

Section 28-29 Of Land Registration Act 2002

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With reference to the case law, legislation and academic commentary, critically assess the courts' interpretation of actual occupation in paragraph 2 of Schedule 3 to the Land Registration Act 2002.

The basic rule of paragraph 2 of Schedule 3 to the Land Registration Act 2002 is found in Section 28 of the Act (Land Registration Act 2002, s. 28; Cooke, 2003; Law Commission, 2018). According to which priority (about occupation) is not affected by a disposition unless it falls within the scope of Section 29; it is Section 30 if the case revolves around a registered charge. Thus, the old rule is applied even in the cases of registered land. The old rule states that the first in time wins.

This brings us to the question of when Section 29 applies (Land Registration Act 2002, s. 29; Gray & Gray, 2009). Most importantly, it requires consideration. Consideration must be paid; the owner will be bound all by prior equitable interests in the absence of such a payment, i.e., if no consideration is paid. Moreover, completion of the registration process is necessary to trigger Section 29. Again, the owner will be bound by all prior equitable interests if the registration process is not complete. Despite such a wide scope, Section 29 is not applied to the subsequently created interests; it is limited to the postponed interests affecting the land immediately before the disposition only.

Under the light of these rules provided under Section 29 concerning the overriding interests, those owners save those who completed the registration of the registerable dispositions themselves. Section 27 of the Act specifies such dispositions and includes legal charges, express grants of legal easements and profits a prendre, long leases, and transfers in it. The short leases are also brought within the scope of this Section through subsection 29(4). Thus, the owner is not bound by any subsequently created interests, even if they were registered before the owner.

Several examples can be demonstrated concerning this context. For instance, a legal charge is executed in favour of party B by party A, but party B fails to register within the priority period. Considering the situation, party A decides to execute a subsequent equitable charge in favour of party C, which successfully registers the claim within the time. After registration of party C, party B registers as well. Now, although party B registered after party C, priority will be given to party B due to the effect of Section 29 which is the old law, i.e., the first in time wins. Thus, party C cannot take advantage of the failure of party B to register within the priority period (Example A).

However, the situation would be different if Party A executed a legal charge in favour of Party C after Party B failed to register within the priority period in response to the execution of a legal charge from Party A. Executing a legal charge in favour of Party C from party A will give party C with the right of taking free of party B's charge under the light of Section 29 (Example B). Now, if Party A executed an equitable right in favour of Party B, who failed to register within the priority period and Party A executed a legal charge in favour of Party C subsequent to Party B's failure to register, party C can

register and take free of party B's charge if party B has not registered until then. Thus, party B has priority until and unless party C registers (Example C).

Example	First Charge	Subsequent Charge	Section 29
A	Legal Charge	Equitable Charge	First in time wins
B	Legal Charge	Legal Charge	Subsequent takes free of the first
C	Equitable Charge	Legal Charge	Unless subsequent pays first have priority

Therefore, the effect of Section 29 is that the owner can take free of all interests if the completion of a registerable disposition is carried out through registration. However, there are two exceptions to this effect: firstly, the interests noted at the time of registration on the register are not exempted, and secondly, any overriding interests are not exempted.

Overriding Interests

Overriding interests are given priority even if they are not registered and even if Section 29 applies to the charge. HM Land Registry explains that such interests can bind a registered proprietor or purchaser even though they do not appear on the register, subject to the statutory conditions and exceptions (HM Land Registry, 2017). This situation has been discussed. Example B: party A executes a legal charge in favour of Party C after Party B fails to register within the priority period in response to the execution of a legal charge from Party A. Executing a legal charge in favour of Party C from Party A will give party C with the right of taking free of party B's charge under the light of Section 29. In this scenario, party C will not be able to take free of interests if party B is in actual occupation of the land and does not fall under any exceptions. It is worth mentioning here that once taken free of interests, it cannot be revived, neither for the person himself nor any successor. Therefore, if Party B was in actual occupation, but Party C took it free of interests, then Party B cannot claim it back after resuming his occupation; the later resumption of occupation does not affect. Similarly, party C will also be given priority if Party B manages to get his interests registered after the registration of those of Party C.

