# *The Forgotten Question:* Clarifying the Extent of the Protection Afforded by Actual Occupation under the Land Registration Act 2002

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## Introduction

Issues of priority are at the centre of English land law. Where a plot of land in which a third party has an interest is transferred from one party to another, a conflict arises between this third party and the transferee: whose interest has priority? If push comes to shove, can the transferee prevent the third-party interest holder from exercising her right, or is the third-party interest-holder entitled to enjoy her interest in the face of the transferee's objections?

The Land Registration Act ('LRA') 2002 does much to answer this question. Under section 29, pre-existing unregistered interests are postponed to the interests of a registered disponee taking for valuable consideration. As a result, any such unenforceable interests are rendered *prima facie* unenforceable against a purchaser. However, section 29 only has this effect where the priority of the interest in question is not 'protected'. Interests falling under any of the paragraphs of schedule 3 LRA 2002 are within this special category of 'protected' interests.[1] This article is concerned with paragraph 2 of schedule 3, which serves the important function of safeguarding interests 'belonging at the time of the disposition to a person in actual occupation'[2] and 'whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition'.[3] Paragraph 1 is limited to leaseholds and paragraph 3 is limited to easements and *profits à prendre*. By contrast, paragraph 2 is not constrained in its application to any particular interests. This makes paragraph 2 potentially far-reaching in its effects and a powerful defence against the postponement mechanism in section 29.

However, the interpretation of schedule 3 paragraph 2 has proved a significant headache for the courts. First, disagreement has emerged regarding precisely when the disposed land must be occupied.[4] Second, there has been debate as to which factors might be relevant when deciding whether a person is in actual occupation. The relevance courts should accord to a person's 'intentions and wishes' has remained particularly ambiguous in this regard.[5] Third, in the context of the rectification and alteration provisions in the LRA 2002, the question has arisen whether a 'right to rectify' the register might amount to an overriding interest under schedule 3 paragraph 2.[6]

1 LRA 2002, s 29(2)(a)(ii).
2 ibid sch 3 para 2.
3 ibid sch 3 para 2(c)(i).
4 Lewison J in *Thompson v Foy* [2009] EWHC 1076 (Ch) suggested that actual occupation must exist both at the time of the disposition and at the time of registration. This view differs from the position under section 70(1)(g) LRA 1925 (see, for example, Lord Oliver in *Abbey National Building Society v Cann* [1991] 1 AC 56, 88).
5 Courts have increasingly considered a party's state of mind when analysing actual occupation. See, for example, *Link Lending Ltd v Bustard* [2010] EWCA Civ 424 [27] (Mummery LJ) and *Bernice Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB) [38] (Ramsey J). For criticism of this approach, see Christopher Bevan 'Overriding and over-extended? Actual occupation: a call to orthodoxy' (2016) 2 Conveyancer & Property Lawyer 104–117.
6 The so-called '*Malory 2* argument', named after *Malory Enterprises Ltd v*

Behind these controversies, however, the question whether the protection afforded by paragraph 2 is coextensive with actual occupation seems to have been largely forgotten. This question did receive some notable attention under the LRA 1925. Applying section 70(1)(g) LRA 1925—the precursor to schedule 3 paragraph 2 in the LRA 2002—the decisions in *Ashburn Anstalt v Arnold*[7] and *Ferrishurst v Wallcite*[8] came to opposite conclusions regarding whether occupation of part of the land could protect an interest in the whole. The LRA 2002 seems to preclude this possibility by providing that an interest is only overriding 'so far as relating to land … in actual occupation'.[9] However, schedule 3 paragraph 2 is not free from ambiguity in this respect. In particular, the change in the wording from section 70(1)(g) LRA 1925 raises the question whether the words 'relating to' enable the protection afforded by paragraph 2(1) to extend *beyond* the land actually occupied.

I will attempt to answer this forgotten question. First, I will outline in brief the pre-LRA 2002 disagreement regarding the scope of the protection afforded by actual occupation. Second, I will analyse the changes implemented by the LRA 2002. I will demonstrate that the vexed question is whether 'relating to land … in actual occupation' should be interpreted narrowly or broadly. Under the narrow interpretation, only an interest in land which is actually occupied by the interest-holder would be protected against postponement; under the broad interpretation, schedule 3 paragraph 2 also protects an interest in land which, although not itself occupied, still 'relates to' occupied land. Third, I will consider the merits of both the broad and narrow interpretations. I will examine the alternative drafting options available to Parliament, analogous language in the pre-LRA 2002 case law, the suggestions of The Law Commission of England and Wales, and the policy implications of each interpretation. From these I will argue that only the narrow interpretation is ultimately convincing. As I will demonstrate, this conclusion has far-reaching implications for the interaction between postponement and protection provisions in the LRA 2002.

## I. Pre-LRA 2002 Judicial Disagreement

Under the LRA 1925, there was conflicting case law surrounding the extent of the protection afforded by actual occupation. Section 70(1)(g) LRA 1925 served a function analogous to schedule 3 paragraph 2 LRA 2002. Under section 70(1)(g), the '[t]he rights of every person in actual occupation of the land' would be overriding and thereby take priority over the interest of a subsequent purchaser. However, while section 70(1)(g) made it clear that a right in the land actually occupied would be overriding, the statute was unclear as to precisely how far this overriding status would extend. Two cases interpreting section 70(1)(g) came to markedly different conclusions on this point.

