

LAND REGISTRATION ACT 2002

EXPLANATORY NOTES

COMMENTARY ON THE SECTIONS

Part 4: Notices and Restrictions

74. **Part 4** of the Act contains provisions on notices and restrictions. It is concerned primarily with the protection of third party rights over or in relation to a registered estate or charge. At present, a person may lodge a caution against dealings with a registered estate or charge in respect of interests which under the Act can be protected by a notice and other types of interest. A caution does not confer priority; only the right to receive notice of dealings with the affected registered estate or charge and to raise objections. Under the Act it will no longer be possible to lodge such a caution but existing cautions will remain in the register by virtue of the transitional provisions contained in paragraphs 1 and 2(3) of Schedule 12.

Notices

Section 32: Nature and effect

75. This section explains that a notice is an entry, made in the register, in respect of the burden of a third party's interest. The entry is to be made against the registered estate or registered charge that is said to be burdened. As under the Land Registration Act 1925, if the interest is not valid (for example, if parties had entered into an agreement that was not a valid contract) the entry of a notice will not validate it.

Section 33: Excluded interests

76. **Section 33** provides that there are five kinds of interest which cannot be the subject of a notice. The five categories set out in this section cover:
- Interests under either a trust of land or a settlement – any interest under any form of trust is excluded because the purpose of a notice is to protect an interest in registered land by binding any person who acquires the land. An interest under a trust will not bind, say, a buyer of land if the buyer pays the purchase money to the trustees and there are at least two of them or a trust corporation. (A restriction is a proper form of entry to ensure that this occurs.)
 - A lease granted for three years or less – at present, subject to certain statutory exceptions, a lease granted for 21 years or less cannot be a registered estate and a notice cannot be entered in respect of such a lease but it is protected as an overriding interest, even though not mentioned in the register. Under the Act, again subject to statutory exceptions, a lease granted for seven years (rather than for 21 years as at present) or less cannot be a registered estate, but will override first registration and registered dispositions, even though not mentioned in the register. As explained in paragraph 192, section 118 gives the Lord Chancellor power to reduce the qualifying time for the registration of leases, and this section anticipates a reduction by providing that notices cannot be entered for leases of 3 years or less (the likely minimum qualifying period).

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(c.9) which received Royal Assent on 26 February 2002*

- Restrictive covenants made between a lessor and lessee, so far as relating to the property leased. Such covenants are normally apparent from the lease, so it is unnecessary for them to be noted in the register. At present the exception includes a restrictive covenant over land not comprised in the lease, such as adjacent property owned by the landlord. This means no notice can be entered in respect of a restrictive covenant that relates to land that is not comprised in the lease, such as other adjacent property owned by the landlord. The Act removes the difficulties created by the current law.
- An interest capable of being registered under the Commons Registration Act 1965.
- An interest in any coal or coal mine, the rights attached to any such interest or the rights of any person under section 38, 49, or 51 of the Coal Industry Act 1994. This exception is as at present. Under the Act these interests override first registration and registered dispositions, even though not mentioned in the register, as provided for in paragraph 7 of Schedule 1, and paragraph 7 of Schedule 3.

Section 34: Entry on application

77. This section provides that a person claiming to have the benefit of an interest capable of being the subject of a notice may, subject to rules, apply to the registrar for entry of an agreed or a unilateral notice in respect of the interest. The section sets out the circumstances in which the registrar may approve an application for an agreed notice. The first two are cases where the relevant registered proprietor consents to entry of the notice. The third would, for example, cover where the applicant could establish to the registrar's satisfaction that the registered proprietor had granted him or her an easement.

Section 35: Unilateral notices

78. Under this section, when the registrar enters a unilateral notice, which may be entered without the proprietor's consent, in the register he must give notice to the affected proprietor and to such other persons as may be prescribed. Rules may provide, for example, that notice be served on the liquidator of a company which was the registered proprietor. *Subsection (2)* provides that a unilateral notice must indicate that it is such a notice, and identify the beneficiary. It is unlikely that anything else will appear in the register. At present, cautions are often entered in preference to notices where transactions are of a commercially sensitive character, because the entry of a caution in the register gives no indication as to the matter that lies behind it. The subsection, however, makes it possible to achieve the same commercial confidentiality by means of a unilateral notice.

Section 36: Cancellation of unilateral notices

79. Unilateral notices may be entered without the registered proprietor's consent. This section therefore provides that an affected proprietor or person entitled to be registered as proprietor of the affected estate or charge may apply for cancellation of a unilateral notice. The beneficiary of the notice will be entitled to object under the general right conferred by the Act to such an application to the registrar. If the matter cannot be disposed of by agreement, it must be referred to the adjudicator.

Section 37: Unregistered interests

80. This section gives the registrar power to enter a notice in respect of an interest that is an interest of the kind mentioned in Schedule 1, provided that it is not excluded by section 33 above. This is part of the strategy of the Act to eliminate, where practicable, overriding interests and ensure that they are entered in the register. The section provides that notice of the making of the entry will be served on such persons as rules may provide.

Section 38: Registrable dispositions

81. In order to register certain registrable dispositions, it is necessary to enter a notice in respect of that interest on the title of the registered estate burdened by it. This includes easements, *profits à prendre* and customary and public rights. This section therefore requires the registrar to enter a notice in respect of an interest under a disposition falling within section 27(2)(b) to (e).

