; loc cit, BLAddMSS 56371, Lord Salisbury to Halsbury, Oct 29, 1886, f 28. Lord Salisbury, speech at Newport, The Times, Oct 8, 1885, 7.

[10]See for example Lord Halsbury, review of *Encyclopaedia Britannica* (10th edn) in *The Times Literary Supplement*, 24 October 1902, p 1, col 3.

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

development of land registration rightly ascribe significant weight to the work of crucial figures including Sir Benjamin Cherry, who is regarded as the chief draftsman of much of the 1925 property legislation, and Arthur Underhill, a conveyancing barrister, who came to play a central role in proposing reforms to the land transfer system.

The purpose of this part of the paper is not, however, to rehearse this well-trodden history. Rather, it is to make the case that the origins of the actual occupation provisions can, in large measure, be attributed to just one man, Charles Fortescue Brickdale, who served as Chief Registrar to Land Registry from 1900–1923. This section begins by noting who Brickdale was before moving to locate his role in the genesis and germination of actual occupation as a concept.

Charles Fortescue Brickdale was the eldest son of Conveyancing Counsel to the Court of Chancery of Lincoln's Inn. Brickdale was a barrister specialising in land law; had a passion for the workings of land law and conveyancing was in his blood. In 1886, Brickdale published an influential book, *Registration of Title to Land and How to Establish It Without Cost or Compulsion*, in which he argued strongly for land registration and in particular that the newly created Land Registry was ineffectual and how it might be improved by adopting approaches from Australia and Prussia.[11] In 1888, he was invited to become Assistant Registrar at Land Registry by Lord Halsbury and later held the role of Chief Registrar from 1900 to 1923, overseeing huge changes both to how Land Registry functioned but also in the registration landscape more generally. During his time, and without exaggeration, Brickdale became almost synonymous with land registration and powerfully advocated for the establishment of compulsory registration of title first in London but with the wider ambition of expansion across the whole country.[12] Described variously as a 'forceful and articulate advocate of his department',[13] 'the guiding spirit of land registration',[14] and 'the arch-expansionist of "officialism"',[15] Brickdale authored many works on land registration[16] and made maximum use of his position to press for reforms. Of course, Brickdale alone did not singlehandedly create land registration and, as noted earlier, his tenure as Chief Registrar ended before the LRA 1925 joined the statute book. Indeed, it must be acknowledged that Brickdale did not draft the Law of Property Act 1922 nor the Land Registration Act 1925. It is here that Sir Benjamin Cherry's role as draftsman-in-chief cannot be understated. This paper is not, however, concerned with Cherry's status, which is well-documented in the literature,[17] but instead on the provenance of the actual occupation concept and Brickdale's involvement in its genesis. In so doing, it is argued here that accounts to date of actual occupation have significantly underplayed Brickdale's role in laying the essential foundations for what would become the actual occupation provisions in the 1925 legislation and ultimately modernised in the LRA 2002.

Brickdale can be credited with transforming the fortunes of Land Registry by remodelling it into a functioning department. He was instrumental in shaping what was to become the series of property legislation of 1925, including the Law of Property Act 1925 and LRA 1925, both of which came into force just a few years after his retirement in 1923.[18] From the late 1890s, Brickdale regularly found himself in

[11]The book has since been reproduced and published by several publishing houses including CF Brickdale *Registration of Title to Land and How to Establish it without Cost or Compulsion* (Legare Street Press, 2022).

[12]Something that was only realised from 1 December 1990.

[13]Offer, above 8 .

[14]JS Anderson *Lawyers and the Making of English Land Law 1832–1940* (Oxford University Press, 1992) p 280.

[15]Ibid.

[16]For example C Brickdale *The Practice of the Land Registry Under the Transfer of Land Act, 1862: With Such Portions of the Rules as Are Now in Force* (1891; reprinted by Kessinger Legacy Reprints); C Brickdale *The Land Transfer Acts, 1875 and 1897* (1891, reprinted by Forgotten Book).

[17]See for example account of the role of Cherry, Underhill and others in the development of the land registration legislation, above 15 generally.

[18]For more on Brickdale, see 'Who's who: an annual biographical dictionary'entry for Charles Fortescue Brickdale (A&C Black, 1907) and A Saint 'Brickdale, Sir Charles Fortescue (1857–1944)' in *Oxford Dictionary of National Biography* (Oxford University Press, 2004).

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

'bitter squabbles'[19] with the Law Society and many solicitors at the time who were intensely hostile to registration. The leader of the attacks was JS Rubinstein, a London-based solicitor who, as archival research exposes, at annual meetings of the Law Society, would routinely offer full-throated and vociferous criticism of Land Registry and its approach to land transfer and registration.[20] In the face of Law Society opposition to the proposed expansion of registration, a Royal Commission on Land Transfer was appointed in 1908 and went on to issue several reports.[21] Brickdale's evidence to the Royal Commission was crucial and it was here that he interleaved his own thinking on actual occupation into the reform agenda. Research reveals that the Royal Commission regularly sought Brickdale's views as part of their questioning and hearings on matters of registration. For present purposes, and drawing on archival works, we can trace the provenance of the actual occupation provisions back to the following exchange on the topic of registration and land transfers (transcribed in the Commission's *First Report on the Transfer Acts* in 1909) in which Brickdale lays out his vision for actual occupation:

> Naturally the purchaser knows the land; he looks at it; he is aware, or, at any rate, he should be, that he can make inquiries as to tenants and others; he knows to whom they pay their rent, and so on. But the Registrar… has not the same facilities for making inquiries on the ground, and there is to my mind a slightly greater risk of mistakes in title, possibly even owing to intentional and deliberate fraud, which would pass the Registrar but would not pass an ordinary purchaser … **I think that we might very well save the insurance fund from liabilities under this head by enacting that an absolute title should not include a guarantee against adverse rights which could be discovered by inspection on the ground. It would certainly relieve the responsibility of the Department, and I do not think it would be an unreasonable addition to the responsibility of the purchaser** … It does not seem to me that it would be really putting upon the purchaser of registered land any burden which he does not now sustain, or a burden which it would be at all difficult to sustain or likely to do him any harm, because he is always there, whereas the Registrar is not always there.[22] (emphasis added)

Brickdale's testimony[23] seemingly singlehandedly convinced the Royal Commission. In its Final Report, the Commission recommended, 'There should be provision that the rights of parties actually in occupation … should not be affected by registration; and that these rights should be protected as against all transferees so long as the parties or their successors in title remain in such occupation.'[24]

Brickdale's proposal was heavily inspired by the approach to *unregistered* conveyancing and the so-called 'rule in the case of *Hunt v Luck*'[25] where the court laid down the principle that, in unregistered land, a purchaser is bound by interests of which they had constructive notice. Brickdale's evidence before the Royal Commission was, in this sense, a promotion or translation and an expansion of the *Hunt v Luck* rule into registered land. Brickdale's arguments proved successful, garnered support,[26] and subsequently appeared in the Real Property and Conveyancing Bill 1914,[27] later in Schedule 16 to the Law of Property Act 1922 which amended the Transfer of Land Act 1875 to include the actual occupation 'overriding

[19]Offer, above 8 , at 506.