In *Ashburn Anstalt v Arnold*[10], Mr Arnold held the head-lease in several properties and granted an informal sublease to Arnold & Co. Arnold & Co. entered into possession of two of these properties. Mr Arnold and Arnold & Co. then both entered into an agreement with Matlodge Limited to sell the head-lease and sub-lease in the properties, respectively. The agreements permitted Arnold and Arnold & Co. to remain in the property as "licensees". The benefit of these agreements was assigned by Matlodge to Cavendish, resulting in the head-lease and sub-lease merging in the freehold. The freehold was ultimately transferred to Ashburn Anstalt subject to the original agreement between Arnold & Co. and Matlodge. Ashburn Anstalt wrote to Mr Arnold, requesting that Arnold & Co. give up possession; when the latter refused, Ashburn Anstalt brought proceedings seeking an order for possession. The relevant question before the court was whether the agreement between Arnold & Co. and Matlodge had created a tenancy which took effect as an overriding interest under section 70(1)(g) LRA 1925 by virtue of Arnold & Co.'s actual occupation. Fox LJ in the Court of Appeal found that Arnold & Co. had a tenancy in the property and that the tenancy was overriding under section 70(1)(g). However, while denying Ashburn Anstalt an order for possession, Fox LJ also adopted a narrow interpretation of the protection afforded by section 70(1)(g):

> The land occupied by Arnold & Co. at the date of the sale and transfer to the plaintiff was registered land; it was part of a larger area comprised in a single title. The overriding interest will relate to the land occupied but not anything further. Thus, we do not think it can extend to any area comprised in the single title but not then occupied by Arnold & Co.[11]

This passage reflects two important propositions. First, occupation of part does not automatically constitute occupation of the whole. This follows from Fox LJ's conclusion that, although Arnold & Co occupied 'part of a larger area comprised in a single title', an interest in the 'area comprised in the single title' was not protected beyond the land actually occupied. This precludes any argument that a claimant might be deemed in law to be occupying the whole site by virtue of her occupation of part. Second, and more far-reaching, the overriding status of any interest extends only so far as the land is occupied. To use the 'protection' terminology adopted in the LRA 2002, the protection against postponement afforded by actual occupation only encompasses an interest in the land actually occupied. An interest in land which is not in actual occupation cannot benefit from section 70(1)(g) LRA 1925.

The Court of Appeal reached a different conclusion in *Ferrishurst v Wallcite*.[12] Ferrishurst Ltd had an option to purchase the underlease of a site. The site consisted of a building, comprised primarily of office space, and an adjoining garage. Ferrishurst sought to exercise this option after Wallcite Ltd acquired the property. However, Ferrishurst had failed to protect its option by entering it in the register. Ferrishurst therefore argued that the option was an overriding interest under section 70(1)(g) LRA 1925. Ferrishurst's justification was that it was in actual occupation of the office space under a sub-underlease granted by Wallcite's predecessor in title. The vexed issue was whether Ferrishurst's actual occupation of part of the site protected its option to purchase the whole of the site.

Judge Wakefield in the County Court held that *Ashburn* was binding. He therefore found that Ferrishurst's interest was only overriding under section 70(1)(g) LRA 1925 to the extent of Ferrishurst's actual occupation of the office space and denied Ferrishurst the right to

*Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151. There is also the related debate over whether an adverse possessor's right to be registered as proprietor of an estate is a potentially overriding interest under schedule 3 paragraph 2(1), as the Law Commission has suggested: Law Com No 271, para 14.64.

7 *Ashburn Anstalt v Arnold* [1989] Ch 1.

8 *Wallcite Ltd v Ferrishurst Ltd* [1999] Ch 355.

9 LRA 2002, sch 3 para 2(1).

10 *Ashburn* (n 7).

11 ibid 28F.

12 *Wallcite Ltd v Ferrishurst Ltd* [1999] Ch 355. Robert Walker LJ referred to *Ashburn* as a 'formidable obstacle' to Ferrishurst's argument: 361.

exercise its option.[13] Robert Walker LJ, however, accepted an argument, advanced by counsel for Ferrishurst, that *Ashburn* was decided *per incuriam* because the Court of Appeal 'would not have decided the case as it did' if it had been made aware of the relevant authorities.[14] On the basis of the third exception in *Young v Bristol Aeroplane*,[15] Robert Walker LJ held that he was not bound by the precedent in *Ashburn*. He instead held that

> a person in actual occupation of a part of the land comprised in a registered disposition can enforce against the new registered proprietor any overriding interest which he has either in the land, or part of the land, occupied by him or in the remainder, or part of the remainder, of the land comprised in the registered disposition in question.[16]

Since Ferrishurst was in actual occupation of part of the site, the unregistered option was protected with respect to the whole plot of land. Therefore, following *Ferrishurst*, the protection afforded by actual occupation under section 70(1)(g) LRA 1925 is not necessarily coextensive with the actual occupation itself.