Interpretation Of 'Actual Occupation'

The definition of actual occupation is interpreted by the courts at several levels. The most important point in this interpretation is that the term is an occupation and not a possession; there is a clear difference between the two. Due to the use of the term occupation instead of possession, no specific

form of control or the need for exclusivity applies to the land to establish occupation. As clear and straightforward as the second half of the term is, the first half needs a deep insight by the courts to interpret it, i.e., what is 'actual' occupation? (Cooke, 2003; Gray & Gray, 2009).

First of all, the term 'actual' means physical and does not contain some entitlement in law (Williams & Glyn's Bank Ltd vs. Boland) (Williams & Glyn's Bank Ltd v Boland, 1981). Lord Denning stated that the meaning of actual occupation is one of physical fact (Williams & Glyn's Bank Ltd vs. Boland). Lord Wilberforce, in a similar vein, stated that the terminology must be used in the context of plain, simple English, i.e., the occupation is given on the land, and the addition of the term 'actual' does not produce any additional qualifications. According to him, the word has been added to emphasize that the occupation must be physical and does not constitute the matter of a law entitlement only as opposed to the concept of possession (Williams & Glyn's Bank Ltd vs Boland).

However, the nature of the property on which the occupation is under consideration can matter. Arden LJ observed the role played by the nature and purpose of the property under question in the composition of the actual occupation (Malory Enterprises Ltd vs. Cheshire Homes (UK) Ltd). Lord Oliver, in a similar vein, elaborated that the actual term occupation can have different connotations according to the purpose and nature of the property (Abbey National Building Society vs. Cann) (Abbey National Building Society v Cann, 1991). According to him, some degree of permanence must be entailed in the occupation to give it the status of 'actual occupation' (Abbey National Building Society vs Cann). He explained (at 93) that any tenant or person who is allowed to go inside the property for the purposes of decorating it or taking measurements for fixtures does not occupy it despite his presence on the property for several hours (Abbey National Building Society vs. Cann).

However, a regular and repeated absence from the property can be consistent with the concept of actual occupation in a case (Kingsnorth Finance Co Ltd vs. Tizard). Lord Oliver explained that the personal presence of an individual is not required on the land to prove occupation and that a caretaker or a representative can occupy it on behalf of the employer (Abbey National Building Society vs Cann). Nicholls LJ, in a similar manner, considered that the presence of a builder on the property in connection to his duties under a contract of services would be regarded in discussing the occupation of the property by the owner (Lloyds Bank plc vs Rosset).

In another case, Kling vs. Keston Properties Ltd, the plaintiff Vinelott J suggested that the husband was in continuous possession of his garage in which the car of his wife was trapped because the door of the garage was blocked. It was believed that the situation would have been the same if the husband was in continuous possession of the garage because he was using it for the regular course of purpose under the license, i.e., the garage for the car as and when possible (Kling vs. Keston Properties Ltd). However, the mere presence of a license does not constitute actual possession (Lloyd vs. Dugdale; Strand Securities Ltd vs. Caswell). Moreover, protection cannot be given under the receipt of rents and profits now as well due to paragraph 2 of Schedule 3 of the Land Registration Act of 2002; it is the successor of Section (70) (g) of the Land Registration Act 1925.

Furthermore, occupation need not involve residence in the case of a house. Nicholls LJ said that a semi-derelict house is capable of actual possession (*Lloyds Bank plc vs. Rosset*). It covers both periods: while the work was in progress in the house and before someone started to live in that house. Another case in this connection is that of *Thomas vs. Clydesdale Bank plc* in which the bank had registered the mortgage, and the interest of Ms. Thomas was not registered. However, she contended that under Section 29, her supervisory visit meant actual occupation of the property by her, and thus, the bank had actual knowledge of her interest that Mr. Thomas wanted to transfer the property in her name. The court found that a reasonable inspection was needed to confirm the occupation. However, the scope or extent of this occupation was not explained. Moreover, there is no specific requirement in the law regarding the inspection (*Thomas vs. Clydesdale Bank plc*).