[20]Rubinstein encapsulated his critique in a book: JS Rubinstein *The Land Transfer 'Scandal': The Interests of the Public v. the Tyranny of Officialdom* (Sweet & Maxwell, 1913).

[21]Second Report of the Royal Commission on the Land Transfer Acts Vol II Evidence Cd 5494 (1911) XXXC F Brickdale q 12719a.

[22]Land Registrar Brickdale answering questions as part of Royal Commission hearings transcribed in First Report of the Royal Commission on the Land Transfer Acts (1909) HCP xxvii 733 qq 1407 ff.

[23]Supported by Sir Benjamin Cherry: Second and Final Report (1911) HCP xxxi, para 81.

[24]First Report of the Royal Commission on the Land Transfer Acts (1909) Cd 5483, para 81.

[25]*Hunt v Luck* [1902] 1 Ch 42.

[26]Including from influential thinkers such as Sir Benjamin Cherry who had drafted Bills for the Law Society and had also given evidence to the Royal Commission.

[27]Real Property and Conveyancing Bill 1914, Tenth Schedule, cl 5(3).

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

interest', and ultimately, after some delays, was finally, formally enacted in its own right as section 70(1)(g) of the LRA 1925.[28]

What this historical scrutiny of the origins of actual occupation exposes is instructive. The seeming ease with which Brickdale's testimony quickly became 'policy' adopted by the Royal Commission is quite remarkable, and so too is just how uncritical the Royal Commission was of Brickdale's evidence. Moreover, how influential his testimony proved to be, speaks to his status as well as his rhetorical and political power. It is striking that no challenge or probing of the veracity or appropriateness of his proposed actual occupation measure was ever fully undertaken.[29] Nowhere in the series of reports that followed his testimony were Brickdale's assertions questioned in any meaningful or substantive way. Perhaps overborne by his position (as Chief Registrar) or his almost evangelical commitment to land registration, Brickdale's philosophy concretised and became law.

As Anderson wrote of the Royal Commission's unquestioning acceptance of Brickdale's arguments, 'it was taken as axiomatic that occupiers would maintain their rights … the axiom itself went wholly unexamined'.[30] This is quite an extraordinary state of affairs and one which has never been fully vented in academic commentary on the actual occupation provision.[31] Yet this insight is crucial because Brickdale's evidence went on to shape land registration in England and Wales for a century, as Brickdale's actual occupation proposals became embedded in the very fabric of the 1925 legislation and, in amended form, continue in the modern law under the LRA 2002.

Having located the origin of the actual occupation provision, it is illuminating to examine what motivated and drove Brickdale to recommend it. In short, why did Brickdale push (successfully) for an exception or special treatment for occupation rights in registered land? Put differently, why would a man so deeply proselytising of the benefits of land registration and 'officialism' make such a significant concession to occupiers' rights? Again, the Royal Commission hearings are enlightening. From archival analysis of these, we can identify that what motivated Brickdale was, in fact, not a desire to safeguard occupiers' rights per se, nor was he concerned with the vulnerability of occupiers and their informally created rights, but instead a concern for money: more explicitly, a determination to ensure the stability and solvency of Land Registry, and to avoid the potential impoverishment of Land Registry's coffers.

A close reading of the Royal Commission hearings reveals Brickdale's central motivations in proposing the actual occupation provisions. We can classify his motivations as falling into three central arguments. First, Brickdale's primary motivation was cost driven. He repeated the assertion that the actual occupation provision would 'save the insurance fund from liabilities'.[32] Here he is speaking of his fear that, without a provision for occupiers' rights, and with the expansion of registration, in the event that purchasers found themselves bound by adverse interests not appearing on the register, they would seek compensation from Land Registry's insurance fund. To avoid this position, Brickdale recommended placing the onus for discovering interests on purchasers of land and thus 'reliev[ing] the responsibility from the Department'.[33] His concern was therefore not for occupiers but for Land Registry being implicated and liable in insurance or compensation pay-outs for unregistered interests subsequently discovered by purchasers. His second and related argument was one fixed on the burden of inspecting land. Brickdale asserted that 'the purchaser knows the land; he looks at it … can make inquiries … But the Registrar … has not the same facilities'.[34] In other words, it is entirely reasonable to expect the purchaser (and not Land Registry) to shoulder the burden of inspection and discovery of unregistered rights (such as those of actual occupation). Again, this is instructive because it reveals and reaffirms that Brickdale's central concern was to reduce or avoid Land Registry's assumption of responsibility for unregistered

[28]On the development of the Law of Property Acts 1910–1925 see generally Offer, above 8 .
[29]See Reports of the Royal Commission 1909–1911.
[30]Anderson, above 14 , p 279.
[31]Brickdale's evidence was noted briefly by the Law Commission in its work on what became the LRA 2002.
[32]First Report of the Royal Commission on the Land Transfer Acts (1909) HCP xxviii 733 qq 1407 ff.
[33]Ibid.
[34]Ibid.

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

rights. He further argued that asking the purchaser to inspect the land involved no additional 'burden which he [the purchaser] does not now sustain'.[35] Thirdly, Brickdale contended that, the actual occupation 'exception' could be justified on the basis that:

> [T]he register was only intended to take the place of the documentary title, and … it may fairly leave the people who deal with land in the same position as they are now with respect to the obligation to inquire on the ground to see that there is nobody in adverse occupation at the time.[36]

Essentially, therefore, Brickdale maintained that the actual occupation provision in registered land would simply replicate the position in unregistered land. We will return to problematise this supposed alignment of unregistered and registered land in the next part of this paper. Again, however, we see that what motivates Brickdale is not an impulse to shield occupiers but rather bureaucratic concerns as to inspection requirements and translating documentary title in unregistered land into the registered land context.

That the core motivation for introducing the actual occupation provision was financially driven, to 'secure maximum immunity'[37] from financial liability for Land Registry, is surprising and, on one view, an oddly unprincipled and arguably unconvincing foundation for actual occupation. Thus, 'the precise formula' for occupiers' rights that emerged from the Royal Commission hearings 'had little to do with the rights and wrongs of the occupiers themselves'.[38] This crucial insight warrants amplification as it not only helps us to see the actual occupation provisions in a new light but, additionally, underscores that this financial motivation is distinctly at odds with the contemporary narrative and justification offered as to the rationale behind actual occupation. This is explored further in the next part. Subsequent renderings of the rationale for actual occupation have not engaged with this archival evidence, have thus reasoned after the fact and, in so doing, it is argued, have obscured the crucial foundations of the law – origins which reflect not an occupier-focused concern for vulnerability or susceptibility of loss of priority of informally created rights, but considerations of financial compensation and liabilities. This analysis opens up the space analytically for us to consider afresh the rationale for actual occupation, its persuasiveness and its place in the modern law. It is to this exercise that the paper now turns.

2. Revisiting and challenging the orthodox and contemporary rationales for actual occupation

This part revisits, re-examines and challenges the traditional and contemporary rationales and justifications for recognition of actual occupation. We can usefully divide our analysis into two: first, the orthodox explanation; and secondly, the more contemporary and pragmatic rationale.