## II. Schedule 3 Paragraph 2 LRA 2002

### A. The broad and narrow interpretations

The LRA 2002 departs from the position in *Ferrishurst* that occupation of part of the land can protect an interest in the whole. Schedule 3 paragraph 2 provides that

> An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—[17]

Notwithstanding this clarification—which reflects a conscious decision by the Law Commission[18]—the new provision is not wholly devoid of ambiguity. In particular, the phrase 'relating to' is problematic. The meaning of this phrase in schedule 3 paragraph 2 has only once been touched on judicially, in *Chaudhary v Yavuz*.[19] Yavuz's predecessor in title had promised Chaudhary that Chaudhary could erect and use a stairway on the land adjoining Chaudhary's in order to access the upper floors of Chaudhary's property. Chaudhary claimed that this promise by Yavuz's predecessor in title gave rise to a proprietary equity by estoppel under section 116(a) LRA 2002. Yavuz acquired the adjoining land for valuable consideration and was registered as a freehold proprietor. Yavuz then refused to permit Chaudhary to use the stairway on the basis that any equity by estoppel Chaudhary may have had in the land had been postponed under section 29. Counsel for Chaudhary argued that Chaudhary's purported interest over the stairway and alleyway was protected under schedule 3 paragraph 2 LRA 2002 by virtue of actual occupation on four grounds.[20] Three of these grounds were more 'conventional': first, counsel argued that Chaudhary was in actual occupation through the metal structure that had been erected in the physical space containing the stairway.[21] Second, that Chaudhary had acquired occupation by his contractors some years prior which he had never given up.[22] Third, that Chaudhary was in actual occupation through his tenants, who had been using the stairway and balcony.[23] Each of these grounds was rejected by Lloyd LJ in the Court of Appeal.[24]

Only the fourth ground put forward by counsel for Chaudhary raised the ambiguity surrounding 'relating to' in schedule 3 paragraph 2 LRA 2002.[25] Counsel argued that, even if there was no actual occupation of the stairway, the purported interest over the stairway could nevertheless be protected by actual occupation of the balcony since 'a right over the staircase and the alleyway would relate to the balcony'.[26] I will term this argument the 'broad interpretation' of schedule 3 paragraph 2(1). By contrast, I will term the argument that protection of an interest in the land only extends so far as the relevant land is in actual occupation (i.e., the interpretation of section 70(1)(g) LRA 1925 adopted by Fox LJ in *Ashburn*) the 'narrow interpretation' of schedule 3 paragraph 2(1). Lloyd LJ, delivering the only reasoned judgment in the Court of Appeal, commented that he could 'see force' in the broad interpretation.[27] However, because he found that Chaudhary was not in actual occupation of the balcony, he did not have to decide the point. The existing academic literature has not addressed which of the two interpretations best represents the current law.[28]

13 ibid 362.

14 ibid 372. The key authorities that had not not been before the Court of Appeal were *Hodgson v Marks* [1971] Ch 892 and *Williams & Glyn's Bank Ltd v Boland* 1981 AC 487. In the former case, Russell LJ remarked, *obiter* (*Hodgson* 391), that 'the judge relied upon the correct conclusion that "the land" [in section 70(1)(g) LRA 1925] included part of the land'. In *Boland*, Lord Wilberforce emphasised that actual occupation under section 70(1)(g) LRA 1925 (like sch 3 para 2 LRA 2002) does not only protect interests giving rise to a right to occupy. Instead, actual occupation is merely the mechanism by which *any* interest is protected: 'In the case of registered land, it is the fact of occupation that matters. If there is actual occupation, and the occupier has rights, the purchaser takes subject to them.'

15 This third exception holds that '[t]he [Court of Appeal] is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam': *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, 730.

16 ibid.

17 LRA 2002, sch 3 para 2(1).

18 Law Com No. 271, para 8.54: 'An interest belonging at the time of the registered disposition to a person in actual occupation is an overriding interest, so far as it relates to land of which he or she is in actual occupation'.

19 *Chaudhary v Yavuz* [2011] EWCA Civ 1314.

20 Although not explicitly identified by Lloyd LJ as four stand-alone arguments, it is clear from his judgement that he considered each ground separately; ground one is discussed at [32], ground two at [33], ground three at [34] and ground four at [35]. Arguably, there is a fifth, more general ground, discussed from [27]–[31] that mere 'passing and repassing' over the stairway merely amounts to 'use', not 'occupation'; it is in support of this more general proposition—that mere use does not constitute actual occupation under schedule 3 paragraph 2—that *Chaudhary* (n 19) is most frequently cited.

21 ibid [32].

22 ibid [33].

23 ibid [34].

24 ibid [32]–[34].

25 ibid [35].

26 ibid.

27 *Chaudhary* (n 19) [35]. This was picked up on in 'Sex, Lies and Land Registration', part of the ten old square 2011/2012 seminar season, where it was noted at [49] that Lloyd LJ 'did … give a hint that he was in favour of Mr Chaudhary's less restrictive interpretation': https://issuu.com/keithplowman/docs/seminar_notes_sex_lies_and_land_registration_feb_2.

28 McFarlane, commenting on *Chaudhary* (n 19), notes that the argument advanced by counsel for Chaudhary 'points out an ambiguity in the wording' of the statute, but does not discuss the matter further: Ben McFarlane, 'Eastenders, Neighbours and Upstairs Downstairs: Chaudhary v Yavuz' (2013) 1 Conveyancer & Property Lawyer 74–82, 78. The ambiguity surrounding the words 'relating to' also goes entirely unaddressed in all of the major commentaries, including *Gale on the Law of Easements* (21st edn, Sweet & Maxwell 2020) and *Megarry & Wade:*

The relevance of the distinction between the broad and narrow interpretations is best illustrated by an example. Assume that A is the registered proprietor of a plot of land with a large two-storey building. A grants B, by deed, a leasehold over the building. B fails to register his leasehold and lives exclusively on the second floor, only ever using the ground floor to access the first floor. Is B's leasehold protected from postponement under schedule 3 paragraph 2(1) LRA 2002 by virtue of actual occupation?

