Overriding Interests under the Land Registration Act 2002: Time to Repair the 'Cracked Mirror'?

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This article revisits the vexed issue of overriding interests under the Land Registration Act 2002 and asks whether, now over 20 years since the 2002 Act came into force, the time has arrived to reform this controversial category of interests to repair 'the cracked mirror' of the register. In asking this question, this article does three things. First, it very briefly explains what overriding interests are and how this category was shaped by the LRA 2002. Secondly, it explores the justifications that have been offered for the existence of overriding interests before, subjecting these to close challenge. Finally, and the pun must be forgiven, the article *reflects* on why the time is now right to reform overriding interests and the shape such reform might take to bring greater certainty, comprehensiveness and reliability to the register by repairing the mirror.

Introduction: Overriding Interests under the LRA 2002

Overriding interests[1] – well-known to readers of this journal and unforgettable for students as the mainstay of undergraduate Land Law assessments – comprise a category of interests which, despite not being registered and therefore not appearing on the face of the register, nevertheless are enforceable and binding on third party transferees of registered land. Overriding interests necessarily and by definition sit in conflict with the 'fundamental objective' of the registration project which, as the Law Commission confirmed in its work drafting the 2002 law, was to create a register that is 'a complete and accurate reflection of the state of the title … at any given time.'[2] Extant, in essence, outside the register but nevertheless deeply impacting the work and efficacy of it, overriding interests can be seen as weakening and undermining registration's objectives and ambitions. For this reason, though preserved under the Land Registration Act 2002, the legislation sought to 'overhaul'[3] the category by deploying a number of strategies to restrict and reduce its impact.[4] Despite these measures, however, the category of overriding interests survives in our modern law and comprises important, commonly encountered property rights.[5] There can, therefore, be no doubt as to the ongoing importance of overriding interests;[6]

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[1] On which see generally: S. Bridge, E. Cooke, M. Dixon, Megarry & Wade *The Law of Real Property* (9th Edn, Sweet & Maxwell, 2019) [6.86]-[6.101]; C. Bevan, 'Overriding and over-extended?: actual occupation: a call to orthodoxy' [2016] Conv 104; E. Cooke, Land Law (Oxford: Oxford University Press, 2012), 76; N. Jackson, 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 LQR 660.

[2] Law Com No.271 para 1.5

[3] Law Commission, 'Updating the Land Registration Act 2002' (Law Com CP 227) (2016), para.[11.4].

[4] Several interests previously overriding under the LRA 1925 lost overriding status (e.g. rights of chancel repair liability, rights acquired under the Limitation Act 1980; rights of persons in receipt of rent and profits); the ambit of certain other overriding interests was tightened (e.g. rights of those in actual occupation under Sch. 3, para. 2); some interests previously overriding under the LRA 1925 were phased out over a period of 10 years (e.g. franchises, manorial rights, Crown and corn rents which lost overriding status at midnight on 12 October 2013); and a new duty of disclosure under s. 71 LRA 2002 was introduced requiring a person applying to be registered as title owner to provide to the Registrar with information of any unregistered interests affecting the estate so that they might be registered. There was also a simplification in the protection of third party interests by entry of a notice[4] and an expansion in the third party rights that could be protected by registration.

[5] Schedule 1 para 1 and Schedule 3 para 1; Schedule 1 para 2 and Schedule 3 para 2; Schedule 1 para 3 and Schedule 3 para 3.

[6] See, for example, the controversy surrounding the House of Lords judgment in *Williams & Glyn's Bank Ltd v Boland* [1981] A.C. 487. So controversial was the judgment in favour of Julia Boland and the enforceability of

compounded by the so-called 'registration gap'[7] which raises the possibility that enforceable informal, concealed overriding interests might arise in the cleft created by the LRA between exchange of contracts, completion and registration of a purchaser's title.[8] The Law Commission has itself conceded the potential harm wrought by overriding interests noting that:

'[T]hey are widely acknowledged to be a potential source of difficulty in registered conveyancing. They necessarily reduce both the reliability and the comprehensiveness of the register. This is especially so given both the breadth of the rights which can be overriding interest … and the fact that some of them are not readily discoverable.'[9]

An affront to the central tenets of Theodore B. Ruoff's foundational cornerstones of land registration, in particular, the mirror and curtain principles,[10] for as long as overriding interests exist there will always be a need for inspection, inquiry and investigation of title beyond the electronic register and, in this way, the register is necessarily impeded and incomplete. Overriding interests therefore represent a deep 'crack in the mirror'[11] that the register purports to deliver with third-party transferees compelled to peer behind and even tear back behind the curtain to be sure of what they are buying. This is the current law, but should it be? Does it have to be this way? It is this question that forms the essential analysis of this article.

Justifying overriding interests: impracticality, informality and unreasonableness to expect registration

Given that the consequences of overriding interests are so significant for the integrity and realization of the registration project itself but also for individual third-party transferees, a clear and convincing justification and explanation for the category must be provided. Moreover, a credible and persuasive rationale for *continued* recognition of overriding interests is required as we move into the third decade of the operation of the Land Registration Act 2002; legislation that was said to messenger 'an unprecedented conveyancing revolution.'[12] What, then, are the justifications put forward in defence of recognition of overriding interests? On what basis is this category defended? The Law Commission in its work shaping what would become the 2002 Act, identified a number of related reasons for preserving the category.[13]

First, drawing on the work of Brickdale and Stewart Wallace, it noted the 'orthodox explanation' that overriding interests comprise:

'various minor liabilities which are not usually, or at any rate not invariably, shown in title-deeds or mentioned in abstracts of title, and as to which, therefore, it is impracticable to form

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her equitable, contribution-based interest in the matrimonial home as an overriding interest that the Law Commission felt obligated to produce a specific report on the fall-out from the judgment: Law Commission No. 115 (1982).

[7] See the discussion by Pottage, 'The Originality of Registration' (1995) 15 O.J.L.S. 371.