It is perhaps no coincidence that the so-called 'orthodox explanation'[39] for the existence of overriding interests (of which actual occupation is by far the most prominent) comes from a work published by Brickdale himself and later cited with approval by Cross J in *National Provincial Bank Ltd v Hastings Car Mart Ltd* (1964),[40] who explained that:

> [V]arious minor liabilities which are not usually … shown in title-deeds or mentioned in abstracts of title, and as to which, therefore, it is impracticable to form a trustworthy record on the register… As to these, persons dealing with registered land must obtain information *aliunde* in the same manner and from the same sources as persons dealing with unregistered land obtain it.[41]

[35]Ibid.
[36]Anderson, above 14 , p 278, quoting extensively from the First Report of the Royal Commission (1909).
[37]Ibid, p 279.
[38]Ibid.
[39]See Law Com No 254 at [4.4].
[40]*National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] Ch 9 at 15 per Cross J.
[41]CF Brickdale and JS Stewart Wallace *Land Registration Act, 1925* (Stevens & Sons, 4th edn, 1939) p 190.

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

The sense of this orthodox explanation runs as follows: overriding interests demand a special status of enforceability despite not appearing on the register because they generally comprise less significant rights that, in unregistered land, were not shown in title deeds. It is therefore proper to expect, in registered land, that the same approach as that of unregistered land be adopted, namely that purchasers make inquiries of, for example, those potentially occupying the land, before purchase. With great respect, this explanation is both unconvincing and, in particular in our contemporary registered landscape, significantly outmoded. For three reasons it fails to offer an adequate or persuasive explanation for the (continued) recognition of overriding interests such as actual occupation whether that be under the 1925 legislation or today under the LRA 2002. First, Brickdale's description of overriding interests as comprising 'minor liabilities' fails to recognise the broad scope and significance of the overriding interest categories and actual occupation in particular both in and of themselves but also for their impact on the whole scheme of registered land. Overriding interests (even today under the LRA 2002 with the list having been reduced) comprise some of the most significant and commonly-encountered encumbrances on land, including short legal leases,[42] legal easements[43] and, not least, rights of those in actual occupation.

Secondly, Brickdale's assertion that overriding interests only comprise matters affecting the title that would not have been ascertainable from the title deeds is unsound and wrong. If one considers the list of overriding interests in section 70(1)(g) of the LRA 1925, one can readily see that this was not the case. Section 70(1)(g) contained rights that would, in many cases, have appeared on the title deeds and, in addition, section 70(2) provided that: 'where at the time of first registration any easement, right, privilege, or benefit created by an instrument and appearing on the title adversely affects the land, the registrar shall enter a note thereof on the register'. In short, even under the 1925 legislation, overriding interests comprised rights that commonly did appear on the title deeds or were the subject of a notice. One cannot therefore justify the existence of overriding interests solely on the basis that they are a category of rights that otherwise would be invisible to a purchaser. Under the LRA 2002, there is a similar position where many of the rights comprising overriding interests can be protected in another way under the register, for example by way of an entry of a notice or, for actual occupation, by entry of a restriction. It is, therefore, a weak justification at best to attempt to defend overriding interests in registered land, as the orthodox explanation seeks to do, by reference to overriding interests' apparent absence from title deeds in unregistered land.

Thirdly, the orthodox explanation is problematic in that it seeks to rationalise and justify the recognition of overriding interests by direct reference to unregistered land principles. Brickdale had already indicated to the Royal Commission in 1909 that, in his view, 'the register was only intended to take the place of the documentary title'[44] and thus what he proposed in terms of actual occupation would only replicate the position where title was unregistered. Brickdale's 'orthodox explanation' extracted above is an extension of this argument. This conflation of unregistered and registered land, or put differently, this carry-across or direct translation of unregistered land principles to registered land has long been a contested and problematic feature of English and Welsh land law.[45] And, as a basis for justifying the existence of overriding interests in registered land, it is argued that this reasoning is itself deeply flawed. Certainly, early developments towards registered conveyancing did draw heavily on unregistered land principles and sought not to replace the substantive law but merely convert documentary title into a central register. Thus, the Royal Commission of 1857, on whose recommendations title registration was first introduced in England, noted 'the register will be a substitute for the documentary or parchment title. But the registered ownership … will remain subject … to such rights as are not usually included in the abstract of title'.[46] In the years that followed the enactment of the LRA

[42]Schs 1 and 3, para 1.

[43]Schs 1 and 3, para 3.

[44]Anderson, above 14 , p 278.

[45]See account by Anderson of the inter-relationship of unregistered and registered land.

[46]Law Commission 'Property Law: Third report on land registration: A. Overriding interests B. Rectification and indemnity C. Minor interests' Law Com No 158 (1987) at [63].

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

1925, however, there was a growing appreciation and drive for registered land to adopt principles distinct from those of unregistered land.[47] The effect of this was that by the time the Law Commission began consulting on its work which would culminate in the LRA 2002, this notion of mere translation of unregistered land principles into registered land had been abandoned. Expressed most positively in its work from 1987 onwards, the Commission's view has since consistently been that unregistered and registered land are distinct systems, organised and operating according to different concerns and motivations; and that registered land was a reaction and response to the problems of unregistered land. It was not developed to further perpetuate those issues. To suggest that the same principles should apply in both systems was, therefore, misguided. Thus, in its 1987 report examining the motivations behind overriding interests under the 1925 legislation, the Commission noted:

> Nor is there any explicit intention that … the two systems of conveyancing should produce the same results … there are substantive differences between registered and unregistered land … Registered conveyancing is after all to be the way forward, the new improving the old.[48]

In its 2001 Report, the Commission strengthened this position by arguing that our modern registration system was to be built on the idea that, 'unregistered land has had its day'.[49] The LRA 2002 represented, as such, a parting of the ways of unregistered and registered land. The fundamental premise on which the Law Commission began and then conducted its work in reforming the 1925 Act, which ultimately produced the LRA 2002, was that unregistered land principles had no place in registered land and of 'the need to create principles that reflected the fact that registered land was different from unregistered land and rested on different principles'.[50] The LRA 1925 'had been perceived as mere machinery for translating [unregistered] principles into a registered format',[51] but there was now a 'need to develop principles appropriate to registered land'.[52] Commonwealth countries across the globe have also recognised that the two systems are distinct, not least because 'the basis of title to unregistered land is possession, whereas the basis of registered title is the fact of registration'.[53] The Commission therefore confirmed that it was 'highly desirable that land registration in England and Wales should develop according to principles that reflect both the nature and potential of land registration … there seems little point in inhibiting the rational development of the principles of property law by reference to a system that is rapidly disappearing'.[54] As the Commission expounded when presenting the Bill that was to become the 2002 Act:

> The fundamental objective of the Bill is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections.[55]

If, as the Commission has repeatedly asserted for four decades, registered land should not be governed by unregistered land principles, the inescapable corollary is that Brickdale's 'orthodox explanation' is incapable of providing a convincing justification. It is now acknowledged and accepted that registered

[47]See shift in tone from Law Commission 'Transfer of Land: Land Registration (Second Paper) Working Paper No 37 (1971) to Law Com No 158 (1987) and Law Com No 254 (1998).

[48]Law Com No 185 (1987) 5.