Since B is living in the upstairs area his presence is certainly more than 'mere[ly] fleeting'.[29] Applying the traditional test, B is therefore in actual occupation of the second floor. Whether B occupies the downstairs area is more open to doubt. It is unlikely that using the land merely as an accessway creates a sufficient 'physical presence'[30] to amount to actual occupation.[31] It is therefore unlikely that B is in actual occupation of the ground floor.

Assume now that A, still the owner of the freehold, sells this freehold to C. Under the narrow interpretation, B's unregistered leasehold would only be overriding insofar as he was in actual occupation of the land. B's interest in the lower floor would therefore be postponed to C's newly acquired interest under section 29. Under the broad interpretation, however, B may argue that the bottom floor 'relat[es] to land of which he is in actual occupation'. B's leasehold over the whole estate would therefore be protected against postponement as an overriding interest.

Therefore, which of the narrow and broad interpretations of 'relating to' is ultimately adopted has potentially far-reaching implications. However, before evaluating the merits of the narrow and broad interpretations, it is necessary to consider a third possible interpretation.

**B. 'Relating to' as a reflection of proprietary status?**

Both the narrow and broad interpretations of schedule 3 paragraph 2(1) outlined above suggest that 'relating to' qualifies the extent of the land protected under schedule 3 paragraph 2(1). A third possible interpretation is that 'relating to occupied land' in schedule 3 paragraph 2(1) emphasises that the interest must be proprietary. In contrast to the broad and narrow interpretations, this interpretation decouples 'relating to' from 'actual occupation' entirely. It thereby creates *two* restrictions on the scope of overriding interests under schedule 3 paragraph 2(1). First, the relevant interest must be a proprietary interest in the land being disposed of. Second, the interest is only overriding insofar as the land is in actual occupation. Under this interpretation, the phrase 'relating to' does not broaden the scope of the protection offered by schedule 3 paragraph 2(1). Instead, it narrows it.

Several observations weigh against this interpretation. First, the fact that only proprietary interests in the disposed land can be overriding is already made clear elsewhere in the statute: section 29(1) only postpones 'interest[s] *affecting the estate*'.[32] Interests that are merely personal and non-proprietary can therefore never survive a disposition.[33] Repeating this in schedule 3 paragraph 2(1) would be redundant. Second, if the intended purpose of the words 'relating to' had been to make clear that only proprietary interests in the disposed land could override, then one would expect to see similar language in the other paragraphs of schedule 3 referenced in section 29. However, no such language can be found: 'relating to' appears only in paragraph 2, and similar wording which might conceivably be aimed at emphasising the proprietary nature of the overriding interests is also almost entirely absent.[34] In the LRA 2002 as a whole, conjugations of the verb 'relate' appear quite rarely. Where 'relate' *is* used, the intention is almost always to establish a relationship to something other than land.[35] This further detracts from the argument that the phrase 'relating to' in schedule 3 paragraph 2(1) confirms the proprietary nature of the interest. It seems unlikely, therefore, that the words 'relating to' in schedule 3 paragraph 2(1) are intended to operate independently of the provision's reference to actual occupation.

The vexed question is therefore whether the narrow or broad interpretation of schedule 3 paragraph 2(1) should prevail. If a narrow interpretation of 'relating to' is adopted, the current law will have made a full return to the approach in *Ashburn*. In other words, only an interest in land that is actually occupied can override a disposition for valuable consideration. Under the broad interpretation, however, the phrase 'relating to' could encompass land which, although not itself occupied, 'relates to' land which *is* occupied. If this interpretation is accepted, schedule 3 paragraph 2 would not have fully embraced the position in *Ashburn*. The argument advanced by counsel for Chaudhary is therefore a middle ground between the outcomes of *Ashburn* and *Ferrishurst* under the LRA 1925: while occupation of part does not *automatically* protect an interest in the whole,[36] occupation of part may have this effect if the unoccupied area is sufficiently related to the occupied area. Since following a broad interpretation of 'relating to' in schedule 3 paragraph 2 would open the door to a potentially far-reaching expansion to the protection afforded to unregistered easements, the merits of this approach must be closely examined.

*The Law of Real Property* (9th edn, Sweet & Maxwell 2020). T B F Ruoff and R B Roper, in *The Law and Practice of Registered Conveyancing* (Sweet & Maxwell 2021), implicitly accept that schedule 3 paragraph 2(1) has brought about a return to the *Ashburn* (n 7) approach for cases decided under the LRA 2002. Commenting on the effect of schedule 3 paragraph 2(1), the authors write without qualification that, under the new legislation, 'the legal reach of the adverse interest is limited to the factual reach of the occupation' [17.015]. Similarly, Roger J. Smith, in *Property Law* (10th edn, Longman Law Series, Pearson 2020) 273, writes that the 'question [of whether protection of an interest in the land can extend further than actual occupation] *is now settled* by the wording of para 2: the overriding interest relates only to land over which there is actual occupation' (emphasis added). Smith cites *Chaudhary* (n 19) but does not mention counsel's argument that the wording of schedule 3 paragraph 2(1) leaves open the possibility that actual occupation and protection of an easement might not necessarily be coextensive. It should be noted, however, that Lloyd LJ's positive reception of the broad interpretation was noted in 'Sex, Lies and Land Registration' [49] (n 27).

29 *Abbey National Building Society v Cann* [1991] 1 AC 56, 93.

30 *Boland* (n 14) (Lord Wilberforce). See also, Law Com No 271 para 8.22.

31 See, for example, *Chaudhary* (n 19), where the use of an external stairway to access an upstairs flat did not constitute actual occupation of the stairway.