[8] Simultaneous creation and registration of rights under e-conveyancing would eliminate this 'registration gap' but movement towards e-conveyancing has stalled. A person may, for example, under the current law enter into actual occupation of the land after exchange of contracts but prior to completion and subsequently be able to assert an overriding interest over the purchaser's registered estate under Schedule 3 paragraph 2. This is only aggravated by significant processing deals at Land Registry: see Dixon, 'HM Land Registry: how did it come to this?' (2023) 3 Conv. 213-215.

[9] Law Com No. 271 at [2.17].

[10] T. B. F. Ruoff, An Englishman Looks at the Torrens System (Sydney: Law Book Co. of Australasia, 1957).

[11] D. Hayton, Registered Land, 3rd edn (London: Sweet & Maxwell, 1981), 76.

[12] Law Com No. 271 at [1.1].

[13] See Law Com No. 254 at [4.4].

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.'[14]

This orthodox justification therefore fixes on three ideas or is constructed of three component parts: one, that overriding interests are 'minor liabilities,' secondly, that they should exist because of their absence from the title deeds and abstracts of title in unregistered land, and, thirdly, as a consequence, it is 'impractical' to form a trustworthy record hence the category of overriding interests must be retained. This orthodox explanation is, however, flawed and no longer convincing to justify the existence of overriding interests. Why? The category of overriding interests and their development and interpretation through section 70(1) of the LRA 1925 and into our contemporary law can, in no way, be said to encapsulate only 'minor liabilities.' Short, legal leases, legal easements and rights of those in actual occupation – even if not giving rise to litigate – are without argument, significant liabilities that, as overriding interests have, at the very least, enormous potential to encumber and impact a purchaser's title. Equally, the allusion to unregistered land in the orthodox explanation, and the practice of information gathering, and inspection required in unregistered, title deeds conveyancing is entirely out-of-step and inappropriate in the context of registered land, especially under the modern scheme of the LRA 2002. To suggest that the recognition of overriding interests in registered land might be justified by reference to unregistered land conveyancing practice is, with respect, therefore both wrong-headed and unhelpful. The Commission itself has noted that this explanation is 'no longer correct in all respects, whatever the position may have been perceived to be when the [1925] legislation was first enacted.'[15]

The suggestion at the centre of the orthodox justification – of the impracticality of registration of overriding interests – is, however, more fruitful and may offer greater scope to form the basis of a rationale for the category. Indeed, this notion of it being 'impractical' to register certain interests is closely associated with the wider, and arguably more persuasive explanations provided by the Law Commission for overriding interests. Thus, the Commission noted that:

'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*.'[16] [emphasis in the original text].

In other words, overriding status should be afforded to certain types of rights on the basis that it is unreasonable for the right-holder to register their interest. This explanation is easy to state but, as will be argued later, far harder to substantiate and defend, in particular in our modern conveyancing landscape. What's more, once again, the Commission conceded that this rationale is itself no catch-all and that 'not every overriding interest can be justified on that basis.'[17]

A further, and associated justification for overriding interests hangs on the informality of the rights or, more precisely, the informal nature of the rights' creation. The classic example here would be the equitable, contribution-based interest arising under a trust which, if coupled with actual occupation under Schedule 3 paragraph 2 of the LRA 2002, will amount to an overriding

[14] Brickdale & Stewart Wallace's *Land Registration Act, 1925* (4th ed 1939), 190; also noted in Ruoff & Roper, *Registered Conveyancing*, 6-04.
[15] Law Com No.254 at [4.4].
[16] Ibid.
[17] Ibid.

interest which may bind a purchaser or mortgagee of the registered estate over which that interest operates. This type of interest arises informally, at times, without the right-holder even being cognizant that rights have been generated in their favour when, for example, they contribute to the purchase price of land but are not recorded on the legal title.[18] To expect registration in these circumstances, so the argument goes, would be 'unreasonable' or perhaps unrealistic and would 'defeat the sound policy that underlies that recognition'[19] that 'the law pragmatically recognises that some rights can arise informally.'[20] Many people, it is said, would regard the fact of their occupation alone as itself sufficient protection for their position without needing to take further action such as registration. The argument is perhaps at its strongest in relation to the actual occupation provisions. Lord Denning in *Strand Securities Ltd v Caswell* (1965), discussing actual occupation under old law section 70(1)(g) of the LRA 1925, the forerunner to Schedule 3 paragraph 2 actual occupation provisions, explained that:

'Fundamentally, its object is to protect a person in actual occupation of land from having his rights lost in the welter of registration. He can stay there and do nothing. Yet he will be protected. No one can buy the land over his head and thereby take away or diminish his rights. It is up to every purchaser before he buys to make the inquiry on the premises. If he fails to do so, it is at his own risk.'[21]

This approach is said to form part of the Commission's broader, guiding principle (drawing on the work of the Law Commission's Third Report on Land Registration (1987),[22] namely that:

'[T]he *only* overriding interests should be those "where protection against purchasers is needed, yet it is either not reasonable to expect nor sensible to require any entry on the register."'[23]

A similar argument is made to justify recognition of short, legal leases (not exceeding 7 years' duration) which enjoy overriding status under paragraph 1 of Schedules 1 and 3 of the LRA 2002. As the Law Commission explained: 'The policy behind this class of overriding interest has been to keep the register free of such leases because of their short duration and the risk that they would clutter the register.'[24] Here, again, the suggestion is that given the shorter duration of these rights, or the nature of their creation (rarely but occasionally by implication[25]), it would prove overly burdensome or inconvenient to expect registration and the register could become overloaded or clogged up with multiple entries of shorter property rights.