[49]Law Commission 'Land Registration for the Twenty-First Century: A Conveyancing Revolution' (Law Com No 271 2001) at [1.6].

[50]Ibid, at [1.15].

[51]Law Com No 254 (1998) at [1.5].

[52]Ibid.

[53]Ibid, at [1.6].

[54]Ibid.

[55]Law Com No 271 (2001) at [1.5].

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

land was designed, by definition, to be a break from the past, from the unpredictable, physical document-based confusions of unregistered land in favour of a clearer, modern register-based system. The suggestion from Brickdale that purchasers could seek information and conduct inquiries 'in the same manner' as in unregistered land therefore runs entirely counter to the central pillars of our modified Torrens-based registration system and Ruoff's three foundational guiding ideals: the mirror, curtain and insurance principles[56] which have always underpinned our approach to registered land. Fundamental to the mirror principle, as is well known, is that the register should be a complete mirror reflecting accurately and completely the interests on land that are binding, with only the most minimal inspections being necessary. The framing of this orthodox justification for overriding interests (of which actual occupation is by far the most controversial) around the close relationship with unregistered land therefore is premised on a logical dissonance: the notion that because non-registered rights in unregistered land were treated in one manner, the same must axiomatically follow for registered land. In truth, the precise opposite result should flow.

Even if one were to accept that, at the time the LRA 1925 was enacted, there might have been some justificatory force in Brickdale's 'explanation', it certainly no longer carries weight under the LRA 2002 – or certainly should not do so. If, then, we are searching for a justification for the existence of actual occupation in our contemporary law, we must locate another more credible justification.

There has, however, been a shift towards what we might call, a more pragmatic justification. This is the second key rationale for recognising actual occupation that must be interrogated and can be seen as the more contemporary rationale. This alternative rationale has been perhaps most clearly elucidated[57] in Law Commission Consultation Paper No 254, where it explained, 'Most overriding interests do appear to have one shared characteristic … namely that *it is unreasonable to expect the person who has the benefit of the right to register it as a means of securing its protection*'[58] (Emphasis in the original text).

The Commission argued that, 'a right [should be] protected as an overriding interest only where it is unreasonable or unrealistic to expect it to be registered'.[59] As to actual occupation more specifically, the Commission expanded on this:

> [W]e consider that it is unreasonable to expect all encumbrancers to register their rights, particularly where those rights arise informally… Furthermore, when people occupy land they are often unlikely to appreciate the need to take the formal step of registering any rights that they have in it. They will probably regard their occupation as the only necessary protection. The retention of [the actual occupation] category of overriding interest is, we believe, justified … because this is a very clear case where protection against purchasers is needed, but where it is 'not reasonable to expect or nor sensible to require any entry on the register'.[60]

This is quite a different justification and some departure from both that offered by Brickdale in his evidence to the Royal Commission and in his publications. This rationale and defence of actual occupation might be described as a more pragmatic or practical justification, it being more occupier-focused centring on questions of time, cost and utility in expecting occupiers to register their rights, as compared to Brickdale's more purchaser-centric explanation.

Again, however, despite this rationale being repeatedly rehearsed over decades,[61] it is argued that it also does not provide sufficient justification or rationalisation for the actual occupation concept which sits in such direct conflict with registered land principles. While it might be argued that it would be

[56]See Ruoff, above 6 .

[57]See also Law Com Working Paper No 37 (1971) at [4] where overriding interests were justified as 'recording on the register is either unnecessary, impracticable or undesirable'.

[58]Law Com No 254 (1998) at [4.4].

[59]Ibid, at [4.23].

[60]Ibid, at [5.61] drawing on the words of Law Com No 158 (1987) at [2.6].

[61]See Law Com Working Paper No 37 (1971); Law Com No 158 (1987); Law Com No 254 (1998); Law Com No 271 (2001).

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

'unreasonable' or 'unrealistic' to expect a tenant on a very short legal lease to register their interest,[62] actual occupation does not have the same short-term impact on the land. Actual occupation can have lasting effects on the purchaser of land far more consequential than a short, legal lease which is necessarily time-limited. It is noteworthy, also, that there is and has never been any precise elaboration in any Law Commission report as to exactly what 'unreasonable' or 'unrealistic' or 'sensible' really means in the specific context of registered land, or precisely why and how it would be unreasonable. The closest we have come to any clarification is the suggestion that those who might seek to rely on the actual occupation provision 'might not know about their rights'. Yet, one must surely question how this position would be any different from other rights arising by implication in law, or arising by estoppel or under an implied trust in other contexts? The informality of the creation of rights over land, it is contended, does not itself justify the actual occupation category. This is particularly the case when the LRA 2002 already provides means by which those in actual occupation might protect their interests. One could go further to query whether, set against the registration landscape, notions of unreasonableness, of unrealism and sensibleness are even appropriate in the registered land context. Arguably they are not. If one takes the registration project for what it was designed to do, these highly speculative and subjective notions might be argued as having no place.

One can usefully probe the 'unreasonableness', 'unrealism' and 'informality' aspects still further. In many walks of life, particularly so in our modern, digitised, technologically-driven and connected world, citizens are asked to engage in often elaborate, time-consuming and costly administrative and registration processes in order to enjoy rights and protections, for example registrations for births, deaths, marriages to seeking a passport and securing visas to live and work abroad. We must therefore question why it would be especially or uniquely 'unreasonable' to expect those with property rights (with all the legal consequences and benefits that flow from such powerful *in rem* rights) not to register them. Indeed, the Law Commission has itself acknowledged that asking interest-holders to register their rights should not be seen as onerous:

> There is a widely-held perception that it is unreasonable to expect people to register their rights over land. We find this puzzling given the overwhelming prevalence of registered title. Furthermore, the law has long required compliance with certain formal requirements for the transfer of interests in land and for contracts to sell or dispose of such interests. The wisdom of these requirements is not seriously questioned. We cannot see why the further step of registration should be regarded as so onerous.[63]

Registration is now the long-established, settled standard in our law, and has become rooted in the national psyche and professional conveyancing sector. Registration is the culture of our land law. The 'change in attitude'[64] and shift in 'the perception of title to land' the Commission envisioned when recommending its reforms has flourished and borne fruit. Compulsory registration was first ventilated in 1897, and the LRA 1925 introduced the power for the government to initiate areas of compulsory registration.[65] The first compulsory registration area declared was Eastbourne in 1926, though it was not until 1 December 1990 that the whole of England and Wales was made subject to compulsory registration. Even so, registration culture has been a stalwart of our law for over 100 years, and has been well-publicised and understood by the general public since the enactment of the LRA 2002, itself over 20 years ago. That is decades of registration-mindedness in the conscience of the population; of those people buying and selling houses, with legal advice from lawyers and conveyancers as well as other dealings with land such as granting leases and taking out mortgages. As such, given the well-established and widely-understood nature of registration, it is argued that it is no longer 'unreasonable, unrealistic,

[62]Currently overriding under Sch 3, para 1, to the LRA 2002.
[63]Law Com No 271 (2001) at [1.9].
[64]Ibid, at [1.10].
[65]LRA 1925, s 123.