32 LRA 2002, s 29(1) (emphasis added).

33 *Ashburn* (n 7). Of course, a new, direct interest can always be created by the words or conduct of the disponee.

34 Only schedule 3 paragraph 1 makes explicit reference to estates 'in land'. Paragraph 3 makes no reference to the fact that an overriding interest must be proprietary.

35 See, *inter alia*, section 4(8)(a), section 5(2), section 33(c), section 42(4) and section 72(2), (3).

36 As would have been the case under the approach following *Ferrishurst* (n 8).

## III. Evaluating the Broad Interpretation

We have seen that the relevant alternatives are the broad and narrow interpretations of schedule 3 paragraph 2(1). In this part, I will consider the comparative merits of each interpretation.

First, I will demonstrate that schedule 3 paragraph 2(1) could have been drafted more clearly, and that Parliament's failure to adopt an alternative formulation supports the broad interpretation. This analysis is lent further credence by judicial interpretation of schedule 3 paragraph 2(1) in a different context. However, merely looking at alternative drafting offers an incomplete picture of Parliamentary intent. Second, I will argue that the analogous language in *Ashburn* can serve as an important source of guidance for interpreting the LRA 2002. Owing to similarities in language and context, 'relating to' in schedule 3 paragraph 2(1) should be attributed the same interpretation as in *Ashburn*. Third, I will examine the Law Commission report to glean the meaning behind the ambiguous language in schedule 3 paragraph 2(1). Although the Law Commission does not explicitly comment on the meaning of 'relating to', it does enumerate its reasons for rejecting the approach in *Ferrishurst*. If these same reasons also militate against the broad interpretation, it may safely be concluded that the Law Commission was not advocating in favour of the broad interpretation when suggesting its proposal to Parliament. Fourth, and finally, I will consider the policy implications of adopting both the broad and the narrow interpretation. I will suggest that the uncertainty introduced by the broad interpretation and its potentially far-reaching implications make it the less plausible of the two interpretations. Drawing from the above considerations, I will argue that the narrow interpretation better reflects the current state of the law.

### A. Alternative drafting

A textual analysis of the LRA 2002 might suggest that the phrase 'relating to land … in actual occupation' in schedule 3 paragraph 2 has a meaning distinct from the interpretation of section 70(1)(g) adopted in *Ashburn*. One might reasonably opine that, had Parliament intended to limit the protection afforded by schedule 3 paragraph 2 to an interest in land in actual occupation, it would have said so more clearly.

Indeed, eliminating the relevant ambiguity from the statute would have required little more than removing 'relating to land'. Schedule 3 paragraph 2(1) (excluding subparagraphs (a)–(d)) could have been rephrased as follows:

> An interest belonging at the time of the disposition to a person in actual occupation, so far as he is in actual occupation of the land, except for—

Why did the Law Commission (and Parliament) shy away from the above wording?[37] One possible reason is that it fails to make explicit the fact that the relevant interest must be an interest in the land (i.e., a proprietary rather than merely personal interest). However, as discussed above, it is unlikely that 'relating to' was intended to fulfill this purpose. Moreover, if Parliament had sought to make this explicit,[38] it could have done so with less ambiguity by adopting the following wording:

> An interest in the land, provided the interest belongs at the time of the disposition to a person in actual occupation and only so far as that person is in actual occupation of the land, except for—[39]

If schedule 3 paragraph 2(1) had adopted the above language, it would have established beyond any doubt that an interest in the land is only overriding insofar as the land is in actual occupation. Therefore, it may reasonably be suggested that Parliament would have adopted this phrasing if it had intended schedule 3 paragraph 2(1) LRA 2002 to mirror the interpretation of section 70(1)(g) LRA 1925 in *Ashburn*. The fact that the phrase 'relating to' was used instead suggests that Parliament intended the provision to carry a different meaning.

This kind of argument has already been accepted when interpreting schedule 3 paragraph 2(1) in a different context. Lewison J in *Thompson v Foy*[40] considered, *obiter*, whether actual occupation must exist only at the time the disposition of the interest occurs or also at the time the disposition is registered.[41] Lewison J held that the choice of language in schedule 3 paragraph 2(1)—'An interest belonging at the time of the disposition to a person in actual occupation'—suggested that actual occupation must exist at both times. This is because '[a]s written, the phrase can be read as tying the "belonging" to the date of the disposition, while leaving at large the date of actual occupation'.[42] Lewison J pointed out that, had Parliament intended to make actual occupation at the time of the disposition the 'sole criterion', it could easily have done so by rewording the beginning of schedule 3 paragraph 2(1) to read 'An interest belonging to a person in actual occupation at the time of the disposition'.[43] The current phrasing of schedule 3 paragraph 2(1) was not inherently incompatible with a construction which only required actual occupation at the time of disposition. Nonetheless, the availability of this alternative, clearer wording led Lewison J to conclude that this was not the correct interpretation of the statute.

This reasoning lends support to the broad interpretation because it indicates that there has been at least *some* judicial receptiveness to this kind of argument in a very similar context. Indeed, the reasoning accepted by Lewison J is weaker than the argument being considered here. In *Thompson*, a construction that required actual occupation only at the time of the disposition did not render any part of the provision superfluous.[44] By contrast, if the narrow interpretation were adopted, 'relating to' in schedule 3 paragraph 2 is arguably left without any obvious meaning at all. I return to this issue below.