The Commission has, in this way, interpolated into the search for a rationale for overriding interest a series of characteristics, attributes and qualities that, it contends, necessitate the safeguarding and protective cloak of overriding status. We can, then, add to the already-discussed orthodox justification, a further list of explanations: informality, unreasonableness, insensibility and inconvenience to expect registration. What emerges, then, is a canvas on which multiple but related justificatory rationales are painted often with very broad brushes,

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[18] See *Boland*, *Flegg*, and consider the facts of *Lloyds Bank Plc v Carrick* [1996] 4 All ER 630, an unregistered land case which, it is had operated under registered land principles, would have resulted in Mrs Carrick's rights binding the bank as an overriding interest.
[19] Law Com No. 254 at [5.61].
[20] Ibid.
[21] *Strand Securities Ltd* at 979 per Lord Denning.
[22] Law Com No 148; Property Law: Third Report on Land Registration (1987) Law Com No 158
[23] Law Com. No. 254 at [5.61] citing ibid at [2.6].
[24] Law Com No. 271 at [8.9].
[25] Cases on implied legal leases

lacking definition and delimitation between hues. In the next part, the justifications are scrutinized and challenged.

Overriding interests: the justifications challenged

When set against the clear and stated ambitions of land registration, in particular the mirror and curtain principles and the fundamental objective of a complete and comprehensive register, one can usefully ask whether the menu of explanations and justifications set out above provides a rationale that is either persuasive or cogent. More pointedly, even if one were to accept that the explanations offered might once have exuded some justificatory power, do these explanations still hold water today? In this part, it is argued that the key, contemporary justifications for overriding interest status – of informality and the unreasonableness of expecting registration – can and should be challenged and rejected.

As to the argument founded on informality, it is contended that this is overdone and does not, of itself, warrant or justify the special, protective treatment afforded to overriding interests. The informality rationale is most keenly felt as the basis for recognising the rights of those in actual occupation, yet it can be resisted. Indeed, the inherent vulnerability of both informally created rights and right-holders is routinely and erroneously overstated. Land law knows of many rights that arise informally from those under implied trusts to proprietary estoppel, implied easements and even implied leases. The very nature and essence of the equitable jurisdiction, in particular, with its emphasis on substance and not form and its rejection of insistence on strict formality requirements is a case in point. These equitable doctrines have roots that reach back to at least the 14th century in England. Much has, however, changed since the 14th century and indeed since the judgment in *Boland*[26] which rocked the legal world.[27] Today, there is an infinitely more developed, broad and deep awareness of the existence and appreciation around informally created rights and their status. Access to legal advice has never been easier, cheaper or quicker and, arguably, never before have citizens been more empowered to understand, examine and protect their (informal) rights. The buying and selling of houses today invariably involves engagement with a conveyancer and/or solicitor and the opportunities for revealing any informal rights and for protecting them have never been greater. Conveyancers, solicitors and by extension vendors and purchasers are now directly asked to confirm the existence or otherwise of those 'in occupation' of land and mortgagees in particular are especially attuned to the potential for informally arising rights of occupation. The case, then, for providing specific or bespoke safeguards for 'informal' rights or the inherent vulnerability of right-holders has therefore arguably lost much of its force in our contemporary, increasingly digitized, online world of conveyancing. More pragmatically, and a practice that developed in the wake of the judgment in *Boland*, mortgagees now frequently request that occupier consent forms (sometimes called 'occupier consent to mortgage') be completed which, in effect, involves occupiers signing away their rights, waiving their rights, postponing them to those of the mortgagee. In this way, much of the sting of the *Boland* judgment and the actual occupation provisions have, thereby, been mitigated and tempered through conveyancing practice, procedure, and paperwork. Additionally, the modern conveyancing process is now more robust in seeking out and exposing informal rights that may operate over land to be sold or purchased.

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[26] *Williams & Glyn's Bank Ltd.* v. *Boland* [1981] A.C. 487. In *Boland*, the House of Lords held that a Bank which had lent money on the security of a house was bound by the interest of the owner's wife in the house and therefore was not entitled to vacant possession, which it sought to obtain for the purpose of enforcing the debt by sale.

[27] The reaction to the decision led to a report being issues by the Law Commission specifically on the implications of the judgment: Law Commission Report '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).

Even a cursory search of any online legal database will reveal that disputes and legal cases argued on the grounds of overriding interests are extremely rare due to the increasing engagement with and acceptance of the necessity for compliance with registration requirements.[28] When assessing, then, how to strike an equilibrium between the delivery of the core ambitions of the registration project and the protection of informally created rights, it is contended that the law currently has set the dial too favourably in the direction of the latter. That is not to suggest that difficult cases will not occur and, certainly, tough results may be reached. However, this is the nature of law, and one should not overlook or under-sell the significant benefits that accrue from clear, bright-line rules in property law where legal certainty brings greater confidence in dealings with land thus buttresses and supports the property market. Equally, mitigations already exist in the law to assuage any fears that 'vulnerable' parties might be disadvantaged by constraining overriding interest categories including through equitable doctrine such as proprietary estoppel.

Moreover, arguments founded on the apparent impracticality or unreasonableness of registration, or the suggestion that it is overly burdensome or time-consuming to expect registration, must also be tested and challenged. Again, while there may have been force in such contentions when land registration was more nascent and embryonic under the LRA 1925 and the population was, essentially, to be coaxed, encouraged, incentivised and reassured to sign up to and join the registration system, that mindset has shifted. Today, over 88% of titles in England and Wales are registered and the number grows annually.[29] We live under a system of title by registration. Registration mentality is the culture of our land law today even with the small and diminishing reservoir of unregistered titles that remains. Resistance to registration there is very little. The 'conveyancing revolution' of which the Law Commission spoke over two decades ago has arrived, been extremely successful and has become the settled, established norm in our law; its position is unassailable. The registration genie, so to speak, will not return to its bottle and the direction of travel is surely inexorably towards greater registration and bringing even more interests hitherto not recorded by Land Registry onto the register.[30] In this anchored and self-assured registration landscape, arguments around the impracticality, burden, or unreasonableness of registration are redundant and speak only to an outmoded view of land registration. The Law Commission, in 2001, itself recognised this when it noted that registration ought 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.'[31]

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[28] For a recent, rare example, see *Pennistone Holdings Ltd v Rock Ferry Waterfront Trust* [2021] EWCA Civ 1029 where the court was asked to consider the meaning of 'actual occupation' in relation to a derelict, former oil site. On the facts, a caretaker was held not to be in actual occupation as agent for Pennistone Holdings which held an interest in the land.

