**Chapter 11**

**Question 1: In what circumstances does section 29 of the LRA 2002 provide a purchaser or mortgagee of registered land with a defence against pre-existing property rights?**

The basic priority rule applied by the LRA 2002, set out in s 28, is the same as under the general law: priority is given to the right that arises first in time. As noted at **11.9**, s 29 sets out a very important exception to this, applying where there is a registrable disposition of a registered estate for valuable consideration. This includes the transfer of a registered estate (freehold and leasehold) and the creation out of a registered estate of a new lease of more than seven years duration. The requirement of valuable consideration excludes from this scheme of priorities transfers by gift or for nominal consideration. However, s 29 can certainly apply to an ordinary sale and mortgage of land. Further, by s 29(4), the protection given to a party acquiring a right in such cases is extended to a party to whom a legal lease of seven years or less is granted.

In an ordinary sale or mortgage to C, the priority rules in s 29 apply, and their basic effect is that C, the purchaser or mortgagee, is bound only by two types of pre-existing property rights of B: those that are protected by an entry on the register, and those that are overriding interests (see **11.10**).

**Question 2: What do you understand by the doctrine of *scintilla temporis* and what relevance does the doctrine have in relation to priorities?**

The *scintilla temporis* (spark of time) doctrine, when applied to the grant by A to C of a charge over A’s land, stated that C must admit that A acquired A’s right to the land *before* C acquired its charge. The doctrine has a logical basis: after all, A cannot give C a charge over land until A has him- or herself acquired a right in that land (see **11.19**).

In *Abbey National v Cann* (1991), however, the House of Lords did not apply the *scintilla temporis* doctrine (see **11.20**), holding instead that it would be unrealistic and artificial to view A, or anyone buying a home with the assistance of a mortgage, as ever holding the land free from a charge in favour of the lender, C. This means that the *scintilla temporis* now has very little relevance in relation to priorities, although it could still be argued that, in a case where, as a matter of fact, A *could* have acquired his freehold without taking out the loan secured by the charge, there is less of case for rejecting the *scintilla temporis* doctrine.

In *Scott v Southern Pacific* (2014) (see **11.22**), the Supreme Court accepted the *Cann* analysis that, in the standard case where a purchase of land is financed by a mortgage, it would be artificial to regard the grant of the charge to C as separate from the acquisition by A of an estate in the land (note that Lady Hale at [109]-[114] reserved her position as to whether this analysis should also apply in a case where the mortgage loan was not required for the purchase of the estate). Indeed, Lord Collins and Lord Sumption considered that the grant of the charge to C could also be seen, in effect, as simultaneous with the *contract* for the purchase of the estate in the land entered into by A and the vendor: Lady Hale, Lord Wilson, and Lord Reed did not however go that far.

**Question 3: Compare and contrast the role played by an entry of a restriction and entry of a notice. Give examples of property rights that each of these forms of entry on the register may be most relevant in respect of.**

Restrictions are closely connected to the an ‘owner’s powers’: powers conferred on registered proprietors by section 23 of the LRA 2002. Under section 26 of the Act, C, a person dealing with the proprietor of an estate, A, may assume that A’s owner’s powers are free from any limitations, except those entered on the register. A restriction is the means by which such limitations are entered on the register (see **11.23-11.24**). If C does not comply with a restriction: (i) C cannot obtain a registered title (and therefore cannot obtain legal title to the land); and (ii) C does not benefit from the distinct priority rules afforded by s 29 of the LRA 2002 to a registrable disposition of a registered estate for valuable consideration (see Q1 above); and (iii) C does not benefit from the protection against beneficial interests provided by the overreaching mechanism. The entry of a restriction is most relevant where land is held on trust: it can specify, for example, that any capital money paid by C must be paid to at least two trustees (see **11.25**).