37 In addition to the likely influence of *Ashburn* (n 7), discussed below.

38 As mentioned above, this is unnecessary, since section 29(1) already qualifies an 'interest' as being 'any interest affecting the estate'.

39 Of course, it might be simpler to refer to 'A proprietary interest belonging at the time of the disposition to a person in actual occupation, so far as he is in actual occupation of the land, except for—'. However, the term 'proprietary interest' is unknown to the LRA 2002. Therefore, the Law Commission, although it uses the term in the Bill and Accompany Commentary to the LRA 2002 (see Law Com No 271, para 2.18), may have wanted to avoid introducing it into the Act here.

40 *Thompson* (n 4).

41 Because neither party advanced the interpretation favoured by Lewison J and because the leading commentators were against it, Lewison J 'le[ft] the point to a case in which it needs to be decided': ibid [126].

42 ibid [29].

43 ibid [124].

44 As Lewison J recognised, 'As written, the phrase can be read as tying the 'belonging' to the date of the disposition, while leaving at large the date of actual occupation' (emphasis added): ibid [125].

However, Lewison J's analysis has also been met with significant criticism.[45] Particularly noteworthy is the comment by Emma Lees. Lees argues that Lewison's interpretation is an 'artificial reading of the statute' because it is 'impractical in practice … and inconsistent with the approach taken under the 1925 legislation'.[46] Other factors, such as the practicability of the interpretation and the treatment of analogous provisions, can be quite appropriately considered alongside alternative drafting. Therefore, although clearer language may have been available to Parliament, this fact cannot be considered in isolation.

Moreover, as will be demonstrated below, the Law Commission had a particular understanding of the words 'relating to' in mind when it proposed the draft Bill of the LRA 2002 to Parliament, and it made that understanding clear. When Parliament deliberated on the proper wording of schedule 3 paragraph 2, it did so in light of the Law Commission's interpretation of the provision.

**B. Analogous language in the case law**

In the absence of language similar to 'relating to land … land in actual occupation' in the LRA 2002, it is worth considering whether similar language can be found in case law. Astute readers will already have noticed that the phrasing of schedule 3 paragraph 2(1) closely mirrors some of the language used in *Ashburn*. Considering the the scope of the protection afforded by actual occupation under section 70(1)(g) LRA 1925 in the penultimate paragraph of his judgment, Fox LJ opined that

> [Arnold & Co.'s] overriding interest will *relate to the land occupied* but not anything further. Thus, we do not think it can extend to any area comprised in the single title but not then occupied by Arnold & Co. Accordingly, the existence of the overriding interest does not entitle Arnold & Co. to enforce any rights it may have under clause 6 of the 1973 agreement over any land other than land in its occupation at the time of the 1985 sale and comprised in that sale.[47]

The italicised words bear stark similarities to the material language in schedule 3 paragraph 2(1), which states that an interest is only overriding 'so far as relating to land of which he is in actual occupation'. As discussed above, the decision in *Ashburn* established that the protection afforded to an interest in the land was coextensive with the actual occupation of that land. While this may not be evident from the italicised words themselves, it is made abundantly clear by the sentences that follow. Arnold & Co.'s overriding interest did not extend to any area 'not then occupied', and Arnold & Co. could not enforce rights over land 'other than land in its occupation'. This language—were it included in schedule 3 paragraph 2(1)—would preclude any argument on the broad interpretation raised in *Chaudhary*. Fox LJ was therefore not using the phrase 'relate to' in order to open up the possibility that an interest in land not itself occupied might be protected by virtue of actual occupation—that is, the broad interpretation. In fact, he meant quite the opposite. 'Relate to' as used in *Ashburn* makes clear that *only* interests in land that is actually occupied are overriding.

The similarities in context and language outlined above[48] suggest that schedule 3 paragraph 2(1) adopted, at least in part, the language used in *Ashburn*. If this is accepted, then 'relating to' in schedule 3 paragraph 2(1) should be accorded the same meaning as 'relate to' in *Ashburn*. The helpful context that is lacking in the statutory drafting may thus be compensated for by Fox LJ's elaboration above.

**C. Law Commission Report**

A narrow interpretation of schedule 3 paragraph 2(1) also aligns better with the meaning of schedule 3 paragraph 2(1) in the Law Commission's commentary to the draft Bill. Taking into account Law Commission reports 'does not of course imply that the meaning which the context provided by this material suggests will be decisive'.[49] However, such reports do offer a useful insight into the 'true intentions of the legislature'.[50]

In the commentary to the proposed Bill that was to become the LRA 2002, the Law Commission discusses the scope of protection afforded by actual occupation under the heading 'Qualification: Protection is restricted to the land in actual occupation'.[51] When the Law Commission goes on to note in the first line of that section that 'actual occupation only protects a person's interest so far as it relates to land of which he or she is in actual occupation',[52] the words 'relates to' are being used in their narrow form—referring only to land actually occupied.