[29] As of 2023, this represents over 26 million registered titles; leaving just 12 per cent of land unregistered: HM Land Registry, *Annual Report and Accounts 2022–23.*

[30] See the recommendations by the Law Commission in its 2018 Report *Updating the Land Registration Act 2002* as to supporting expansion in registration, reducing fraud and other technical changes: Law Commission No. 380 (2018).

[31] Law Com No. 271 (2001) at [1.9].

In short, it should no longer be regarded as unreasonable, impracticable or 'not sensible' to expect those with rights over land – and all the attendant consequences and advantages that accompany them – to register those rights. The suggestion, for example, that short legal leases should be overriding to avoid 'cluttering the register' is fallacious especially when the register is electronic, online and easily searched and rendered. Given the broad range of interests (formerly known as 'minor interests') that can now be the subject of a notice in the register, it is hard to understand why these 'minor' interests are not seen as 'cluttering' the register, yet registration of short legal leases would. Equally, the prevalence and importance of short leases – under which millions of Britons reside every day – must be strong grounds for arguing that these rights ought to be reflected on the register. The depiction of registration as a burden, an ardour, or as a 'welter' as Lord Denning termed it in *Strand Securities* Ltd no longer feels appropriate. As citizens, we routinely sign up to, register and contract for a wide range of services and rights whether that be from mobile phone contracts to internet provision, to finance arrangements for cars. What's more, we are well-versed in the registration requirements for births, deaths, marriages and, more widely, for voting. Albeit in a distinct, property context, why should we be afraid or shy away from expecting registration of informal rights in relation to land. In short, to expect those with powerful, valuable and enforceable proprietary rights to register them should no longer be regarded as unreasonable however informal those rights may be and neither should it be portrayed as bothersome or as cluttering the register. Registration of rights is and should be upheld as the core, the rule, the benchmark of our system.

With the increasing digitization of services pertaining to property dealings, and with changing social attitudes and growing awareness of property rights, the long-rehearsed justifications for overriding interests are open to significant challenge. The case for revisiting and reconsidering the extent and reach of existing overriding interests therefore becomes a strong one. The next part reflects on the potential consequences of just such a move.

Time to repair the 'cracked mirror'?

The existence and continued recognition of overriding interests – even in constrained form under the LRA 2002 – means that Ruoff's foundational principles and the central tenets and ambitions of land registration remain heavily undermined, and their realization, in key respects, denied. Striking at the heart of the registration project, from a perspective of principle, one might see the 'cracked mirror' in fact as more of a shattered mirror, misrepresenting the true state of title, distorting and impeding a full reflection of the interests encumbering land. On this view, it might be suggested that the overriding interest category represents the single most significant and direct affront to and block on the movement towards a more comprehensive and reliable register. As the previous sections of the article have sought to argue, a strong justification is therefore required to defend the damage and violence the overriding category wreaks on the land registration scheme. It has been argued that, to date, the explanations offered do not meet that threshold and, particularly so, when considered in the context of our now well-established registration culture. The corollary of this, in the author's view, is that the time is now right to explore how the 'crack in the mirror' of the register might be repaired. However, before embarking more fulsomely on this discussion, the counterargument must be acknowledged. Indeed, views will vary as to both the viability and/or defensibility of the ambition of a truly reflective 'mirror.' For some, the very idea or aspiration that the register should comprise an accurate 'mirror' may be challenged. Others, more broadly, may accept the principle of the 'mirror' but query the problematisation of its incompleteness or 'cracked' nature; questioning whether, in fact, it really requires perfecting or repair. It must, moreover, be conceded that not all will regard the mirror concept as an essential 'good' and consequently

not all will regard the restoration of the integrity of the mirror as a legitimate or desirable ambition. Thus, one person's 'cracked mirror' is another's necessary compromise. In other words, what in this author's view is a distorted or imperfect mirror, might be regarded by others as a carefully curated and vital trade-off or settlement at the heart of the registration project – as the need for clarity, certainty and comprehensiveness bends, in part, to the pragmatism of the need to recognise and protect informal or short-duration rights. These views are noted here but respectfully doubted. The central thesis advanced in this article is that the mirror principle is essentially a good or beneficial notion, and, moreover, that it is long-rooted in our registration system and brings key advantages in terms of increasing the accuracy, comprehensiveness and reliability of the register for all concerned with dealings in land. Logically, and springing from this position, it is therefore argued that the current incomplete picture offered by the mirror and its 'cracked' nature are problematic and require redress. The whole history of land registration in England and Wales evinces a long-standing trajectory of increasing registration, of expansion in the number of interests that can and are required to appear on the register but also in the breadth and depth of those registrable interests. This expansionist path, as we might term it, is, in the author's view, to be seen as inexorable. Put simply, the 'mission' of land registration as conceived by the Law Commission is not yet complete, in large measure because the mirror remains fragmented.

In the interests of clarity and, potentially, in the face of opposition, it is perhaps helpful to recognise that the argument being made here is not one premised on the notion of a 'mirror at all costs.' The argument is not that the law should jump immediately to a 'total mirror' approach according to an unnuanced, uncompromising or inflexible view that *only* what is recorded on the register will ever bind a title. That would, on our current law, be untenable and undeliverable. No, the argument is not one of pure ideological zeal, it is not an argument of a mirror for a mirror's sake. Instead, it is argued that the mirror principle remains a key foundation of our law; that the furtherance of this mirror principle is hampered by the current incarnation of the 'mirror' and, that realisation of the aims of the registration project requires us to think again about how we might strengthen and bolster the integrity of the mirror.

