

## Answers to end of chapter Q&A

### **Question 1: What do you understand by the defence of bona fide purchaser? In what circumstances is this defence relevant to determining priority questions in unregistered land?**

This question concerns one of the two basic priority rules traditionally applied to unregistered land. The defence of bona fide purchaser is concerned specifically with the enforcement of equitable interests in land. To answer this question, you are required first to explain the operation of the defence and secondly to identify the circumstances in which the defence is still used, as in many cases its application has been superseded by other developments.

The defence of bona fide purchaser is outlined in part 4. In that part we have seen, in particular, its link with the doctrine of notice. The defence provides that the bona fide (good faith) purchase for value of a legal estate in unregistered land has a defence against the enforcement of pre-existing equitable interests of which they do not have actual, constructive or imputed notice. To explain the defence it is therefore necessary to review the meaning of each of these terms, as is provided in part 4.

The defence of bona fide purchaser now plays a residual role in unregistered land. It applies to determine the enforcement of equitable interests where that matter is not governed by other principles. Hence, to answer the second part of the question you should identify other ways in which the enforcement of equitable interests may be determined:

- Some equitable interests are now registrable as land charges under the Land Charges Act 1972. The enforcement of such interests is determined solely according to whether they have been registered. We have considered the scope of the Land Charges Act 1972 in part 5. In part 5.6 we have seen, through *Midland Bank Trust Co Ltd v Green* [1981] AC 513, that the courts have refused to use the defence of bona fide purchaser to determine the enforcement of a registrable, but unregistered, land charge, even against a purchaser with actual notice.
- In our conclusion in part 6 we have noted that where there are two or more trustees, beneficial interests under a trust are overreached on a sale of the land. Where that mechanism applies, the beneficial interests are removed from the land and cannot be enforced against the purchaser.

Taking these developments into account, we can conclude that the defence of bona fide purchaser is relevant to determining priority questions in unregistered land when:

- The question concerns the enforcement of an equitable interest; and
- The interest is not registrable as a land charge; and
- The interest has not been overreached.

In our conclusion in part 6 we have listed some of the key equitable interests whose enforcement remains determined by the defence.

**Question 2: What difficulties arise from the use of a names-based register for the registration of land charges under the LCA 1972?**

This question concerns the operation of the register of land charges maintained under the Land Charges Act 1972. The operation of the Act is considered in part 5 and the particular problems arising from a names-based register are discussed in part 5.5. Two key difficulties have arisen; errors in search and registration and the danger of interests being hidden behind a good root of title.

**Question 3: What do you consider to be the advantages and disadvantages of the LCA 1972 as a means of determining priority questions compared with the defence of bona fide purchaser?**

To answer this question it is necessary to compare the operation of the LCA 1972 with the defence of bona fide purchaser.

Advantages of the LCA 1972 may be considered to include:

- It replaces the enquiries required under the doctrine of notice (as a key component of the defence of bona fide purchaser) with a search of the register. In particular, it avoids leaving the enforcement of interests to the uncertainty of what constitutes reasonable enquiries.
- It provides certainty, both for the purchaser and the holders of registrable land charges. Purchasers know they are protected against unregistered, but registrable land charges; the holders of those interests are provided with a simple means of securing their enforcement.

Disadvantages of the LCA 1972 may include:

- The flaws in the operation of a names-based register. These are discussed in part 5.5 and they are the topic of question 2. To what extent do you consider these flaws to detract from the supposed certainty of the system?
- The certainty provided by the LCA 1972 may come at the expense of broad notions of justice or morality in dealings with land. In part 5.6 we have seen in the extract from Wade that he considered the adoption of the LCA to mark “a shift from a moral to an a-moral basis” for enforcing equitable interests. Consider the discussion of *Midland Bank Trust Co Ltd v Green* [1981] AC 513 also contained in part 5.6: do you think that the outcome in that case lends support to Wade’s assessment?

**Question 4: In what circumstances will B, a purchaser of unregistered land, be bound by the following pre-existing property rights held by C:**

- (a) A beneficial interest, assuming B purchased the land from a single trustee;**
- (b) A beneficial interest, assuming B purchased the land from two trustees;**
- (c) A legal mortgage;**
- (d) An equitable easement created in 1930;**
- (e) A restrictive covenant created in 1900.**

The purpose of this question is to test your understanding of the operation of priority rules in unregistered land.

- (a) A beneficial interest is an equitable interest in land and its enforcement is determined by the defence of bona fide purchaser unless the application of that rule has been superseded. We have seen in part 3 (and have also highlighted in our answer to question 1) that the defence of bona fide purchaser remains applicable to the enforcement of beneficial interests where land is purchased from a single trustee. A useful example of this is *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783 which we have discussed in part 4.4.2. Hence, B will be bound by C's beneficial interest unless B is a bona fide purchaser for value of a legal estate without actual, constructive or imputed notice.
- (b) Where land is purchased from two trustees, the application of the defence of bona fide purchaser is superseded by the mechanism of overreaching. We have noted this in part 3 and in our conclusion in part 6. You will also find it useful to review the answer to question 1. The operation of overreaching is the topic of chapter 20.
- (c) In part 3 we highlighted the two basic priority rules applied in unregistered land. The first of these rules is that legal rights bind all third parties who later purchase the land. The only exception to this rule is the puisne mortgage; a specific type of legal mortgage that is registrable as a land charge under the LCA 1972. A puisne mortgage, as we have seen in part 5.1, is a legal mortgage in which the mortgagee is not given the title deeds. It is generally a second or subsequent legal mortgage. Hence, the answer to (c) depends on the nature of the legal mortgage. If it is a puisne mortgage, then its enforcement against B is dependent upon whether it has been properly registered as a Class C(i) land charge. If the mortgage is not a puisne mortgage, then it is necessarily binding against B.
- (d) Equitable easements created or arising on or after 1 January 1926 (the date when the original Land Charges Act 1925 came into force) are registrable as a Class D(iii) land charge under the LCA 1972. That provision is extracted in part 5.1. Hence, whether the easement is enforceable against B is dependent upon

whether it has been property registered. If it has, then under section 198 of the LPA 1925 (extracted in part 5.2) it will be binding against B. If unregistered, then under section 4(6) of the LCA 1972 (also extracted in part 5.2) it will be void against B, as long as B is the purchaser of a legal estate for money or money's worth.

- (e) Restrictive covenants are registrable as a Class D(ii) land charge under the LCA 1972, but only where they were entered into on or after 1 January 1926 (the date when the original Land Charges Act 1925 came into force). As this restrictive covenant was entered into prior to that date, it is not registrable as a land charge and, being an equitable interest, its enforcement falls to be determined under the defence of bona fide purchaser. This part of the question therefore illustrates the residual role that the defence plays. B will be bound by the restrictive covenant unless B is a bona fide purchaser for value of a legal estate without actual, constructive or imputed notice.