The interpretation of actual occupation that only requires a presence on the property has been altered or modified, to be exact, in another case. In *Chaudhary vs. Yavuz*, the court found that occupation must be differentiated from the mere use of the property. Lloyd LJ elaborated that mere use of the staircase and landing to pass through the land does not constitute actual occupation. According to him, such activity is used, not the occupation of the property (*Chaudhary vs. Yavuz*) (*Chaudhary v Yavuz*, 2011). Thus, the degree of permanence and continuity of presence is critically important in deciding the actual occupation of the property (*Link Lending Ltd vs Hussein*) (*Link Lending Ltd v Bustard*, 2010).

A recent regarding the interpretation of actual occupation is *AIB Group vs. Turner*. In this case, party A owned a large property and decided to renovate a three-bedroom cottage for Party B to live in. Party B paid for it and, thus, asserted proprietary estoppel. Later, party B bought a house in Barbados but could not go there due to a visa issue. She came back with the purpose of living in the cottage that she claimed to be her permanent house and had all her belongings there (*AIB Group vs. Turner*). No one occupied the cottage during her absence other than her son, who was a student at a boarding school in England (*AIB Group vs. Turner*). The matter was taken to the court, which refused all of the equitable interests of party B in the property, i.e., the cottage. The court held the reason that party B was not in actual occupation of the property as she was moving to Barbados (*AIB Group vs. Turner*).

The most recent case concerning the interpretation of actual occupation in paragraph 2 of Schedule 3 to the Land Registration Act 2002 is *Baker vs. Craggs* (*Baker v Craggs*, 2018). In this case, party A completed its side of the sale of its farm along with the yard to party B, who failed to register within the priority time. Later, party A executed a legal charge against Party C for another part of the farm with permission to use the yard as a means of passing through the property. Party C immediately registered for the legal charge. Therefore, party C took free of the equitable interest of party B who was in actual occupation of the property at that time (*Baker vs. Craggs*).

The question of the actual occupation of the farm arose because party B was involved in demolishing a barn and constructing staples on its part of the land. Party B, along with its partner, had been on the farm for several days. They also placed building materials in the yard. However, the construction work was completed one day before the day when the purchase of party C was completed. Party C asked

for its interest in the yard. Party B claimed that it was not in actual occupation of the land on the day the purchase deed of Party C was completed. The court held against party B; it was in the actual occupation because it had been working on the land along with its partner for several days (Baker vs. Craggs).

Both of the last two cases suggest that the actual date of completion of the deed between the parties concerning an equitable or legal charge does not matter while interpreting the term 'actual occupation.' The court must look at the overall position running in a few weeks before the deed. In the first case, the absence of party B disrupts the scenario of actual occupation for her, whereas in the second case, absence on the day did not mean that party B was not in actual occupation of the farmhouse. However, the nature of the land in question is also important. For instance, the extent of protection only belongs to the portion of the land that is owned by the person, i.e., owning one part of the land does not mean that the person owns the whole of it.

In conclusion, there are several factors that play a critical role in the interpretation of actual occupation in paragraph 2 of Schedule 3 to the Land Registration Act 2002 by the courts (Land Registration Act 2002, sch. 3, para. 2; Cooke, 2003; Gray & Gray, 2009; HM Land Registry, 2017). For this reason, numerous interpretations have emerged on the table. Most importantly, occupation and possession are not the same. The term 'actual' means physical and does not contain some entitlement in law (Williams & Glyn's Bank Ltd vs. Boland). Some degree of permanence must be entailed in the occupation to give it the status of 'actual occupation' (Abbey National Building Society vs. Cann). Similarly, the personal presence of an individual is not required on the land to prove occupation and that a caretaker or a representative can occupy it on behalf of the employer (Abbey National Building Society vs. Cann). Additionally, occupation need not involve residence in the case of a house (Lloyds Bank plc vs. Rosset). Moreover, the mere use of the staircase and landing to pass through the land does not constitute actual occupation (Chaudhary vs. Yavuz). The more recent case studies also support these interpretations.

References

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