Entry of a notice allows a potential party easily to discover a property right claimed by B. The effect of the entry is governed by section 32 of the LRA 2002. It ensures that if in fact the property right exists, then it will be enforceable against the purchaser, C. However, the entry of a notice does not operate as a guarantee that B’s claimed property right does in fact exist. Many (but not all – see **11.31**) property rights can be protected by the entry of a notice – for example, a restrictive covenant, an equity by proprietary estoppel, an equitable easement and an equitable lease may all be protected by the entry of a notice. If such a right is not protected by the entry of a notice, then C will be able to use the s 29 defence to take priority to B’s pre-existing right, unless B is in actual occupation of the land and thus has an overriding interest under Sch 3, para 2 of the LRA 2002.

**Question 4: What is an ‘overriding interest’? What is the relevance of ‘actual occupation’ to the category of overriding interests? In what circumstances may a person who is not physically present on land be held to be in actual occupation?**

An overriding interest is best described as a property right, existing in relation to registered land, that is immune to the lack of registration defence (see **11.34**). The lack of registration defence provides important protection to a third party acquiring, for value, a legal property right in registered land. The essence of the defence is that such a third party only be bound by a pre-existing property right in the land if that property right has been recorded on the register. However, overriding interests are exempt from the lack of registration defence. So, if B’s pre-existing property right counts as an overriding interest, C will never be able to use the lack of registration defence against B’s right. Note however that, even if B’s right is overriding, C may still be able to use a *different* defence, such as overreaching, to take priority over B’s interest – *City of London Building Society v Flegg* (1988) provides an example (see **11.80**).

To determine if B’s pre-existing property right is overriding, we simply need to look at the list of overriding interests provided by the Land Registration Act 2002. One particularly important provision is Schedule 3, paragraph 2 (see **11.37-11.59**). Its basic effect is that, if B is in actual occupation of the registered land at the relevant time, any property right held by B can then count as an overriding interest. Note of course that if B does not have a property right, but only a personal right against A, then actual occupation has no effect, as B’s personal right is not in any case binding on C: see eg *National Provincial Bank v Ainsworth* (1965) (see **1.57-1.62**).

It is possible for B to be in actual occupation of land for the purpose of Sch 3, para 2 without being physically present on the land, although note that if B’s actual occupation would not have been obvious on a reasonably careful inspection of the property by C, and C does not otherwise know of B’s right, then B’s right will *not* qualify as overriding under Sch 3, para 2 (see **11.46** and **11.54**). As discussed at **11.53-11.55**, it is possible for B to occupy through the presence of another person (a proxy) – in *Lloyds Bank v Rosset* (1989), for example, the Court of Appeal accepted that Mrs Rosset had established actual occupation through the presence of builders renovating the land (see **11.53**).

**Question 5: What is the effect of overreaching? For what property interests is overreaching of most significance?**

As discussed at **11.70**, overreaching is a mechanism by which C can take priority over a pre-existing property right of B. It is distinct from the lack of registration defence, and so can give C a defence even against an overriding interest of B, as occurred in *City of London Building Society v Flegg* (1988) (see **11.80**). As in *Flegg*, its most frequent use in land law is where A1 and A2 hold a legal estate in land on trust for B, and C then buys the land, or gives money to A1 and A2 as part of a mortgage loan. In such a case, if overreaching occurs, B can claim an equitable interest in relation to the money paid by C to A1 and A2, but B can no longer claim an equitable interest in relation to the land itself.