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

impracticable' or not 'sensible' to expect registration. In this light, the unreasonableness justification therefore falls away, and we should acknowledge it has lost any explanatory power it once had and can no longer be used as a catch-all rationale for actual occupation.

As to the argument that actual occupation must continue to exist to protect those whose rights arise in circumstances of 'informality', it is submitted this argument is overblown and routinely exaggerated. The controversy of the decision in *Williams & Glyn's Bank Ltd v Boland*[66] might have shocked the professional classes[67] but times have changed and awareness of the existence and appreciation of informally-created rights has surely increased. There is, for example, now a vibrant and highly sophisticated and developed jurisprudence surrounding doctrines such as proprietary estoppel[68] and implied trusts[69] which demonstrates how 'informally-created' rights productively operate outside the register and are readily understood by lawyers and their clients. These doctrines are inventions of equity and are, by definition, 'informal' but this has not stymied their development nor prevented justice from being done for claimants, and neither has it stopped their lawyers from making use of and succeeding in arguments founded on these 'informal' principles. There is no longer a sense in which these concepts require 'special protection' under the LRA in the manner afforded to actual occupation.[70] As explored in the next part, occupiers whose rights arise informally already benefit from protections under the LRA 2002 and mechanisms can be expanded to guarantee this without recourse to actual occupation and its attendant impact on purchasers and the registration project more widely. If a balance has to be struck between protecting informally-created rights and upholding the fundamental tenets of land registration, it is argued that this balance has, to date, been misplaced and going forward ought to be recast.

Having identified and challenged the key justifications offered for recognition of actual occupation, the paper now moves in its final part to explore the 'harm' caused to the land registration project by actual occupation and, building on this, proceeds to make the radical case for the abolition of actual occupation.

3. Locating the 'harm' caused to the land registration project by actual occupation and making the radical case for abolition

> The mirror principle can never be complete until everything affecting the title … is reflected on the register. This means that the category of overriding interests should be abolished … To have a series of interests … not on the register, which bind a legal owner of land regardless of notice is inconsistent with the whole concept of registered title.
> G Dworkin 'Land law' in G Gardiner and A Martin (eds) *Law Reform Now* (Gollancz, 1964) p 81

In this final part, the paper reflects on how the actual occupation provisions can be understood as doing 'harm' to the registered land project. Set in the context of the foregoing analysis, this, in turn, allows the radical case to be made for the abolition of the actual occupation category.[71] It is argued that actual occupation 'harms' the registration project on three levels: theoretical; conceptual; and practical. Each is unpacked here.

First, actual occupation can be construed as doing harm to the fundamental essence or theoretical underpinning of registered land. The actual occupation category represents the most significant 'crack in the mirror' of the register. The registration project is and will remain heavily undermined and go

[66] *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487.

[67] See Law Commission 'The implications of *Williams & Glyn's Bank Ltd. v. Boland*: report on a reference under section 3(l)(e) of the Law Commissions Act 1965' Law Com No 115 (1982).

[68] See for example *Guest v Guest* [2022] UKSC 27.

[69] See for example *Stack v Dowden* [2007] UKHL 17; *Jones v Kernott* [2011] UKSC 53.

[70] LRA 2002, s 116 confirms an 'equity by estoppel' is capable of protection under the register by entry of a notice.

[71] For more on the mechanics of actual occupation, see 2 .

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

unrealised for as long as actual occupation rights retain their status as 'exceptions' to the essential, underpinning of land registration: that interests must be registered to be enforceable.[72] The concept of actual occupation runs entirely counter to the central ethos of a registration system and its core ambition – namely, first and foremost, that the register is designed to be a 'complete and accurate reflection of the state of the title'[73] serving as a 'mirror' which, as Ruoff explained, 'reflects accurately and completely and beyond all argument the current facts that are material to a man's title'.[74] This is said to be the 'fundamental objective' of our registration regime yet cannot be delivered fully while actual occupation remains on the statute book. As the Commission has acknowledged, the corollary is that 'absolute title cannot be absolute in the true sense, because the register [is] not a true mirror of the state of the title'. In other words, '[a]bsolute title becomes something of a misnomer'.[75] The Commission concedes that the impact of a right by actual occupation on a potential purchaser is 'vital and the burden devastating'.[76] On one view, what is the register for if it is not a complete, accurate and reliable record of the interests affecting a title? What is it worth? As Maudsley wrote of actual occupation in 1973, '[T]he register must count for something. To set up a system of registration and then to decide that a purchaser takes subject to equitable rights created [informally] … is to make a caricature of the system.'[77]

In this way, actual occupation can be construed as '*the* stumbling block on registration'[78] that impacts the meaningful realisation of the registration project and, crucially, destroys the confidence that purchasers can have in the register as, despite the promise of registration, purchasers must engage in making inquiries and inspections before purchase to avoid being encumbered by unregistered rights. On this basis, Maudsley questioned 'what purpose the register serves'.[79] The result is perverse in that it leads to the inescapable position that a purchaser who positively places their faith in the register may find that reliance entirely 'misplaced'.[80] Actual occupation thus undermines and harms 'that absolute certainty which is the ideal of all registration systems throughout the world'.[81] This leaves us with a register that seeks to be complete but never will be until rights such as those of people in actual occupation lose their overriding status. As Dworkin has argued, 'nothing is more desirable than that a purchaser should be able to look at one Land Certificate … and see to it practically everything that can affect his title'.[82] The ideal of a comprehensive and complete register designed to simplify conveyancing, to ensure the security of property interests and marketability of land can be seen, in fact, as part of a consistent policy in our law for almost 200 years, dating back to the reports of the Real Property Commissioners in 1829–30.[83]

Of course, an argument can be made that there are other rights or duties which adversely impact estate-holders in relation to land that are also not visible on the land register, for example, aspects of environment-related liabilities, or conditions relating to planning permissions. Why then is the enforceability of unregistered actual occupation rights so problematic? While there is force in this argument, it is resisted. It is argued that unregistered rights of occupation are of an altogether different order to environmental or planning regulations and should be treated as such. It is, for example, plain, from the work of the Law Commission that rights arising by actual occupation are unique and, perhaps, uniquely problematic. Doubtless important, environmental and planning regulations are, by their nature, more administrative and bureaucratic. By contrast, the recognition and enforcement of unregistered actual occupation rights have a deeper resonance with land law's long preoccupation with and the importance

[72]See Law Com No 271 (2001) Part I.
[73]Described as the 'fundamental objective' of the LRA 2002: Law Com No 271 (2001) at [1.5].
[74]Ruoff, above 6 .
[75]Chief Registrar Sir John Stewart *Principles of Land Registration* (Stevens & Sons, 1937) p 32.
[76]Law Com No 158 (1987) at [2.4].
[77]RH Maudsley 'Bona fide purchasers of registered land' (1974) 36(1) MLR 25 at 31.
[78]Above 76 .
[79]Maudsley, above 77 , at 32.
[80]Law Com No 158 (1987) at [1.4].
[81]*Ruoff and Roper* (Sweet & Maxwell, 5th edn, 1986) p 878.
[82]G Dworkin 'Land law' in G Gardiner and A Martin (eds) *Law Reform Now* (Gollancz, 1964) p 81.
[83]See Law Com No 15 (1982) at [68].

