

MIND THE GAP

- From Roots to Triplark

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by

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Brie Stevens-Hoare QC is a very client focused specialist in property and property related work. Her main focus is on real property and the more commercial aspects of property work including disputes around property developments and commercial property. In addition, Brie has considerable experience of property related professional negligence and contentious probate matters involving property.

Brie has been recommended in both Chambers & Partners and the Legal 500 as a leading property practitioner every year since 2002. Brie won the Chambers & Partners Real Estate Silk of the Year 2017. In 2005 Brie was appointed as a Deputy Adjudicator to HM Land Registry.

She has been described in the directories as "...the go to silk for heavy-weight property work..." and "An all-round modern QC. Super-bright, incredibly hardworking and a great court room advocate " which may be why she was awarded Barrister of the Year at the Modern Law Awards this year.

In 2010 she was reappointed as a Tribunal Judge, drawing on on her extensive experience of property litigation and has allowed her to further enhance her knowledge and skills.

Mediation is another major string to Brie's bow. She has the benefit of a great deal of experience of mediation from both angles: representing clients in mediations and as a mediator. She is increasingly in demand in both capacities. Brie has also contributed to several editions of Foskett "The Law and Practice of Compromise".

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MIND THE GAP – ROOTS TO TRIPLARK

Introduction

In this paper a distinction is drawn between

- the completion of a contract for transfer or assignment of registeredable estate in land ("**Contractual Completion**" or "**CC**") AND
- the completion of the application to registrar such a transaction ("**Completion by Registration**" or "**CR**")

This paper is focused on the position of the parties (between each other and in relation to third parties) in the period between CC and CR, otherwise known as the **registration gap**. The registration gap may last days, weeks or years.

The paper asks the questions

- is there a coherent approach?
- Are there some easy guidelines to remember?

The Fundamental Distinction

CC is completion of the private legally binding transaction between the parties.

CR is the completion, or updating of the public register which records a snapshot of the legal interests, with a state backed guarantee, for the benefit of third parties as well as the parties.

A Starting Point – the Modern approach to Equitable Assignments Generally

An equitable assignee of a debt is entitled to the debt in its own right and name to bring proceedings. The equitable assignee is generally required to join assignor so that the debtor is not exposed to the risk of double recovery. The requirement to join the assignor is a purely procedural and can be dispensed with by the Court. See **National Westminster Bank plc v Kapour** October 5, 2011

Registered Land & Dealings with Registerable Interests

The transfer, grant of a lease of more than 7 years or a legal charge out of a registered estate must be **completed by registration**. The transfer or grant of a sub-charge out of a legal charge must also be **completed by registration**. See s27 LRA

Such dispositions do not take effect in law until CR occurs. s27(1) LRA. They are not rendered void or voidable. They can and do take effect in equity.

It follows during the registration gap

- the legal estate of a transferred freehold or leasehold remains with the transferor
- the equitable interest in the freehold or leasehold estate or charge passes into the hands of the transferee
- although the transferee has a contractual right to the legal estate and the contract is complete but it does not pass to them

- with the legal estate and equitable interest in separate "ownership" pending completion of registration a trust of land is created as between the parties.

Registrable dispositions of Unregistered Land

When an unregistered freehold or leasehold estate is transferred for value, the subject of a grant for a term of more than 7 years or a first legal charge there is a duty on the transferor/lessor/mortgagor to register that disposition. Ss 4 and 6 LRA.

A failure to register within the required timeframe results in the transfer or grant being void as regards the legal estate. s7 LRA. So the legal estate passes with CC but passes back to the transferor/grantor if RC is delayed.

At that point the purchaser, lessee and/or mortgagee has an equitable interest. To complete the transfer or grant the parties will then have to retransfer or regrant the legal interest. The transferor/grantor is liable for all the costs of the retransfer/regrant and is liable to indemnify the other party. s8 LRA

Once again a trust will be created. However on this occasion it is only created once the period for registration has expired and legal estate has reverted to the transferor/grantor.

The Questions...

During the registration gap

- are the actions of the assignee effective
- can the assignor still deal with the land
- can third parties deal with one or must they deal with both?

The answer will depend upon

- whether the property is registered or unregistered (and if unregistered when the dealings occur)
- whether the question relates to the effect on the other party alone or third parties
- the nature of the trust of land created – see TOLATA
- the operation of ss 23 and 24 LRA

TOLATA s6 provides trustees of land have the powers of an absolute owner **subject to the trust** itself.

Sections 23 & 24 provide that a person is entitled to exercise "owner's powers" in relation to a registered estate or charge if they are

- the registered proprietor
- entitled to be registered as proprietor (which would include the purchaser/lessee/mortgagee between CC and CR).

The Coaches on the Train

Break Notices & other notices

Brown & Root Technology v Sun Alliance & London Assurance [2001] Ch 733

Lease granted out of registered freehold. Lease registered. Provision for a tenant's break clause ending when the lease assigned by the tenant.

Tenant assigned the lease to an associated company with landlord's consent. CC but no application to register. Original tenant/transferor purported to serve break notice.

CA – "Assignment" means legal assignment unless there is a contrary indication. Pending CR there was no legal assignment, only the assignment of the beneficial interest between assignor and assignee. The effectiveness of the break clause was concerned with the position between landlord and tenant (not between the parties to the assignment) and so was focused on the legal interest/rights not beneficial. Given the fact there was no legal assignment

- the break clause had not ended
- the assignor (not the assignee) remained entitled to exercise the break clause

Stodday Land v Pye [2016] EWHC 2454 (Ch)

Notice to quit served by assignee prior to registration not served by legal owner and invalid.