An important and related question concerns why we ought to consider reform now. First, as highlighted earlier, the registration mindset is now firmly embedded as the status quo in our law. As such, many of the concerns (and justifications for overriding status) of imposing registration requirements on more informal or shorter-duration rights fall away. In addition, with the march towards e-conveyancing once so urgent and inevitable[32] now having stalled and ambitions in that regard diluted, the prospect of overriding interests being eradicated (and the 'registration gap' being closed) by the introduction of simultaneous, electronic creation and registration of rights is now a distant, far-away dream. E-conveyancing was to be the cornerstone of the LRA 2002 and was the vision of the future of registration. The LRA was founded on the promise of e-conveyancing. In the very first paragraph of its 2001 report, it noted:

'The purpose of the [Land Registration] Bill is a bold and striking one. It is to create the necessary legal framework in which registered conveyancing can be conducted electronically. The move from a paper-based system of conveyancing to one that is entirely electronic is a very major one and it will transform fundamentally the manner in which the process is conducted. The Bill will bring about an unprecedented conveyancing revolution within a

[32] The whole scheme of the LRA 2002 Act was designed to contribute to and facilitate e-conveyancing.

comparatively short time. It will also make other profound changes to the substantive law that governs registered land.'[33]

However, over two decades later, e-conveyancing has not been delivered and the Commission, while retaining the 'ultimate goal'[34] of electronic conveyancing has essentially stepped back from and stepped down its ambitions in this area, for now.[35] Furthermore, the Law Commission has, for the foreseeable future at least, finished its work on 'updating the LRA 2002' which, in effect, eschewed any substantive change to the law on overriding interests in favour of recommendations around more technical aspects.[36] Despite this, the Commission has repeatedly reaffirmed its commitment to more comprehensive registration noting that it 'continue[s] to believe in the goal of a full and complete register.'[37] The UK Government too has thrown its weight behind the drive towards a complete and more reflective register, noting, for example in its White Paper 'Fixing our Broken Housing Market' the Government's goal of 'comprehensive land registration' and the elimination of unregistered land by 2030 with the register better reflecting 'wider interests in land.'[38] Nevertheless, serious strides towards achieving this have been lacking and progress too sluggish. Coupled with increasingly lengthy and troubling processing times for applications to Land Registry,[39] it can be argued that, in the absence of e-conveyancing any time soon, specific reform to the overriding interest categories is required now to contribute to this push towards a stronger, more accurate and complete register that can offer genuinely reflective mirror of title.

This in turn naturally begs the question of how the cracked mirror might be 'repaired' or restored. What shape might reform take? Some observations on this reform exercise are offered here as an opening gambit, an invitation to treat, if you will, to begin the debate about the precise scope and scale of overriding interests as the LRA 2002 moves into its third decade in force. Helpfully, the LRA 2002 itself has provided a blueprint for how a debate and action as to reform of overriding interests might usefully be pursued. As explored earlier in this article, the LRA was a major reforming statute ushering in significant changes to how overriding interests operated. Just as the LRA itself constrained, narrowed, and, in some instances, removed overriding status from certain rights, the same ought to be explored as a possibility now. In considering reform options, the discussion here is confined to paragraphs 1-3 of Schedule 3 of the LRA 2002[40] and how the law might be changed to reduce the impact of overriding status. There is a spectrum of reform possibilities from the more tentative, and incremental to the more radical. Where one's view ultimately comes to rest on that spectrum will be largely determined by how persuaded one is of the damage caused by overriding interests and one's assessment of the urgency of reform. Each paragraph will be taken in turn.

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[33] Law Com No.271 at [1.1].
[34] Law Com No. 380 Updating the Land Registration Act 2020 (2018) at [5.194].
[35] Ibid at Chapter 20.
[36] For a critique of these technical recommendations as to overriding interests, see Bevan, 'Overriding interests under the Land Registration Act 2002' (2023) 2 Conv. 137-139.
[37] Law Com No. 380 Updating the Land Registration Act 2020 (2018) at [16.3].
[38] Department of Housing, Communities & Local Government, *Fixing Our Broken Housing Market* (2017) Cm 9352 at [1.17]-[1.20].
[39] Dixon, 'HM Land Registry: how did it come to this?' (2023) 3 Conv. 213-215.
[40] These observations will apply to a varying degree to paragraphs 1-3 of Schedule 1 of the LRA 2002 albeit cognizant of the fact that Schedule 1 (overriding interests impacting first registration) are framed slightly differently e.g. paragraph 2.

Paragraph 1 of Schedule 3 currently affords overriding status to short, legal leases namely those of a duration of 7 years or less.[41] Under the old law – section 70(1)(k) of the LRA 1925 – leases of 21 years or less and at a rent were deemed overriding. This curtailment of the overriding status of leases from 21 year under the 1925 legislation to 7 years or less under the 2002 Act was designed to extend the requirement for registration to a broader range of leases and to facilitate dealings with leasehold by making it easier to grant or assign them; easier to access the terms of leases, and increasing the security of title for any derivative interests carved out of them.[42] The question is whether this limitation under the 2002 Act went far enough. In drafting the Land Registration Bill, the Law Commission expressly conceded that further reductions in the duration of leases that attracted overriding protection would be needed. At the time, the Commission envisaged a further curtailment taking place once e-conveyancing was operative:

'The introduction of electronic conveyancing will, however, make it possible to register shorter leases very easily and to ensure that they are removed on expiry. As we have explained, it is likely that, once it is possible to grant and assign leases electronically, the Lord Chancellor may, in exercise of his powers, already described, seek views on a further reduction of the period of seven years that will initially apply under the Bill.'[43]

However, given the setback and delay to delivery of the 'e-conveyancing revolution,' there are strong arguments for reforming the law now to lessen the impact of this category of overriding interest. How might that be done? A first option would be to follow the suggestion of the Law Commission and amend the law so that only leases of 3 years or less would be overriding. This would neatly align the law with sections 52(1), (2)(d) and 54(2) of the LPA 1925 which requires leases in excess of three years to be made by deed. The result would be to bring far greater number of short legal leases onto the register while ensuring a measure of protection remains for leases that are shorter still in duration or may have been created orally. This would be an effective compromise and middle ground between the desirability of expanding registration requirements for leases to both enlarge the register and render it more comprehensive yet, at the same time, obviating the anxiety (if it is genuine or defensible) of cluttering the register with a flood of very short leases. Concerns may come from conveyancers of the increase in cost, inconvenience and workload – though, these were precisely the arguments made by professional bodies against the proposal to reduce overriding leases from 21 years to 7 under the LRA 2002[44] and, to put it bluntly, once this reduction was duly enacted, the sector readily accepted the change and coped. There is no reason to assume the result would be any different if the law was reformed to provide for a further reduction from 7 to 3 years.