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

placed upon possession and relativity of title. This history imbues actual occupation with a significance that exceeds that connected with other unregistered rights. In essence, set in the trajectory of land law in England and Wales, and the apparent break from the past that land registration was said to represent, the recognition of unregistered occupation rights represents a far more serious challenge to the nature and theoretical underpinning of land registration than environmental or planning obligations ever could.

In exploring the theoretical aspects of registered land, it is helpful to reflect on the literature underscoring the economic and social rationales for registration. There is a voluminous body of work here explicating the impact, significance and potential benefits of registration from across the world.[84] Much of this literature reaches back decades but is still deeply instructive. Of particular value is the work of Rowton Simpson who, writing in the 1970s, explained the importance of registration:

> Land is the source of all material wealth. From it we get everything that we use or value, whether it be food, clothing, fuel, shelter, metal, or precious stones. We live on the land and from the land, and to the land our bodies or our ashes are committed when we die. The availability of land is the key to human existence, and its distribution and use are of vital importance. Land records, therefore, are of great concern to all governments. The framing of land policy, and its execution, may in large measure depend on the effectiveness of 'land registration', as we can conveniently call the making and keeping of these records.[85]

There are strong synergies here with the influential work of de Soto, who highlighted the societal value of effective registration regimes:

> Modern market economies generate growth because widespread formal property rights, registered in a system governed by legal rules, afford indisputable proof of ownership and protection from uncertainty and fraud so permitting massive low-cost exchange, fostering specialization and greater productivity. It is law that defines the relationship of rights to people. Civilized living in market economies is not simply due to greater prosperity but to the order that formalized property rights bring.[86]

These works, and those of others including Feder and Nishio[87] tracing the social as well as economic rationales for registration systems across the globe, and arguing that registration is, 'a key form of public investment',[88] are powerful reminders of the opportunities and implications of robust and effective registration regimes. Rowton Simpson cautions us, crucially, however, that 'land registration must… be kept in perspective', and that it is 'merely part of the machinery of government … not some sort of magical specific which will automatically produce good land use and development'.[89] Rowton Simpson continues that, 'land registration is only a means to an end' and 'not an end in itself'.[90] In this, there is force and, for this reason, locating the theoretical 'harm' of the actual occupation provisions would alone be insufficient as grounds for the principle's abolition. Motivated by this, we move next beyond the

[84]See for example the work undertaken by Gershon Feder, also, United Nations Economic Commission for Europe Working Party on Land Administration, 'Social and Economic Benefits of Good Land Administration (Second Edition)' (2005) published by HM Land Registry, London; T Bethell *The Noblest Triumph: Property and Prosperity Through the Ages* (New York: St Martin's Press, 1998); on the English position more directly see A Pottage 'The originality of registration' (1995) 15(3) *Oxford Journal of Legal Studies* 371.

[85]S Rowton Simpson *Land Law and Registration* (London: Surveyor's Publications, 1976) para 1.1.

[86]H De Soto *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (London: Bantam, 2000) p 1.

[87]See G Feder and A Nishio 'The benefits of land registration and titling: economic and social perspectives' (1998) 15(1) Land Use Policy 25, drawing on studies of registration and titling regimes from across the world.

[88]Ibid, at 26.

[89]S Rowton *Simpson Land Law and Registration* (London: Surveyor's Publications, 1976) n 85, at para 1.2.

[90]Ibid.

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

theoretical to reflect on the conceptual and, thereafter, the real, practical 'harm' wrought by actual occupation.

The actual occupation provisions can, secondly, therefore, be construed as manifesting conceptual 'harm' to our idea of registered land. This concerns how actual occupation, as a concept, has been delimited in registered land. Here, the central argument fixes on the lingering echoes of unregistered land principles which, despite the reform and re-framing of actual occupation under the LRA 2002, Schedule 3, para 2, remain central to the modern statutory scheme. Registered land was said to be 'the way forward, the new improving on the old', that 'unregistered land has had its day'. Indeed, the Law Commission and a range of academic commentary have fallen in behind this notion that, under the LRA 2002, 'the basis of title … [is] the register'[91] and suggesting that title today derives from exactly what appears on the register; and relatedly that notions such as relativity of title and title by possession 'used to be an important concept, but [are] no longer'.[92] Despite claims of a shift from emphasis on possession/occupation under the old, unregistered land regime to 'title by registration', where notions of occupation, possession or notice are irrelevant, in key respects, elements of our contemporary law of actual occupation still perpetuate unregistered land notions and impulses. Actual occupation remains governed by what we might term an 'unregistered land mentality' which has bedevilled our registered land system from the time of the 1925 legislation and continues to sound today in the modern law. This is most discernible in the principles around notice and discoverability. Despite the Law Commission's ostensible rejection of unregistered land principles, these aspects are troublingly 'unregistered' in character and flavour and represent an unwelcome hangover or inappropriate intruder in our registered land scheme. Thus, under Schedule 3, para 2, an interest of a person in actual occupation loses its overriding status if that occupation 'would not have been obvious on a reasonably careful inspection'[93] and, additionally, if 'the person to whom the disposition was made did not have actual knowledge at that time'.[94] These two elements were newly inserted into the scheme and did not appear in the forerunner actual occupation provisions under section 70(1)(g) of the LRA 1925 – though, as Howell has noted, section 70(1)(g) itself was interpreted by the court in a manner 'strongly redolent of [unregistered] notions of "notice"'.[95] The new additions in the modern law transplant issues of notice and discoverability from unregistered land into the registered land scheme. Questions of the apparentness and discoverability of occupation and rights over land are highly reminiscent of the doctrine of notice, and constructive notice in particular, that was such a beleaguered and problematic feature of unregistered title deeds conveyancing.[96] Despite the Law Commission's repeated assertions that 'the doctrine of notice has no application to registered land',[97] that issues of 'notice … are irrelevant in registered land',[98] and 'there should in general be no place for concepts of knowledge or notice',[99] these statements are significantly undercut by the express statutory language which provides explicitly for an assessment of 'obviousness' of the occupation and for an inquiry into the transferee's actual knowledge of the interests of those in occupation. It is hard to justify the claim that notice has no role to play with these principles plainly on the face of the LRA 2002. While this is not a direct codification of the unregistered land doctrine of notice, the focus on

[91]Law Com No 254, at [10.43].

[92]E Cooke *Land Law* (Oxford: Oxford University Press, 2nd edn, 2023) p 243; see similar comments by K Gray and SF Gray *Elements of Land Law* (Oxford: Oxford University Press, 5th edn, 2009) p 183.

[93]LRA 2002, Sch 3, para 2(c)(i).

[94]LRA 2002, Sch 3, para 2(c)(ii).

[95]J Howell 'Notice: a broad and a narrow view' (1996) Conveyancer and Property Lawyer 34, citing statements from *Abbey National Building Society v Cann* [1991] 1 AC 56.

[96]See *Hunt v Luck* [1902] 1 Ch 428; *Pilcher v Rawlins* (1872) 7 Ch App 259; *Kingsnorth v Tizard* [1986] 1 WLR 783.

[97]Law Com No 254 (1998) at [2.5].