Sackville UK Property v Robertson Taylor [2018] EWHC 122

Assignee of part of the reversionary interest related to a registered leasehold. Assignment not registered. Break notice served by assignee not effective. The "owner's powers" were limited to those "permitted by general law" and equitable owners did not have power to terminate the legal estate. Applying the same approach to s24 as in **Skelwith**.

Villarosa v Ryan [2019] 1 WLR 515

Executors of lessee sold flat. CC but application for registration not yet made. Executors served notice claiming new lease under 1993 Act. Executors contracted to assign the benefit of the notice to take effect upon CR. The legal title to the flat and the benefit of the notice under statute had to be in the ownership of the same party. Pending registration both were held by the executors. Accordingly the notice was valid and its validity would be maintained by the arrangements in place.

Breach of Covenant & Forfeiture

Scribes West v Relsa Anstalt [2004] EWCA Civ 1744

Transfer of lease. CC and no CR. Equitable right to receive rent assigned and notice to pay assignee given to tenant. Assignee could forfeit before registration.

Rother District Investments v Corke [2004] EWHC 14 (Ch)

Unregistered transferee landlord effected peaceable re-entry. Transferor's authorisation of transferee to forfeit was presumed.

Reiner v Triplark [2018] EWCA Civ 2151

Assignment without consent (RTM failed to give notice to landlord). Application to register assignment of leasehold interest objected to. Covenant against assignment or parting with possession. Parties agreed there was no assignment in breach as legal assignment was not complete (Consistent with Brown & Root).

CC was effective and amounted to a parting with possession. The contract provided for vacant possession and the assignee took physical possession/control. The assignor remained legal owner and trustee. However assignor's powers as trustee pursuant to the trust and as registered owner were, as between assignor and assignee defined and curtailed by the contract. The assignor did not retain legal or actual possession as against the assignee.

NB Also deals with unreasonable refusal of consent to assignment in the context of an RTM.

Liability to Third Parties

East Lindsey DC v Thompson [2001] EWHC Admin 81

Transfer completed but not registered. Enforcement notice served. Pending CR transferor/registered proprietor as owner at law liable to comply and for default.

Mortgages/charges – Third Parties

Bank of Scotland v King [2007] EWHC 2747 (Ch)

Transfer of estate. CC but not CR. Assignee executed a first legal charge. Pursuant to s24 LRA although transferor remained legal owner, assignee able to execute a valid legal charge capable of registration (notwithstanding the fact the mortgagor was not the registered proprietor).

Skelwith (Leisure) Ltd v Armstrong [2016] Ch 345

Registered property subject to a registered charge. Charge assigned to a third party. CC but no application to register the assignment. Assignee "sold" the property pursuant to the power of sale under the charge.

Assignment of charge does not operate at law until registered. The s24 "owner's powers" to make a disposition are restricted to making "a disposition of any kind permitted by the general law". The general law does not permit the granting of an interest greater than the grantor has. The distinction between legal and beneficial was

relevant as an equitable assignee could not grant legal title ordinarily. Accordingly, s24 does not simply mean those entitled to be registered can do all that a registered proprietor can do. However, under s101 a person entitled to receive and give discharge for mortgage money could exercise the power of sale. An equitable mortgagee can receive and give good discharge for mortgage monies. Accordingly the equitable mortgagee could exercise the power of sale.

Creating an easement

Baker & anrs v Craggs [2018] Ch 617

Sale of one of two properties owned by vendor. CC but no CR. No easements reserved for the other property. Purchaser into actual occupation. Purchaser's priority period ended. Vendor sold the neighbouring property including a grant of an easement over the first property. Grant of easement did not overreach purchaser's right to be registered free of the easement and that right was protected as an overriding interest given his actual occupation.

What goes down the Gap?

A registration gap occurs in every registrable disposition. The idea of the vendor/assignor (transferor/grantor) being the purchaser's trustee would surprise many. However, that is the reality. The assignor/vendor remains the legal owner and a trustee until RC.

However, the nature of trust is close to bare trust. The entire beneficial interest passes to the purchaser/assignee. As between vendor/assignor and purchaser/assignee the terms of their contract is likely to shape the trust. Certainly it is hard to argue that the assignor can lawfully fail to comply with:-

- the terms of of the contract

or

- the assignee's wishes and requirements provided they are, in themselves lawful and consistent with the transaction between them.

The difficulties really arise when third parties are involved. It will frequently be the case that the third party can ignore the assignee/purchaser and simply deal with the "no longer interested" legal owner.

The key to seeing down the gap and understanding it is to be clear about whether the relevant question relates to the position as between the parties to the transaction i.e. trustee and beneficiary or assignor and assignee or whether it involves third parties when the strict legal position is likely to dominant so far as the third party is concerned.

A PS from the Sidings

There are other routes through. The contract (having provided merger will not occur) can provide for appointment of the purchaser/assignee as the vendor/assignor's agent for the purpose of serving notices or commencing proceedings or taking any other specified action between CC and CR. See Scribes. Equally statute may enable others to enforce and the effect of CC maybe that the purchaser/assignee has sufficient interest. For instance where the equitable assignee is entitled to recover rent or the underlying debt. See Skelwith and Scribes