The alternative and far more radical proposal would be the removal altogether of the overriding protection from short legal leases – perhaps with the qualification that implied legal leases still enjoyed overriding status. This would necessarily mean a significant increase in the number of leases requiring registration and would place further burdens on Land Registry. It would have the advantage, however, of clarity, and simplicity and would amount to a full-throated response to the problem of the 'cracked mirror.' It would resolve the confusion which the current scheme perpetrates whereby the registrability of leases is highly duration-dependent and the statutory framework can work less than intuitively; the law drawing a distinction between leases which

[41] Unless it is a lease covered by section 4(1)(d), (e) or (f) of the LRA 2002 or otherwise amounts to a registrable disposition: Schedule 3 paragraph 1(a), (b).
[42] See Law Com No. 254 at [3.8].
[43] Law Com No. 271 at [8.9].
[44] Law Com No 158, para 2.41.

amount to registrable disposition (those of 7 years' duration or less),[45] those which can be protected by entry of a notice (those of more than 3 but less than 7 years' duration)[46] and those which can exist as overriding interests (those less than 7 years' duration).[47] This perplexity (as far as it is felt) would be swept aside. In truth, however, such a radical reform as this would likely only be effectively deliverable once e-conveyancing with simultaneous creation and registration of leases had been introduced, was fully-fledged and operational.

Paragraph 2 of Schedule 3[48] provides overriding protection to those with proprietary rights in land coupled with actual occupation, except where that occupation would not have been obvious on a reasonably careful inspection and the person to whom the disposition is made did not actually know of the interest,[49] or where inquiry was made of the person in occupation and they did not disclose their interest when it would have been reasonable so to do.[50] The forerunner to paragraph 2 – section 70(1)(g) of the LRA 1925[51] – has been described by the Law Commission as 'the most notorious and most litigated - category of overriding interests'; the Commission adding that 'any [reform] proposal which we may make in relation to this paragraph will be controversial because it is a provision that has both strong supporters and equally vocal detractors.'[52]

When the 2002 Act was enacted, the provision newly inserted the 'discoverability' or 'obviousness' exception and expanded the 'inquiry exception' from that which appeared under the LRA 1925.[53] Surprisingly little litigation has flowed from these contemporary actual occupation provisions and, anecdotally, conveyancers and property lawyers report no difficulty, very few disputes and little engagement with the provisions. This is illuminating because property law orthodoxy (or perhaps property law academics) would have one believe that the actual occupation provisions continue to provoke significant practical problems. It is submitted that, in the contemporary law, post-*Boland* and the associated uproar in professional circles that ensued, the law of actual occupation, for practical purposes, poses few difficulties. However, it nevertheless does present problems of principle, of theory and of academic interest. This is not the place to examine all the pitfalls and deficiencies of the modern actual occupation provisions – that has been done elsewhere.[54] Instead, here, it is asked whether the law ought to be reformed to deliver a more robust, complete and reliable register. Why, one could ask, if the problems of actual occupation are now more academic than practical, should the law be changed? In fact, these concerns of principles, to a large degree, go arm-in-arm with practical questions or, put differently, impinge on issues such as the integrity, completeness and confidence held in the register. For example, the discoverability/obviousness exception of paragraph 2 of Schedule 3 can be criticised for ushering in, through the backdoor, unregistered

[45] Section 27(2)(b) of the LRA 2002.
[46] Section 33(b) and section 27(2)(b) of the LRA 2002.
[47] Paragraph 1 of Schedules 1 and 3 of the LRA 2002.
[48] On which, see generally C. Bevan, 'Overriding and over-extended?: actual occupation: a call to orthodoxy' [2016] Conv 104; 'The Relevance of "Intentions and Wishes" to Determine Actual Occupation: A Sea Change in Judicial Thinking?' [2014] *Conv.* 27.
[49] Paragraph 2(c) of Schedule 3 – no corresponding exception exists under Schedule 1.
[50] Paragraph 2(b) of Schedule 3 – again, no corresponding exception exists under Schedule 1.
[51] On which see 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) 328.
[52] Law Com No. 254 at [5.56].
[53] Section 70(1)(g) of the LRA 1925 provided: The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed.
[54] C. Bevan, 'Overriding and over-extended?: actual occupation: a call to orthodoxy' [2016] Conv 104; 'The Relevance of "Intentions and Wishes" to Determine Actual Occupation: A Sea Change in Judicial Thinking?' [2014] *Conv.* 27.

land notions, or at least, unregistered land adjacent notions of notice; despite repeated assertions that the doctrine of notice, and issues of notice have no place in registered land scheme. Moreover, further issues have been identified with the highly open-textured, flexible, and common-sense, plain interpretation given to 'actual occupation' in the absence of any definition of the term in the statute.[55] There is, in addition, a dearth of case law elucidating precisely what is to be understood by the phrase 'would not have been obvious' under the paragraph 2(c) exception,[56] and rather obscure positions reached (most likely on policy grounds) that an individual can be in 'actual occupation' of land despite quite significant periods of absence or interruption of their occupation.[57] On one view, one might conclude that if little litigation is generated by the actual occupation provisions, then why disturb them? However, given this lack of litigation, and the deleterious effects on the register of retaining a category of rights that binds third-party transferees despite not appearing on the register, further restricting or removing overriding status from those in actual occupation should seriously be considered.