[98]Ibid, at [3.44]. See also comments in *Boland* [1981] AC 487 at 508, per Lord Wilberforce; '… the doctrine of purchaser for value without notice has no application to registered land…' in *Barclays Bank plc v Boulter* [1998] 1 WLR 1, at 11 per Mummery LJ.

[99]Law Com No 254 (1998) at [3.46]; see also 'Property law: the implications of *Williams & Glyn's Bank Ltd v Boland*' (1982) Law Com No 115, App 2, para 17; MP Thompson 'Registration, fraud and notice' (1985) Cambridge Law Journal 280 at 289.

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

discoverability and transferees' actual knowledge must be seen as an evident rendering, an updated version or quasi-reincarnation of the doctrine of notice in all but name. Several academics have explicitly called for registered land to be subject to a 'notice' requirement such that, for example, unregistered interests would only be binding on purchasers if the latter had actual notice of those rights. The most prominent 'notice' proponents are Anderson, Battersby, Howell, Smith and Sparkes,[100] each of whom argues separately but similarly that either fairness or 'ethical'[101] considerations require a notice element to ensure an 'ethical allocation of property … that accord[s] more with common sense'.[102] Smith contends, for example, that a purchaser aware of an unprotected right 'should not be able to take advantage of a failure to register it' and that 'protection of purchasers who are aware of unprotected interests is less easy to defend'.[103] Moreover, Howell asserts that the 'exclusion of notice is not a *sine qua non* of a register of title'; that a notice requirement would not 'cause' particular complications not already experienced in our law; that 'there is nothing which makes a legal interest morally superior to an equitable one';[104] and, ultimately, that a legal purchaser should not be able to take free of an equitable interest of which she has actual knowledge. Howell also suggests that a notice requirement would remove the need for clients to shoehorn difficult arguments based on estoppel principles to ensure the enforceability of unregistered rights about which a purchaser had knowledge.[105]

Yet notwithstanding these pro-notice arguments, the Law Commission has consistently rejected calls for a role for notice in registered land. Ironic then, that, in fact, notice or notice-aligned notions are arguably already operating in the registered system under the actual occupation provisions. But, we are told that registered land ought not be concerned with matters of inspection of land, of discovering rights, of what purchasers did or did not know. These are the much-criticised and much-maligned considerations of the past travails of unregistered land but they nevertheless continue to resonate in the modern law of actual occupation. This ongoing connection with unregistered land, drawn out by Brickdale in his 'orthodox explanation', and the clear echoes of the doctrine of notice, is an enduring, conceptual wound kept open by the presence of the actual occupation principles.

Thirdly, and beyond conceptual matters, the actual occupation provisions can be understood as doing practical or 'real world' harm to the registration project. Thus, in a conveyancing landscape which already takes a considerable time from the date of acceptance of an offer to purchase a property to completion, and then to registration by Land Registry, the further inspections and occupation consent or waiver agreements necessitated by the actual occupation provisions add further delay and expense to an already prohibitively costly endeavour. There are good grounds for suggesting that, without the actual occupation provisions, the conveyancing process would be clearer, expedited and, to a degree, cheaper, further delivering on the long-standing ambitions of registered land to rationalise, facilitate and 'simplify conveyancing'.[106] Relatedly, there are, on a more granular level, significant problems in how Schedule 3, para 2 is drafted and, consequently, in how it has been interpreted by the courts. This is fuelled by the legislative linguistic framing of its provisions in part written confoundingly in the negative[107] and its importation of highly discretionary legal tests into a registered system that should otherwise be clear and streamlined. For example, no statutory definition of 'actual occupation' is offered, leaving navigation of this crucial concept to judge-made law. The result has been the development of a whole raft of, at times, conflicting and incoherent 'factors' to be deployed in the determination of whether an occupier was 'in

[100]Anderson [1977] 40 MLR 600; G Battersby 'Informal transactions in land, estoppel and registration' (1995) 58 MLR 637; Howell, above 95 ; R Smith 'Land registration: reform at last' in P Jackson and DC Wilde (eds) *The Reform of Property Law* (Routledge, 1997) p 129; P Sparkes 'The proprietary effect of undue influence' (1995) Conveyancer and Property Lawyer 250.

[101]Battersby, above 100 , at 655.

[102]Howell, above 95 , at 42.

[103]Smith, above 100 , p 136.

[104]Howell, above 95 , at 41.

[105]Ibid, at 42.

[106]Rowton Simpson, above 85 , at para 2.1.

[107]See LRA 2002, Sch 3, para 2(c) in particular.

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

actual occupation'.[108] These factors range from examination of the degree of permanence and continuity of presence of the occupier; the intentions and wishes of that person;[109] the length of any absence from the property and the reason for it; the nature of the land and the personal circumstances of the occupier. This intensely case-by-case and fact-sensitive analysis has produced some intriguing and, at times, difficult-to-rationalise results, including the now-accepted view that a person can be 'in actual occupation' despite not actually living on the land and being physically absent from the land even for significant periods of time.[110] In many decided cases in the area there are also strong reasons to suspect sympathy for the occupier played a weighty role in the court's determinations of the issue.[111] The highly discretionary, contextual, often unpredictable and indeterminate assessment of actual occupation sanctioned and compelled by Schedule 3, para 2 offends the clear aims and objectives of registration.[112]

In light of these three identified and central 'harms' wrought by the actual occupation category, its continued recognition as a statutory exception to the fundamental registration rule can no longer be defended. Attempts under the LRA 2002 to constrain the deleterious effects of actual occupation by further nuancing and limiting its scope[113] do not go far enough. Moreover, they have in some ways instead introduced even greater confusion through transposed concepts of obviousness and knowledge. The 'mirror' of the register must be restored and a step towards this is the abolition of actual occupation.

This inevitably, however, begs a final and important question: if actual occupation were to be abolished, how would this work and what would the impact be on occupiers' rights over registered land? Undoubtedly, actual occupation exists as a 'safety valve' for informally-created rights of occupiers. However, to suggest that this alone justifies continued recognition is to overstate the case and to ignore the existing protections and avenues for enforcement of informal rights that already exist. Put plainly, if actual occupation were abolished, occupiers would still be able to protect their rights by, for example, the entry of a restriction on the title. This would have the effect of restricting how the title in question could be dealt with, whether and in what circumstances it could be sold and issues around the consent of occupiers before sale.[114] In addition, and operating outside the LRA 2002, the doctrine of overreaching[115] provides a further mechanism by which occupiers' rights are safeguarded. Overreaching ensures, on sale of land, provided certain statutory conditions are met,[116] that those with equitable, overreachable rights are compensated in monetary terms for their interest while, at the same time, purchasers take the land unencumbered. In this way, overreaching strikes a balance between occupiers and purchasers. Furthermore, occupiers may be able to avail themselves of estoppel arguments and initiate personal claims against, for example, purchasers (who have made representations at the time of purchase that the occupier's rights would be enforceable) or against conveyancers to uphold and protect their rights. Crucially, these avenues exist presently and can be exploited without recourse to actual occupation provisions. These avenues would remain open were actual occupation to be abolished. This means that the abolition of actual occupation would not leave occupiers unprotected yet would begin the process of repairing the 'cracked mirror' of the register, delivering a more complete and comprehensive register than is currently possible. Abolition would have the concomitant advantage of actively encouraging

[108]See the discussion of the definition of 'actual occupation' in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 and *Link Lending v Bustard* [2010] EWCA Civ 424.