**Question 6: In each of the following circumstances, would B or C have priority?**

1. **A (a single trustee) holds legal title to a home on trust for herself and for B, her husband. A and B are both living in the house when A uses title as security for a loan obtained from a bank, C. A defaults on the loan.**
2. **A1 and A2 are joint registered proprietors of a home which they hold on trust for themselves and for B1 and B2. All four parties are living in the house when A1 and A2 use the title as security for a loan obtained from a bank, C. A1 and A2 default on the loan.**

As for (a), on the facts given here, it seems that B would have priority. We will assume we are dealing with registered land. As stated at **11.8**, the basic rule, confirmed by s 28 of the LRA 2002, is that B’s property right will take priority as it arose first in time. So the question is whether C has a defence to B’s equitable interest. As the grant of the charge to C is a registrable disposition, s 29 of the LRA 2002 may protect C (see **11.9**), but the lack of registration defence it provides is not available if B has an overriding interest (see **11.34-11.36**). As B has an equitable interest, and is in actual occupation of the land, then B does have an overriding interest under Sch 3, para 2 of the LRA 2002 (see **11.37-11.40**). If this is also a standard mortgage loan, where money is advanced to A by the bank, then the overreaching defence cannot apply either, as the capital money has been paid only to A, and so the requirement for payment to at least two trustees or a trust corporation, set out by s 27 of the LPA 1925, has not been met. The case is thus effectively identical to *Williams and Glyn’s Bank v Boland* (1981) (see **11.44**), where B’s right took priority.

As for (b), on the facts given here, it seems that C would have priority. The difference is that, assuming this is a standard mortgage loan (see further Q7 below), where money is advanced to A1 and A2 by the bank, then the overreaching defence *can* apply, as the capital money has been paid to at least two trustees. It makes no difference that B1 and B2 are in actual occupation of the land, as shown by the result in *City of London Building Society v Flegg* (1988) (**11.80**), to which this case is effectively identical.

**Question 7: In relation to 6(b) above, consider the following:**

1. **Would it make any difference to your answer if A1 and A2 were not paid any purchase money at the time of the mortgage, but were instead granted an overdraft facility? Over the next year, A1 and A2 became overdrawn to £500,000 at which point C sought to enforce the security.**
2. **Would it make any difference to your answer if A1 and A2 did not have power to mortgage, so the grant of the mortgage by them was an ultra vires breach of trust?**
3. **What courses of action, if any, might B have against C?**

As for Question 7(a), we saw in answer to Question 6(b) above that C would be able to use the overreaching defence to take priority if there was a standard mortgage transaction. On the facts of Question 7(a), no capital money is paid initially, and so there is no payment to at least two trustees. This does not however prevent overreaching occurring. The requirement of s 27 of the LPA 1925 is that, *if* capital money is paid, it must be paid to at least two trustees or a trust corporation: there is no requirement that capital money must be paid (see *State Bank of India v Sood* (1997) (**11.77**). There is a requirement that C provide valuable consideration (see s 2(1) of the LPA 1925) but this is met by provision of the overdraft facility.

As for Question 7(b), as noted at **11.84**, as the overreaching defence is ultimately based on A (or A1 and A2, etc) exercising a power to give C a right free from B’s pre-existing property right, if A1 and A2 truly have no power to confer a charge on C, overreaching cannot take place. In relation to registered land, however, s 23 of the LRA 2002 gives A1 and A2 a wide set of owner’s powers, and a limit on those powers can affect C only if it is entered on the register as a restriction (see **11.23-11.26**). So, if there were to be a limit on the powers of A1 and A2 to create a charge (such as eg the need for consent from X before the charge is granted), then it would have to be entered on the register as a restriction to make a difference to C. As noted at **11.85**, the argument has been made that s 6(6) of the Trusts of Land and Appointment of Trustees Act 1996 limits the power of trustees to make a disposition that is also a breach of a duty owed to B1 and B2. This would be surprising, however, and the Law Commission (2018) has recently recommended clarifying the law to put the point beyond doubt.

As for Question 7(c), the operation of overreaching will give C priority over B1 and B2’s pre-existing beneficial interests. It does not, by itself, prevent B1 and B2 instead arguing that they have a different type of claim against C, for example based on a new, direct right against C (see **3.83-3.86**). As noted at **11.91**, however, it will only be in rare cases, for example involving fraud or the making of a promise by C, that C will act in such a way as to give rise to a new, direct right of B1 and B2.