Restrictions

82. Restrictions are retained under the Act, but in altered form. Inhibitions are abolished because they are not needed: they are, in reality, just one form of restriction. The provisions of the Act relating to restrictions will apply to restrictions and inhibitions entered under the Land Registration Act 1925 (Schedule 12, paragraph 2(2)).

Section 40: Nature

83. This section defines the nature of a restriction. Because it is an entry to regulate the circumstances in which a disposition of a registered estate or charge may be the subject of an entry in the register, no restriction can be entered in respect of dealings with interests the title to which cannot be entered in the register. So, for example, it would not be possible to enter a restriction against the assignment of a lease granted for a term of seven years or less, since the title to such a lease cannot ordinarily be registered.
84. The section gives particular - but non-exhaustive - examples of the form that a restriction might take. Examples of cases where restrictions might be employed using such form are: to reflect a freezing injunction granted over a registered property; where the registered proprietor (typically a corporation or statutory body) has limited powers of disposition; and where under a registered charge the chargor agrees with the chargee to exclude his or her statutory power of leasing under the Law of Property Act 1925, section 99.

Section 41: Effect

85. This section provides that, subject to an exception, no entry in respect of a disposition to which a restriction applies is to be made in the register otherwise than in accordance with the terms of the restriction. The exception is that upon the application of a person who appears to have a sufficient interest in the restriction, the registrar may order that the restriction be disapplied or modified in relation to a particular disposition or disposition of a specified kind. An example of where it might be appropriate for the registrar to exercise his power is if the restriction requires a consent by a named individual and he or she has disappeared.

Section 42: Power of registrar to enter

86. Under this section the registrar may enter a restriction where it appears to him necessary or desirable to do so for the purposes set out in the section. The following are examples of situations in which such an entry might be made:
- To prevent unlawfulness, say a breach of trust, where the trustees of the land are required to obtain the consent of some person to a disposition.
 - To secure that interests under a trust of land or settlement under the Settled Land Act 1925 are overreached – the restriction could be to the effect that the proceeds of any registered disposition must be paid to at least two trustees or a trust corporation.
 - To protect a right or claim (which need not be proprietary) in relation to a registered estate or charge: a restriction to protect a claim by a person that he or she has a beneficial interest in the property under a resulting or constructive trust because he or she has contributed to the cost of its acquisition; or a restriction entered in

respect of an order appointing a receiver or sequestrator; or a restriction entered in respect of a charging order relating to an interest under a trust.

87. A restriction is simply a means of preventing some entry in the register except to the extent (if any) that it is permitted by the terms of the restriction. It is not intended to confer priority. For these reasons the section provides that the registrar's power to enter a restriction for the purpose of protecting a right or claim in relation to the estate or charge is limited in that no restriction may be entered for the purpose of protecting the priority of an interest which is, or could be, the subject of a notice. This provision does not, however, prevent a notice and restriction being entered in respect of the same interest, provided that each serves its proper function. For example, the priority of a right of pre-emption might be protected by a notice while a restriction might be entered to ensure that the registered proprietor first offers to sell the land to the grantee of the right before he or she contracts to sell it to anybody else.

Section 43: Applications

88. **Section 43** sets out who may apply under section 42 for a restriction. If a person entitled to apply applies for a form of restriction not prescribed by rules then the registrar may only approve the application if it appears to him that the terms of the restriction are reasonable and that the application of the proposed restriction would be straightforward and not place an unreasonable burden on him.

Section 44: Obligatory restrictions

89. An example illustrates an effect of this section - if two registered proprietors were to hold an estate on trust for a number of beneficiaries, a restriction might be entered to ensure that the proceeds of any registered disposition are paid to at least two trustees or to a trust corporation. If one of the trustees were to die, this would ensure that no disposition could be made until another trustee was appointed.
90. Other provisions of the Act also impose a duty on the registrar to enter a notice in respect of bankruptcy petitions (section 86(2)).

Section 45: Notifiable applications

91. The purpose of this section is to protect a registered proprietor against the unjustified entry of a restriction against his or her title. The effect of the section is that where a person makes a notifiable application (as set out in the section) for a restriction the registrar must serve notice on the registered proprietor and such other persons as rules may prescribe.
92. A person receiving notice of an application may object to the application under the general right conferred by the Act to object to an application to the registrar. If the matter cannot be disposed of by agreement, it must be referred to the adjudicator.

Section 46: Power of court to order entry

93. The court is most likely to order the entry of a restriction under the provisions of this section where, under the present law, it would order the entry of an inhibition. Whereas inhibitions prevent the entry of any dealing in the register, however, the entry of a restriction under the Act might be of more limited effect. For example, if the court determined that a person was entitled to a beneficial interest under a resulting or constructive trust, it might also order the entry of a restriction to ensure that there was no disposition of the registered estate without the prior consent of the beneficiary. By contrast, where the court has granted a "freezing injunction" the court might also order a restriction on the making in the register of an entry in respect of any dealing. Such a restriction would have an effect similar to that of an inhibition at present.

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94. This section gives the court the power to direct that a restriction ordered by it has overriding effect so that the restriction overrides the priority protection given to an official search or the entry of a notice in respect of an estate contract. Terms and conditions may be imposed if the power is exercised - these might require an undertaking from the applicant that he or she would indemnify any person acting in good faith who has suffered loss as a result of the court's direction and require the applicant to give security, pay money into court, pay costs, or to withdraw some entry in the register.