More cautious reform proposals could see the statutory language tightened and clarified, perhaps by introducing a statutory definition of 'actual occupation,' a definition of 'obviousness' and a laying down expressly the factors that the court is specifically to have regard to when determining if paragraph 2 is activated. The unhelpful and less than clear drafting of the paragraph could also be rectified with, for example, rephrasing of the 2(c) exception so that paragraph 2 is no longer phrased in what is, essentially, a double negative: rights of those in actual occupation are overriding *except* … where it *would not* be obvious …'[58] If, however, one is concerned to rid the provision of the echoes of unregistered land and notice and, at the same time, sure up and bringing more rights onto the register, a more radical proposal of abolition of actual occupation altogether might be explored. This would be a bold move but would serve to protect third-party transferees, enhance the protection of dynamic security (which favours purchasers) under the LRA 2002 over static security (which favours title holders),[59] and contribute to greater realization of the foundational aims of registered land by repairing the mirror and ensuring purchasers would not need to look 'behind the curtain' of the register. Such radicalism would surely incite concerns at the loss of protection for vulnerable rights-holders whose interests, perhaps arising under a constructive trust, would not be protected. However, safeguards and alternative means of protection for these rights already exist in our law both inside and outside the LRA 2002. Thus, irrespective of overriding status, many of the rights that are 'qualifying' for the purposes of actual occupation can already be registered either by entry of a notice on the Charges register[60] or protected by entry of a

[55] Lord Wilberforce in *Boland* called for a reading of the actual occupation provision 'for what it says', adding: 'These words are ordinary words of plain English, and should, in my opinion, be interpreted as such.' See also the factors to be taken into account when determining actual occupation per Mummery LJ in *Link Lending v Bustard* [2010] EWCA Civ 424 at [127].

[56] We know very little except that, per Ramsey J in *Thomas v Clydesdale Bank plc* [2010] EWHC 2755 (QB)at [38] that, 'what has to be obvious is the relevant visible signs of occupation upon which a person who asserts an interest by actual occupation relies.'

[57] On which, see *Chhokar v Chhokar* [1984] FLR 313, *Link Lending v Bustard* [2010] EWCA Civ 424; cf Stockholm Finance Ltd v Garden Holdings Inc [1995] NPC 162.

[58] Paragraph 2(c) of Schedule 3 of the LRA 2002.

[59] For a helpful summary of the static/dynamic security divide, see P. O'Connor, 'Registration of Title in England and Australia: A Theoretical and Comparative Analysis' in E. Cooke (ed.), *Modern Studies in Property Law, Vol. 2* (Oxford: Hart, 2003), ch. 5 and A. Fouillée, J. Charmont, L. Duguit, and R. Demogue, *Modern French Legal Philosophy* (Boston, MA: Boston Book Co., 1916), ch. 13.

[60] See section 33 of the LRA 2002; for example, leases, see *Trevallion v Watmore (*2016).

Restriction.[61] To remove overriding status for interests coupled with actual occupation would, then, remove one but not all routes to protection for these rights. There is, moreover, the doctrine of overreaching which ensures that, while equitable rights, if overreached, are not enforceable against purchasers of the land over which they operate, interest holders do not go empty-handed; their interests are transmuted into money. Finally, there is the possibility of claims based on proprietary estoppel and personal actions against purchasers, conveyancers and others on the grounds of misrepresentation or negligence. Certainly, such a significant change to the categories of overriding interests would require a lengthy transition period, a campaign of publicity and supporting guidance for vendors, purchasers and the conveyancing and legal industry more widely. In the same vein as the reforms introduced by the LRA 2002, a 10-year 'phasing out' period could be deployed to ensure no one was caught unawares by the changes. Bold, yes, but this reform would certainly represent a robust commitment to the ongoing comprehensiveness of the register and to restoring the crack in the mirror. If this would be a step too far, too fast, statutory clarification along the lines outlined earlier might be preferred.

Paragraph 3 of Schedule 3 affords overriding status to legal easements and profits. The forerunner to paragraph 3, section 70(1)(a) of the LRA 1925 provided for the overriding status of legal easements and profits not required to be registered. Section 70(1)(a) was subsequently described by the Law Commission as "'amongst the most unsatisfactory" in the legislation that governs land registration'[62] largely as a result of a distinct lack of clarity as to which types of easements and profits were covered by the provision and which not and the impact of the difficulty of proving abandonment of easements.[63] In response to these issues, paragraph 3 of the LRA 2002 therefore comprised a heavily constrained reworking of section 70(1)(a) and introduced a series of limitations imposed on the category of overriding interest beyond those contemplated even at the Consultation stage of the Law Commission's work formulating the Land Registration Bill. Thus, all easements expressly created after the entry into force of the LRA 2002 amount to registrable dispositions[64] and must therefore be completed by registration if they are to operate at law. Moreover, paragraph 3 makes plain on its face that only *legal* easements and profits can amount to overriding interest thus clarifying some doubt on the status of equitable easements under the old law. The combined effect of these two measures is to confine overriding status to easements arising by prescription, by implied grant[65] or by implied reservation. Even then, implied legal easements or profits will still only be overriding if (1) the third-party transferee actually knows about it;[66] (2) it is obvious on a reasonably careful inspection of the land;[67] or (3) it has been exercised within the period of one year before the disposition.[68]

While the efforts of the Law Commission in reformulating the problematic, uncertain overriding provisions of section 70(1)(a) into the reworked paragraph 3 of Schedule 3 are to be lauded, the consequence of navigating the pitfalls raised by the old law has produced a lumpen

[61] See section 40 of the LRA 2002; equitable contribution-based interests arising under a trust of land could be protected by entry of a restriction preventing sale of the land without that interest holder's consent or preventing registration of a new owner unless overreaching has taken place.
[62] Law Com No. 271 at [8.21] citing Law Com. No. 254 at [5.2].
[63] See the criticisms listed in detailed in Law Com. No. 254 at [5.2]-[5.16] and further explored in Law Com No. 271 at [8.65]-[8.67].
[64] Under section 27(2)(d) of the LRA 2002.
[65] This includes implication under section 62 of the LPA 1925.
[66] Paragraph 3(1)(a) of Schedule 3 of the LRA 2002.
[67] Paragraph 3(1)(b) of Schedule 3 of the LRA 2002.
[68] Paragraph 3(2) of Schedule 3 of the LRA 2002.