[109]For critique, see Bevan, above 2 ; Bogusz, above 2 .

[110]See *Chhokar v Chhokar* [1984] EWCA Civ 7; *Link Lending v Bustard* [2010] EWCA Civ 424; *Stockholm Finance v Garden Holdings Inc* [1995] NPC 162, *AIB Group UK plc v Turner* [2015] EWHC 3994 (Ch).

[111]See ibid in particular *Chhokar* and *Link Lending*.

[112]See Bevan, above 2 .

[113]By introducing the exceptions in Sch 3, para 2(c) and reworking the 'inquiry exception' in para 2(b).

[114]See LRA 2002, s 40.

[115]On which see generally G Ferris and G Battersby 'General principles of overreaching and the reforms of the 1925 legislation' (2002) 118 Law Quarterly Review 270; N Jackson 'Overreaching in registered land law' (2006) 69 MLR 214; JG Owen and D Cahill 'Overreaching—getting the right balance' (2017) Conveyancer and Property Lawyer 26.

[116]Law of Property Act 1925, ss 2 and 27.

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

greater registration, as citizens would be compelled to become more aware of their rights and how to protect them in registered land by bringing them onto the register. In this way, abolition could positively contribute to the Law Commission's long-standing ambition of a change of perception towards registration and increase registration awareness. Overall, the register would become a more accurate and reliable source of information for purchasers; all notions of unregistered land would be banished to the history books; and confidence in the register would be strengthened, with its attendant benefits for the property market. Incentives to register could additionally be introduced, as took place when the LRA 2002 was first enacted,[117] to increase engagement with the register as well as education programmes to inform the public of the potential for informally-created rights. Ultimately, this could lead to a better understanding by the public of the nature and reach of land law and how rights are protected and enforced.

Naturally, for those staunch advocates of actual occupation, concerns would be raised about the impact of such radical reform. Self-evidently abolition comes at a price, and, to an extent, the protections hitherto enjoyed by occupiers with unregistered rights would necessarily be reduced. But, it is contended that adequate protections would still exist for occupiers as noted above and, in any event, it is argued, with e-conveyancing having stalled,[118] the time is apt to rebalance the LRA 2002 to shore up the register and deliver on its stated aims. Even the Commission conceded, when musing on the potential for repeal of certain overriding interests, that most anxieties about repeal could be allayed and 'minimised by consultation and publicity'.[119] It must also be borne in mind that repealing overriding interests is nothing new. When the LRA 2002 was enacted, many categories of previously overriding rights were abolished successfully,[120] some immediately and others after a transitional period of 10 years.[121] The same transitional and measured approach could be adopted for the repeal of actual occupation now, giving the public, lawyers and the whole conveyancing sector time to educate, inform and adapt to the new landscape. Equally, any disquiet at a potential human rights challenge to the removal of actual occupation under Article 1 of Protocol 1 to the European Convention on Human Rights,[122] can be assuaged. It is highly likely that any curtailment of the right to property that the abolition of actual occupation would entail would fall within the state's 'margin of appreciation' and could be argued as being 'in the public interest'. As confirmed in *James v United Kingdom* (1986),[123] it is 'for national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken'.[124] Only if the state's assessment is manifestly unreasonable would the measures be taken to fall outside the exception.[125] The pursuit of a more comprehensive register would surely be held as a legitimate economic aim to strengthen, simplify and reduce the cost of dealings with land by ensuring more rights over land were reflected on the register and thus discoverable.[126] This argument would be buttressed by the fact that occupiers' rights can nevertheless be protected by entry of a restriction, enforced through other avenues, and where a transitional period towards abolition was provided.

[117]HM Land Registry offered a reduced fee for first registration of unregistered land.

[118]E-conveyancing would deliver simultaneous creation and registration of rights, meaning most overriding interests would no longer need special protection: see Law Com No 254 (1998) at [4.35]; also S Gardner 'The Land Registration Act 2002 – the show on the road' (2014) 77(5) MLR 763.

[119]Law Com No 254 (1998) at [4.26].

[120]Including rights of chancel repair liability, rights acquired under the Limitation Act 1980 by way of adverse possession.

[121]Including franchises, manorial rights, Crown and corn rents.

[122]Which guarantees the right to property. See *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 50, at [61]; see also *Marckx v Belgium* (1979) 2 EHRR 330, 354 at [63].

[123]*James v United Kingdom* (1986) ECHR 2, 8 EHRR 123

[124]Ibid, at 142, [46].

[125]Ibid, at 144, [49]; see also *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301, 336 at [37].

[126]See the discussion of this human rights aspect in Law Com No 254 (1998) at [4.27]–[4.30].

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press

Conclusion

> Great uncertainty is added … by the vagueness of the concept of 'actual occupation' … it seems that an intending purchaser must make inquiries of every person he sees, just in case that person may be in actual occupation … If his title is to depend upon such inquiries, one wonders what purpose the register serves.

Maudsley, writing 50 years ago, recognised the problem of actual occupation and its detrimental effects on the register.[127] As the actual occupation provisions turn 100 years old, and with the 'registration revolution' now having firmly established registration as the dominant force in our land law, this paper has seized the opportunity to make the radical case for actual occupation's abolition. By exposing the shaky foundations of the law, and revisiting and challenging the traditional wisdom and contemporary narrative for recognition of actual occupation, the paper has shed new light on this area of law. Comparatively little academic commentary has sought to get under the skin and test the actual occupation provisions. This paper has sought to do that. It has exposed the historical development and origins of the provisions, revealed their financially-motivated foundations – resting not on principled notions of vulnerability or informality, but on monetary concerns and a desire to keep unregistered and registered land in step – and has elucidated what, it is argued, are the theoretical, conceptual and practical 'harms' inflicted by the actual occupation provisions. It has argued that the central role and significance of Charles Brickdale in foregrounding the actual occupation provisions has to date been largely overlooked and has been given insufficient weight in the literature and in our understanding of actual occupation and its historical motivations. This analysis has, in turn, cleared the way for engagement with radical reform. Moreover, this paper has ushered a new way of seeing actual occupation by questioning its place and status, dislodging long-held and largely uncontested assumptions. In so doing, it has been contended that, while abolition may seem radical to some, it is both defensible and workable, ensuring that occupiers are provided with sufficient protection for their rights through registration and overreaching. Since their very inception, the actual occupation provisions have generated both ire and admiration in equal measure and any suggested reform in this field will garner strong views. Yet, this paper has sought to contribute to the reform debate by arguing for an analytical reset on actual occupation.

[127]RH Maudsley 'Bona fide purchasers of registered land' (1974) 36(1) MLR 25 at 31.

Cite this article: C Bevan '100 years of actual occupation as an overriding interest in English & Welsh land law: challenging the rationale and making the radical case for abolition.' (2025) *Legal Studies* **45,** 22–39. https://doi.org/10.1017/lst.2024.41

https://doi.org/10.1017/lst.2024.41 Published online by Cambridge University Press