This is further evidenced by the Law Commission's comment that, at the time of the consultation, the proposed legislation 'did no more than reflect the way in which section 70(1)(g) of the Land Registration Act 1925 had been interpreted by the Court of Appeal in *Ashburn Anstalt v Arnold*'.[53] The report goes on to explain that the decision in *Ferrishurst* departed from the analysis in *Ashburn*. It also explains why the Law Commission considers the approach in *Ferrishurst* to be unfit for the new system of land registration.[54]

45 In addition to what follows, see, for example, Ruoff and Roper (n 29) [17.013]: 'it is not clear that the LRA 2002 was meant to alter the principle established by *Abbey National v Cann*. In any event, given that the changes made by the LRA 2002 were designed to ensure that actual occupation was discoverable by a potential purchaser before he completed his purchase, there is nothing to be gained by requiring actual occupation at the date of registration save to provide a fortuitous and unmerited lifeline for a purchaser otherwise caught by discoverable actual occupation at the time of completion.' See also Martin Dixon, *Modern Land Law* (Routledge 2021) 64; Ben McFarlane, Nicholas Hopkins, and Sarah Nield, *Land Law: Text, Cases & Materials* (4th edn, Oxford University Press 2018) 627; and Emma Lees, *The Principles of Land Law* (1st edn, Oxford University Press 2020) 475. Contrast Barbara Bogusz, 'Defining the scope of actual occupation under the LRA 2002: some recent judicial clarification' (2011) 4 Conveyancer & Property Lawyer 268–284, 272.

46 Lees (n 46) 272.

47 *Ashburn* (n 7) 28F (emphasis added). The first sentence in this quote is cited above in relation to the case law pre-LRA 2002.

48 As well as the Law Commission's explicit reference to *Ashburn* in its proposal, which is discussed in further detail below.

49 Law Commission and Scottish Law Commission, *The Interpretation of Statutes* (Law Com No 21 and Scot Law Com No 11, 1969) para 52.

50 *Pepper (Inspector of Taxes) Respondent v Hart Appellant* [1993] AC 593, 635 (Lord Browne-Wilkinson). See also *R v Secretary of State for Transport, Ex parte Factortame Ltd* [1990] 2 AC 85. Here the House of Lords had regard to a Law Commission report when ascertaining Parliamentary intention from the fact that Parliament failed to implement one of the recommendations of the Law Commission.

51 Law Com No 271, para 8.55.

52 ibid.

53 Law Com No 271, para 8.56.

54 ibid paras 8.56–8.58.

Also relevant are the reasons underpinning the Law Commission's rejection of the *Ferrishurst* approach. Commenting on the proposed change to the law, the Law Commission explicitly states that the Bill reversed the ruling in *Ferrishurst* because this decision ran counter to two central objectives of the new land registration regime.[55] The first was the objective of creating 'a faster and simpler electronically based conveyancing system'.[56] The LRA 2002 sought to make interests in the land discoverable on the online register without the need for many additional enquiries. The interpretation in *Ferrishurst* increases the possibility that an interest—not discoverable on the register—would be protected against a subsequent disponee. The interpretation is therefore in direct conflict with this objective of the LRA 2002. The second objective undermined by the decision in *Ferrishurst* was the objective of encouraging registration of rights.[57] *Ferrishurst* makes it more likely that an interest will be protected as an overriding interest by virtue of actual occupation. The decision thereby discourages registration and, perhaps more importantly, continues to uphold the notion 'that it is somehow unreasonable to expect those who have rights over registered land to register them'.[58] The Law Commission concluded that the Bill reverses *Ferrishurst* 'in furtherance of these two objectives'.[59]

These same considerations militate against the adoption of the broad interpretation of schedule 3 paragraph 2(1). With regard to the first objective of land conveyancing the broad interpretation is out of line with the Law Commission's intention for two reasons. First, by departing from the straightforward approach in *Ashburn* that only an interest in land actually occupied can be protected as an overriding interest, the broad interpretation generates a degree of uncertainty that is inimical to the first objective's aims of creating a 'faster and simpler'[60] land registration system which minimises the need for in-person examination of the land.[61] 'Relating to' under the broad interpretation of schedule 3 paragraph 2(1) could take on a wide range of definitions.[62] In *Chaudhary*, for example, it was suggested that the external stairwell 'related to' the balcony. Would it also have related to the house itself? What of a garage at the other side of the house where the dominant owner always parked before entering his house through the stairway? Because of this uncertainty in application, the broad interpretation fails to encourage the 'absolute minimum of additional enquiries and inspections'.[63]

Second, the broad interpretation runs counter to the first objective enumerated by the Law Commission because of the very nature of the legal inquiry which it requires courts to embark on. The vexed question under the broad interpretation is always whether the *interest* sufficiently relates to the occupied land. It seems entirely possible that one interest—such as an easement—might not sufficiently relate to the occupied land, while another interest—such as a beneficial freehold estate—would. This is relevant to the method and the ease with which it is possible to mitigate against the risk of an overriding interest arising by virtue of actual occupation under schedule 3 paragraph 2(1). Under the narrow interpretation of schedule 3 paragraph 2(1), an interest only overrides if the land is actually occupied. Therefore, a purchaser seeking to protect themselves against a potential overriding interest would only have to investigate the physical property. The nature of the interest of any occupier is immaterial. By contrast, properly mitigating the risks of an overriding interest under the broad interpretation of schedule 3 paragraph 2(1) may require not only an investigation of the land itself, but also an investigation into what *kind* of interest is held by any occupier. This requirement is alien to both the *Ashburn* and *Ferrishurst* approaches. In this way the broad interpretation of schedule 3 paragraph 2(1) constitutes an even greater interference with the Law Commission's first stated objective of the LRA 2002 than the *Ferrishurst* interpretation. The Law Commission's rejection of the *Ferrishurst* approach under the LRA 2002 therefore demands, *a fortiori*, that the broad interpretation of schedule 3 paragraph 2(1) also be rejected.