and unnecessarily convoluted approach which, it is argued, is ripe for further reform. Most significant of the changes made in paragraph 3 is the provision that easements and profits exercised within the last year will be overriding. This, in effect, means that the vast majority of implied legal easements and profits enjoy overriding status. The Law Commission explained that:

'This is important … and is intended to cover the numerous 'invisible' easements such as rights of drainage or the right to run a water supply pipe over a neighbour's land. These rights have often existed for many years, but because they were commonly not the subject of any express arrangement between the parties are not recorded on the register … We wish to encourage … a straightforward system of standard inquiries as to easements and profits which will prompt sellers to disclose what they can reasonably be expected to know. This will in turn ensure such rights are then registered. We anticipate that, prior to contract, a seller would be expected to disclose any unregistered easements or profits affecting his or her property of which he or she was aware, at least to the extent that they were not obvious on a reasonably careful inspection of the land. In particular, he or she would be asked to disclose any easements or profits that had been exercised in the year preceding the inquiry. The result of such inquiries is likely to be that the buyer will have actual knowledge of any unregistered legal easements and profits long before the transaction is completed.'[69]

This 'straightforward system of standard inquiries as to easements and profits' has, in fact, already been delivered. Implied easements and profits, in almost all cases, rarely cause difficulty in today's conveyancing landscape as the sector has adapted procedures to ensure they are revealed and taken into account by all the parties to a sale of land. Whenever land is being sold, conveyancers now raise specific queries with the vendor to ensure that easements operating or potentially operating over the land are recognised and the details of which are clarified. All this information is then included in the report on the title which is provided to the purchaser prior to signing the contract for sale. Should either party (in particular the purchaser) have concerns as to the nature and scope of the easement or profit disclosed, this can be negotiated, after legal advice, with the other side and a way forward devised. This could result in a reduced purchase price, withdrawal from the sale or even an examination of whether the easement has been terminated by release or abandonment, obsolescence, by operation of proprietary estoppel, or if there has been excessive user. As a consequence of the conveyancing processes surrounding inquiries as to easements and profits, one can usefully ask if the overriding status of implied legal easements and profits as provided for under paragraph 3 is any longer necessary. Modern conveyancing practice has effectively expunged the need for this overriding category. In the interests of ensuring a more complete register and reconstituting the cracked mirror of that register, the overriding status of implied legal easements could meaningfully be repealed, requiring implied easements and profits to be registered under the LRA 2002 if they are to be enforceable.

Conclusion: Repairing the 'cracked mirror' – Lessons from the ancient Japanese art of Kintsugi

Cooke, writing of the modern law of land registration under the LRA 2002 when the Act came into force wrote that, 'one thing the register does not do is to show all the interests subject to which the registered estate is held,'[70] adding that overriding interests, 'are the main reason why

[69] Law Com No. 271 at [8.70]-[8.71].
[70] E. Cooke, *The New Law of Land Registration* (London: Bloomsbury 2003) 69.

the perfect register can only ever be a myth.'[71] For those more cautious among us, the continued recognition of overriding interests in their current form may provide some measure of comfort and reassurance that a fair compromise is being reached between, on the one hand, the cold insistence on registration and, on the other, this position softened, caveated through the special overriding category of rights offering protection from the 'welter' of registration. However, if the registration project is to realise its full potential, and in the absence of any impending introduction of simultaneous creation and registration of rights via e-conveyancing, we should consider if we might be rather bolder. On the current law, we should ask if the compromise of overriding interests has gone too far? Arguably so. While as Cooke rightly notes, the register may never be 'perfect,' why should a more complete and accurate register necessarily be a myth? Instead, as this article has argued, we should reflect on how we might restore the 'cracked mirror' of the register, move closer to eradicating the registration gap and deliver on the registration promise: a register that fulsomely and accurately reflects the state of title; a true system of title by registration where the fact of registration ensures the enforceability of rights over land.

The justifications for recognising overriding interests have been noted, exposed to scrutiny and found to be wanting in key respects. The article has suggested potential reform proposals to paragraphs 1-3 of Schedule 3 of the LRA 2002 ranging from the tentative to the more radical. As the LRA 2002 enters its third decade in force, the discussion here is intended to spur debate, and begin a conversation about how the future of land registration might be shaped, in particular, as we await e-conveyancing; its delivery still far off on the horizon.

In conclusion and perhaps as a post-script here, in considering the reform agenda around overriding interests issues one can draw inspiration perhaps unexpectedly but, it is suggested, instructively, from the 15th century Japanese art of Kintsugi.[72] Just as Dixon drew insightfully on painters Hodgkin, Titian and Pollock to explicate the clarity (or lack thereof) in the court's approach to proprietary estoppel following the Supreme Court judgment in *Guest*,[73] here too, the ancient art of Kintsugi or 'golden repair' is illuminating. Kintsugi describes the practice by which pottery once shattered is restored and rendered stronger by reconstruction through the use of lacquer and powdered gold. The result is a reassembled object, its cracks highlighted in gold and its defects accentuated and acknowledged whilst not losing touch with the object's history, neither ignoring nor disguising the imperfections of the fracture. The underlying philosophy of Kintsugi is helpful by extension to aid us capture visually and conceptually how the 'cracked mirror' of the register – distorted and not wholly reflective – might itself be reconstituted through reform of the overriding interest categories to produce a stronger register that is both faithful to the impulses of registration, forward-looking yet embraces the inherent ruptures and compromises that lie at the heart of the land registration project.

[71] Ibid, 70.

[72] Kintsugi (金継ぎ) means 'golden joinery' in Japanese and is also known as kintsukuroi (金繕い) meaning 'golden repair'.

[73] Dixon, 'Painting Proprietary Estoppel: Howard Hodgkin, Titian or Jackson Pollock?' [2022] Conv. 30.