The broad interpretation also runs counter to the second objective of the LRA 2002. Just as with *Ferrishurst's* interpretation of section 70(1)(g) LRA 1925, the broad interpretation discourages registration by making it more likely that an interest will be protected without registration. Indeed, the legal ambiguity described above may contribute to this issue, since the current uncertainty surrounding the phrase 'relating to' might encourage interest-holders to take their chances in the courts. The broad interpretation also continues to perpetuate the 'puzzling' notion that it may be unreasonable to expect persons to register, which the Law Commission sought to eradicate by reducing the number and scope of overriding interests in the LRA 2002.[64] Had the Law Commission been presented with the broad interpretation of schedule 3 paragraph 2(1), it seems likely that it would have rejected this interpretation for the same reasons motivating the rejection of the *Ferrishurst* approach.

**D. Policy considerations**

Adopting the broad interpretation is also undesirable from a policy perspective. If 'relating to' does not limit the protection afforded by schedule 3 paragraph 2(1) to the land actually occupied (as would be the case under the narrow interpretation), then the limit to protection under schedule 3 paragraph 2(1) must lie elsewhere. This raises two questions, neither of which has a clear answer.

The first is a question of some kind. What sort of relationship does the phrase 'relating to' require? Does the relationship between the occupied and non-occupied land have to be one of purpose? One of use?[65] One of physical proximity? While a multi-factor approach considering all of these factors might be possible, it would do little to

55 Law Com No. 271, para 8.58.
56 ibid.
57 ibid.
58 ibid.
59 ibid.
60 ibid para 8.1.
61 The uncertainty generated by the broad approach is discussed in greater detail below when considering the policy reasons weighing against the adoption of the broad interpretation. In this context, the uncertainty of the broad approach is not being criticised in its own right. Instead, the uncertainty is being raised as evidence in support of the proposition that the Law Commission did not have the broad interpretation of schedule 3 paragraph 2 in mind when drafting the statute.
62 It is true that some ambiguity also exists with respect to what amounts to actual occupation of the 'whole' under the interpretation in *Ashburn* (n 7) (and under the narrow approach). However, if protection is coextensive with actual occupation, this simply becomes a question of whether the whole plot of land is, in fact, occupied. The courts are very experienced in answering this kind of question; indeed, the question whether a plot of land is 'occupied' is the question at the core of schedule 3 paragraph 2. Smith (n 29) notes that it 'remains probable that actual occupation of an entire plot does not require physical occupation of every inch of it': 273.
63 Law Com No 271, para 1.5.
64 ibid para 1.9.
65 Counsel for Chaudhary seemed to suggest that the overlap in purpose and use between the balcony and the stairway brought the interest in the latter within the scope of the protection afforded by schedule 3 paragraph 2(1): *Chaudhary* (n 19) [35].

introduce certainty. Any court trying to delimit the scope of 'relating to' must also be careful not to interpret the provision too broadly, lest it incorporate the *Ferrishurst* approach through the back door. If it were accepted that in some (not-so-remote) way every area of land 'relates to' the other land in the same registered plot, then it would follow that occupation of part of the land would protect interests in the whole.

Once the relevant kind of relationship is established, the second question is one of degree. How close must the relationship be in order for one part of land to 'relate to' another? For example, if a holistic approach to the meaning of 'relating' were adopted, would it suffice if two parts of the plot generally served a single purpose, even if the interest-holder only ever used the two parts separately? What if the two parts had virtually no characteristics in common, but happened to be used together by a particular interest-holder?

As was demonstrated above, the Law Commission did not have the broad interpretation of 'relating to' in mind when drafting the statute. Therefore, no guidance on answering the above questions can be gleaned from schedule 3 paragraph 2 or the accompanying preparatory material. Moreover, the term 'relating to' is not used in a similar context elsewhere in the LRA 2002 or the LRA 1925. This leaves little in the way of analogous case law which might assist judicial decision-making. In short, under the broad interpretation, the judiciary would be left in the dark regarding the proper application of schedule 3 paragraph 2(1). Actual occupation is already a context-dependent and volatile area of the law. Adopting the broad interpretation of 'relating to' would compound this uncertainty, severely inhibiting the reliability of commercial transactions and encouraging costly litigation.

## Conclusion

In this article I have considered the forgotten question of whether the extent of protection afforded by actual occupation under schedule 3 paragraph 2 LRA 2002 is coextensive with the land actually occupied. Under the broad interpretation of schedule 3 paragraph 2, the protection afforded by actual occupation also encompasses an interest land which 'relates to' occupied land, even if that land is not itself occupied. Under the narrow interpretation, the protection afforded by actual occupation does not extend beyond the actual occupation itself. I have argued that, although Parliament could have adopted more precise wording for schedule 3 paragraph 2(1), the narrow interpretation is more convincing. This is because the narrow interpretation better reflects the case law which inspired the statutory provision, is in line with the Law Commission's intention when drafting the Bill, and is more defensible from a policy perspective. Therefore, the Court of Appeal's suggestion in *Chaudhary* that there is 'force' in the broad interpretation should not be followed. Only an interest in land which is actually occupied by the interest-holder is protected as an overriding interest under schedule 3 paragraph 2(1).

The implications of this conclusion are particularly important for the protection of unregistered easements, because the purportedly overriding interest does not infrequently affect only part of the land. However, the rejection of the broad interpretation has more far-reaching consequences. In any context where only part of a registered plot is occupied, the broad interpretation had kept open the possibility that this occupation might protect an interest in another unoccupied part of the land, or even in the plot of land as a whole (as the *Ferrishurst* approach would have). Such an occupier has now lost this argument to fall back on.